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Date and Time: Wednesday, October 25, 2023 4:51:00 PM CST

Job Number: 208889024

Documents (100)

1. [Simon & Simon, PC v. Align Tech., Inc., 533 F. Supp. 3d 904]

Client/Matter: -None-

Search Terms: "antitrust law"

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2. [Impax Labs., Inc. v. FTC, 994 F.3d 484]

Client/Matter: -None-

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3. [Maxwell Foods, LLC v. Smithfield Foods, Inc., 2021 NCBC LEXIS 39]

Client/Matter: -None-

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4. [Spinner Consulting LLC v. Stone Point Capital LLC, 843 Fed. Appx. 411]

Client/Matter: -None-

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5. [Brooks v. Bank of Am., N.A., 2021 U.S. Dist. LEXIS 75643]

Client/Matter: -None-

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

6. *In re Ahern Rentals, Inc., 2021 U.S. Dist. LEXIS 76265*

Client/Matter: -None-

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7. *Agency Y LLC v. DFO Global Performance Commerce Ltd., 2021 U.S. Dist. LEXIS 126844*

Client/Matter: -None-

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8. *Hobart-Mayfield, Inc. v. Nat'l Operating Comm. on Stds. for Ath. Equip., 535 F. Supp. 3d 638*

Client/Matter: -None-

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9. *Williams v. Estates LLC, 2021 U.S. Dist. LEXIS 78101*

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

10. *Reveal Chat Holdco LLC v. Facebook, Inc., 2021 U.S. Dist. LEXIS 79786*

Client/Matter: -None-

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

11. Hawthorne Hangar Operations, L.P. v. Hawthorne Airport, LLC, 2021 U.S. Dist. LEXIS 81615

Client/Matter: -None-

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

12. Stewart v. Kodiak Cakes, LLC, 537 F. Supp. 3d 1103

Client/Matter: -None-

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

13. Back v. GTL, 2021 U.S. Dist. LEXIS 81771

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

14. Pittsburgh Logistics Sys. v. Beemac Trucking, LLC, 249 A.3d 918

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15. AngioDynamics, Inc. v. C.R. Bard, Inc., 537 F. Supp. 3d 273

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16. [Las Vegas Sun v. Adelson, 2021 U.S. Dist. LEXIS 99358]

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17. [In re Glumetza Antitrust Litig., 2021 U.S. Dist. LEXIS 87085]

Client/Matter: -None-

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

18. [Mehta v. Robinhood Fin. LLC, 2021 U.S. Dist. LEXIS 253782]

Client/Matter: -None-

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

19. [Gorrio v. Francis, 2021 U.S. Dist. LEXIS 87570]

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

20. [Edge Sys. LLC v. Ageless Serums LLC, 2021 U.S. Dist. LEXIS 164868]

Client/Matter: -None-

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

21. [Sheet Metal Workers Local No. 20 Welfare & Ben. Fund v. CVS Pharm., Inc., 540 F. Supp. 3d 182]

Client/Matter: -None-

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

22. *In re Rail Freight Fuel Surcharge Antitrust Litig. (No. II.), 2021 U.S. Dist. LEXIS 90200*

Client/Matter: -None-

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

23. *Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., 2021 U.S. Dist. LEXIS 90488*

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

24. *In re Auto. Parts Antitrust Litig., 997 F.3d 677*

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

25. *In re Ranbaxy Generic Drug Application Antitrust Litig., 338 F.R.D. 294*

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

26. *Acad. of Allergy & Asthma in Primary Care v. Quest Diagnostics, Inc., 998 F.3d 190*

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

27. Texas v. Google LLC, 2021 U.S. Dist. LEXIS 96586

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

28. Pac. Steel Grp. v. Commercial Metals Co., 2021 U.S. Dist. LEXIS 97113

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Search Terms: "antitrust law"

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

29. Cigna Corp. v. Celgene Corp., 2021 U.S. Dist. LEXIS 97590

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

30. Nfinitylink Communs., Inc. v. City of Monticello, 2021 U.S. Dist. LEXIS 98844

Client/Matter: -None-

Search Terms: "antitrust law"

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

31. O.M. v. Nat'l Women's Soccer League, LLC, 541 F. Supp. 3d 1171

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

32. AlphaCard Sys. LLC v. Fery LLC, 2021 U.S. Dist. LEXIS 102098

Client/Matter: -None-

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Search Type: Natural Language

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

33. In re Broiler Chicken Antitrust Litig., 2021 U.S. Dist. LEXIS 102550

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

34. Spectrum Scis., LLC v. Celestron Acquisition, LLC, 2021 U.S. Dist. LEXIS 103832

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

35. Facebook, Inc. v. BrandTotal Ltd., 2021 U.S. Dist. LEXIS 108137

Client/Matter: -None-

Search Terms: "antitrust law"

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

36. In re Opana ER Antitrust Litig., 2021 U.S. Dist. LEXIS 105342

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Search Terms: "antitrust law"

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

37. [BHRS Group, LLC v. Brio Water Tech., Inc., 553 F. Supp. 3d 793]

Client/Matter: -None-

Search Terms: "antitrust law"

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

38. [Comprehensive Sec. v. Metro. Gov't of Nashville & Davidson Cty., 2021 U.S. Dist. LEXIS 108055]

Client/Matter: -None-

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

39. [Winn-Dixie Stores, Inc. v. Eastern Mushroom Mktg. Coop., 2021 U.S. Dist. LEXIS 107778]

Client/Matter: -None-

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

40. [1-800 Contacts, Inc. v. FTC, 1 F.4th 102]

Client/Matter: -None-

Search Terms: "antitrust law"

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

41. [In re Lantus Direct Purchaser Antitrust Litig., 2021 U.S. Dist. LEXIS 256698]

Client/Matter: -None-

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

42. [In re Namenda Indirect Purchaser Antitrust Litig., 2021 U.S. Dist. LEXIS 110081]

Client/Matter: -None-

Search Terms: "antitrust law"

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

43. *Ekbatani v. Cmty. Care Health Network, LLC, 2021 U.S. Dist. LEXIS 127772*

Client/Matter: -None-

Search Terms: "antitrust law"

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

44. *In re Inclusive Access Course Materials Antitrust Litig., 544 F. Supp. 3d 420*

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

45. *In re Inclusive Access Course Materials Antitrust Litig., 2021 U.S. Dist. LEXIS 111135*

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

46. *O.M. v. Nat'l Women's Soccer League, LLC, 544 F. Supp. 3d 1063*

Client/Matter: -None-

Search Terms: "antitrust law"

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

47. *NCAA v. Alston, 141 S. Ct. 2141*

Client/Matter: -None-

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

48. *Parks v. Ala. Bd. of Pharm., 2021 U.S. Dist. LEXIS 116150*

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

49. *Reorganized FLI, Inc. v. Williams Cos., 1 F.4th 1214*

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

50. *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices and Antitrust Litig., 545 F. Supp. 3d 922*

Client/Matter: -None-

Search Terms: "antitrust law"

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51. *Always Towing & Recovery, Inc. v. Milwaukee, 2 F.4th 695*

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

52. *House v. NCAA, 545 F. Supp. 3d 804*

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

53. *Miami Prods. & Chem. Co. v. Olin Corp., 546 F. Supp. 3d 223*

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

54. *FTC v. Facebook, Inc., 560 F. Supp. 3d 1*

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

55. *New York v. Facebook, Inc., 549 F. Supp. 3d 6*

Client/Matter: -None-

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

56. *Multiple Energy Techs., LLC v. Under Armour, Inc., 2021 U.S. Dist. LEXIS 120744*

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

57. *Tyler Techs., Inc. v. Lexur Enters. Inc., 2021 U.S. Dist. LEXIS 120935*

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58. *In re Zantac (Ranitidine) Prods. Liab. Litig., 546 F. Supp. 3d 1216*

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59. *In re Google Assistant Privacy Litig., 546 F. Supp. 3d 945*

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60. *Tershakovec v. Ford Motor Co., 546 F. Supp. 3d 1348*

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61. *Ticas v. Youssef, 2021 Cal. Super. LEXIS 97005*

Client/Matter: -None-

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62. *Marcum v. Columbia Gas Transmission, LLC, 549 F. Supp. 3d 408*

Client/Matter: -None-

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63. *Siegler v. Sorrento Therapeutics, Inc., 2021 U.S. App. LEXIS 21391*

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64. *SmileDirectClub, LLC v. Battle, 4 F.4th 1274*

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

65. *Yellowcake, Inc. v. Hyphy Music, Inc., 2021 U.S. Dist. LEXIS 135269*

Client/Matter: -None-

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

66. *Mount Wilson FM Broadcasters v. A 1 Elec. Serv. Co., 2021 Cal. Super. LEXIS 65933*

Client/Matter: -None-

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

67. *Conrad v. Jimmy John's Franchise, LLC, 2021 U.S. Dist. LEXIS 142272*

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68. *Ni-Q, LLC v. Prolacta Bioscience, Inc., 2021 U.S. Dist. LEXIS 138675*

Client/Matter: -None-

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69. [Ruiz v. Celsius Holdings, 2021 U.S. Dist. LEXIS 235986]

Client/Matter: -None-

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70. [Deslandes v. McDonald's USA, LLC, 2021 U.S. Dist. LEXIS 140735]

Client/Matter: -None-

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71. [Yanagi v. Bank of Am., N.A. (In re Herrero), 2021 Bankr. LEXIS 1995]

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72. [Yellowcake, Inc. v. Morena Music, Inc., 2021 U.S. Dist. LEXIS 144231]

Client/Matter: -None-

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73. [Quadvest, L.P. v. San Jacinto River Auth., 7 F.4th 337]

Client/Matter: -None-

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74. *Agency v. Dfo Global Performance Commerce Ltd., 2021 U.S. Dist. LEXIS 190357*

Client/Matter: -None-

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

75. *FTC v. Hackensack Meridian Health, Inc., 2021 U.S. Dist. LEXIS 158158*

Client/Matter: -None-

Search Terms: "antitrust law"

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

76. *FWK Holdings, LLC v. Merck & Co. (In re Zetia (Ezetimibe) Antitrust Litig.), 7 F.4th 227*

Client/Matter: -None-

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

77. *Maralago Cay Homeowners Ass'n v. Mhc Operating, 2021 U.S. Dist. LEXIS 248397*

Client/Matter: -None-

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

78. *Young v. Parry, 2021 Cal. Super. LEXIS 61026*

Client/Matter: -None-

Search Terms: "antitrust law"

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

79. Hendershot v. Southern Glazer's Wine & Spirits of Okla., LLLP, 2021 U.S. Dist. LEXIS 148676

Client/Matter: -None-

Search Terms: "antitrust law"

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

80. Midwest Renewable Energy v. Archer Daniels Midland Co., 2021 U.S. Dist. LEXIS 150803

Client/Matter: -None-

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

81. Pluspass, Inc. v. Verra Mobility Corp., 2021 U.S. Dist. LEXIS 201843

Client/Matter: -None-

Search Terms: "antitrust law"

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

82. Animal Sci. Prods. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.), 8 F.4th 136

Client/Matter: -None-

Search Terms: "antitrust law"

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

83. St. Luke's Hosp. v. ProMedica Health Sys., 8 F.4th 479

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

84. Dekker v. Vivint Solar, Inc., 2021 U.S. Dist. LEXIS 151377

Client/Matter: -None-

Search Terms: "antitrust law"

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

85. *N. Penn Towns, LP v. Concert Golf Partners, LLC, 554 F. Supp. 3d 665*

Client/Matter: -None-

Search Terms: "antitrust law"

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

86. *Utesch v. Lannett Co., 2021 U.S. Dist. LEXIS 151694*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

87. *In re Xyrem (Sodium Oxybate) Antitrust Litig., 555 F. Supp. 3d 829*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

88. *Posada v. Cultural Care, Inc., 554 F. Supp. 3d 309*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

89. *Ned Elka v. Anklive V.johnson & Johnson, 2021 Cal. Super. LEXIS 66551*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

90. Top Agent Network, Inc. v. Nat'l Ass'n of Realtors, 554 F. Supp. 3d 1024

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

91. Meyberg v. City of Santa Cruz, 2021 U.S. App. LEXIS 24502

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

92. Rose Ml v. Mazaya United States, 2021 Cal. Super. LEXIS 26682

Client/Matter: -None-

Search Terms: "antitrust law"

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

93. Edwards Vacuum, LLC v. Hoffman Instrumentation Supply, Inc., 556 F. Supp. 3d 1156

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

94. Hetronic Int'l, Inc. v. Hetronic Germany GmbH, 10 F.4th 1016

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

95. In re Glumetza Antitrust Litig., 2021 U.S. Dist. LEXIS 161066

Client/Matter: -None-

Search Terms: "antitrust law"

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

96. Maxwell Foods, LLC v. Smithfield Foods, Inc., 2021 NCBC 50

Client/Matter: -None-

Search Terms: "antitrust law"

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

97. Rosenman v. Facebook Inc., 2021 U.S. Dist. LEXIS 163171

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

98. Bais Yaakov of Spring Valley v. ACT, Inc., 12 F.4th 81

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

99. Binotti v. Duke Univ., 2021 U.S. Dist. LEXIS 225003

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

100. *Sanborn Library LLC v. Eris Info. Inc., 2021 U.S. Dist. LEXIS 165496*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

Simon & Simon, PC v. Align Tech., Inc.

United States District Court for the Northern District of California

April 8, 2021, Decided; April 8, 2021, Filed

Case No. 20-cv-03754-VC

Reporter
533 F. Supp. 3d 904 *; 2021 U.S. Dist. LEXIS 69583 **

SIMON AND SIMON, PC, et al., Plaintiffs, v. ALIGN TECHNOLOGY, INC., Defendant.

Core Terms

Align, scanner, iTero, dental practice, termination, Dental, allegations, antitrust, contracts, monopoly power, discount, orders, plaintiffs', patent, markets, interoperability, anticompetitive, patients, prices, competitors, monopolist's, purchases, scans, teeth, manufacturers, inflated, products, anticompetitive conduct, infringement, conceivable

Counsel: **[**1]** For VIP Dental Spas, Plaintiff: Kevin E. Rayhill, Joseph Saveri Law Firm Inc., San Francisco, CA; Daniel Jay Mogin, Timothy Z. LaComb, MoginRubin LLP, San Diego, CA; David K. Lietz, LEAD ATTORNEY, PRO HAC VICE, Mason Lietz & Klinger LLP, Washington, DC; Gary Michael Klinger, LEAD ATTORNEY, PRO HAC VICE, Mason Lietz & Klinger LLP, Chicago, IL; Jennifer Marie Oliver, Moginrubin LLP, San Diego, CA.

For Simon and Simon PC, doing business as, Simon and Simon PC, City Smiles, Plaintiffs: Daniel John Walker, PRO HAC VICE, Berger Montague PC, Washington, DC; Joseph R. Saveri, Kevin E. Rayhill, Joseph Saveri Law Firm Inc., San Francisco, CA; Keydon Levy, Steven Noel Williams, Joseph Saveri Law Firm, San Francisco, CA; April D Lambert, Daniel Evan Rubenstein, PRO HAC VICE, Radice Law Firm, Princeton, NJ; Joshua Taylor Ripley, Eric L. Cramer, PRO HAC VICE, Berger Montague PC, Philadelphia, PA; John Daniel Radice, PRO HAC VICE, Radice Law Firm PC, Princeton, NJ; Kevin S. Landau, PRO HAC VICE, Taus Cebulash Landau LLP., New York, NY.

For ALIGN TECHNOLOGY INC., Defendant: Noah Pinegar, PRO HAC VICE, Paul Hastings LLP, Washington, DC; Thomas A. Counts, LEAD ATTORNEY, Abigail Heather Wald, Paul Hastings **[**2]** LLP, San Francisco, CA; Steven Arthur Marenberg, James Pearl, Paul Hastings LLP, Los Angeles, CA; Michael C Whalen, PRO HAC VICE, Adam Michael Reich, Paul Hastings LLP, Chicago, IL.

Judges: VINCE CHHABRIA, United States District Judge.

Opinion by: VINCE CHHABRIA

Opinion

[*908] ORDER DENYING MOTION TO DISMISS

Re: Dkt. No. 52

This case involves Invisalign, the popular dental aligner that dentists sell patients to straighten their teeth. According to the plaintiffs, the company that makes Invisalign has a monopoly in the aligner market as well as the market for scanners that are used to produce aligners. The company has allegedly engaged in a multifaceted scheme to stifle competition in these markets—a scheme that has achieved its intended result of entrenching the company's monopoly power, reducing consumer choice in both markets, and preserving its ability to charge supracompetitive prices for aligners and scanners. Although the complaint could have done a better job of explaining aspects of the alleged scheme, and although not every aspect of the alleged scheme gives rise to an antitrust claim on its own, the totality of the conduct does—if the plaintiffs are able to prove that it actually occurred—violate the antitrust **[**3]** laws. In fact, one aspect of the alleged scheme, the termination of an agreement with another scanner company, amounts to an antitrust violation even when it is considered in isolation. Accordingly, the motion to dismiss the complaint is denied.

I

Aligners are transparent, removable mouthpieces that slip over and straighten teeth. To order aligners for a patient, a dental practice must send an aligner manufacturer some sort of image or imprint of the patient's teeth and jaws. Historically, dental practices used silicon molds to fit an aligner to a patient's teeth, but handheld scanners that take digital images of jaws and teeth have emerged as a more accurate and efficient tool. Aligner manufacturers use the images to create custom aligners. Patients typically undergo multiple scans and use multiple sets of aligners to shift their teeth over time, with the aligners being adjusted as their teeth move. This case arises out of Align Technology's sale of its aligner as well as its scanner for making that aligner. The aligner is called "Invisalign," and the scanner is called "iTero."

The plaintiffs are two dental practices, both of which use iTero scanners to offer Invisalign to their patients. **[**4]** City Smiles is a practice located in Chicago, Illinois. VIP Dental Spas is a practice with offices in Los Angeles and Beverly Hills, California. Both City Smiles and VIP Dental Spas allegedly purchased an iTero to scan patients' teeth for Invisalign orders—orders they regularly made from Align from 2015 onward. The plaintiffs allege that the prices they paid for these aligners and scanners were artificially inflated due to an anticompetitive scheme that Align implemented in response to new competition in the aligner market. That scheme, they allege, was orchestrated to monopolize both the scanner and aligner markets. The following is a description of the allegations in the plaintiffs' complaint. At this stage, the Court is required to assume the truth of these allegations, so long as they are adequately articulated and not contradicted by any document that the complaint relies upon.

According to the plaintiffs, for years, Align faced little competition in the aligner market and enjoyed large profit margins on Invisalign, thanks in large part to its patents. Although some key patents have **[*909]** expired and other aligner companies have attempted to break into the market, Align still allegedly **[**5]** controls roughly 90 percent of that market. During this time, Invisalign has become synonymous with aligners generally, and the product is considered a "must have" for dental practices that offer aligners.

The plaintiffs allege that Align has also come to dominate the scanner market to the point that iTero accounts for roughly 80 percent of that market. The complaint defines the relevant scanner market with reference to scanners that are designed specifically to produce images for making aligners, excluding scanners that perform other functions but can also be used to produce images for aligner manufacturers. Align's only competitor in this aligner-specific scanner market is 3Shape. 3Shape sells a scanner called "Trios."

The plaintiffs allege that Align designed its iTero scanner so that, for practical purposes, it can only be used to order Invisalign. According to the complaint, iTero creates scans in a specialized format rather than in the standard file format used by other aligner companies, which means that a dental practice wishing to order another company's aligners using iTero would have to undertake the expensive and time-consuming task of converting the iTero scans into a compatible **[**6]** format. Thus, according to the plaintiffs, a dental practice with an iTero scanner cannot realistically use that scanner to order any type of aligner besides Invisalign.

On the flip side, if a dental practice wishes to offer Invisalign to patients, it is allegedly limited as a practical matter to using the iTero scanner to generate those orders. Align will fill orders for Invisalign from dental practices that use a limited number of preapproved multi-use scanners (i.e., scanners not specifically designed to generate images for aligners), but the complaint does not treat those scanners as viable substitutes. And although the complaint provides little information about the differences between multi-use scanners and aligner-specific scanners, Align does not (for purposes of this motion to dismiss) challenge the plaintiffs' definition of the scanner market. Meanwhile, the only other scanner that is aligner-specific—3Shape's Trios—cannot be used to order Invisalign because Align will not accept scans from Trios.

That was not always the case. In December 2015, Align and 3Shape entered an "interoperability agreement" and built an interface that allowed dentists to use Trios scans to order Invisalign. **[**7]** Align allegedly entered this agreement to increase Invisalign sales, including from dental practices that were already using the Trios scanner. But the plaintiffs allege that this arrangement ultimately fell apart because 3Shape was unwilling to help Align develop a stranglehold on the aligner market. Even as Align was finalizing the 2015 interoperability agreement with 3Shape, it was allegedly lobbying 3Shape to modify the agreement so that the Trios scanner could only be used to order Invisalign. 3Shape allegedly refused to make the Trios scanner exclusive in this way, so the agreement ultimately permitted Trios to generate orders for aligners made by other companies. But, according to the complaint, Align continued to try to alter the arrangement. The plaintiffs describe a February 2016 meeting, during which Align allegedly conveyed that 3Shape would need to treat Align as the "preferred partner" for aligners to continue the collaboration. The plaintiffs also describe a November 2016 meeting, during which Align allegedly asked 3Shape to enter a joint venture that would allow Align to control Trios. The plaintiffs allege that, although 3Shape consistently rejected these demands, **[**8]** Align continued to insist that 3Shape join some sort of venture that would exclude Align's **[*910]** competitors in the aligner market. Eventually, Align announced that it would terminate the interoperability agreement with 3Shape. The announcement came in December 2017—roughly two and a half years after the arrangement was established. Thus, beginning in January 2018, dental practices with only the Trios scanner were no longer able to order Invisalign for their patients.

And that, according to the plaintiffs, left dental practices in the position where they remain today: where iTero, as a practical matter, is the only scanner for offering aligners. The plaintiffs allege that this is, in part, thanks to the nature of scanner purchases. While scanners are essential for dental practices selling aligners, practices typically do not purchase more than one scanner because scanners are large capital investments meant to last several years. The plaintiffs also allege that, in the rare case that a dental practice owns more than one scanner, that practice tends to use only one scanner brand (either Align's or 3Shape's) due to the cost of maintaining multiple software subscriptions and the time and expense **[**9]** of training personnel to use different scanners and software programs. According to the complaint, because Invisalign dominates the aligner market and is a "must have" for dental practices, iTero is left as the only sensible scanner option. And as dental practices invest in iTero, the investment creates a long-term dependence on Invisalign, since that is the only aligner for which iTero is designed to make scans.

The termination of the interoperability agreement reflected something of a change in philosophy for Align. In 2015, before Align entered the agreement with 3Shape (and before its key patents expired), Align's then-Chief Operating Officer told industry analysts that the company preferred having multiple scanners generate orders for Invisalign:

> No one wants to have to redesign, start over, buy multiple pieces of equipment if they can have greatest utility from a scanner . . . . So, we believe what we hear from our customers is they don't want to be forced to buy a system from you for the pleasure of offering Invisalign to their patients and other therapies we may have down the road. So we feel actually very strongly . . . . There's no reason for us not to act in complementary **[**10]** ways because it's good for the customer. So in our minds, we don't need to own the channel. We don't need to have exclusivity. In fact, we want probably more high-quality scanners that can make it easier to do Invisalign and other chair-side procedures that we have the unique capabilities to fulfill.

According to the plaintiffs, terminating the agreement with 3Shape is contrary to this goal, as it eliminated the only other high-quality scanner for Align's customers. Moreover, the plaintiffs allege that Align's termination of the interoperability agreement represented a significant short-term sacrifice of "many millions of dollars" in revenue for Align.

While the plaintiffs commonly refer to Align as having "terminated" the interoperability agreement, they note that the agreement was actually worldwide and that Align did not stop filling orders generated by Trios scanners for Invisalign in other countries. They allege that the reason for terminating the agreement only in the United States was based on Align's relative market shares: because Align has less power in the aligner markets in other countries, it cannot force customers to use iTero by preventing Trios scanners from generating **[**11]** orders for Invisalign, but it can do that in the United States due to Invisalign's dominance and prominence.

The plaintiffs allege that—concurrent with the establishment of a system where **[*911]** a dental practice wanting to offer Invisalign was left with little choice but to use an iTero scanner, and where a practiceusing an iTero scanner had little choice but to refrain from offering any aligner other than Invisalign—Align began executing various contracts that committed dental practices to using its products and blocked competitors in both the aligner and scanner markets.

First, in late 2017, Align launched the Fusion Program. According to the plaintiffs, 3Shape's Trios scanner and Align's iTero scanner are typically sold at similar list prices. But the plaintiffs allege that, under the Fusion Program, Align drops the price of iTero by $10,000 in exchange for a dental practice's commitment to making a minimum number of Invisalign orders during the next three years. The plaintiffs allege that, if a dental practice fails to order the minimum number of aligners, it incurs back-end penalties that could be as large as the entire $10,000 discount. The complaint does not describe the program's minimum **[**12]** Invisalign order requirements, but it does allege that they are so high that dental practices must stop ordering other aligners and focus all their energy on selling Invisalign. According to the plaintiffs, Align's scanner and aligner competitors are unable to compete with this offer: 3Shape would lose one third of its scanner revenue if it discounted Trios to match iTero's price; and other aligner manufacturers would have to offer below-cost prices to offset Align's iTero discount.[1]

Second, in mid-2018, Align entered multiyear contracts with two of the nation's largest dental service organizations (DSOs), Heartland Dental and Aspen Dental. DSOs provide business support to independent dental practices, including by managing purchase contracts with suppliers. According to the complaint, Heartland Dental and Aspen Dental agreed to work only with Align in providing its member offices with both scanners and aligners. The complaint's description of the contracts focuses mainly on the scanner component. Heartland Dental, the nation's largest DSO with more than 850 supported dental offices, allegedly agreed to place iTero scanners in 90 percent of those offices by the end of 2018, which resulted **[**13]** in the industry's single-largest scanner deployment. At the same time, Align allegedly contracted with Aspen Dental, another of the nation's largest DSOs with nearly 700 locations, to equip each Aspen location with an iTero scanner. The plaintiffs allege that these DSO contracts enabled Align to rapidly increase its share in the scanner market. However, they do not explain the size of these deals relative to the overall scanner market. They also do not say much about the contracts' impact in the aligner market.

Third, also in 2018, Align changed its discount program, the Advantage Program. The plaintiffs allege that the Advantage **[*912]** Program is a tiered discount program that conditions a dental practice's prices for Invisalign on its ability to maintain certain levels of Invisalign orders over time. According to the plaintiffs, before 2018, the pricing criteria focused on a dental practices' number of "lifetime" cases. The plaintiffs don't explain this term, but presumably it means the number of orders over the entire history of the dental practice. But Align allegedly changed the criteria to focus on the number of orders submitted in the previous six months, and then again more recently, **[**14]** on the number of orders submitted in the previous twelve months. The plaintiffs allege that, to get

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[1] It's worth noting that this part of the complaint is difficult to understand. On the one hand, the complaint alleges that dental practices with the iTero scanner are stuck ordering Invisalign because iTero does not, as a practical matter, facilitate orders for other companies' aligners. If that is true, then one wonders if the Fusion Program's purchase requirements should have any effect on a practice's decision to order aligners from other companies, except in the situation where a practice uses both Align's iTero and 3Shape's Trios (which the complaint alleges is quite unusual). Moreover, although the complaint alleges that Align is offering a $10,000 discount on the iTero scanner, it does not allege how significant a discount this is as a matter of percentage. These are just a couple examples of ambiguities in the allegations relating to Align's contractual arrangements with dental offices—ambiguities that, as explained in Section II.A, prevent the Court from concluding that any one contractual arrangement alone constitutes an antitrust violation.

competitive prices for Invisalign, dental practices must place a very high number of Invisalign orders and have a strong incentive to forego ordering other aligners until they do so.[2]

II

Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ." *15 U.S.C. § 2*. To state an unlawful monopolization claim, a plaintiff must allege "(1) [p]ossession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury." *SmileCare Dental Group v. Delta Dental Plan of California, Inc., 88 F.3d 780, 783 (9th Cir. 1996)*.

The complaint summarizes the plaintiffs' monopolization claim as follows: "Align was able to use its monopoly power in the Aligner market to drive 3Shape out of the scanner market, and then to use its increased monopoly power in the scanner market to maintain its monopoly power in the aligner market. In this way, Align's ability to leverage both its scanner and aligner monopolies to prevent competition in both markets has enabled it to maintain or increase **[**15]** its monopoly power in both markets and to charge supracompetitive prices for both its aligners and its scanners."

Align does not dispute that the plaintiffs have adequately alleged the first element of a *section 2* claim—possession of monopoly power in the aligner and scanner markets. And as previously mentioned, Align does not, at least for purposes of this motion to dismiss, challenge the plaintiffs' definition of the scanner market as consisting only of scanners designed exclusively to produce scans for aligners. But Align contends that the complaint does not adequately allege the next two elements—that Align engaged in the willful acquisition or maintenance of monopoly power in those markets and that the plaintiffs suffered antitrust injury as a result.

A

The "willful acquisition or maintenance of monopoly power" is a difficult concept to pin down. Courts often distinguish it from "growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Courts also frequently equate "willful acquisition or maintenance of monopoly power" with "anticompetitive conduct," even though the latter phrase is no more precise. *Id.* ("The possession **[**16]** of monopoly **[*913]** power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."). Anticompetitive conduct, the courts say, "is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 894 (9th Cir. 2008)* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985))*; *see* *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 482-83, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* ("The second element of a *§ 2* claim is the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" (quoting *United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)))*; *Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1208 (9th Cir. 1997)*.

Sometimes, a monopolist's singular activity will amount to an antitrust violation on its own. But other times, a series of activities will combine to create an antitrust violation even if no one activity is sufficiently "anticompetitive" in isolation. *See, e.g., City of Anaheim v. Southern California Edison Co., 955 F.2d 1373, 1376, 1378 (9th Cir. 1992)* ("[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect."); *Twin City Sportservice, Inc. v. Finley & Co., Inc., 676 F.2d 1291, 1302 (9th Cir. 1982)*; *see also* *Free FreeHand Corp. v. Adobe Systems Inc., 852 F. Supp. 2d 1171, 1180 (N.D. Cal. 2012)*; *Tele Atlas N.V. v. NAVTEQ Corp.*, 2008 WL 4911230, at *1 (N.D. Cal. Nov. 13, 2008) (citing *Continental Ore Co. v.*

[2] As noted earlier with respect to the Fusion Program, it's not clear why the Advantage Program's allegedly aggressive numbers-based pricing criteria is problematic if it's true, as the plaintiffs allege elsewhere, that a dental practice with an iTero scanner is effectively limited to ordering Invisalign anyway.

Union Carbide & Carbon Corp., 370 U.S. 690, 698-99, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)). And sometimes, an activity is so innocuous that it adds nothing to a plaintiff's *section 2* claim because it is simply not anticompetitive. *See, e.g., Free FreeHand, 852 F. Supp. 2d at 1184*.

Some of the conduct alleged in the complaint—specifically, the termination of the interoperability agreement with 3Shape, **[**17]** the Fusion Program involving a scanner discount that locks dental practices into purchasing Invisalign aligners for several years, and the contracts with DSOs to offer only Align products to and place iTero scanners in dental practices within those organizations—combine to constitute a *section 2* violation. Indeed, the termination of the interoperability agreement, as alleged in the complaint, amounts to a *section 2* violation on its own. The Fusion Program and DSO contracts, at least in the context of Align's alleged monopoly power and its overall course of conduct, are problematic from an antitrust standpoint. They might well be said to "impair the opportunities of rivals" in a way that does not "further competition on the merits." *Cascade Health, 515 F.3d at 894*. Although the complaint does not include enough information about these two programs to state a standalone claim, at a minimum they combine with the termination of the interoperability agreement (and with each other) to strengthen the plaintiffs' assertion of anticompetitive conduct by a monopolist. On the other hand, the plaintiffs' allegations regarding Align's Advantage Program suggest that it is essentially a system for providing short-term volume discounts—too innocuous **[**18]** to add anything to the plaintiffs' *section 2* claim.

1. The interoperability agreement. Even a firm with monopoly power has no general duty to engage in a joint marketing venture with a competitor. But in certain circumstances, a monopolist's termination of a cooperative venture can give rise to liability under the Sherman Act as a refusal to deal. *Aspen Skiing Co.,* ***[*914]*** *472 U.S. at 601*; *see also Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*. The Ninth Circuit has described a refusal to deal as involving the following: (1) the "unilateral termination of a voluntary and profitable course of dealing," (2) a refusal to sell "even if compensated at retail price," and (3) a refusal to provide "products that were already sold in a retail market to other customers." *MetroNet Services v. Qwest, 383 F.3d 1124, 1131 (9th Cir. 2004)*; *see Federal Trade Commission v. Qualcomm Inc., 969 F.3d 974, 993-94 (9th Cir. 2020)*. But the termination of a relationship will only violate *section 2* if "the only conceivable rationale or purpose" of the termination "is to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1184 (9th Cir. 2016)*; *Qualcomm, 969 F.3d at 994*; *see also Trinko, 540 U.S. at 409*. "When a legitimate business justification supports a monopolist's exclusionary conduct, that conduct does not violate *[section 2*] of the Sherman Act." *Image Technical, 125 F.3d at 1212*.

The parties dispute whether the plaintiffs adequately allege that the "only conceivable rationale or purpose" behind **[**19]** the termination was anticompetitive. They do. The allegations in the complaint create a strong inference that the only conceivable reason for terminating the agreement with 3Shape was to stifle competition in both the aligner and scanner markets. The complaint alleges that the agreement resulted in tens of thousands of Invisalign orders for Align. And, given the price of each Invisalign order, Align sacrificed millions of dollars in short-term profits by terminating the agreement. According to the complaint, the sacrifice only made economic sense if Align expected the termination to result in long-term gains from an eventual enhancement of monopoly power. The plaintiffs explain in detail how the termination would run 3Shape out of the scanner market by compelling dentists to acquire the iTero scanner, which in turn would effectively compel dentists to focus primarily or exclusively on selling Invisalign, thus entrenching the company's monopoly power in both markets.

Economics aside, the complaint's allegations regarding Align's prior conduct with 3Shape also create a strong inference that the termination was intended to be anticompetitive. The complaint describes Align's repeated efforts **[**20]** to cajole 3Shape into preventing its Trios scanner from being used for any type of aligner other than Invisalign. And after 3Shape repeatedly refused, Align ended the agreement. This sequence of events strongly suggests that Align's decision to sacrifice short-term profits by terminating the agreement was calculated to accomplish a result that 3Shape previously refused to help Align achieve: the entrenchment of Invisalign's monopoly power in the aligner market. *See Trinko, 540 U.S. at 409* (noting that, at the pleading stage, allegations should "shed[] . . . light upon the motivation of [the defendant's] refusal to deal—upon whether it[] . . . [was] prompted not by competitive zeal but by anticompetitive malice"). Overall, the allegations about the termination are sufficient to raise a reasonable expectation that discovery will reveal evidence of illegal conduct. *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

Align's primary response is that the complaint fails to rule out other possible explanations for the termination. There is a general version and a specific version of this argument. In the general version, Align asserts that an antitrust plaintiff must, in the complaint itself, list other **[*915]** potential rationales for the refusal to deal and explain **[**21]** why each of them could not conceivably explain the defendant's actions. That can't be right. The cases Align cites on this issue involve summary judgment or trials, where courts often inquire whether an antitrust plaintiff presented sufficient evidence to refute an alternative rationale for the refusal to deal. *Aerotec, 836 F.3d at 1184*; *Qualcomm, 969 F.3d at 993-97*; *MetroNet, 383 F.3d at 1130-34*. Align has cited no case—nor can the Court find one—holding antitrust plaintiffs to this type of burden at the pleading stage. *Creative Copier Servs. v. Xerox Corp., 344 F. Supp. 2d 858, 867 (D. Conn. 2004)* ("It is not required to allege the negative of every possible justification Xerox may offer for its conduct."); *see* SmileCare, 88 F.3d at 786 ("[T]he existence of valid business reasons is ordinarily a question of fact . . . ."); *Free FreeHand, 852 F. Supp. 2d at 1182*.

The specific version of Align's argument goes something like this: (i) the complaint alleges that Align has enjoyed patent protection for its products and that it has aggressively asserted its patent rights; (ii) the Court can take judicial notice of the fact that Align sued 3Shape for patent infringement around the time it terminated the agreement with 3Shape; and (iii) the best inference from the complaint and judicially noticeable material is that Align terminated the agreement with 3Shape because of the infringement. Therefore, according **[**22]** to Align, its patent justification precludes the plaintiffs from plausibly alleging that the "only conceivable purpose" for the termination was anticompetitive.

But the response to this specific argument is largely the same—it raises an issue for summary judgment or trial, not for a motion to dismiss. The mere fact that Align filed a patent infringement suit against 3Shape is not a basis for dismissing a claim alleging that the termination of the interoperability agreement violates *section 2*. That's especially true because the patent lawsuit raises more questions than answers. If Align doesn't want to do business with an infringer of its patents, why does it continue to do business with 3Shape in other countries? Does the patent infringement suit have merit, or is it brought in retaliation for 3Shape's refusal to comply with Align's ongoing pressure make the Trios scanner exclusive to Invisalign? How did it come about that Align discovered the alleged patent infringement right around the time that 3Shape was refusing to make its scanner exclusive to Invisalign? And given the number of patent lawsuits between Align and 3Shape, is it appropriate to conclude anything from just one of these lawsuits **[**23]** without a deeper analysis and more detailed timeline?

It may well be that Align has good answers to these questions, and that the existence of the patent dispute is indeed a legitimate rationale for the agreement's termination. But at this stage, the existence of the patent suit against 3Shape does not render implausible the otherwise highly plausible allegation that the only conceivable reason Align terminated the interoperability agreement was to stifle competition and entrench its monopoly power.

2. The Advantage Program, Fusion Program, and DSO contracts. The plaintiffs allege that the Advantage Program, Fusion Program, and DSO contracts are examples of "de facto exclusive dealing arrangements." At its simplest, "exclusive dealing" involves an agreement between a seller and a buyer where the buyer agrees to purchase only the seller's product and refrains from doing business with the seller's competitors. *Allied Orthopedic, 592 F.3d at 996*; *see* Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961). A firm **[*916]** might, for instance, offer discounts or rebates that are conditioned on exclusivity. *See, e.g.,* United Shoe Machinery Corp. v. United States, 258 U.S. 451, 457, 42 S. Ct. 363, 66 L. Ed. 708 (1922); *see also* Aerotec, 836 F.3d at 1182. Section 2 is implicated when a seller has monopoly power, and its exclusive dealing arrangements prevent the seller's rivals from competing. *Allied Orthopedic, 592 F.3d at 996*.

But even without an explicit **[**24]** agreement of exclusivity, a monopolist can violate *section 2* by entering arrangements that have the "practical effect" of preventing buyers from doing business with the monopolist's competitors. *Tampa Electric, 365 U.S. at 327*; *see, e.g.,* United Shoe, 258 U.S. at 457. For example, quantity discount programs can amount to exclusive dealing when they are "extreme." *See* Aerotec, 836 F.3d at 1181; *see also* Allied Orthopedic, 592 F.3d at 996-97. Such arrangements are commonly called "de facto" exclusive dealing.

See, e.g., *Aerotec, 836 F.3d at 1182*; 14 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶¶ 1800a3, 1807a (4th ed. 2019).[3]

The Ninth Circuit has articulated a couple of principles for assessing whether a contract is "exclusive." First, "the short duration and easy terminability of [] agreements negate substantially their potential to foreclose competition" because "a competing manufacturer need only offer a better product or a better deal" to get its own contracts. *Omega Environmental, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1164 (9th Cir. 1997)*. Second, "exclusive dealing arrangements imposed on distributors rather than end-users are generally less cause for anticompetitive concern" because "[i]f competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether [exclusive **[**25]** dealing arrangements] foreclose from competition any part of the relevant market." *Id. at 1162-63*; *see also* *PNY Technologies, Inc. v. SanDisk Corp., 2014 U.S. Dist. LEXIS 58108, 2014 WL 1677521, at *4 (N.D. Cal. Apr. 25, 2014)*; *Church & Dwight Co., Inc. v. Mayer Laboratories, Inc., 868 F. Supp. 2d 876, 903 (N.D. Cal. 2012)*, *vacated in part on other grounds*, *2012 U.S. Dist. LEXIS 68681, 2012 WL 1745592 (N.D. Cal. May 16, 2012)*.

But it is not enough for an exclusive arrangement—de facto or explicit—to foreclose competition in some relatively inconsequential portion of the market. To rise to the level of a *section 2* violation, an arrangement must "substantially" foreclose market opportunities for the monopolist's competitors. *Allied Orthopedic, 592 F.3d at 996*; *Qualcomm, Inc., 969 F.3d at 1003*. "That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited . . . ." *Tampa Electric, 365 U.S. at 328*. To determine whether foreclosure is "substantial," courts "weigh the probable effect of the contract **[*917]** on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." *Id. at 329*; *see also* *Twin City, 676 F.2d at 1298, 1304* (holding that a contract restricting as little as 24% of the relevant market resulted in a cognizable foreclosure under section 1, which typically requires a higher level **[**26]** of foreclosure than *section 2*); *CollegeNet, Inc. v. Common Application, Inc., 355 F. Supp. 3d 926, 952-53 (D. Or. 2018)* (noting that, under *section 2*, foreclosing about 30% of the market suffices as substantial).

As a preliminary matter, the plaintiffs' allegations regarding Align's Advantage Program do not add anything to their antitrust theory. As described in the complaint, the program is essentially a system for providing short-term (one year) volume discounts. Simply alleging that "dental practices must maintain a very high prescribing level of Invisalign in order to offer competitive prices to patients" is insufficient to raise an inference that the arrangement amounts to an "extreme" quantity discount or is otherwise anticompetitive. *See* *Allied Orthopedic, 592 F.3d at 997*. Accordingly, the program (at least as alleged) does not contribute to the plaintiffs' *section 2* claim.

The DSO contracts with Aspen Dental and Heartland Dental, on the other hand, raise antitrust concerns. They can be understood as requirement contracts: Align contracted with the DSOs to fill their aligner and scanner needs entirely across multiple years, and the DSOs agreed to work exclusively with Align. DSO-member practices rely on their DSO to procure supplies. While not spelled out by the complaint, one can reasonably infer from the allegations that **[**27]** it is difficult for a member practice to contract outside its DSO to buy unsupported products. Accordingly, if these DSOs are only offering Align's aligner and scanner, as the complaint alleges, their member practices only

[3] It's not clear that arrangements involving an aggregation of discounts across multiple related products raise exclusive dealing concerns. *See* ***Cascade Health, 515 F.3d at 909***. *But see* Areeda & Hovenkamp, *supra* ¶ 1807b2. Nevertheless, such multiproduct discounts can raise antitrust concerns when they exclude equally efficient rivals that produce only one competing product because the rivals would have to give a much larger discount to compensate customers for the forsaken discount on products that they do not sell. Areeda & Hovenkamp, *supra* ¶ 1807b2; *see* ***Cascade Health, 515 F.3d at 909*** ("[T]he primary anticompetitive danger posed by a multiproduct bundled discount is that such a discount can exclude a rival who is equally efficient at producing the competitive product simply because the rival does not sell as many products as the bundled discounter."); *see also LePage's, Inc. v. 3M*, *324 F.3d 141 (3d Cir. 2003)* (en banc), *cert. denied*, ***542 U.S. 953, 124 S. Ct. 2932, 159 L. Ed. 2d 835 (2004)***.

have meaningful access to Align's aligner and scanner. *See* Pro Search Plus, LLC v. VFM Leonardo Inc., 2013 U.S. Dist. LEXIS 169856, 2013 WL 6229141, at *6 (C.D. Cal. Dec. 2, 2013).

The Fusion Program also raises antitrust concerns: Align's discount on its iTero scanner (tied to Invisalign purchases) means that equally efficient aligner manufacturers may find it impossible to compensate for a lost iTero discount since they do not produce scanners. *See Cascade Health, 515 F.3d at 909* ("[T]he primary anticompetitive danger posed by a multiproduct bundled discount is that such a discount can exclude a rival who is equally efficient at producing the competitive product simply because the rival does not sell as many products as the bundled discounter."). The plaintiffs allege rival aligner companies cannot compete because they would have to offer below-cost aligner prices to offset a forsaken iTero discount. The plaintiffs also allege that the program has left 3Shape in a difficult position. Matching iTero's discounted price would allegedly require 3Shape to sacrifice a third of its revenue. Thus, 3Shape's Trios is not **[**28]** only tied to less desirable aligners but also is more expensive.

Both contracts must also be understood in light of the allegations describing the nature of scanner and aligner purchases. According to the complaint, scanners are large capital investments that last several years and do not lend themselves to a second purchase—especially not from a different company. Thus, at this stage, it is safe to assume that those in the Fusion Program as well as DSO-member dental **[*918]** practices will not soon purchase 3Shape's Trios and therefore will be unable to order anything but Invisalign. Furthermore, while both programs operate on dental practices rather than aligner end-users (patients ordering aligners from their dentists), anticompetitive concerns remain because the complaint suggests that aligner companies do not sell to individuals directly: dentists appear to be the only channel for distribution. Accordingly, considered in their totality, the plaintiffs' allegations—combined with a series of inferences in their favor—suggest that both contracts stifle competition and commit dental practices to a monopolist's products.

Nevertheless, the allegations about these arrangements—even considered together—do **[**29]** not state a section 2 claim on their own. As discussed throughout this ruling, the complaint omits information in some areas, and is vague in other areas. Moreover, although the complaint portrays both the DSO contracts and the Fusion Program as exclusive (a conclusion that seems dubious as to the latter), it does not adequately allege that foreclosure of market opportunity for competitors is "substantial" within the meaning of antitrust doctrine. One might speculate that the DSO contracts have a meaningful impact in the scanner market given that Heartland Dental and Aspen Dental are two of the nation's largest DSOs and given that just one of the contracts "represents the industry's single-largest scanner deployment." Indeed, the complaint alleges that the contracts enabled Align to rapidly increase its market share in the scanner market, thereby pushing out 3Shape. One might also assume that the Fusion Program's incentives for dental practices to buy iTero and order Invisalign would cause a significant decline in 3Shape's market share. And with a decline in the major mode of production for other aligners, one might expect the market share of competing aligner companies to fall as well. The **[**30]** plaintiffs' allegations that various other aligner manufacturers have attempted but failed to gain a foothold in the aligner market support such an assumption. But neither the high-level allegations regarding the impressive nature of the DSO scanner deployments nor the vague allegations regarding rapid increases or decreases in market shares are sufficient for inferring that the foreclosure is in fact *substantial*. For example, the complaint does not even estimate the percentage of the market represented by Heartland Dental and Aspen Dental. Thus, the exclusive dealing allegations cannot be understood as a section 2 violation on their own. Instead, they are best understood as combining with the refusal-to-deal allegations to make a strong overall section 2 claim in both the scanner and aligner markets. *But see* 3Shape Trios A/S v. Align Technology, Inc., 2020 U.S. Dist. LEXIS 221845, 2020 WL 6938054, at *2 (D. Del. Nov. 25, 2020) (holding that a similar complaint adequately alleged that the DSO contracts resulted in substantial foreclosure).

B

To state a federal antitrust claim, a plaintiff must allege "loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)). In general, "[a]ntitrust injury requires the plaintiff to have suffered **[**31]** its injury in the market where competition is being restrained." American Ad Management, Inc. v. General Telephone Co. of California, 190 F.3d 1051, 1057 (9th Cir. 1999). The plaintiffs allege that they suffered injury by paying overcharges when they purchased Invisalign and iTero at prices inflated by Align's scheme, but **[*919]** Align contends that their allegations are inadequate for pleading injury in both the aligner and scanner markets.

1. Injury in the aligner market. Align stresses that, absent basic details about the timing of the plaintiffs' aligner purchases, the complaint fails to plausibly allege that the plaintiffs suffered injury from the scheme. According to Align, since part of the class period predates the allegedly anticompetitive scheme, there is a possibility that the plaintiffs' Invisalign orders occurred before prices were artificially inflated. But the complaint states that the dental practices regularly purchased Invisalign throughout the class period, which extends until today. Especially given the complaint's allegations regarding the prominence of Invisalign and its allegations that both dental practices own iTero scanners, it is easy to infer that City Smiles and VIP Dental Spas ordered Invisalign during the alleged scheme.

2. Injury in the scanner market. According **[**32]** to the complaint, City Smiles purchased an iTero scanner during the class period at an artificially inflated price, and VIP Dental Spas purchased an iTero scanner from Align in 2018, also at a price that was artificially high. Align submits extrinsic evidence to dispute these allegations. First, it submits City Smiles's iTero purchase contract to show that the purchase occurred before Align's allegedly anticompetitive conduct began. Second, Align submits an iTero purchase agreement between someone called "Sherwin Matian" and Align. Matian is the sole shareholder of VIP Dental Spas. Align argues that, while Matian (as an individual) purchased an iTero, VIP Dental Spas did not. Align contends that these purchase agreements are incorporated by reference because the plaintiffs' claims depend on their purchasing an iTero at an inflated price, and neither plaintiff has disputed the documents' authenticity.

Align is correct that the Court can consider the contracts, but they only defeat the allegations of antitrust injury in the scanner market as to City Smiles, not VIP Dental Spas. The complaint does not explicitly mention the contracts, but the plaintiffs' scanner claim "depends on" a valid **[**33]** antitrust injury—indeed, that's a required element of a *section 2* claim. The plaintiffs allege that their scanner injury arose from purchasing an iTero scanner directly from Align at an inflated price, and they have not disputed the authenticity of the documents. *See, e.g., Knievel v. ESPN, 393 F.3d 1068, 1076-77 (9th Cir. 2005)*; *see also Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1002 (9th Cir. 2018)*; *U.S. v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003)*. Since City Smiles purchased its iTero scanner in 2016—before the alleged anticompetitive conduct began—that conduct could not have inflated the price of City Smiles's iTero. The plaintiffs do not argue otherwise. But for VIP Dental Spas, the name on Align's purchase agreement does not alone establish that VIP Dental Spas is an improper plaintiff. As a practical matter, that VIP Dental Spas's sole owner, Matian, is listed on the agreement seems immaterial—one might imagine that small business owners regularly purchase items on behalf of their business. Relatedly, as a legal matter, it seems quite plausible—and Align does not dispute—that Matian purchased the scanner as an agent for the corporation, giving VIP Dental Spas antitrust standing as a direct purchaser. *In re Cathode Ray Tube (CRT) Antitrust Litigation, 2016 U.S. Dist. LEXIS 102408, 2016 WL 7805628, at *14-15 (N.D. Cal. Aug. 4, 2016)*.

Accordingly, Align's arguments regarding antitrust injury do not require dismissal of either defendant. Both dental practices have adequately alleged **[**34]** antitrust injury in their purchase of aligners, and one of them has adequately alleged antitrust injury in its purchase of a scanner.

[*920] III

The motion to dismiss is denied. Align must file an answer within 14 days. The case management conference scheduled for April 21 is continued until May 12, 2021, and an updated joint case management statement is due 7 days before the conference.

IT IS SO ORDERED.

Dated: April 8, 2021

/s/ Vince Chhabria

VINCE CHHABRIA

United States District Judge

Impax Labs., Inc. v. FTC

United States Court of Appeals for the Fifth Circuit

April 13, 2021, Filed

No. 19-60394

Reporter

994 F.3d 484 *; 2021 U.S. App. LEXIS 10555 **; 2021 U.S.P.Q.2D (BNA) 417; 2021 WL 1376984

IMPAX LABORATORIES, INCORPORATED, A CORPORATION, Petitioner, versus FEDERAL TRADE COMMISSION, Respondent.

Subsequent History: US Supreme Court certiorari denied by *Impax Labs., Inc. v. FTC, 2021 U.S. LEXIS 6247 (U.S., Dec. 13, 2021)*

Prior History: On Petition for Review of an Order of the Federal Trade Commission. FTC Docket No. 9373 **[**1]** .

In re Impax Labs., Inc., 2017 FTC LEXIS 36 (F.T.C., Jan. 19, 2017)

Core Terms

generic, settlement, patent, anticompetitive, effects, brand, procompetitive, restrictive alternative, benefits, manufacturer, infringement, reformulated, antitrust, delayed, expiration, oxymorphone, anti trust law, invalid, parties, paying, generic drug, extended-release, consumers, monopoly, pharmaceutical, feasibility, competitor, negotiator, no-payment, percent

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN1[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

Normally, when lawsuits settle the defendant pays the plaintiff. That makes sense as the defendant is the party accused of wrongdoing. But when a generic drug is poised to enter the market and threaten the monopoly enjoyed by a brand-name pharmaceutical, federal law can incentivize a different type of settlement. The Hatch-Waxman Act delays the entry of the generic drug if the brand-drug manufacturer files a patent infringement suit against the generic. Those patent suits are sometimes settled with the brand-drug plaintiff paying the allegedly-infringing generic. In return for the payment, the generic agrees to delay its market entry beyond the date when the FDA would allow it to compete. The result is an extension of the brand drug's monopoly.

Civil Procedure > Settlements > Effect of Agreements

HN2[] Settlements, Effect of Agreements

Reverse payment settlements, are not automatically invalid; they are subject to the rule of reason.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN3[] Defenses, Experimental Use & Testing

To bring competition to the drug market, the Hatch-Waxman Act promotes entry for generics. Rather than undergoing the lengthy and costly approval process that a new drug faces, generics can file an Abbreviated New Drug Application with the Food and Drug Administration. *21 U.S.C.S. § 355(j)*. If the generic drug is biologically equivalent to a brand drug the FDA has already approved, then the generic can essentially piggy-back on the pioneer's approval efforts. *21 U.S.C.S. § 355(j)(2)(A)(i)-(iv)*. The Act offers an additional carrot to the first generic applicant: it can market its generic drug for 180 days without competition from any other generic manufacturer. *21 U.S.C.S. § 355(j)(5)(B)(iv)*.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Making & Manufacturing Infringement

HN4[] Defenses, Experimental Use & Testing

If the brand manufacturer asserts a patent in its initial drug application, then the generic manufacturer must certify in its application that the patent is invalid or that its drug will not infringe the patent. *21 U.S.C.S. § 355(j)(2)(A)(vii)(IV)*. If the brand manufacturer disagrees (it likely will), it may file a patent infringement suit. *35 U.S.C. § 271(e)(2)(A)*. And if it does so within 45 days, the FDA is stayed from approving the generic application until either 30 months have passed or the patent litigation concludes. *21 U.S.C. § 355(j)(5)(B)(iii)*. This delay for the first generic's entry also postpones the potential entry of other generics. They must wait for the same 30-month stay and then for the expiration of the first generic's 6-month exclusivity period before entering the market.

Patent Law > Infringement Actions > Defenses > Statute of Limitations

HN5[] Defenses, Statute of Limitations

If the patent suit against the first generic settles, the brand manufacturer no longer faces an immediate threat of competition from new generic entrants. The 30-month statutory stay restarts if the brand maker brings a patent suit against another generic that wishes to enter the market. *21 U.S.C.S. § 355(j)(5)(B)(iii)*. Plus, any subsequent generic is not entitled to the exclusivity period.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Trademark Law > ... > Infringement Actions > Defenses > Genericness

HN6[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The features of the Hatch-Waxman Act—the period of exclusivity for the first generic; the 30-month stay of the generic's FDA application when the brand maker sues for infringement; and the reduced incentive a subsequent generic has to challenge the brand maker's patent—can lead the brand maker to pay large sums for delaying entry of the first generic maker.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

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

HN7[] **Standards of Review, De Novo Standard of Review**

Courts review the FTC's ruling, not the administrative law judges. Any legal conclusions are reviewed de novo, though the courts are to give some deference to the FTC's informed judgment that a particular commercial practice is to be condemned as unfair.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN8[] **Standards of Review, Substantial Evidence**

The findings of the FTC as to the facts, if supported by evidence, shall be conclusive. *15 U.S.C.S. § 45(c)*. That statutory command is essentially identical to the substantial-evidence standard that often governs judicial review of agency factfinding. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Courts must accept findings supported by such evidence even if suggested alternative conclusions may be equally or even more reasonable and persuasive. This deferential review should be no more searching than if they were evaluating a jury's verdict.

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN9[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

A reverse payment settlement is a settlement of patent litigation in which the patentholder gives the alleged infringer cash or other valuable services or property and the alleged infringer agrees not to market its allegedly infringing product until some later date. These horizontal agreements unlawfully restrain trade, *15 U.S.C.S. § 1*, if they cause anticompetitive effects that outweigh any procompetitive benefits.

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

HN10[] Per Se Rule Tests, Manifestly Anticompetitive Effects

The rule-of-reason inquiry uses a burden-shifting framework. The initial burden is on the FTC to show anticompetitive effects. If the FTC succeeds in doing so, the burden shifts to a competitor to demonstrate that the restraint produced procompetitive benefits.

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

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

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

HN11[] Per Se Rule Tests, Manifestly Anticompetitive Effects

If the FTC fails to demonstrate a less restrictive alternative way to achieve the procompetitive benefits, the court must balance the anticompetitive and procompetitive effects of the restraint. If the anticompetitive harms outweigh the procompetitive benefits, then the agreement is illegal.

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

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

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

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

HN12[] Per Se Rule Tests, Manifestly Anticompetitive Effects

In an antitrust context, the first question is whether the agreement caused anticompetitive effects or created the potential for anticompetitive effects. Such effects may be proved indirectly, with proof of market power plus some evidence that the challenged restraint harms competition.

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

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

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

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

HN13[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Anticompetitive effects are those that harm consumers. Eliminating potential competition is, by definition, anticompetitive. Indeed, paying a potential competitor not to compete is so detrimental to competition that normally it is a per se violation of the antitrust laws.

Trademark Law > ... > Infringement Actions > Defenses > Genericness

HN14[] **Defenses, Genericness**

A brand maker's paying a generic to delay entry in effect amounts to a purchase by the patentee of the exclusive right to sell its product, a right it already claims, but would lose if the patent litigation were to continue and the patent were held invalid or not infringed by the generic product.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN15[] **Inequitable Conduct, Anticompetitive Conduct**

If a patent is valid, then unlike traditional market allocation agreements, a settlement that allows generic entry after the FDA's approval of the drug but still earlier than the patent expiration date may result in more competition than would have existed absent the settlement.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN16[] **Inequitable Conduct, Anticompetitive Conduct**

The likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN17[] **Attorney Fees & Expenses, Reasonable Fees**

A large reverse payment might be justified if it represents avoided litigation costs or fair value for services.

Patent Law > ... > Specifications > Definiteness > Precision Standards

HN18[] **Definiteness, Precision Standards**

The size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.

Torts > Wrongful Death & Survival Actions > Survival Actions

HN19[] **Wrongful Death & Survival Actions, Survival Actions**

A large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival.

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN20[] **Standing, Requirements**

A large and unjustified reverse-payment can show that the parties perceived weakness with the patent that would have made earlier entry likely. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN21[] **Inequitable Conduct, Anticompetitive Conduct**

It is a basic antitrust principle that the impact of an agreement on competition is assessed as of the time it was adopted. That approach also makes sense in reverse payment cases.

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

HN22[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

A restraint is unreasonable when any procompetitive benefits it produces could be reasonably achieved through less anticompetitive means.

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

HN23[] **Tying Arrangements, Sherman Act Violations**

The less-restrictive-alternative standard applies across a range of antitrust claims and is included in model antitrust jury instructions. The idea is that it is unreasonable to justify a restraint of trade based on a purported benefit to competition if that same benefit could be achieved with less damage to competition.

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

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

HN24[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Focusing on the existence of less restrictive alternatives may allow courts to avoid difficult balancing of anticompetitive and procompetitive effects and to smoke out anticompetitive effects or pretextual justifications for the restraint. When a less restrictive alternative exists, a party's decision to nonetheless engage in conduct that harms consumers likely results from a desire to gain from the resulting consumer harm. The question, in short, is whether the good could have been achieved equally well with less bad.

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN25[] **Standards of Review, Questions of Fact & Law**

In an anti-trust context, the existence of a viable less restrictive alternative is ordinarily a question of fact.

Evidence > Burdens of Proof > Allocation

HN26[] **Burdens of Proof, Allocation**

But leading scholars have recognized that other parties' actual experience in analogous situations can help establish the feasibility or practicality of a less restrictive alternative.

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

HN27[] **Settlement Agreements, Validity of Agreements**

In the context of the less-restrictive-alternative, the question is whether there was evidence that would allow a reasonable factfinder to conclude that a no-payment settlement was feasible.

Counsel: For Impax Laboratories, Incorporated, a corporation, Petitioner: Jay P. Lefkowitz, Kirkland & Ellis, L.L.P., New York, NY.

For Federal Trade Commission, Respondent: Bradley Grossman, Alden F. Abbott, Donald S. Clark, Joseph J. Simons, Federal Trade Commission, Washington, DC.

For Washington Legal Foundation, Amicus Curiae: Richard Abbott Samp, Chief Counsel, New Civil Liberties Alliance, Washington, DC; Cory L. Andrews, Senior Litigation Counsel, Washington Legal Foundation, Washington, DC.

For Open Markets Institute, Amicus Curiae: Christopher L. Coffin, Pendley, Baudin & Coffin, L.L.P., New Orleans, LA.

For Association for Accessible Medicines, Amicus Curiae: Jonathan D. Janow, Buchanan Ingersoll & Rooney, P.C., Washington, DC.

For Antitrust Economists, Amicus Curiae: John Mark Gidley, Esq., White & Case, L.L.P., Washington, DC; Bryan Gant, White & Case, L.L.P., New York, NY.

For State of Mississippi, State of Washington, State of Alaska, State of California, State of Colorado, State of Connecticut, State of Delaware, District of Columbia, State of Hawaii, State of Idaho, State of Illinois, State of Iowa, State of Maine, **[**2]** State of Maryland, State of Massachusetts, State of Minnesota, State of Montana, State of Nebraska, State of New Mexico, State of North Carolina, State of Oregon, State of Pennsylvania, State of Virginia, State of Wisconsin, Amicus Curiae: Crystal Utley Secoy, Esq., Acting Assistant Attorney General, Office of the Attorney General, Jackson, MS.

For American Antitrust Institute, Public Knowledge, Patients for Affordable Drugs, Amicus Curiae: Richard M. Brunell, Hilliard & Shadowen, L.L.P., Austin, TX.

For American Association of Retired Persons, American Association of Retired Persons Foundation, Amicus Curiae: Maame Gyamfi, AARP Foundation Litigation, Washington, DC.

For 82 Law, Economics, Business and Medical Professors, Amicus Curiae: Michael Carrier, Rutgers University of New Jersey, Camden, NJ.

Judges: Before SOUTHWICK, COSTA, and DUNCAN, Circuit Judges.

Opinion by: GREGG COSTA

Opinion

[*487] GREGG COSTA, *Circuit Judge*:

HN1[] Normally, when lawsuits settle the defendant pays the plaintiff. That makes sense as the defendant is the party accused of wrongdoing.

But when a generic drug is poised to enter the market and threaten the monopoly enjoyed by a brand-name pharmaceutical, federal law can incentivize a different type of settlement. **[**3]** The Hatch-Waxman Act delays the entry of the generic drug if the brand-drug manufacturer files a patent infringement suit against the generic. Those patent suits are sometimes settled with the brand-drug plaintiff paying the allegedly-infringing generic. In return for the payment, the generic agrees to delay its market entry beyond the date when the FDA would allow it to compete. The result is an extension of the brand drug's monopoly.

Given the counterintuitive flow of money in this scenario—to, rather than **[*488]** from, the alleged wrongdoer—such deals are called "reverse payment settlements." The Supreme Court has held that these settlements that extend the brand drug's monopoly can have anticompetitive effects that violate the antitrust laws. *FTC v. Actavis, 570 U.S. 136, 158, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. ***HN2***[] Reverse payment settlements, however, are not automatically invalid; they are subject to the rule of reason. *Id. at 159*.

In its first post-*Actavis* reverse payment case, the Federal Trade Commission charged Impax Laboratories with antitrust violations for accepting payments ultimately worth more than $100 million to delay the entry of its generic drug for more than two years. The resulting administrative hearing included testimony from 37 witnesses and over **[**4]** 1,200 exhibits. Based on that record, the Commission conducted a rule-of-reason analysis and unanimously concluded that Impax violated ***antitrust law***.

On appeal, we face a narrower task: determining whether the Commission committed any legal errors and whether substantial evidence supported its factual findings. Concluding that the Commission's ruling passes muster on both fronts, we DENY the petition for review.

I.

A.

Anyone who buys pharmaceuticals knows that generic drugs are cheaper than their brand counterparts. The first generic to enter the market typically costs 10 to 25 percent less than the branded drug; those discounts grow to between 50 and 80 percent once other generics enter.

HN3[] To bring competition to the drug market, the Hatch-Waxman Act promotes entry for these generics. *Actavis, 570 U.S. at 142*. Rather than undergoing the lengthy and costly approval process that a new drug faces, generics can file an Abbreviated New Drug Application with the Food and Drug Administration. *Id. at 142*; *21 U.S.C. § 355(j)*. If the generic drug is biologically equivalent to a brand drug the FDA has already approved, then the generic can essentially "piggy-back on the pioneer's approval efforts." *Actavis, 570 U.S. at 142*; *21 U.S.C. § 355(j)(2)(A)(i)-(iv)*. The Act offers an additional carrot to the first **[**5]** generic applicant: it can market its generic drug for 180 days without competition from any other generic manufacturer. *Actavis, 570 U.S. at 143-44*; *21 U.S.C. § 355(j)(5)(B)(iv)*. During this period of exclusivity, the newly approved generic only faces competition from the brand drug or a generic sold by the brand manufacturer. *Actavis, 570 U.S. at 143-44*. In effect, the statute allows a duopoly during those 180 days. A first-to-file generic often realizes most of its profits, potentially "several hundred million dollars," during this initial six-month period. *Id. at 143* (quoting C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, *81 N.Y.U. L. Rev. 1553, 1579 (2006)*).

Generic entry is not so easy when there is a patent for the brand drug. The Hatch-Waxman Act also addresses this common situation. ***HN4***[] If the brand manufacturer asserts a patent in its initial drug application, then the generic manufacturer must certify in its application that the patent is invalid or that its drug will not infringe the patent. *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*. If the brand manufacturer disagrees (it likely will), it may file a patent infringement suit. *35 U.S.C. § 271(e)(2)(A)*. And if it does so within 45 days, the FDA is stayed from approving the generic application until either 30 months have passed or the patent **[*489]** litigation concludes. **[**6]** *21 U.S.C. § 355(j)(5)(B)(iii)*; *see also* *Actavis, 570 U.S. at 143* (describing these procedures). This delay for the first generic's entry also postpones the potential entry of other generics. They must wait for the same 30-month stay and then for the expiration of the first generic's 6-month exclusivity period before entering the market.

What happens if the patent suit against the first generic settles? The brand manufacturer no longer faces an immediate threat of competition from new generic entrants. ***HN5***[] The 30-month statutory stay restarts if the brand maker brings a patent suit against another generic that wishes to enter the market. *Actavis, 570 U.S. at 155* (citing *21 U.S.C. § 355(j)(5)(B)(iii)*). Plus, any subsequent generic is not entitled to the exclusivity period. *Id.* That greatly reduces the potential benefit of challenging the brand maker's patent. *Id.* (noting that subsequent generics "stand to win significantly less than the first if they bring a successful" challenge to the patent).

HN6[] These features of the Hatch-Waxman Act—the period of exclusivity for the first generic; the 30-month stay of the generic's FDA application when the brand maker sues for infringement; and the reduced incentive a subsequent generic has to challenge the brand maker's patent—can lead the brand maker to pay **[**7]** large sums for delaying entry of the first generic maker. *Actavis, 570 U.S. at 155* (recognizing that these Hatch-Waxman "features together mean that a reverse payment settlement with the first filer . . . 'removes from consideration the most motivated challenger, and the one closest to introducing competition'" (quoting Hemphill, *Paying for Delay, supra, at 1586*)).

B.

The facts of this case show those incentives in action. The drug at issue is a type of oxymorphone, which is an opioid. Endo, the brand-name drug maker in this case, started selling an extended-release formulation of oxymorphone called Opana ER in 2006. An extended-release pain reliever provides medication to the bloodstream over several hours, as opposed to immediate-release opioids which are short-acting. When it entered the market, Opana ER was the only extended-release version of oxymorphone.

In late 2007, Impax filed the first application to market generic extended-release oxymorphone. The application did not result in prompt approval of the generic, however, because Endo held patents for Opana ER that would not expire until 2013. Endo sued Impax for patent infringement in January 2008, delaying any FDA approval of the generic for 30 months—until June 2010—unless the litigation **[**8]** concluded earlier.

Early settlement talks failed, with Endo rejecting Impax's proposed entry dates of January 2011, July 2011, December 2011, or January 2012.

The June 2010 expiration of the Hatch-Waxman stay loomed. Delaying Impax's entry beyond the stay period would save Endo millions. Endo had projected that generic entry would cut Opana ER sales by 85 percent within three months and cost it $100 million in revenue within six months.

But extending the period in which it could sell Opana ER without competition was just one of Endo's priorities. The drug maker had something else in the works: It planned to move consumers to a new brand-name drug that would not face competition for years. Endo would remove the original Opana ER from the market, replace **[*490]** it with a crush-resistant version of the drug, and obtain new patents to protect the reformulated drug. While Impax's generic would still eventually reach the market, it would not be therapeutically equivalent to Endo's new branded drug and thus pharmacists would not be able to automatically substitute the generic when filling prescriptions. This automatic substitution of brand drug prescriptions, promoted by state laws, is the primary **[**9]** driver of generic sales. So, if Endo succeeded in switching consumers to its reformulated drug, which would be just different enough from the original formulation to preclude substitution, the market for Impax's generic would shrink dramatically, preserving Endo's monopoly profits.

The success of this "product hop"[1] depended on the reformulated Opana ER reaching the market sufficiently in advance of Impax's generic entry to allow patients to move away from the original drug before pharmacists started substituting the generic version. This transition period to the reformulated drug would take roughly six to nine months. A successful transition to the reformulated Opana ER before generic entry would mean millions to Endo. The company projected that the reformulated Opana ER would generate about $200 million in annual sales by 2016 if the market transitioned to the new drug before the generic entered. But if the generic launched first, then 2016 sales of the new formulation would fall to $10 million.

The date when Impax could start selling its generic was thus critical. The FDA tentatively approved Impax's application in May **[**10]** 2010. The Hatch-Waxman stay would expire the next month. There were signs that Impax was planning to launch its generic soon thereafter.[2]

With the possible launch date for generic entry imminent, Endo restarted settlement negotiations just three days after the FDA's tentative approval of the generic. The parties settled the patent litigation in June 2010, just a few days after the patent trial began and less than a week before the FDA fully approved Impax's application.

C.

Under the settlement, Impax agreed to delay launching its generic until January 1, 2013—two and a half years after Impax otherwise could have entered "at-risk." In turn, Endo agreed to not market its own generic version of extended-release oxymorphone until Impax's 180-day Hatch-Waxman exclusivity period concluded in July 2013. Additionally, Endo agreed to pay Impax a credit if sales revenues for the original formulation of Opana ER fell by more than 50 percent between the dates of settlement and Impax's entry. This credit served as an insurance policy for Impax, preserving the value of the settlement in case Endo undermined the generic oxymorphone market by transitioning consumers to the reformulated Opana ER. Endo **[**11]** also provided Impax with a broad license to Endo's existing and future patents covering extended-release oxymorphone. Finally, Endo and Impax agreed to collaboratively develop a new Parkinson's disease treatment, with Endo **[*491]** paying Impax $10 million immediately and up to $30 million in additional payments contingent on achieving sufficient development and marketing progress.

Impax's delayed entry allowed Endo to execute the product hop. In March 2012, Endo introduced its reformulated drug and withdrew the original drug. It publicly stated that the original drug was unsafe, though the FDA later disagreed that safety concerns motivated the withdrawal. Predictably, the market for the original Opana ER shriveled. So Endo had to pay Impax $102 million in credits. Endo subsequently succeeded in securing additional patents, and in 2015 and 2016 secured injunctions that prevented all manufacturers, including Impax, from

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[1] Product hopping can itself be anticompetitive. *See generally* *New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 643 & n.2, 652-59 (2d Cir. 2015)*; Alan Devlin, *Exclusionary Strategies in the Hatch-Waxman Context*, *2007 Mich. St. L. Rev. 631, 657 - 673* (crediting Professor Hovenkamp with the "product hop" term).

[2] If Impax entered the market before resolution of the patent litigation, it would risk paying any damages for its sales in the event Endo later proved infringement. This is called "at risk" entry. *See* *In re Lipitor Antitrust Lit., 868 F.3d 231, 241 (3d Cir. 2017)*.

marketing generic versions of the reformulated drug. But in 2017, the FDA asked Endo to voluntarily withdraw the reformulated Opana ER from the market due to safety concerns, and it did.

For its part, Impax began marketing original formulation generic oxymorphone in January 2013, **[**12]** despite the damaged market Endo left behind. Because of the injunctions Endo secured against other generics and because Endo eventually withdrew the reformulated Opana ER from the market, Impax's generic is the only extended-release oxymorphone available to consumers today.

D.

The FTC brought separate actions against Endo and Impax alleging that the settlement was an unfair method of competition under the FTC Act and an unreasonable restraint on trade under the Sherman Act. Endo settled. Impax fought the charge and successfully argued that the case should proceed in an administrative proceeding rather than in federal district court where the Commission had first filed.

An administrative law judge determined that the agreement restricted competition but was nevertheless lawful because its procompetitive benefits outweighed the anticompetitive effects. Reviewing both the facts and law *de novo*, *16 C.F.R. § 3.54(a)*, the Commission reached a different conclusion. It found that Impax had failed to show that the settlement had any procompetitive benefits. Moreover, it determined that the purported benefits Impax identified could have been achieved through a less restrictive agreement. The Commission did not impose **[**13]** any monetary sanctions. It did not even invalidate Impax's agreements with Endo or other drug makers. Instead, it issued a cease-and-desist order enjoining Impax from entering into similar reverse payment settlements going forward.

Impax now petitions for review of the FTC's order.

II.

HN7[] We review the Commission's ruling, not the ALJ's. *N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 354 (5th Cir. 2008)*; *cf.* *Shaikh v. Holder, 588 F.3d 861, 863 (5th Cir. 2009)* (noting that we review the decision of the BIA in immigration cases). Any legal conclusions are reviewed *de novo*, though we "are to give some deference to the [FTC]'s informed judgment that a particular commercial practice is to be condemned as 'unfair.'" *N. Tex. Specialty, 528 F.3d at 354* (quoting *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*.

HN8[] The "findings of the Commission as to the facts, if supported by evidence, shall be conclusive." *15 U.S.C. § 45(c)*. That statutory command is "essentially identical" to the substantial-evidence standard that often governs judicial review of agency factfinding. *Ind. Fed'n of Dentists, **[*492]** 476 U.S. at 454*. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951))*. We must accept findings supported by such evidence "even if 'suggested alternative conclusions may be equally or even more reasonable and persuasive.'" *N. Tex. Specialty, 528 F.3d at 354* (quoting *Colonial Stores, Inc. v. FTC, 450 F.2d 733, 739 (5th Cir. 1971))*. This deferential review should be no more searching **[**14]** than if we were evaluating a jury's verdict. *See* *District of Columbia v. Pace, 320 U.S. 698, 702, 64 S. Ct. 406, 88 L. Ed. 408 (1944)* (explaining that substantial evidence review is less intrusive than clear error review); 3 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 15.04 (same); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 84-86 (1944) (analyzing Justice Jackson's opinion in *Pace*).

III.

HN9[] A reverse payment settlement is a settlement of patent litigation in which the patentholder gives the alleged infringer cash or other valuable services or property and the alleged infringer agrees not to market its allegedly infringing product until some later date. *See* *Actavis, 570 U.S. at 140*. These horizontal agreements unlawfully restrain trade, *see* 15 U.S.C. § 1, if they cause anticompetitive effects that outweigh any procompetitive benefits.[3] *See* Actavis, 570 U.S. at 156-59.

HN10[] This rule-of-reason inquiry uses a burden-shifting framework. *See* Ohio v. Am. Express, 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018). The initial burden is on the FTC to show anticompetitive effects. *Id.* If the FTC succeeds in doing so, the burden shifts to Impax to demonstrate that the restraint produced procompetitive benefits. *Id.* If Impax successfully proves procompetitive benefits, then the FTC can demonstrate that any procompetitive effects could be **[**15]** achieved through less anticompetitive means. *Id.* **HN11**[] Finally, if the FTC fails to demonstrate a less restrictive alternative way to achieve the procompetitive benefits, the court must balance the anticompetitive and procompetitive effects of the restraint. *Apani Sw., Inc. v. Coca-Cola Enters., Inc., 300 F.3d 620, 627 (5th Cir. 2002)*. If the anticompetitive harms outweigh the procompetitive benefits, then the agreement is illegal. *Id.*

A.

HN12[] The first question is whether the agreement caused anticompetitive effects or "created the potential for anticompetitive effects." *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., Inc., 123 F.3d 301, 310 (5th Cir. 1997)*; *accord* *Retractable Techs, Inc. v. Becton Dickinson & Co., 842 F.3d 883, 895 (5th Cir. 2016)* (noting that an antitrust plaintiff must show that a restraint "had the potential to eliminate, or did in fact eliminate, competition"); *see also* *Actavis, 570 U.S. at 157* (noting that the "relevant anticompetitive harm" of a reverse payment settlement is "prevent[ing] the risk of competition"). Such effects may be proved "indirectly," with "proof of market power **[*493]** plus some evidence that the challenged restraint harms competition."[4] *Am. Express Co., 138 S. Ct. at 2284*.

Anticompetitive effects are those that harm consumers. Think increased prices, decreased output, or lower quality goods. *Id.* **HN13**[] Eliminating potential competition is, by definition, anticompetitive. *See, e.g.*, *United States v. Falstaff Brewing Corp., 410 U.S. 526, 532-33, 93 S. Ct. 1096, 35 L. Ed. 2d 475 (1973)* (acquiring potential competitor was anticompetitive both because of current **[**16]** pressure of potential entry and potentially beneficial effects of future entry). Indeed, paying a potential competitor not to compete is so detrimental to competition that normally it is a *per se* violation of the antitrust laws. *See* *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 48-49, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)*; *see also* *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995)* (Posner, C.J.) (suggesting that market allocation agreements are even more pernicious than price-fixing agreements because the former eliminates all forms of competition); Joshua P. Davis & Ryan J. McEwan, *Deactivating Actavis: The Clash Between the Supreme Court and (Some) Lower Courts, 67 Rutgers U.L. Rev. 557, 559 (2015)* (calling "an agreement between horizontal competitors not to compete, the *bête noir* of ***antitrust law***").

Actavis concluded that, in contrast to the typical horizontal agreement to divvy up markets, reverse payment settlements might produce both anti-and procompetitive effects. **HN14**[] On the one hand, a brand maker's paying a generic to delay entry "in effect amounts to a purchase by the patentee of the exclusive right to sell its product, a right it already claims but would lose if the patent litigation were to continue and the patent were held invalid or not infringed by the generic product." *570 U.S. at 153-54*. In fact, reverse payment settlements may restrict competition even more than typical market allocation agreements because delaying entry of the first generic **[**17]** does not just eliminate one competitor—it prolongs the "bottleneck" that delays entry of other generic competitors. *In re Nexium (Esomeprazole) Antitrust Lit., 842 F.3d 34, 41 (1st Cir. 2016)*. But the existence of patent—a lawful monopoly if valid—points in the other direction. **HN15**[] If the patent is valid, then unlike traditional market allocation agreements, a settlement that allows generic entry after the FDA's approval of the drug

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[3] Reverse-payment settlements are also sometimes called "pay for delay" agreements. *See* *FTC v. Watson Pharms., Inc., 677 F.3d 1298, 1301 (11th Cir. 2012)*, *rev'd sub nom.* *FTC v. Actavis, 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. Following the Supreme Court's lead, we use the term "reverse payment."

[4] The FTC required that showing of market power to show potential anticompetitive effect under *Actavis*. Impax does not argue that it lacked market power—it held a patent after all—so we need not address that issue further.

but still earlier than the patent expiration date may result in more competition than would have existed absent the settlement. Actavis, 570 U.S. at 154. Given the potentially countervailing impacts of reverse payment settlements, the Supreme Court applied the rule of reason rather than automatic invalidity. Id. at 159.

At this first step of the rule-of-reason analysis, we are just focused on the anticompetitive side of the equation. *Actavis* held that a "large and unjustified" reverse payment creates a likelihood of "significant anticompetitive effects." Id. at 158. **HN16**[] "[T]he likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." Id. at 159.

[*494] In many reverse **[**18]** payment cases, the central dispute is whether there was in fact a reverse payment. HERBERT HOVENKAMP ET AL. IP & ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 16.01 (2018 Supp.); *see, e.g.,* In re Loestrin 24 Fe Antitrust Litig., 814 F.3d 538, 550-51 (1st Cir. 2016) (citing numerous post-*Actvavis* case addressing whether nonmonetary benefits to a generic are reverse payments). The settling party will often contend that any settlement payments are for services rather than for delayed entry. *Id.* That is not the case here. Impax has not challenged the ALJ's original determination "that a large reverse payment helped induce settlement or that the payment was linked to the January 2013 entry date."

That concession makes sense in light of the valuable consideration Impax received in exchange for delaying entry.[5] We will note two significant items. First, Endo committed to not market an authorized generic, which increased Impax's projected profits by $24.5 million. *See* King Drug Co. of Florence, 791 F.3d 388, 394 (3d Cir. 2015) (holding that brand manufacturer commitments to not market a generic drug during the 180-day exclusivity period are "payments" under *Actavis*); *see also* Loestrin 24 Fe Antitrust Litig., 814 F.3d at 549-53 (explaining that *Actavis* recognized that a reverse **[**19]** payment could include more than just an exchange of money). Second, Endo would pay Impax credits for the shrunken market the latter would inherit if, as expected, Endo timely executed the product hop to the reformulated Opana ER. The $102 million Endo ultimately paid is likely a good approximation of the parties' expected value for these credits. The size of these payments is comparable to other cases where courts have inferred anticompetitive effect. *See* In re Wellbutrin XL Antitrust Lit. Indirect Purchaser Class, 868 F.3d 132, 162 (3d Cir. 2017) (holding that $233 million paid to three generic manufacturers is large under *Actavis*); Nexium, 842 F.3d at 50, 54 (acknowledging jury finding that a $300-$690 million payment was large); *accord* Actavis, 570 U.S. at 145 (brand manufacturer agreed to pay three generic manufacturers $12 million, $60 million, and an estimated $171-270 million over nine years).

The Commission rejected the argument that just showing a large payment was enough to establish anticompetitive harm. It reasoned that "[e]stablishing that the payment is not otherwise justified is necessary for demonstrating that the payment is purchasing an exclusive right and preventing the risk of competition." *See also* Actavis, 570 U.S. at 158 (stating that "a reverse payment, where large and *unjustified*, can bring with it the risk of significant **[**20]** anticompetitive effects" (emphasis added)).

But the Commission correctly found no such justification. **HN17**[] A large reverse payment might be justified if it represents "avoided litigation costs or fair value for services." Id. at 156. That is not the case here. The FTC estimated the settlement saved Endo only $3 million in litigation expenses, an amount in the ballpark of the typical cost for litigating pharmaceutical patents. *See* FED. TRADE COMM'N, AUTHORIZED GENERIC DRUGS: SHORT-TERM EFFECTS AND LONG-TERM IMPACT 111-12 & n.27 (2011) (estimating average costs in the $5-10 million range based on research from Morgan Stanley); Michael R. Herman, **[*495]** Note, *The Stay Dilemma: Examining Brand and Generic Incentives for Delaying the Resolution of Pharmaceutical Patent Litigation*, 111 Colum. L. Rev. 1788, 1795 n.41 (2011) (noting that litigation expenses can bring the costs of generic entry to about $10 million). Nor did the agreement involve any services that the generic would provide to Endo that could otherwise justify the large payment. Only the services associated with the Parkinson's collaboration could plausibly provide an appropriate basis for the payments. But even assuming that the collaboration is relevant and that the $10 million

[5] The Commission also considered the payments to Impax for the Parkinson's research and the licenses Endo granted Impax.

Parkinson's **[**21]** research agreement constituted payment for services, over $100 million of Endo's payment remains unjustified.

This large and unjustified payment generated anticompetitive effects. The Commission explained that there "was a real threat of competition from Impax" snuffed out by Endo's agreement to make the reverse payments. The FDA had just approved Impax's generic, allowing it to sell the drug. Impax had taken steps to do so, even though its market entry would be "at risk" of infringement liability. Endo's known product-hop plans increased Impax's incentive to quickly enter the market. The Commission thus had substantial evidence to conclude that the reverse payments replaced the "possibility of competition with the certainty of none."

Impax argues that the Commission needed to do more at this first stage of the rule of reason. Its principal attack on the finding of anticompetitive effect is that the Commission needed to evaluate "the patent's strength, which is the expected likelihood of the brand manufacturer winning the litigation." Impax reasons that if it was highly likely that Endo would win the patent suit, then the reverse payment was not anticompetitive because it allowed the **[**22]** generic to enter the market before the patent expired.

We disagree that *Actavis* requires the Commission to assess the likely outcome of the patent case in order to find anticompetitive effects. The fact that generic competition was possible, and that Endo was willing to pay a large amount to prevent that risk, is enough to infer anticompetitive effect. *Actavis, 570 U.S. at 157*. In fact, *Actavis* squarely rejected Impax's argument: ***HN18***[] "[T]he size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself." *Id. at 158*; *see also* *id. at 157* ("[I]t is normally not necessary to litigate patent validity to answer the antitrust question."); *id. at 158* (reiterating that a court can assess the anticompetitiveness of a reverse payment "without litigating the validity of the patent"); *id. at 159* (stating yet again that the Commission need not "litigate the patent's validity" to establish anticompetitive effects). ***HN19***[] The idea is that a large reverse payment "itself would normally suggest that the patentee has serious doubts about the patent's survival." *Id. at 157*; *see also* HOVENKAMP, *supra*, § 16.01[D] (explaining that a sizeable reverse payment "raise[s] a strong inference **[**23]** that that the parties believed ex ante that there was a significant chance that the patent was invalid").

Consider this settlement. If the parties thought Endo was highly likely to win the infringement suit, then Impax would have been happy with a deal giving it nothing more than entry months in advance of the likely-valid patent's expiration. *Cf.* *In re Cipro Cases I & II, 61 Cal. 4th 116, 187 Cal. Rptr. 3d 632, 348 P.3d 845, 865 (Cal. 2015)* (noting that a settlement postponing market **[*496]** entry, but not accompanied by a reverse payment, would be a "fair approximation" of the strength of the patent suit). Reverse payments potentially worth nine figures would have been a windfall. The need to add that substantial enticement indicates that at least some portion of that payment is "for exclusion beyond the point that would have resulted, on average, from simply litigating the case to its conclusion." *Id. at 867*; *see also* *In re Aggrenox Antitrust Lit., 94 F. Supp. 3d 224, 240-41 (D. Conn. 2015)* (explaining that a plaintiff need not prove that the patent was weak because ***HN20***[] a "large and unjustified reverse-payment" can show that the parties perceived weakness with the patent that would have made earlier entry likely). "And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather **[**24]** than face what *might have been* a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness." *Actavis, 570 U.S. at 157* (emphasis added).[6]

Impax also argues that the settlement does not look anticompetitive in hindsight. After all, since the settlement Endo has obtained more patents for Opana ER and proven their validity in court. On top of that, the product hop ended up failing once Endo had to take reformulated Opana ER off the market due to safety concerns. So Impax's generic is now the only version of Opana ER on the market.

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[6] In addition to crediting these economic implications of a large reverse payment, the Supreme Court recognized the difficulty of trying a patent case within an antitrust case. *Actavis, 570 U.S. at 157* (discussing the Eleventh Circuit's concern with "litigat[ing] patent validity" in an antitrust case, but explaining that is not needed for antitrust scrutiny). An Eleventh Circuit colleague apparently familiar with Cajun cuisine called this the "turducken" problem. *Watson, 677 F.3d at 1315*.

HN21[] But it is a basic antitrust principle that the impact of an agreement on competition is assessed as of "the time it was adopted." *See* *Polk Bros. v. Forest City Enters., 776 F.2d 185, 189 (7th Cir. 1985)* (Easterbrook, J.); *see also* FTC & DOJ, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 2.4 (2000) (stating that the agencies "assess the competitive effects of a relevant agreement as of the time of possible harm to competition"). That approach also makes sense in reverse payment cases. *Valley Drug Co. v. Geneva Pharms., 344 F.3d 1294, 1306 (11th Cir. 2003)* (refusing to consider postagreement invalidation of patent because "reasonableness of agreements under the antitrust laws are to be judged at the time the agreements are entered into"); *Cipro, 348 P.3d at 870* ("Just as later invalidation **[**25]** of a patent does not prove an agreement when made was anticompetitive, later evidence of validity will not automatically demonstrate an agreement was procompetitive."); 12 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** ¶ 2046e1, at 399 (4th ed. 2019) (explaining that the "reasonableness of a patent settlement agreement cannot be made to depend on an *ex post* determination" of validity or infringement).

So the focus is on the following facts as they existed when the parties adopted the settlement. Endo agreed to make large payments to the company that was allegedly infringing its patents. In exchange, Impax agreed to delay entry of its generic drug until two-and-a-half years after the FDA approved the drug. Neither the saved costs of forgoing a trial nor any services Endo received justified these payments. Substantial evidence supports the **[*497]** Commissions' finding that the reverse payment settlement threatened competition.

B.

The next rule-of-reason question is whether Impax can show procompetitive benefits. *Am. Express, 138 S. Ct. at 2284*. The Commission concluded it could not. Although the ALJ had recognized that the settlement's license and covenant-not-to-sue provisions benefited competition, the Commission concluded **[**26]** that these procompetitive effects did not flow from the challenged restraint—the reverse payments themselves. As a result, the Commission did not treat Impax's ability to enter the market nine months before the patents expired, and the protection Impax secured against other patents Endo might obtain, as benefits to be weighed against the anticompetitive effects of the reverse payments. After the Commission concluded that the reverse payments lacked any procompetitive benefits, it followed that they "constitute[d] an unreasonable restraint of trade."

The parties and amici vigorously contest the Commission's finding of "no nexus" between the restraint and the procompetitive benefits Impax asserts. That dispute turns largely on how to define the restraint. Is it limited to the reverse payments or does it extend to the entire settlement agreement?

We need not resolve this question because of an alternative ruling the Commission made. Although the Commission found the reverse payments generated no procompetitive benefits, it went on to assume *arguendo* that Impax could connect the settlement's purported procompetitive effects to the challenged restraint. Even if that was so, the Commission **[**27]** determined that "Impax could have obtained the proffered benefits by settling without a reverse payment for delayed entry—which is a practical, less restrictive alternative." If we conclude that substantial evidence supported this finding of a less restrictive alternative, we can also assume that Impax has proven procompetitive benefits. So we will turn to our review of the "less restrictive alternative" finding.

C.

HN22[] A restraint is unreasonable when any procompetitive benefits it produces "could be reasonably achieved through less anticompetitive means." *Am. Express, 138 S. Ct. at 2284*; *see generally* 11 AREEDA & HOVENKAMP, *supra*, ¶ 1913, at 395-402; C. Scott Hemphill, *Less Restrictive Alternatives in* ***Antitrust Law***, *116 Colum. L. Rev. 927, 937-42 (2016)*. The concept traces back to then-Circuit Judge Taft's opinion in *United States v. Addyston Pipe & Steel Co. Hemphill, Less Restrictive, supra, at 938 & n.53* (citing *85 F. 271, 282 (6th Cir. 1898)* (holding that a restraint of trade is unenforceable unless it is "ancillary to the main purpose of a lawful contract[] and *necessary* to protect the covenantee['s] . . . enjoyment of the legitimate fruits of the contract" (emphasis added))). ***HN23***[] The less-restrictive-alternative standard applies across a range of antitrust claims and is included in model antitrust jury instructions. *Id. at 929, 938 & n.50* (citing ABA SECTION OF ***ANTITRUST LAW***, MODEL JURY INSTRUCTIONS IN **[**28]**

CIVIL ANTITRUST CASES A-10 (2005)).[7] The idea is that it is unreasonable to justify a restraint of trade based on a purported benefit to competition if that same benefit could be achieved with less damage to competition. **HN24**[] Focusing on the **[*498]** existence of less restrictive alternatives may allow courts to avoid difficult balancing of anticompetitive and procompetitive effects and to "smoke out" anticompetitive effects or pretextual justifications for the restraint. *Hemphill, Less Restrictive, supra, at 947-63*. When a less restrictive alternative exists, a party's decision to nonetheless engage in conduct "that harms consumers" likely results from a desire "to gain from the resulting consumer harm." *Id. at 968*. The question, in short, is whether "the good [could] have been achieved equally well with less bad." *Id. at 929*.

Actavis recognizes the possibility of less restrictive alternatives to reverse payment settlements. The Court noted that parties to pharmaceutical patent litigation "may, as in other industries, settle in other ways, for example, by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without . . . paying the challenger to stay out prior to **[**29]** that point." *570 U.S. at 158*; *see also* 12 AREEDA & HOVENKAMP, *supra*, ¶ 2046c2, at 381-82 (observing that *Actavis* recognizes "that there are better, less anticompetitive ways to settle these disputes").

The Commission found that Impax could have achieved just as much and likely more good (an entry date even earlier than 2013) without the bad (Endo's agreement not to sell a competing generic during the exclusivity period and to pay credits to Impax for the decline of the Opana ER market while Endo executed the product hop). The Commission explained that "[h]olding everything else equal, Impax's acceptance of payment would normally be expected to result in a later entry date than what Impax would have accepted based on the strength of the patents alone." To support its view that Impax could have entered into a settlement without reverse payments that would have resulted in greater generic competition, the Commission relied on industry practice, economic analysis, expert testimony, and adverse credibility findings discounting the testimony of Impax's lead settlement negotiator.

HN25[] "[T]he existence of a viable less restrictive alternative is ordinarily a question of fact." 11 AREEDA & HOVENKAMP, *supra*, ¶ 1913b, at 398; *accord* *O'Bannon v. NCAA, 802 F.3d 1049, 1074 (9th Cir. 2015)* (applying clear-error review **[**30]** to district court's finding of less restrictive alternative). So the substantial deference we owe the Commission's factfinding kicks in, in particular on its determination that a no-payment settlement was feasible.

Impax nonetheless tries to lodge legal objections to the finding of a less restrictive alternative. First, it argues that the Commission only recognized what it considers an equally restrictive alternative—the possibility of a settlement with the same entry date but no reverse payments. But the Commission recognized the feasibility of no-payment settlements with both the same[8] or an earlier entry date. Its ultimate ruling relied on an agreement with an earlier entry date as a less restrictive alternative: "A no-payment settlement allowing *pre-2013 generic entry* would have been a practical alternative for both Impax and Endo, but they chose instead to **[*499]** exchange sizeable payment for *a later* entry date." (emphasis added). Impax does not dispute that an agreement with an earlier entry date would be less restrictive.

Impax does argue that the Commission "flipped the burden of proof" in finding that such a less restrictive settlement was feasible. We disagree. The Commission concluded **[**31]** that there was a "strong showing" of the possibility of less restrictive settlement, and only then asked whether Impax had rebutted that evidence. That is a normal way of evaluating whether a plaintiff has met its burden of persuasion.

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[7] The Fifth Circuit Pattern Jury Instructions does not include circuit-specific antitrust instructions, but refer courts and parties to two sources, including the ABA Antitrust Section's proposed instructions. FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 6 (2020).

[8] Even if Impax's entry date were the same in a no-payment settlement, the arrangement would be less anticompetitive than the actual agreement because it would not include Endo's "payment" of not selling a generic competitor during Impax's six-month exclusivity period. Thus, in a no-payment settlement, there would have been greater price competition during at least those six months. In any event, because the Commission's ultimate finding relied on the feasibility of a no-payment settlement with an earlier entry date, we only consider that agreement as a less restrictive alternative.

So we turn to whether substantial evidence supports the Commission's conclusion that Complaint Counsel had established a less restrictive alternative. First is the fact that most settlements between brand and generic makers do not include reverse payments. The Commission relied on an expert witness who analyzed industry practice and studies showing that from 2004-2009 "only 30 percent of the patent settlements filed with the FTC involved both compensation from the branded firm to the generic firm and restrictions on generic entry." In recent years, reverse payment settlements may have become even rarer; over 80 percent of brand-generic settlements reached within the year following *Actavis* did not include a reverse payment.

Impax suggests this evidence of industry practice is not probative of whether it had the opportunity to enter in a no-payment settlement. ***HN26***[] But leading scholars have recognized that other parties' "actual experience in analogous situations" **[**32]** can help establish the feasibility or practicality of a less restrictive alternative. 11 AREEDA & HOVENKAMP, *supra*, ¶ 1913b, at 398; *accord* Hemphill, *Less Restrictive, supra, at 984* ("One useful indicia of practicality is that the alternative has been implemented by this or other firms in similar circumstances."); *see also* *Ind. Fed'n of Dentists, 476 U.S. at 454* (recognizing the FTC's expertise about commercial practices). Showing that the alternative is "rooted in real commercial experience" may be especially compelling as the defendant often will not want to acknowledge its willingness to enter into an arrangement that would not have included "the illicit profits arising from an anticompetitive effect." *Id. at 984-85*; *see also* Kevin B. Soter, Note, *Causation in Reverse Payment Antitrust Claims*, *70 Stan. L. Rev. 1295, 1336 (2018)* (raising concerns about rules that would "tell[] defendants that all they need to do to avoid liability is to insist in settlement talks that the only agreement they would make is an illegal one").

And the Commission did not rely on industry practice alone. It acknowledged but refused to credit the trial testimony of Impax's chief negotiator, who said that Endo was "adamant about preventing pre-2013 entry."[9] The Commission noted that this resolute trial testimony was inconsistent with the witness's **[**33]** prior statements that he could not remember discussing pre-2013 entry dates with Endo. In that earlier testimony, the negotiator said he could not remember if "Impax ever 'tried to get a date earlier than January of 2013'" or whether "Endo ever told Impax that it would 'not settle the litigation' with an entry date before 2013." Doubts about the negotiator's newfound certainty allowed the Commission not just to reject his testimony but also to treat it as evidence of the possibility of pre-2013 entry. *See* *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)* (discussing **[*500]** the "general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'"). The Commission further noted that while early on Impax had unsuccessfully sought entry dates during 2011 and even January 2012, a significant time gap exists between those proposed entry dates and the 2013 entry date in the final agreement. The professed failure to consider other possible 2012 entry dates thus casts doubt on the notion that an agreement with pre-2013 entry was unachievable.[10]

Finally, economics support the Commission's finding that Endo **[**34]** would have entered into a settlement with an earlier entry date if it could have could have kept the more than $100 million it ended up paying Impax. Hemphill, *Less Restrictive, supra, at 984* (recognizing that a plaintiff could use "expert testimony based on economic theory" to show a likelihood that the parties would have entered into a less restrictive alternative). If everything has a price, then those large payments were the price for Impax's delayed entry. *King Drug, 791 F.3d at 405 n.23*; *Cipro, 348 P.3d at 871*. Such "fairly obvious" observations can show the feasibility of a less restrictive alternative. 11 AREEDA & HOVENKAMP, *supra*, ¶ 1913b, at 398; *see also* *Ind. Fed'n of Dentists, 476 U.S. at 454* (holding that deference is due FTC's assessment of business practices).

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[9] The Commission's consideration of this testimony further dispels Impax's claim that the Commission did not find a settlement with an *earlier* entry date to be a viable alternative.

[10] The case-specific nature of this aspect of the FTC's ruling undermines Impax's concern that the agency's decision would invalidate all reverse payment settlements. So does the FTC's enforcement record. During the first fifteen years of this century, the agency challenged only 6 of the 1336 brand/generic settlements entered into during that period. FTC BUREAU OF COMPETITION, OVERVIEW OF AGREEMENTS FILED IN FY 2016, at 4.

Three evidentiary legs—industry practice, credibility determinations about settlement negotiations, and economic analysis—thus supported the Commission's conclusion that Endo would have agreed to a less restrictive settlement. 11 AREEDA & HOVENKAMP, *supra*, ¶ 1914c, at 410 (stating that a finding of less restrictive alternative should be based on alternatives "that are either quite obvious or a proven success"). As for Impax's side of things, of course it would have preferred the settlement that paid it over $100 million. But any reluctance Impax had to agree to a no-payment settlement **[**35]** based on a "desire to share in monopoly rents" cannot undermine the Commission's finding that a less restrictive settlement was viable. *See* Hemphill, *Less Restrictive, supra, at 984-85*; *see also* *Soter, supra, at 1336*.

Our question is not whether the Commission could have reached a different result on the less-restrictive-alternative question. ***HN27***[] It is whether there was evidence that would allow a reasonable factfinder to conclude that a no-payment settlement was feasible. *Ind. Fed'n of Dentists, 476 U.S. at 454*; *see also* *Ripley v. Chater, 67 F.3d 552, 555 (5th Cir. 1995)* (noting that substantial evidence can even be less than a preponderance). Because there was more than enough evidence to support that unanimous view of the Commissioners, we must uphold their view that a less restrictive alternative was viable. And that means the reverse payment settlement was an agreement to preserve and split monopoly profits that was not necessary to allow generic competition before the expiration of Endo's patent. As a result, Impax agreed to an unreasonable restraint of trade.

The petition for review is DENIED.

End of Document

Maxwell Foods, LLC v. Smithfield Foods, Inc.

North Carolina Superior Court, Wayne County

April 13, 2021, Decided

20 CVS 1430

Reporter
2021 NCBC LEXIS 39 *; 2021 NCBC Order 11

MAXWELL FOODS, LLC, Plaintiff, v. SMITHFIELD FOODS, INC., Defendants.

Notice: This document is designated an Order of Significance by the North Carolina Business Court. Orders of Significance are not published as Business Court opinions but may be cited and relied upon.

Subsequent History: Dismissed by, in part, Dismissed by, Without prejudice, in part, Motion denied by, in part *Maxwell Foods, LLC v. Smithfield Foods, Inc., 2021 NCBC LEXIS 71, 2021 WL 3811610 (Aug. 26, 2021)*

Request granted, Request denied by *Maxwell Foods, LLC v. Smithfield Foods, Inc., 2021 NCBC LEXIS 101, 2021 NCBC Order 24 (Nov. 23, 2021)*

Claim dismissed by *Maxwell Foods v. Smithfield Foods, 2023 NCBC LEXIS 20 (Feb. 3, 2023)*

Prior History: *Maxwell Foods v. Smithfield Foods, 2021 U.S. Dist. LEXIS 74856 (E.D.N.C., Feb. 22, 2021)*

Core Terms

Designation, complex business, hog, mandatory, anti trust law, alleges

LexisNexis® Headnotes

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

HN1[] **Complaints, Requirements for Complaint**

N.C. Gen. Stat. § 7A-45.4(c) requires that the Notice of Designation as a Complex Business Case shall, in good faith and based on information reasonably available, succinctly state the basis of designation. As a result, the court may consider all materials reasonably necessary to rule on an opposition to designation. For a case to be certified as a mandatory complex business case, the pleading upon which designation is based must raise a material issue that falls within one of the categories specified in *§ 7A-45.4*.

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

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

Designation as a complex business case under *N.C. Gen. Stat. § 7A-45.4(a)(3)* is proper if the action involves a material issue related to disputes involving ***antitrust law***, including disputes arising under N.C. Gen. Stat. ch. 75 that do not arise solely under *N.C. Gen. Stat. § 75-1.1* or N.C. Gen. Stat. ch. 75, art. 2.

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

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

While it is true that the plaintiff is the master of its complaint and free to choose which causes of action it will bring, designation as a complex business case may be appropriate if disputes within the scope of *N.C. Gen. Stat. § 7A-45.4(a)* have not been expressly pleaded but must necessarily be resolved in order to litigate the claims that have been asserted.

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

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination

HN4[] **Trade Practices & Unfair Competition, State Regulation**

N.C. Gen. Stat. § 7A-45.4(b)(2) provides that an action described in *§ 7A-45.4(a)(1)*, *(2)*, *(3)*, *(4)*, *(5)*, or *(8)* in which the amount in controversy computed in accordance with *N.C. Gen. Stat. § 7A-243* is at least five million dollars shall be designated as a mandatory complex business case by the party whose pleading caused the amount in controversy to equal or exceed five million dollars.

Judges: [*1] Louis A. Bledsoe, III, Chief Business Court Judge.

Order by: Louis A. Bledsoe, III

Order

ORDER ON OPPOSITION TO DESIGNATION AS A COMPLEX BUSINESS CASE

1. **THIS MATTER** is before the Court on Plaintiff Maxwell Foods, LLC's ("Maxwell") Opposition to Designation as a Complex Business Case (the "Opposition"). (Opp'n Designation Complex Bus. Case [hereinafter "Opp'n"], ECF No. 17.)

2. Maxwell initiated this action on 13 August 2020, asserting claims for breach of contract and breach of duty of good faith and fair dealing against Defendant Smithfield Foods, Inc. ("Smithfield"). (*See* Compl. ¶¶ 82-112, ECF No. 3.) Smithfield timely removed the case to the United States District Court for the Eastern District of North Carolina on 11 September 2020. (*See* Notice Removal, ECF No. 5.) Maxwell filed a motion to remand the case to state court on 9 October 2020, which the District Court granted on 22 February 2021. (*See* Order, ECF No. 6.) Maxwell then filed an Amended Complaint on 1 March 2021, asserting claims for breach of contract and unfair and deceptive trade practices under *N.C.G.S. § 75-1.1* against Smithfield. (*See* Am. Compl. ¶¶ 94-132, ECF No. 7.)

3. Smithfield timely filed a Notice of Designation (the "NOD") on 5 March 2021, asserting **[*2]** that this action involves a dispute under *N.C.G.S. §§ 7A-45.4(a)(3)* and *(b)(2)* and thus must be designated as a mandatory complex business case. (Notice Designation 1-2 [hereinafter "NOD"], ECF No. 9.)

4. On 8 March 2021, the action was designated as a mandatory complex business case by the Honorable Paul Newby, Chief Justice of the Supreme Court of North Carolina, (Designation Order, ECF No. 1), and assigned by the undersigned to the Honorable Adam M. Conrad, Special Superior Court Judge for Complex Business Cases, (Assignment Order, ECF No. 2).

5. Maxwell timely filed the Opposition on 25 March 2021, contending that designation of this action as a mandatory complex business case is not proper under either ground stated in the NOD. (Opp'n 1-2, 7-10.) Smithfield filed its Response to Opposition (the "Response") on 9 April 2021. (Resp. Opp'n Designation [hereinafter "Resp."], ECF No. 18.) The matter is now ripe for determination.

6. *Section 7A-45.4(c)* ***HN1***[] requires that "[t]he Notice of Designation shall, in good faith and based on information reasonably available, succinctly state the basis of designation[.]" As a result, "the Court may consider all materials reasonably necessary to rule on an opposition to designation." *In re Summons Issued to Target Corp. & Affiliates, 2018 NCBC LEXIS 185, at *3 (N.C. Super. Ct. Dec. 4, 2018)*.

7. "For a case **[*3]** to be certified as a mandatory complex business case, the pleading upon which designation is based must raise a material issue that falls within one of the categories specified in *section 7A-45.4*." *Composite Fabrics of Am., LLC v. Edge Structural Composites, Inc., 2016 NCBC LEXIS 11, at *25 (N.C. Super. Ct. Feb. 5, 2016)*.

8. ***HN2***[] Designation under *section 7A-45.4(a)(3)* is proper if the action involves a material issue related to "[d]isputes involving ***antitrust law***, including disputes arising under *Chapter 75 of the General Statutes* that do not arise solely under *G.S. 75-1.1* or *Article 2 of Chapter 75 of the General Statutes*."

9. According to the Amended Complaint, Maxwell was a major producer in the U.S. hog industry and a former supplier to Smithfield, the largest processor of pork in the world. (*See* Am. Compl. ¶¶ 7, 10, 16.) Maxwell and Smithfield entered into a Production Sales Agreement (the "PSA") on 5 December 1994, in which Maxwell agreed to sell hogs to Smithfield and Smithfield agreed to purchase hogs from Maxwell. (*See* Am. Compl. ¶ 16.) The parties executed a written amendment (the "Amendment") to the PSA on 6 December 1994. (*See* Am. Compl. ¶ 28.) Maxwell alleges that Smithfield has violated the terms of the PSA and Amendment by failing to (i) give Maxwell the same economic incentives and benefits given to other major swine suppliers; (ii) negotiate in good faith with Maxwell to find a substitute basis for determining the purchase **[*4]** price for Maxwell's hogs when the PSA's pricing formula was no longer economically viable; and (iii) purchase all of the hogs produced by Maxwell up to a certain monthly cap. (*See* Am. Compl. ¶¶ 60-68, 70-75, 81-83, 94-121.) Maxwell further alleges that Smithfield has used its status as the dominant—indeed the monopoly—pork processor in the Southeast to manipulate the pricing mechanism in the PSA and provide other major hog suppliers with better economic terms and incentives, thereby driving Maxwell out of the hog business and benefiting Smithfield's affiliated hog producers. (*See* Am. Compl. ¶¶ 86-93, 122-32.)

10. Maxwell argues that designation under *7A-45.4(a)(3)* is improper because it "has not alleged an antitrust claim under either state or federal law." (Opp'n 7.) Maxwell further contends that because the Amended Complaint asserts "several breach of contract claims and an additional claim 'solely under *G.S. 75-1.1*' to recover damages for Smithfield's unfair trade practices against Maxwell[,]" (Opp'n 2), the action "falls expressly outside the ambit of [s]ection *7A-45.4(a)(3)*[,]" (Opp'n 7).

11. ***HN3***[] The Court disagrees. While it is true that the "plaintiff is the master of its complaint and free **[*5]** to choose which causes of action it will bring[,]" *UNOX, Inc. v. Conway, 2019 NCBC LEXIS 41, at *6 (N.C. Super. Ct. June 28, 2019)*, this Court has previously recognized that "designation as a complex business case may be appropriate if disputes within the scope of *section 7A-45.4(a)* have not been expressly pleaded but must necessarily be resolved in order to litigate the claims that have been asserted[,]" *Mkt. Am., Inc. v. Doyle, 2016 NCBC LEXIS 182, at *4, 2016 NCBC Order 5 (N.C. Super. Ct. Feb. 29, 2016)*.

12. Such is the case here. Designation is based on the Amended Complaint, and the NOD provides ample support for Smithfield's assertion that Maxwell's *section 75-1.1* claim is premised on antitrust allegations. (*See* NOD 3-5; *see also* Am. Compl. ¶¶ 7-13, 16, 87-90, 93, 122-26.) As Smithfield notes in its Response, "Maxwell alleges that Smithfield violated [s]ection 75-1.1 by abusing its alleged monopoly power and dominant market position to manipulate national hog prices, favor its vertically-integrated producers, and force Maxwell out of business." (Resp. 6.) Although Maxwell correctly notes that designation is improper where the claim arises "solely under *G.S. 75-1.1*," (*see* Opp'n 7), unlike the cases that Maxwell cites in its Opposition, a close reading of the Amended Complaint reveals that Maxwell has "otherwise invoked state or federal ***antitrust law***" by alleging that Smithfield's monopolistic misconduct **[*6]** serves as the basis for its claim under *section 75-1.1*. *Cf.* *Vertical Crop Consultants, Inc. v. Brick St. Farms LLC, 2021 NCBC LEXIS 3, at *3, 2021 NCBC Order 1 (N.C. Super. Ct. Jan. 12, 2021)* (declining to designate under *(a)(3)* where "the Complaint does not contain a claim for trade secret misappropriation or otherwise invoke state or federal ***antitrust law***"); *Pinsight Tech., Inc. v. Driven Brands, Inc., 2020 NCBC LEXIS 23, at *4, 2020 NCBC Order 9 (N.C. Super. Ct. Feb. 20, 2020)* (declining to designate under *(a)(3)* where plaintiff has "not alleged trade secret misappropriation, a Chapter 75 claim other than one under *section 75-1.1*, or otherwise involved state or federal ***antitrust law***"); *Charah v. Sequoia Servs. LLC, 2019 NCBC LEXIS 87, at *2, 2019 NCBC Order 14 (N.C. Super. Ct. May 30, 2019)* (declining to designate under *(a)(3)* where plaintiff's claim arises solely under *section 75-1.1* and plaintiff does not "allege or contend that the current action involves consideration and application of federal or state ***antitrust law***"). Because there exists a material issue of ***antitrust law*** that must be resolved to litigate Maxwell's claim arising under *section 75-1.1*, designation under *section 7A-45.4(a)(3)* is proper.

13. ***HN4***[] Designation under *section 7A-45.4(b)(2)* is also appropriate. That section provides that "[a]n action described in *subdivision (1)*, *(2)*, *(3)*, *(4)*, *(5)*, or *(8) of subsection (a)* of this section in which the amount in controversy computed in accordance with *G.S. 7A-243* is at least five million dollars ($5,000,000) shall be designated as a mandatory complex business case by the party whose pleading caused the amount in controversy to equal or exceed five million dollars ($5,000,000)." **[*7]** Maxwell alleges that Smithfield's conduct has "cost Maxwell tens of millions of dollars already and is causing Maxwell to incur additional substantial losses every day." (Am. Compl. ¶ 91.) For the reasons discussed above, this case is properly designated under *section 7A-45.4(a)(3)*, and because the Amended Complaint establishes that the amount in controversy exceeds five million dollars, the Court concludes that this action qualifies for "mandatory mandatory" designation under *section 7A-45.4(b)(2)*.

14. **WHEREFORE**, the Court hereby **ORDERS** that the Opposition is **OVERRULED**. This action involves a material issue related to "[d]isputes involving ***antitrust law***, including disputes arising under *Chapter 75 of the General Statutes* that do not arise solely under *G.S. 75-1.1* or *Article 2 of Chapter 75 of the General Statutes*[ ]" and shall proceed as a mandatory complex business case before the Honorable Adam M. Conrad.

SO ORDERED, this the 13th day of April, 2021.

/s/ Louis A. Bledsoe, III

Louis A. Bledsoe, III

Chief Business Court Judge

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Spinner Consulting LLC v. Stone Point Capital LLC

United States Court of Appeals for the Second Circuit

April 13, 2021, Decided

No. 20-3355

Reporter

843 Fed. Appx. 411 *; 2021 U.S. App. LEXIS 10477 **; 2021 WL 1382809

SPINNER CONSULTING LLC, Plaintiff-Appellant, v. STONE POINT CAPITAL LLC, Defendant-Appellee.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [1]** Appeal from a judgment of the United States District Court for the District of Connecticut (Arterton, J.).

Spinner Consulting LLC v. Stone Point Capital LLC, 623 B.R. 671, 2020 U.S. Dist. LEXIS 181942 (D. Conn., Sept. 30, 2020)

Core Terms

conspiracy, price-fixing, competitors, horizontal, antitrust, Sherman Act, pricing, conspiracy claim, support services, bare assertion, Cartwright Act, interpretations, acquire, courts

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

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

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Sherman Act, Claims**

To state a price-fixing conspiracy claim under § 1 of the Sherman Act, plaintiffs must plead enough factual matter (taken as true) to suggest that an agreement was made. To meet this requirement and state a plausible claim to relief, an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. The parallel conduct must be placed in a context that raises a suggestion of a preceding agreement. The same is true for antitrust claims brought under Connecticut and California law. *Conn. Gen. Stat. § 35-44b* provides that it is the intent of the General

Assembly that in construing *Conn. Gen. Stat. §§ 35-24 to 35-46*, inclusive, the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes *Conn. Gen. Stat. § 35-26* was patterned after federal ***antitrust law*** and that, as directed by *§ 35-44b*, the court would analyze a *§ 35-26* claim based upon the law governing claims under Sherman Act § 1. In antitrust actions brought under the Cartwright Act, courts look to interpretations of its federal law counterpart, the Sherman Antitrust Act.

Counsel: FOR PLAINTIFF-APPELLANT: WILLIAM DUNNEGAN (Laura Scileppi, on the brief), Dunnegan & Scileppi LLC, New York, NY.

FOR DEFENDANT-APPELLEE: JONATHAN M. HERMAN (Kaleb McNeely, on the brief), Dorsey & Whitney LLP, New York, NY.

Judges: PRESENT: RICHARD C. WESLEY, SUSAN L. CARNEY, WILLIAM J. NARDINI, Circuit Judges.

Opinion

[*412] SUMMARY ORDER

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on September 30, 2020, is **AFFIRMED**.

Spinner Consulting LLC ("Spinner") appeals from the dismissal of its complaint alleging that Stone Point Capital LLC ("Stone Point"), a private equity firm, participated in a conspiracy to fix the price of certain bankruptcy support services. Spinner alleges that Stone Point caused one of its funds to acquire a controlling stake in Bankruptcy Management Solutions, Inc. ("BMS"), in order to participate in a previously established horizontal price-fixing conspiracy between BMS and its competitors in the bankruptcy support services market, and that Stone Point subsequently directed BMS's continued participation in the alleged conspiracy. We **[**2]** assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to affirm.

HN1[] To state a price-fixing conspiracy claim under section one of the Sherman Act, plaintiffs must plead "enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.[1] To meet this requirement and state a "plausible" claim to relief, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Id.* The parallel conduct "must be placed in a context that raises a suggestion of a preceding agreement." *Id. at 557*. The same is true for antitrust claims brought under Connecticut and California law. *See* *Conn. Gen. Stat. § 35-44b* ("It is the intent of the General Assembly that in construing *sections 35-24 to 35-46*, inclusive, the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes."); *Reserve Realty, LLC v. Windemere Reserve, LLC, 335 Conn. 174, 185-86, 229 A.3d 708 (2020)* (explaining that *§ 35-26* "was patterned after federal ***antitrust law***" and that, as directed by *Conn. Gen. Stat. § 35-44b*, the court would analyze a *§ 35-26* claim based upon the law governing claims under *Sherman Act* § 1); *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1131 n.5 (9th Cir. 2015)* (affirming dismissal of *Cartwright Act* claim based upon proper dismissal of Sherman Act horizontal conspiracy claim **[**3]** because "the analysis under the Cartwright Act is identical to that under the Sherman Act"); *In re Auto. Antitrust Cases I & II, 1 Cal. App. 5th 127, 204 Cal. Rptr. 3d 330, 351 n.15 (Cal. Ct. App. 2016)* ("In antitrust actions brought under the Cartwright Act, we look to interpretations of its federal law counterpart, the *Sherman Antitrust Act* . . . .").

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[1] Unless otherwise indicated, this Summary Order omits internal quotation marks, alterations, citations, and footnotes in text quoted from caselaw.

On de novo review, we conclude that Spinner's complaint fails to plausibly allege Stone Point's participation in a horizontal price-fixing conspiracy. Spinner's complaint is devoted almost entirely to **[*413]** describing the conduct of BMS and its competitors. It outlines a price-fixing conspiracy allegedly begun by BMS and its competitors sometime before 2011, and claims that Stone Point learned of and chose to join the conspiracy by acquiring BMS between May 2016 and April 2017. Spinner's primary non-conclusory allegation regarding Stone Point is that Stone Point directed BMS to continue using the pricing model purportedly established as part of the conspiracy between BMS and its competitors—and which had been in place for approximately six years before Stone Point's acquisition of BMS.[2]

Even assuming *arguendo* that Spinner plausibly alleged **[**4]** that this pricing model was established in a conspiracy involving BMS and its competitors, Stone Point's later support for continuing that pricing model—by then established in the market—amounts at most to an allegation of parallel conduct. Beyond this allegation, Spinner's complaint does little more than make "a bare assertion" of Stone Point's participation in the purported conspiracy. *Twombly, 550 U.S. at 556*. Accordingly, the complaint fails to state a horizontal price-fixing claim against Stone Point under either federal or state law.

* * *

We have considered Spinner's remaining arguments on appeal and find in them no basis for reversal. According, the judgment of the district court is **AFFIRMED**.

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[2] Spinner concedes that it cannot state a price-fixing claim against Stone Point based upon the conduct of BMS alone. *See* *In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 69 (2d Cir. 2012)* (affirming grant of summary judgment to corporate parent where plaintiffs "failed . . . to offer any concrete evidence in support their theory" and where "the record [was] devoid of evidence that [corporate parent] had any direct involvement in decisions regarding the marketing, sale, or pricing of publication paper in the United States"); *see also* *Precision Assocs., Inc. v. Panalpina World Transp., (Holding) Ltd., No. CV-08-42 (JG) (VVP), 2013 U.S. Dist. LEXIS 177023, 2013 WL 6481195, at *15 (E.D.N.Y. Sept. 20, 2013)*, *report and recommendation adopted*, *No. 08-CV-00042 (JG) (VVP), 2014 U.S. Dist. LEXIS 10345, 2014 WL 298594 (E.D.N.Y. Jan. 28, 2014)* (explaining that it "is undisputed that conclusory allegations that an affiliate joined a conspiracy are insufficient to allege that the affiliates entered into the conspiratorial conduct" and that "a parent and a subsidiary will not be held equally liable when one of them participates in antitrust misconduct where there is no evidence that both were involved in the challenged conduct").

Brooks v. Bank of Am., N.A.

United States District Court for the Southern District of California

April 19, 2021, Decided; April 20, 2021, Filed

Case No. 20-cv-01348-BAS-LL

Reporter
2021 U.S. Dist. LEXIS 75643 *; 2021 WL 1541643

WILLIAM NORMAN BROOKS, III, on behalf of himself and all others similarly situated, Plaintiff, v. BANK OF AMERICA, N.A., Defendant.

Subsequent History: Claim dismissed by, Without prejudice, Motion denied by, As moot *Brooks v. Bank of Am., 2022 U.S. Dist. LEXIS 133019 (S.D. Cal., July 26, 2022)*

Core Terms

unfair, alleges, consumer, motion to dismiss, unfair practice, reporting, balancing test, inaccurate, practices, summary judgment, match

Counsel: **[*1]** For William Norman Brooks, III, on behalf of himself and all others similarly situated, Plaintiff: James A. Francis, LEAD ATTORNEY, PRO HAC VICE, Francis & Mailman, PC, Philadelphia, PA; Lauren Kw Brennan, LEAD ATTORNEY, PRO HAC VICE, Francis Mailman Soumilas, P.C., Philadelphia, PA; Tammy Gruder Hussin, LEAD ATTORNEY, Hussin Law, Encinitas, CA.

For Bank of America, NA, Defendant: Danielle N. Oakley, LEAD ATTORNEY, O'Melveny & Myers LLP, Newport Beach, CA; William K. Pao, O'Melveny & Myers, Los Angeles, CA.

Judges: Hon. Cynthia Bashant, United States District Judge.

Opinion by: Cynthia Bashant

Opinion

ORDER DENYING DEFENDANT'S PARTIAL MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

(ECF No. 16)

Defendant moves to dismiss two counts alleged in Plaintiff's First Amended Complaint ("FAC") for failing to state claims upon which relief can be granted. (Mot. to Dismiss FAC ("Motion" or "Mot."), ECF No. 16.) Plaintiff opposes, and Defendant replies. (ECF Nos. 17, 18.) The Court finds the Motion suitable for determination on the papers submitted and without oral argument. *See Fed. R. Civ. P. 78(b)*; CivLR 7.1(d)(1). For the reasons stated below, the Court **DENIES** Defendant's Motion.

I. BACKGROUND

A. Factual Background

This action arises from Defendant's **[*2]** decision to suspend Plaintiff's access to funds from his Bank of America line of credit due to its erroneous belief that Plaintiff had filed for bankruptcy. (ECF No. 15.) Specifically, Plaintiff claims that on January 8, 2020, Defendant sent a form letter to Plaintiff suspending his access because it had received notification of a bankruptcy filing by or against Plaintiff. (FAC ¶ 19.) Five days later during a phone call with Defendant, Plaintiff learned that Defendant "had matched him to a bankruptcy filed in Mobile, Alabama by a William E. Brooks," whose Social Security number contained the same last four digits as Plaintiff's. (FAC ¶ 22.)

Plaintiff states he has never filed for bankruptcy and has never lived in Alabama. (FAC ¶¶ 21, 23.) Further, he states that his middle name is "Norman," and "he consistently uses the generational suffix 'III[,]'" both of which are not present in the public record of the Alabama bankruptcy filing, which uses the filer's full middle name "Eugene." (FAC ¶¶ 23-24.) In addition, Plaintiff alleges that the public bankruptcy record at issue also does not list any Bank of America accounts. (FAC ¶ 25.)

Plaintiff alleges that he "disputed the accuracy of [Defendant's] **[*3]** association of the Alabama bankruptcy with him and his credit accounts," but Defendant "nevertheless reported to the consumer credit reporting agencies that Plaintiff had filed for bankruptcy" and that the bankruptcy action included his Bank of America line of credit. (FAC ¶¶ 26-27.) Plaintiff states he contacted the agencies to inform them that he had not filed for bankruptcy, and each agency contacted Defendant as required by law. (FAC ¶ 30.) However, Plaintiff claims Defendant thereafter "failed to conduct a reasonable reinvestigation of the disputed bankruptcy information." (FAC ¶ 31.)

Defendant also sent a letter to Plaintiff on January 27, 2020 stating that it had accurately reported the bankruptcy. (FAC ¶ 35.) Plaintiff states that he spoke to Defendant many times after receiving this letter to resolve the issue and Defendant represented it would correct the misreporting. (FAC ¶¶ 36-37.)

As a result of Defendant's purported conduct, Plaintiff claims his credit score "dropped substantially," he was denied financing for a personal loan, and he suffered emotional distress. (FAC ¶¶ 28, 38-39.)

B. The FAC and Defendant's Partial Motion to Dismiss

In his FAC, Plaintiff brings allegations **[*4]** on behalf of himself under the *Fair Credit Reporting Act ("FCRA")*, the *California Consumer Credit Reporting Agencies Act ("CCRAA")*, and the California Unfair Competition Law ("UCL"). In Count I, Plaintiff alleges that Defendant's inaccurate reporting and disclosures constituted unlawful, unfair, and fraudulent business practices under the UCL. (FAC ¶¶ 50-56.) In Count II, Plaintiff claims that Defendant violated the CCRAA by furnishing the erroneous information that Plaintiff's line of credit was involved in a bankruptcy to credit reporting agencies, "despite having reason to know that the alleged bankruptcy was filed by a person other the consumer account holder." (FAC ¶ 60.)[1] Plaintiff's third count, which Defendant does not seek to dismiss, requests remedies under the FCRA for Defendant's failure to correct the error. (FAC ¶ 65.)

Defendant argues that Count I and Count II should be dismissed because Plaintiff has failed to allege facts sufficient to state a violation of either the CCRAA or the UCL. As to the CCRAA claim, Defendant contends that the matching first and last names and last four digits of the Social Security number defeats Plaintiff's argument that Bank of America "knew **[*5]** or had reason to know" its attribution of the bankruptcy to Plaintiff and subsequent reporting was inaccurate. (Mem. of P. & A. in supp. of Mot. ("Mem. of P. & A.") at 4-5, ECF No. 16-1.) Relatedly, Defendant contends Plaintiff's unlawful practices claim under the UCL cannot be maintained without a predicate CCRAA claim, again arguing that Defendant "relied on ample criteria" to match the bankruptcy filer to Plaintiff and characterizing the resulting misidentification as "an extraordinary coincidence." (*Id.* at 6.) Defendant also states that because its bankruptcy monitoring procedures reasonably rely on common indicators and benchmarks, they

[1] Plaintiff alleges the CCRAA violations and UCL violations on behalf of himself and two putative classes. (FAC ¶ 40.)

outweigh any alleged harm to Plaintiff under the "unfair" prong of the UCL. (*Id.* at 7.) In opposition, Plaintiff maintains that Defendant's "failure to use all of the publicly available personal identifying information" available in the bankruptcy records was unreasonable under the CCRAA and suffices to state an unlawful and/or unfair practice under the UCL. (*See* Opp'n to Def.'s Mot. to Dismiss ("Opp'n") at 1, 3, 9-10, ECF No. 17.)

II. LEGAL STANDARD

A motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* tests the legal sufficiency of the claims asserted in the complaint. *Fed. R. Civ. P. 12(b)(6)*; *Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001)*. The court **[*6]** must accept all factual allegations pleaded in the complaint as true and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. To avoid a *Rule 12(b)(6)* dismissal, a complaint need not contain detailed factual allegations, rather, it must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 557*).

"[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (quoting *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)* (alteration in original)). A court need not accept "legal conclusions" as true. *Iqbal, 556 U.S. at 678*. Despite the deference the court must pay to the plaintiff's allegations, it is not proper for the court to assume that "the [plaintiff] can prove facts that **[*7]** [he or she] has not alleged or that defendant[] ha[s] violated the...laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*.

III. ANALYSIS

A. CCRAA Claim

The provision of the CCRAA at issue is *Cal. Civ. Code § 1785.25(a)*, which prohibits the furnishing of information "on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." "The statutory term 'should have known' imparts a test of reasonableness." *Holmes v. NCO Fin. Services, Inc., 538 F. App'x 765, 766 (9th Cir. 2013)* (citing *Shultz v. Dep't of Army, 886 F.2d 1157, 1160 (9th Cir. 1989))*. "The critical question . . . is thus whether a reasonable [furnisher] . . . would have known" that the furnished information was incomplete or inaccurate. *Id.*

Here, Plaintiff alleges that publicly available information about the bankruptcy revealed that the filer was a different person than Plaintiff and, as such, Defendant's failure to review this information raises a colorable claim that it should have known Plaintiff was not the subject of the bankruptcy. Defendant argues that these factual allegations do not, as a matter of law, suffice to state a violation of the CCRAA. (Mot. at 3-4.)

The Court disagrees. Plaintiff's allegation that Defendant's failure to cross-check identities in bankruptcy using all available information **[*8]** states, at minimum, a claim that Defendant negligently violated the CCRAA. *See Pastrano v. Ditech Fin., LLC, No. EDCV 18-00659-ABM (RWx), 2018 U.S. Dist. LEXIS 117128, 2018 WL 3343606, at *5 (C.D. Cal. July 3, 2018)* (finding sufficient to state a claim the allegation that defendant should have known plaintiff was not a joint obligor on a loan "because it had the relevant documents in its possession"); *see also Cortez*

v. Trans Union, LLC, 617 F.3d 688, 723 (3d Cir. 2010) (finding violation of FCRA where TransUnion did not exercise sufficient care to match information in its records with information on federal list of "Specially Designated Nationals & Blocked Persons List")[2] ; Williams v. First Advantage LNS Screening Sols, Inc., 238 F. Supp. 3d 1333, 1343-44 (N.D. Fla. 2017) (finding FCRA violation where defendant failed to implement procedures using all available personal identifying information, including middle names, "woefully insufficient" and warranting punitive damages) *aff'd in relevant part*, 947 F.3d 735, 745-46 (11th Cir. 2020). Accepting as true Plaintiff's allegation that Defendant failed to properly consider all information available to it, the Court finds it plausibly alleges that Defendant should have known the information was inaccurate under § 1785.25(a). *See* Iqbal, 556 U.S. at 678.

Moreover, dismissal of the CCRAA claim requires this Court to definitively conclude that Defendant's actions, as stated, were reasonable. *See* Holmes, 538 F. App'x at 766. This inquiry is ill-suited for determination at the pleading **[*9]** stage. Rather, such determinations require the Court to consider evidence regarding what information defendants had or should have had access to at the time of reporting, which, at the earliest, occurs at summary judgment. *See, e.g.*, Holmes, 538 F. App'x at 766 (denying summary judgment where evidence supported an inference that defendant could have discovered its regular access to essential information was obstructed before reporting); Griffin v. Navient Sols., Inc., No. 15-CV-1818 DMS (DHB), 2016 U.S. Dist. LEXIS 136241, 2016 WL 5719831, at *5 (S.D. Cal. Sept. 30, 2016) (weighing evidence on summary judgment to determine whether defendant "had no knowledge, and no reasonable basis on which it 'should have known'" that reported information was inaccurate); Jones v. Pennsylvania Higher Educ. Assistance Agency, No. CV 16-00107-RSWL-AFMx, 2017 U.S. Dist. LEXIS 115215, 2017 WL 4594078, at *9 (C.D. Cal. July 24, 2017) (same).[3]

Thus, the Court finds that Plaintiff's allegations about Defendant's conduct state a colorable CCRAA violation and survive 12(b)(6) scrutiny. Accordingly, the Court finds Defendant's arguments in support of dismissing Count II of the FAC without merit.

B. UCL Claim

Under California law, unfair competition is defined as "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. "Because section 17200 is written in the disjunctive, **[*10]** it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair or fraudulent. A practice is prohibited as unfair or deceptive even if not unlawful or vice versa." Lippitt v. Raymond James Fin. Servs. Inc., 340 F.3d 1033, 1043 (9th Cir. 2003); *see also* Lee v. Pep Boys-Manny Moe & Jack of Cal., 186 F. Supp. 3d 1014, 1034 (N.D. Cal. 2016) ("Under the unfairness prong of the UCL, a practice may be deemed unfair even if not specifically proscribed by some other law.").

Defendant moves to dismiss on the basis that Plaintiff has failed to adequately allege the predicate CCRAA claim necessary for an "unlawful practices" claim and has not stated a viable claim for unfair practices because Defendant's bankruptcy monitoring process ensures compliance with the automatic stay requirement and includes "the most reliable indicators of a person's identity[.]" (Mem. of P. & A. at 6-7.) The Court easily disposes of the first argument because, as stated above, Plaintiff has sufficiently stated a CCRAA claim against Defendant. As to the second, the Court also finds that the FAC adequately pleads a claim for unfair practices under the UCL.

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[2] "[B]ecause the CCRAA is substantially based on the Federal Fair Credit Reporting Act, judicial interpretation of the federal provisions is persuasive authority and entitled to substantial weight when interpreting the California provisions." ***Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 889 (9th Cir. 2010)*** (quotations omitted).

[3] In some cases, courts have expressly held that questions of reasonableness should be reserved for trial. *See* ***Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1157 (9th Cir. 2009)*** ("summary judgment is generally an inappropriate way to decide questions of reasonableness because the jury's unique competence in applying the 'reasonable man' standard is thought ordinarily to preclude summary judgment") (quotations omitted); *see also* Cortez, 617 F.3d at 710 ("the reasonableness of a credit reporting agency's procedures is normally a question for trial unless the reasonableness or unreasonableness of the procedures is beyond question").

The UCL does not define "unfair," and California courts follow two different definitions of the term in consumer cases. *See* *Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1169 (9th Cir. 2012)* (quoting *Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 735 (9th Cir. 2007))*. The first test finds "unfair conduct" where a practice **[*11]** "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 886-87, 85 Cal. Rptr. 2d 301 (1999)* (quotations omitted). Under this analysis, courts engage in a balancing test in which they "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim[.]" *Id. at 886*. Finding this test "too amorphous," the California Supreme Court developed a second definition of "unfair practices" as "conduct that threatens an incipient violation of an ***antitrust law***[] or violates the policy or spirit of one of those laws" and required "any finding of unfairness to competitors under section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. While the second test did not originally apply to consumer actions, "some courts have extended the *Cel-Tech* definition to consumer actions, while others have applied the old balancing test[.]" *Davis, 691 F.3d at 1170*.

In the FAC, Plaintiff relies on the balancing test, claiming that Defendant's practice of matching consumers to bankruptcies "based on insufficient criteria" inflicts harm on consumers that "vastly outweighs any legitimate utility [the practice] **[*12]** possibly could have." (FAC ¶¶ 53-54.) Specifically, Plaintiff alleges that Defendant's practices are "unfair" under the UCL because its failure to consider all available evidence leads to false attributions of bankruptcy, which in turn improperly denies consumers access to credit by lowering their credit scores, wastes consumers' time by requiring them to resolve the issue, and causes emotional distress. (FAC ¶¶ 28, 39, 53; Opp'n at 9.) Plaintiff further alleges these harms outweigh any claimed utility. (FAC ¶ 54.)

The Court finds that this allegation suffices to state that Defendant's practices are unfair practices under the balancing test. *See* *S. Bay Chevrolet, 72 Cal. App. 4th 886-87*; *see also* *Hawkins v. Kroger Co., No. 15-CV-2320 JM (BLM), 2019 U.S. Dist. LEXIS 59249, 2019 WL 1506845, at *5 (S.D. Cal. Apr. 4, 2019)* (finding that "nothing more" than the allegation that defendant's action causes harm and provides little utility was required to state a claim under the UCL's unfair prong). The actual weighing of the parties' respective interests is not appropriately resolved at the pleading stage. *See* *In re Solara Med. Supplies, LLC Customer Data Sec. Breach Litig., No. 3:19-CV-2284-H-KSC, 2020 U.S. Dist. LEXIS 80736, 2020 WL 2214152, at *12 (S.D. Cal. May 7, 2020)* (holding that the defendant's arguments against Plaintiff's unfair practices UCL claim "are better suited for a motion for summary **[*13]** judgment when the record is more fully developed"); *In re Anthem, Inc. Data Breach Litig., 162 F. Supp. 3d 953, 990 (N.D. Cal. 2016)* (holding, on a motion to dismiss, that "[w]hether Defendants' public policy violation is outweighed by the utility of their conduct under the balancing test is a question to be resolved at a later stage in this litigation"); *see also* *Puentes v. Wells Fargo Home Mort., 160 Cal. App. 4th 638, 645 n.5, 72 Cal. Rptr. 3d 903 (2008)* (noting that "[t]he issue of whether a practice is deceptive or unfair is generally a question for the trier of fact," though it "may disposed of by summary judgment on undisputed facts").

Because Plaintiff relies solely on the balancing test and the Court finds that Plaintiff can maintain the UCL claim under this theory, the Court need not reach the *Cel-Tech* test. *See, e.g.,* *In re Yahoo! Inc. Customer Data Sec. Breach Litig., No. 16-MD-02752-LHK, 2017 U.S. Dist. LEXIS 140212, 2017 WL 3727318, at *24 (N.D. Cal. Aug. 30, 2017)* (denying motion to dismiss UCL claim for unfair practices because, "at a minimum," one test for unfairness was met). Thus, the Court concludes that Plaintiff's UCL claim is adequately pled as to the unlawful and unfair prongs and rejects Defendant's arguments in favor of dismissal as to Count I of the FAC.

IV. CONCLUSION AND ORDER

For the reasons stated above, Defendant's Partial Motion to Dismiss Counts I and II of the FAC (ECF No. 16) is **DENIED**. Further, Defendant's **[*14]** September 16, 2020 Motion to Dismiss the Complaint (ECF No. 12) is **DENIED AS MOOT**. Defendant shall file an Answer to the FAC by **May 3, 2021**.

IT IS SO ORDERED.

DATED: April 19, 2021

/s/ Cynthia Bashant

Hon. Cynthia Bashant

United States District Judge

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In re Ahern Rentals, Inc.

United States District Court for the Western District of Missouri, Central Division

April 21, 2021, Decided; April 21, 2021, Filed

Case No. 20-02945-MD-C-BP; Case No. 20-04141-CV-C-BP

Reporter

2021 U.S. Dist. LEXIS 76265 *; 2021 WL 1566450

IN RE: AHERN RENTALS, INC., TRADE SECRET LITIGATION.

Prior History: *In re Ahern Rentals, 2020 U.S. Dist. LEXIS 249694 (W.D. Mo., Oct. 29, 2020)*

Core Terms

allegations, customers, trade secret, amended complaint, confidential information, employees, contracts, misappropriated, intentional interference, preempted, disruption, interfered, contractual relationship, motion to dismiss, contends, solicitation, unfair, prospective economic advantage, reasons, Counts, intentionally, conclusory, preemption, profession, interfere, practices

LexisNexis® Headnotes

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

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

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

When considering a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the court must accept as true all of the complaint's factual allegations and view them in the light most favorable to the plaintiff. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. A claim is facially plausible if it allows the reasonable inference that the defendant is liable for the conduct alleged. However, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

Trade Secrets Law > Employee Duties & Obligations > Right to Compete > Covenants Not to Compete

HN2[] **Right to Compete, Covenants Not to Compete**

Cal. Bus. & Prof. Code § 16600 states that, with exceptions, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void. A restraint is described as something that significantly or materially impedes a person's lawful profession, trade, or business such that its enforcement would implicate the policies of open competition and employee mobility that animate *§ 16600*. *Section 16600* does not authorize employees to compete with former employers by stealing their confidential customer information.

Business & Corporate Compliance > ... > Trade Secrets Law > Protection of Secrecy > Duty to Safeguard

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Acquisition

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Confidentiality

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Improper Means

Trade Secrets Law > Trade Secret Determination Factors > Economic Value

HN3[] **Protection of Secrecy, Duty to Safeguard**

The California Uniform Trade Secrets Act provides a cause of action for misappropriation of trade secrets. *Cal. Civ. Code § 3426.3*. Misappropriation includes acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means. *Cal. Civ. Code § 3426.1(b)(1)*. Misappropriation also includes the use of a trade secret by someone who knows or has reason to know that the trade secret was misappropriated or derived from a person who owed a duty to maintain the trade secret's secrecy. *§ 3426.1(b)(2)*. A trade secret is information (including a compilation of information) that (1) derives economic value from not being generally known to the public or to other persons and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. *§ 3426.1(d)*.

Business & Corporate Compliance > ... > Trade Secrets Law > Federal Versus State Law > Uniform Trade Secrets Act

Trade Secrets Law > Federal Versus State Law > Common Law

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Disclosures

Trade Secrets Law > ... > Remedies > Damages > Costs & Attorney Fees

HN4[] **Trade Secrets, Uniform Trade Secrets Act**

The California Uniform Trade Secrets Act contains a preemption provision. The preemption provision expressly allows contractual and criminal remedies, whether or not based on trade secret misappropriation but at the same time, *Cal. Civ. Code § 3426.7* implicitly preempts alternative civil remedies based on trade secret misappropriation. Accordingly, claims are preempted where they are based entirely on the same factual allegations that form the basis of a trade secrets claim. But claims are not preempted if they are not based on allegations that constitute a misappropriation of trade secrets. *Cal. Civ. Code § 3426.7(b)(2)*.

Torts > ... > Contracts > Intentional Interference > Elements

HN5[] Intentional Interference, Elements

To state a claim for intentional interference with a contract, a plaintiff must allege 1) the existence of a valid contract between plaintiff and a third party; 2) the defendant's knowledge of the contract; 3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; 4) actual breach or disruption of the contractual relationship; and 5) resulting damage.

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

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

HN6[] Motions to Dismiss, Failure to State Claim

A plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, and the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

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

HN7[] Intentional Interference, Elements

To state a claim for intentional interference with prospective economic advantage, a plaintiff must allege 1) an existing economic relationship or one containing the probability of future economic benefit; 2) knowledge by the defendant of the relationship; 3) acts by defendant designed to disrupt the relationship; 4) actual disruption of the relationship; 5) damages proximately caused by the acts of the defendant. In addition, the act must be wrongful by some legal measure other than the fact of interference itself. Thus, the plaintiff must allege that the defendants' conduct was independently wrongful. An act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN8[] Trade Practices & Unfair Competition, State Regulation

The California Business & Professions Code prohibits any unlawful, unfair or fraudulent business act or practice. *Cal. Bus. & Prof. Code § 17200*. By proscribing any unlawful business practice, *§ 17200* borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. However, a practice may be deemed unfair even if not specifically proscribed by some other law. The word unfair means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Counsel: **[*1]** For EquipmentShare.com Inc, Western Missouri 20-4116, Plaintiff (2:20-md-02945-BP): Billie D. Wenter, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, San Francisco, CA; Jackson Hobbs, Rosalee Miller McNamara, LEAD ATTORNEYS, Lathrop GPM LLP, Kansas City, MO; Mark David Taylor, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, Dallas, TX; Michael E. Brewer, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, California, San Francisco, CA; Daniel E Richardson, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA.

For Ahern Rentals Incorporated, Arizona 2:20-cv-00705, Plaintiff (2:20-md-02945-BP): Christopher Miller Suffecool, LEAD ATTORNEY, Littler Mendelson PC - Phoenix, AZ, Phoenix, AZ; Kristy Leah Peters, LEAD ATTORNEY, PRO HAC VICE, Littler Mendelson PC - Phoenix, AZ, Phoenix, AZ; Mark J Connot, LEAD ATTORNEY, Fox Rothschild, LLP, Litigation, Las Vegas, NV; Daniel E Richardson, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA.

For Ahern Rentals Inc, South Carolina 2:20-cv-01428, Plaintiff (2:20-md-02945-BP): Allan Huddleston Neighbors, IV, LEAD ATTORNEY, Littler Mendelson PC, Houston, TX; Benjamin A. Emmert, LEAD ATTORNEY, Littler Mendelson, San Jose Office, San **[*2]** Jose, CA; Daniel E Richardson, LEAD ATTORNEY, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA; Joseph M. Wientge, Jr., LEAD ATTORNEY, Littler Mendelson, PC-STL, St. Louis, MO; Mark J Connot, LEAD ATTORNEY, Fox Rothschild, LLP, Litigation, Las Vegas, NV; William H Foster, III, LEAD ATTORNEY, Littler Mendelson PC (GVL), Greenville, SC.

For Ahern Rentals Inc, Western Washington 2:20-cv-00542, Plaintiff (2:20-md-02945-BP): Anne E Reuben, LEAD ATTORNEY, Littler Mendelson, Seattle, WA; Benjamin A. Emmert, LEAD ATTORNEY, Littler Mendelson, San Jose Office, San Jose, CA; Joseph M. Wientge, Jr., LEAD ATTORNEY, Littler Mendelson, PC-STL, St. Louis, MO; Mark J Connot, LEAD ATTORNEY, Fox Rothschild, LLP, Litigation, Las Vegas, NV; Ryan Paul Hammond, LEAD ATTORNEY, LITTLER MENDELSON (WA), SEATTLE, WA; Daniel E Richardson, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA.

For Ahern Rentals Inc, South Carolina 2:19-cv-02823, Plaintiff (2:20-md-02945-BP): Benjamin A. Emmert, LEAD ATTORNEY, Littler Mendelson, San Jose Office, San Jose, CA; Joseph M. Wientge, Jr., LEAD ATTORNEY, Littler Mendelson, PC-STL, St. Louis, MO; Mark J Connot, LEAD ATTORNEY, Fox Rothschild, LLP, Litigation, **[*3]** Las Vegas, NV; William H Foster, III, LEAD ATTORNEY, Littler Mendelson PC (GVL), Greenville, SC; Daniel E Richardson, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA.

For Ahern Rentals, Inc., Eastern California 2:19-cv-01788, Plaintiff (2:20-md-02945-BP): Benjamin A. Emmert, LEAD ATTORNEY, Littler Mendelson, San Jose Office, San Jose, CA; Joseph M. Wientge, Jr., LEAD ATTORNEY, Littler Mendelson, PC-STL, St. Louis, MO; Mark J Connot, LEAD ATTORNEY, Fox Rothschild, LLP, Litigation, Las Vegas, NV; Daniel E Richardson, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA.

For Ahern Rentals, Inc., Nevada 2:19-cv-02138, Plaintiff (2:20-md-02945-BP): Benjamin A. Emmert, LEAD ATTORNEY, Littler Mendelson, San Jose Office, San Jose, CA; Joseph M. Wientge, Jr., LEAD ATTORNEY, Littler Mendelson, PC-STL, St. Louis, MO; Kevin M Sutehall, Lucy Clara Crow, LEAD ATTORNEYS, Fox Rothschild, LLP, Las Vegas, NV; Mark J Connot, LEAD ATTORNEY, Fox Rothschild, LLP, Litigation, Las Vegas, NV; Daniel E Richardson, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA.

For Ahern Rentals, Inc., Texas South 2:20-cv-00046, Plaintiff (2:20-md-02945-BP): Adam R. Perkins, LEAD ATTORNEY, PRO **[*4]** HAC VICE, Littler Mendelson P.C., Houston, TX; Allan Huddleston Neighbors, IV, LEAD ATTORNEY; Benjamin A. Emmert, LEAD ATTORNEY, Littler Mendelson, San Jose Office, San Jose, CA; James Bradley Spalding, Lee Michael Wilson, LEAD ATTORNEYS, PRO HAC VICE, Littler Mendelson, Houston, TX; Joseph M. Wientge, Jr., LEAD ATTORNEY, Littler Mendelson, PC-STL, St. Louis, MO; Mark J Connot, LEAD ATTORNEY, Fox Rothschild, LLP, Litigation, Las Vegas, NV; Daniel E Richardson, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA.

For Ahern Rentals, Utah 2:19-cv-01003, Plaintiff (2:20-md-02945-BP): Allan Huddleston Neighbors, IV, LEAD ATTORNEY, Littler Mendelson PC, Houston, TX; Andrew Applegate, Gregory S. Roberts, LEAD ATTORNEYS, RAY QUINNEY & NEBEKER PC, SALT LAKE CITY, UT; Bruce A. Griggs, LEAD ATTORNEY, Ogletree Deakins, Austin, TX; Mark J Connot, LEAD ATTORNEY, Fox Rothschild, LLP, Litigation, Las Vegas, NV; Robert (Bob) Craig, LEAD ATTORNEY, Craig, Terrill, Hale & Grantham, LLP, Lubbock, TX; Patrick H. Hicks, Littler Mendelson, PC, Las Vegas, NV; Daniel E Richardson, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA.

For Ahern Rentals, Inc., Nevada 2:20-cv-00094, Plaintiff (2:20-md-02945-BP): **[*5]** Amy L Thompson, LEAD ATTORNEY, Littler Mendelson, Las Vegas, NV; Benjamin A. Emmert, LEAD ATTORNEY, Littler Mendelson, San Jose Office, San Jose, CA; Joseph M. Wientge, Jr., LEAD ATTORNEY, Littler Mendelson, PC-STL, St. Louis, MO; Kelsey E. Stegall, LEAD ATTORNEY, PRO HAC VICE, Littler Mendelson, Las Vegas, NV; Mark J Connot, LEAD ATTORNEY, Fox Rothschild, LLP, Litigation, Las Vegas, NV; Patrick H. Hicks, LEAD ATTORNEY, PRO HAC VICE, Littler Mendelson, PC, Las Vegas, NV; Daniel E Richardson, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA.

For Ahern Rentals, Inc., Colorado 1:20-cv-00941, Plaintiff (2:20-md-02945-BP): Benjamin A. Emmert, LEAD ATTORNEY, Littler Mendelson, San Jose Office, San Jose, CA; Charles William Weese, III, Williams Weese Pepple & Ferguson PC, Denver, CO; John H. Bernetich, Williams Weese Pepple & Ferguson PC, Denver, CO; Mark J Connot, LEAD ATTORNEY, Fox Rothschild, LLP, Litigation, Las Vegas, NV; Joseph M. Wientge, Jr., Littler Mendelson, PC-STL, St. Louis, MO; Daniel E Richardson, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA.

For Ahern Rentals Inc, Northern Texas 1:20-cv-00106, Plaintiff (2:20-md-02945-BP): Barbara A Bauernfeind, LEAD **[*6]** ATTORNEY, Craig, Terrill, Hale & Grantham, LLP, Lubbock, TX; Benjamin A. Emmert, LEAD ATTORNEY, Littler Mendelson, San Jose Office, San Jose, CA; Joseph M. Wientge, Jr., LEAD ATTORNEY, Littler Mendelson, PC-STL, St. Louis, MO; Mark J Connot, LEAD ATTORNEY, Fox Rothschild, LLP, Litigation, Las Vegas, NV; Robert L Craig, Jr, LEAD ATTORNEY, Craig Terrill Hale & Grantham, Lubbock, TX; Daniel E Richardson, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA.

For Ahern Rentals Inc, Texas Western, 1:20-cv-01050, Plaintiff (2:20-md-02945-BP): Benjamin A. Emmert, LEAD ATTORNEY, Littler Mendelson, San Jose Office, San Jose, CA; Bruce A. Griggs, LEAD ATTORNEY, Ogletree Deakins, Austin, TX; Elizabeth Adamek, LEAD ATTORNEY, Ogletree, Deakins, Nash, Smoak & Stewart, P.C, Austin, TX; Joseph M. Wientge, Jr., LEAD ATTORNEY, Littler Mendelson, PC-STL, St. Louis, MO; Mark J Connot, Mark J Connot, LEAD ATTORNEYS, Fox Rothschild, LLP, Litigation, Las Vegas, NV; Daniel E Richardson, LEAD ATTORNEY, PRO HAC VICE, Ogletree, Deakins, Nash, Smoak & Stewart, Sacramento, CA.

For Ahern Rentals Inc., Missouri Western: 20-cv-4144, Ahern Rentals Inc, California Northern, 3:20-cv-06750, Plaintiffs (2:20-md-02945-BP): **[*7]** Benjamin A. Emmert, LEAD ATTORNEY, PRO HAC VICE, Littler Mendelson, San Jose Office, San Jose, CA; Daniel E Richardson, LEAD ATTORNEY, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA; Joseph M. Wientge, Jr., LEAD ATTORNEY, Littler Mendelson, PC-STL, St. Louis, MO; Mark J Connot, LEAD ATTORNEY, Fox Rothschild, LLP, Litigation, Las Vegas, NV.

For EquipmentShare.com Inc, Colorado, 1:20-cv-03709, Plaintiff (2:20-md-02945-BP): Michael E. Brewer, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, California, San Francisco, CA; Stacey Alan Campbell, LEAD ATTORNEY, Campbell Litigation, P.C., Denver, CO; Daniel E Richardson, Ogletree, Deakins, Nash, Smoak & Stewart, Sacramento, CA.

For Ahern Rentals Inc, Missouri Eastern, 4:20-cv-01565, Plaintiff (2:20-md-02945-BP): Benjamin A. Emmert, LEAD ATTORNEY, Littler Mendelson, San Jose Office, San Jose, CA; Daniel E Richardson, LEAD ATTORNEY, Ogletree, Deakins, Nash, Smoak & Stewart, CA, Sacramento, CA; Joseph M. Wientge, Jr., LEAD ATTORNEY, Littler Mendelson, PC-STL, St. Louis, MO; Lindsey Rendlen Latzke, LEAD ATTORNEY, LITTLER MENDELSON PC - St Louis, St. Louis, MO; Mark J Connot, Mark J Connot, LEAD ATTORNEYS, Fox Rothschild, LLP, Litigation, **[*8]** Las Vegas, NV.

For Ahern Rentals Inc, Texas Western, 1:21-cv-00205, Plaintiff (2:20-md-02945-BP): Bruce A. Griggs, LEAD ATTORNEY, Ogletree Deakins, Austin, TX; Elizabeth Adamek, LEAD ATTORNEY, Ogletree, Deakins, Nash, Smoak & Stewart, P.C, Austin, TX.

For Ahern Rentals, Inc., Western Missouri 20-4116, Defendant (2:20-md-02945-BP): Adam R. Perkins, LEAD ATTORNEY, PRO HAC VICE, Littler Mendelson P.C., Houston, TX; Anthony J DeCristoforo, LEAD ATTORNEY, PRO HAC VICE, Ogletree, Deakins, Nash,Smoak & Stewart, P.C., Sacramento, CA; Daniel E Richardson, LEAD

ATTORNEY, PRO HAC VICE, Ogletree, Deakins, Nash, Smoak & Stewart, Sacramento, CA; Joseph M. Wientge, Jr., LEAD ATTORNEY, Littler Mendelson, PC-STL, St. Louis, MO; Michael L. Matula, Walter M. Brown, LEAD ATTORNEY, Sarah Jones, Ogletree, Deakins, Nash, Smoak & Stewart-KCMO, Kansas City, MO.

For Cory Rosencranse, Western Missouri 20-4116, Defendant (2:20-md-02945-BP): Michael L. Matula, Walter M. Brown, LEAD ATTORNEYS, Sarah Jones, Ogletree, Deakins, Nash, Smoak & Stewart-KCMO, Kansas City, MO.

For EquipmentShare.com Incorporated, Arizona 2:20-cv-00705, Defendant (2:20-md-02945-BP): Jeffrey Dale Gardner, Jimmie W Pursell, Jr., LEAD ATTORNEYS, **[*9]** Jennings Strouss & Salmon PLC - Phoenix - Washington St, Phoenix, AZ; Kimberly F Rich, LEAD ATTORNEY, Baker & McKenzie LLP - Dallas, TX, Dallas, TX; Mark David Taylor, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, Dallas, TX.

For Daniel Martinez, Arizona 2:20-cv-00705, Unknown Martinez, Arizona 2:20-cv-00705, Defendants (2:20-md-02945-BP): James Burr Shields, II, LEAD ATTORNEY, Shields Petitti, PLC, Phoenix, AZ.

For Adam Donato, South Carolina 2:20-cv-01428, Defendant (2:20-md-02945-BP): Edward Brandon Gaskins, LEAD ATTORNEY, Moore and Van Allen PLLC (Chas), Charleston, SC.

For EquipmentShare.com Inc, South Carolina 2:20-cv-04128, Defendant (2:20-md-02945-BP): Allen Said Al-Haj, LEAD ATTORNEY, Baker McKenzie, Dallas, TX; Mark David Taylor, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, Dallas, TX; Robert E Sumner, IV, LEAD ATTORNEY, Butler Snow LLP (CHS), Charleston, SC.

For Travis Mendenhall, Western Washington 2:20-cv-00542, Defendant (2:20-md-02945-BP): Jamie L. Lisagor, LEAD ATTORNEY, PACIFICA LAW GROUP LLP, SEATTLE, WA.

For EquipmentShare.com Inc, Western Washington 2:20-cv-00542, Defendant (2:20-md-02945-BP): Billie D. Wenter, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie **[*10]** LLP, San Francisco, CA; David A. Perez, Ian Rogers, LEAD ATTORNEYS, PERKINS COIE (SEA), SEATTLE, WA; Michael E. Brewer, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, California, San Francisco, CA.

For William J Meadows, South Carolina 2:19-cv-02823, Defendant (2:20-md-02945-BP): Clinton T Magill, Edward Brandon Gaskins, LEAD ATTORNEYS, Moore and Van Allen PLLC (Chas), Charleston, SC.

For EquipmentShare.com Inc, South Carolina 2:19-cv-02823, Defendant (2:20-md-02945-BP): Allen Said Al-Haj, LEAD ATTORNEY, Baker McKenzie, Dallas, TX; Charles Robert Scarminach, Robert E Sumner, IV, LEAD ATTORNEYS, Butler Snow LLP (CHS), Charleston, SC; Mark David Taylor, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, Dallas, TX; Michael E. Brewer, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, California, San Francisco, CA.

For Equipmentshare.com, Inc., Eastern California 2:19-cv-01788, Defendant (2:20-md-02945-BP): Michael E. Brewer, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, California, San Francisco, CA; Michael Gerald Leggieri, LEAD ATTORNEY, Baker & McKenzie LLP, San Francisco, CA.

For Matthew Allen, Eastern California 2:19-cv-01788, Derrick Torres, Eastern California 2:19-cv-01788, **[*11]** Defendants (2:20-md-02945-BP): Michelle R. Ferber, LEAD ATTORNEY, PRO HAC VICE, Ferber Law, PC, San Ramon, CA; Stephen L. Moses, LEAD ATTORNEY, Ferber Law, P.C., San Ramon, CA.

For Equipmentshare.com, Inc., Nevada 2:19-cv-02138, Defendant (2:20-md-02945-BP): Colton Long, LEAD ATTORNEY, PRO HAC VICE, Baker McKenzie, Chicago, IL; Emily Anne Ellis, LEAD ATTORNEY, Brownstein Hyatt Farber Shreck, Las Vegas, NV; Mark David Taylor, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, Dallas, TX; Michael E. Brewer, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, California, San Francisco, CA; Mitchell J. Langberg, LEAD ATTORNEY, Brownstein Hyatt Farber Schreck, LLP, Las Vegas, NV.

For EquipmentShare.com Inc, Texas South 2:20-cv-00046, Defendant (2:20-md-02945-BP): Allen Said Al-Haj, Nicholas O Kennedy, LEAD ATTORNEYS, Baker McKenzie, Dallas, TX; Mark David Taylor, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, Dallas, TX; Melissa R. Null, LEAD ATTORNEY, EquipmentShare.com Inc., Legal Department, Columbia, MO.

For Seth Taylor, Texas South 2:20-cv-00046, Dale Lawrence, Texas South 2:20-cv-00046, Defendants (2:20-md-02945-BP): Amanda J. Kujda, Mauricio Rondon, LEAD ATTORNEYS, PRO HAC VICE, **[*12]** Hall Maines Lugrin, PC, Houston, TX; Ellen Horton Raine, LEAD ATTORNEY, PRO HAC VICE, Hall Maines Lugrin, PC, Houston, Houston, TX; Clinton Mann, GM Law PC - KC, Kansas City, MO.

For Michelle McCormac, Utah 2:19-cv-01003, Defendant (2:20-md-02945-BP): Austin B. Egan, LEAD ATTORNEY, Stavros Law P.C., Sandy, UT.

For Equipmentshare.com, Utah 2:19-cv-01003, Defendant (2:20-md-02945-BP): Andrea Kelly, Perry S. Clegg, LEAD ATTORNEYS, Kunzler Bean & Adamson, Salt Lake City, UT; Colton Long, LEAD ATTORNEY, PRO HAC VICE, Baker McKenzie, Chicago, IL; Goli Rahimi, LEAD ATTORNEY, PRO HAC VICE, Chicago, IL; Mark David Taylor, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, Dallas, TX; Michael E. Brewer, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, California, San Francisco, CA; Rosalee Miller McNamara, LEAD ATTORNEY, Lathrop GPM LLP, Kansas City, MO.

For Keith Wade, Nevada 2:20-cv-00094, Jessie Wade, Nevada 2:20-cv-00094, Defendants (2:20-md-02945-BP): Aviva Y Gordon, LEAD ATTORNEY, Gordon Law, Henderson, NV.

For Equipmentshare.com, Inc., Nevada 2:20-cv-00094, Defendant (2:20-md-02945-BP): Colton Long, LEAD ATTORNEY, PRO HAC VICE, Baker McKenzie, Chicago, IL; Emily Anne Ellis, LEAD ATTORNEY, **[*13]** Brownstein Hyatt Farber Shreck, Las Vegas, NV; Goli Rahimi, LEAD ATTORNEY, PRO HAC VICE, Chicago, IL; Michael E. Brewer, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, California, San Francisco, CA; Mitchell J. Langberg, LEAD ATTORNEY, Brownstein Hyatt Farber Schreck, LLP, Las Vegas, NV; Rosalee Miller McNamara, LEAD ATTORNEY, Lathrop GPM LLP, Kansas City, MO.

For Equipmentshare.com, Inc., Colorado 1:20-cv-00941, Defendant (2:20-md-02945-BP): Aaron Weinstock Chaet, Stacey Alan Campbell, LEAD ATTORNEYS, Campbell Litigation, P.C., Denver, CO; Kimberly F Rich, LEAD ATTORNEY, Baker & McKenzie LLP - Dallas, TX, Dallas, TX.

For Glen Maestretti, Colorado 1:20-cv-00941, Defendant (2:20-md-02945-BP): Jordan Lee Lipp, LEAD ATTORNEY, Childs McCune LLC, Denver, CO.

For EquipmentShare.com Inc, Northern Texas 1:20-cv-00106, Defendant (2:20-md-02945-BP): Allen Said Al-Haj, Nicholas O Kennedy, LEAD ATTORNEYS, Baker McKenzie, Dallas, TX; Mark David Taylor, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, Dallas, TX; Meghan Elizabeth Hausler, LEAD ATTORNEY, Baker McKenzie LLP, Dallas, TX; Michael E. Brewer, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, California, San Francisco, CA.

For Jay Mitchell, **[*14]** Northern Texas 1:20-cv-00106, Defendant (2:20-md-02945-BP): Fernando M. Bustos, Matthew Nephi Zimmerman, LEAD ATTORNEYS, Bustos Law Firm, P.C., Lubbock, TX.

For James E. Kollar, Texas Western, 1:20-cv-01050, Defendant (2:20-md-02945-BP): Carlos R. Soltero, Kayla Carrick, LEAD ATTORNEYS, Soltero Sapire Murrell PLLC, Austin, TX.

For Ahern Rentals, Inc., Colorado, 1:20-cv-03709, Elliot Vigil, Colorado, 1:20-cv-03709, Defendants (2:20-md-02945-BP): Charles William Weese, III, LEAD ATTORNEY, John H. Bernetich, Williams Weese Pepple & Ferguson PC, Denver, CO.

For EquipmentShare.com Inc, Missouri Eastern, 4:20-cv-01565, Defendant (2:20-md-02945-BP): Emily Cantwell, LEAD ATTORNEY, Lathrop GPM LLP-Clayton, Clayton, MO; Jackson Hobbs, Rosalee Miller McNamara, LEAD ATTORNEYS, Lathrop GPM LLP, Kansas City, MO; Rosalee Miller McNamara, LEAD ATTORNEY, Lathrop GPM LLP, Kansas City, MO.

For Tom Schreiner, California Northern, 3:20-cv-06750, Defendant (2:20-md-02945-BP): Michelle R. Ferber, LEAD ATTORNEY, PRO HAC VICE, Ferber Law, PC, San Ramon, CA.

For EquipmentShare.com Inc, Texas Western, 1:21-cv-00205, Defendant (2:20-md-02945-BP): Mark David Taylor, LEAD ATTORNEY, PRO HAC VICE, Baker & McKenzie LLP, **[*15]** Dallas, TX; Nicholas O Kennedy, LEAD ATTORNEY, Baker McKenzie, Dallas, TX.

For Jessie Wade, Nevada 2:20-cv-00094, Keith Wade, Nevada 2:20-cv-00094, Counter Claimants (2:20-md-02945-BP): Aviva Y Gordon, LEAD ATTORNEY, Gordon Law, Henderson, NV.

For Ahern Rentals, Inc., Nevada 2:20-cv-00094, Counter Defendant (2:20-md-02945-BP): Amy L Thompson, LEAD ATTORNEY, Littler Mendelson, Las Vegas, NV; Patrick H. Hicks, LEAD ATTORNEY, PRO HAC VICE, Littler Mendelson, PC, Las Vegas, NV.

For Travis Mendenhall, Western Washington 2:20-cv-00542, Counter Claimant (2:20-md-02945-BP): Jamie L. Lisagor, LEAD ATTORNEY, PACIFICA LAW GROUP LLP, SEATTLE, WA.

For Ahern Rentals, Inc., Plaintiff (2:20-cv-04141-BP): Aleksandr Markelov, Morgan Lewis & Bockius LLP, Palo Alto, CA; Jason Phillip Brown, Morgan, Lewis & Bockius LLP, Spear Street Tower, San Francisco, CA; Christopher John Banks, Morgan, Lewis & Bockius, LLP, San Francisco, CA.

For Equipmentshare.com, Inc., Defendant (2:20-cv-04141-BP): Michael E. Brewer, LEAD ATTORNEY, Baker & McKenzie LLP, California, San Francisco, CA; Michael Gerald Leggieri, Baker & McKenzie LLP, San Francisco, CA.

For Matthew Allen, Derrick Torres, Defendants (2:20-cv-04141-BP): Jonathan **[*16]** R. Babione, LEAD ATTORNEY, Connor M. Day, Ferber Law, P.C., San Ramon, CA; Michelle R. Ferber, LEAD ATTORNEY, Ferber Law, APC, San Ramon, CA.

Judges: BETH PHILLIPS, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: BETH PHILLIPS

Opinion

ORDER AND OPINION GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS

This MDL arises from a dispute between two companies in the equipment rental industry. Generally, Ahern Rentals, Inc. ("Ahern") alleges that EquipmentShare.com, Inc. ("EquipmentShare") has been hiring away its employees and in the course of doing so it (and the employees) committed various torts and other wrongful acts.

Ahern filed this suit in the Eastern District of California against EquipmentShare and two of Ahern's former employees who later worked for EquipmentShare, Matthew Allen and Derrick Torres. The case was assigned to the Honorable Morrison C. England, Jr., United States District Judge for that District. On June 29, 2020, Judge England granted Defendants' Motions to Dismiss but allowed Ahern twenty days to file an amended complaint. Ahern filed its First Amended Complaint on July 20, 2020. Defendants filed Motions to Dismiss, but the case was transferred to the MDL before the motions were fully briefed. After **[*17]** they became fully briefed, the undersigned granted the motions in part and denied them in part. (Doc. 25.)[1] As relevant to the matters now before the Court, that Order dismissed federal and state claims alleging misappropriation of trade secrets and state claims alleging intentional interference with contracts and intentional interference with prospective economic advantage, and held that all other claims stated a claim for which relief could be granted. The trade secret claims were dismissed with prejudice because Ahern "failed to heed Judge England's recommendations with respect to" pleading them properly but the claims for intentional interference with contracts and intentional interference with prospective economic advantage were dismissed without prejudice. (Doc. 25, p. 20.)[2]

Ahern filed its Second Amended Complaint, (Doc. 238), which reasserts the claims the Court did not dismiss and attempts to replead the two intentional interference claims. EquipmentShare has filed a Motion to Dismiss, seeking dismissal of the intentional interference claims and one claim that the Court previously declined to dismiss. Allen and Torres have filed their own Motion to Dismiss, seeking dismissal **[*18]** of the intentional interference claims

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1 All references to documents filed with the Court are documents filed in the master MDL case.

2 All page numbers are those generated by the Court's CM/ECF system.

and another claim that the Court previously declined to dismiss. For the reasons discussed below, both EquipmentShare's motion, (Doc. 279), and the Allen/Torres motion, (Doc. 280) are **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND

As stated earlier, both Ahern and EquipmentShare are in the equipment rental industry. (Doc. 238, ¶ 10.) Allen served as a sales representative for Ahern from June 4, 2002 to June 3, 2019, and Torres worked as an Ahern branch manager from July 11, 2013 to February 2, 2016. (*Id.* at ¶¶ 8, 9.) Both Allen and Torres subsequently went to work for EquipmentShare.

During their employment with Ahern, Allen and Torres had access to "Ahern Confidential Information" to perform their duties as Ahern employees. (*Id.* at ¶¶ 27, 28.) Ahern Confidential Information consists of:

> Ahern's customer lists, Ahern's equipment prices for particular customers, Ahern's customer pricing strategies, Ahern's customer relationship management ("CRM") information relating to its clients such as identities and preferences for customer decision makers, Ahern's project pricing structures, Ahern's actual and prospective employee rosters, Ahern's internal **[*19]** compensation strategies regarding incentive plans and payouts, Ahern's internal human resources policies and practices, Ahern's internal details and evaluations of staff,—including strengths and weaknesses—Ahern's records of customer communications (including logs), and Ahern's competitive business techniques[.]

(*Id.* at ¶ 21.) Ahern Confidential Information "is non-public information" that "is not generally known in the industry or publicly available" and this confidentiality "enables Ahern to generate great economic benefit from Ahern Confidential Information." (*Id.*) Ahern also takes steps to limit access, use and dissemination of Ahern Confidential Information. (*E.g., id.* at ¶¶ 22-23, 31.) Ahern Confidential Information is comprised of, and collectively constitutes, trade secrets. (*Id.* at ¶¶ 25-26.)

Ahern claims that Allen and Torres took and retained Ahern Confidential Information. (*Id.* at ¶¶ 33-35, 40.) All three Defendants then "use[d] Ahern Confidential Information against Ahern so as to cause damage to Ahern's business operations, client relationships, and market share. At the same time Defendants attempted to use Ahern Confidential Information to sow discord and insecurity among **[*20]** Ahern's employees . . . ." (*Id.* at ¶ 38; *see also id.* at ¶¶ 39-42.) However, allegations about these incidents are very limited and will be discussed in Part II of this Order. Other allegations from the Second Amended Complaint will also be discussed as necessary.

As stated earlier, the Second Amended Complaint reasserts the claims the Court did not dismiss and attempts to replead the two intentional interference claims. Specifically, the Second Amended Complaint contains the following nine counts:

- Count I — Breach of Contract against Torres;
- Count II — Intentional Interference With Contract against all Defendants;
- Count III — Intentional Interference with Prospective Economic Advantage against all Defendants;
- Count IV — Breach of Fiduciary Duty against Torres;
- Count V — Breach of the Duty of Loyalty against Allen and Torres;
- Count VI — Breach of the Duty of Loyalty (California Faithless Servant Doctrine) against Allen and Torres;
- Count VII — Unfair Business Practices in violation of the *California Business and Professions Code § 17200 et seq.*, against all Defendants;
- Count VIII — Violation of *California Penal Code § 502*, against Allen and Torres; and
- Count IX — Accounting against all Defendants.[3]

[3] "Accounting" is a remedy and not a cause of action.

EquipmentShare has filed a Motion to Dismiss, seeking dismissal **[*21]** of Counts II, III and VII. Allen and Torres have filed their own Motion to Dismiss, seeking dismissal of Counts I, II and III. The Court resolves the parties' arguments below.

II. DISCUSSION

Defendants bring this motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*. ***HN1***[] When considering a motion to dismiss under *Rule 12(b)(6)*, the Court "must accept as true all of the complaint's factual allegations and view them in the light most favorable to the Plaintiff[ ]." *Stodghill v. Wellston School Dist., 512 F.3d 472, 476 (8th Cir. 2008)*.

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. . . . The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quotations and citations omitted). A claim is facially plausible if it allows the reasonable inference that the defendant is liable for the conduct alleged. *E.g*., *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Horras v. American Capital Strategies, Ltd., 729 F.3d 798, 801 (8th Cir. 2013)*. However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable **[*22]** to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678*.

A. Count I - Breach of Contract against Torres

The Second Amended Complaint alleges that during his employment with Ahern, Torres entered into an agreement "in which he agreed to safeguard Ahern Confidential property . . . and would safeguard Ahern information and not transfer information improperly." (Doc. 238, at ¶ 45.) Count I alleges that Torres breached this agreement by (1) accessing Ahern's computer network and emailing "at least one internal Ahern document to his personal e-mail account," (2) taking possession of other information, and (3) using information taken from Ahern for his personal benefit. (*Id.* at 47.)

These are the same allegations that were presented to support the breach of contract claim in the Amended Complaint. Torres sought dismissal, contending that the pleading was inadequate; the Court disagreed. (Doc. 25, p. 5.) Torres now seeks dismissal for a different reason: he now argues that the breach of contract claim is barred by *§ 16600 of the California Business and Professions Code*.[4] The Court disagrees.

HN2[] *Section 16600* states that, with exceptions that are not relevant here, "every contract by which anyone **[*23]** is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." However, the contract provisions that form the basis for Count I do not restrain Torres's ability to engage in a lawful profession, trade, or business — they require him to take certain actions, and refrain from taking certain actions, with respect to Ahern's property/information. *See* *Golden v. California Emergency Physicians Med. Grp., 896 F.3d 1018, 1021-24 (9th Cir. 2018)* (discussing *§ 16600* at length and describing a "restraint" as something that "significantly or materially impedes a person's lawful profession, trade, or business [such] that its enforcement would implicate the policies of open competition and employee mobility that animate *section 16600*."). The provision at issue here does not implicate *§ 16600*. *See* *Neville v. Chudacoff, 160 Cal. App. 4th 1255, 1270, 73 Cal. Rptr. 3d 383 (2008)* ("*Section 16600* does not authorize employees to compete with former employers by stealing their confidential customer information.").

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4 Torres occasionally refers to the statute number as 16660, but this appears to be a typographical error.

Torres contends that the California Court of Appeals' decision in *AMN Healthcare, Inc. v. AYA Healthcare Servs., Inc., 28 Cal. App. 5th 923, 239 Cal. Rptr. 3d 577 (2018)*, "is directly on point." (Doc. 280, p. 10.) There, an employer (AMN Healthcare) sued, *inter alia*, former employees for breaching a contract provision barring them from soliciting the departure of other AMN Healthcare employees. Torres contends that "[t]he basis for Ahern's breach of contract **[*24]** claim against [him] is identical to the basis for the plaintiff's claims in *AMN Healthcare*; namely, that a former employee, i.e., Torres, is improperly competing with Ahern by using Ahern's confidential information in connection with his employment at EquipmentShare." (Doc. 280, p. 11.) But this is not true — Count I does not allege Torres breached a contract by soliciting employees or customers, nor is it any way based on Torres's solicitation of employees or customers. *AMN Healthcare* is inapplicable and *§ 16600* provides no basis for dismissing Count I.

B. Count II — Intentional Interference With Contract

Count II alleges that Defendants intentionally interfered with Ahern's contractual relationships with customers. Defendants contend that the claim must be dismissed because (1) it is preempted by the California Uniform Trade Secrets Act, ("CUTSA"), and (2) the Second Amended Complaint does not allege facts that plausibly demonstrate Defendants intentionally interfered with contracts. The Court agrees with both contentions.

1. Preemption Under CUTSA

In summary, Defendants' preemption argument is that (1) Count II is based on the misappropriation of Ahern's trade secrets, (2) CUTSA provides the **[*25]** exclusive remedy for misappropriations of trade secrets, so (3) Count II is preempted. To address this argument, the Court begins by examining CUTSA.

HN3[] CUTSA provides a cause of action for misappropriation of trade secrets. *CAL. CIV. CODE § 3426.3*. Misappropriation includes "[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means." *Id. § 3426.1(b)(1)*. Misappropriation also includes the use of a trade secret by someone who knows or has reason to know that the trade secret was misappropriated or derived from a person who owed a duty to maintain the trade secret's secrecy. *Id. § 3426.1(b)(2)*. A trade secret is information (including a compilation of information) that (1) "[d]erives economic value . . . from not being generally known to the public or to other persons" and "[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *Id. § 3426.1(d)*.

HN4[] CUTSA also contains a preemption provision. *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc., 171 Cal. App. 4th 939, 954, 90 Cal. Rptr. 3d 247 (2009)* (citing *Cal. Civ. Code § 3426.7*). The preemption provision "expressly allows contractual and criminal remedies, whether or not based on trade secret misappropriation [but] at the same time, *§ 3426.7* implicitly preempts alternative civil remedies based on trade secret misappropriation." **[*26]** *Id.* Accordingly, claims are preempted where they are "based entirely on the same factual allegations that form the basis of [a] trade secrets claim." *Id. at 955* (quotation omitted). But claims are not preempted if they are not based on allegations that constitute a misappropriation of trade secrets. *Cal. Civ. Code § 3426.7(b)(2)*.

Defendants describe Count II as alleging that they intentionally interfered with Ahern's contracts by using Ahern's misappropriated trade secrets, so they contend that Count II is preempted by CUTSA. Ahern does not dispute that Count II would be preempted if Defendants' description of Count II is accurate but contends that Count II is based on other, different conduct. So the critical question is: what conduct forms the basis for Count II? The only insight Count II itself provides is that

> Plaintiff is informed and believes, and on that basis alleges, that Defendants intentionally and knowingly disrupted and interfered with Ahern's contractual relationships with customers (including McKinley Equipment Corp. and Nationwide Electrical Contractors), and knew that their conduct was certain or substantially certain to disrupt Ahern's contractual relationship with its customers.

(Doc. 238, at ¶ 52.) Count **[*27]** II does not explain *how* Defendants "disrupted and interfered" with Ahern's contractual relationships; it just asserts, in conclusory fashion, that they did.

As discussed in Part I, the Second Amended Complaint's general allegations repeatedly accuse Defendants of taking and using Ahern Confidential Information to injure Ahern's business relationships — but Ahern Confidential Information constitutes a trade secret under CUTSA. In describing Ahern Confidential Information, the Second Amended Complaint alleges all of the facts necessary to make it a trade secret under *§ 3426.1(d)*: it is non-public information that generates economic value from being non-public, and Ahern takes active steps to preserve it secrecy. (*Id.* at ¶¶ 21-23, 31.) The Second Amended Complaint also explicitly attaches the label "trade secret" to Ahern Confidential Information. (*Id.* at ¶¶ 25-26.) Thus, if Count II is based on anything, it is based on Defendants' alleged use of misappropriated trade secrets — which means that it is preempted by CUTSA.

As stated above Ahern contends that Count II is based on conduct unrelated to misappropriation of trade secrets, but for support it relies on allegations made in the context of completely **[*28]** different counts. The Court does not believe that Ahern can (as it is attempting to do) support the viability of Count II by relying on allegations made specifically for Count V; that is not a fair or logical way to read or interpret Count II. Moreover, the allegations Ahern points to from other counts do not support Count II or clarify that Defendants tortiously interfered with Ahern's contracts with customers by means other than using misappropriated trade secrets. For instance:

• In Count V (breach of duty of loyalty) the Second Amended Complaint alleges that Allen and Torres "use[d] other forms of non-trade secret Ahern property to facilitate their personal benefit and not the benefit of Ahern, and in fact with the intent of using it against Ahern's interest." (*Id.* at ¶ 75.) But Ahern does not (1) identify the non-trade secret property Allen and Torres allegedly used or (2) allege that any Defendant used non-trade secret information to interfere with Ahern's contracts.

• That paragraph also alleges that Allen and Torres "solicit[ed] Ahern Employees to leave Ahern and go to work for ES, with the intention of diverting not only key employees, but also diverting business opportunities **[*29]** and client relationships away from Ahern." (*Id.*) While this allegation may plausibly suggest a breach of the duty of loyalty Allen and Torres owed to Ahern, it does not plausibly suggest conduct that supports a claim for intentional interference with contracts. And it says nothing about EquipmentShare.

• In Count VII (unfair business practices) Ahern alleges that Defendants "engaged in a scheme to interfere with Ahern's contracts and economic advantage, to sow discord among Ahern's employees through a disparaging solicitation campaign, and to take market share and personnel from Ahern through the use of former employees who acted against Ahern while still employed by Ahern." (*Id.* ¶ 86.) This alleges conduct directed to Ahern's contracts with employees and does not describe any conduct that interfered with Ahern's contracts with customers.

• In Count VII Ahern also alleges that Defendants "conspired and acted . . . to interfere with Ahern's existing business relationships with its employees and customers." (*Id.* ¶ 87.) But this allegation does not establish what means were utilized, much less demonstrate that the means utilized were anything other than the use of Ahern Confidential Information **[*30]** (i.e., trade secrets) as alleged in the Second Amended Complaint's general allegations.

The best possible interpretation of Count II is that Defendants allegedly used misappropriated trade secrets to interfere with Ahern's contracts with its customers. This claim is preempted by CUTSA, so Count II must be dismissed.

2. Sufficiency of the Allegations

Defendants argue that Count II must be dismissed even if it is not preempted because it is not adequately pleaded. Ahern contends that Count II satisfies the requirements of *Iqbal* and *Twombly*. The Court agrees with Defendants.

Portions of the Court's preemption discussion are also relevant on this issue. ***HN5***[] To state a claim for intentional interference with a contract, Ahern must allege "1) the existence of a valid contract between plaintiff and a third party; 2) the defendant's knowledge of the contract; 3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; 4) actual breach or disruption of the contractual relationship; and 5) resulting damage." *AccuImage Diagnostics Corp. v. Terarecon, Inc., 260 F. Supp. 2d 941, 956 (N.D. Cal. 2003)* (*citing Quelimane Co. v. Stewart Title, 19 Cal. 4th 26, 77 Cal. Rptr. 2d 709, 960 P.2d 513, 530 (Cal. 1998)*). But Count II fails to allege several of these elements in sufficient detail to satisfy *Iqbal* and *Twombly*. First, Count II alleges, in **[*31]** conclusory fashion, "that Defendants intentionally and knowingly disrupted and interfered with Ahern's contractual relationships with customers (including McKinley Equipment Corp. and Nationwide Electrical Contractors)," (Doc. 238, ¶ 52), but this is just a formulaic recitation of the tort's third element and is therefore insufficient. ***HN6***[] "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," *Twombly, 550 U.S. at 555* (cleaned up), and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678*. Count II only reiterates the third element — unless, of course, one looks outside of Count II. But doing so brings Ahern right back to the difficulty in identifying the conduct of Defendants that Count II is based on. For the reasons discussed in Part II(B)(1):

• Count II cannot be based on Defendants' use of misappropriated trade secrets,

• the conduct described in paragraph 75 in connection **[*32]** with Count V does not satisfy the pleading requirements for Count II because it does not describe any conduct Defendants took with respect to Ahern's contracts with customer contracts (or any conduct by EquipmentShare),

• the conduct described in paragraph 86 in connection with Count VII also does not involve Ahern's contracts with customers, and

• the conduct described in paragraph 87 in connection with Count VII is just as conclusory as Count II itself.

For these reasons, Count II does not adequately allege that Defendants engaged in intentional acts designed to induce a breach or disruption Ahern's contractual relationship with customers.

Count II also does not adequately allege the fourth element, which requires that there be an actual breach or disruption in Ahern's contractual relationship with a customer. In dismissing this claim as it appeared in the First Amended Complaint, the Court held the pleading was insufficient because it did "not specify any actual contracts with customers . . . that were interfered with or affected by Defendants." (Doc. 25, p. 10.) Count II now states that Defendants "disrupted and interfered with" Ahern's contractual relationships with . . . McKinley **[*33]** Equipment Corp. and Nationwide Electrical Contractors," (Doc. 238, ¶ 52), but this is another inadequate conclusion. Were the contracts terminated? Were the contracts breached? Count II provides no information that plausibly suggests disruption or interference occurred; it simply declares that such occurred and in that way it does not "nudge the claim across the line from conceivable to plausible" as required by *Iqbal* and *Twombly*. *McDonough v. Anoka County, 799 F.3d 931, 945 (8th Cir. 2015)* (quotation omitted); *see also* *Iqbal, 556 U.S. at 680*.

3. Conclusion

For these reasons, the Court concludes that Count II is preempted by CUTSA because it is based on the use of misappropriated trade secrets. Even if it is not preempted, Count II fails to adequately allege the third and fourth elements for the tort of intentional interference with contract. Accordingly, Count II is dismissed with prejudice.

C. Count III — Intentional Interference with Prospective Economic Advantage

Defendants' arguments regarding Count III are similar to their arguments with respect to Count II: that the claim for interference with prospective economic advantage must be dismissed because it is preempted by CUTSA and is not adequately pleaded. As with Count II, the Court agrees with Defendants.

Count III contends that **[*34]** Defendants interfered with Ahern's business relationships and potential economic benefits involving Ahern customers and employees. (Doc. 238, ¶ 56.) It first contends that Torres and Allen committed the tort by using "Confidential Information to target Ahern's customers and undercut Ahern's pricing," (*id.*, ¶ 57), but (1) nothing indicates what "Confidential Information" is or that it is different from Ahern Confidential Information and (2) customer lists and pricing information were specifically included in the definition of Ahern Confidential Information. Thus, to this extent, Count III is preempted by CUTSA.

The remaining aspects of Count III fail to satisfy the pleading requirements of *Iqbal* and *Twombly*. As the Court explained with respect to this claim as it appeared in the First Amended Complaint:

> ***HN7***[] To state a claim for intentional interference with prospective economic advantage, Ahern must allege "1) an existing economic relationship or one 'containing the probability of future economic benefit'; 2) knowledge by the defendant of the relationship; 3) acts by defendant designed to disrupt the relationship; 4) actual disruption of the relationship; 5) damages proximately caused by **[*35]** the acts of the defendant." *AccuImage Diagnostics Corp., 260 F. Supp. 2d at 956* (*citing* *Della Penna v. Toyota Motor Sales, U.S.A., 11 Cal. 4th 376, 45 Cal. Rptr. 2d 436, 902 P.2d 740, 743 n.1 & 750-51 (Cal. 1995))*. In addition, "the act must be wrongful by some legal measure other than the fact of interference itself." *Id.* (*citing* *Della Penna, 902 P.2d at 751*). Thus, Ahern must allege that Defendants' conduct was "independently wrongful." *Id.* (*citing* *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Vill. Square Venture Partners, 52 Cal. App. 4th 867, 881, 60 Cal. Rptr. 2d 830 (1997))*. An act is "independently wrongful" if it is "unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937, 81 Cal. Rptr. 3d 282, 189 P.3d 285, 290 (Cal. 2008)*.

(Doc. 25, pp. 10-11.) And in dismissing this claim from the First Amended Complaint, the Court stated, *inter alia*, that "Ahern ha[d] not alleged that Defendant's conduct was independently wrongful." (*Id.*, p. 11.) Nonetheless, Ahern has simply alleged that "Defendants solicited Ahern employees and customers unfairly using disparaging tactics intended to disrupt and impair Ahern's relationships with its customers," (Doc. 238, ¶ 58), which is the same allegation that the Court found insufficient when it considered this claim before. The Court adheres to its conclusion.

For these reasons, Count V is dismissed with prejudice.

D. Count VII — Unfair Business Practices in violation of the *California Business and Professions Code § 17200*

EquipmentShare argues that Count VII fails to adequately allege a violation of California's **[*36]** Business & Professions Code. The argument is similar to one the Court rejected when it reviewed the First Amended Complaint, and the Court rejects it again.

HN8[] The California Business & Professions Code prohibits "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. "By proscribing 'any unlawful' business practice, *section 17200* borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 539-40 (Cal. 1999)* (quotations omitted). However, "a practice may be deemed unfair even if not specifically proscribed by some other law." *Id.* The word "unfair" means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Scripps Clinic v. Superior Court, 108 Cal. App. 4th 917, 939, 134 Cal. Rptr. 2d 101 (2003)* (*citing* *Cel-Tech, 973 P.2d at 544*).

Like the First Amended Complaint, the Second Amended Complaint alleges that Defendants:

> (1) disparaged Ahern to its current employees and customers,
>
> (2) prepared to "compete with Ahern and [used] Ahern's internal systems under the false pretenses of being loyal employees of Ahern and acting in Ahern's best interests," and **[*37]**

(3) failed to "disclose key facts to Ahern, which Allen and Torres were under a duty to disclose[.]"

(Doc. 238, ¶ 89.) Count VII also alleges (as did the First Amended Complaint) that Defendants engaged in this conduct to "interfere with Ahern's contracts and economic advantage, to sow discord among Ahern's employees through a disparaging solicitation campaign, and to take market share and personnel from Ahern through the use of former Ahern employees who acted against Ahern while still employed by Ahern." (*Id.* at ¶ 88.)

In challenging this claim in the First Amended Complaint, EquipmentShare argued that these allegations failed to satisfy the requirement that they engage in unlawful or wrongful conduct. The Court rejected that argument, (Doc. 25, pp. 14-15 & n.7), and EquipmentShare does not explain why the Court should revisit is ruling. The Court discerns no reason to do so; EquipmentShare's arguments are rejected for the reasons previously stated.[5]

III. CONCLUSION

EquipmentShare's Motion to Dismiss, (Doc. 279), and Allen's and Torres's Motion to Dismiss, (Doc. 280), are **GRANTED IN PART** and **DENIED IN PART**. Counts II and III are dismissed with prejudice.

IT IS SO ORDERED.

/s/ Beth Phillips **[*38]**

BETH PHILLIPS, CHIEF JUDGE

UNITED STATES DISTRICT COURT

DATE: April 21, 2021

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[5] In its Reply Suggestions, EquipmentShare argues that Count VII is preempted by CUTSA. The Court also rejected this argument previously, (Doc. 25, pp. 16-18), and the Court adheres to that decision insofar as Count VII is predicated on actions unrelated to Ahern Confidential Information.

Agency Y LLC v. DFO Global Performance Commerce Ltd.

United States District Court for the Central District of California

April 22, 2021, Decided; April 22, 2021, Filed

SACV 20-1716 JVS(KESx)

Reporter

2021 U.S. Dist. LEXIS 126844 *; 2021 WL 2791616

Agency Y LLC v. DFO Global Performance Commerce LTD

Prior History: *Agency Y LLC v. DFO Global Performance Commerce LTD, 2021 U.S. Dist. LEXIS 61412 (C.D. Cal., Feb. 2, 2021)*

Core Terms

DFO, Global, allegations, argues, brand, false advertising, trademark infringement, false designation, website, agrees, unfair competition, leave to amend, prong, service mark, fraudulent, unfair, fraudulent concealment, consumers, promotion, trademark, relates, economic loss doctrine, false statement, reputation, goodwill, parties, motion to dismiss, cause of action, judicial notice, infringement

LexisNexis® Headnotes

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

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

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

Under *Fed. R. Civ. P. 12(b)(6)*, a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility if the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

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

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

In resolving a *Fed. R. Civ. P. 12(b)(6)* motion under Twombly, the court must follow a two-pronged approach. First, the court must accept all well-pleaded factual allegations as true, but threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Nor must the court accept as true a legal conclusion couched as a factual allegation. Second, assuming the veracity of well-pleaded factual allegations, the court must determine whether they plausibly give rise to an entitlement to relief. This determination is context-specific, requiring the court to draw on its experience and common sense, but there is no plausibility where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Public Records

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN3[] **Adjudicative Facts, Facts Generally Known**

Under *Fed. R. Evid. 201*, the court may take judicial notice of matters of public record if the facts are not subject to reasonable dispute. *Fed. R. EvId. 201(b)*.

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

HN4[] **Motions to Dismiss, Failure to State Claim**

Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim. The defendant may offer such a document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN5[] **Compulsory Joinder, Indispensable Parties**

Fed. R. Civ. P. 12(b)(7) permits dismissal for failure to join a party pursuant to *Fed. R. Civ. P. 19*, and in order to determine whether dismissal is appropriate, the court must determine whether the absent party is required. *Fed. R. Civ. P. 19(a)*. A party is required in two scenarios: (1) when complete relief is impossible without the absent party; or (2) when the absent party claims a legally protected interest in the action such that (i) disposition of the action may impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring multiple or otherwise inconsistent obligations. *Fed. R. Civ. P. 19(a)*.

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

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > Burdens of Proof

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Standing

HN6[] **Infringement Actions, Determinations**

To establish standing to sue for trademark infringement under the Lanham Act, a plaintiff must show that he or she is either (1) the owner of a federal mark registration, (2) the owner of an unregistered mark, or (3) a nonowner with a cognizable interest in the allegedly infringed trademark.

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

Business & Corporate Compliance > ... > Likelihood of Confusion > Factors for Determining Confusion > Comparison of Advertising

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

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

HN7[] **False Advertising, Lanham Act**

A plaintiff suing under the Lanham Act for false advertising ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising.

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

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

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

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN8[] **Trade Practices & Unfair Competition, State Regulation**

In order to have standing to assert a *Cal. Bus. & Prof. Code § 17200* claim, the plaintiff must (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim.

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

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > Burdens of Proof

HN9[] **Infringement Actions, Determinations**

To state a claim for trademark infringement, a plaintiff must allege two elements: first, that the plaintiff owns a valid and protectible trademark; and second, that a defendant used, in commerce, a similar mark without authorization in a manner that is likely to cause consumer mistake, confusion, or deception.

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

Trademark Law > ... > Particular Subject Matter > Geographic Terms > Terms Ineligible for Protection

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

HN10[] **False Advertising, Lanham Act**

The Lanham Act prohibits a person from misrepresenting the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities in commercial advertising or promotion. A false advertising claim requires a showing that: (1) the defendant made a false statement either about the plaintiff's or its own product; (2) the statement was made in commercial advertisement or promotion; (3) the statement actually deceived or had the tendency to deceive a substantial segment of its audience; (4) the deception is material; (5) the defendant caused its false statement to enter interstate commerce; and (6) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff's product.

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

HN11[] **False Designation of Origin, Elements of False Designation of Origin**

To prevail on a false designation of origin claim, a plaintiff must show that the defendant used in commerce any word, term, name, symbol, or device that is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of defendant with plaintiff, or as to the origin, sponsorship, or approval of his goods by plaintiff.

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

HN12[] **Nondisclosure, Elements**

The elements of a claim for fraudulent concealment are: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage.

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Remedies

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Remedies

HN13[] **Types of Losses, Economic Losses**

Under the economic loss doctrine, tort claims are barred where they are based on the same facts and damages as a breach of contract claim. The economic loss doctrine precludes recovery for purely economic loss due to disappointed expectations, unless the plaintiff can demonstrate harm above and beyond a broken contractual promise. The weight of authority counsels in favor of applying the economic loss doctrine to fraudulent concealment. The economic loss doctrine bars recovery in tort for the same loss that emanates from a broken contractual promise.

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

Torts > Business Torts > Unfair Business Practices > Elements

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

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN14[] **State Regulation, Claims**

California's Unfair Competition Law (UCL) prohibits any unlawful, unfair, or fraudulent business act or practices. *Cal. Bus. & Prof. Code § 17200 et seq.* To prevail on a UCL claim, a plaintiff must make a twofold showing: he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

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

In the context of *Cal. Bus. & Prof. Code § 17200*, unfair means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

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

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

It is well-established that where a claim of an unfair act or practice is predicated on public policy, the public policy which is a predicate to the action must be tethered to specific constitutional, statutory or regulatory provisions.

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

Attorneys Present for Defendants: Not Present.

Judges: James V. Selna, United States District Judge.

Opinion by: James V. Selna

Opinion

CIVIL MINUTES - GENERAL

Proceedings: [IN CHAMBERS] Order Regarding Motion to Dismiss

Defendant DFO Global Performance Commerce Ltd. (formerly DBA Direct Focus Online Ltd.) ("DFO Global") filed a motion to dismiss the Second Amended Complaint ("SAC") of Plaintiff Agency Y LLC ("Agency Y"). Mot., Dkt. No. 39. Agency Y opposed the motion. Opp'n., Dkt. No. 40. DFO Global Replied. Reply, Dkt. No. 43.

For the following reasons, the Court **GRANTS** the motion with leave to amend.

I. BACKGROUND

The following facts are alleged in Agency Y's SAC.

On September 3, 2016, Tim Burd ("Burd"), based on his expertise and reputation in the internet marketing field, created a Facebook Business Manager Account at the highest setting, (5,000 ad accounts). SAC, Dkt. No. 38 ¶ 12. The usual number of ad accounts is around 2-10 per Business Manager. Id. Burd is a high profile internet marketing expert and owner of a service mark application for "Tim Burd" (App. No. 90230756) who attracts high-end clients that routinely spend in the $100,000 a month range. Id.

Later in 2016, **[*2]** Burd and Sean Brown ("Brown") founded Agency Y and created a successful brand under the service mark "AGENCY Y" to promote its internet marketing services via its website at "www.agencyy.com." Id. ¶ 13. Burd and Brown are the original owners of well-established common law service mark rights to Agency Y in connection with lead generation for online ads and internet marketing. Id. Since 2016, clients have placed confidence and trust in the services offered under the Agency Y brand that created goodwill in the Agency Y mark. Id. ¶ 14.

In December 2016, Agency Y registered www.agencyy.com through the registrar GoDaddy (the "Domain"), which has been an important mechanism through which Agency Y has interacted with its clients. Id. ¶ 16. Agency Y invested substantial time, effort, and resources in promoting and marketing its services through Agency Y. As a result, the mark in connection with these services was valuable with considerable goodwill. Id. ¶ 17. In 2017 alone, Agency Y expended approximately $700,000 on the marketing, advertising, and promotion of services offered under the AGENCY Y mark. Id. ¶ 18 From 2016 to 2020, Agency Y participated in numerous regional and global conferences **[*3]** to market and promote its services under the AGENCY Y mark. Id. ¶ 19. Agency Y's mark is distinctive to both the consuming public and Agency Y's trade. Id. ¶ 22. In 2017 alone, Agency Y generated over $750,000 in Year-1 revenue under its Agency Y mark. Id. Clients understood that the Agency Y services originated from Agency Y and Burd, and based on the strength of the Agency Y brand, Year 1 revenue, and Burd's reputation, the business could easily have sold for a substantial sum. Id.

During the period of December 2016 to February 2019, the Agency Y mark and services received significant coverage in various media, including from well-known publishers and media outlets such as Facebook and Instagram, and received substantial promotion from Facebook groups, name brand recognition with Burd, word of mouth marketing, and personal referrals.Id. ¶ 24. Burd heavily promoted Agency Y through interviews, podcasts, seminars, speaking events at conferences, and paid sponsorships. Id. In early 2020, Burd participated in multiple Agency Y promotion videos in DFO Global's San Diego office. Id.

In November 2017, Agency Y entered into an agreement (the "Agreement") with DFO Global. Id. ¶ 25. During the **[*4]** course of this initial Agreement, Agency Y remained the owner of the Agency Y service mark and all goodwill associated with it. Id. DFO Global's principal, Bruce Cran ("Cran"), promised to drive and grow the Agency Y business once it was under the DFO Global umbrella. Id.

For approximately two years thereafter, Agency Y believed that the parties coexisted within the parameters of the Agreement. Id. ¶ 26. In reality, once DFO Global took over day-to-day management, DFO Global began the process of taking control of Agency Y's customers and business, including the service mark and associated goodwill, which involved, among other things, falsifying ownership in a U.S. federal service mark application in violation of federal law. Id. ¶ 27. DFO Global withheld this information about the Agency Y mark with an ongoing intent to deceive and manipulate Agency Y into assigning its IP rights. Id. DFO Global intended to claim ownership, acquire the business created by Burd through the Agency Y brand, and divert it to DFO Global's new company: Amasa. Id. ¶ 28. In essence, DFO Global was surreptitiously destroying the Agency Y brand, all before Agency Y realized the extent of the betrayal. Id.

In February **[*5]** 2019, in an Addendum to the Agreement insisted on by DFO Global and Cran (while withholding material facts from Agency Y and Burd), Agency Y assigned to DFO Global the IP assets to the AGENCY Y brand including the AGENCY Y mark and the www.agencyy.com domain (with Burd still holding a leadership role in Agency Y). Id. ¶29.

During this time, Burd assisted DFO Global with bringing in a client only to witness DFO Global fire the client and take the client's business model. Id. ¶ 30. Burd was appalled at DFO Global's blatant disregard for the client and misuse of Burd's reputation, and he insisted that DFO Global apologize to the client and promise to grow the brand or return the brand to Agency Y (as it was not worth ruining Agency Y's or Burd's reputations). Id. Because of Agency Y's concerns about DFO Global's poor performance, the parties entered into a Second Addendum to the Agreement that, among other things, outlined Burd's and DFO Global's obligations and included a clause for returning the Agency Y IP assets to Agency Y. Id.

The Second Addendum states in pertinent part: "... if Agency Y has shown positive growth in terms of number of employees and clients, this Agreement shall remain **[*6]** effective in accordance with this Agreement as amended. Otherwise, this Agreement shall be terminated, and the Company shall assign back to Agency Y any and all rights, title and interest to the IP Assets as contemplated in Section 8 herein as amended." Id. ¶ 31 Agency Y and Burd later observed that its brand was suffering damage to its business reputation with decreased goodwill associated with its mark, meaning that customers were less likely to select Agency Y and instead take their business elsewhere. Id.

Later, DFO Global requested a lower commission, and Agency Y denied this request but instead proposed a buy-out at market value. Id. ¶ 32. In response, on May 28, 2020, DFO Global's counsel sent a letter to Agency Y advising of a perceived breach of contract for failure to provide leads and that such breach required rectification. Id. This was followed by a May 29, 2020 letter reminding Agency Y of its obligations under the Agreement, as amended. Id. Also on May 29, 2020, Cran sent a letter to Agency Y supporting the breach of contract theory, cancelling the contract, and then ostensibly retracting the prior statements to make a proposal to continue the relationship on virtually **[*7]** the same terms provided for in the Agreement, as amended. Id. ¶ 32.

On June 3, 2020, Burd requested clarification about the return of the IP assets, to which Cran replied that DFO Global owns Agency Y and the registered mark for Agency Y, and that the Agreement, as amended, does not provide for the return of the IP. Id. ¶ 34. Cran again suggested that the parties continue the relationship without a formal contract. Id. On June 4, 2020, Agency Y provided an in-depth response to the series of letters and emails correcting Cran's mistaken view that the Agreement, as amended, did not address the return of the IP. Id. ¶¶ 35-36. Agency Y invoked Section 3(c) of the Second Addendum and demanded return of the IP assets immediately. Id.

_ DFO Global's counsel replied on June 10, 2020 and incorrectly stated that it had already served notice of termination and therefore Agency Y's claim to invoke *Section 3(c)* was not relevant. Id. ¶ 37. DFO Global's statement that payments would terminate at the end of the contract were also not correct, as Section 3(b) still remained in effect and states that despite termination, Section 2 along with other Sections survive termination. Id.

Unbeknownst to Agency Y and in **[*8]** violation of the Agreement, DFO Global fraudulently applied for a United States service mark registration for Agency Y with the USPTO on October 2, 2018 (Application No. 88/139,137). Id. ¶ 38. DFO Global's filing of the service mark was only possible because of the fraud it perpetrated. Id. ¶ 39. Agency Y would never have entered into the Agreement or either Addendum had it known of DFO Global's intentions. Id.

Upon applying for registration with the USPTO, DFO Global was required to sign a declaration indicating, among other things, that it was the owner of the mark. Id. ¶ 40. Furthermore, DFO Global was warned that willful false statements and the like are punishable by fine or imprisonment, or both, under *18 U.S.C. § 1001*, and that willful false statements may jeopardize the validity of the application or submission or any registration resulting therefrom. Id.

As soon as Agency Y discovered the unauthorized registration, it gathered the necessary information and submitted a petition to cancel the registration on June 26, 2020. Id. ¶ 46. The Cancellation proceeding is in process. Id. After the filing of the unauthorized application, DFO Global continued to divest itself of the contract with Agency **[*9]** Y with the intent to deceive consumers to move to DFO Global's new company, Amasa Id. ¶ 47. With Agency Y out of the way, DFO intended to divert Agency Y's high-end clients to its own company website, www.agencyamasa.com, and in the process destroy the AGENCY Y brand. Id. As of August 29, 2020, the DFO Global website ("www.dfo.global") displayed Agency Y in the "About Us" section, and clicking on the link for more information about Agency Y diverted to the AMASA website. Id. ¶ 49. After the filing of the Complaint, DFO Global removed all traces of Agency Y from the DFO Global website and partially restored the Agency Y website. Id.

_On June 22, 2020, DFO Global made an announcement about a rebranding initiative before the parties had an opportunity to discuss the proper distribution of the IP assets. Id. ¶ 52. DFO Global withheld material facts when it withheld information about the pending "rebranding." Id. The announcement contains many false statements with the intent to deceive clients into thinking that Agency Y and Burd were affiliated with and approved of the alleged rebranding to Amasa. Id. ¶ 53. On January 27, 2021, DFO Global, without permission, changed the Burd-originated **[*10]** Facebook Business Manager ad account to Amasa with a dead link to www.agencyy.com that leads to a defunct website. Id. ¶ 50. Lack of a functioning website for an internet business is a death knell. Id. Another misleading public document about Agency Y and Amasa is a "PitchBook" profile, which improperly merges Agency Y with Amasa. Id. ¶ 56. Still another misleading and incomplete profile is the Agency Y "LinkedIn" page, which states that Agency Y is "powered by" DFO Global and lists Burd as an employee. Id. ¶ 57.

Agency Y's SAC alleges nine causes of action against DFO Global, for: (1) Federal Trademark Infringement; (2) Federal Unfair Competition; (3) Fraudulent Concealment; (4) Violation of California Unfair Competition Law; (5) Common Law Trademark Infringement; (6) Common Law Unfair Competition; (7) Breach of Contract; (8) Breach of Implied Covenant of Good Faith and Fair Dealing; (9) Violation of Anti-Cybersquatting Consumer Protection Act.

II. Legal Standard

A. Motion to Dismiss

HN1[] Under *Rule 12(b)(6)*, a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim **[*11]** has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

HN2[] In resolving a 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678*. Nor must the Court "'accept as true a legal conclusion couched as a factual allegation.'" *Id. at 678-80* (quoting *Twombly, 550 U.S. at 555*). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." *Id. at 679*. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

B. Request for Judicial Notice

HN3[] Under *Federal Rule of Evidence 201*, the Court may take judicial notice of matters of public record if the facts are not "subject to reasonable dispute." *Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001)*; see *Fed. R. EvId. 201(b)*.

III. Discussion

A. Incorporation By Reference

DFO Global first asks the **[*12]** Court to incorporate by reference the parties' Agreement and the two Addenda to the Agreement, because Agency Y refers extensively to these documents in its SAC. See Mot., Dkt. No. 39 at 4. DFO Global also seeks judicial notice of the Agency Y Facebook Page, LinkedIn page, and a video by Burd that is "currently available on the Facebook page." Id. Agency Y does not appear to oppose this request.

HN4[] "Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim. The defendant may offer such a document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*(citations omitted).

The Court agrees with DFO Global that Agency Y relies extensively on the Agreement and its two Addenda in its SAC. See, e.g., SAC ¶¶ 25, 29, 31-36; 38-39; 41; 124-136. Agency Y also refers to the Agency Y Facebook and LinkedIn pages. Accordingly, the Court **GRANTS** the request with reepect to the the Agreement between the parties, the First and Second Addenda **[*13]** to the Agreement, and the Facebook and LinkedIn pages. However, the the Court **DENIES** the request with respect to the Burd video, as the Court does not find that it is incorporated by reference in the complaint.

B. Request for Judicial Notice

DFO Global seeks judicial notice of what it has marked as "Exhibit 3," which is described as "information gathered from the United States Patent and Trademark Office. . .." RJN, Dkt. No. 39-4, at 2. DFO Global explains that it "seeks to have the Court take judicial notice of document [sic] related to the application for the Tim Burd mark." Id. Agency Y objects to the RJN, arguing that "the information provided in DFO's Exhibit 3 is not actually a document from the USPTO and the information provided is incomplete," and that "[t]here is a significant dispute as to the contents of the 'alleged' document that DFO is attempting to interpose via judicial notice." See RJN Opp'n., Dkt. No. 41, at 4.

The Court finds that the proposed document is not clearly enough a true and correct copy of the USPTO's records to be considered a matter of public record with the facts not "subject to reasonable dispute." See Lee 250 F.3d, 688-89 (9th Cir. 2001); see also *Fed. R. EvId. 201(b)*. Accordingly, the Court **DENIES** the RJN **[*14]** with respect to Exhibit 3.

C. Motion to Dismiss

i. Causes of Action with Respect to the Burd Mark—Standing

DFO Global argues that Agency Y lacks standing to sue for Burd's damaged reputation or trademark rights because Burd is not a plaintiff in this case. Mot., Dkt. No. 39, at 5. Accordingly, DFO Global seeks dismissal of the allegations within the trademark infringement, false designation of origin, false advertising, and unfair competition claims that center on Burd's alleged harm. Id.

Agency Y argues in opposition that DFO Global's motion as it relates to the Burd allegations results in two possibilities:

> First, Plaintiff can independently pursue its claims without Burd pursing [sic] his own claims against DFO, and DFO has no recourse, since that is not the basis for a Rule 12(b)(1) or Rule 12(b)(6) attack. Alternatively, if Plaintiff cannot independently pursue its claims without Burd, then what DFO is arguing in essence is that Burd is an indispensable party, in which case the ground for dismissal is Rule 12(b)(7), failure to join a party under Rule 19, which sets forth the requirements for joinder.
> Opp'n., Dkt. No. 40, at 13.

The Court finds Agency Y's argument on this point to be unavailing. Regarding the first possibility, the **[*15]** Court agrees that Agency Y can certainly pursue its claims against DFO Global without Burd, but as DFO Global points out in reply, Agency Y "must nevertheless still allege harm to itself." Reply, Dkt. No. 43, at 4. This, therefore, does not cure a standing defect. Regarding the second possibility, DFO Global argues that Burd is neither a necessary nor an indispensable party under *Fed. R. Civ. P. 12(b)(7)*. Id. The Court agrees. ***HN5***[] *Rule 12(b)(7)* permits dismissal for failure to join a party pursuant to *Rule 19*, and in order to determine whether dismissal is appropriate, the Court must determine whether the absent party is "required." See *EEOC v. Peabody Western Coal Co., 400 F.3d 774, 779 (9th Cir. 2005)*; see also *Fed. R. Civ. P. 19(a)*. A party is "required" in two scenarios: (1) when complete relief is impossible without the absent party; or (2) when the absent party claims a legally protected interest in the action such that (i) disposition of the action may "impair or impede" the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring multiple or otherwise inconsistent obligations. *Fed. R. Civ. P. 19(a)*. The Court finds that Burd is not indispensable because complete relief as to the current parties—Agency Y and DFO Global—is possible without joining Burd. **[*16]** *Rule 12(b)(7)* is not invoked merely because Burd's absence may result in future litigation. Accordingly, the Court will address DFO Global's arguments with respect to standing as the claims relate to the Burd Mark.

1. Trademark Infringement and False Designation of Origin

DFO Global addresses Agency Y's first and second causes of action—for trademark infringement and false designation of origin—together because the standing inquiries with respect to both claims is the same. Mot., Dkt. No. 39, at 6.

HN6[] "To establish standing to sue for trademark infringement under the Lanham Act, a plaintiff must show that he or she is either (1) the owner of a federal mark registration, (2) the owner of an unregistered mark, or (3) a nonowner with a cognizable interest in the allegedly infringed trademark." *Halicki Films, LLC v. Sanderson Sales & Mktg., 547 F.3d 1213, 1225 (9th Cir. 2008)*. DFO Global argues that Agency Y fails to satisfy the first two tests under Halicki Films because the SAC states that the Burd Mark is not registered and Agency Y is not the owner of the mark or the filer of the application. Mot., Dkt. No. 39, at 6. DFO Global goes on to argue that Agency Y fails to satisfy the third alternative element of the Halicki Films test because the pleading fails to identify how Burd's relationship **[*17]** to Agency Y rises to a "cognizable" or "commercial" interest in the Burd Mark. Id., at 7.

The Court agrees with DFO Global that Agency Y has not shown a commercial interest sufficient to confer standing to sue for infringement, as Agency Y has neither pled that it has a royalty or license for exclusive use of the mark, nor has it shown that it is the assignee of the Burd Mark. See *Spin Master, Ltd. v. Zobmondo Entm't, LLC, No. CV 06-3459 ABC PLAX, 2011 U.S. Dist. LEXIS 94905, 2011 WL 3714772, at *6 (C.D. Cal. Aug. 22, 2011)*; *Ultrapure Sys., Inc. v. Ham—Let Grp., 921 F.Supp. 659, 665-66 (N.D. Cal. 1996)*. In short, Agency Y has not alleged that it "personally" suffered a commercial injury separate and apart from any injury Burd suffered as a result of DFO Global's allegedly infringing acts as to the Burd Mark. Accordingly, the Court **GRANTS** the motion to dismiss the trademark infringement and false designation of origin claims insofar as they relate to the Burd Mark for lack of standing with leave to amend.

2. False Advertising

Next, DFO Global argues that the Court should dismiss Agency Y's false advertising claim related to the Burd Mark for lack of standing. Mot., Dkt. No. 39, at 8. Specifically, DFO Global argues that the SAC merely alleges that DFO Global's allegedly false advertising caused Burd injury, and that Agency Y should be able to sue for his harm. Id., at 9 (citing SAC ¶ 59).

HN7[] A plaintiff suing **[*18]** under the Lanham Act for false advertising "ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising[.]" *Lexmark Intern., Inc. v. Static Control Components, Inc., 572 U.S. 118, 133, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*. The Court does not find that Agency Y has adequately alleged such an injury to itself. Instead, the Court finds that the SAC refers exclusively to Burd's harm as a result of the alleged false advertising. Accordingly, the Court agrees with DFO Global that Agency Y lacks standing to bring this false advertising claim, and thus **GRANTS** the motion to dismiss the false advertising claim insofar as it relates to the Burd Mark with leave to amend.

3. Unfair Competition Law

DFO Global argues that Agency Y's Unfair Competition Law ("UCL") claim, which centers in part on the Burd Mark, is predicated on the improper trademark infringement, false designation of origin, and false advertising claims, and that it therefore cannot survive. Mot., Dkt. No. 39, at 9. Further, DFO Global argues, Agency Y has not demonstrated that it has standing to bring a UCL claim on behalf of DFO Global's alleged use of the Burd Mark for the same reasons addressed in the previous two sections. Id.; see also supra.

HN8[] The Court agrees. In order to **[*19]** have standing to assert a *Section 17200* claim, the plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*. As noted above, Agency Y has not alleged that it (rather than Burd) has been harmed by the allegedly infringing activities. Accordingly, the Court **GRANTS** the motion to dismiss the UCL claim insofar as it relates to the Burd Mark, because Agency Y has failed to demonstrate standing and the requisite injury.

ii. Causes of Action with respect to the Agency Y Mark

1. Trademark Infringement

DFO Global next argues that the Court should dismiss Agency Y's trademark infringement claim as it relates to the Agency Y Mark on the ground that it is inconsistent with and barred by the parties' contracts. Mot., Dkt. No. 27, at 10.

HN9[] To state a claim for trademark infringement, a plaintiff must allege two elements: first, that the plaintiff owns a valid and protectible trademark; and second, that a defendant used, in commerce, a similar mark without authorization in a manner that **[*20]** is likely to cause consumer mistake, confusion, or deception. *So. Cal. Darts Ass'n v. Zaffina, 762 F.3d 921, 929 (9th Cir. 2014)*.

DFO Global argues that Agency Y's trademark infringement claim, based on DFO Global's allegedly unauthorized use of the Agency Y mark, is subject to dismissal because the Agreement makes it clear the DFO Global was entitled to use the mark from the date of the Agreement until Agency Y invoked section 3(c) of the Second Addendum. Mot., Dkt. No. 39, at 11. Further, DFO Global states that Agency Y's claims for unauthorized use even after the emergence of the contractual dispute (post-June 2020) must also be dismissed because a contractual dispute over the ownership and use of assets does not give rise to infringement claims simply because the assets are intellectual property. Id. In effect, DFO Global argues that while the contract at issue involved and referred to the use and ownership of trademark rights, this case ultimately is not a trademark dispute but rather is a straightforward contract dispute. Id.

Agency Y does not appear to respond directly to DFO Global's argument regarding the trademark infringement claim as it relates to the Agency Y Mark. In any event, the Court agrees with DFO Global, and once again dismisses **[*21]** the trademark infringement claim with respect to the Agency Y mark as inconsistent with the contract. Accordingly, the Court **GRANTS** the motion to dismiss the trademark infringement claim as it relates to the Agency Y mark, with leave to amend

2. False Designation of Origin/ False Advertising

DFO Global next asks the Court to dismiss Agency Y's false designation of original, false advertising, and common law unfair competition claims. Mot., Dkt. No. 39, at 10.

HN10[] The Lanham Act "prohibits a person from misrepresenting the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities in commercial advertising or promotion." *Alfasigma USA, Inc. v. First Databank, Inc., 398 F. Supp. 3d 578, 590 (N.D. Cal. 2019)* (citing *15 U.S.C. § 1125(a)(1)(B)*). A false advertising claim requires a showing that: (1) the defendant made a false statement either about the plaintiff's or its own product; (2) the statement was made in commercial advertisement or promotion; (3) the statement actually deceived or had the tendency to deceive a substantial segment of its audience; (4) the deception is material; (5) the defendant caused its false statement to enter interstate commerce; and (6) the plaintiff has been or is likely to be injured as a result of **[*22]** the false statement, either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff's product. *Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 835 n.4 (9th Cir. 2002)*.

The SAC alleges false advertising premised on allegations that (1) DFO Global's filing of the Agency Y mark with the USPTO in the name of DFO Global was false (SAC ¶ 76); and (2) the Pitchbook profile was false (Id. ¶ 56).

Regarding the USPTO Ffiling, the Court finds that Agency Y's SAC suffers from the same defects as did its FAC. Just as before, any unlawfulness regarding DFO Global's filing with the USPTO is based on Section 8(d) of the Agreement, which provides that DFO Global is not the owner Agency Y mark. SAC ¶ 41. Agency Y also again pleads that DFO Global's filing of the service mark was a violation of the Agreement. Id. ¶ 127. As such, the Court once again finds that any damages resulting from the USPTO filing would be breach of contract damages, so the economic loss doctrine bars this tort claim.

Regarding the Pitchbook Profile, Agency Y claims that it contained false statements (SAC ¶ 56), but fails to allege how the Pitchbook profile is "commercial advertisement or promotion" or that DFO Global made the statements. **[*23]** See Mot., Dkt. No. 39, at 13. For the same reasons, DFO Global seeks dismissal of the remainder of the claim (having to do with "allegations regarding the LinkedIn, Facebook, and website") on the grounds that these claims do not discuss the nature, characteristics, qualities, or geographic origin of th services. Id. The Court agrees, and finds that Agency Y's allegations are insufficient to state a claim for false advertising.

DFO Global also asks the Court to dismiss Agency Y's claim for false designation of origin as it relates to the Agency Y Mark. See Mot. Dkt. No. 39, at 13. ***HN11***[] "To prevail on a false designation of origin claim, a plaintiff must show that the defendant 'used in commerce any word, term, name, symbol, or device ...' that is 'likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of [d]efendant with [p]laintiff, or as to the origin, sponsorship, or approval of his goods by [p]laintiff.'" *Blizzard Entm't, Inc. v. Blizzard Sports Ctr., Inc., 2018 U.S. Dist. LEXIS 224178, 2018 WL 7448915, at *5 (C.D. Cal. Nov. 2, 2018)*. Agency Y's false designation claim appears to be centered on: (1) Agency Y's LinkedIn and Facebook pages and DFO's website (SAC ¶ 57-58, 71-72); (2) a Facebook Business Manger designation (SAC ¶ 60); and (3) a June 22, 2020 announcement **[*24]** (SAC ¶ 52-55; 69-70).

With respect to the LinkedIn and Facebook pages and DFO Global's Website, Agency Y asserts that it is an improper "identifier of source" to state that "Agency Y is powered by DFO Global." See SAC ¶ 57. Agency Y also takes issue with the fact that DFO Global's website included Agency Y in the "About Us" section up until August 29, 2020. Id. ¶ 49. However, as DFO Global points out, the Agreementbetween the parties called for DFO Global to "grow and promote the AGENCY Y brand." See SAC ¶ 25. Pursuant to the Agreement, Agency Y assigned, granted, and transferred to DFO Global Agency Y's entire business (the right, title, and interest in the Agency Y brand and Domain and all of the goodwill associated therewith). Given that the business performed under the Agency Y brand included its social media accounts, per the Agreement, Agency Y was, in fact, "powered by" DFO Global, which DFO Global had the right to promote.

On the issue of the Facebook Business Manager designation, Agency Y alleges that DFO Global "changed the Business Manager designation on the Agency Y Facebook ad account from Agency Y to Amasa." SAC ¶ 60. However, the Court finds that Agency Y fails to allege **[*25]** how changing the information on a Facebook Business Manager Account would be seen by consumers or how it would be likely to cause confusion. As DFO Global points out, "the screenshot Plaintiff includes of the business account clearly shows it to be an internal page displaying information to an account administrator, not a consumer. . . A 'designation' on a Facebook account is just that; an internal designation that is not client or consumer-facing." Mot., Dkt. No. 39, at 17. Accordingly, the Court does not find that these allegations amount to a well-plead claim for false designation.

Finally, Agency Y alleges that on June 22, 2020, DFO Global made an announcement that Agency Y was "rebranding" as Amasa. See SAC ¶ 52. However, the Court does not find that Agency Y has alleged that this "rebranding" was false or likely to cause consumer confusion. As DFO Global notes, even if Agency Y is able to prevail on its breach of contract theory and is found to own the Agency Y Mark, in announcing the rebrand, DFO Global ensure that its consumers knew where the services were coming from.

> DFO did exactly what a former licensee would be permitted to do at the conclusion of a trademark license: it **[*26]** identified to the public that instead of offering its products or services under the prior mark, such services would instead be offered under a new mark. This accurately, rather than falsely, designates source, and informed consumers that such services will emanate from DFO, whether previously under the Agency Y Mark or subsequently under the Amasa Mark.

Mot., Dkt. No. 39, at 18. Accordingly, the Court does not see how this allegation can properly state a claim for false designation of origin.

As such, the Court **GRANTS** the motion to dismiss with respect to the false advertising, false designation of origin, and common law unfair competition claims, with leave to amend.

3. Fraudulent Concealment

DFO Global next argues that Agency Y's fraudulent concealment claims should be dismissed. Mot., Dkt. No. 39, at 19. Agency Y's allegations regarding fraudulent concealment are: (1) that DFO Global concealed its filing of the Agency Y Mark application and (2) that it had a "plan to destroy Agency Y's business." SAC ¶¶ 82-86.

HN12[] The elements of a claim for fraudulent concealment are: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the **[*27]** plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage. *Hahn v. Mirda, 147 Cal. App. 4th 740, 748, 54 Cal. Rptr. 3d 527 (2007)*.

HN13[] DFO Global asserts that the first claim should be dismissed because it is barred by the economic loss doctrine under which tort claims are barred where they are based on the same facts and damages as a breach of contract claim. Mot., Dkt. No. 39, at 19. The economic loss doctrine "precludes recovery for 'purely economic loss due to disappointed expectations,' unless the plaintiff 'can demonstrate harm above and beyond a broken contractual promise.'" *Silcox v. State Farm Mut. Auto. Ins. Co., No. 14-cv-2345-AJB-MDD, 2014 U.S. Dist. LEXIS 176297, 2014 WL 7335741, at *7 (S.D. Cal. Dec. 22, 2014)* (citations omitted). "[T]he weight of authority counsels in favor of applying the economic loss doctrine to fraudulent concealment . . . ." *Rattagan v. Uber Techs., Inc., No. 19-CV-01988-EMC, 2020 U.S. Dist. LEXIS 150342, 2020 WL 4818612, at *8 (N.D. Cal. Aug. 19, 2020)* (citing cases). The Court agrees with DFO Global that the economic loss doctrine bars recovery in tort for the same loss that emanates from a broken contractual promise.

Regarding the alleged intent to **[*28]** destroy Agency Y's business, DFO Global argues that these allegations are "nothing more than disguised breach of contract claim[s] for failure to grow and promote the brand." Mot., Dkt. No. 39, at 20. The Court agrees that these allegations are insufficient to show intent to destroy the Agency Y brand as is required under the heightened 9(b) pleading standard. Even if Agency Y alleges that it was fraudulently induced to enter into the Addendum, it cannot reasonably argue that DFO Global was concealing its intent to do the very thing that the Addendum allowed. Accordingly, the Court **GRANTS** the motion to dismiss the fraudulent concealment claims as they relate to the Agency Y Mark, with leave to amend.

iv. *Unfair Competition Claims*

DFO Global next argues that Agency Y's claims under the unlawful, unfair, and fraudulent prongs of California's Unfair Competition Law ("UCL") must be dismissed. Mot., Dkt. No. 39, at 21.

HN14[] California's UCL prohibits "any unlawful, unfair, or fraudulent business act or practices." *Cal. Bus. & Prof. Code §17200, et. seq.* To prevail on a UCL claim, a plaintiff must "make a twofold showing: he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition." *Peterson v. Cellco P'ship, 164 Cal. App. 4th 1583, 1590, 80 Cal. Rptr. 3d 316 (4th Dist. 2008)*.

1. Unlawful **[*29]** Prong

DFO Global points out that Agency Y's contention of unlawful behavior under the UCL is based on the fact that DFO Global adopted and registered the Agency Y mark with the USPTO and engaged in conduct that violated the Lanham Act as asserted in the second and third causes of action. SAC ¶ 94. Thus, the UCL claim is premised on Agency Y's Lanham Act and fraudulent concealment causes of action, which as discussed above, cannot survive. The Court agrees.

Accordingly, the Court **GRANTS** the motion to dismiss the UCL claim based on the unlawful prong, with leave to amend.

2. Unfair Prong

DFO Global next argues for the dismissal of Agency Y's UCL claim under the "unfair" prong. Mot., Dkt. No. 39, at 21. ***HN15***[] In the context of *section 17200*, "unfair...means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

The Court finds that, like the FAC, the SAC fails to specifically explicate what public policy DFO Global violated through its allegedly unfair actions. Agency Y has not cured its deficiency, instead **[*30]** vaguely alleging that DFO's actions "offend[] an established public policy." SAC ¶ 96. Because there is no further detail or explanation as to what public policy Agency Y claims has been violated, the Court cannot allow this claim to stand. ***HN16***[] It is well-established that "where a claim of an unfair act or practice is predicated on public policy, . . . Cel—Tech [requires] that the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory or regulatory provisions." *Graham v. Bank of Am., N.A., 226 Cal. App. 4th 594, 613, 172 Cal. Rptr. 3d 218 (2014)*.

Accordingly, the Court **GRANTS** the motion to dismiss the UCL claim with respect to the "unfair" prong, with leave to amend.

3. Fraudulent Prong

Finally, DFO Global argues that Agency Y's claim under the UCL for fraudulent behavior must be dismissed. Mot., Dkt. No. 39, at 22. Specifically, DFO Global states that Agency Y's fraudulent prong claim is based on "actions, claims, nondisclosures, and misleading statements, as alleged herein, as well as its willful use of the AGENCY Y mark." Id. (citing SAC ¶ 100). DFO Global points out, though, that none of these allegations is sufficient to meet the *Rule 9* heightened pleading standard for fraud, and that this claim is also barred by the economic **[*31]** loss doctrine. Id.

The Court agrees that the fraudulent prong is not properly plead according to the heightened *Rule 9* pleading standard. Further, the Court finds that this claim is barred by the economic loss doctrine. Accordingly, the Court **GRANTS** the motion to dismiss the UCL claim as it relates to the fraudulent prong, with leave to amend.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** the motion with leave to amend. The Court finds that oral argument will not be helpful in this matter. *Fed. R. Civ. P. 78*; L-R 7-15. Accordingly, the Court VACATES the hearing set for April 26, 2021.

IT IS SO ORDERED.

Hobart-Mayfield, Inc. v. Nat'l Operating Comm. on Stds. for Ath. Equip.

United States District Court for the Eastern District of Michigan, Southern Division

April 22, 2021, Decided; April 22, 2021, Filed

Case No. 19-cv-12712

Reporter

535 F. Supp. 3d 638 *; 2021 U.S. Dist. LEXIS 77122 **; 2021 WL 1575297

HOBART-MAYFIELD, INC., D/B/A MAYFIELD ATHLETICS, Plaintiff, v. NATIONAL OPERATING COMMITTEE ON STANDARDS FOR ATHLETIC EQUIPMENT, ET AL., Defendants.

Subsequent History: Affirmed by *Hobart-Mayfield, Inc. v. Nat'l Operating Comm. on Standards for Ath. Equip., 2022 U.S. App. LEXIS 25338 (6th Cir. Mich., Sept. 9, 2022)*

Prior History: *Hobart-Mayfield, Inc. v. Nat'l Operating Comm. on Stds. for Ath. Equip., 2020 U.S. Dist. LEXIS 193471, 2020 WL 6130878 (E.D. Mich., Oct. 19, 2020)*

Core Terms

helmet, Manufacturer, Add-on, certification, allegations, conspiracy, football, Defendants', motion to dismiss, expectancy, license agreement, void, products, testing, restraint of trade, press release, Sherman Act, business relationship, tortious interference, circumstantial evidence, speculation, Athletic, factors, unreasonable restraint, Counts, Sports, fails

LexisNexis® Headnotes

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

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

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

Fed. R. Civ. P. 12(b)(6) allows a court to make an assessment as to whether the plaintiff has stated a claim upon which relief may be granted. To withstand a motion to dismiss pursuant to *Rule 12(b)(6)*, a complaint must comply with the pleading requirements of *Fed. R. Civ. P. 8(a)(2)*. *Rule 8(a)(2)* requires a short and plain statement of the claim showing that the pleader is entitled to relief, to give the defendant fair notice of what the claim is and the grounds upon which it rests. To meet this standard, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.

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

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

HN2[] Motions to Dismiss, Failure to State Claim

When considering a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, a court must construe the complaint in a light most favorable to the plaintiff and accept all of his factual allegations as true. While courts are required to accept the factual allegations in a complaint as true, the presumption of truth does not apply to a claimant's legal conclusions. Therefore, to survive a motion to dismiss, a plaintiff's pleading for relief must provide more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN3[] Sherman Act, Claims

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, prohibits contracts or conspiracies in restraint of trade or commerce among the several states. Only unreasonable restraints of trade are considered in violation of the Sherman Act. Thus, to establish a violation of *Section 1*, a plaintiff must demonstrate that there is: (1) an agreement, which may be in the form of a contract, combination, or conspiracy; (2) affecting interstate commerce; (3) that imposes an unreasonable restraint of trade.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Types of Evidence > Circumstantial Evidence

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

HN4[] Sherman Act, Claims

To plead unlawful agreement, a plaintiff may allege either an explicit agreement to restrain trade, or sufficient circumstantial evidence tending to exclude the possibility of independent conduct. But under either approach, the facts alleged must plausibly suggest, rather than be merely consistent with, an agreement to restrain trade in violation of the Sherman Act.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN5 [] **Sherman Act, Claims**

A plaintiff must plead more than parallel conduct to maintain a claim under *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*; parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a claim under *Section 1*; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a *Section 1* complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Types of Evidence > Circumstantial Evidence

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

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

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

HN6 [] **Sherman Act, Claims**

A plaintiff must provide sufficient circumstantial evidence to maintain a parallel conduct claim under *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*, also called plus factors, that tend to exclude the possibility of independent conduct. The Sixth Circuit has provided various plus factors that a district court may employ in its analyses, including (1) whether the defendants' actions, if taken independently, would be contrary to their economic self-interest; (2) whether defendants have been uniform in their actions; (3) whether defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and (4) whether defendants have a common motive to conspire.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN7 [] **Sherman Act, Claims**

Mere presence on either a board or at a trade association meeting, without further factual allegations, does not amount to a conspiracy claim under *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN8[] **Sherman Act, Claims**

The Sixth Circuit has held that generic pleading, alleging misconduct against defendants without specifics as to the role each played in an alleged conspiracy under *Section 1 of the Sherman Act, 15 U.S.C.S. § 1*, is specifically rejected.

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

HN9[] **Per Se Rule & Rule of Reason, Sherman Act**

The rule of reason inquiry provides that the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > ... > Commercial Interference > Employment Relationships > Elements

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

HN10[] **Intentional Interference, Elements**

To state a claim for intentional interference with a business relationship or expectation, a plaintiff must allege the following elements: (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy by defendant; (3) an intentional interference by defendant inducing or causing a breach or termination of the relationship or expectancy; and (4) resulting damage to the plaintiff. The third prong, intentional interference, requires that the plaintiff demonstrate with some specificity affirmative acts by the defendant that corroborate the improper motive of the interference. Importantly, where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.

Torts > ... > Business Relationships > Intentional Interference > Elements

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

HN11[] **Intentional Interference, Elements**

To satisfy the element of a valid business expectancy for a tortious interference claim under Michigan law, a plaintiff must show that the plaintiff had more than a subjective expectation of entering into a business relationship.

Counsel: [1]** For Hobart-Mayfield, Inc., Doing business as Mayfield Athletics, Plaintiff: Allen Russell Bachman, LEAD ATTORNEY, K&L; Gates, ***Antitrust Law***, Washington, DC; Christopher M. Wyant, K&L; Gates LLP, Seattle, WA; Diane L Hewson, Rochester Hills, MI.

For National Operating Committee on Standards for Athletic Equipment, also known as NOCSAE, Gregg Hartley, Michael Oliver, Defendants: Jennifer A. Morante, Wilson Elser Moskowitz Edelman & Dicker LLP, Livonia, MI; Luke David Wolf, Wilson Elser Moskowitz Edelman and Dicker LLP, Livonia, MI; William S. Cook, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, Livonia, MI.

For Kranos Corporation, Doing business as Schutt Sports, Defendant: David A. White, Davis & White, LLC, North Andover, MA; Matthew L. Powell, Kerr, Russell, Detroit, MI.

For Riddell, Inc., Defendant: Christopher G. Hanewicz, Gabrielle E. Bina, Rodger K. Carreyn, Perkins Coie LLP, Madison, WI; Michael G. Brady, Warner, Norcross, Southfield, MI.

For Xenith, LLC, Kyle Lamson, Defendants: David A. Ettinger, Honigman, Miller, Schwartz and Cohn LLP, Detroit, MI; Jeffrey B Morganroth, Morganroth & Morganroth, Birmingham, MI.

For Vincent Long, Defendant: Matthew L. Powell, Kerr, Russell, Detroit, **[**2]** MI.

Judges: GERSHWIN A. DRAIN, UNITED STATES DISTRICT JUDGE.

Opinion by: GERSHWIN A. DRAIN

Opinion

[*641] OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS [#62]

I. INTRODUCTION

On September 16, 2019, Plaintiff Hobart-Mayfield, Inc. ("Mayfield") filed the instant action against Kranos Corporation ("Schutt Sports"), Riddell, Inc., Xenith, LLC, Gregg Hartley, Michael Oliver, Vincent Long, and Kyle Lamson (collectively referred to as the "Manufacturer Defendants") as well as the National Operating Committee on Standards for Athletic Equipment ("NOCSAE").[1] *See* ECF No. 1. Plaintiff filed an Amended Complaint on October 10, 2020. ECF No. 61. Plaintiff maintains that Defendants have unlawfully interfered with the sale of its helmet aftermarket product, the S.A.F.E.Clip, in violation **[*642]** of the Sherman Act and the Michigan Antitrust Reform Act. *Id.*

Presently before the Court is Defendants' Motion to Dismiss, filed on November 11, 2020. ECF No. 62. Plaintiff filed its Response in Opposition on December 11, 2020. ECF No. 63. Defendants' Reply was filed on December 28, 2020. ECF No. 65. The Court held a hearing on this matter on April 13, 2021. For the reasons that follow, the Court will **GRANT** Defendants' Motion to Dismiss [#62].

[**3] II. BACKGROUND

A. Factual Background

Plaintiff Hobart-Mayfield, Inc. is the marketer, distributor, and seller of a football helmet shock absorber called the "S.A.F.E.Clip." ECF No. 61, PageID.1340. The S.A.F.E.Clip is an aftermarket "add-on" product that "can be

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[1] On December 23, 2020, Defendant Kranos Corporation, doing business as Schutt Sports, filed a Suggestion of Bankruptcy and Notice of Operation of the Automatic Stay. ECF No. 64. The Notice indicates that Defendant voluntarily filed for bankruptcy on December 18, 2020. While the Court acknowledges the petition filed in the United States Bankruptcy Court for the District of Delaware, the ultimate disposition of this case is not affected by Defendant's filing.

retrofitted to most existing helmets and facemasks" and purports to reduce the impact to the football player's helmet each time they are hit. *Id.* at PageID.1358. Mayfield was formed in 2014 and received fully patented status for the S.A.F.E.Clip in 2017. *Id.* Plaintiff states that "several generations of the S.A.F.E.Clip were extensively tested and refined" between 2016 and 2018. *Id.* Plaintiff further claims that "the use of the S.A.F.E.Clip resulted in force reductions as high as 35% per hit" after multiple rounds of helmet testing. *Id.* at PageID.1359.

The National Operating Committee on Standards for Athletic Equipment ("NOCSAE") is a nonprofit body that "develops voluntary performance and test standards for athletic equipment that are available for adoption by any athletic regulatory body." *Id.* at PageID.1350, 1424. The parties agree that the majority of football regulatory bodies require most players, from youth leagues to the **[**4]** NFL, to use football helmets and facemasks that comply with NOCSAE standards. *Id.* Plaintiff contends that under this structure, equipment that does not meet NOCSAE standards "are almost entirely excluded from the respective markets for football helmets and football helmet Add-ons." *Id.* at PageID.1356.

Plaintiff states that NOCSAE enters into licensing agreements with certain football helmet manufacturers, including Defendants Riddell, Schutt Sports, and Xenith, which allows them to utilize NOCSAE-trademarked logos and phrases. *Id.* at PageID.1371. Plaintiff alleges that these Defendants together control nearly one hundred percent of the relevant football helmet and Add-on or replacement part market. *Id.*

NOCSAE published various press releases, some from 2013 and others from 2018, that relate to the certification of helmets with Add-on products attached. The 2013 press releases states in relevant part:

> The addition of an item(s) to a helmet previously certified without those item(s) creates a new untested model. Whether the add-on product changes the performance or not, the helmet model with the add-on product is no longer "identical in every aspect" to the one originally certified by the **[**5]** manufacturer.
> When this happens, the manufacturer which made the original certification has the right, under the NOCSAE standards, to declare its certification void. It also can decide to engage in additional certification testing of the new model and certify the new model with the add-on product, but it is not required to do so.

Id. at PageID.1522 (emphasis added). Thus, the addition of an Add-on product to a previously NOCSAE-certified helmet would create a new untested—and uncertified—helmet model. *Id.* However, the 2013 **[*643]** press release statements did specify that "[c]ompanies which make add-on products for football helmets have the right to make their own certification of compliance with NOCSAE standards on a helmet model, but . . . the certification and responsibility for the helmet/third-party product combination would become theirs, (not the helmet manufacturer)." *Id.*

The 2018 press release statements addressed a different position on this issue, providing now that:

> The addition of an item(s) to a helmet previously certified without the item(s) creates a new untested model. Whether the add-on product improves the performance or not, the helmet model with the add-on product is no longer **[**6]** "identical in every aspect" to the one originally certified by the manufacturer.
> ....
> When this happens, the helmet manufacturer has the right, under the NOCSAE standards, to declare its certification void. It may elect to allow the certification to remain unaffected, or it may also decide to engage in additional certification testing of the new model and certify the new model with the add-on product, but it is not required to do so.

Id. at PageID.1525. This release indicates that third party add-on manufacturers could no longer independently acquire NOCSAE certification for the helmets with Add-on products.

Plaintiff thus alleges that the Manufacturer Defendants' right to declare its NOCSAE certification void constitutes an unreasonable restraint on trade that interferes with sales of the S.A.F.E.Clip. Plaintiff points specifically to the licensing agreements between NOCSAE and the Manufacturer Defendants as evidence of a conspiracy to exclude the S.A.F.E.Clip from the market. ECF No. 61, PageID.1367. These licensing agreements, Plaintiff claims, "are unreasonably anticompetitive because all of NOCSAE's legitimate standard setting objectives could be served with less restrictive licensing **[**7]** terms." *Id.* These allegations form the basis for Plaintiff's claims for violations of the Sherman Act and Michigan Antitrust Reform Act as well as tortious interference with a business relationship or expectancy by all Defendants. *Id.*

B. Procedural Background

Plaintiff filed its initial Complaint against Defendants on September 16, 2019. *See* ECF No. 1. Pursuant to multiple stipulations, Defendants were granted additional time to respond to the Complaint. *See* ECF Nos. 5, 10, 20. Defendants subsequently moved to dismiss Plaintiff's Complaint in late 2019 and early 2020. ECF Nos. 18, 31. The dismissal motions were fully briefed following a stipulated extension of time for Plaintiff to file its Response. *See* ECF No. 25.

On October 19, 2020, this Court granted Plaintiff's Motion for Leave to File an Amended Complaint and consequently mooted Defendants' outstanding Motions to Dismiss. *See* ECF No. 60. Defendants now move to dismiss Plaintiff's First Amended Complaint.

III. Legal Standard

HN1[] *Federal Rule of Civil Procedure 12(b)(6)* allows the court to make an assessment as to whether the plaintiff has stated a claim upon which relief may be granted. *See* *Fed. R. Civ. P. 12(b)(6)*. To withstand a motion to dismiss pursuant to *Rule 12(b)(6)*, a complaint must comply with the pleading **[**8]** requirements of *Federal Rule of Civil Procedure 8(a)(2)*. *See* *Ashcroft v. Iqbal, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. *Rule 8(a)(2)* requires "a short and plain statement of the claim showing that the pleader is entitled **[*644]** to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quotation marks omitted) (quoting *Fed. R. Civ. P. 8(a)(2)*; *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. To meet this standard, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*; *see also* *Iqbal, 556 U.S. at 678-80* (applying the plausibility standard articulated in *Twombly*).

HN2[] When considering a *Rule 12(b)(6)* motion to dismiss, the Court must construe the complaint in a light most favorable to the plaintiff and accept all of his factual allegations as true. *Lambert v. Hartman, 517 F.3d 433, 439 (6th Cir. 2008)*. While courts are required to accept the factual allegations in a complaint as true, *Twombly, 550 U.S. at 556*, the presumption of truth does not apply to a claimant's legal conclusions. *See* *Iqbal, 556 U.S. at 678*. Therefore, to survive a motion to dismiss, the plaintiff's pleading for relief must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Ass'n of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 548 (6th Cir. 2007)* (quoting *Twombly, 550 U.S. at 555*) (internal citations and quotations omitted).

IV. Discussion

Plaintiff asserts six counts against Defendants: (1) Violation of the Sherman Act and the **[**9]** Michigan Antitrust Reform Act by all Defendants (Count I); (2) Conspiracy to Restrain Trade in violation of the Sherman Act and the Michigan Antitrust Reform Act by all Defendants (Count II); (3) Tortious Interference with a Business Relationship or Expectancy by Schutt Sports (Count III); (4) Tortious Interference with a Business Relationship or Expectancy by Riddell (Count IV); (5) Tortious Interference with a Business Relationship or Expectancy by Xenith (Count V); and (6) Tortious Interference with a Business Relationship or Expectancy by NOCSAE (Count VI). The Court will address the claims in their relative pairings below.

A. Count I

HN3[] Section 1 of the Sherman Act prohibits contracts or conspiracies "in restraint of trade or commerce among the several States." 15 U.S.C. § 1; *see* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283, 201 L. Ed. 2d 678 (2018).[2] The Supreme Court has emphasized that only *unreasonable* restraints of trade are considered in violation of the Sherman Act. *Id.* Thus, in order to establish a violation of Section 1, a plaintiff must demonstrate that there is: (1) an agreement, which may be in the form of a contract, combination, or conspiracy; (2) affecting interstate commerce; (3) that imposes an unreasonable restraint of trade. *See* White and White, Inc. v. American Hospital Supply Corp., 723 F. 2d 495, 504 (6th Cir. 1983); *see also* United States v. Blue Cross Blue Shield of Michigan, 809 F. Supp. 2d 665, 671 (E.D. Mich. 2011).

HN4[] "To plead unlawful agreement, **[**10]** a plaintiff may allege either an explicit agreement to restrain trade, or 'sufficient circumstantial evidence tending to exclude the possibility of independent conduct.'" **[*645]** Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc., 648 F.3d 452, 457 (6th Cir. 2011) (quoting In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 907 (6th Cir. 2009)). But "[u]nder either approach, the facts alleged must 'plausibly suggest[],' rather than be 'merely consistent with,' an agreement to restrain trade in violation of the Sherman Act." *Id.*

In its first claim, Plaintiff alleges that the licensing agreements between the Manufacturer Defendants and Defendant NOCSAE permit unreasonable restraints on trade regarding the certifications of helmets with Add-on products attached. ECF No. 61, PageID.1408. However, Plaintiff clarifies in its Response brief that Count I is based not just on the licensing agreements, but also "on terms NOCSAE added beyond the four corners of the initial agreements themselves." ECF No. 63, PageID.1618. Plaintiff's assertion is accordingly reliant on the difference between the 2013 and 2018 NOCSAE press releases and the lost ability for Add-on manufacturers to independently obtain NOCSAE helmet certification. *Id.* Defendants oppose this argument, maintaining instead that the licensing agreements were never amended and contain standard provisions **[**11]** that do not unreasonably restrain trade with Add-on product manufacturers. *See* ECF No. 65, PageID.1938-39.

During the hearing on this matter, the parties disagreed about the characterization of a third NOCSAE document, this time from 2015. *See* ECF No. 61, PageID.1455. Defendants state that the NOCSAE policy changed not in 2018 but "three years earlier in 2015, when it began requiring all certifications of compliance with NOCSAE standards to be made by an American National Standards Institute accredited product-certification body . . . and thereby eliminated the self-certification option." ECF No. 62, PageID.1590. Plaintiff acknowledges this document, but maintains that the 2013 policy regarding Add-on manufacturer NOCSAE certifications was viable until the 2018 press release expressly removed that language.

The ultimate resolution of this Count, however, does not hinge on whether NOCSAE's policy regarding Add-on manufacturer certifications changed in 2015 or 2018. Plaintiff's first Count is deficient because it has not demonstrated that the licensing agreements themselves, or the impact of the 2013, 2015, or 2018 NOCSAE-related documents, were unreasonable restraints on trade. The change **[**12]** in policy reflected the omission of the Add-on manufacturer certification—but did not impact what the Manufacturer Defendants could or could not do with NOCSAE certifications. As Plaintiff's First Amended Complaint notes, the Manufacturer Defendants always had "the right, under NOCSAE standards, to declare its certification void" in 2013. ECF No. 61, PageID.1365. Defendants are correct to emphasize that neither the form agreements nor the press statements "require that any action be taken with respect to add-ons, much less require their exclusion." ECF No. 65, PageID.1938.

Plaintiff thus fails to meet the *Watson Carpet* standard demonstrating "either an explicit agreement to restrain trade, or 'sufficient circumstantial evidence tending to exclude the possibility of independent conduct.'" 648 F.3d at 457. In *Watson Carpet*, the plaintiff sufficiently alleged that the defendants actively worked together to design a plan and exclude the plaintiff from the market by making false and public accusations about the plaintiff's business and unilaterally refusing to sell any of its products in the market. *See* id. at 455 (describing how the defendants falsely

[2] "Because the Michigan Anti-Trust statute and the Sherman Anti-Trust Act mirror each other, [the court] appl[ies] the same analysis to both the federal and state anti-trust claims." Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 368 n.1 (6th Cir. 2003).

claimed that the plaintiff "used drugs, sold drugs, cheated **[**13]** his customers, **[*646]** slept with his employees, had financial problems, had trouble with the IRS, and was in the mob," while also instructing employees to "keep [the p]laintiff from getting the sale, even if it meant losing money on the sale.").

Here, Plaintiff's claims in the First Amended Complaint fall far short of this standard—there are no allegations of any communication, agreement, or conspiratorial conduct between Defendants about the policy change or any of the Manufacturer Defendants' licensing agreements. *See* *In re Travel Agent Comm'n Antitrust Litig., 583 F.3d at 907* (quoting *Monsanto Co. v. Spray—Rite Service Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))* ("[T]here must be direct or circumstantial evidence that reasonably tends to prove that the defendant and others had a conscious commitment to a common scheme designed to achieve an unlawful objective."). Further, Defendants emphasize that these license agreements applied to "sports equipment manufacturers" more broadly, including helmets and other equipment for baseball, softball, ice hockey, lacrosse, and polo. ECF No. 62, PageID.1588. Plaintiff's allegations do not adequately explain how these widely used licensing agreements are evidence of a conspiracy specifically executed by football helmet manufacturers.

Plaintiff additionally fails to **[**14]** demonstrate how the certification policy modification was unreasonable in light of Defendants' competing and valid interests in maintaining their brand credibility and helmet safety standards. Thus, Count I does not provide sufficient evidence beyond mere speculation that demonstrates a conspiracy derived from the licensing agreements and the NOCSAE press releases. The Court will accordingly grant Defendants' Motion as to Count I.

B. Count II

In its second claim, Plaintiff argues that Defendants have engaged in an overarching conspiracy "to decertify any football helmets to which consumers have applied helmet Add-ons *regardless* of whether the helmet and Add-on collectively meet[] NOCSAE standards" in violation of *Section 1* of the Sherman Act. ECF No. 61, PageID.1410 (emphasis in original). This allegation is purportedly supported by various circumstantial factors that establish Defendants' involvement in unlawful, parallel conduct to restrain trade. In response, Defendants argue that the majority of Plaintiff's arguments are boilerplate allegations devoid of the requisite detail to survive a dismissal motion. See ECF No. 62, PageID.1593. Defendants further maintain that the circumstantial evidence **[**15]** supports their position and emphasizes their independent concerns about the S.A.F.E.Clip product's safety.

HN5[] A plaintiff must plead more than parallel conduct to maintain their claim; as described in *Twombly*, "parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a *§ 1* claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory." *550 U.S. at 557*. "An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a *§ 1* complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitle[ment] to relief." *Id.* (internal quotations omitted).

HN6[] Accordingly, a plaintiff must provide sufficient circumstantial evidence, also called "plus factors," that tend to exclude the possibility of independent conduct. *In re Travel Agent Comm'n Antitrust Litig.,* ***[*647]*** *583 F.3d at 907*. The Sixth Circuit has provided various "plus factors" that a district court may employ in its analyses, including "(1) whether the defendants' actions, if taken independently, would be contrary to their economic self-interest; **[**16]** (2) whether defendants have been uniform in their actions; (3) whether defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and (4) whether defendants have a common motive to conspire." *Id.*

Here, Plaintiff's second Count relies heavily on the allegation that Defendants are voiding, or threatening to void, their helmet NOCSAE certifications if third-party Add-on products are attached, even when the combined product passes the required NOCSAE testing standards. *See* ECF No. 63, PageID.1621-22. Plaintiff supports its claim by noting that Zuti, a non-party Add-on manufacturer, purportedly developed faceguards that pass NOCSAE certification standards with Defendant Riddell's helmets. *See* ECF No. 61, PageID.1387. But even with this certification, "Riddell nevertheless still voids its helmet certifications if the helmets are used with a Zuti faceguard." *Id.* This is an example, Plaintiff argues, of the ongoing conspiracy to entirely exclude all Add-on products like the S.A.F.E.Clip from the market.

As Defendants point out, however, the claims in the First Amended Complaint must derive from Mayfield's experiences; allegations as to other **[**17]** Add-on products, such as the Zuti faceguard, cannot be substituted to form the basis of Plaintiff's own claims. Plaintiff's claims must therefore "stand or fall on its allegations relating to Mayfield and the S.A.F.E.Clip." ECF No. 62, PageID.1596. When asked about this during the hearing, Plaintiff conceded that First Amended Complaint contains no allegations stating that Mayfield submitted evidence to the Manufacturer Defendants that demonstrated its product, the S.A.F.E.Clip, complied with NOCSAE standards. While the product underwent various rounds of testing between 2016 and 2018, it is not pled that Defendants (1) knew whether or not Plaintiff's product was NOCSAE-compliant; (2) received information about Plaintiff's most recent testing results; or (3) voided or threatened to void their NOCSAE-compliance with the S.A.F.E.Clip product attached. Without these facts, Plaintiff does no more than speculate that its product *would* be rejected even if it were in full compliance with NOCSAE standards—but mere speculation does not survive the pleading requirements established under *Twombly*.

In an attempt to illustrate additional "plus factors" indicating Defendants' broader conspiracy, **[**18]** Plaintiff also points to specific communications between Defendants Schutt and Xenith in 2018 about testing an older model—the only one seemingly available to them—of the S.A.F.E.Clip. ECF No. 61, PageID.1391. While the email states that the product failed certain testing performed independently by both Schutt and Xenith, Plaintiff highlights that this communication between the parties was in purported violation of nondisclosure agreements. *Id.* But the Court is not persuaded that this exchange evinces an attempt by Defendants to "coordinate their opposition to the product and further lessen competition from Mayfield Athletics and other Add-on manufacturers." *Id.* at 1392. To the contrary, the communication plainly illustrates that Defendants found that an older version of the S.A.F.E.Clip failed NOCSAE compliance—which Plaintiff does not dispute. The Court agrees with Defendants that it was "only natural" for the Manufacturer **[*648]** Defendants to individually reject the use of a product that changed their helmets absent ironclad assurance as to its safety, especially considering the potential for serious head injuries and concussions. *See* ECF No. 62, PageID.1585. Thus, without more, this claim does not **[**19]** "invest[] either the action or inaction alleged with a plausible suggestion of conspiracy." *Twombly, 550 U.S. at 565*.

The additional circumstantial factors Plaintiff provides similarly fail to rise above the level of speculation with neutral, parallel conduct. For example, Plaintiff references the Manufacturer Defendants' purported control of the NOCSAE board and the potential for collusion where "Defendants routinely attended trade association meetings." ECF No. 63, PageID.1627. ***HN7***[] But mere presence on either a board or at a trade association meeting, without further factual allegations, does not amount to a conspiracy claim. *See, e.g., In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007)* (the allegation "is in entirely general terms without any specification of any particular activities by any particular defendant; it is nothing more than a list of theoretical possibilities . . . ."). Additionally, exhibits to the First Amended Complaint reveal that NOCSAE's board contains representation from at least ten different organizations, not just football helmet manufacturers. *See* ECF No. 61, PageID.1424-25 (listing, for example, the American Medical Society for Sports Medicine and the National Athletic Trainers Association as additional NOCSAE board members).

Thus, **[**20]** without more information, such as (1) when conspiratorial communication and conduct occurred between Defendants; (2) which Defendants communicated with one another to influence NOCSAE policy; or (3) how Defendants acted in concert to unilaterally exclude the S.A.F.E.Clip from the market, the Court cannot find Plaintiff's second Count sufficient to withstand dismissal. Instead, the First Amended Complaint largely contains bare legal conclusions or allegations of unilateral conduct that remain in neutral territory and does not rise to the level of conspiratorial action. *See* ECF No. 62, PageID.1578. ***HN8***[] The Sixth Circuit has routinely dismissed cases on similar grounds, holding that "[g]eneric pleading, alleging misconduct against defendants without specifics as to the role each played in the alleged conspiracy, was specifically rejected by *Twombly*." *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 436 (6th Cir. 2008)* (specifying that "nowhere did

Plaintiffs allege when Defendants joined the [] conspiracy, where or how this was accomplished, and by whom or for what purpose.").

Further, during the hearing, the parties both discussed whether Defendants were acting contrary to their respective economic interests by declining to adopt the S.A.F.E.Clip to their **[**21]** helmets. Plaintiff argued that "NOCSAE has an economic interest in maintaining safety standards by certifying helmet/Add-on combinations when testing data establishes that they reduce risks," and that the policy change reflected in the 2018 press release contradicts this interest. ECF No. 63, PageID.1626. But Defendants do not dispute that both NOCSAE and the Manufacturer Defendants share this strong economic interest in maintaining safety standards and engaging with NOCSAE-compliant Add-ons. Instead, as discussed *supra*, Plaintiff fails to allege that it ever provided Defendants with a NOCSAE-compliant S.A.F.E.Clip.

Consequently, Defendants are not acting contrary to their economic interests by adhering to publicly available safety standards and ensuring that their credibility as **[*649]** institutional and market actors are maintained. As Defendants note, it was prudent for them to decline to use the S.A.F.E.Clip at this juncture because helmet manufacturers have an equally "strong incentive and moral imperative to control the quality of their products . . . [i]f they do not, safety is compromised, and they subject themselves to negative press and liability." ECF No. 62, PageID.1585. Given these **[**22]** competing objectives, Plaintiff's Count II fails to plead sufficient "plus factors" of circumstantial evidence demonstrating an overarching conspiracy here.

Finally, while Plaintiff has not met the standards to plead a conspiracy, the Court also notes its agreement with Defendants' assertion that the First Amended Complaint does not contain adequate facts to establish either a *per se* violation of ***antitrust law*** or a violation under the rule of reason. *See* ECF No. 62, PageID.1597. Neither Count I or II allege that Defendants "boycott[ed] suppliers or customers in order to discourage them from doing business with a competitor," a general requirement for *per se* violations. *Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1013 (6th Cir. 1999)* (quoting *F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*. Given Defendants' competing interests in safety and standards adherence, this case clearly does not involve "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Lie v. St. Joseph Hosp. of Mount Clemens, Mich., 964 F.2d 567, 569 (6th Cir. 1992)*.

HN9[] Plaintiff's argument fails under the rule of reason inquiry as well, which provides that the "test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress **[**23]** or even destroy competition." *Indiana Fed'n of Dentists, 476 U.S. at 458* (quoting *Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918))*. As the Court has discussed, Plaintiff has failed to demonstrate how NOCSAE's policy change unreasonably restrained trade or fostered an anticompetitive market. The First Amended Complaint fails to rise above the level of mere speculation, especially with regard to the S.A.F.E.Clip specifically. Without this evidence, Plaintiff cannot adequately plead a violation of ***antitrust law*** under the rule of reason either.

Accordingly, the Court will also dismiss Plaintiff's Count II.

C. Counts III-VI

Plaintiff's remaining Counts allege that Defendants individually and intentionally interfered with Mayfield's "ongoing business relationships and business expectancies with football teams, football players, football equipment distributors, and other purchasers of football equipment throughout the United States." ECF No. 61, PageID.1410-11. Defendants collectively deny Plaintiff's claims, arguing instead that Plaintiff fails to establish any malicious conduct by Defendants or any valid business expectancies that could maintain Counts III through VI. *See* ECF No. 62, PageID.1598-99.

HN10[] In order to state a claim for intentional interference with a business relationship **[**24]** or expectation, a plaintiff must allege the following elements: (1) the existence of a valid business relationship or expectancy; (2)

knowledge of the relationship or expectancy by defendant; (3) an intentional interference by defendant inducing or causing a breach or termination of the relationship or expectancy; and (4) resulting damage to the plaintiff. *Badiee v. **[*650]** Brighton Area Sch., 265 Mich. App. 343, 365-66, 695 N.W.2d 521 (2005)*. The third prong, intentional interference, requires that the plaintiff demonstrate with some specificity "affirmative acts by the defendant that corroborate the improper motive of the interference." *BPS Clinical Lab. v. Blue Cross & Blue Shield of Michigan, 217 Mich. App. 687, 699, 552 N.W.2d 919, 925 (1996)* (citing *Feldman v. Green, 138 Mich. App. 360, 369, 360 N.W.2d 881 (1984))*. Importantly, "[w]here the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *Id.* (citing *Michigan Podiatric Medical Ass'n v. Nat'l Foot Care Program, Inc., 175 Mich. App. 723, 736, 438 N.W.2d 349 (1989))*.

Here, Plaintiff's remaining claims fail on two separate grounds: Plaintiff does not adequately allege either (1) the existence of valid business relationships or expectancies by Mayfield, or (2) improper motive or interference by Defendants. First, the First Amended Complaint contains only speculation about future business relationships that were desired, but not acquired, by Mayfield. Plaintiff alleges, for example, that various football teams—including **[**25]** teams at Georgetown University and various Michigan and Wisconsin high schools—declined to purchase S.A.F.E.Clips for fear that the product would void the helmets' warranties. *See* ECF No. 61, PageID.1404-05. ***HN11***[] But to satisfy the element of a "valid business expectancy" under Michigan law, a plaintiff "must show that they had more than a 'subjective expectation of entering into a [business] relationship.'" *Saab Auto. AB v. Gen. Motors Co., 953 F. Supp. 2d 782, 789 (E.D. Mich. 2013)* (Drain, J.), *aff'd*, *770 F.3d 436 (6th Cir. 2014)*. As in *Saab*, Plaintiff presents no facts "that indicate that any of the various agreements were close to or in the process of being negotiated or approved." *Id.* Plaintiff thus fails to meet its initial burden in the tortious interference analysis.

Additionally, even accepting Plaintiff's factual allegations as true, Mayfield does not establish how any of the Defendants acted intentionally to harm Plaintiff in a manner not "motivated by legitimate business reasons." *Id.; see also* *Badiee v. Brighton Area Sch., 265 Mich. App. 343, 365-66, 695 N.W.2d 521 (2005)*. Mayfield "must allege that the interferer did something illegal, unethical or fraudulent," and it has not done so here. *Dalley v. Dykema Gossett, 287 Mich. App. 296, 324, 788 N.W.2d 679, 696 (2010)*. To the contrary, Defendants have emphasized their prioritization of safety and credibility in the helmet manufacturing space. *See* ECF No. 62, PageID.1599. Plaintiff's **[**26]** First Amended Complaint contains no allegations that the newest generation of the S.A.F.E.Clip met NOCSAE certification standards, was provided to Defendants, and was nevertheless rejected by the Manufacturer Defendants. Without this critical claim, Plaintiff cannot sufficiently allege that Defendants acted either maliciously or improperly in this case.

Accordingly, Plaintiff has not met its burden to withstand a dismissal motion as to its tortious interference claims. Counts III through VI will therefore be dismissed.

V. Conclusion

For the reasons discussed herein, Defendants' Motion to Dismiss [#62] is **GRANTED**.

IT IS SO ORDERED.

/s/ Gershwin A. Drain

GERSHWIN A. DRAIN

UNITED STATES DISTRICT JUDGE

Dated: April 22, 2021

Williams v. Estates LLC

United States District Court for the Middle District of North Carolina

April 22, 2021, Decided; April 22, 2021, Filed

1:19-CV-1076

Reporter
2021 U.S. Dist. LEXIS 78101 *; 2021 WL 1581239

BRIAN C. WILLIAMS, MARICOL YUNAIRA TINEO DE LEON, JAIRO VENSRIQUE LEON DA COSTA, and others similarly situated, Plaintiff, v. THE ESTATES LLC, THE ESTATES REAL ESTATE GROUP, LLC, TIMBRA OF NORTH CAROLINA, LLC, VERSA PROPERTIES LLC, RED TREE HOLDINGS, LLC, MALDIVES, LLC, CAROLYN SOUTHER, et al., Defendant.

Prior History: Williams v. Estates LLC, 2020 U.S. Dist. LEXIS 30932, 2020 WL 887997 (M.D.N.C., Feb. 24, 2020)
Williams v. Estates, LLC, 2019 U.S. Dist. LEXIS 242675 (M.D.N.C., Nov. 5, 2019)

Core Terms

antitrust, class certification, predominance, class member, foreclosure, bid, parties, foreclosure sale, bid-rigging, conspiracy, certify, damages, declaration, properties, bidder, class action, plaintiffs', discovery, cleaned, renewed

Counsel: **[*1]** For BRIAN C. WILLIAMS, and others similarly situated, MARICOL YUNAIRA TINEO DE LEON, and others similarly situated, JAIRO VENSRIQUE LEON DA COSTA, and others similarly situated, Plaintiffs: DHAMIAN A. BLUE, BLUE STEPHENS & FELLERS, RALEIGH, NC; JAMES C. WHITE, J.C. WHITE LAW GROUP, PLLC, CHAPEL HILL, NC.

For THE ESTATES LLC, THE ESTATES (UT), LLC, TIMBRA OF NORTH CAROLINA, LLC, MALDIVES, LLC, CAROLYN SOUTHER, Defendants: STEPHANIE C. ROBERTS, LEAD ATTORNEY, COOPER LEGAL FIRM, PC, CONCORD, NC.

For THE ESTATES REAL ESTATE GROUP, LLC, VERSA PROPERTIES, LLC, RED TREE HOLDINGS, LLC, TONYA NEWELL, Defendants: STEPHANIE C. ROBERTS, COOPER LEGAL FIRM, PC, CONCORD, NC.

Judges: Catherine C. Eagles, UNITED STATES DISTRICT JUDGE.

Opinion by: Catherine C. Eagles

Opinion

MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, District Judge.

The plaintiffs, Brian Williams, Mike Gustafson, Maricol De Leon, and Jairo Da Costa, lost their homes in three separate foreclosure sales and allege they received lower prices because of a bid-rigging conspiracy organized by the defendants. They seek to certify a nationwide Sherman Act class and a North Carolina subclass of similarly situated individuals who lost their homes in foreclosure proceedings **[*2]** where a member of the defendant organization, The Estates, was the highest bidder. The plaintiffs have not affirmatively demonstrated that the antitrust element of "impact" can be proven at trial with common evidence and have thus failed to meet the predominance requirement of *Rule 23(b)(3)*. The only evidence the plaintiffs provided on this point is untimely and it would be unfairly prejudicial to the defendants to consider it. The motion for class certification and the motion for leave to file the declaration of Dr. DeForest McDuff will both be denied.

I. Facts

For purposes of the motion for class certification, the Court makes the following findings of fact. Additional facts are set forth as appropriate during discussion of the class action requirements.

The Estates solicit individuals and businesses across North Carolina to become members of its organization. Doc. 104 at ¶ 19. The Estates maintains a database of properties in foreclosure and assists members and their related entities who wish to bid on these properties. *Id.* at ¶¶ 19-21. Members pay a monthly user fee to access the database, as well as an "acquisition fee" for any property acquired through the database, and they must split any profits **[*3]** with The Estates. *Id.* at ¶ 22. Membership in The Estates also requires members to use real estate agents, brokers, and closing attorneys selected or approved by The Estates. *Id.* at ¶¶ 26-27. Members must establish separate companies to participate in each foreclosure sale. *Id.* at ¶ 28.

The plaintiffs allege and have offered significant evidence that members in The Estates network agree that no more than one member may bid on a given property in a foreclosure sale. *Id.* at ¶¶ 33, 36-37; Doc. 104-8 at 2; Doc. 65 at ¶¶ 4-5. Members interested in a property indicate their desire to bid on that property, whereupon an Estates "acquisition assistant" determines who among the interested members will be allowed to submit a bid on the property. Doc. 104 at ¶¶ 39-41,43. The member chosen to bid on a particular property then sets up a limited liability company for the sole purpose of making the bid. *Id.* at ¶ 42. Next, an acquisition assistant, acting on behalf of the member and the newly formed LLC, attends the foreclosure sale and bids on the property. *Id.* at ¶¶ 43-44, 48; Doc. 65 at ¶ 6.

The named plaintiffs owned homes in North Carolina that were sold in foreclosure proceedings to an Estates member, **[*4]** or to an entity created by an Estates member, using the services provided by The Estates. Doc. 104 at ¶ 3; *see, e.g.*, Doc. 1-6; Doc. 1-12.

II. The Pending Class Certification Motion

The Court denied the plaintiffs' first motion for class certification, Doc. 56, without prejudice to a renewal after discovery. Doc. 70. The parties presented a scheduling plan, Doc. 72, which the Magistrate Judge approved. Doc. 73. Following discovery limited to class certification issues, the plaintiffs filed this renewed motion for class certification, Doc. 86, and a motion to amend the complaint. Doc. 85. The Court granted the motion to amend, Doc. 103, and will treat the amended complaint, Doc. 104, as the operative complaint for purposes of evaluating the renewed motion for class certification. Doc. 86.

The amended complaint identifies over 100 prospective class members in North Carolina, South Carolina, and Texas, with the potential for more.[1] Doc. 104 at ¶ 97(a). The renewed motion for class certification asks the Court to

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[1] The numbers of potential class members provided by the named plaintiffs are not completely consistent across filings, but they fall within a fairly narrow range. The amended complaint alleges that 137 prospective class members have been identified from documents produced by the defendants. Doc. 104 at ¶ 97; Doc. 81-1 (showing around 101 foreclosed North Carolina properties); Doc. 87-2 (showing 15 foreclosed Texas and South Carolina properties purchased by an Estates member). In one brief, the plaintiffs assert the existence of 120 North Carolina plaintiffs, six South Carolina plaintiffs, and nine Texas plaintiffs—totaling only 135. Doc. 87 at 7. In another, this number shifts to 144 total plaintiffs across the three states, Doc. 100 at 4, but the exhibits filed to support this number, Docs. 100-1, 100-2, 100-3, show that many of the identified North Carolina properties were

certify this group into two classes. Doc. 86 at ¶¶ 2-3. First, the plaintiffs ask the Court to certify a nationwide class seeking redress for their claims under the Sherman Act. This **[*5]** class would be defined as:

> All persons and entities whose properties were sold through foreclosure proceedings at which a Member of the Estates was the high bidder and at which the Estates placed the bid deposit on their behalf.

Id. at ¶ 2; *see* Doc. 104 at ¶ 95. Second, the plaintiffs seek to certify a subclass to pursue North Carolina state law claims. This North Carolina subclass would be defined as:

> All persons and entities whose properties were sold through foreclosure proceedings in North Carolina at which a Member of the Estates was the high bidder and at which the Estates placed the bid deposit on their behalf who have standing to bring North Carolina state law claims.

Doc. 86 at ¶ 3; *see* Doc. 104 at ¶ 95. This subclass would pursue both a state antitrust claim under *N.C. Gen. Stat. § 75-1* and a state unjust enrichment claim. Doc. 86 at ¶ 3.

III. Class Action Requirements

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (cleaned up). To certify a class, the plaintiffs "must affirmatively demonstrate [their] compliance" with *Federal Rule of Civil Procedure 23*. *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*. "*Rule 23* does not set forth a mere pleading standard." *Id.* The plaintiffs "must be prepared **[*6]** to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.*

As a threshold matters, *Rule 23* requires the proposed class members to be readily identifiable and the proposed class representatives to be members of the proposed class. *See* *Fed. R. Civ. P. 23(a)*; *EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014)* (recognizing "implicit threshold" requirements). The plaintiffs must then establish that the class satisfies all four enumerated requirements of *Rule 23(a)* and fits into at least one of the three subsections of *Rule 23(b)*. *Comcast Corp., 569 U.S. at 33*. The Court must rigorously assess the proffered evidence, *Gariety v. Grant Thornton, LLP, 368 F.3d 356, 359 (4th Cir. 2004)*, but has "a wide range of discretion" in evaluating whether the *Rule 23* requirements have been met. *Windham v. Am. Brands, Inc., 565 F.2d 59, 65 (4th Cir. 1977)* (cleaned up); *see* *Reiter v. Sonotone Corp., 442 U.S. 330, 345, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)* (noting that district courts "have broad power and discretion vested in them" as to the "certification and management of potentially cumbersome" class actions). Where necessary, the Court must "resolve a genuine legal or factual dispute relevant to determining the requirements." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008)*. Here, the plaintiffs rely on *Rule 23(b)(3)*, *see* Doc. 87 at 28, which requires that common issues predominate and that a class action is the superior method for resolution of the issues. *Fed. R. Civ. P. 23(b)(3)*.

The predominance requirement is satisfied when "questions of law or fact common to the members **[*7]** of the class predominate over any questions affecting only individual members." *Gariety, 368 F.3d at 362*; *see also* *Fed. R. Civ. P. 23(b)(3)*. "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016)* (cleaned up).

IV. Analysis

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owned by the same person or entity, *see, e.g.*, Doc. 100-1 at 2 (showing Kiraboltam, LLC as owner of four foreclosed properties), likely lowering the 144-class-member estimate.

The Court need not discuss all the requirements that the plaintiffs have met, which are many. The plaintiffs have failed to show that the antitrust element of impact can be proven by common class-wide proof, which means that they cannot show that common issues predominate. Without predominance, the motion must be denied.

The predominance inquiry begins "with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Haliburton Co., 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011)*. To establish a private antitrust claim, a plaintiff must prove three elements: (1) a violation of the antitrust laws here, *15 U.S.C. § 1* and *N.C. Gen. Stat. § 75-1*; (2) individual injury, or impact, resulting from that violation; and (3) measurable damages. *See Deiter v. Microsoft Corp., 436 F.3d 461, 467 (4th Cir. 2006)*; *In re Titanium Dioxide Antitrust Litig., 284 F.R.D. 328, 344 (D. Md. 2012)*. "In antitrust cases, impact often is critically important for the purpose of evaluating *Rule 23(b)(3)*'s predominance requirement because it is an **[*8]** element of the claim that may call for individual, as opposed to common, proof." *In re Hydrogen Peroxide, 552 F.3d at 311*.

Two of the elements require little discussion. If the defendants engaged in an illegal bid-rigging conspiracy to suppress the price of properties purchased through foreclosure sales, that bid-rigging conspiracy is a *per se* antitrust violation.[2] *United States v. Joyce, 895 F.3d 673, 677 (9th Cir. 2018)* ("Bid rigging is . . . *a per se* violation of the Sherman Act."). "Such agreements or practices are conclusively presumed to be unreasonable because of their pernicious effect on competition and lack of any redeeming virtue." *See id. at 676* (cleaned up). Whether the defendants so conspired "can be resolved for each class member in a single hearing" and does not "turn[] on a consideration of the individual circumstances of each class member." *Thorn v. Jefferson-Pilot Life Ins., 445 F. 3d 311, 319 (4th Cir. 2006)* (cleaned up). The evidence is common to all class members and will not require individualized evidence. *See Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 359 (3d Cir. 2013)*.

Conversely, as the plaintiffs admit, "there is an individualized component to the damages suffered by the class." Doc. 87 at 22; *see Deiter, 436 F.3d at 467* (discussing the requirement that the plaintiffs must establish measurable damages); *In re Titanium Dioxide, 284 F.R.D. at 348* (same). But individual questions as to damages do not necessarily defeat an antitrust class **[*9]** certification. *See, e.g., Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 429 (4th Cir. 2003)* ("[T]he need for individualized proof of damages alone will *not* defeat class certification."); *Soutter v. Equifax Info. Servs., 307 F.R.D. 183, 214 (ED. Va. 2015)* (noting that courts will typically certify a class if "common questions predominate regarding liability").

The plaintiffs' plan to address the third element, antitrust injury or "impact" from the bid-rigging conspiracy, requires more discussion. A *per se* antitrust violation only means the ***antitrust law*** has been violated; it "does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under *§ 4* of the *Clayton Act*." *Atl. Richfield Co. v. USA Petrol. Co., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. At the class certification stage, the plaintiffs must show that antitrust impact is "capable of proof at trial through evidence that is common to the class rather than individual to its members" in order to meet the predominance requirement. *In re Hydrogen Peroxide, 552 F.3d at 311-12*; *accord Bell Atl. Corp. v. AT & T Corp., 339 F.3d 294, 302 (5th Cir.2003)* ("[W]here fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats *Rule 23(b)(3)* predominance.").

Whether a class member has suffered an "injury-in-fact" as a result of the antitrust violation alleged here is a question of fact with obvious individual **[*10]** components. *See Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 106 (2d Cir. 2007)* (discussing the "familiar factual question" of whether the plaintiff suffered an "injury-in-fact"); *In re Titanium Dioxide, 284 F.R.D. at 344 n.13* (same). The price obtained for a piece of residential real estate at a foreclosure sale would ordinarily be affected by many factors specific to the piece of property, including the amount of the mortgage and other pending liens, the location, and the extent of needed

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[2] *See, e.g., United States v. W.F. Brinkley & Son Constr. Co., 783 F.2d 1157, 1160 (4th Cir. 1986)* (holding that bid rigging is *a per se* antitrust violation); *ITCO Corp. v. Michelin Tire Corp., Commercial Div., 722 F.2d 42, 48 (4th Cir. 1983)* ("[P]roof of conduct violative of the Sherman Act is proof sufficient to establish a violation of the *North Carolina Unfair Trade Practices Act*.").

repairs. The price would also typically be affected by external influences like the state of the economy, opportunities for profitable resale, and the number of bidders at foreclosure. The Estates did not control the market for foreclosure properties, and unlike some price-fixing or bid-rigging schemes, there is no obvious reason to think that the agreement resulted in a lower price at every single foreclosure. For example, for any particular class property, only one Estates member may have been interested, or there may have been several other non-Estates bidders who raised the price so high that any agreement between defendants was essentially irrelevant.

Despite the obvious individual issues, the plaintiffs barely addressed antitrust impact; indeed, in their briefs in support of their initial motion, **[*11]** *see* Doc. 57 at 29-30; Doc. 66 at 16-17, and their renewed motion, *see* Doc. 87 at 28-30; Doc. 100 at 8-9, the plaintiffs devoted little more than a page to the entire predominance inquiry. The plaintiffs touched on impact in their discussion of *Rule 23(a)(2)* commonality, where they correctly noted that a civil antitrust claim requires an additional showing of an "injury causally linked to an illegal presence in the market." Doc. 87 at 20-21. But other than asserting that the defendants' "scheme was highly organized and impacted dozens of foreclosure auctions," *id.* at 21, they did not explain how they intend to establish at trial, using common proof, that every foreclosure auction in which an Estates member was the winning bidder caused antitrust injury to a class member.

The plaintiffs seem to assume that the existence of the bid-rigging scheme is enough to show injury. But proof that the conspiracy exists is not the same as proof that each class member was injured-in-fact by that conspiracy. *Atl. Richfield Co., 495 U.S. at 342*.

Whether antitrust impact can be shown by common proof is, as the Court has already highlighted, "critically important for the purpose of evaluating *Rule 23(b)(3)*'s predominance requirement." *In re Hydrogen Peroxide, 552 F.3d at 311*. At the certification stage the Court **[*12]** must rigorously assess "the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial." *Id. at 312*. The plaintiffs' initial briefings and submissions did not meet this requirement.

In response to the Court's request for supplemental briefing directed to the predominance issue and antitrust impact, Doc. 133, the plaintiffs filed a brief, Doc. 144, and a separate motion for leave to file a declaration from an expert economist, Dr. DeForest McDuff, setting forth a summary of how impact and damages could be proven with common evidence. Doc. 145 (motion); Doc. 145-1 (Dr. McDuff's declaration). The defendants reiterated their concerns over the individual issues related to causation and noted that they would be significantly prejudiced if the Court considered Dr. McDuff's declaration. Doc. 148 at 4-6; Doc. 149; Doc. 150 at ¶¶ 1-2.

Under the joint discovery plan and scheduling order, the plaintiffs did not envision expert testimony would be necessary at this stage, and expert disclosure was not scheduled to begin until after class certification. *See* Doc. 72 at 4 (agreeing to complete expert discovery within seven months, and disclosure within **[*13]** 90 days, of the Court's ruling on class certification); Doc. 73 (approving the discovery schedule). There is nothing to show that the defendants had any notice of Dr. McDuff's report until it was filed in response to the Court's request for a short supplemental brief. There is also significant authority suggesting that the Court must conduct a *Daubert* analysis when challenged expert testimony is necessary to meet the requirements for class certification.[3] Dr. McDuff's

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[3] No controlling precedent dictates whether a district court must conduct a *Daubert* analysis at the class certification stage or how focused or full that analysis should be. *See* *Childress v. JPMorgan Chase & Co., No. 5:16-CV-298-BO, 2019 U.S. Dist. LEXIS 110396, 2019 WL 2865848, *2-3 (E.D.N.C. July 2, 2019)*; 3 *Newberg on Class Actions* § 7:24 (5th ed. Dec. 2020 Update). The Supreme Court has suggested that *Daubert* likely applies to challenged expert testimony at this stage, *Dukes, 564 U.S. at 354*, but the courts of appeals have taken different approaches to the issue. *Compare* *In re Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015)* (requiring a district court to rule on challenges to an expert's qualifications if the expert's report is "critical to class certification"), *and* *Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815-16 (7th Cir. 2010)* (same), *with* *In re Zurn Pex Plumbing Prod. Liab. Litig., 644 F.3d 604, 612 (8th Cir. 2011)* (approving a certification order without a full *Daubert* analysis and explaining the impracticalities of requiring a district court to consider the admissibility of evidence at the class certification stage), *and* *Sali v. Corona Reg'l Med. Ctr., 909 F.3d 996, 1006 (9th Cir. 2018)* (finding a district court abused its discretion by only reviewing admissible evidence in its class certification analysis). The Court has previously found the rationale

declaration is quite short, with little detail, and it raises many questions about his methodology and otherwise.[4] The defendants have had no opportunity to depose Dr. McDuff about his findings or methods. Nor have they had time or opportunity to locate and consult an expert of their own, much less to offer contradictory expert opinion testimony.

The late addition of this expert testimony to establish one of the clear requirements for class certification would be unfairly prejudicial to the defendants. The motion for leave to file Dr. McDuff's report **[*14]** will therefore be denied as untimely and as unfairly prejudicial to the defendants.

Without Dr. McDuff's testimony, the plaintiffs have not offered a sufficient plan to provide a common method of proving antitrust impact at trial. Without a common method to prove impact at trial, an individual assessment of whether and how the defendants' scheme affected each class member's foreclosure sale will be required—in addition to individual issues of damages. *See* discussion *supra*. Given these individual issues, common questions of law and fact do not predominate, and the motion for class certification will be denied.

V. Other Matters

In the amended complaint, Doc. 104, the plaintiffs named over 100 additional defendants who were alleged to be a part of the bid-rigging conspiracy organized by The Estates. Many of these defendants have nothing to do with the claims of the named plaintiffs and only have to do with the claims of putative class members. It seems appropriate, then, that the defendants who are unrelated to the foreclosures of the named plaintiffs should be dismissed.

The parties shall immediately meet and confer. No later than May 10, 2021, the parties shall file a joint submission containing **[*15]** a list of the specific defendants that the parties agree should be removed from the case in light of the class certification decision. If there are disagreements as to certain defendants, the parties shall suggest an appropriate way to address and resolve the issue.

It is **ORDERED**:

1. That the plaintiffs' motion for leave to file declaration of DeForest McDuff, Doc. 145, is **DENIED**;

2. That the plaintiffs' second motion to certify class, Doc. 86, is **DENIED**; and
3. That the parties shall meet, confer, and then file a joint submission on or before May 10, 2021, identifying which defendants are unrelated to the claims of the named plaintiffs and the best mechanism for dismissing the claims against them.

This the 22nd day of April, 2021.

/s/ Catherine C. Eagles

UNITED STATES DISTRICT JUDGE

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in *In re Blood Reagents* and *Am. Honda Motor Co.* to be persuasive. *See* Krakauer v. Dish Network, LLC, No. 1:14-CV-333, 2015 U.S. Dist. LEXIS 118858, 2015 WL 5227693, at *5 (M.D.N.C. Sept. 8, 2015).

[4] While Dr. McDuff's testimony might be sufficient to find a common method of proving antitrust impact at trial, that is not a sure thing. To provide an example, it appears that his "but-for" method only works if at least two Estates members expressed an interest in bidding on a particular property. *See* Doc. 145-1 at 19-22 (determining a "but-for winning bid" for each property as a partial function of "Additional Estates bidders" who expressed interest in a property but did not ultimately participate in the bidding process because of the alleged conspiracy). But what about members of the class whose properties were only ever subject to one expression of interest from an Estates member? And wouldn't this require individual proof to determine whether more than one Estates member was interested?

Reveal Chat Holdco LLC v. Facebook, Inc.

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

April 26, 2021, Decided; April 26, 2021, Filed

Case No. 20-cv-00363-BLF

Reporter
2021 U.S. Dist. LEXIS 79786 *; 2021 WL 1615349

REVEAL CHAT HOLDCO LLC, et al., Plaintiffs, v. FACEBOOK, INC., Defendant.

Subsequent History: Affirmed by, in part, Appeal dismissed by, in part *Reveal Chat HoldCo LLC v. Meta Platforms, Inc., 2022 U.S. App. LEXIS 5233 (9th Cir. Cal., Feb. 28, 2022)*

Prior History: *Reveal Chat Holdco, LLC v. Facebook, Inc., 2020 U.S. Dist. LEXIS 92828 (N.D. Cal., Apr. 10, 2020)*

Core Terms

allegations, user, fraudulent concealment, removal, diligence, notice, statute of limitations, developers, antitrust, documents, exemption, network, reasons, particularity, advertising, pled, motion to dismiss, give rise, Friends, argues, platform, publicly, continuing violation, limitations, third-party, misconduct, Messaging, cases, constructive knowledge, judicial notice

LexisNexis® Headnotes

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

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

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

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim. When determining whether a claim has been stated, the Court accepts as true all well-pled factual allegations and construes them in the light most favorable to the plaintiff. However, the Court need not accept as true allegations that contradict matters properly subject to judicial notice or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. While a complaint need not contain detailed factual allegations, it must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim is facially plausible when it allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. However, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. As such, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed. On a motion to dismiss, the Court's review is limited to the face of the complaint and matters judicially noticeable.

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

HN2[] Amendment of Pleadings, Leave of Court

A district court ordinarily must grant leave to amend unless one or more of the Foman factors is present: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party, or (5) futility of amendment. It is the consideration of prejudice to the opposing party that carries the greatest weight. However, a strong showing with respect to one of the other factors may warrant denial of leave to amend.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

HN3[] Heightened Pleading Requirements, Fraud Claims

Claims sounding in fraud are subject to the heightened pleading requirements of *Fed. R. Civ. P. 9(b)*, which require that a plaintiff alleging fraud must state with particularity the circumstances constituting fraud. *Fed. R. Civ. P. 9(b)*. To satisfy the heightened standard under *Rule 9(b)*, the allegations must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. Thus, claims sounding in fraud must allege an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations. A plaintiff must set forth what is false or misleading about a statement, and why it is false. However, intent, knowledge, and other conditions of a person's mind need not be stated with particularity, and may be alleged generally. *Fed. R. Civ. P. 9(b)*.

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Public Records

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN4[] Adjudicative Facts, Facts Generally Known

Courts may take judicial notice of matters either that are generally known within the trial court's territorial jurisdiction or that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *Fed. R. Evid. 201(b)*. Specifically, a court may take judicial notice: (1) of matters of public record, (2) that the market was aware of information contained in news articles, and (3) publicly accessible websites whose accuracy and authenticity is not subject to dispute.

Antitrust & Trade Law > Clayton Act > Claims

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN5[] Clayton Act, Claims

The injury rule applies to antitrust cases. The ordinary Clayton Act rule, applicable in private antitrust treble damages actions, holds a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. Courts do not require a plaintiff to actually discover its antitrust claims before the statute of limitations begins to run. The statute of limitations under the Sherman Act is four years.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

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

HN6[] Sherman Act, Defenses

To state a continuing violation of the antitrust laws in the Ninth Circuit, a plaintiff must allege that a defendant completed an overt act during the limitations period that meets two criteria: 1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2) it must inflict new and accumulating injury on the plaintiff.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Evidence > Burdens of Proof > Allocation

Governments > Legislation > Statute of Limitations > Tolling

HN7[] Tolling of Statute of Limitations, Fraudulent Concealment

A statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence. The plaintiff carries the burden of pleading and proving fraudulent concealment.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

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

Torts > ... > Statute of Limitations > Tolling > Equitable Estoppel

HN8[] Tolling of Statute of Limitations, Fraudulent Concealment

To plead fraudulent concealment, the plaintiff must allege that: (1) the defendant took affirmative acts to mislead the plaintiff; (2) the plaintiff did not have actual or constructive knowledge of the facts giving rise to its claim; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to its claim. Thus, a fraudulent concealment defense requires a showing both that the defendant used fraudulent means to keep the plaintiff unaware of his cause of action, and also that the plaintiff was, in fact, ignorant of the existence of his cause of action. The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud. It is enough that the plaintiff should have been alerted to facts that, following duly diligent inquiry, could have advised it of its claim. Moreover, allegations of fraudulent concealment must be pled with particularity. Although it is generally inappropriate to resolve the fact-intensive allegations of fraudulent concealment at the motion to dismiss stage, plaintiffs nevertheless must allege specific factual allegations of fraudulent concealment to survive a motion to dismiss. Conclusory statements are not enough.

Governments > Legislation > Statute of Limitations > Tolling

HN9[] **Statute of Limitations, Tolling**

If a plaintiff has actual or constructive knowledge of the facts giving rise to his claim, then fraudulent concealment does not apply.

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Time Limitations

HN10[] **Statute of Limitations, Equitable Estoppel**

The failure to own up to illegal conduct is not sufficient for fraudulent concealment, and to find otherwise would effectively nullify the statute of limitations in cases.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

HN11[] **Heightened Pleading Requirements, Fraud Claims**

To plead fraudulent concealment in accordance with *Fed. R. Civ. P. 9(b)*, plaintiffs must allege an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

HN12[] **Tolling of Statute of Limitations, Fraudulent Concealment**

In the context of fraudulent concealment, diligent inquiry is required where facts exist that would excite the inquiry of a reasonable person, and diligence must be pled with particularity.

Counsel: [*1] For Reveal Chat Holdco LLC, a Delaware limited liability company, Plaintiff: Brian James Dunne, LEAD ATTORNEY, Bathaee Dunne LLP, Los Angeles, CA; Yavar Bathaee, LEAD ATTORNEY, Bathaee Dunne LLP, New York, NY; Christopher M. Burke, ScottScott Attorneys at Law LLP, San Diego, CA; Edward Maxwell Grauman, PRO HAC VICE, Bathaee Dunne LLP, Austin, TX; Kristen Marie Anderson, Scott and Scott Attorneys at Law LLP, New York, NY; Michael P Srodoski, PRO HAC VICE, Scott and Scott Attorneys at Law LLP, New York, NY; Patrick J McGahan, PRO HAC VICE, Scott and Scott Attorneys at Law LLP, New York, NY; Yifan Kate Lv, Scott and Scott Attorneys at Law LLP, San Diego, CA.

For USA Technology and Management Services, Inc. a Delaware corporation doing business as Lenddo USA, Plaintiff: Brian James Dunne, LEAD ATTORNEY, Bathaee Dunne LLP, Los Angeles, CA; Yavar Bathaee, LEAD ATTORNEY, Bathaee Dunne LLP, New York, NY; Christopher M. Burke, ScottScott Attorneys at Law LLP, San

Diego, CA; David H. Goldberger, Scott and Scott Attorneys at Law LLP, San Diego, CA; Edward Maxwell Grauman, PRO HAC VICE, Bathaee Dunne LLP, Austin, TX; Kristen Marie Anderson, Scott and Scott Attorneys at Law LLP, New York, NY; Michael **[*2]** P Srodoski, PRO HAC VICE, Scott and Scott Attorneys at Law LLP, New York, NY; Patrick J McGahan, PRO HAC VICE, Scott and Scott Attorneys at Law LLP, New York, NY; Yifan Kate Lv, Scott and Scott Attorneys at Law LLP, San Diego, CA.

For Beehive Biometric, Inc., a dissolved Delaware corporation, Plaintiff: Brian James Dunne, LEAD ATTORNEY, Bathaee Dunne LLP, Los Angeles, CA; Yavar Bathaee, LEAD ATTORNEY, Bathaee Dunne LLP, New York, NY; Christopher M. Burke, ScottScott Attorneys at Law LLP, San Diego, CA; David H. Goldberger, Scott and Scott Attorneys at Law LLP, San Diego, CA; Edward Maxwell Grauman, PRO HAC VICE, Bathaee Dunne LLP, Austin, TX; Kristen Marie Anderson, Scott and Scott Attorneys at Law LLP, New York, NY; Michael P Srodoski, PRO HAC VICE, Scott and Scott Attorneys at Law LLP, New York, NY; Patrick J McGahan, PRO HAC VICE, Scott and Scott Attorneys at Law LLP, New York, NY; Yifan Kate Lv, Scott and Scott Attorneys at Law LLP, San Diego, CA.

For Facebook, Inc., a Delaware corporation, Defendant: Sonal N. Mehta, LEAD ATTORNEY, Wilmer Cutler Pickering Hale and Dorr LLP, Palo Alto, CA; Ari Holtzblatt, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; David Zahler Gringer, **[*3]** PRO HAC VICE, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Molly Maureen Jennings, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC.

For Maximilian Klein, Sarah Grabert, Miscellaneous: Adam Bryan Wolfson, Quinn Emanuel Urquhart Sullivan LLP, Los Angeles, CA.

For Rachel Banks Kupcho, Miscellaneous: Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA.

For Deborah Dames, Timothy Mathews, Miscellaneous: Jennifer Lauren Joost, Kessler Topaz Meltzer and Check LLP, San Francisco, CA.

For Vickie Sherman, Leah Neville-Marrs, Katherine Loopers, Jarred Johnson, Miscellaneous: Rachel Renee Johnson, Ahdoot & Wolfson, PC, Burbank, CA.

For Affilious, Inc., Jessyca Frederick, NJ Premier Inc., Timothy Mills, Mark Young, Danny Collins, Joshua Jeon, 406 Property Services, PLLC, Mark Berney, MarQuisha Cork, Miscellaneous: Yavar Bathaee, LEAD ATTORNEY, Bathaee Dunne LLP, New York, NY.

For Charles Steinberg, Miscellaneous: Samuel M. Ward, Barrack Rodos & Bacine, San Diego, CA.

Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

ORDER GRANTING MOTION TO DISMISS

Three web developers—Reveal Chat Holdco LLC ("Reveal Chat"), USA Technology and Management **[*4]** Services, Inc. ("Lenddo"), and Beehive Biometric, Inc. ("Beehive") (collectively "Plaintiffs")—have brought this lawsuit against Defendant Facebook, Inc. ("Facebook") for removing access to a set of application programming interfaces ("APIs") in 2015 that Plaintiffs relied on for their mobile applications. *See* Am. Compl., ECF 62. Plaintiffs allege that Facebook's removal of these APIs was part of an elaborate scheme that violates *Section 2 of the Sherman Act*. *See id.* The Court previously found that Plaintiffs' claims were time-barred and granted them leave to amend their complaint. *See* Order ("Prior MTD order"), ECF 61. Facebook has again filed a motion to dismiss that includes the threshold issue of whether Plaintiff's claims are time-barred. *See* Mot., ECF 71. Plaintiffs oppose this motion. *See* Opp'n, ECF 73. The Court held a two-hour oral argument on December 3, 2020, giving Plaintiffs ample opportunity to discuss the viability of their claims. *See* Min Entry, ECF 78. For the reasons detailed below, the Court GRANTS Facebook's motion.

I. BACKGROUND

Plaintiffs allege that between 2004 and 2010, Facebook vanquished a number of rivals in order to emerge as the dominant social network in the United **[*5]** States. Am. Compl. ¶ 76. "By 2010, Facebook stood alone as the dominant player in the newly emergent market for social data (the 'Social Data Market')—a market in which Facebook's own users provided Facebook with a constant stream of uniquely valuable information, which Facebook in turn monetized through the sale of social data (for example, through advertising, monetizing APIs, or other forms of commercializing access to Facebook's network)." Am. Compl. ¶ 90. Facebook sold access to social data to developers and sold advertisements targeting Facebook's network of engaged and active users. Am. Compl. ¶ 91. Because user data made Facebook's network more valuable and thus attracted more customers, which then led to more data and more customers, a feedback loop emerged. Am. Compl. ¶¶ 92-95. Data provided by users made Facebook's network more valuable, thereby attracting more users to the network. Am. Compl. ¶ 92. A barrier to entry emerged from this feedback loop—to compete with Facebook, a new entrant would have to rapidly replicate both the breadth and value of the Facebook network by building its own vast network and duplicating the active user engagement on the same massive scale. **[*6]** Am. Compl. ¶ 95. Plaintiffs allege that this "Social Data Barrier to Entry" allows Facebook to control and increase prices in the Social Data and Social Advertising Markets without the pressures of price competition from existing competitors or new entrants. Am. Compl. ¶ 96.

In 2012, Facebook coined the term "Open Graph" "to describe a set of tools developers could use to traverse Facebook's network of users, including the social data that resulted from user engagement." Am. Compl. ¶ 131. Open Graph contained a set of APIs, which "allowed those creating their own social applications to query the Facebook network for information." Am. Compl. ¶ 132. Beginning in the fall of 2011, to allegedly address the threat posed by mobile applications, Facebook devised a scheme to attract third-party developers to build for their platform and then remove access to the APIs that were central to these applications. Am. Compl. ¶ 157. For example, the "Friends API" allowed third-party developers to search through a user's friends, as well as their friends of friends. Am. Compl. ¶ 158. Plaintiffs consider the Friends API, News Feed API, and certain Messaging APIs the "Core APIs." Am. Compl. ¶ 5. Without **[*7]** access to this data, third-party applications "would be abruptly left with none of the social data they needed to function." Am. Compl. ¶ 159. By August 2012, Facebook planned to prevent competitive third-party applications from buying social data from Facebook. Am. Compl. ¶ 167. Facebook even identified direct, horizontal competitors in the Social Data and Social Advertising Markets. Am. Compl. ¶ 168. In November 2012, Facebook announced that it would block competitors or require full data reciprocity for continued access to its data. Am. Compl. ¶ 176. Plaintiffs allege that Facebook's statements from September 2011 through April 2014 about the functionality of the Core APIs were false, half-truths that created a duty to speak fully and truthfully about the Core APIs. Am. Compl. ¶ 450.

In April 2014, Facebook announced that it would remove access to several "rarely used" APIs, including the Friends and News Feed APIs. Am. Compl. ¶ 242. Plaintiffs allege that these APIs were in fact quite popular and relied on by tens of thousands of third-party applications. Am. Compl. ¶ 243. After this announcement and through the full removal of the APIs in April 2015, Facebook entered into Whitelist **[*8]** and Data Sharing Agreements with certain third-party developers that allowed continued access to the Friends or News Feed APIs and included a provision acknowledging that the covered APIs were not available to the general public. Am. Compl. ¶¶ 247-248. These agreements "were only offered in exchange for massive purchases of Facebook's social data through mobile advertising and/or through the provision of the developer's own social data back to Facebook (so-called 'reciprocity')." Am. Compl. ¶ 249. Plaintiffs allege that Facebook covered up the real reason for the removal of the APIs—while Facebook publicly stated that the change was made to give users more control over their data, Plaintiffs allege that the real reason for the change was to kill applications that were competitive or potentially competitive with Facebook. Am. Compl. ¶¶ 461-62, 469. Plaintiffs allege that they first learned that Facebook's purported reasons for the removal of the APIs was false on November 6, 2019, when NBC News posted a trove of internal Facebook documents seized by the United Kingdom Parliament that allegedly showed that Facebook internally viewed the purported withdrawal as lacking any legitimate **[*9]** business or technical justification and that the scheme had a broad impact on competition. Am. Compl. ¶ 475.

A. Reveal Chat

Plaintiff Reveal Chat[1] was a dating platform whose business model was to consume social data through Facebook's APIs to provide match-making services and create a platform from which it could sell advertising. Am. Compl. ¶ 21. Reveal Chat learned in late 2014 that Facebook had slated APIs it relied on for removal. Am. Compl. ¶ 24. In 2015, Reveal Chat allegedly contacted Facebook "to determine if there was a way forward." Am. Compl. ¶ 25. Facebook allegedly referred Reveal Chat to its official policy documents and developer documentation, which suggested that the APIs were being removed for user control and privacy reasons. Am. Compl. ¶ 25. Reveal Chat then allegedly "contacted acquaintances that worked at Facebook to get more clarity as to the APIs and to determine whether [Reveal Chat] could obtain an exemption from the decision." Am. Compl. ¶ 26. Reveal Chat never obtained an exception and accepted Facebook's explanation that the APIs were being removed due to user privacy concerns. Am. Compl. ¶ 27. One of Reveal Chat's founders reviewed Facebook's blog post in **[*10]** December 2018, which responded to documents released as part of a United Kingdom Parliament investigation that again allegedly misled him into believing the APIs had been removed due to user privacy and control concerns. Am. Compl. ¶ 30. Reveal Chat alleges that it did not and could not learn the true reasons for the removal of the APIs until November 6, 2019, when internal Facebook documents were publicly released. Am. Compl. ¶ 31.

B. Lenddo

Plaintiff Lenddo developed a mobile application that used social data to assess a user's creditworthiness based on studies showing that a person's network of associations is predictive as to credit risk, fraud, and likelihood of loan repayment. Am. Compl. ¶¶ 32-33. Lenddo's business model was based on consuming social data from Facebook. Am. Compl. ¶ 39. Lenddo learned in April 2015 that Facebook was eliminating the Core APIs and the Messaging APIs for all companies that were not given exemptions. Am. Compl. ¶ 43. On April 23, 2015, Lenddo entered a developer ticket, seeking to obtain an exemption from the new policy. Am. Compl. ¶ 44. Lenddo alleges it communicated with Facebook's Neil Hiltz and Simon Cross, and Cross informed Lenddo that it could **[*11]** not have access to the Core APIs and the Messaging APIs because the its application was credit-related and was part of a business that provided credit. Am. Compl. ¶¶ 45-46. Lenddo alleges that this explanation is false, as Royal Bank of Canada had allegedly obtained an exemption after having purchased large amounts of advertising from Facebook. Am. Compl. ¶ 47. Lenddo allegedly spoke with other developers, reviewed documentation from Facebook, and spoke to "other acquaintances at Facebook" and concluded that Facebook's policy change was for legitimate reasons. Am. Compl. ¶ 48. Lenddo alleges that it did not and could not learn the true reasons for the removal of the APIs until 2019 when internal Facebook documents were publicly released. Am. Compl. ¶ 52.

C. Beehive

Plaintiff Beehive had devised an algorithm that would analyze a user's social connections and interactions to determine whether the individual's identification was authentic and thus establish whether a Facebook user was a real person. Am. Compl. ¶¶ 55-56. Beehive targeted its product to dating sites, and as a result, the dating sites saw immediate increases in reliability of users on their platforms and a significant drop **[*12]** in fraud risk. Am. Compl. ¶ 58. Beehive's business was halted in 2015 when it discovered that Facebook was removing the APIs, including the Friends and News Feed APIs, that Beehive's business depended on for its functionality. Am. Compl. ¶ 60. Beehive sought an exemption from Facebook but never received a response. Am. Compl. ¶ 61. "Beehive sought an

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[1] Reveal Chat is the successor in interest to Reveal Chat, Inc. (f/k/a LikeBright, Inc.), pursuant to an April 2015 merger between Reveal Chat and Reveal Chat, Inc. Am. Compl. ¶ 18. The Court will refer to this company both pre- and post-merger as Reveal Chat.

exemption from Facebook but received no answer. Beehive then contacted an acquaintance that worked at Facebook, who advised them that they would never receive an exemption." Am. Compl. ¶ 61. Beehive allegedly spoke to other developers, read documentation by Facebook, and viewed developer message boards and did not find any explanation other than the one Facebook had offered regarding user privacy for the API removals. Am. Compl. ¶ 63. Beehive alleges that it did not and could not learn the true reasons for the removal of the APIs until 2019 when internal Facebook documents were publicly released. Am. Compl. ¶ 65.

D. Prior Order Granting Facebook's Motion to Dismiss

This Court previously granted a motion to dismiss filed by Facebook on July 8, 2020. *See* Prior MTD Order; *see also* *Reveal Chat Holdco, LLC v. Facebook, Inc., 471 F. Supp. 3d 981 (N.D. Cal. 2020)*. The Court found as a matter of law that Plaintiffs' claims **[*13]** were time-barred by the four-year statute of limitations for antitrust claims and that Plaintiffs had not adequately pled fraudulent concealment in part because they had not plausibly alleged they were without actual or constructive knowledge of the facts giving rise to their claims. Prior MTD Order 10, 14. The Court found that, "[t]o allege fraudulent concealment, Plaintiffs must establish that 'its failure to have notice of its claim was the result of [Facebook's] affirmative conduct.'" Prior MTD Order 9 (quoting *Conmar Corp. v. Mitsui & Co. (U.S.A.), 858 F.2d 499, 505 (9th Cir. 1988))*. The Court found that Plaintiffs had notice as of April 30, 2014, that access to the Friends and News Feed APIs would be removed, and Plaintiffs had notice of the Whitelist and Data Sharing Agreements in September 2015 via an article published in the Wall Street Journal. Prior MTD Order 10. "Thus, at the very least, Plaintiffs had constructive knowledge of the facts that give rise to their claims." Prior MTD Order 10. The Court also found that Facebook's decision to keep "tightly underwraps" the "real reason for the removal of the APIs" is not affirmative conduct that necessarily tolls the statute of limitations. Prior MTD Order 10.

The Court further found that Plaintiffs **[*14]** had failed to allege how they had acted diligently in trying to uncover facts giving rise to their claims. Prior MTD Order 10-11. "Here, the publicly available facts regarding Facebook's allegedly anticompetitive conduct would excite the inquiry of a reasonable person, and therefore Plaintiffs must plead diligence with particularity. They have failed to do so here." Prior MTD Order 11. The Court granted Plaintiffs leave to amend on the issue of fraudulent concealment, which if applicable, would toll the statute of limitations. Prior MTD Order 14.

II. LEGAL STANDARD

A. *Rule 12(b)(6)*

HN1[] "A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar, 646 F.3d 1240, 1241-42 (9th Cir. 2011)* (quoting *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001))*. When determining whether a claim has been stated, the Court accepts as true all well-pled factual allegations and construes them in the light most favorable to the plaintiff. *Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681, 690 (9th Cir. 2011)*. However, the Court need not "accept as true allegations that contradict matters properly subject to judicial notice" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (internal quotation marks and citations omitted). While a complaint need not contain **[*15]** detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "However, as the Supreme Court has noted precisely in the context of private antitrust litigation, 'it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.'" *Feitelson v. Google Inc., 80 F. Supp. 3d 1019, 1025 (N.D. Cal. 2015)* (quoting *Twombly, 550 U.S. at 558-59*). "As such, 'a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" *Feitelson, 80 F. Supp. 3d at 1025-26* (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n.17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* *quoted with approval in* *Twombly, 550 U.S. at 559*). On a motion to dismiss, the Court's review is limited to the face of the complaint and matters judicially noticeable. *MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986)*; *N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983)*.

HN2[] In deciding whether to grant leave to amend, the Court must consider the factors set forth by the Supreme Court in *Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*, and discussed at length by the Ninth Circuit in *Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048 (9th Cir. 2009)*. A district court ordinarily must grant leave to amend unless one or more of the *Foman* factors is **[*16]** present: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party, or (5) futility of amendment. *Eminence Capital, 316 F.3d at 1052*. "[I]t is the consideration of prejudice to the opposing party that carries the greatest weight." *Id.* However, a strong showing with respect to one of the other factors may warrant denial of leave to amend. *Id.*

B. *Rule 9(b)*

HN3[] Claims sounding in fraud are subject to the heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)*, which require that a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." *Fed. R. Civ. P. 9(b)*; *see also* *Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)*. To satisfy the heightened standard under *Rule 9(b)*, the allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*. Thus, claims sounding in fraud must allege "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)* (per curiam) (citation omitted). "A plaintiff must set forth what is false or misleading about a statement, **[*17]** and why it is false." *In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)* (en banc), *superseded by statute on other grounds as stated in* *SEC v. Todd, 642 F.3d 1207, 1216 (9th Cir.2011)*. However, "intent, knowledge, and other conditions of a person's mind" need not be stated with particularity, and "may be alleged generally." *Fed. R. Civ. P. 9(b)*.

III. DISCUSSION

A. Request for Judicial Notice

Defendants request judicial notice of three documents: the Complaint in *Six4Three, LLC v. Facebook, Inc*, No. CIV 533328 (San Mateo Cnty. Super. Ct. April 10, 2015), *see* Ex. 1, State Court Complaint, ECF 71-2; a September 21, 2015 *Wall Street Journal* article, *Facebook's Restrictions on User Data Cast a Long Shadow, see* Ex. 2, Data Sharing Article, ECF 71-3; and an October 20, 2020 *Wall Street Journal* article, *Snapchat Nears 250 Million Daily Users as Advertisers Lift Spending on Platform, see* Ex. 1, Snapchat Article, ECF 74-2. ***HN4***[] Courts may take judicial notice of matters either that are "generally known within the trial court's territorial jurisdiction" or that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*. "Specifically, a court may take judicial notice: (1) of matters of public record, (2) that the market was aware of information contained in news articles, **[*18]** and (3) publicly accessible websites whose accuracy and authenticity is not subject to dispute." *In re Facebook, Inc. Sec. Litig., 405 F. Supp. 3d 809, 827 (N.D. Cal. 2019)* (internal citations and quotation marks omitted). Plaintiffs do not object to judicial notice of these documents. The Court grants Defendants' request and finds the state court complaint judicially noticeable as a publicly available court document, *see* *Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006)* and the *Wall*

Street Journal articles judicially noticeable "as an indication of what information was in the public realm at the time," *see Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2010)*.

B. Statute of Limitations

Facebook argues that Plaintiffs' claims are time-barred, as the Court found in its prior order, and the amendments do not cure the identified deficiencies in the pleading. Mot. 4-5. Plaintiffs chose to not address this threshold issue until the last section of their brief and argue that there is an intra-circuit split as to whether a "discovery rule" or an "injury rule" applies to antitrust claims, and if this Court chooses the discovery rule, then Plaintiffs' claims have not accrued. Opp'n 20-21.

HN5[] The Court disagrees with Plaintiffs and finds that the Supreme Court and Ninth Circuit have clearly stated that the injury rule applies to antitrust cases. *See Klehr v. A.O. Smith Corp., 521 U.S. 179, 188, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* (finding that the ordinary **[*19]** *Clayton Act* rule, applicable in private antitrust treble damages actions holds "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.") (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971))*; *Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012)* ("We do not require a plaintiff to actually discover its antitrust claims before the statute of limitations begins to run.") (citing *Beneficial Standard Life Ins., Co. v. Madariaga, 851 F.2d 271, 274-75 (9th Cir. 1988))*. The statute of limitations under the *Sherman Act* is four years. *Hexcel, 681 F.3d at 1057* (citing *15 U.S.C. § 15b*). To the extent that Plaintiffs are seeking injunctive relief, the Court reiterates its previous finding that "the doctrine of laches applies to the instant case", Prior MTD Order 7, and the same "four-year statute of limitations in *15 U.S.C. § 15b* furnishes a guideline for computation of the laches period." Prior MTD Order 7 (quoting *Samsung Elecs. Co. v. Panasonic Corp., 747 F.3d 1199, 1205 (9th Cir. 2014))*.

Plaintiffs admit that they had notice of their injury by April 30, 2015 when the Core APIs that their businesses relied on were withdrawn. Am. Compl. ¶¶ 6, 13, 245.[2] Plaintiffs did not commence this lawsuit until January 16, 2020. *See* Compl., ECF 1. Therefore, Plaintiffs' claims are time barred unless the Sherman Act statute of limitations is properly tolled. The Court finds that it is not.

Continuing Violation

Plaintiffs argue that Facebook's conduct **[*20]** restarted the statute of limitations under the "continuing violation" doctrine. Opp'n 21-22. Plaintiffs argue that Facebook continued to operate its Onavo spyware to spy on mobile application users as part of its scheme to prevent the advent of a rival social advertising platform or generator of social data. Opp'n 21. This allegedly prevented Snapchat from evolving into a viable platform that would allow Plaintiffs to reacquire the social data they needed for their original business models, as Facebook "cloned" Snapchat's functionality in 2016. Opp'n 21-22. Plaintiffs also argue that Facebook continued to operate under Whitelist and Data Sharing Agreements that allowed some companies to continue having access to the necessary APIs in exchange for social data sharing or advertising purposes. Opp'n 22.

Facebook argues that Plaintiffs did not allege in their complaint that Facebook's purported "cloning" of Snapchat's features caused them injury. Reply 4, ECF 74. Facebook argues that since Plaintiffs were already allegedly excluded from the social data market as of April 2015, when they lost access to the Core APIs, Plaintiffs have failed to plead how any alleged cloning in 2016 somehow **[*21]** worsened their pre-existing injury or constituted a new injury. Reply 4. Facebook also argues that the continued existence of the Data Sharing Agreements, which Plaintiff had notice of by September 2015, do not establish a continuing violation. Reply 4.

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[2] Plaintiffs do not allege that they signed any Whitelist or Data Sharing Agreements with Facebook, but they had notice of those agreements by September 2015. *See* Prior MTD Order 10; Ex. 2, Data Sharing Article, ECF 71-3.

HN6[] "To state a continuing violation of the antitrust laws in the Ninth Circuit, a plaintiff must allege that a defendant completed an overt act during the limitations period that meets two criteria: 1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2) it must inflict new and accumulating injury on the plaintiff." *Samsung Elecs. Co. v. Panasonic Corp., 747 F.3d at 1202 (9th Cir. 2014)*; *accord* *Oliver v. SD-3C LLC, 751 F.3d 1081, 1086 (9th Cir. 2014)* (stating limitations begins to run from date of each "new overt act causing injury").

Here, Plaintiffs were allegedly injured when they were excluded from the social data market by virtue of losing access to the Core APIs by April 30, 2015. Am. Compl. ¶¶ 6, 13, 245 The Court has reviewed the allegations concerning Facebook cloning Snapchat features, *see* Am. Compl. ¶¶ 311-12 and agrees with Facebook that Plaintiffs have not pled facts demonstrating that this alleged cloning inflicted any new and accumulating injury on Plaintiffs beyond their pre-existing injury **[*22]** via exclusion in April 2015. Accordingly, these allegations do not constitute a "continuing violation."

The Court also agrees with Facebook that the relevant act concerning the Data Sharing Agreements occurred in April 2015, the latest start date Plaintiffs allege for the agreements. Am. Compl. ¶¶ 247, 256. Accordingly, the continued existence of these Data Sharing Agreements does not constitute new and independent acts that restart the statute of limitations. *See* *Ryan v. Microsoft Corp. ("Ryan II"), 147 F. Supp. 3d 868, 884 (N.D. Cal. 2015)* (where the defendant entered into an allegedly unlawful contract prior to the limitations period, the defendant still must take an unlawful 'new and independent act that is not merely a reaffirmation of a previous act' during the limitations period.") (citing *Pace Indus. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir.1987))*.

In conclusion, the Court does not find that the continuing violation doctrine applies here to toll the statute of limitations. Plaintiffs already received an opportunity to amend their complaint to properly plead this theory, and they have not suggested that a third attempt would be more productive than the first two. The Court finds that further amendment would be futile and accordingly dismisses this theory with prejudice.

Fraudulent [*23] Concealment

Plaintiffs argue that the doctrine of fraudulent concealment applies to toll the statute of limitations in this case. Opp'n 22-25. Plaintiffs allege that Facebook had a duty to speak fully and truthfully about its plans for removing the APIs, and Facebook affirmatively lied about the real reasons for removing the APIs. Opp'n 22-24. Plaintiffs also argue that, if the Court finds that "facts exist that would excite the inquiry of a reasonable person" regarding Facebook's misconduct, they were diligent in trying to discover the misconduct. Opp'n 25. Facebook argues that Plaintiffs have not cured the deficiencies the Court identified in its prior order finding that the doctrine of fraudulent concealment does not apply. Mot. 5-11, Reply 5-8. Specifically, Facebook argues that Plaintiffs have not pled affirmative acts Facebook took to mislead them Mot. 5-11. Facebook argues that Plaintiffs knew of their injuries by April 2015, and the fact that they were allegedly unaware of Facebook's motives for the removal of the APIs does not impact the fraudulent concealment analysis. Mot. 6, 8-9. Facebook also argues that Plaintiffs have not adequately alleged that they were diligent after **[*24]** learning of their injuries. Mot. 11.

HN7[] "A statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence." *Hexcel, 681 F.3d at 1060*. "The plaintiff carries the burden of pleading and proving fraudulent concealment." *Id.* (brackets and internal quotation marks omitted). *HN8*[] "To plead fraudulent concealment, the plaintiff must allege that: (1) the defendant took affirmative acts to mislead the plaintiff; (2) the plaintiff did not have 'actual or constructive knowledge of the facts giving rise to its claim'; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to its claim." *In re Animation Workers Antitrust Litig. ("Animation Workers II"), 123 F. Supp. 3d 1175, 1194 (N.D. Cal. 2015)* (quoting *Hexcel, 681 F.3d at 1060*)). Thus, "[a] fraudulent concealment defense requires a showing both that the defendant used fraudulent means to keep the plaintiff unaware of his cause of action, and also that the plaintiff was, in fact, ignorant of the existence of his cause of action." *Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515, 1521 (9th Cir. 1983)*. "The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, **[*25]** would have led to discovery of the fraud." Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 275 (9th Cir. 1988). "It is enough that the plaintiff should have been alerted to facts that, following duly diligent inquiry, could have advised it of its claim." Hexcel, 681 F.3d at 1060 (internal quotation marks omitted).

"Moreover, allegations of fraudulent concealment must be pled with particularity." Ryan II, 147 F. Supp. 3d at 885. "Although it is generally inappropriate to resolve the fact-intensive allegations of fraudulent concealment at the motion to dismiss stage, Plaintiffs nevertheless must allege specific factual allegations of fraudulent concealment to survive a motion to dismiss," Garrison v. Oracle Corp. ("Garrison II"), 159 F. Supp. 3d 1044, 1073 (N.D. Cal. 2016) (granting a motion to dismiss with prejudice and finding that plaintiffs had failed to adequately plead fraudulent concealment). "Conclusory statements are not enough." Conmar Corp., 858 F.2d at 502.

HN9[] In *Hexcel*, the Ninth Circuit emphasized that if a plaintiff has actual or constructive knowledge of the facts giving rise to his claim, then fraudulent concealment does not apply. Hexcel, 681 F.3d at 1060. Plaintiffs do not attempt to contest that they knew of their alleged exclusion by Facebook by April 30, 2015, when Facebook removed access to the Core APIs. Rather, Plaintiffs argue that without the knowledge of Facebook's true motives **[*26]** for removing the APIs, they could not know they were injured. **HN10**[] However, the "failure to own up to illegal conduct" is not sufficient for fraudulent concealment, "and to find otherwise 'would effectively nullify the statute of limitations in these cases.'" Garrison II, 159 F. Supp. 3d at 1077 (quoting Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 218-19 (4th Cir. 1987)); *see also* Conmar, 858 F.2d at 505 (citing favorably Pocahontas, 828 F.2d at 218); In re Animation Workers Antitrust Litig. ("Animation Workers I"), 87 F. Supp. 3d 1195, 1216 (N.D. Cal. 2015) ("That Defendants did not affirmatively disclose the details of their allegedly unlawful conspiracy to Plaintiffs is neither surprising nor sufficient to constitute 'affirmative steps to mislead.'")[3] (citing Conmar, 858 F.2d at 505)). Under Hexcel, what is important is the facts that give rise to Plaintiffs' claims. The critical fact was losing access to the Core APIs in April 2015.

The Court finds the primary cases Plaintiffs rely on, Animation Workers II and In re Glumetza Antitrust Lit., 2020 U.S. Dist. LEXIS 39649, 2020 WL 1066934, at *6 (N.D. Cal. Mar 5, 2020), distinguishable from this case. As Facebook notes, these cases involve allegations of illegal price-fixing, a different antitrust violation than what Plaintiffs have alleged here. Both cases allege a conspiracy, which is also absent in this case. These different factual scenarios are meaningful in terms of evaluating whether Plaintiffs have sufficiently pled fraudulent concealment. **[*27]** The Court agrees with Facebook that "In a price-fixing case, concealing the reasons a price is set at a given level obscures not only the defendant's intent but also the fact that a potential plaintiff has been injured at all—i.e., that prices are the result of collusion rather than market forces." Mot. 8. Here, by contrast, the injury of lost API access was clear to Plaintiffs when it occurred. *See* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 320a (4th ed., last updated Sept. 2020) ("[I]n the typical refusal to deal, tying, or exclusive dealing case, the injured party and likely plaintiff has virtually immediate knowledge of the unlawful act.").

The Court also finds that Plaintiffs have failed to plead affirmative conduct on the part of Facebook with the requisite particularity that Rule 9(b) requires. **HN11**[] "[T]o plead fraudulent concealment in accordance with Rule 9(b), Plaintiffs must allege an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." Garrison II, 159 F. Supp 3d at 1075 (internal quotation and citation omitted). Many of the statements cited by Plaintiffs were not made **[*28]** to these particular Plaintiffs. *See, e.g.*, Am. Compl. ¶¶ 464-65 (statements to developers at Microsoft and Airbiquity); Am. Compl. ¶ 466 (statements to unspecified, unnamed developers). Statements made before Plaintiffs were allegedly injured in April 2015 necessarily cannot toll the statute of limitations, *see* Am. Compl. ¶¶ 459-60. Plaintiffs also allege a "code of silence"

[3] The Court acknowledges that the *Animation Workers* plaintiffs were ultimately able to plead sufficient facts to establish fraudulent concealment at the motion to dismiss stage after Judge Koh gave them one opportunity to amend their complaint. *See* Animation Workers II, 123 F. Supp 3d at 1193-1205. Even under *Animation Workers II*, the facts pled by Plaintiffs after their opportunity to amend are not sufficient to plausibly plead fraudulent concealment.

internally at Facebook, Am. Compl. ¶¶ 454-58, but this Court has already rejected Plaintiffs' attempts to rely on Facebook's private actions as affirmative misconduct that specifically misled them. Prior MTD Order 9-10.

Plaintiffs allege that Facebook misrepresented the real goal of the API withdrawal in an April 30, 2015 blog post, Am. Compl. ¶ 467, but Plaintiffs do not allege that any of them read or relied on this statement. The March 26, 2018 statement of senior executive Ime Archibong, Am. Compl. ¶ 472, suffers from the same deficiency. Plaintiffs also refer to unspecified Facebook "documentation and FAQ," publicized by Facebook employee Simon Cross on an unspecified message board on an unspecified date, that was false and misleading, Am. Compl. ¶ 468, but this type of allegation is wholly insufficient under **[*29]** *Rule 9(b)*. *See* *Animation Workers I, 87 F. Supp. 3d at 1217* ("Plaintiffs offer no specific facts showing the 'who, what, where, when' of these alleged incomplete or materially false statements.") (citing *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)* (per curiam)). Plaintiffs' allegations that Reveal Chat and Beehive "frequented those sources of information as a matter of course" and read the posts and accepted the pretextual reason for the API removal, Am. Compl. ¶ 471, is not the type of allegation of fraud "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge." *Garrison II, 159 F. Supp 3d at 1075* (citing *Swartz, 476 F.3d at 764*). Defendants also allege that December 5, 2018 blog post by Facebook misrepresented the reasons for the API withdrawal and Data Sharing Agreements, and this post was read by one of the founders of Reveal Chat. Am. Compl. ¶¶ 30, 474. However, the Complaint does not specifically identify this founder, or how many founders Reveal Chat and its predecessor company claim. These allegations are significantly less particular than those held sufficient in *Animation Workers II*, where those plaintiffs alleged facts such as "Lucasfilm made 'affirmative efforts to eliminate a paper trail regarding its code-named 'DNR' **[*30]** agreements,' including a requirement that "all discussions of 'DNR' needed to be conducted over the phone ... [i]f you see an email forward to Steve and one of our lawyers." *123 F. Supp. 3d at 1201*. Despite a previous warning from the Court that the alleged affirmative acts need to be specifically pled, *see* Prior MTD Order 9-10, Plaintiffs have still not cured this deficiency.

Finally, Plaintiffs have failed to plead their diligence in trying to uncover the facts giving rise to its claim with particularity. ***HN12***[] "Diligent inquiry is required where facts exist that would excite the inquiry of a reasonable person," and diligence must be pled with particularity. *Glumetza, 2020 U.S. Dist. LEXIS 39649, 2020 WL 1066934, at *6* (citing *Conmar, 858 F.2d at 502, 504)*. Allegations such as "[Reveal Chat] then contacted *acquaintances that worked at Facebook* to get more clarity as to the APIs and to determine whether [Reveal Chat] could obtain an exemption from the decision," Am. Compl. ¶ 26 (emphasis added) fall woefully short of the particularity required to plead diligence. Beehive likewise "contacted an *acquaintance that worked at Facebook*, who advised them that they would never receive an exemption." Am. Compl. ¶ 61 (emphasis added). Lenddo alleges that it spoke with Facebook's Simon Cross and Neil Hiltz about **[*31]** an exemption to the policy withdrawing access to the Core APIs, and Cross told them they would not be receiving an exemption. Am. Compl. ¶¶ 44-46, 476. Plaintiff has not pled how seeking an exemption to a policy constitutes diligence in attempting to determine if the API withdrawal was unlawful. Plaintiffs also claim they read two Facebook blog posts from 2015 and 2018 and unspecified message board posts, but "[o]nce [parties] had clear knowledge of their claims, it was not reasonable for them to rely on reassuring comments from [Defendant]." *Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1416 (9th Cir. 1987)* (citation omitted). Accordingly, the Court finds that Plaintiffs have failed to plead sufficient facts alleging they acted diligently in trying to uncover the facts giving rise to their claim.

Conclusion

The Court is mindful that resolution of statute of limitations challenges are generally deferred until a presentation of a more developed record, but this is one of the rare cases where Plaintiffs' entire theory of liability is based on completed acts by Facebook beyond the limitations period. By their own pleading, Plaintiffs have exposed the tardiness of their claims, their knowledge of their injury, and the absence of diligence. Thus, the Court **[*32]** finds that the four-year statute of limitations applies to this case, and Plaintiffs have not adequately pled a tolling theory under the continuing violation or fraudulent concealment doctrines. The Court put Plaintiffs on notice in its first order granting Facebook's motion to dismiss that "allegations of fraudulent concealment must be pled with particularity." Prior Order 8 (citing *Ryan II, 147 F. Supp. 3d at 885*). Despite this notice, Plaintiffs' allegations are wholly inadequate to meet the pleading standard for fraud claims under *Rule 9(b)*. Given Plaintiffs' adequate notice of the need to plead with particularity and their continued failure to do so, the Court finds that further amendment would be futile and will GRANT Facebook's motion to dismiss WITH PREJUDICE.

C. Facebook's Remaining Arguments

Facebook argues several other grounds for dismissal, including that Plaintiffs have not plausibly alleged an antitrust injury and have failed to state a claim establishing a violation of *Section 2 of the Sherman Act*. Mot. 11-25. However, because this case is being dismissed under the statute of limitations, the Court need not reach these arguments.

IV. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that Facebook's motion to dismiss **[*33]** is GRANTED WITH PREJUDICE.

Dated: April 26, 2021

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

JUDGMENT

The amended complaint of Plaintiffs Reveal Chat HoldCo LLC, USA Technology and Management Services, Inc. (d/b/a Lenddo USA), and Beehive Biometric, Inc. (a/k/a Beehive ID) having been dismissed without leave to amend and the action having been dismissed with prejudice,

it is hereby ORDERED and ADJUDGED that Plaintiffs Reveal Chat HoldCo LLC, USA Technology and Management Services, Inc. (d/b/a Lenddo USA), and Beehive Biometric, Inc. (a/k/a Beehive ID) take nothing by this action and that judgment is entered for Facebook, Inc. and against Plaintiffs Reveal Chat HoldCo LLC, USA Technology and Management Services, Inc. (d/b/a Lenddo USA), and Beehive Biometric, Inc. (a/k/a Beehive ID).

Dated: April 26, 2021

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

Hawthorne Hangar Operations, L.P. v. Hawthorne Airport, LLC

United States District Court for the Central District of California

April 27, 2021, Decided; April 27, 2021, Filed

CV 20-10744 PA (ASx)

Reporter

2021 U.S. Dist. LEXIS 81615 *; 2021 WL 3264420

Hawthorne Hangar Operations, L.P., et al. v. Hawthorne Airport, LLC, et al.

Subsequent History: Affirmed by *Hawthorne Hangar Operations, L.P. v. Hawthorne Airport, LLC, 2022 U.S. App. LEXIS 21647 (9th Cir. Cal., Aug. 4, 2022)*

Prior History: *Hawthorne Hangar Operations, L.P. v. Hawthorne Airport, 2021 U.S. Dist. LEXIS 103596, 2021 WL 2149639 (C.D. Cal., Mar. 12, 2021)*

Core Terms

fuel, fence, Airport, statute of limitations, Sherman Act, Hangar, Reply, continuing violation, erected, lease, motion to dismiss, summary judgment, Defendants', accrue, sales, restrictive covenant, antitrust claim, matter of law, pre-existing, inserted, monopoly

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

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

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

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

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

HN1[] **Summary Judgment, Burdens of Proof**

Summary judgment is proper where the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. The burden on the moving party may be discharged by showing—that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case. The moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence, or by any other form of admissible evidence. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. The facts are construed in the light most favorable to the party opposing the motion.

Importantly, a mere scintilla of evidence will be insufficient to defeat a properly supported motion for summary judgment.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Rights Law > Protection of Rights > Procedural Matters > Claim Accrual

Governments > Legislation > Statute of Limitations > Time Limitations

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

HN2[] **Remedies, Damages**

The statute of limitations begins to run when a defendant commits an act that injures a plaintiff's business. Both the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court have long assumed as a basic principle of ***antitrust law*** that antitrust claims accrue at the time of injury. The plaintiff's knowledge is generally irrelevant to accrual.

Antitrust & Trade Law > Sherman Act > Claims

Governments > Legislation > Statute of Limitations > Time Limitations

HN3[] **Sherman Act, Claims**

A plaintiff's Sherman Act claim begins to accrue on the date on which injury occurs.

Antitrust & Trade Law > Sherman Act > Defenses

Civil Rights Law > Protection of Rights > Procedural Matters > Continuing Violations

Labor & Employment Law > ... > Title VII Discrimination > Statute of Limitations > Continuing Violations

Torts > ... > Statute of Limitations > Begins to Run > Continuing Violations

Governments > Legislation > Statute of Limitations > Extensions & Revivals

HN4[] **Sherman Act, Defenses**

Under the continuing violations doctrine, each overt act that is part of the antitrust violation and that injures the plaintiff starts the statutory period running again. (A continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured.). In the United States Ninth Circuit, an overt act restarts the statute of limitations if it: (1) is a new and independent act that is not merely a reaffirmation of a previous act,; and (2) inflicts new and accumulating injury on the plaintiff. The effect of a continuing violation is to restart the statute of limitations.

Counsel: **[*1]** For Hawthorne Hangar Operations, L.P., a California limited partnership, Dan Wolfe, an individual, Plaintiffs: Ernest J. Franceschi , Jr., LEAD ATTORNEY, Franceschi Law Corporation, Marina Del Rey, CA.

For Hawthorne Airport, LLC, a Delaware limited liability company, Advanced Air, LLC, a California limited liability company, David Wehrly, an individual, Levi Stockton, an individual, Defendants: Douglas Leland Stuart, LEAD

ATTORNEY, Stephen R Hofer, Aerlex Law Group, Los Angeles, CA; Michael Brett Cooper, LEAD ATTORNEY, Kirsten Elizabeth Stockton, Yoffe and Cooper LLP, Manhattan Beach, CA.

Judges: PERCY ANDERSON, UNITED STATES DISTRICT JUDGE.

Opinion by: PERCY ANDERSON

Opinion

CIVIL MINUTES - GENERAL

Proceedings: IN CHAMBERS - COURT ORDER

On January 21, 2021 defendants Hawthorne Airport, LLC, Advanced Air, LLC, David Wehrly, and Levi Stockton ("Defendants") filed a Motion to Dismiss. (Dkt. No. 29 ("Mot.").) Plaintiffs Hawthorn Hangar Operations, L.P., and Dan Wolfe ("Plaintiffs") filed an Opposition (Dkt. No. 33) and Defendants filed a Reply (Dkt. No. 37.) Plaintiffs filed a Request to Strike Defendants' Reply (Dkt. No. 40) and Defendants filed a Request to Strike Plaintiffs' Request (Dkt. No. 41).

On February 26, 2021, **[*2]** the Court provided notice to the parties that it was converting Defendants' Motion to Dismiss into a *Rule 56* Summary Judgment Motion on the issue of whether Plaintiffs' antitrust claims are barred by the statute of limitations. (Dkt. No. 47.) In its Order, the Court noted that several of the documents attached to the parties' Motion to Dismiss, Opposition, and Reply were not proper documents for judicial notice, and included facts that the Court could not rely on in deciding a *Rule 12(b)(6)* motion. (Id.) The Court further noted that, pursuant to *Federal Rule of Civil Procedure 12(d)*, a Court may convert a *Rule 12(b)(6)* motion to dismiss into a *Rule 56* motion for summary judgment. (Id. citing *Fed. R. Civ. P. 12(d)* ("If, on a motion under *Rule 12(b)(6)* or *Rule 12(c)*, matters outside the pleading are presented to and not excluded by the court, the motion must be treated as one for summary judgment under *Rule 56*. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.")).

The Court provided Plaintiffs with an opportunity to file a supplemental opposition by March 12, 2021, and for Defendants to file a reply by March 19, 2021. (Id.) On March 12, 2021, Plaintiffs filed their Opposition. (Dkt. No. 54 ("Pl.'s Supp. Opp.").) On March 19, 2021, Defendants filed their **[*3]** Reply. (Dkt. No. 58 ("Def.'s Supp. Reply").) Pursuant to *Rule 78 of the Federal Rules of Civil Procedure* and *Local Rule 7-15*, the Court finds this matter appropriate for decision without oral argument.

I. Background

Plaintiffs brought this case against Defendants and the City of Hawthorne[1], alleging Defendants "conspired among themselves to restrain interstate commerce at the Hawthorne Municipal Airport," and that "[w]ith the complicity of the City, [Defendants] have acquired a de facto monopoly over all ground leases and aviation services at the airport." (Dkt. No. 1 ("Compl.") ¶ 1.) Plaintiffs allege Defendants have "attempted to prevent Plaintiffs from engaging in competing fuel sales at the airport." (Id. ¶ 10.)

As alleged in Plaintiffs' Complaint, in 2005, "the City of Hawthorne entered into a master ground lease with [d]efendant Hawthorn Airport, LLC for thirty-five years with two . . . renewal options for *sections 1*, *2*, *4*, *5*, *6*, *7*, *9*, and *11*." (Id. ¶ 14.) Hawthorne Airport LLC was also "given the option to lease the remaining *sections 3*, *8*, and *10*."

[1] The Court granted the City of Hawthorne's Motion to Dismiss without leave to amend on March 12, 2021. (Dkt. No. 55.)

(Id.) Hawthorne Airport LLC "exercised the option to lease *sections 3*, *8*, and *10* and has therefore acquired from the City a constructive exclusive right [over] the entire aircraft non movement area of the airport." (Id.) Plaintiffs allege **[*4]** that "by being the master lease holder, [Hawthorne Airport LLC,] Wehrly, and Stockton are able to exclude from the airport any business seeking to compete with the services they and [defendant Advanced Air, LLC] provide." (Id.)

As alleged in Plaintiffs' Complaint, in 2009, plaintiff Wolfe and defendant Wehrly, entered into a Purchase/Sale Agreement to "purchased the former Northrop headquarters property adjacent to the airport." (Id. ¶ 17.) "The Northrop parcel included a large hangar and two existing 15,000 gallon underground fuel tanks that were previously used by Northrop to fuel its aircraft." (Id. ¶18.)

According to Plaintiffs, defendant Wehrly "sought to preserve his monopoly through the insertion in the Purchase/Sale Agreement [of] restrictive covenants which sought to limit Wolfe's ability to sell fuel to the general public." (Id.) "In August of 2009 Hawthorne Hangar Operations L.P. was formed as a partnership between Wehrly and Wolfe to purchase the Northrop property." (Id. ¶ 19.) Section 10.4 of the Purchase/Sale Agreement contains a fuel restriction stating "Buyer covenants and agrees that Buyer shall not use the fuel tanks located on the Real Property for any purpose other than fueling **[*5]** and refueling of (i) airplanes, helicopters and other equipment owned or directly managed by Buyer . . . ."

"In 2014, [plaintiff] Wolfe sought to buy out [defendant] Wehrly's partnership interest in [Hawthorne Hangar Operations L.P.] . . . because Wehrly refused to proceed with the renovation of the fuel facility." (Id. ¶ 25.) Wehrly allegedly agreed to be bought out, but insisted that the fueling restriction be made part of the buyout agreement, which Wolfe refused. (Id.) In order to avoid a "forced sale, a compromise was reached where a provision was inserted into the buyout agreement" in which Wolfe allegedly "simply acknowledge[d] that [the fueling restriction]" was part of the Purchase/Sale Agreement. (Id.) "After the 2014 buyout, Wolfe expended $1.2 million to make the fuel farm operational." (Id. ¶ 26.)

According to Plaintiffs, Defendants allegedly continued their conspiracy to restrain fuel competition by erecting a fence that was "intended to obstruct and hinder [Hawthorne Hangar Operations L.P.'s'] fueling operations." (Id. 28.) According to the undisputed facts submitted by the parties in their supplemental briefing, in 2009 there was a fence located between the Hawthorne Hangar **[*6]** Airport Property and Defendant/ Hawthorne Airport, LLC's leasehold just north of the Hawthorne Hangar Airport property. (Def.'s Supp. Reply at 1, Decl. of L. Stockton at ¶¶ 11-13.) The pre-existing fence was a "chain link" type fence with "slats and support poles that were cemented into the ground." (Id. ¶ 5.) In 2016, this pre-existing fence was removed by Plaintiffs. (Id.; see also Pls.' Supp. Opp., Decl. of Dan Wolfe at ¶ 7 (Plaintiffs "removed" "open-corral areas" because Plaintiffs "didn't need any outdoor fenced-in area for storage," and removal was "approved without [Plaintiffs'] fuel farm refurbishment project." "Building a tall unnecessary fence with no openings in its entire length formed a three sided very dangerous trap."). Defendant Hawthorne Airport LLC demanded that Plaintiffs replace the pre-existing fence. On April 28, 2017, after Plaintiffs did not put up a new fence, Defendant Hawthorne Airport LLC put up a new fence. (Def.'s Supp. Reply, Decl. of L. Stockton ¶ 28.)

In their Complaint, Plaintiffs bring claims for: (1) violation of *15 U.S.C. section 1*, conspiracy to restrain interstate commerce (fuel sales), (2) violation of *15 U.S.C. section 2*, for unlawful attempt to monopolize fuel sales and airport **[*7]** services, (3) declaratory relief that section 10.4 (the fuel restriction section of the Purchase/Sale Agreement) is void by operation of *California Business & Professions Code Section 16600*, and (4) nuisance and abatement. Defendants now ask the Court to find on summary judgment that Plaintiffs' *Sherman Act* claims (claims 1 and 2) are barred by the statute of limitations.

II. Legal Standard

HN1[] Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); see also Musick v. Burke, 913 F.2d 1390, 1394 (9th Cir. 1990). The moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence, or by any other form of admissible evidence. See Celotex, 477 U.S. at 322. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. See id. at 325. The facts are construed "in the light most favorable to the **[*8]** party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Importantly, a "mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment.'" Fazio v. City & County of San Francisco, 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting Anderson, 477 U.S. at 249, 252).

III. Discussion

In their original Motion to Dismiss, Defendants argued in part that the statute of limitations has run on Plaintiffs' Sherman Act claims because all of the alleged antitrust acts occurred more than four years ago. In particular, Defendants argued Plaintiffs' Sherman Act claims began to run in 2009 when Plaintiffs and Defendants entered into the Purchase/Sale Agreement which contained a restrictive covenant on Plaintiffs' fuel sales. According to Defendants, it was at this time that any alleged injury to Plaintiffs' potential fuel sales operations occurred.

In response, Plaintiffs argue that the statute of limitations did not begin to run until February of 2017. Plaintiffs argue they were not injured in 2009 because they did not intend to sell fuel on their property in 2009, and that under the accrual exception they were not injured until 2017 when they decided they wanted to sell fuel on their property. (Dkt. No. 54, Pls. Opp. to Motion to Dismiss at 5.)

In addition, Plaintiffs argue that under the continuing **[*9]** violation doctrine, the April 2017 erection of the fence blocking Plaintiffs' property constitutes a continuing violation which kept the statute of limitations from running. (Dkt. No. 54 at 2.) According to Plaintiffs, this fence was part of Defendants' continuing effort to prevent Plaintiffs from competing with Defendants' fuel sales.

A. Sherman Act Statute of Limitations

Plaintiffs' claims under the Sherman Act are subject to a four year statute of limitations. See15 U.S.C. § 15(b). ***HN2***[] The statute of limitations begins to run "when a defendant commits an act that injures a plaintiff's business." Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971); see also In re Animation Workers Antitrust Litig., 87 F. Supp. 3d 1195, 1209 (N.D. Cal. Apr. 3, 2015) ("[B]oth the Ninth Circuit and U.S. Supreme Court have long assumed as a basic principle of ***antitrust law*** that antitrust claims accrue at the time of injury.") "[T]he plaintiff's knowledge is generally irrelevant to accrual." Beneficial Standard Life Insurance Co. v. Madariaga, 851 F.2d 271, 274-75 (9th Cir. 1988).

1. When Plaintiffs' Sherman Act Claims Accrued

In their supplemental Opposition, Plaintiffs argue that the "accrual exception" applies to their Sherman Act claims, and that under this exception, the statute of limitations did not begin to run until February 14, 2017. ***HN3***[] A plaintiff's Sherman Act claim begins to accrue on "the date on which injury occurs." In re Animation Workers Antitrust Litig., 87 F. Supp. 3d at 1209.

According to Plaintiffs, **[*10]** February of 2017 is when Plaintiffs first decided they wanted to sell fuel on their property and this is when Defendants first attempted to assert the restrictive covenant that injured Plaintiffs. (Dkt. No. 54 at 5.) Plaintiffs argue they had "no intention of engaging in competing fuel sales at the time of the [2009 Purchase/Sale Agreement]." Instead, "[a]ll that [plaintiff] Wolfe wanted to do at the time was to be able to fuel his own aircraft." (Id.) However, "due to the cost of restoring the fueling facility, [plaintiff] Wolfe changed his mind and decided to operate a fueling [facility] as a means of recovering these costs." (Id.) According to Plaintiffs, "it was only then, that Wolfe decided to enter the market and was adversely impacted by the . . . restrictive covenant." (Id.)

As the Court previously found, "Plaintiffs were injured in 2009 when Plaintiffs entered into the Purchase/Sale Agreement for the Northrop Property." (See Dkt. No. 55 at 4.) As the Court previously stated, Plaintiffs' allege that defendant Wehrly's motivation in entering into the agreement with Plaintiffs was to continue Wehrly's and the other defendants' monopoly and control over the airport property, which **[*11]** was granted to them by the City in the 2005 Master Lease Agreement and option to lease the remaining airport parcels. (Id.) Wehrly "further sought to preserve his monopoly through the insertion in the 2009 Purchase/Sale Agreement of restrictive covenants which sought to limit Wolfe's ability to sell fuel to the general public." (Id.) Plaintiffs were eventually forced to buy out Wehrly's interest in the Northrop property because Wehrly refused to develop the fuel facility and destroy the alleged monopoly granted to him by the City. Because an antitrust claim accrues "when a defendant commits an act that injured a plaintiff's business," Plaintiffs' antitrust claims against Defendants accrued in 2009 when Defendants committed the act of injuring Plaintiffs' potential fuel business by inserting the fuel restriction in the 2009 Purchase/Sale Agreement.

While Plaintiffs argue in their supplemental Opposition that Wolfe did not intend to sell fuel on his property until 2017 and therefore was not injured until 2017, the evidence submitted in support of this Motion directly contradicts Plaintiffs' argument. For example, in April of 2017, plaintiff Dan Wolfe sent an email to Levi Stockton stating **[*12]** he intended to sell fuel on the property in 2009, but thought it would be easier to challenge the fuel restriction after the Purchase/Sale Agreement was finalized. (See Def.'s Supp. Reply Ex. C ("They fraudulently inserted a bogus fabricated covenant (10.4) into our original purchase agreement. . . . At the time, just before closing, I didn't want to take the chance of screwing up the purchase. I also believed that it would be easy later to prove the wrong doing. . . . To counter the bogus, deceitful actions by Hoonie and David, BEFORE I put my money into escrow to close the sale, I presented Davis with a Partnership Agreement clearly outlining our shared ([Hawthorne Hangar Operation's]) intentions to sell fuel to 'outside tenants, invitees and visitors."))

Because there is no genuine dispute that Plaintiffs were injured in 2009, the Court finds as a matter of law that Plaintiffs' Sherman Act claims accrued in 2009. Thus, absent some other exception, the statute of limitations on Plaintiffs' Sherman Act claims expired four years later in 2013.

B. Continuing Violation Exception

Plaintiffs next argue that a new fence erected in 2017 constitutes a "continuing violation" that continued the **[*13]** statute of limitations for Plaintiffs' antitrust claims. ***HN4***[] Under the "continuing violations" doctrine, "each overt act that is part of the [antitrust] violation and that injures the plaintiff . . . starts the statutory period running again." *Klehr, 521 U.S. at 189*; *Pace Indus. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987)* ("A continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured."). In the Ninth Circuit, an overt act restarts the statute of limitations if it: (1) "is a new and independent act that is not merely a reaffirmation of a previous act,"; and (2) "inflict[s] new and accumulating injury on the plaintiff." *Pace, 813 F.3d at 237*. "The effect of a continuing violation is to restart the statute of limitations." *Airweld, Inc. v. Airco, Inc., 742 F.3d 1184, 1190 (9th Cir. 1984)*.

The undisputed facts show that in 2009 there was a fence located on the property where Plaintiffs allege a new fence was constructed. (Def.'s Supp. Reply at 1, Decl. of L. Stockton at ¶¶ 11-13.) The pre-existing fence was a "chain link" type fence with slats and support poles that were cemented into the ground." (Id. ¶ 5.) In 2016, this pre-existing fence was removed by Plaintiffs. (Id.; see also Plaintiffs' Supp. Opp., Decl. of Dan Wolfe at ¶ 7 (Plaintiffs "removed" "open-corral **[*14]** areas" because Plaintiffs "didn't need any outdoor fenced-in area for storage," and removal was "approved without [Plaintiffs'] fuel farm refurbishment project.") Thus, the fence erected in 2017 was not a new and independent act, but was rather a reaffirmation of a previous act - namely replacing a fence Plaintiffs had previously taken down.

In their Opposition, Plaintiffs argue that the "fences that [Hawthorne Hangar Operations] removed were not security fences." (Pl.'s Supp. Opp., Decl. of Dan Wolfe at ¶ 7.) Dan Wolfe's declaration states that there was "never, at least while [Hawthorne Hangar Operations] has been in existence, been an Airport Boundary Security Fence." However, the issue is not whether there was an "Airport Boundary Security Fence." The issue is whether there existed prior to 2017 a fence similar to the one Defendants erected in 2017. Based on the undisputed facts, the answer to that question is yes, there was a fence similar to the one Defendants erected, but it was removed by Plaintiffs in 2016.

The Court finds as a matter of law that the continuing violations exception does not apply to Plaintiffs' Sherman Act claims, because the fence erected in 2017 was not a **[*15]** new and independent act, and did not inflict a new and independent accumulating injury on Plaintiffs. The fence was simply erected to replace a fence that Plaintiffs earlier had taken down. Because the statute of limitations began to run on Plaintiffs' Sherman Act claims in 2009, and the continuing violations exception does not apply to Plaintiffs' Sherman Act claims, the Court finds as a matter of law that the statute of limitations on Plaintiffs' Sherman Act claims ran in 2013. Thus, Plaintiffs' Sherman Act claims brought against Defendants in 2020 are barred by the statute of limitations.

Conclusion

For the foregoing reasons, the Court finds as a matter of law that Plaintiffs' Sherman Act claims are barred by the statute of limitations. Plaintiffs' Sherman Act claims are dismissed with prejudice. The Court declines to exercise supplemental jurisdiction over Plaintiffs' remaining claims for (1) declaratory relief that section 10.4 is void, and (2) nuisance and abatement. See *28 U.S.C. § 1367(c)* (A federal court may decline to exercise supplemental jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction.") Plaintiffs' claims for (1) declaratory relief and (2) nuisance **[*16]** and abatement are dismissed without prejudice. Defendants' Petition to Compel Arbitration of the Third Cause of Action of the Complaint (Dkt. No. 32) is denied as moot. The Court will issue a judgment consistent with this Order.

IT IS SO ORDERED.

JUDGMENT

Pursuant to the Court's March 12, 2021 Order granting defendant the City of Hawthorne's Motion to Dismiss and the Court's April 27, 2021 Order granting defendants Hawthorne Airport LLC, Advanced Air LLC, David Wehrly, and Levi Stockton's (together with the City of Hawthorne, "Defendants") Motion for Summary Judgment, it is HEREBY ORDERED, ADJUDGED, AND DECREED that

1. Judgment is entered in favor of Defendants and against Plaintiffs Hawthorne Hangar Operations, L.P. and Dan Wolfe ("Plaintiffs"); and

2. Plaintiffs take nothing and Defendants are entitled to their costs of suit pursuant to *Federal Rule of Civil Procedure 54*.

DATED: April 27, 2021

/s/ Percy Anderson

Percy Anderson

UNITED STATES DISTRICT JUDGE

Stewart v. Kodiak Cakes, LLC

United States District Court for the Southern District of California

April 28, 2021, Decided; April 29, 2021, Filed

Case No. 19-cv-2454-MMA (MSB)

Reporter

537 F. Supp. 3d 1103 *; 2021 U.S. Dist. LEXIS 82267 **; 2021 WL 1698695

TY STEWART, et al., Plaintiffs, v. KODIAK CAKES, LLC, Defendant.

Subsequent History: Dismissed by, Without prejudice, in part, Motion denied by, in part, Objection overruled by, Request granted, Request denied by *Stewart v. Kodiak Cakes, LLC, 2021 U.S. Dist. LEXIS 205305, 2021 WL 4950297 (S.D. Cal., Oct. 25, 2021)*

Dismissed by, in part, Dismissed by, Without prejudice, in part *Stewart v. Kodiak Cakes, LLC, 2022 U.S. Dist. LEXIS 43147 (S.D. Cal., Mar. 10, 2022)*

Core Terms

consumer, products, packaging, Plaintiffs', allegations, advertising, fill, deceptive, cause of action, labels, box, Mix, slack, healthy, prong, misleading, ingredients, online, preservatives, defense motion, artificial, marketing, unfair, fraudulent, additives, deceived, argues, misrepresentation, non-GMO, motion to dismiss

LexisNexis® Headnotes

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

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Public Records

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

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

Generally, district courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under Fed. R. Civ. P. 12(b)(6). However, a court may take judicial notice of matters of public record, and of documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, overruled on other grounds by Fed. R. Evid. 201. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Rule 201(b).

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

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN2[] False Advertising, State Regulation

Judicial notice is proper over websites and images of packaging in consumer protection advertising actions.

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

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN3[] Motions to Dismiss, Failure to State Claim

Unlike rule-established judicial notice, incorporation-by-reference is a judicially created doctrine that treats certain documents as though they are part of the complaint itself. The doctrine prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken — or doom — their claims. The Ninth Circuit has noted that there is a policy concern underlying the rule: preventing plaintiffs from surviving a Fed. R. Civ. P. 12(b)(6) motion by deliberately omitting references to documents upon which their claims are based. Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim. Incorporation-by-reference allows a court to treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6). While a court unlike judicial notice may assume an incorporated document's contents are true for purposes of a motion to dismiss under Rule 12(b)(6) it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint.

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

HN4[] Motion Practice, Content & Form

Courts can use incorporation-by-reference to consider exhibits containing printouts taken from websites that plaintiffs refer to and use to support their allegations.

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

HN5[] Motion Practice, Content & Form

Plaintiffs may not select only portions of documents that support their claims, while omitting portions of those very documents that weaken — or doom — their claims.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Evidence > Burdens of Proof > Allocation

HN6[] Standing, Burdens of Proof

A Fed. R. Civ. P. 12(b)(1) motion to dismiss allows for dismissal of an action for lack of subject matter jurisdiction. Subject matter jurisdiction must exist when the action is commenced. Further, subject matter jurisdiction may be challenged at any stage in the litigation. Rule 12(h)(3). The party seeking federal jurisdiction bears the burden to establish jurisdiction. A party may challenge standing in a Rule 12(b)(1) motion given standing pertains to a federal court's subject-matter jurisdiction under Article III.

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

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN7[] **Motions to Dismiss, Failure to State Claim**

A facial attack on jurisdiction asserts that the allegations in a complaint are insufficient to invoke federal jurisdiction, whereas a factual attack disputes the truth of the allegations that would otherwise confer federal jurisdiction. In resolving a facial challenge to jurisdiction, a court accepts the allegations of the complaint as true and draws all reasonable inferences in favor of the plaintiff. In resolving a factual attack, a court may examine extrinsic evidence without converting the motion to dismiss into a motion for summary judgment, and a court need not accept the allegations as true.

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

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN8[] **Entitlement as Matter of Law, Genuine Disputes**

A Fed. R. Civ. P. 12(b)(1) motion is not appropriate for determining jurisdiction where issues of jurisdiction and substance are intertwined. A court may not resolve genuinely disputed facts where the question of jurisdiction is dependent on the resolution of factual issues going to the merits. When there is an entanglement, determination of the jurisdictional issue should be determined on either a motion going to the merits or at trial. Unless the summary judgment standard is met, the disputed jurisdictional fact must be determined at trial by the trier of fact.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

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

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN9[] **Standing, Burdens of Proof**

Article III standing requires a plaintiff to have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. The party invoking federal jurisdiction bears the burden to establish standing.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN10[] **Class Actions, Certification of Classes**

District Courts in California are split on the issue of whether standing inquiries can be deferred until after class certification, but they note a trend that courts can address standing at the pleadings stage and dismiss claims brought under state laws that have no connection to the named plaintiffs.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN11[] **Prerequisites for Class Action, Adequacy of Representation**

The United States District Court for the Southern District of California agrees with the growing trend that courts can address the issue of Article III standing at the pleading stage and dismiss claims asserted under the laws of states in which no plaintiff resides or has purchased products. Even in circumstances where courts have found they have discretion to defer standing questions until after class certification, the standing inquiry can be addressed when plaintiffs bring claims from states where they do not have a connection. Indeed, if a complaint includes multiple claims, at least one named class representative must have Article III standing to raise each claim. The United States Supreme Court has insisted that a plaintiff must demonstrate standing separately for each form of relief sought. The fact that an action is a putative class action does not excuse plaintiffs' obligation to show standing for each claim asserted.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

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

HN12[] **Standing, Burdens of Proof**

A plaintiff must demonstrate constitutional standing separately for each form of relief requested. In applying the standing framework to a plaintiff seeking injunctive relief, the plaintiff must demonstrate that she or he has suffered or is threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that he will again be wronged in a similar way. The likelihood of further harm requires a real and immediate threat of repeated injury. Past wrongs constitute evidence of a real and immediate threat of repeated injury; however, past wrongs do not in themselves amount to a real and immediate threat of injury necessary to make out a case or controversy.

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

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

In the false advertising context, the Ninth Circuit has held that a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an actual and imminent, not conjectural or hypothetical threat of future harm. The Ninth Circuit emphasized that knowledge of a label's falsity does not equate to knowledge that it will remain false in the future.

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

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

HN14[] Motions to Dismiss, Failure to State Claim

A Fed. R. Civ. P. 12(b)(6) motion to dismiss tests the sufficiency of the complaint. A pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). However, plaintiffs must also plead enough facts to state a claim to relief that is plausible on its face. Fed. R. Civ. P. 12(b)(6). The plausibility standard demands more than a formulaic recitation of the elements of a cause of action, or naked assertions' devoid of further factual enhancement. Instead, the complaint must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively.

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

HN15[] Motions to Dismiss, Failure to State Claim

In reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), courts must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party. The court need not take legal conclusions as true merely because they are cast in the form of factual allegations. Similarly, conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss.

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

HN16[] Motions to Dismiss, Failure to State Claim

In determining the propriety of a Fed. R. Civ. P.12(b)(6) dismissal, courts generally may not look beyond the complaint for additional facts. A court may, however, consider certain materials — documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice — without converting the motion to dismiss into a motion for summary judgment. However, courts are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

HN17[] Heightened Pleading Requirements, Fraud Claims

Allegations of fraud or mistake require the pleading party to state with particularity the circumstances constituting fraud or mistake. Fed. R. Civ. P. 9(b). The context surrounding the fraud must be specific enough to give defendants notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong. Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged. A party alleging fraud must set forth more than the neutral facts necessary to identify the transaction.

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

HN18[] Amendment of Pleadings, Leave of Court

Where dismissal is appropriate, a court should grant leave to amend unless the plaintiff could not possibly cure the defects in the pleading.

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

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

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

The California Consumers Legal Remedies Act (CLRA), Cal Civ. Code §§ 1750-1784, prohibits unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer. Cal. Civ. Code §§ 1770(a), 1760. Specifically, the CLRA prohibits, among other things, representing that goods or services have characteristics, ingredients, uses, benefits, or quantities that they do not have; representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; advertising goods or services with intent not to sell them as advertised; and representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not. Cal. Civ. Code § 1770(a)(5), (7), (9), (16).

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

Business & Corporate Compliance > ... > Computer & Internet Law > Privacy & Security > State Regulation

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

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

HN20[] **Trade Practices & Unfair Competition, State Regulation**

The California False Advertising Law (FAL), Cal. Bus. & Prof. Code §§ 17500-17606, prohibits unfair, deceptive, untrue, or misleading advertising, and the United States District Court for the Southern District of California has previously concluded that a product's packaging may form the basis of an FAL claim. In particular, the FAL forbids the dissemination of any statement concerning property or services that is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. Cal. Bus. & Prof. Code § 17500.

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

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

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

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN21[] **State Regulation, Claims**

The California Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200-17210, prohibits any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. Cal. Bus. &

Prof. Code § 17200. The UCL provides a separate theory of liability under each of the three prongs: unlawful, unfair, and fraudulent. The UCL expressly incorporates the California False Advertising Law's prohibition on unfair advertising as one form of unfair competition. Additionally, a violation of the California Consumers Legal Remedies Act (CLRA) also violates the UCL.

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

HN22[] **Complaints, Requirements for Complaint**

Regardless of standing problems, separate claims should not be lumped together into one cause of action. Fed. R. Civ. P. 10(b).

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

HN23[] **Heightened Pleading Requirements, Fraud Claims**

Where fraud is not a necessary element of a cause of action, a plaintiff may opt to allege that the defendant engaged in fraud. In cases where a plaintiff alleges a unified course of fraudulent conduct and relies on the conduct, the claim sounds or is grounded in fraud, and the pleading of that claim as a whole must satisfy the particularity requirement of Fed. R. Civ. P. 9(b). However, in cases where the plaintiff opts to not allege a unified course of fraudulent conduct and alleges a mix of some fraudulent and nonfraudulent conduct, only the allegations of fraud are subject to Rule 9(b)'s heightened pleading requirements.

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

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

HN24[] **Heightened Pleading Requirements, Fraud Claims**

To determine whether a plaintiff met the particularity requirements of Fed. R. Civ. P. 9(b), a court examines the complaint to determine whether plaintiff plead the the who, what, when, where, and how of the misconduct charged.

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

HN25[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) has three purposes: (1) to provide defendants with adequate notice to allow them to defend the charge and deter plaintiffs from the filing of complaints as a pretext for the discovery of unknown wrongs; (2) to protect those whose reputation would be harmed as a result of being subject to fraud charges; and (3) to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.

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

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

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

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

HN26[] State Regulation, Claims

A plaintiff alleging claims under the California Consumers Legal Remedies Act (CLRA), California False Advertising Law (FAL), or California Unfair Competition Law (UCL), must allege actual reliance. A plaintiff alleging false advertising or misrepresentation to consumers must show that the misrepresentation was an immediate cause of the injury-producing conduct. However, a plaintiff is not required to allege that the challenged misrepresentations were the sole or even the decisive cause of the injury-producing conduct.

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

HN27[] Motions to Dismiss, Failure to State Claim

Collective allegations can survive a motion to dismiss.

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

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

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

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN28[] State Regulation, Claims

To state a claim under the California Consumers Legal Remedies Act (CLRA), California False Advertising Law (FAL), or the fraudulent prong of the California Unfair Competition Law (UCL), a plaintiff must allege that the defendant's purported misrepresentations are likely to deceive a reasonable consumer. Because the same standard for fraudulent activity governs all three statutes, courts often analyze the three statutes together. These laws prohibit not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.

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

Securities Law > ... > Elements of Proof > Materiality > Puffery

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

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

HN29[] Trade Practices & Unfair Competition, State Regulation

A reasonable consumer is the ordinary consumer acting reasonably under the circumstances. Likely to deceive implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled. In determining whether a statement is misleading under the statute, the primary evidence in a false advertising case is the advertising itself. However, generalized, vague, and unspecified assertions constitute mere puffery upon which a reasonable consumer could not rely, and hence are not actionable under the California Unfair Competition Law (UCL), California False Advertising Law (FAL), or the California Consumers Legal Remedies Act (CLRA). Under the reasonable consumer test, the Ninth Circuit has emphasized that it is a rare situation in which granting a motion to dismiss is appropriate because it raises questions of fact.

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

HN30[] **Deceptive & Unfair Trade Practices, State Regulation**

In assessing a product, whether a reasonable consumer would be deceived often depends on the circumstances. Substantial, nonfunctional empty space may be a factor that could plausibly mislead a reasonable consumer. The reasonable consumer is neither the most vigilant and suspicious of advertising claims nor the most unwary and unsophisticated, but instead is the ordinary consumer within the target population.

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

HN31[] **Deceptive & Unfair Trade Practices, State Regulation**

To some degree, consumers may reasonably rely on the size of the packaging and believe that it accurately reflects the amount she is purchasing. Even if a product's packaging accurately displays its weight, it does not mean that the way in which the product was packaged may not be misleading. However, the inquiry does not end with merely relying on a package's size. Reasonable consumers also rely on serving size and product yield information as well as the feel of the package to inform their purchasing decisions.

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

HN32[] **Motions to Dismiss, Failure to State Claim**

What is relevant at the motion to dismiss stage is not what a reasonable consumer actually believes, but whether plaintiff has plausibly pleaded facts indicating what a reasonable consumer could believe. Also at this stage, a court must construe plaintiffs' allegations in the light most favorable to them.

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

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

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN33[] **Trade Practices & Unfair Competition, State Regulation**

The California Unfair Competition Law (UCL), California False Advertising Law (FAL), and the California Consumers Legal Remedies Act (CLRA), are designed to prohibit not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. Cal. Civ. Code § 1760. Further, § 1770(a)(9) does not include the word "representation;" rather, it merely makes unlawful advertising goods or services with intent not to sell them as advertised. Construing the CLRA liberally as required by statute, Cal. Civ. Code § 1760, the the United States District Court for the Southern District of California finds that exaggerated box size and slack fill allegations can form the basis for a CLRA claim.

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

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

HN34[] **Heightened Pleading Requirements, Fraud Claims**

Allegations of fraud upon information and belief typically do not satisfy Fed. R. Civ. P. 9(b)'s heightened pleading requirements.

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

HN35[] **Complaints, Requirements for Complaint**

A court does not accept as true allegations contradicted by documents attached to or referred to in the complaint, matters subject to judicial notice, unwarranted deductions of fact, or unreasonable inferences.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

HN36[] **Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products**

The fact that the FDA regulates the use of the term "healthy" implies that consumers rely on health-related claims on food products in making purchasing decisions.

Evidence > Weight & Sufficiency

HN37[] **Evidence, Weight & Sufficiency**

The Ninth Circuit has stated that Williams stands for the proposition that if a defendant commits an act of deception, the presence of fine print revealing the truth is insufficient to dispel that deception.

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

HN38[] **Complaints, Requirements for Complaint**

A court does not accept as true allegations contradicted by documents attached to or referred to in the complaint, matters subject to judicial notice, unwarranted deductions of fact, or unreasonable inferences.

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

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

HN39[] **Trade Practices & Unfair Competition, State Regulation**

The unlawful prong of the California Unfair Competition Law (UCL) is essentially an incorporation-by-reference provision. Accordingly, when a statutory claim fails, a derivative UCL claim also fails.

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN40[] **Trade Practices & Unfair Competition, State Regulation**

The California Fair Packaging and Labeling Act (CFPLA) states that food containers cannot be made, formed, or filled as to be misleading. Cal. Bus. & Prof. Code § 12606.2(b). The statute further provides that a container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill. Slack fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack fill is the empty space in a package that is filled to substantially less than its capacity for reasons other than any one or more of the safe harbor provisions. § 12606.2(c). District courts in California are split as to whether the safe harbor provisions are affirmative defenses or or whether their inapplicability is an element that must be pled.

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN41[] **Trade Practices & Unfair Competition, State Regulation**

As a plaintiff's online purchases, the California Fair Packaging and Labeling Act (CFPLA) provides that there is no nonfunctional slack fill where the mode of commerce does not allow the consumer to view or handle the physical container or product. Cal. Bus. & Prof. Code § 12606.2(c)(8). The CFPLA itself provides that it is to be interpreted consistently with federal law. § 12606.2(e).

Business & Corporate Compliance > ... > Computer & Internet Law > Privacy & Security > State Regulation

HN42[] **Privacy & Security, State Regulation**

The plain language of Cal. Bus. & Prof. Code § 12606.2(c)(8) prevents online purchases from falling under nonfunctional slack fill because online shopping does not allow a consumer to be in contact with the physical container or product. However, 21 U.S.C.S. § 343(d) and federal regulation 21 C.F.R. § 100.100 do not contain the mode of commerce requirement found in Cal. Bus. & Prof. Code § 12606.2(c)(8). Thus, by the terms of Cal. Bus. & Prof. Code § 12606.2(f), the mode of commerce requirement is not operative. § 12606.2(f).

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

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

HN43[] **Trade Practices & Unfair Competition, State Regulation**

As to the unfair prong of the California Unfair Competition Law (UCL), the California Supreme Court has defined unfair conduct in competitor cases to mean conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. However, the California Supreme Court has not established a test to determine whether a business practice is unfair in consumer cases.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

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

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN44[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

After the California Supreme Court's decision in Cel-Tech, the California Courts of Appeal have created a split of authority through applying three different tests for unfairness in consumer cases. The first test requires that the public policy which is a predicate to a consumer unfair competition action under the unfair prong of the the California Unfair Competition Law (UCL) must be tethered to specific constitutional, statutory, or regulatory provisions. The second test asks whether the alleged business practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim. The third test draws on the unfair definition in the Federal Trade Commission Act and requires that (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided. (first and then.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Warranties

HN45[] **Types of Contracts, Express Warranties**

Plaintiffs must allege the applicable law to determine whether they plead a sufficient claim. Even if the basic elements of breach of express warranties are unlikely to differ much from state to state, there may be (and likely are) differences from state to state regarding issues such as applicable statute of limitations and various equitable defenses. Plaintiffs cannot remedy the pleading defect through argument in their opposition brief.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN46[] **Types of Contracts, Express Contracts**

In California, there is not a standalone cause of action for unjust enrichment, which is synonymous with restitution. When a plaintiff alleges unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution. It is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Contracts

HN47[] **Types of Contracts, Express Contracts**

Under California law, there cannot be a claim based on quasi contract where there exists between the parties a valid express contract covering the same subject matter.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Immaterial Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Irrelevant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Redundant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Scandalous Matters

HN48[] **Motions to Strike, Immaterial Matters**

A Fed. R. Civ. P. 12(f) motion to strike allows a court to strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. For the purposes of this rule, immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded. Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question. In order to show that a defense is insufficient, the moving party must demonstrate that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed. The purpose of a Rule 12(f) motion is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial. Motions to strike are generally disfavored, unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN49[] **Judges, Discretionary Powers**

Ultimately, the decision about whether to strike allegations is a matter within a court's discretion.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Immaterial Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Redundant Matters

HN50[] Motions to Strike, Immaterial Matters

Reading Fed. R. Civ. P. 12(f) as a means to dismiss some or all of a pleading would create a redundancy within the Federal Rules of Civil Procedure because a Rule 12(b)(6) motion (or a motion for summary judgment at a later stage in the proceedings) already serves such a purpose.

Counsel: [1]** For Ty Stewart, individually and on behalf of all other similarly situated, Plaintiff: Courtney M. Vasquez, David Adam Fox, LEAD ATTORNEYS, Fox Law, A.P.C., Solana Beach, CA.

For Jocelyn Fielding, individually and on behalf of all other similarly situated, Laureene Buck, individually and on behalf of all other similarly situated, Anna Altomare, individually and on behalf of all other similarly situated, Plaintiffs: David Adam Fox, LEAD ATTORNEY, Fox Law, A.P.C., Solana Beach, CA.

For Kodiak Cakes, LLC, a Delaware limited liability company, Defendant: Arameh Zargham O'Boyle, Evelyn Crystal Lopez, LEAD ATTORNEYS, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Los Angeles, CA.

Judges: HON. MICHAEL M. ANELLO, United States District Judge.

Opinion by: MICHAEL M. ANELLO

Opinion

[*1117] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS AND DENYING DEFENDANT'S MOTION TO STRIKE

[Doc. No. 44]

Ty Stewart and twenty-two other Plaintiffs (collectively, "Plaintiffs") bring this putative class action against Kodiak Cakes, LLC ("Defendant"). *See* Doc. No. 37 ("FAC"). Plaintiffs assert six causes of action premised on two main issues with Defendant's products: "(1) non-functional slack fill and (2) deceptive marketing **[**2]** practices." *Id.* ¶ 3. Defendant moves to dismiss each cause of action for lack of standing and failure to state a claim pursuant to *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)* and moves to strike several allegations from the First Amended Complaint ("FAC") pursuant to *Federal Rule of Civil Procedure 12(f)*. *See* Doc. No. 44. Plaintiffs filed an opposition to Defendant's motion, and Defendant replied. *See* Doc. Nos. 62, 65. The Court found the matter suitable for determination on the papers and without oral argument pursuant to *Federal Rule of Civil Procedure 78(b)* and Civil *Local Rule 7.1.d.1*. *See* Doc. No. 66. For the reasons set forth below, the Court **GRANTS IN PART and DENIES IN PART** Defendant's motion to dismiss and **DENIES** Defendant's motion to strike.

I. BACKGROUND[1]

Defendant "manufactures, markets, advertises, and sells a line of packaged breakfast and snack products," including pancake and waffle mixes. FAC ¶ 1. Plaintiffs' **[*1118]** action arises from two overarching issues with Defendant's products: (1) "nonfunctional slack fill," which is the empty space in a package that serves no purpose, and (2) deceptive marketing statements. *See id.* 3, 5-6, 10.

As to nonfunctional slack fill, Plaintiffs allege Defendant packages its products in a manner that "conceals the amount of the product actually contained in the package and misleads **[**3]** consumers into believing there is more

[1] Because this matter is before the Court on a motion to dismiss, the Court must accept as true the allegations set forth in the complaint. *See* *Hosp. Bldg. Co. v. Trs. Of Rex Hosp., 425 U.S. 738, 740, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*.

product inside the packaging than there actually is." *Id.* ¶ 6. In particular, Plaintiffs claim less than half of the packaging is full and thus misrepresents the amount of product within each package. *Id.* ¶¶ 7, 83, 85.

As to deceptive marketing statements, Plaintiffs allege Defendant makes five types of misleading statements in advertising its products. *Id.* ¶ 10. Plaintiffs allege that Defendant misleadingly labels and advertises its products as having "no preservatives" as well as being "free of artificial additives," "non-GMO," "healthy," and "protein-packed." *See* FAC ¶¶ 10, 63, 97-126, 127-31, 132-48. Plaintiffs aver that Defendant's marketing strategy is designed to lure consumers to purchase their products because of these deceptive statements. *Id.* ¶ 13.

Plaintiffs allege that they relied on Defendant's misleading packaging and advertising when purchasing Defendant's products. *Id.* ¶ 14. Plaintiffs seek to rectify these problems. In doing so, Plaintiffs bring six causes of action against Defendant: (1) "violation of the consumer protection acts of all 50 states (and the District of Columbia)" on behalf of the nationwide class; (2) violation **[**4]** of the *California Consumers Legal Remedies Act ("CLRA"), Cal Civ. Code §§ 1750-1784*, on behalf of the California class; (3) violations of the California Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code §§ 17200-17210*, on behalf of the California class; (4) violation of the California False Advertising Law ("FAL"), *Cal. Bus. & Prof. Code §§ 17500-17606*; (5) breach of express warranty on behalf of the nationwide class; and (6) "restation based on quasi-contract and unjust enrichment" on behalf of the nationwide class. *Id.* ¶¶ 161-222.

Defendant moves to dismiss the causes of action on the grounds that Plaintiffs lack standing under *Rule 12(b)(1)* and fail to state a claim under *Rule 12(b)(6)* as well as moves to strike allegations from the FAC under *Rule 12(f)*. *See* Doc. No. 44 at 2.[2]

II. Request for Judicial Notice and Incorporation-by-Reference

As an initial matter, Defendant requests the Court to consider fifty-eight exhibits—comprising various product packaging labels and high-resolution "proofs" of the labels—pursuant to the judicial notice and incorporation-by-reference doctrines. *See* Doc. Nos. 44-2, 65-1. Plaintiffs object to Defendant's request. *See* Doc. No. 62-1. Before delving into the substance of the motion to dismiss, the Court addresses the request and objection.

Defendant argues that the **[**5]** Court should take judicial notice of the product labels because Plaintiffs' claims are based on them. *See* Doc. No. 44-2 at 5. Defendant reasons that all six causes of action "rely on product labeling and marketing [Plaintiffs] allege is misleading." *Id.* Noting that Plaintiffs allege five misleading terms and pursue claims against most of Defendant's products, Defendant asserts that all of the proffered product labels "are at issue and **[*1119]** effectively incorporated by reference." *Id.* Plaintiffs respond that judicial notice is improper for two main reasons: the labels are not generally known in this district and are subject to dispute. *See* Doc. No. 62-1 at 4. As to the latter point, Plaintiffs argue that the labels are subject to dispute because the labels are unauthenticated; the high-resolution images are from unknown sources, appear to be internal documents, and distort what consumers actually see; Defendant failed to explain the labels' relevancy; and the labels inappropriately dispute Plaintiffs' allegations. *See id.* at 4-7. Additionally, Plaintiffs respond that incorporation-by-reference is improper because they challenge the labels' authenticity. *Id.* at 9.

The Court proceeds by determining whether it **[**6]** can consider the exhibits under the separate doctrines of judicial notice and incorporation-by-reference. *See* *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018)* ("Both of these procedures permit district courts to consider materials outside a complaint, but each does so for different reasons and in different ways.").

A. Request for Judicial Notice

[2] All citations to electronically filed documents refer to the pagination assigned by the CM/ECF system.

1. Legal Standard

HN1[] "Generally, district courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under *Rule 12(b)(6)* . . . ." *Khoja, 899 F.3d at 998* (citing *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)*, *overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119, 1125-26 (9th Cir. 2002))*. However, "a court may take judicial notice of matters of public record," *id. at 999* (quoting *Lee, 250 F.3d at 689*), and of "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading," *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)*, *overruled on other grounds by Galbraith, 307 F.3d at 1125-26*; *see also Fed. R. Evid. 201*. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *Fed. R. Evid. 201(b)*; *see* also *Khoja, 899 F.3d at 999* (quoting *Fed. R. Evid. 201(b)*).

2. Discussion

Plaintiffs raise the specter of an authenticity dispute as to the labeling and high-resolution **[**7]** "proof" specifications. *See* Doc. No. 62-1 at 4-6. However, Plaintiffs do not detail how they are inauthentic, inaccurate, or disputed; instead, they merely question the manner in which they are presented before the Court. *See Brown v. Hain Celestial Grp., Inc., 913 F. Supp. 2d 881, 893 (N.D. Cal. 2012)* (noting that authenticity objections to judicial notice usually can be surmounted). Therefore, Plaintiffs do not genuinely question the authenticity of the exhibits.

As to the proofs specifically, Plaintiffs submit a declaration in support of their objection that attaches an exhibit containing a spreadsheet. Vasquez Decl., Doc. No. 62-2 ¶¶ 2-4. The attached spreadsheet "contains links to images of the revisions to product labels for products at issue from 2015 through 2020." *Id.* ¶ 3. The signed declaration states that the documents were produced by Defendant in response to Plaintiffs' request for "all versions of the packaging and product labels for the products at issue in this case." *Id.* ¶ 2. The links reveal high-resolution proof images, which appear to have overlap with Defendant's attached exhibits. *See* Vasquez Decl., Exh. 1, Doc. No. 62-3 at 2. Thus, to **[*1120]** the extent there is any genuine authenticity dispute over the high-resolution "proof" specifications, **[**8]** Plaintiffs resolve it.

However, Plaintiffs' objections to the high-resolution proof specifications have some merit. These two-dimensional, flattened proofs distort what consumers see when viewing the three-dimensional products and do not represent how the products are advertised in their final product. *See Tsan v. Seventh Generation, Inc., No. 15-cv-00205-JST, 2015 U.S. Dist. LEXIS 149042, 2015 WL 6694104, at *3 (N.D. Cal. Nov. 3, 2015)*; *Brown, 913 F. Supp. 2d at 893*. Moreover, these proofs do not appear to fall under Plaintiffs' false or misleading advertising allegations, and the Court did not need to rely on these exhibits to rule on the instant motion. Additionally, there are instances where the proofs do not match the final advertised packaging supplied by Defendant. *Compare, e.g.*, Doc. No. 44-3 at 1-2 (Buttermilk Flapjack and Waffle Milk packaging as advertised), *with, e.g.*, Doc. No. 44-3 at 3 (Buttermilk Flapjack and Waffle Milk packaging in proof-form). Therefore, the Court ultimately declines to take judicial notice over the high-resolution proof specifications.

Aside from the high-resolution proof specifications, the labels have a link to their respective product pages on Defendant's website, and Defendant supplies their webpage where the publicly available images can be found. *E.g.* ***[**9]*** , Doc. No. 44-3 at 1 (providing the Buttermilk Flapjack and Waffle Mix product label); *see* Doc. No. 44-2 at 4 ("These exhibits consist of publicly-available images from Kodiak's website, https://kodiakcakes.com/."). As already noted, Plaintiffs do not genuinely dispute the accuracy or authenticity of the labels found on Defendant's website. ***HN2***[] Judicial notice is proper over websites and images of packaging in consumer protection advertising actions. *See Loomis v. Slendertone Distribution, Inc., 420 F. Supp. 3d 1046, 1063 (S.D. Cal. 2019)* (taking judicial notice sua sponte over printouts from the defendant's website and Amazon.com listing); *Hadley v. Kellogg Sales Co., 243 F. Supp. 3d 1074, 1087 (N.D. Cal. 2017)* (quoting *Kanfer v. Pharmacare US, Inc., 142 F. Supp. 3d 1091, 1098-99 (S.D. Cal. 2015))* (taking judicial notice of Raisin Bran during the alleged class period);

Gustavson v. Wrigley Sales Co., 961 F. Supp. 2d 1100, 1113 n.1 (N.D. Cal. 2013) (taking judicial notice of packaging labels that the complaint quoted and referenced and screenshots taken from a website and referenced in the complaint); *Brazil v. Dole Food Co., 935 F. Supp. 2d 947, 963 n.4 (N.D. Cal. 2013)* (taking judicial notice of packaging labels of the defendant's products). Therefore, the Court takes judicial notice over the labeling taken from Defendant's website but is mindful that the product labels may have changed over the course of the alleged class periods. Accordingly, the Court's grant of judicial notice is limited: it does not extend to prejudice Plaintiffs' allegations that pertain **[**10]** to time periods where Defendant's proffered labels were not used or nonwebsite advertising. Additionally, in examining the exhibits, the Court remains mindful of the risk of over-extending the judicial notice doctrine to avoid a "premature dismissal[] of a plausible claim[]." *Khoja, 899 F.3d at 998*.

Accordingly, the Court **GRANTS in part and DENIES in part** Defendant's request for judicial notice. The Court **GRANTS** Defendant's request as it pertains to the labeling taken from Defendant's website. The Court **DENIES** Defendant's request as it pertains to the high-resolution proof specifications.

B. Incorporation by Reference

1. Legal Standard

> ***HN3***[] Unlike rule-established judicial notice, incorporation-by-reference is a **[*1121]** judicially created doctrine that treats certain documents as though they are part of the complaint itself. The doctrine prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken—or doom—their claims.

Khoja, 899 F.3d at 1002 (citing *Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)*, *superseded by statute on other grounds as recognized in* *Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 681-82 (9th Cir. 2006))*. The Ninth Circuit has noted that there is a "policy concern underlying the rule: Preventing plaintiffs from surviving a *Rule 12(b)(6)* motion by deliberately omitting **[**11]** references to documents upon which their claims are based." *Parrino, 146 F.3d at 706*; *see also* *Khoja, 899 F.3d at 1003* ("[T]he incorporation-by-reference doctrine is designed to prevent artful pleading by plaintiffs."). "Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*; *see also* *Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)* ("The rationale of the 'incorporation by reference' doctrine applies with equal force to internet pages as it does to printed material."). Incorporation-by-reference allows a court to "treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*." *Ritchie, 342 F.3d at 908*. While a court "unlike judicial notice . . . 'may assume an incorporated document's contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*' . . . it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint." *Khoja, 899 F.3d at 1003* (quoting *Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006))*.

2. Discussion

As with their objection to the Court taking judicial notice over the labels and proofs, Plaintiffs raise the specter of an authenticity dispute. *See* **[**12]** Doc. No. 62-1 at 8. However, as already noted, Plaintiffs merely question the manner in which the exhibits are presented before the Court and do not genuinely question the authenticity of the exhibits. Although they focus on the physical printouts, Plaintiffs' objections do not appear to question the genuineness of Defendant's publicly available website.

However, the Court finds the high-resolution proof specifications are not proper for incorporation-by-reference because Plaintiffs do not refer to the proofs in their FAC, and the proofs do not form the basis of Plaintiffs' claims.

Although the proofs may be similar in appearance and have some relation to the ultimate packaging that was presented to consumers, Plaintiffs' claims pertain to the final product packaging as presented in stores or online. *See, e.g.*, FAC ¶¶ 17, 19, 21, 23, 27, 29, 31, 33, 35, 37, 39, 61, 64. Furthermore, as mentioned above, there are instances where the proofs do not match the final advertised packaging supplied by Defendant. *Compare, e.g.*, Doc. No. 44-3 at 1-2 (Buttermilk Flapjack and Waffle Milk packaging as advertised), *with, e.g.*, Doc. No. 44-3 at 3 (Buttermilk Flapjack and Waffle Milk packaging in proof-form). **[**13]** Thus, the Court declines to consider the proofs under the incorporation-by-reference doctrine.

Aside from the high-resolution proof specifications and the authentication objection, the labels found on Defendant's website are subject to incorporation-by-reference. **[*1122]** ***HN4***[] Courts can use incorporation-by-reference to consider exhibits containing printouts taken from websites that plaintiffs refer to and use to support their allegations. *See* *Loomis, 420 F. Supp. 3d at 1063-64*. The labels are taken from Defendant's website. *E.g.*, Doc. No. 44-3 at 1 (providing the Buttermilk Flapjack and Waffle Mix product label); *see* Doc. No. 44-2 at 4 ("These exhibits consist of publicly-available images from Kodiak's website, https://kodiakcakes.com/."). Plaintiffs refer extensively to Defendant's online advertising, and online advertising forms a basis of their claims. *See, e.g.*, FAC ¶¶ 17, 23, 37, 39, 64 ("This advertising and marketing included statements made on Kodiak Cakes' online store, on Kodiak Cakes' social media profiles on Instagram and Facebook, on the Kodiak Cakes website and blog, on Amazon and/or on the *Shark Tank* episode that aired on ABC."); *see also* *Ritchie, 342 F.3d at 908* ("Even if a document is not attached to a complaint, it may be incorporated **[**14]** by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim."). Plaintiffs' FAC includes at least two inserted pictures taken from Defendant's online store. *See* FAC ¶ 64. ***HN5***[] Plaintiffs may not "select[] only portions of documents that support their claims, while omitting portions of those very documents that weaken—or doom—their claims." *Khoja, 899 F.3d at 1002* (citing *Parrino, 146 F.3d at 706*). Therefore, the Court considers the advertising on Defendant's website as a proper subject of incorporation-by-reference to the extent that the labels are not a means to "short-circuit the resolution of a well-pleaded claim" by "serv[ing] to dispute facts stated in a well-pleaded complaint." *Khoja, 899 F.3d at 1003*.

Accordingly, the Court considers the advertising on Defendant's website and other online marketing under the incorporation-by-reference doctrine. The Court declines to consider the high-resolution proof specifications under incorporation-by-reference.

III. Motion to Dismiss for Lack of Standing

A. Legal Standard

HN6[] A *Rule 12(b)(1)* motion to dismiss allows for dismissal of an action for lack of subject matter jurisdiction. Subject matter jurisdiction must exist when the action is commenced. *Morongo Band of Mission Indians v. California State Bd. of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988)*. Further, **[**15]** subject matter jurisdiction may be challenged "at any stage in the litigation." *Arbaugh v. Y&H Corp., 546 U.S. 500, 506, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)*; *see also* *Fed. R. Civ. P. 12(h)(3)* ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). The party seeking federal jurisdiction bears the burden to establish jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* (citing *McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 182-83, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)*). A party may challenge standing in a *Rule 12(b)(1)* motion given standing "pertain[s] to a federal court's subject-matter jurisdiction under Article III." *White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)*.

HN7[] A *facial* attack on jurisdiction asserts that the allegations in a complaint are insufficient to invoke federal jurisdiction, whereas a *factual* attack disputes the truth of the allegations that would otherwise confer federal jurisdiction. *Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)*. In resolving a facial challenge to jurisdiction, a court accepts the allegations of the complaint as true and draws all reasonable inferences in favor of the plaintiff. *Doe v. Holy See, 557 F.3d 1066, 1073* **[*1123]** *(9th Cir. 2009)* (quoting *Wolfe v. Strankman, 392 F.3d*

358, 362 (9th Cir. 2004)). In resolving a factual attack, a court may examine extrinsic evidence "without converting the motion to dismiss into a motion for summary judgment," and a court need not accept the allegations as true. Safe Air for Everyone, 373 F.3d at 1039 (citing Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa County, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)); *see also* Land v. Dollar, 330 U.S. 731, 735 n.4, 67 S. Ct. 1009, 91 L. Ed. 1209 (1947) ("[W]hen a question of the District Court's jurisdiction is raised . . . the court may inquire **[**16]** by affidavits or otherwise, into the facts as they exist.").

HN8[] However, a Rule 12(b)(1) motion is "not appropriate for determining jurisdiction . . . where issues of jurisdiction and substance are intertwined. A court may not resolve genuinely disputed facts where 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits.'" Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983)). When there is an entanglement, determination of the jurisdictional issue should be determined "on either a motion going to the merits or at trial." Augustine, 704 F.2d at 1077. Unless the summary judgment standard is met, the disputed jurisdictional fact "must be determined at trial by the trier of fact." *Id.*

B. Discussion

Defendant argues that Plaintiffs lack standing for several reasons: (1) they lack standing to bring claims based on laws of states where they do not reside and (2) they lack standing to seek injunctive relief. *See* Doc. No. 44-1 at 18, 38. In raising its standing challenges, Defendant brings a facial attack to subject matter jurisdiction.

HN9[] Article III standing requires a plaintiff to have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable **[**17]** judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (first citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); and then citing Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)). The party invoking federal jurisdiction bears the burden to establish standing. *Id.* The Court addresses Defendant's standing challenges in turn.

1. Standing to Assert Nationwide Class Claims

Defendant argues that the twenty-three Plaintiffs, who reside in eleven states, lack standing to assert a nationwide class claim. *See* Doc. No. 44-1 at 19; Doc. No. 65 at 8-9. Plaintiffs respond that this argument attempts to prematurely address class certification issues at the pleadings stage. *See* Doc. No. 62 at 22. Plaintiffs clarify that they "seek to apply the laws of each state in which the unnamed plaintiffs reside." *Id.* at 23.

HN10[] District Courts in California are split on the issue of whether standing inquiries can be deferred until after class certification, but they note a trend that courts can address standing at the pleadings stage and dismiss claims brought under state laws that have no connection to the named plaintiffs. Soo v. Lorex Corp., No. 20-cv-01437-JSC, 2020 U.S. Dist. LEXIS 164664, 2020 WL 5408117, at *10 (N.D. Cal. Sept. 9, 2020) ("While the Ninth Circuit has not definitively answered whether named plaintiffs have standing to pursue class claims under the common laws of states to which the named plaintiffs have no **[**18]** connection, district courts in this Circuit **[*1124]** routinely hold that they do not."); Senne v. Kansas City Royals Baseball Corp., 114 F. Supp. 3d 906, 921 (N.D. Cal. 2015) (noting the split); *see also* Schertzer v. Bank of Am., N.A., 445 F. Supp. 3d 1058, 1072, 1072 n.3 (S.D. Cal. 2020) (providing examples and finding that there is a "growing trend" among California district courts to address standing at the pleadings stage and dismiss claims "under the laws of states in which no plaintiff resides or has purchased products"); Mercado v. Audi of Am., LLC, No. ED CV18-02388 JAK (SPx), 2019 U.S. Dist. LEXIS 231689, 2019 WL 9051000, at *14 (C.D. Cal. Nov. 26, 2019) ("The Ninth Circuit has not directly addressed this question in the context of multistate claims."); In re Carrier IQ, Inc., 78 F. Supp. 3d 1051, 1068 (N.D. Cal. 2015) ("Given the prevalence of nationwide class actions, it is perhaps surprising that there is no Ninth Circuit precedent specifically deciding this question.").

Plaintiffs bring three causes of action on behalf of a nationwide class: "violation of the consumer protection acts of all 50 states (and the District of Columbia)," breach of express warranty, and "restation based on quasi-contract and unjust enrichment." FAC ¶¶ 161-78, 211-16, 217-22; *see also id.* ¶ 149. However, the named Plaintiffs are from only eleven states. *See id.* at ¶¶ 16-68.

HN11[] The Court agrees with the growing trend that courts can "address the issue of Article III standing at the pleading stage and dismiss claims asserted under the **[**19]** laws of states in which no plaintiff resides or has purchased products." *Schertzer, 445 F. Supp. 3d at 1072*. Even in circumstances where courts have found they have discretion to defer standing questions until after class certification, the standing inquiry can be addressed when Plaintiffs bring claims from states where they do not have a connection. *See In re Carrier IQ, Inc., 78 F. Supp. 3d at 1074, 1075*; *see also Senne, 114 F. Supp. 3d at 924* (agreeing with the reasoning of *In re Carrier IQ, Inc.*). Indeed, "[i]f a complaint includes multiple claims, at least one named class representative must have Article III standing to raise each claim." *Mercado, 2019 U.S. Dist. LEXIS 231689, 2019 WL 9051000, at *15* (quoting *Los Gatos Mercantile, Inc v. E.I. DuPont De Nemours & Co., No. 13-cv-01180-BLF, 2014 U.S. Dist. LEXIS 133540, 2014 WL 4774611, at *4 (N.D. Cal. Sept. 22, 2014))*; *see also Soo, 2020 U.S. Dist. LEXIS 164664, 2020 WL 5408117, at *11* (quoting *Jones v. Micron Tech. Inc., 400 F. Supp. 3d 897, 909 (N.D. Cal. 2019))* (stating that standing must be shown for each claim and distinguishing the facts from *Melendres v. Arpaio, 784 F.3d 1254 (9th Cir. 2015))*; *In re Glumetza Antitrust Litig., No. C 19-05822 WHA, 2020 U.S. Dist. LEXIS 39649, 2020 WL 1066934, at *10 (N.D. Cal. Mar. 5, 2020)* (same).[3] The Supreme Court has insisted that "a plaintiff must demonstrate standing separately **[*1125]** for each form of relief sought." *DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)* (quoting *Friends of the Earth, Inc., 528 U.S. at 185*). The fact that this action is a putative class action does not excuse Plaintiffs' obligation to show standing for each claim asserted. *See Spokeo, Inc., 136 S. Ct. at 1547 n.6* (quoting *Simon v. E. Kentucky Welfare Rts. Org., 426 U.S. 26, 40 n.20, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976))* ("That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must **[**20]** allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'"). No named Plaintiff alleges a connection to forty of the jurisdictions where they do not reside or have not purchased Defendant's products. Therefore, the Court finds Plaintiffs lack standing to bring claims under the laws of the states where they do not reside or did not purchase the at-issue products.

Even if the Court found that it had discretion to defer the standing issue until after class certification, the Court would decline to exercise its discretion. *See In re Carrier IQ, Inc., 78 F. Supp. 3d at 1074-75*. Plaintiffs reside in eleven jurisdictions but raise claims from fifty-one jurisdictions. The forty claims from jurisdictions without a named Plaintiff is vast when compared to the mere eleven claims from jurisdictions with a named Plaintiff. The Court has reservations about subjecting Defendant "to the expense and burden of nationwide discovery without Plaintiffs first securing actual plaintiffs who clearly have standing and are willing and able to assert claims under these state laws." *Id. at 1074*; *see also* ***[**21]*** *Soo, 2020 WL 2020 U.S. Dist. LEXIS 164664, 2020 WL 5408117, at *10*; *Jones, 400 F. Supp. 3d at 909*; *cf*. *Fed. R. Civ. P. 1*.

Accordingly, the Court **GRANTS** Defendant's *Rule 12(b)(1)* motion to dismiss and **DISMISSES** with leave to amend the causes of action under the laws of states where named Plaintiffs do not reside or did not purchase the at-issue products.

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[3] The Court finds Plaintiffs' reliance on *Melendres v. Arpaio, 784 F.3d 1254 (9th Cir. 2015)*, distinguishable—and thus unavailing—for the reasoning outlined by several recent district court cases. *See Soo, 2020 U.S. Dist. LEXIS 164664, 2020 WL 5408117, at *10-11*; *In re Glumetza Antitrust Litig., No. C 19-05822 WHA, 2020 U.S. Dist. LEXIS 39649, 2020 WL 1066934, at *10* ("The short distinction is that *Melendres* did not address the circumstance here, where plaintiffs raise claims under several jurisdictions where they were not harmed. The legal distinction, though, is that the named plaintiffs in *Melendres* asserted the same constitutional injury as the class; they just alleged different circumstances."); *Jones, 400 F. Supp. 3d at 909* ("Unlike the instant case, *Melendres* did not confront a situation where named plaintiffs brought claims under the laws of multiple states where they did not reside and where they were not injured: in *Melendres*, all plaintiffs alleged that they suffered the same constitutional injury, only in different factual circumstances. Here, because Plaintiffs bring claims under the laws of multiple states (some antitrust and some not), Plaintiffs technically invoke different legally protected interests.").

2. Standing to Seek Injunctive Relief

Defendant argues Plaintiffs lack standing to seek injunctive relief because they do not allege that they intend to repurchase Defendant's products. *See* Doc. No. 44-1 at 39; *see also* Doc. No. 44-1 at 25-26; Doc. No. 65 at 26. Plaintiffs respond that they sufficiently show a likelihood of reinjury, which can be remedied by injunctive relief. *See* Doc. No. 62 at 43; *see also* Doc. No. 62 at 35-36. Plaintiffs contend that their request is not defeated merely because they have discovered the deceptive packaging because the packaging remains misleading. *See* Doc. No. 62 at 43.

HN12[] "A plaintiff must demonstrate constitutional standing separately for each form of relief requested." *Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 967 (9th Cir. 2018)* (citing *Friends of the Earth, Inc., 528 U.S. at 185*). In applying the standing framework to a plaintiff seeking injunctive relief, the plaintiff must demonstrate that she or he "has suffered or is threatened with a 'concrete and particularized' legal harm, coupled with 'a sufficient likelihood that he **[**22]** will again be wronged in a similar way.'" *Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007)* (citation omitted) (first quoting *Lujan, 504 U.S. at 560*; and then quoting *City of Los Angeles v. Lyons, 461 U.S. 95, 111, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983))*. The likelihood of further harm requires "a 'real and immediate threat of repeated injury.'" *Id.* (quoting *O'Shea v. Littleton, 414 U.S. 488, 496, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974))*. Past wrongs constitute evidence of "a real and **[*1126]** immediate threat of repeated injury"; however, "[p]ast wrongs do not in themselves amount to a real and immediate threat of injury necessary to make out a case or controversy." *Id.* (first quoting *O'Shea, 414 U.S. at 496*; and then quoting *Lyons, 461 U.S. at 103*); *see also* *Lujan, 504 U.S. at 564* (quoting *Lyons, 461 U.S. at 102*) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.").

HN13[] In the false advertising context, the Ninth Circuit has held that

> a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an "actual and imminent, not conjectural or hypothetical" threat of future harm.

Davidson, 889 F.3d at 969 (quoting *Summers v. Earth Island Inst., 555 U.S. 488, 493, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009))*. The Ninth Circuit emphasized that knowledge of a label's falsity "does not equate to knowledge that it will **[**23]** remain false in the future." *Id. Davidson* noted that "the threat of future harm may be the consumer's plausible allegations that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to" or "may be the consumer's plausible allegations that she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved." *Id. at 969-70*. Ultimately, the *Davidson* court held the plaintiff bringing UCL, FAL, and CLRA causes of action had standing to pursue injunctive relief where she adequately alleged an imminent or actual threat of future harm because the plaintiff

> alleged that she "continues to desire to purchase wipes that are suitable for disposal in a household toilet"; "would purchase truly flushable wipes manufactured by [Defendant] if it were possible"; "regularly visits stores . . . where [Defendant's] 'flushable' wipes are sold"; and is continually presented with [Defendant's] flushable wipes packaging but has "no way of determining whether the representation 'flushable' is in fact true."

Id. at 970-71 (recognizing **[**24]** this conclusion was a "close question").

Here, Plaintiffs allege that "[they] have an intention to purchase the products in the future if the products are truthfully labeled and not misleadingly filled." FAC ¶ 159. At this stage of the proceedings, the Court must presume the truth of Plaintiffs' allegations and construe the allegations in their favor. *See Davidson, 889 F.3d at 971* (citing *Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010))*. Plaintiffs allege that they intend to purchase Defendant's products if labeling and filling issues are resolved. *See* FAC ¶ 159. Plaintiffs' allegations are more concrete than claiming that they would merely "consider" buying Defendant's products. *See* *Lanovaz v. Twinings N. Am., Inc., 726 F. App'x 590, 591 (9th Cir. 2018)* (holding that the plaintiff's "would 'consider buying'" allegations and a mere intent to purchase the defendant's products in the future were insufficient to sustain Article III standing); *Loomis, 420 F. Supp. 3d at 1077* (finding that vague "would consider purchasing" allegations coupled with the speculative nature of the at-issue product ever achieving its claimed representations was insufficient to sustain Article III standing).

[*1127] However, as to Plaintiffs' theory of misleading slack fill packaging, Plaintiffs' allegations do not show a likelihood of further harm. The Ninth Circuit noted that the facts in **[**25]** *Davidson* presented a "close question," *Davidson, 889 F.3d at 971*, "implying that standing was unlikely in cases where the threat of future harm was weaker," *Jackson v. Gen. Mills, Inc., No. 18-cv-2634-LAB (BGS), 2019 U.S. Dist. LEXIS 162447, 2019 WL 4599845, at *5 (S.D. Cal. Sept. 23, 2019)*. "Whatever other customers might know or not know, however, [plaintiffs are] on notice of facts in [their] own complaint. If [they] choose[] to ignore them and rely on box size alone, [their] reliance would not be reasonable." *Jackson v. Gen. Mills, Inc., No. 18-cv-2634-LAB (BGS), 2020 U.S. Dist. LEXIS 157898, 2020 WL 5106652, at *6 (S.D. Cal. Aug. 28, 2020)*. Unlike in *Davidson* where the plaintiff had no way to determine whether the representation of the wipes being "flushable" was in fact true in the future, *Davidson, 889 F.3d at 971-72*, the exaggerated size of Defendant's packaging can be checked easily by Plaintiffs. In the future, Plaintiffs can cross-check their previous disappointing purchases by examining the undisputed net weight on the face of Defendant's product and the serving size in cylindrical cups and servings per container on the nutrition facts label. *See, e.g.*, Doc. No 44-8 at 2 (Strawberry Chocolate Chip Flapjack and Waffle Mix); *Power Cakes: Strawberry Chocolate Chips*, Kodiak Cakes, https://kodiakcakes.com/products/strawberry-dark-chocolate-power-cakes (same). If there is a change in the weight or quantity **[**26]** within the same sized box, Plaintiffs will be able to determine whether the box-to-mix ratio continues to be exaggerated.[4] Therefore, Plaintiffs do not establish Article III standing to assert their claim for injunctive relief based on their theory of misleading slack fill packaging. *See Jackson, 2020 U.S. Dist. LEXIS 157898, 2020 WL 5106652, at *6*; *Jackson, 2019 U.S. Dist. LEXIS 162447, 2019 WL 4599845, at *5-6*; *Cordes v. Boulder Brands USA, Inc., No. CV 18-6534 PSG (JCx), 2018 U.S. Dist. LEXIS 217534, 2018 WL 6714323, at *4 (C.D. Cal. Oct. 17, 2018)*.

Plaintiffs' theory of misleading marketing statements faces similar hurdles. Plaintiffs allege that Defendant markets its products as having "no preservatives" as well as being "free of artificial additives," "non-GMO," "healthy," and "protein-packed." *See* FAC ¶¶ 10, 93-148. Similar to their slack-fill allegations, Plaintiffs do not dispute the veracity of the nutrition facts or ingredient labeling on the products. Rather, they complain about this marketing language found on the product's packaging and online. In the future, as with their slack fill theory, Plaintiffs can check the nutrition facts or ingredient labeling to assess if the products still contain preservatives; artificial additives; unhealthy levels of fat, cholesterol, sugar, and vitamins; or insufficient protein. Therefore, Plaintiffs do not establish Article III standing **[**27]** to assert their claim for injunctive relief based on their theory of misleading "no preservatives," "free of artificial additives," "healthy," and "protein-packed" marketing statements.

On the other hand, Plaintiffs face an injury of being unable to rely upon Defendant's "non-GMO" marketing statements in deciding whether to purchase the product in the future. *See Davidson, 889 F.3d at 971-72*. Unlike the other alleged forms of deception, Plaintiffs cannot check the undisputed serving size, net weight, nutrition facts, or ingredient list on the products to determine if the at-issue ingredients are genetically modified. Plaintiffs **[*1128]** face an injury of being unable to rely upon Defendant's "non-GMO" marketing statements in deciding whether to purchase the product in the future. *See id.* Pursuant and similar to *Davidson*, Plaintiffs show a concrete injury that subjects Plaintiffs to an imminent or actual threat of future harm. *See id. at 971-72*. Therefore, Plaintiffs establish Article III standing to assert their claim for injunctive relief based on their theory of misleading "non-GMO" marketing statements. *See id. at 972*.

Accordingly, the Court **GRANTS in part and DENIES in part** Defendant's *Rule 12(b)(1)* motion to dismiss Plaintiffs' claims for injunctive **[**28]** relief. The Court **GRANTS** the motion and **DISMISSES** without leave to amend Plaintiffs' claim for injunctive relief as to their theory of misleading slack fill packaging and the "no preservatives,"

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[4] The concern that other customers might benefit from an injunction and have standing does not mean Plaintiffs have standing. *See Jackson, 2020 U.S. Dist. LEXIS 157898, 2020 WL 5106652, at *6*; *see also Spokeo, Inc., 136 S. Ct. at 1547 n.6* (quoting *Simon, 426 U.S. at 40 n.20*).

"free of artificial additives," "healthy," and "protein-packed" marketing statements. The Court **DENIES** the motion as to Plaintiffs' theory of "non-GMO" marketing statements.

C. Conclusion

For the foregoing reasons, the Court **GRANTS in part and DENIES in part** Defendant's motion to dismiss brought under *Rule 12(b)(1)*.

IV. Motion to Dismiss for Failure to State a Claim

A. Legal Standard

HN14[] A *Rule 12(b)(6)* motion to dismiss tests the sufficiency of the complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. However, plaintiffs must also plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *see also* *Fed. R. Civ. P. 12(b)(6)*. The plausibility standard demands more than a "formulaic recitation of the elements of a cause of action," or "'naked assertions' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 555, 557)*. Instead, the complaint "must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself **[**29]** effectively." *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*.

HN15[] In reviewing a motion to dismiss under *Rule 12(b)(6)*, courts must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)* (citing *Nat'l Wildlife Fed'n v. Espy, 45 F.3d 1337, 1340 (9th Cir. 1995))*. The court need not take legal conclusions as true merely because they are cast in the form of factual allegations. *Roberts, 812 F.2d at 1177* (quoting *W. Min. Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981))*. Similarly, "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998)*.

HN16[] In determining the propriety of a *Rule 12(b)(6)* dismissal, courts generally may not look beyond the complaint for additional facts. *See* *Ritchie, 342 F.3d at 907-08*. "A court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *Id. At 908*; *see also* *Lee, 250 F.3d at 688*. "However, [courts] are not required to accept as true conclusory allegations which are contradicted by documents **[*1129]** referred to in the complaint." *Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295-96 (9th Cir. 1998)* (citing *In re Stac Electronics Securities Litigation, 89 F.3d 1399, 1403 (9th Cir. 1996))*.

HN17[] Additionally, allegations of fraud or mistake require the pleading party to "state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. The context surrounding the fraud must "be 'specific **[**30]** enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" *Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)* (quoting *Bly—Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001))*. "'Averments of fraud must be accompanied by "the who, what, when, where, and how" of the misconduct charged.' A party alleging fraud must 'set forth more than the neutral facts necessary to identify the transaction.'" *Kearns, 567 F.3d at 1124* (citation omitted) (first quoting *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)*; and then quoting *In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)*, *superseded by statute on other grounds*).

HN18[] Where dismissal is appropriate, a court should grant leave to amend unless the plaintiff could not possibly cure the defects in the pleading. *Knappenberger v. City of Phoenix, 566 F.3d 936, 942 (9th Cir. 2009)* (quoting *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000))*.

B. Discussion

Defendant challenges each of Plaintiffs' causes of action. *See* Doc. No. 44 at 2. The Court proceeds by addressing whether Plaintiffs state a viable claim for each cause of action.

1. Consumer Protection Causes of Action

Given that the Court has dismissed the causes of action under the laws of states where named Plaintiffs do not reside or did not purchase the at-issue products, *see supra* Section III.B.1, Plaintiffs' California consumer protection causes of action under the CLRA, UCL, and FAL remain as well as their non-dismissed claims **[**31]** in the first cause of action. These causes of action arise from Plaintiffs' nonfunctional slack fill and deceptive marketing allegations.

HN19[] The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer." *Cal. Civ. Code § 1770(a)*; *see also id. § 1760*. Specifically, the CLRA prohibits, among other things, "[r]epresenting that goods or services have . . . characteristics, ingredients, uses, benefits, or quantities that they do not have"; "[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another"; "[a]dvertising goods or services with intent not to sell them as advertised"; and "[r]epresenting that the subject of a transaction has been supplied in accordance with a previous representation when it has not." *Id. § 1770(a)(5)*, *(7)*, *(9)*, *(16)*.

HN20[] "The FAL prohibits unfair, deceptive, untrue, or misleading advertising, and this Court has previously concluded that a product's packaging may form the basis of an FAL claim." *Ebner v. Fresh, Inc., 838 F.3d 958, 967 n.2 (9th Cir. 2016)* (emphasis omitted). In particular, the FAL forbids the dissemination **[**32]** of any statement concerning property or services that "is untrue or misleading, and which is known, or which by the exercise of reasonable care **[*1130]** should be known, to be untrue or misleading." *Cal. Bus. & Prof. Code § 17500*.

HN21[] The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. The UCL provides a separate theory of liability under each of the three prongs: "unlawful," "unfair," and "fraudulent." *See Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 540 (Cal. 1999)* (quoting *Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 58 Cal. Rptr. 2d 89, 98 (1996))* ("Because Business and Professions Code *section 17200* is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent."); *see also Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1168 (9th Cir. 2012)* (same). "The UCL expressly incorporates the FAL's prohibition on unfair advertising as one form of unfair competition." *Hinojos v. Kohl's Corp., 718 F.3d 1098, 1103 (9th Cir. 2013)*. Accordingly, any violation of the FAL also violates the UCL. *Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008)* (quoting *Kasky v. Nike, Inc., 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243, 250 (Cal. 2002))*. Additionally, a violation of the CLRA also violates the UCL. *See Hadley, 243 F. Supp. 3d at 1089* (first citing *In re Tobacco II Cases, 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20, 29 n.8 (Cal. 2009)*; and then citing *Consumer Advocs. v. Echostar Satellite Corp., 113 Cal. App. 4th 1351, 8 Cal. Rptr. 3d 22, 29 (Ct. App. 2003))*. Plaintiffs bring their UCL cause of action under all three prongs. *See* FAC ¶¶ 196-98.

The Court begins by addressing Defendant's objection to the framing of Plaintiffs' first cause of action. The Court then examines the CLRA, FAL, and the **[**33]** fraudulent UCL prong together under *Rule 9(b)* and the "reasonable consumer test." The Court then finally addresses the remaining unlawful and unfair UCL prongs.

i. Nationwide Class Claims

Defendant argues that Plaintiffs' first cause of action—for violation of the consumer protection acts of all fifty states and the District of Columbia—is not a cognizable claim under *Federal Rules of Civil Procedure 8* and *10*. *See* Doc. No. 44-1 at 19; *see also* Doc. No. 65 at 9. Defendant asserts that Plaintiffs cannot mix these separate consumer protection causes of action and fold them into a single cause of action. *Id.* Plaintiffs respond that Defendant elevates form over substance over an issue "that can be readily repleaded." Doc. No. 24 at 44.

Based on lack of Article III standing, the Court has dismissed the causes of action under the laws of states where named Plaintiffs do not reside or did not purchase the at-issue products. *See supra* Section III.B.1. ***HN22***[] Regardless of the standing problems, separate claims should not be lumped together into one cause of action. *See* *Swafford v. Int'l Bus. Machines Corp., 383 F. Supp. 3d 916, 932 n.4 (N.D. Cal. 2019)* (finding it improper for the plaintiff to assert a cause of action for violations of the California Labor Code and California Civil Code); *In re Nexus 6P Prods. Liab. Litig., 293 F. Supp. 3d 888, 908 (N.D. Cal. 2018)* ("[C]auses of action should **[**34]** not group together multiple sources of law; rather, Plaintiffs should plead separate causes of actions for each source of law, whether federal or state."); *Saling v. Royal, No. 2:13-cvv-1039-TLN-EFB PS, 2015 U.S. Dist. LEXIS 120087, 2015 WL 5255367, at *4 (E.D. Cal. Sept. 9, 2015)* (finding a cause of action titled "Intrusion into Seclusion (Privacy) Under Equal Protection"—which referenced the *Equal Protection Clause* and cited the *Fourth* and *Fourteenth Amendment of the US Constitution* as well as the California Constitution—was **[*1131]** improper to the extent the plaintiff attempted to assert multiple causes of action under one count); *see also* *Fed. R. Civ. P. 10(b)*.

Regardless of potential overlap between the state statutes, *see* FAC ¶ 166, Plaintiffs do not cite to any authority that permits this Court to mix together the statutes of fifty-one separate jurisdictions into a single consumer protection cause of action. Undercutting their own position, Plaintiffs provide separate causes of action for their California CLRA, UCL, and FAL causes of action. *See* FAC ¶¶ 179-210. Even if there are similarities between the vast list of statutes, Plaintiffs have not shown the degree of overlap in terms of the statutes' substantive or procedural requirements. In sum, the Court declines to conflate the statutes of fifty-one jurisdictions into a single cause of action.

Accordingly, the Court **[**35]** **GRANTS** Defendant's motion and **DISMISSES** Plaintiffs' first cause of action with leave to amend. If Plaintiffs wish to file a second amended complaint, the Court directs Plaintiffs to separate their allegations of various state statute violations into separate causes of action.

ii. The *Rule 9(b)* Heightened Pleading Standard and Parallels between the CLRA, UCL, and FAL

Defendant argues that Plaintiffs do not satisfy *Rule 9(b)*. *See* Doc. No. 44-1 at 16; *see also* Doc. No. 65 at 13. In particular, Defendant argues that Plaintiffs do not allege facts about their purchases, the terms they relied on for specific products, when they saw the terms, or how the terms were false or misleading to them. *See* Doc. No. 44-1 at 16-17; *see also* Doc. No. 65 at 13. Plaintiffs respond that *Rule 9(b)*'s requirements "may not even be necessary." *See* Doc. No. 62 at 18 (quoting *Moore v. Mars Petcare US, Inc., 966 F.3d 1007, 1019 n.11 (9th Cir. 2020))*. Regardless, Plaintiffs contend that they allege the required specificity, arguing that (1) the "who" is Defendant; (2) the "what" is nonfunctional slack fill and the five misleading marketing claims; (3) the "when" is January 1, 2015 through the class period; (4) the "where" is Defendant's product labels and advertising; and (5) the "how" is packaging that violates **[**36]** slack fill laws, the misleading advertising, and Plaintiffs' reliance on the advertising to buy products they would not have purchased or would have paid a lower price for the products. *Id.* at 18-19 (citing FAC ¶¶ 6, 10, 16, 69, 149, 63-64, 82-148).

As a threshold issue, the Court addresses whether Rule 9(b) applies to Plaintiffs' allegations.[5] **HN23**[] Where fraud is not a necessary element of a cause of action, a plaintiff may opt to allege that the defendant engaged in fraud. *See* Vess, 317 F.3d at 1103. In cases where a plaintiff alleges "a unified course of fraudulent conduct" and relies on the conduct, the claim sounds or is grounded in fraud, and "the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b)." Id. 1103-04; *see also* Kearns, 567 F.3d at 1125 (citing Vess, 317 F.3d at 1103-04). However, in cases where the plaintiff opts to not allege a unified course of fraudulent conduct and alleges a mix of some fraudulent and nonfraudulent conduct, "only the allegations **[*1132]** of fraud are subject to Rule 9(b)'s heightened pleading requirements." Id. at 1104.

Here, Plaintiffs' own allegations defeat their argument. Plaintiffs aver that Defendant engaged in a unified course of fraudulent conduct. As an initial matter, the words "fraud or fraudulent" occur throughout the FAC. *See,* ***[**37]*** *e.g.*, FAC ¶¶ 9, 92, 155, 165, 166, 175, 198, 199, 202; *see also* Vess, 317 F.3d at 1105 ("Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word 'fraud' is not used)."). Plaintiffs refer to the nonfunctional slack fill as a fraudulent practice. *See id.* ¶ 92; *see also id.* ¶ 8 (referring the practice as "deceptive and misleading"). Plaintiffs allege that Defendant uses this "false and misleading" practice to "deceive" consumers, and they imply Defendant used slack fill to intentionally mislead consumers. *Id.* ¶ 83; *see id.* ¶ 87. Plaintiffs further refer to Defendant's marketing representations as "unfair competition or unfair, unconscionable, deceptive, or fraudulent acts." *Id.* ¶ 165; *see also id.* ¶¶ 166, 198. Plaintiffs emphasize that Defendant's marketing "is designed to cause consumers to purchase [Defendant's] products *because of* these deceptive messages." *Id.* ¶ 13; *see also id.* ¶ 111 (alleging that Defendant "intentionally" uses certain misrepresentative claims to take advantage of health trends); *id.* ¶ 168 (alleging that Defendant intended for Plaintiffs to rely on its representations).

Plaintiffs weave allegations of fraud throughout **[**38]** the FAC.[6] Regardless of whether Plaintiffs' causes of action require pleading fraud, Plaintiffs allege Defendant engaged in a fraudulent course of conduct, which triggers Rule 9(b). *See* Kearns, 567 F.3d at 1125 (citing Vess, 317 F.3d at 1103) ("While fraud is not a necessary element of a claim under the CLRA and UCL, a plaintiff may nonetheless allege that the defendant engaged in fraudulent conduct."); *see also* Brice Yingling v. eBay, Inc., No. C 09-01733 JW, 2009 U.S. Dist. LEXIS 131776, 2010 WL 11575080, at *2 (N.D. Cal. Mar. 10, 2010) (citing Hovsepian v. Apple, Inc., No. 08-5788 JF (PVT), 2009 U.S. Dist. LEXIS 131776, 2009 WL 2591445, at *2 (N.D. Cal. Aug. 21, 2009)) ("Rule 9(b)'s heightened pleading standards apply to claims for violations of the CLRA, FAL, and UCL where such claims are based on a fraudulent course of conduct."). Accordingly, the Court finds that Plaintiffs' pleading must satisfy the particularity requirement of Rule 9(b). *See* Kearns, 567 F.3d at 1125-26; *see also Davidson, 889 F.3d at 964* (citing Kearns, 567 F.3d at 1125) ("Because [the plaintiff's] common law fraud, CLRA, FAL, and UCL causes of action are all grounded in fraud, the FAC must satisfy the traditional plausibility standard of Rules 8(a) and 12(b)(6), as well as the heightened pleading requirements of Rule 9(b).").

The Court now turns to whether Plaintiffs meet the particularity requirement of Rule 9(b). **HN24**[] To do so, the Court examines the FAC to determine whether Plaintiffs plead the "'the who, what, when, where, and how' of the misconduct charged." Kearns, 567 F.3d at 1124 (quoting **[**39]** Vess, 317 F.3d at 1106).

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[5] Plaintiffs rely on a Ninth Circuit footnote to support their argument. *See* Doc. No. 62 at 18 (quoting Moore, 966 F.3d at 1019 n.11). In *Moore*, the Ninth Circuit applied Rule 9(b) and found the plaintiffs satisfied Rule 9(b). *See* Moore, 966 F.3d at 1019-20. The court questioned the applicability of Rule 9(b) "given that a defendant can violate the UCL, FAL, and CLRA by acting with mere negligence." Id. at 1019 n.11. Although the Court noted that Rule 9(b) "may" not apply, the plaintiffs did not raise this issue and the court did not decide the issue. *Id.*

[6] Additionally, in opposing Defendant's argument that they did not sufficiently plead a claim under ***Cal. Civ. Code § 1770(a)(9)***, Plaintiffs argue that they did sufficiently plead an intent to defraud. *See* Doc. No. 62 at 23 n.6 (citing FAC ¶¶ 11, 168, 186-87). In rebutting Defendant's motion, Plaintiffs also refer to the violation of the consumer protection acts as "Plaintiffs' consumer *fraud* claims." Id. at 26 (emphasis added).

Plaintiffs allege that the "who" is Defendant. *See, e.g.*, FAC ¶¶ 3, 6, 10, 163, 185, 196-98, 205, 215, 218. The "what" concerns two overarching issues with Defendant's products: (1) nonfunctional **[*1133]** slack fill and (2) deceptive marketing statements. *See id.* ¶ 3. Regarding the nonfunctional slack fill, the "what" is that Defendant fills several of its products with substantially less than the container's capacity and the packaging leads consumers to believe the box contains more of the product. *See id.* ¶ 7; *see also id.*, Exh. A (providing a "misrepresentation chart" that details Defendant's products and the alleged misrepresentations for each product). As to the marketing claims, the "what" is that Defendant makes five false or misleading statements on its products: "no preservatives," "free of artificial additives," "non-GMO," "healthy," and "protein-packed." *Id.* ¶¶ 10, 13, 14; *see also id.*, Exh. A. The "when" is Plaintiffs' alleged class period: January 1, 2015 through the date class notice is issued. *Id.* ¶ 149. Further, whereas some of the named Plaintiffs allege to have bought Defendant's products "over the past few years," *e.g., id.* ¶ 17; *see also* ¶¶ 25, 27, 29, 33, 35, 37, 39, **[**40]** 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, other named Plaintiffs allege a more specific date, *e.g., id.* ¶ 19 ("in or around August 2019"); *see also id.* ¶¶ 21, 23; *id.*, Ex. B at 75, 80 (providing specific purchase dates for Plaintiffs Anna Altomare and Ty Stewart in Plaintiffs' CLRA violation notice). The "where" is Defendant's product packaging and advertising, which included "statements made on Kodiak Cakes' online store, on Kodiak Cakes' social media profiles on Instagram and Facebook, on the Kodiak Cakes website and blog, on Amazon and/or on the Shark Tank episode that aired on ABC." *Id.* ¶¶ 63-64. Additionally, although some Plaintiffs allege to have bought products in a specific county, chain store, or unspecified location, *e.g., id.* ¶ 19; *see also* ¶¶ 25, 27, 29, 31, 35, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, other Plaintiffs allege to have bought products at a specific store or online, *e.g., id.* ¶ 17 ("Mr. Stewart purchased [Defendant's] products . . . at various stores in San Diego County, most frequently the Target store located at 3245 Sports Arena Blvd, San Diego, CA 92110, and online through Kodiak Cakes' online store."); *see also* ¶¶ 21, 23, 33, 37, 39.

Plaintiffs allege **[**41]** the "how" differently based on the underlying theories. Regarding the nonfunctional slack fill theory, the "how" is that Defendant misrepresents the products' quantities through filling their opaque product boxes with less than half of product for no functional purpose. *Id.* ¶¶ 6-9, 82-85. Regarding the marketing statements theory, the "how" is that Defendant misrepresents the naturalness, healthiness, and nutritiousness of its products. Plaintiffs allege that Defendant misrepresents the natural[7] claims because its products contain "non-natural, synthetic and/or artificial substances," such as monocalcium phosphate, sodium bicarbonate, sodium acid pyrophosphate ("SAPP"), citric acid, and xanthan gum. *Id.* ¶ 119; *see also id.* ¶¶ 122-24. Plaintiffs further add that the several products contain genetically modified ingredients, such as "soy lecithin, soy protein, and corn starch." *Id.* ¶ 120. Plaintiffs allege that the health claims are misleading because consumers interpret "healthy" foods as having "low levels of fat, cholesterol and sugar and contain a certain level of vitamins and nutrients," but Defendant's products do not meet those standards. *Id.* ¶¶ 139-41 (citing *21 C.F.R. § 101.65(d)(2)*). Plaintiffs allege **[**42]** that **[*1134]** the nutrient claims are misleading because consumers interpret "protein-packed" foods as having "high" amounts or constituting an "excellent source" of protein, which means at least ten grams of protein per serving; however, many of Defendant's products contain only two to eight grams per serving. *Id.* ¶¶ 128-31 (first citing *21 C.F.R. § 101.54*; and then citing *21 C.F.R. § 101.9(c)(7)(iii)*). Plaintiffs claim that they relied upon these misrepresentations by purchasing Defendant's products and that they would not have purchased or paid as much if they knew the products did not have the claimed characteristics. *See id.* ¶¶ 63-67; *see also id.* ¶¶ 16, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 60.

HN25[] *Rule 9(b)* has three purposes:

> (1) to provide defendants with adequate notice to allow them to defend the charge and deter plaintiffs from the filing of complaints "as a pretext for the discovery of unknown wrongs"; (2) to protect those whose reputation would be harmed as a result of being subject to fraud charges; and (3) to "prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis."

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[7] The Court notes that Plaintiffs' FAC takes issue with statements of "no preservatives," "free of artificial additives," and "non-GMO," which Plaintiffs collectively refer to as "natural claims." *See* FAC ¶¶ 10, 97, 115; *id.*, Exh. A. Despite referring to "all-natural" statements, Plaintiffs do not allege that "all-natural" is a misrepresentation or otherwise at-issue in this action.

Kearns, 567 F.3d at 1125 (quoting In re Stac Elecs. Sec. Litig., 89 F.3d at 1405). Here, Plaintiffs plead **[**43]** with the requisite specificity that upholds the purpose behind Rule 9(b). Although the alleged timeframe spans several years for some Plaintiffs, they generally outline how the products misled them, and Plaintiffs list the products at issue along with the nonfunctional slack fill or misrepresentation associated with each one. *See* FAC, Exh. A. The Court finds that Plaintiffs have provided adequate notice to Defendant in a manner that shows the suit is not merely a fishing expedition for unknown wrongs; does not harm Defendant in the same manner as a speculative, conclusory, or barebones complaint; and does not impose upon the Court, the parties, or society the cost of baseless litigation at this stage of the action.

Defendant's arguments to the contrary are unavailing. As noted above, Plaintiffs have pleaded sufficiently the "who, what, when, where, and how" of the alleged misconduct. *See* Escobar v. Just Born Inc., No. CV 17-01826 BRO (PJWx), 2017 U.S. Dist. LEXIS 186573, 2017 WL 5125740, at *13 (C.D. Cal. June 12, 2017); Ang v. Bimbo Bakeries USA, Inc., No. 13-cv-01196-WHO, 2013 U.S. Dist. LEXIS 138897, 2013 WL 5407039, at *2-4 (N.D. Cal. Sept. 25, 2013); Clancy v. The Bromley Tea Co., 308 F.R.D. 564, 576 (N.D. Cal. 2013); Astiana v. Ben & Jerry's Homemade, Inc., No. C 10-4387 PJH, 2011 U.S. Dist. LEXIS 57348, 2011 WL 2111796, at *6 (N.D. Cal. May 26, 2011). Although the individual Plaintiffs do not directly state which of their purchased products contained which misleading **[**44]** information, the Court can easily connect the allegations when coupling the products that each Plaintiff purchased with Plaintiffs' "Per-Product Misrepresentation Chart" that pairs each product with each alleged misrepresentation and is referred to throughout the FAC. *See* Ang, 2013 U.S. Dist. LEXIS 138897, 2013 WL 5407039, at *3 ("Plaintiffs have also identified with specificity the precise representations alleged to be illegal, fraudulent and misleading, as well as the specific products on which that language is found."). *Compare* FAC ¶¶ 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61 (listing the products purchased by named Plaintiffs), *and id.* ¶¶ 6, 12, 131, 141, 149 n.40, 164 (referring directly to the attached "Per-Product Misrepresentation Chart"), *with id.*, Exh. A (providing the "Per-Product Misrepresentation Chart"). Regardless of using judicial notice or incorporation-by-reference to examine Defendant's proffered exhibits to disprove **[*1135]** that every product contained the misrepresentations, this issue is not appropriate at the Rule 9(b) juncture where Plaintiffs allege that Defendant did make such representations and the product labels may have changed over time. *See* **[**45]** Bruton v. Gerber Prods. Co., No. 12-cv-02412-LHK, 2014 U.S. Dist. LEXIS 5493, 2014 WL 172111, at *13 (N.D. Cal. Jan. 15, 2014); Ang, 2013 U.S. Dist. LEXIS 138897, 2013 WL 5407039, at *4.

Accordingly, the Court finds that Plaintiffs meet the particularity requirement of Rule 9(b) unless otherwise noted below. *See* Moore, 966 F.3d at 1020 ("The fact that Plaintiffs placed Defendants on sufficient notice to respond to the alleged fraud reflects how their allegations meet Rule 9(b)."). The Court now turns to whether Plaintiffs satisfy Rule 8's general plausibility requirement and whether Plaintiffs state a viable claim for relief under the reasonable consumer test.

iii. The Rule 8 General Plausibility Requirement and Reliance

Before discussing the reasonable consumer test and the claim-specific requirements of Plaintiffs' causes of action, Defendant generally argues that Plaintiffs do not satisfy Rule 8's plausibility requirement. *See* Doc. No. 44-1 at 14; *see also* Doc. No. 65 at 10. In particular, Defendant asserts that the twenty-three Plaintiffs use "almost identical copy-and-paste conclusory statements." Doc. No. 44-1 at 14. Defendant contends that each Plaintiff fails to allege she or he read the product packaging and provides no information about buying experiences or price comparisons. *Id.* Defendant adds that Plaintiffs fail to allege reliance, which they claim is crucial because "not all of [Defendant's] products have all **[**46]** the purported representations that plaintiffs rely on in their FAC." *Id.* at 15. Finally, Defendant argues Plaintiffs do not explain why they continued to purchase products if they were dissatisfied with the labels or fill levels. Plaintiffs respond that facts do not become conclusions merely because allegations are shared between Plaintiffs, and they challenge Defendant's assertion that they fail to allege facts. *See* Doc. No. 62 at 12. Plaintiffs push back against the information Defendant argues is needed and contend they sufficiently allege reliance. *Id.* at 13-14, 15.

To the extent Defendant's arguments are duplicative or subsumed into the *Rule 9(b)* particularity requirement, its arguments are unavailing. As noted above, Plaintiffs have pleaded sufficiently the "who, what, when, where, and how" of the alleged misconduct. *See supra* Section IV.B.1.ii.[8] The Court declines to repeat its above analysis.

The Court now turns to whether Plaintiffs plead actual reliance and begins with the issue of Plaintiffs' shared reliance allegations. ***HN26***[] A plaintiff alleging claims under the CLRA, FAL, or UCL, must allege actual reliance. *See Moore, 966 F.3d at 1020*; *Guzman v. Polaris Indus., Inc., No. 8:19-cv-01543-JLS-KES, 2020 U.S. Dist. LEXIS 90041, 2020 WL 2477684, at *3 (C.D. Cal. Feb. 13, 2020)* (quoting **[**47]** *Stewart v. Electrolux Home Prods., Inc., No. 1:17-cv-01213-LJO-SKO, 2018 U.S. Dist. LEXIS 63078, 2018 WL 1784273, at *4 (E.D. Cal. Apr. 13, 2018))*. A plaintiff alleging false advertising or misrepresentation to consumers "'must show that the misrepresentation was an *immediate cause* of the injury-producing conduct.' However, a 'plaintiff is *not* required **[*1136]** to allege that the challenged misrepresentations were the *sole* or even the *decisive* cause of the injury-producing conduct.'" *Moore, 966 F.3d at 1020* (quoting *Kwikset Corp. v. Superior Ct., 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877, 888 (Cal. 2011))*. In *Moore*, the Ninth Circuit determined that although the plaintiffs did not provide many facts in their "individual allegations," they "collectively allege[d]" that "as a result of the false and fraudulent prescription requirement, each Plaintiff paid more for Prescription Pet Food than each Plaintiff would have paid in the absence of the requirement, or would never have purchased Prescription Pet Food." *Id.* The court held this was sufficient to survive a motion to dismiss. *See id.*

Similarly, Plaintiffs here collectively allege that if they had known about the real nature behind the slack fill and misrepresentations, "they would not have purchased the [Defendant's] products or, alternatively, would have paid less for the Products." FAC ¶ 14; *see also id.* ¶¶ 62, 67, 92, 145-46. ***HN27***[] As in *Moore* **[**48]** , collective allegations can survive a motion to dismiss. *See Moore, 966 F.3d at 1020*; *see also id. at 1021* (quoting *Friedman v. AARP, Inc., 855 F.3d 1047, 1055 (9th Cir. 2017))* ("[A]t the motion to dismiss stage, 'actual reliance . . . is inferred from the misrepresentation of a material fact.'"). Thus, Plaintiffs' collective or identical allegations do not doom a showing of actual reliance.

In assessing whether Plaintiffs allege actual reliance across Defendant's advertising, the Court splits its analysis between the "product packaging" and "other advertising."[9] As to the packaging and as noted above, the Court can easily connect each product to its respective alleged misrepresentation. *See supra* Section IV.B.1.ii. *Compare* FAC ¶¶ 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61 (listing the products purchased by named Plaintiffs), *and id.* ¶¶ 6, 12, 131, 141, 149 n.40, 164 (referring directly to the attached "Per-Product Misrepresentation Chart"), *with id.*, Exh. A (providing the "Per-Product Misrepresentation Chart"). Each Plaintiff alleges that she or he was "exposed to each of the Claims that were prominently displayed *on the package of the products [she or he] purchased* and in [Defendant's] marketing and advertising." *Id.* ¶¶ 16, 18, **[**49]** 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 60 (emphasis added). Thus, the Court finds that Plaintiffs have alleged actual reliance on the statements found on the packaging for the products purchased by each individual Plaintiff.

As to the other advertising, each Plaintiff alleges that she or he was "exposed to each of the Claims that were prominently displayed . . . in [Defendant's] *marketing and advertising*." *Id.* ¶¶ 16, 18, 20, 22, 24, 26, 28, 30, 32, 34,

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[8] Defendant's reliance on *Ballard v. Bhang Corp., No. EDCV 19-2329 JGB (KKx), 2020 U.S. Dist. LEXIS 188626, 2020 WL 6018939 (C.D. Cal. Sept. 25, 2020)*, is unsuccessful. In *Ballard*, the court granted a motion dismiss, requiring greater clarity as to "which chocolates [the plaintiff] bought, when he bought them, how they were advertised, and how they fell short—at the very least as to the chocolates that Plaintiff had lab-tested." *2020 U.S. Dist. LEXIS 188626, [WL] at *7*. Here, Plaintiffs have provided the requisite clarity. *See supra* Section IV.B.1.ii.

[9] The Court refers to "packaging" as both the physical packaging for Plaintiffs who purchased products in stores and the packaging images viewable online for Plaintiffs who purchased products online. The Court refers to "other advertising" as all nonpackaging advertisements found on Defendant's website, online store, blog, social media, Amazon.com pages, and *Shark Tank* episode that aired on ABC.

36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 60 (emphasis added); *see also id.* ¶ 64. After their individual allegations, Plaintiffs repeat this allegation and define "advertising and marketing":

> Each of the Plaintiffs were also exposed to, read, and relied upon the Claims made about these Products through Kodiak Cakes' advertising and marketing. This advertising and marketing included statements made on Kodiak Cakes' online store, on Kodiak Cakes' social media profiles on Instagram and **[*1137]** Facebook, on the Kodiak Cakes website and blog, on Amazon and/or on the *Shark Tank* episode that aired on ABC.

Id. ¶ 64. Plaintiffs clearly aver that each Plaintiff was exposed to Defendant's advertising. **[**50]** *See id.*; *see also id.* ¶¶ 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 60. However, in defining "advertising and marketing," Plaintiffs provide a wide net of what the advertising "included" and tethers the advertisement media together with a vague "and/or." *Id.* It is unclear what advertisement medium each Plaintiff relied upon. Even if Defendant did in fact make misrepresentations across these media, Plaintiffs must each still show that the misrepresentation was an immediate cause of the injurious conduct. *See* *Moore, 966 F.3d at 1020* (quoting *Kwikset Corp., 246 P.3d at 888*). Here, the causal connection between each Plaintiff and each misrepresentation across Defendant's advertising media is too tenuous and insufficiently pleaded. *See* *McCrary v. Elations Co., LLC, No. EDCV 13-0242 JGB (OPx), 2013 U.S. Dist. LEXIS 173592, 2013 WL 6403073, at *8*. ("Plaintiff alleges that the [Defendant's] website contains various misrepresentations, but the SAC does not allege that he looked at or relied on anything on Defendant's website before purchasing [the product]. Thus, Plaintiff did not actually rely on any website statements and does not have standing to bring claims based on [] those statements." (citation omitted)).

However, one Plaintiff does appear to plead actual reliance **[**51]** plausibly to one alleged deceptive statement found on the other advertising. Plaintiff Ty Stewart ("Stewart") plausibly pleads reliance on the "healthy" statement regarding Defendant's Double Dark Chocolate Muffin Mix from the online store. *See* FAC ¶¶ 64, 137; *see also infra* Section IV.B.1.iv.b.2. Stewart alleges that he purchased products on Defendant's online store. *See* FAC ¶ 17. Stewart alleges he purchased Double Dark Chocolate Muffin Mix. *Id.; see also id.* Exh. B. at 80. Plaintiffs allege the deceptive "healthy" claim was made on Defendant's online store regarding the Double Dark Chocolate Muffin Mix. *See id.* ¶¶ 64, 137. Construing Plaintiffs' allegations in the light most favorable to them, *see* *Cahill, 80 F.3d at 337-38* (citing *Nat'l Wildlife Fed'n, 45 F.3d at 1340*), the Court finds Plaintiff Stewart plausibly pleads actual reliance on the alleged "healthy" statement for the Double Dark Chocolate Muffin Mix as advertised on Defendant's online store.

Therefore, with the exception of Plaintiff Stewart and his plausible reliance on the "healthy" statement, the Court finds that Plaintiffs fail to plausibly allege actual reliance on the statements found on Defendant's other advertising.

iv. Reasonable Consumer Test and the CLRA, UCL, and FAL

HN28[] To state a claim **[**52]** under the CLRA, FAL, or the fraudulent prong of the UCL, a plaintiff must allege that the defendant's purported misrepresentations are likely to deceive a reasonable consumer. *See Ebner, 838 F.3d at 967* (citing *Williams, 552 F.3d at 938*); *see also* *Becerra v. Dr Pepper/Seven Up, Inc., 945 F.3d 1225, 1228 (9th Cir. 2019)* (citing *Williams, 552 F.3d at 938*); *Safransky v. Fossil Grp., Inc., No. 17-cv-1865-MMA (NLS), 2018 U.S. Dist. LEXIS 60946, 2018 WL 1726620, at *9 (S.D. Cal. Apr. 9, 2018)*; *Hadley, 243 F. Supp. 3d at 1089*. "Because the same standard for fraudulent activity governs all three statutes, courts often analyze the three statutes together." *Loomis, 420 F. Supp. 3d at 1080 n.7* (quoting *Hadley, 243 F. Supp. 3d at 1089*). "These laws prohibit 'not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to **[*1138]** deceive or confuse the public.'" *Hadley, 243 F. Supp. 3d at 1092* (quoting *Kasky, 45 P.3d at 250*).

HN29[] "A reasonable consumer is 'the ordinary consumer acting reasonably under the circumstances.'" *Davis, 691 F.3d at 1162* (quoting *Colgan v. Leatherman Tool Grp., Inc., 135 Cal. App. 4th 663, 38 Cal. Rptr. 3d 36, 48 (Ct. App. 2006))*. "Likely to deceive implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *In re Sony Gaming Networks &*

Customer Data Sec. Breach Litig., 903 F. Supp. 2d 942, 967 (S.D. Cal. 2012) (quoting Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 129 Cal. Rptr. 2d 486, 495 (Ct. App. 2003)); *see also* Becerra, 945 F.3d at 1228 (same). Rather, "the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." Lavie, 129 Cal. Rptr. 2d at 495. "In determining whether a statement is **[**53]** misleading under the statute, 'the primary evidence in a false advertising case is the advertising itself.'" Colgan, 38 Cal. Rptr. 3d at 46 (quoting Brockey v. Moore, 107 Cal. App. 4th 86, 131 Cal. Rptr. 2d 746, 756 (Ct. App. 2003)). However, "'[g]eneralized, vague, and unspecified assertions constitute "mere puffery" upon which a reasonable consumer could not rely, and hence are not actionable' under the UCL, FAL, or CLRA." In re Ferrero Litig., 794 F. Supp. 2d 1107, 1115 (S.D. Cal. 2011) (quoting Annunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1139 (C.D. Cal. 2005)). Under the reasonable consumer test, the Ninth Circuit has emphasized that it is a "rare situation in which granting a motion to dismiss is appropriate" because "it raises questions of fact." Reid v. Johnson & Johnson, 780 F.3d 952, 958 (9th Cir. 2015); *Williams, 552 F.3d at 939*.

The Court now turns to whether Plaintiffs allege that Defendant's products are likely to deceive a reasonable consumer under their two overarching theories of liability: (1) deceptive fill level and (2) deceptive marketing statements.

a. Deceptive Fill Level

Despite Plaintiffs referring to this issue as "nonfunctional slack fill," *see* FAC ¶¶ 3, 4-9, 82-92, the substance of these allegations appears to be brought under two sub-theories: (1) consumer deception under the CLRA, FAL, and the fraud UCL prong, *see* FAC ¶¶ 6,7, 8, 62, 83, 90, 186, 198, 205, and (2) nonfunctional slack fill under the unfair or unlawful prongs of the UCL, *see id.* ¶¶ 7, 9, 62, **[**54]** 84-86, 90, 163, 196; *see also* Doc. No. 62 at 29. Given the different analysis required for these theories, the Court addresses the first sub-theory under the reasonable consumer analysis here and the second sub-theory under the unfair and unlawful UCL prongs further below. *See* Buso v. ACH Food Companies, Inc., 445 F. Supp. 3d 1033, 1037 (S.D. Cal. 2020) (discussing the two theories in turn where the plaintiff alleged the packaging was filled in a misleading manner and contained nonfunctional slack fill); Escobar, 2017 U.S. Dist. LEXIS 186573, 2017 WL 5125740, at *7, *12 (first discussing whether the plaintiff alleged facts to state a claim under the reasonable consumer analysis and then under the nonfunctional slack fill analysis); *see also infra* Section IV.B.1.v.

Defendant asserts that Plaintiffs' slack-fill theory is insufficient to state a claim for five reasons. *See* Doc. No. 44-1 at 21-26; *see also* Doc. No. 65 at 15-19. First, Defendant argues the theory fails because the boxes state how much product they contain "in weight, serving sizes, and often by final product output"; the recipes on the boxes note the yield; and the box size does not **[*1139]** correlate with the ultimate baked product amount given that the baking mixes must be combined with other ingredients. Doc. No. 44-1 at 22 (emphasis omitted). Second, Defendant asserts **[**55]** that Plaintiffs cannot claim they were deceived because they allege slack fill violations based on online purchases, which prevent the consumer from examining the box. *See id.* at 23. Third, Defendant asserts that Plaintiffs failed to allege they were barred from comparison shopping based on "price per ounce" or from picking up similar products to compare weight. *Id.* at 23, 24. Defendant claims that "[w]hen the price per ounce is indicated on the price tag of all the same products in a product category, the consumer cannot be misled." *Id.* at 23. Fourth, Defendant argues that Plaintiffs' allegation of repeated deception for every purchase is implausible because Plaintiffs would have known the fill level after the first purchase. *See id.* at 24-26. Fifth, Defendant argues the CLRA claim premised on slack fill should be dismissed because it requires a representation and Plaintiffs "do not allege an objective false representation (written or oral) that the box contains more product than it has." *Id.* at 26.

Plaintiffs respond with several arguments. *See* Doc. No. 62 at 28-36. First, Plaintiffs highlight that Defendant does not argue that the empty space is functional, which prevents dismissal of their unfair and unlawful UCL claim premised under **[**56]** Cal. Bus. & Prof. Code § 12606.2. *See id.* at 28-29. Second, Plaintiffs contend that they sufficiently allege that a reasonable consumer can be misled by a baking mix that requires cooking. *See id.* at 29-32. Third, Plaintiffs argue that slack fill allegations are sufficient when they include online purchases. *See id.* at 32. Fourth, Plaintiffs assert that they are not required to allege that they compared price per ounce or handled the product to determine weight. *See id.* at 33-34. Fifth, Plaintiffs claim that their causes of action are not limited to the initial purchase because deceptive packaging in one instance does not mitigate the deception in a subsequent instance. *See id.* at 35. Sixth, Plaintiffs contend that they allege an injury caused by the slack fill. *See id.* at 36. Seventh, Plaintiffs argue that the CLRA claim premised on slack fill is viable because product size is a misrepresentation. *See id.*

Plaintiffs allege that Defendant has a "uniform packaging scheme" across twenty-seven products where products are packaged in nontransparent, cardboard-resembling boxes and contain less than half of the boxes' capacity. FAC ¶¶ 6-7. Plaintiffs claim that within the boxes is an interior plastic bag that contains the product mix, which often amounts to only one-third the size **[**57]** of the box. *Id.* ¶ 83. Plaintiffs aver that the "deceptive packaging leads the reasonable consumer to believe that the package contains substantially more product than it actually does." *Id.* ¶ 7; *see also id.* ¶ 83.

Within their FAC, Plaintiffs include a picture comparing the opaque exterior box next to a clear interior sealed bag containing the product mix—and using a ruler to show the difference. *See id.* ¶ 7. The picture shows that the exterior box is roughly nine inches tall, the interior bag containing the product mix is about eight-and-a-half inches tall, and the content of the bag is under four inches tall. *See id.* Comparing Defendant's exterior packaging with its competitors, Plaintiffs allege that competitors sell products with "significantly more product" than Defendant, which "lead[s] consumers to the reasonable assumption that [Defendant's products] contain the same amount of mix." *Id.* ¶ 86 (emphasis omitted). For example, Plaintiffs include a picture of one of Defendant's products next to a similar sized competitor product. **[*1140]** *See id.* ¶ 86. Plaintiffs allege that Defendant's package contains 12.7 ounces of product and the competitor's product contains 32 ounces of products. ***[**58]*** *See id.* In addition, Defendant's product packaging details the product weight on the front of the box as well as the serving size—sometimes by final product output—and servings per container on the back or side of the box. *See, e.g.*, Doc. No. 44-3 at 1-2 (Buttermilk Flapjack and Waffle Mix packaging); Doc. No. 44-5 at 1-2 (Cinnamon Oat Flapjack and Waffle Mix packaging); Doc. No. 47-11 at 1-2 (Chocolate Fudge Brownie Mix packaging); Doc. No. 48-1 at 1-2 (Power Flapjacks packaging). To assess the plausibility of Plaintiffs' theory, the Court first reviews how other courts have addressed consumer deception based on unfulfilled quantity expectations.

In *Ebner v. Fresh, Inc.*, the Ninth Circuit affirmed the district court's dismissal of deceptive advertising claims. *See 838 F.3d at 961-62*. The plaintiff alleged the defendant's lip balm packaging was deceptive because it misled consumers into thinking it contained a larger quantity than it actually contained. *See id. at 962*. The plaintiff claimed the deception stemmed from a weighted metallic bottom, oversized packaging, and a screw mechanism that allowed only 75% of the product to rise to the top of the tube. *Id.* In holding that the plaintiff did not allege a plausible **[**59]** consumer deception claim, the court reasoned that the tube and accompanying box had an accurate net weight label, a reasonable consumer understands the screw prevents full advancement of the product, and some additional weight may be necessary to keep the tube upright. *See id. at 967*. Noting the "context of the high-end cosmetics market," the court added "elaborate packaging and the weighty feel of the tube is commonplace and even expected." *Id.*

In *Buso v. ACH Food Companies, Inc.*, the district court dismissed the plaintiff's consumer deception claim. *See* *445 F. Supp. 3d at 1039*. The plaintiff alleged that the defendant's cornbread mix packaging was deceptive because it contained about 50% empty space and misled consumers into thinking it contained a larger quantity than it actually contained. *Id. at 1035*. The court found that it was "unreasonable for a customer to be deceived as to the amount of product contained in the cornbread mix box" because the front of the package stated the product's net weight and the approximate number of servings per container and the back of the package indicated that "the box contains enough cornmeal mix to make 'one 8-in square "loaf" of cornbread or 12 standard cornbread muffins.'" *Id. at 1038*. The court **[**60]** noted that the packaging clearly put consumers on notice of the quantity of cornbread that could be made per box. *See id.*

In *Kennard v. Lamb Weston Holdings, Inc.*, the district court dismissed the plaintiff's consumer deception claim. *See* *No. 18-cv-04665-YGR, 2019 U.S. Dist. LEXIS 63637, 2019 WL 1586022, at *7, *11 (N.D. Cal. Apr. 12, 2019)*. The plaintiff alleged that defendant's sweet potato fries packaging was deceptive because "the container had more than 50% empty space" and misled consumers into thinking it contained a larger quantity than it actually contained. *2019*

*U.S. Dist. LEXIS 63637, [WL] at *1*. The court reasoned that the packaging disclosed the product's net weight, number of fries per serving, and the number of servings per container; additionally, the weight and serving size labels "[did] not contradict other representations or inferences from defendant's packaging." *2019 U.S. Dist. LEXIS 63637, [WL] at *5*. Court noted that "many district courts have found that where the package itself discloses the actual unit counts, a 'reasonable consumer' could not be misled." *Id.*

[*1141] In *Buso v. Vigo Importing Co.*, the district court dismissed the plaintiff's consumer deception claim. *See No. 18-cv-1328-WQH-BGS, 2018 U.S. Dist. LEXIS 201726, 2018 WL 6191390, at *5 (S.D. Cal. Nov. 28, 2018)*. The plaintiff alleged that defendant's risotto packaging was deceptive because it contained about 70% empty space and misled consumers into thinking **[**61]** it contained a larger quantity than it actually contained. *See 2018 U.S. Dist. LEXIS 201726, [WL] at *1*. The court found "there [was] no deceptive act to be dispelled." *2018 U.S. Dist. LEXIS 201726, [WL] at *4* (quoting *Ebner, 838 F.3d at 966*). The court reasoned that the label's net weight was accurate and the package was pliable, which allowed consumers to see and feel the package to assess its quantity before purchase. *2018 U.S. Dist. LEXIS 201726, [WL] at *4, *5*.

On the other hand, in *Escobar v. Just Born Inc.*, the court denied the defendant's motion to dismiss the plaintiff's consumer deception claim. *See 2017 U.S. Dist. LEXIS 186573, 2017 WL 5125740, at *1*. The plaintiff alleged that the defendant's candy products were deceptive because they contained about 46% empty space and misled consumers into thinking they contained a larger quantity than they actually contained. *See id.* The court explained that

> a reasonable consumer is not necessarily aware of a product's weight or volume and how that weight or volume correlates to the product's size. In other words, the fact that the Products' packaging accurately indicated that a consumer would receive 141 grams or 5 ounces of candy does not, on its own, indicate to a reasonable consumer that the Products' box may not be full of candy and that, instead, 35.7% of the box is empty. Rather, a reasonable consumer may believe that 141 **[**62]** grams or five ounces of candy is equivalent to an amount approximately the size of the Products' box.

*2017 U.S. Dist. LEXIS 186573, [WL] at *9*. The court found the facts distinguishable from those in *Bush*: whereas in *Bush* "the product's packaging indicated the *number* of cookies the package contained, giving the consumer a reasonable expectation of the product's contents beyond just the weight," the packaging in *Escobar* "include[d] the [p]roduct[']s net weight, and a serving size approximation in ounces and cups." *Id.* (citing *Bush v. Mondelez Int'l, Inc., No. 16-cv-02460-RS, 2016 U.S. Dist. LEXIS 174391, 2016 WL 7324990, at *2 (N.D. Cal. Dec. 16, 2016))*. The court added that the fact that a consumer can hear the rustling of a package's contents does not prevent a package from being deceptive to consumers and that "consumers may reasonably rely on the size of the packaging and believe that it accurately reflects the amount she is purchasing." *2017 U.S. Dist. LEXIS 186573, [WL] at *10*. The court further noted that the plaintiff was unable to inspect the package prior to purchase because the candy was kept behind a glass enclosure and was handed to the consumer only after purchase. *Id.*

HN30[] In assessing a product, whether a reasonable consumer would be deceived often depends on the circumstances. Substantial, nonfunctional empty space may be a factor that **[**63]** could plausibly mislead a reasonable consumer. The reasonable consumer "is neither the most vigilant and suspicious of advertising claims nor the most unwary and unsophisticated, but instead is 'the ordinary consumer within the target population.'" *Chapman v. Skype Inc., 220 Cal. App. 4th 217, 162 Cal. Rptr. 3d 864, 872 (2013)* (quoting *Lavie, 129 Cal. Rptr. 2d at 497*). The reasonable consumer does not don Sherlock Holmes garb to scrutinize an entire aisle filled with shelves of a various pancakes by comparing the exact weight of each box's content with the price across a dozen brands or shaking and manipulating each box to detect the nature of the hidden culinary treasure. Although consumers take into consideration **[*1142]** certain labels and information provided on the packaging, consumers plausibly do not perform intense word-by-word detective work for each product they toss in their shopping cart. ***HN31***[] To some degree, "consumers may reasonably rely on the size of the packaging and believe that it accurately reflects the amount she is purchasing." *Escobar, 2017 U.S. Dist. LEXIS 186573, 2017 WL 5125740, at *10*. "[E]ven if a product's packaging accurately displays its weight, it does not mean that the way in which the product was packaged may not be misleading." *Id.; Spacone v. Sanford, LP, No. CV 17-02419-BRO (MRWx), 2017 U.S. Dist. LEXIS 228377, 2017 WL 6888497, at *10 (C.D. Cal. May 11, 2017)*.

However, the inquiry does not end with merely relying on **[**64]** a package's size. Reasonable consumers also rely on serving size and product yield information as well as the feel of the package to inform their purchasing decisions. *See ACH Food Companies, Inc., 445 F. Supp. 3d at 1038* (finding that it would be unreasonable for a consumer to be deceived as to the amount of cornbread mix in the box where the net weight and number of servings per box were displayed on the front of the box and the rear label indicated that the box could yield "one 8-in square 'loaf' of cornbread or 12 standard cornbread muffins"); *Kennard, 2019 U.S. Dist. LEXIS 63637, 2019 WL 1586022, at *5* (finding that it was not plausible for a consumer to be deceived where the fry packaging disclosed the product's net weight, number of fries per serving, and the number of servings per package); *Vigo Importing Co., 2018 U.S. Dist. LEXIS 201726, 2018 WL 6191390, at *5* (finding that a reasonable consumer would not be deceived where the risotto packaging was pliable and the consumer can "see and feel the package and perceive the amount of product").

Here, the product is baking mix. Unlike the high-end cosmetics market with the widespread nature of elaborate and weighty packaging in *Ebner, see 838 F.3d at 967*, the Court is unaware that—and the parties do not argue—the pancake and other baking mixes at issue are part of a high-end market where large and weighty packages are expected. **[**65]** Indeed, Plaintiffs' slack-fill comparison between Defendant's Chocolate Chip Flapjack and Waffle Mix and a competitor's product suggests that empty space in pancake packaging is not the norm. *See* FAC ¶ 86; *see also id.* ¶ 85.

Further, whereas some labels state the final product yield after cooking or baking the mix and its ingredients, *see, e.g.*, Doc. No 44-4 at 2 (Chocolate Chip Flapjack and Waffle Mix); *see also Power Cakes: Chocolate Chips*, Kodiak Cakes, https://kodiakcakes.com/products/chocolate-chip-power-cakes (same), other labels only provide serving size in cylindrical cups and list an approximate number of those servings per container,[10] *see, e.g.*, Doc. No 44-8 at 2 (Strawberry Chocolate Chip Flapjack and Waffle Mix); *see also Power Cakes: Strawberry Chocolate Chips*, Kodiak Cakes, https://kodiakcakes.com/products/strawberry-dark-chocolate-power-cakes (same). At this stage, the Court finds it plausible that the reasonable consumer is unlikely to convert cylindrical cups plus other ingredients[11] into the approximate product yield of the finished pancakes, waffles, or other baked goods. *Cf. Escobar,* ***[*1143]*** *2017 U.S. Dist. LEXIS 186573, 2017 WL 5125740, at *9 n.4* ("In the Court's view, the reasonable consumer is unlikely to (1) make volume conversions from **[**66]** cylindrical cups to rectangular prisms; and (2) know the density of candy products, such that the printed weight of candy may be converted to approximate the volume of candy product packaged in a rectangular prism.").

At least some of the products here are distinguishable from the special consumer context and unique mechanics of a lip balm dispenser in *Ebner*, the listing of final product output information in *ACH Food Companies, Inc.* and *Kennard*, and the pliability of the packaging in *Vigo Importing Co.* Additionally, Plaintiffs' claims raise questions of fact that do not trigger the rare situation where granting a motion to dismiss is appropriate. *See Reid, 780 F.3d 952, 958* (quoting *Williams, 552 F.3d at 939*); *see also Spacone, 2017 U.S. Dist. LEXIS 228377, 2017 WL 6888497, at *10* ("The Court recognizes the admonition that whether product labeling or packaging may mislead a reasonable consumer is a factual inquiry rarely appropriate for decision on a motion to dismiss."). Therefore, the Court finds that Plaintiffs could plausibly prove that a reasonable consumer would be deceived by the size of Defendant's packaging where the opaque, nonpliable packaging does not provide information about the final product output.

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[10] Defendant asserts in their motion that "[t]he boxes state exactly how much product is inside in weight, serving sizes, and *often by* final product output (muffins, cookies, brownies, protein balls, flapjacks/waffles etc.)." Doc. No. 44-1 at 22 (emphasis omitted and added). Defendant appears to concede that not all of its product boxes state the final product yield.

[11] For example, Defendant's pancake mixes only require water to be added. *See, e.g.*, Doc. No. 44-3 at 1-2 (Buttermilk Flapjack and Pancake Mix).

Defendant argues Plaintiffs cannot claim they were deceived **[**67]** because they allege they made online purchases and there is no nonfunctional slack fill where "[t]he mode of commerce does not allow the consumer to view or handle the physical container or product." Doc. No. 44-1 at 23 (quoting *Cal. Bus. & Prof. Code § 12606.2(c)(8)*). This argument is unavailing because this provision is from the *California Fair Packaging and Labeling Act*, which Plaintiffs allege as part of their unlawful UCL prong claim and is distinct from their fraudulent UCL prong allegations. *See* FAC ¶ 196. The Court addresses Defendant's argument as it pertains to the unlawful and unfair UCL prongs in a later section of this order. *See infra* Section IV.B.1.v. To the extent Defendant makes a similar argument to rebut Plaintiffs' consumer deception theory, it is unavailing at this stage of the litigation. The Court still finds that Plaintiffs could plausibly prove a reasonable consumer would be deceived. Although Defendant notes that online consumers do not know the box's size from looking at a picture without a physical measure of reference, *see* Doc. No. 65 at 18, the issue still remains that online consumers may reasonably rely on the packaging, along with final product yield information, to accurately reflect the **[**68]** amount of product it contains. Thus, consumers could plausibly rely on the online product's picture—without a measure of reference—to assume that the container's size bears some relation to amount of its contents. Considering Plaintiffs' allegations in the light most favorable to them, *see* *Cahill, 80 F.3d at 337-38* (citing *Nat'l Wildlife Fed'n, 45 F.3d at 1340*), consumers purchasing online products may have a stronger deception claim if they have less information about the product because they cannot visualize or handle the physical product and, thus, may be more susceptible to deceptive advertising. *Cf.* *Escobar, 2017 U.S. Dist. LEXIS 186573, 2017 WL 5125740, at *10* (noting that "common sense" reveals that a consumer may not have the opportunity to shake or manipulate a product on the shelf or behind glass to determine whether the box is full and further noting that the plaintiff alleged that the candy was kept in a "glass enclosure" and only handed to the consumer after purchase). Overall, Defendant has not persuaded the Court to differentiate the online purchase experience from the **[*1144]** in-person retail experience at the motion to dismiss stage.

Defendant also argues that Plaintiffs do not allege that they were precluded from comparison shopping and that "price per ounce" price tags allow consumers to easily **[**69]** compare products. *See* Doc. No. 44-1 at 23. In addition to not providing authority for its proposition, Defendant concedes that listing unit prices is merely "encouraged" and not mandatory in California. *See id.* at 23-24, 24 n.7 (quoting *Cal. Bus. & Prof. Code § 12655* ("It is the intent of the Legislature to *encourage* the unit pricing of all . . . packaged foods . . . offered by merchants in their places of business for sale at retail to the public. The Legislature finds that unit pricing, the price per ounce, per pound, per gallon, or the metric equivalent thereof, or per 100 square feet, or per 100 count, for which those items are offered for sale at retail, effectively informs the consumer of the comparative prices and values of commodities, and is thus useful for the formulation of intelligent consumer choices." (emphasis added))). Construing Plaintiffs' allegations in the light most favorable to them, *see* *Cahill, 80 F.3d at 337-38* (citing *Nat'l Wildlife Fed'n, 45 F.3d at 1340*), the Court assumes California Plaintiffs were not provided with price per ounce information when they selected the product. Thus, Defendant's challenge is unavailing.

Additionally, Defendant argues Plaintiffs' allegations hinder their claim that a reasonable consumer would be deceived because they knew about the slack **[**70]** fill after their first purchase yet continued to purchase Defendant's products for several years. *See* Doc. No. 44-1 at 25-26; *see also* FAC ¶¶ 16-17. ***HN32***[] However, "what is relevant at this stage is not what a reasonable consumer *actually* believes, but whether Plaintiff has plausibly pleaded facts indicating what a reasonable consumer *could* believe." *Escobar, 2017 U.S. Dist. LEXIS 186573, 2017 WL 5125740, at *10 n.5*; *Spacone, 2017 U.S. Dist. LEXIS 228377, 2017 WL 6888497, at *9 n.10*; *see also Williams, 552 F.3d at 940* (concluding that the plaintiffs "could plausibly prove that a reasonable consumer would be deceived" by the snack packaging). Also at this stage, the Court must construe Plaintiffs' allegations in the light most favorable to them. *See* *Cahill, 80 F.3d at 337-38* (citing *Nat'l Wildlife Fed'n, 45 F.3d at 1340*). Plaintiffs' allegations about continued purchases cut against their individual claims. However, reading the allegations in a favorable light, the Court finds that Plaintiffs' allegations plausibly state that they were deceived at least when they made their first purchase. *See* FAC ¶¶ 16, 89-90. This is enough at this stage of the litigation.

Finally, Defendant argues that Plaintiffs' CLRA claim must be dismissed as to their slack fill theory because the CLRA requires a representation and slack fill is not a representation. *See* Doc. No. 44-1 at 26; *see also* Doc. No. 65 at 19-20. Plaintiffs **[**71]** respond that the exaggerated box size is a representation. *See* Doc. No. 62 at 36.

Plaintiffs' CLRA cause of action alleges violations of *Cal. Civ. Code § 1770(a)(5)*, *(7)*, *(9)*, *(16)*. *See* FAC ¶ 186. ***HN33***[] The UCL, FAL, and CLRA "are designed to prohibit 'not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.'" *Williams, 552 F.3d at 938* (quoting *Kasky, 45 P.3d at 250*); *see also* *Cal. Civ. Code § 1760* ("This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection."). Further, unlike the other subsections Plaintiffs rely, *§ 1770(a)(9)* **[*1145]** does not include the word "representation"; rather, it merely makes unlawful "[a]dvertising goods or services with intent not to sell them as advertised." *Cal. Civ. Code § 1770(a)(9)*. Construing the CLRA liberally as required by statute, *see* *Cal. Civ. Code § 1760*, the Court finds that exaggerated box size and slack fill allegations can form the basis for a CLRA claim. *Cf.* *Escobar, 2017 U.S. Dist. LEXIS 186573, 2017 WL 5125740, at *11* (finding that the plaintiff stated a viable claim under the CLRA, FAL, and UCL based on her allegations that the defendant sold candy in misleading **[**72]** packaging that contained 46% empty space); *Spacone, 2017 U.S. Dist. LEXIS 228377, 2017 WL 6888497, at *10* (finding that plaintiff stated a viable claim under the CLRA, FAL, and UCL based on her allegations that the defendant sold glue in misleading packaging that contained 80% empty space).

Overall, without information stating how much final product a package contains or how many final products constitute a serving size with the number of servings per package, a reasonable consumer could plausibly assume that the size of an opaque, nonpliable package bears some relationship to the amount of product inside. In sum, the Court finds that Plaintiffs *could* plausibly prove that a reasonable consumer would be deceived by the size of Defendant's packaging where the packaging *does not* provide information about the final product output. However, the Court also finds that Plaintiffs *could not* plausibly prove that a reasonable consumer would be deceived by the size of Defendant's packaging where the packaging *does* provide information about the final product output. Accordingly, the Court **GRANTS in part and DENIES in part** Defendant's motion to dismiss Plaintiffs' CLRA, FAL, and the fraudulent UCL prong causes of action premised on deceptive fill level.

b. Deceptive [**73] Marketing Statements

The Court now turns to the viability of Plaintiffs' allegations that Defendant made several misleading statements in marketing its products that would deceive a reasonable consumer under the CLRA, FAL, and the fraudulent UCL prong. Plaintiffs allege that Defendant employed five misleading statements, and they organize the statements into three categories: "Natural Claims, Health Claims, and Nutrient Claims." *Id.* ¶¶ 10, 96. The Court proceeds by assessing each of the five statements within the three categories.

1. Natural Claims

Plaintiffs allege that Defendant misleadingly labels and advertises its products as having "no preservatives" as well as being "free of artificial additives" and "non-GMO." *See* FAC ¶¶ 10, 63, 97-126; *see also id.* Exh. A (providing the "Per-Product Misrepresentation Chart"). Defendant argues that Plaintiffs do not allege that "free of artificial additives" and "no preservatives" are misleading. *See* Doc. No. 44-1 at 30; *see also* Doc. No. 65 at 22. Defendant takes issue with Plaintiffs conflating the alleged statements with "all natural." *See* Doc. No. 44-1 at 30; *see also* Doc. No. 65 at 22-23. Defendant criticizes the FAC for taking issue with **[**74]** trace ingredients and not identifying the artificial additives or preservatives. *See* Doc. No. 44-1 at 30-31; *see also* Doc. No. 65 at 22. Defendant asserts that Plaintiffs could not have been misled by the presence of the minor ingredients because they are ingredients in baking soda and baking powder. *See* Doc. No. 44-1 at 31; *see also* Doc. No. 65 at 23. Further, Defendant argues that Plaintiffs fail to allege that the substances were used as a preservative or additive. *See* Doc. No. 44-1 at 31; *see also* Doc. No. 65 at 23. As to the "non-GMO" allegations, Defendant contends that reasonable consumers would not **[*1146]** be misled by "a trace or secondary ingredient." Doc. No. 44-1 at 32; *see also* Doc. No. 65 at 23. Defendant criticizes Plaintiffs for not citing studies or tests on the products and for relying on assumption that the ingredients are genetically modified. *See* Doc. No. 44-1 at 32; *see also* Doc. No. 65 at 24. Defendant argues that the alleged genetically modified ingredients are all sub-ingredients: "corn starch is a sub-ingredient of baking powder, soy [lecithin] is a sub-ingredient of chocolate chips, and soy protein is a sub-ingredient of marshmallows." *See* Doc. No. 44-1 at 33-34. **[**75]**

Plaintiffs respond that they allege "free of artificial additives" means "there was nothing non-natural, synthetic or artificial in the products" and "'no preservatives' meant that there were no chemical preservatives, none at all." Doc. No. 62 at 38-39 (emphasis omitted). Plaintiffs contend it is irrelevant that they do not allege that they never used baking powder or avoid products with similar ingredients. *See id.* at 39. Further, Plaintiffs state that it is inappropriate at this stage to challenge whether a reasonable consumer would be misled by such minor ingredients. *See id.* As to their "non-GMO" allegations, Plaintiffs argue that the statement appears on Defendant's packaging and they sufficiently allege that the products contain genetically modified ingredients. *See id.* at 40. Finally, Plaintiffs assert that they do not need to provide test results of the products. *See id.*

Plaintiffs lump together their "no preservatives" and "free of artificial additives" claims.[12] *See* FAC ¶ 99; *see also id.* ¶¶ 104-05. Plaintiffs allege that they and reasonable consumers "understand that the representation that a product is 'free of artificial additives' and contains 'no preservatives' means that none of its ingredients **[**76]** are non-natural, synthetic, artificial, or chemical preservatives." *Id.* ¶ 99. Plaintiffs aver that Defendant's baking mixes represent the following in bold: "In our [baking] mix, we use only 100% whole grains that are non-GMO and free of preservatives and artificial additives because to us, simple food is better." *Id.* ¶ 115 (emphasis omitted). Plaintiffs also allege that Defendant advertises its frozen Power Waffles "are made with only non-GMO ingredients and zero preservatives." *Id.* ¶ 116 (emphasis added). Plaintiffs further aver that many products' side or back panels state they are "[m]ade with freshly-ground whole grains and no preservatives" or "are non-GMO and free of preservatives and artificial additives because, to us, simple food is better." *Id.* ¶ 117; *see also id.* Exh. A. In particular, Plaintiffs allege that Defendant's products all contain one or more of the following substances, which are are preservatives or artificial additives: monocalcium phosphate, sodium bicarbonate, sodium acid pyrophosphate ("SAPP"), citric acid, xanthan gum, and "potentially others." *Id.* ¶ 119.

As to the "potentially others" part of the list, any unalleged preservative or artificial **[**77]** additive fails under *Rule 9(b)* for lack of specificity. The unclear, blanket allegation leaves Defendant to guess which statements across its products it will be required to defend. *Gitson v. Trader Joe's Co., No. 13-cv-01333-WHO, 2014 U.S. Dist. LEXIS 33936, 2014 WL 1048640, at *6 (N.D. Cal. Mar. 14, 2014)* (finding that the plaintiff's allegations regarding undisclosed additives failed under *Rule 9(b)*). Thus, any allegations premised **[*1147]** on unalleged preservatives or artificial additives fail under *Rule 9(b)*.

As to the remainder of the list that comprises definite substances, Plaintiffs aver that Defendant advertises at least several of its products as "free of artificial additives" or containing "no preservatives." *See* FAC ¶¶ 115-17. Plaintiffs provide a definition of "free of artificial additives" and "no preservatives." *See id.* ¶ 99. Plaintiffs allege that all of Defendant's products contain at least one of the five substances, which they claim are artificial additives or preservatives. *See id.* ¶ 119.

Defendant does not point to authority showing how these five ingredients are not artificial additives or preservatives. Instead, Defendant argues that these substances are minor and common ingredients in baking soda and baking powder. *See* Doc. No. 44-1 at 31. Defendant asserts that sodium bicarbonate **[**78]** is baking soda, SAAP is an ingredient in baking powder, and monocalcium phosphate is a leavening agent common in baked goods. *See id.* Defendant does not discuss citric acid or xanthan gum. Focusing on the ingredients' role as leavening agents, Defendant criticizes Plaintiffs for not alleging that the ingredients are used as a preservatives or additives and, relatedly, argues that they all serve a functional purpose. *See id.*

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[12] Plaintiffs appear to conflate other statements. These include statements that Plaintiffs do not allege were part of the at-issue marketing, such as "all natural" or "synthetic." *See* FAC ¶¶ 98, 99, 102-07, 114, 199. Because Plaintiffs limit the alleged misrepresentations to specific phrases, the Court does not address whether Plaintiffs allege that other phrases support a viable claim. *See supra* note 7.

Whether these substances function as artificial additives or preservatives is an inappropriate inquiry at this stage. *Cf.* Gitson, 2014 U.S. Dist. LEXIS 33936, 2014 WL 1048640, at *4 ("[W]hether sodium citrate, citric acid, and tocopherol function as artificial flavors, chemical preservatives, or both, is inappropriate to determine at this stage of the litigation."); Ivie v. Kraft Foods Glob., Inc., No. C-12-02554-RMW, 2013 U.S. Dist. LEXIS 25615, 2013 WL 685372, at *10 (N.D. Cal. Feb. 25, 2013) ("[T]he factual determinations of whether maltodextrin is used as a sweetener and/or sodium citrate is used as a flavoring agent in this particular product, and whether a reasonable consumer would have thus been misled by the 'no artificial sweeteners or preservatives' label, are inappropriate for determination on a motion to dismiss."). Defendant does not provide support to show how the substances are not preservatives **[**79]** or additives—even if the ingredients are also leavening agents or have a functional purpose. *See* Thomas v. Costco Wholsale Corp., No. 5:12-cv-02908-EJD, 2014 U.S. Dist. LEXIS 46405, 2014 WL 1323192, at *9 (N.D. Cal. Mar. 31, 2014) (finding that the plaintiffs alleged that the defendant's "preservative free" product was misbranded and may deceive a reasonable consumer because the product contained tocopherols, despite the defendant arguing it contained "natural tocopherols"); Leonhart v. Nature's Path Foods, Inc, No. 13-cv-00492-BLF, 2014 U.S. Dist. LEXIS 164425, 2014 WL 6657809, at *6 (N.D. Cal. Nov. 21, 2014) ("Defendant's argument that tocopherol is not actually a chemical preservative presents a factual issue not appropriate for determination at the pleading stage."). Moreover, Defendant fails to address Plaintiffs' allegations concerning the presence of citric acid or xanthan gum.

The Court finds it curious how consumers of baking products would be misled by the presence of leavening agents. Nevertheless, at this stage, the Court must accept Plaintiffs' allegations as true and construe them in Plaintiffs' favor. *See* Cahill, 80 F.3d at 337-38 (citing Nat'l Wildlife Fed'n, 45 F.3d at 1340); *see also* Gitson, 2014 U.S. Dist. LEXIS 33936, 2014 WL 1048640, at *4 ("At the pleading stage I cannot second guess the truth of the plaintiffs' allegations that the identified ingredients function as artificial flavors or chemical preservatives."). The Court finds that Plaintiffs **[**80]** plausibly plead that a reasonable consumer could be misled by advertising products as not containing artificial additives or preservatives where the **[*1148]** products contain ingredients that Plaintiffs allege are additives or preservatives. *See Williams, 552 F.3d at 939* ("We disagree with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box."). Thus, the Court finds Plaintiffs' claims regarding the alleged artificial additives or preservatives survive the instant motion.

The Court now examines the viability of Plaintiffs' "non-GMO"[13] allegations. Plaintiffs allege that Defendant advertises their baking mixes as "non-GMO." *See* FAC ¶¶ 115-18. Including a picture of a product, Plaintiffs claim that Defendant displays "non-GMO" in multiple places on the packaging, and it appears in "nearly every advertisement." *Id.* ¶ 118. Plaintiffs allege that products claiming to be "non-GMO" contain genetically modified ingredients, "including but not limited to soy lecithin, soy protein, and corn starch." *Id.* ¶ 120. Upon information and belief, Plaintiffs claim "these ingredients **[**81]** are synthesized, and Kodiak Cakes utilizes the synthesized form of these substances." *Id.* ¶ 121.

Plaintiffs fail to define a plausible definition, or any definition at all, of the term "non-GMO" or "GMO." *See* Pappas v. Chipotle Mexican Grill, Inc., No. 16-cv-612-MMA (JLB), 2016 U.S. Dist. LEXIS 202524, 2016 WL 11703770, at *7 (S.D. Cal. Aug. 31, 2016) (assessing whether the plaintiff plausibly defined "non-GMO" as a threshold issue before determining whether she pleaded a reasonable consumer would be misled by the defendant's description of its ingredients as non-GMO). The Court is left with only a blanket statement that the three ingredients are genetically modified. *See* FAC ¶ 120. Without a plausible definition or further allegations, the Court cannot assess *how* the at-issue ingredients are plausibly genetically modified or how a reasonable consumer would be misled. Thus, the Court finds Plaintiffs' claims regarding "non-GMO" allegations do not survive the instant motion because they lack specificity and plausibility.

In addition, Plaintiffs compound this lack of specificity by alleging on information and belief that the ingredients are "synthesized" and that Defendant uses "synthesized form of these substances." *Id.* ¶ 121. Plaintiffs fail to allege how this "synthesized" **[**82]** allegation connects to their "non-GMO" claim. ***HN34***[] Further, "allegations of fraud

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[13] "GMO" is an acronym for "genetically modified organism." *See* FAC ¶ 109.

upon information and belief typically do not satisfy Rule 9(b)'s heightened pleading requirements." Tortilla Factory, LLC v. Health-Ade LLC, No. CV 17-9090-MWF (AFMx), 2018 U.S. Dist. LEXIS 157538, 2018 WL 6174708, at *8 (C.D. Cal. July 13, 2018); *see also* Shane v. Fla. Bottling, Inc., No. CV 17-02197 SJO (AGRx), 2017 U.S. Dist. LEXIS 141069, 2017 WL 8240786, at *3 (C.D. Cal. Aug. 9, 2017) (noting exceptions where (1) the facts are within the possession and control of the defendant or (2) the belief is based on factual information making the inference "culpably plausible"). Here, Plaintiffs do not allege or argue that this information is within the control of Defendant, the information is based on sufficient underlying information, or that they do not have the access or means to test their belief. *See* Tortilla Factory, LLC, 2018 U.S. Dist. LEXIS 157538, 2018 WL 6174708, at *8.

Finally, Plaintiffs appear to allege an open-ended list of potential substances that could be "non-GMO." *See* FAC ¶ 120 (alleging that the list of genetically modified ingredients "*includ[es] but [is] not limited to* soy lecithin, soy protein, and corn starch" (emphasis added)). As with **[*1149]** their "no preservatives" and "free of artificial additives" claims regarding "potentially other[]" ingredients, Plaintiffs do not state a claim for unalleged substances that serve as the basis for their "non-GMO" claim. **[**83]**

Accordingly, the Court **GRANTS in part and DENIES in part** Defendant's motion to dismiss Plaintiffs' CLRA, FAL, and the fraudulent prong of the UCL causes of action premised on consumer deception through advertising that contained the statements "no preservatives," "free of artificial additives," and "non-GMO." The Court **GRANTS** Defendant's motion and **DISMISSES** with leave to amend Plaintiffs' theory as it pertains to their "non-GMO" claim and any unspecified ingredients that form the basis of the three statements. The Court **DENIES** the motion as to Plaintiffs'"no preservatives" and "free of artificial additives" claim.

2. Health Claims

Plaintiffs allege that Defendant misleadingly labels and advertises its products as "healthy." *See* FAC ¶¶ 10, 63, 132-48; *see also id.* Exh. A (providing the "Per-Product Misrepresentation Chart"). Defendant argues that Plaintiffs take issue with a word on their website and blog that was never used on their boxes, and Defendant critiques Plaintiffs for not alleging that they saw or relied upon the online advertising. *See* Doc. No. 44-1 at 28; *see also* Doc. No. 65 at 21. Defendant further asserts that Plaintiffs confuse the issue by citing inapplicable FDA regulations **[**84]** because Plaintiffs fail to allege Defendant used the word "healthy" on food labels. *See* Doc. No. 44-1 at 28; *see also* Doc. No. 65 at 22. Defendant finally contends that "healthy" is merely nonactionable puffery because the word is used to show superiority to other muffins, and the word needs to be taken in context. *See* Doc. No. 44-1 at 29; *see also* Doc. No. 65 at 21-22. Plaintiffs respond that "healthy" is not puffery given that it suggests a health benefit. *See* Doc. No. 62 at 37. Rebutting Defendant's argument that "healthy" never appeared on the packaging, Plaintiffs argue that "whether the statements that Plaintiffs allege they relied actually existed on the packaging" and whether the word would deceive a reasonable consumer are issues inappropriate on a motion to dismiss. *See id.* at 38. Despite Defendant's argument, Plaintiffs argue that they alleged reliance on the term "healthy." *See id.* (citing FAC ¶¶ 63-64). Finally, Plaintiffs argue that they refer to the FDA regulations to show the benchmark for what "healthy" means to a reasonable consumer, not to show that Defendant violated the regulations. *See id.*

Plaintiffs plausibly allege that the "healthy" statement exists on Defendant's website. **[**85]** *See, e.g.*, FAC ¶¶ 64, 137, 138. Plaintiffs' FAC leaves the Court uncertain whether "healthy" is mentioned on Defendant's physical products. The products subject to judicial notice and incorporation-by-reference do not appear to bear the word "healthy." Plaintiffs noticeably do not argue that the word appeared on the product's packaging. *See* Doc. No. 62 at 38. ***HN35***[] A court does not accept as true allegations contradicted by documents attached to or referred to in the complaint, matters subject to judicial notice, "unwarranted deductions of fact, or unreasonable inferences." Seven Arts Filmed Ent. Ltd. v. Content Media Corp. PLC, 733 F.3d 1251, 1254 (9th Cir. 2013) (quoting Daniels-Hall, 629 F.3d at 998); Steckman, 143 F.3d at 1295-96 (citing In re Stac Elecs. Sec. Litig., 89 F.3d at 1403). The Court declines Plaintiffs' invitation to make the unreasonable inference or deduction that "healthy" appeared on the product packaging given their own allegations in addition to the materials subject to judicial notice and incorporation-by-reference. However, the **[*1150]** Court finds that this issue is not dispositive.

Examining the FAC in the light most favorable to Plaintiffs, only Plaintiff Stewart plausibly pleads actual reliance on the alleged "healthy" statement for the Double Dark Chocolate Muffin Mix as advertised on Defendant's online store. *See supra* Section IV.B.1.iii; *see also* FAC ¶¶ 16-17, **[**86]** 64, 137. In addition to in-store purchases, he alleges that he purchased products online, and he alleges that one of his purchases included "Double Dark Chocolate Muffin Mix." FAC ¶ 17. Plaintiffs supply a screenshot describing Defendant's Double Dark Chocolate Muffin Mix from the online store, which reads as follows:

> Kodiak Cakes Double Dark Chocolate Muffin Mix balances nutrition with the rich flavor of cocoa and semisweet chocolate chips. The easy-to-prepare muffin mix creates a moist, delicious, and *healthy* muffin you'll be glad you baked after you finish a tough workout or busy morning at the office. Crafted from all-natural ingredients and 100% whole grains, each protein-packed muffin is a nourishing treat you can feel good about indulging in.

See id. (emphasis added); *see also id.* ¶ 137. Thus, Stewart plausibly alleges that he relied upon Defendant's online advertising.[14] *See supra* Section IV.B.1.iii. Whether Stewart did indeed rely upon Defendant's online advertising is not an appropriate inquiry at this stage. The Court now turns to whether a reasonable consumer would be deceived by Defendant's use of "healthy" based on (1) the online description of Defendant's Double Dark Chocolate **[**87]** Muffin Mix and (2) a blog post.

Plaintiffs provide an alleged method to measure healthiness and compare it to Defendant's products. Plaintiffs claim that they interpret "healthy" as foods containing low levels of fat, cholesterol, and sugar and containing a certain level of vitamins and nutrients. *See* FAC ¶ 139. Plaintiffs rely upon a FDA regulation to set a benchmark for what consumers consider "healthy": "(1) At least 10% of the DV of Vitamin A, Vitamin C, calcium, iron, protein or fiber (2) Less than 60mg of cholesterol, (3) Less than 3 grams of fat[,] and (4) Less than 1 gram of saturated fat." *Id.* ¶ 140 (citing *21 C.F.R. § 101.65(d)(2)*). Plaintiffs further allege that Defendant's products do not meet these standards and are unhealthy because the products

> actually contain unhealthy levels of (1) fat and saturated fat, the consumption of which has been shown to cause heart disease and other serious health problems, (2) cholesterol, which has been shown to increase the risk of heart attack, stroke, and narrowed arteries (atherosclerosis), among other serious health problems; (3) contains high levels of sugar that can lead to heart disease, type 2 diabetes, and cancer, among other serious health conditions **[**88]** and (4) fails to meet at least 10% of the DV of Vitamin A, Vitamin C, calcium, iron, protein or fiber.

Id. ¶ 141. Defendant does not challenge the sufficiency of these allegations, arguing instead that the FDA regulation does not apply and "healthy" is puffery. *See* Doc. No. 44-1 at 28.

"[T]he questions of reliance and how the term healthy will be understood is a question of fact 'ill-suited for resolution on a motion to dismiss.'" *Hadley v. Kellogg Sales Co., 273 F. Supp. 3d 1052, 1084 (N.D.* ***[*1151]*** *Cal. 2017)* (quoting *Bruton, 2014 U.S. Dist. LEXIS 5493, 2014 WL 172111, at *11)*. "***HN36***[] The fact that the FDA regulates the use of the term 'healthy' implies that 'consumers rely on health-related claims on food products in making purchasing decisions.'" *Id.* (quoting *Bruton, 2014 U.S. Dist. LEXIS 5493, 2014 WL 172111, at *11)*. Defendant's desire for the Court to examine the context of its main selling point of "100% whole grains" and the added protein to its products is unavailing at this stage of the litigation. Many of the descriptors of the muffin mix could be considered general, vague, unspecified assertions. *Compare* FAC ¶ 64 (referring to the muffin mix as "rich flavor," "moist," and "delicious"), *with* *Hadley, 273 F. Supp. 3d at 1081* (quoting *Glen Holly Ent., Inc. v. Tektronix Inc., 343 F.3d 1000, 1015 (9th Cir. 2003))* ("'Generalized, vague, and unspecified assertions constitute "mere puffery" upon which a reasonable consumer could not rely,' and thus are not actionable under the UCL, FAL, **[**89]** or CLRA."). However, at this stage, Defendant cannot shield an actionable health-related claim by mixing it with nonactionable puffing language. The Double Dark Chocolate Muffin Mix states that it "creates . . . a healthy muffin." *See* FAC ¶¶ 64, 137. Although the context may suggest that a reasonable consumer may not be deceived, the Court finds that Plaintiffs'

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[14] Except for Plaintiff Stewart and for the reasons noted above regarding the lack of actual reliance, Plaintiffs do not plausibly allege their "healthy" theory of liability. *See supra* Section IV.B.1.iii.

"healthy" allegations cannot completely be dismissed as a matter of law in the instant motion to dismiss as to the Double Dark Chocolate Muffin Mix. *See Hadley, 273 F. Supp. 3d at 1085* ("[T]he Court finds that the statements 'Start with a healthy spoonful,' 'Invest in your Health invest in yourself,' 'good for you,' and 'balanced breakfast' cannot be dismissed as puffery in the instant motion to dismiss."); *Bruton, 2014 U.S. Dist. LEXIS 5493, 2014 WL 172111, at *11* (finding that "As Healthy As Fresh," "Support Healthy Growth & Development," and "Nutrition for Healthy Growth & Natural Immune Support" were not puffery and plausibly pleaded to survive a motion to dismiss).

However, Plaintiffs have not sufficiently pleaded a plausible claim that a reasonable consumer would be misled by the "Healthy Living on a Budget" blog post. *See* FAC ¶ 138. As an initial matter and as already mentioned, all Plaintiffs fail to plausibly **[**90]** allege actual reliance on the statements found on Defendant's other advertising. *See supra* Section IV.B.1.iii. This includes Plaintiff Stewart who does not allege plausible facts showing that he relied on Defendant's "other advertising"—with the exception of the Double Dark Chocolate Muffin Mix from the online store. *See supra* Section IV.B.1.iii. Furthermore, the blog post is nonactionable puffery. Plaintiffs supply a tightly cropped series of two screenshots: the title of the post and a small paragraph. *See id.* The paragraph states the general difficulty of deciding "back to school breakfast ideas" and ends with stating "[b]ut now that the kids are back in school, it's even more important to have a *healthy* breakfast every morning." *Id.* (emphasis added). It appears that Plaintiffs attempt to use this blog post to allege that all of Defendant's products are deceptively marketed. This theory of liability is unavailing because there is no deceptive act to be dispelled. *See Ebner, 838 F.3d at 966*. The paragraph merely provides generalizations of breakfast and does not mention Defendant's products. The paragraph "do[es] not describe 'specific or absolute characteristics' *of the product*, but rather involve[s] **[**91]** 'generalized, vague, and unspecified assertions.'" *Hadley, 273 F. Supp. 3d at 1088* (emphasis added) (quoting *Annunziato, 402 F. Supp. 2d at 1139*). The blog post excerpt does not plausibly imply that Defendant's products are healthy. Thus, the Court finds that the blog post is merely nonactionable puffery **[*1152]** and Plaintiffs fail to allege how a reasonable consumer would be deceived.

Accordingly, the Court **GRANTS in part and DENIES in part** Defendant's motion to dismiss Plaintiffs' CLRA, FAL, and the fraudulent UCL prong causes of action premised on consumer deception through advertising that contained the statement "healthy." The Court **GRANTS** Defendant's motion and **DISMISSES** Plaintiffs' theory as it pertains to Defendant's general comments on the importance of breakfast on its blog post. Dismissal is with leave to amend to the extent Plaintiffs can show that the blog post shows a direct connection that implies Defendant's products are healthy and goes beyond mere generalizations on health and breakfast. The Court **DENIES** the motion as to the description of Defendant's Double Dark Chocolate Muffin Mix.

3. Nutrient Claims

Plaintiffs allege that Defendant misleadingly labels and advertises its products as "protein-packed." *See* FAC ¶¶ 10, 63, 127-31; *see also* ***[**92]*** *id.* Exh. A (providing the "Per-Product Misrepresentation Chart"). Defendant argues that Plaintiffs' protein allegations are implausible because the front of the box states the grams of protein in large bold font and the nutrition facts panel on the back also states the grams of protein. *See* Doc. No. 44-1 at 26-27; *see also* Doc. No. 65 at 20. Defendant further asserts that "protein-packed" is nonactionable puffery and is not equivalent to the FDA-regulated terms of "high" or "excellent." *See* Doc. No. 44-1 at 27; *see also* Doc. No. 65 at 20-21. Plaintiffs respond that Defendant incorrectly assumes that the products did represent the number of grams of protein on the front of the box. *See* Doc. No. 62 at 36. Plaintiffs also argue that "protein-packed" does not fall under nonactionable puffery "given that this phrase asserts a health benefit of high protein." *Id.* at 37. Finally, Plaintiffs ague that Defendant misconstrues their reliance on FDA-regulated terms of "high" or "excellent." *See id.* Plaintiffs explain that a reasonable consumer believes protein-packed "means that the products are high in protein (> 10 grams per serving)," which is confirmed by the FDA benchmark. *Id.*

HN37[] The Ninth Circuit has **[**93]** stated that "*Williams* stands for the proposition that *if* the defendant commits an act of deception, the presence of fine print revealing the truth is insufficient to dispel that deception." *Ebner, 838 F.3d at 966* (citing *Williams, 552 F.3d at 939*). Here, the Court finds no deceptive act to be dispelled. *See id.*

In their FAC, Plaintiffs attach numerous pictures of Defendant's products. *See* FAC ¶¶ 7, 13, 86, 118, 127. Each of these pictures show in large, bold typeface the words "protein-packed" on the front of the box. *See id.* However, each of these pictures also clearly show the number of grams of protein in roughly the same large, bold typeface on the front of the box. *See id.* Although Plaintiffs argue that this does not mean the packaging was the same for all products throughout the class period, Plaintiffs do not cite to one example where the statement "protein-packed" was not also accompanied by the number of grams of protein in bold lettering on the front of the box. ***HN38***[] As noted above, the Court does not accept as true allegations contradicted by documents attached to or referred to in the complaint, matters subject to judicial notice, "unwarranted deductions of fact, or unreasonable inferences." *Seven Arts Filmed Ent. Ltd., 733 F.3d at 1254* (quoting *Daniels-Hall, 629 F.3d at 998*); *Steckman v. Hart Brewing, Inc., 143 F.3d at 1295-96* (citing *In re Stac Elecs. Sec. Litig., 89 F.3d at 1403*). The Court **[**94]** declines Plaintiffs' invitation to accept unreasonable **[*1153]** inferences or deductions of fact in the face of the contradictory packaging pictured in their own FAC in addition to the materials subject to judicial notice and incorporation-by-reference.

Thus, the Court finds that a reasonable person would not find Defendant's use of "protein-packed" to be misleading. *Cf. Hadley, 243 F. Supp. 3d at 1101* (dismissing the plaintiff's unlawful prong UCL cause of action with prejudice where "the information concerning the amount of protein originating from milk and cereal is located directly below the allegedly misleading statement"). Even if a consumer were still uncertain on the meaning of "protein-packed" after seeing the grams of protein listed clearly on the front of the box, a reasonable consumer would be aware of the nutrition facts label on the back or side of the box as a means to clarify any uncertainty.

Accordingly, the Court **GRANTS** Defendant's motion and **DISMISSES** Plaintiffs' CLRA, FAL, and the fraudulent prong of the UCL causes of action premised on consumer deception through packaging and advertising that contained the statement "protein-packed." Dismissal is with leave to amend to the extent Plaintiffs can overcome **[**95]** the contradictory packaging pictured in their own FAC in addition to the materials subject to judicial notice and incorporation-by-reference.

4. Conclusion

Accordingly, for the reasons provided above, Court **GRANTS in part and DENIES in part** Defendant's motion to dismiss Plaintiffs' CLRA, FAL, and the fraudulent prong of the UCL causes of action premised on deceptive marketing statements.

8 v. Remaining UCL Prongs

In its motion, Defendant does not directly challenge the remaining unlawful and unfair UCL prongs and instead focuses on the fraudulent UCL prong regarding consumer deception. Defendant appears to conflate Plaintiffs' two sub-theories regarding their deceptive fill level allegations. As noted above, the analysis for these theories is distinct. *See supra* Section IV.B.1.iv.a. The Court now turns to whether Plaintiffs plead a viable claim under the unfair and unlawful prongs of the UCL.

a. Unlawful Prong

HN39[] The unlawful prong "is essentially an incorporation-by-reference provision." *Obesity Research Inst., LLC v. Fiber Research Int'l, LLC, 165 F. Supp. 3d 937, 952 (S.D. Cal. 2016)*; *see also* *Cel-Tech Commc'ns, Inc., 973 P.2d at 539-40* ("By proscribing 'any unlawful' business practice, '*section 17200* "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable."). **[**96]** Accordingly, "[w]hen a statutory claim fails, a derivative UCL claim also fails." *Obesity Research Inst., LLC, 165 F. Supp. 3d at 953* (quoting *Aleksick v. 7-Eleven, Inc., 205 Cal. App. 4th 1176, 140 Cal. Rptr. 3d 796, 801 (Ct. App. 2012))*.

Here, Plaintiffs can succeed on this prong only if they plead sufficient facts to support another cause of action. *See* *Aleksick, 140 Cal. Rptr. 3d at 801*. Because Plaintiffs have pleaded sufficient facts to bolster their FAL, CLRA, and fraudulent UCL prong causes of action at least to parts of Plaintiffs' theories, *see supra* Section IV.B.1.iv.a—b, their unlawful UCL prong claim survives Defendant's motion to dismiss. *See* *Loomis, 420 F. Supp. 3d at 1085*; *Safransky, 2018 U.S. Dist. LEXIS 60946, 2018 WL 1726620, at *13*.

In addition, Plaintiffs allege a violation of the unlawful prong because of deceptive fill level, which is predicated on the California Fair Packaging and Labeling **[*1154]** Act ("CFPLA"), *Cal. Bus. & Prof. Code § 12606.2*, and federal regulation, *21 C.F.R. § 100.100*. *See* FAC ¶ 196. As noted above, this theory is distinct from Plaintiffs' deceptive fill level allegations predicated on consumer deception under the CLRA, FAL, and the fraudulent UCL prong. *See supra* Section IV.B.1.iv.a.

HN40[] The CFPLA states that food containers cannot be "made, formed, or filled as to be misleading." *Cal. Bus. & Prof. Code § 12606.2(b)*. The statute further provides the following:

> A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional **[**97]** slack fill. Slack fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack fill is the empty space in a package that is filled to substantially less than its capacity for reasons other than any one or more of the following [safe harbor provisions] . . . .

Cal. Bus. & Prof. Code § 12606.2(c). District courts in California are split as to whether the safe harbor provisions are affirmative defenses or "or whether their inapplicability is an element that must be pled." *Jackson, 2019 U.S. Dist. LEXIS 162447, 2019 WL 4599845, at *6*; *see also* *Matic v. United States Nutrition, Inc., No. CV 18-9592 PSG (AFMx), 2019 U.S. Dist. LEXIS 131576, 2019 WL 3084335, at *6 (C.D. Cal. Mar. 27, 2019)* (detailing examples of the split).

Here, the Court does not need to resolve this split because Plaintiffs sufficiently plead that the safe harbor provisions do not apply. *See* FAC ¶¶ 83-86. Plaintiffs claim less than half of the opaque cardboard packaging is full and thus misrepresents the amount contained within each product. *See id.* ¶¶ 7, 83, 85; *id.*, Exh. A (providing the "Per-Product Misrepresentation Chart"). Plaintiffs aver that none of the functional purposes in the state or federal safe harbor provisions apply because the products "are in a powdered form that do not need slack fill to protect the contents"; "slack fill **[**98]** is not required by the machines to enclose the contents of the product"; "slack fill is not the unavoidable product settling during shipping and handling as it is much too large"; "[t]he oversized package container is not required to provide adequate space for mandatory and necessary labeling by law"; "[t]he box is not needed to prevent theft or accommodate tampering resistant devices"; and "[c]onsumers do not mix, add, shake or dispense liquids into the Slack Fill Products at issue such that slack fill is necessary." *Id.* ¶ 84. Plaintiffs highlight that Defendant's other products reveal the lack of a functional purpose because "[i]n the same size box, Kodiak sells as much as 24 ounces and as little as 12.7 ounces, with no plausible explanation for the difference in the amounts while maintaining the same size box." *Id.* ¶ 85. Plaintiffs further aver that Defendant's competitors that use similar size boxes contain significantly more product. *See id.* ¶ 86. Defendant does not argue that the empty space serves a particular function.

The Court finds that Plaintiffs allege a plausible claim under the CFPLA, which can serve as a predicate violation under the unlawful UCL prong. *See* *Matic, 2019 U.S. Dist. LEXIS 131576, 2019 WL 3084335, at *6* ("The Court **[**99]** believes that the reasonable inferences that can be drawn from these are enough to render it at least plausible that each of the other safe harbor provisions do not apply."); *see also* *Kennard, 2019 U.S. Dist. LEXIS 63637, 2019 WL 1586022, at *9* (denying the defendant's motion to dismiss plaintiff's unlawful and unfair UCL prongs predicated on the nonfunctional slack fill liability theory).

However, Defendant argues Plaintiffs cannot claim they were deceived because they allege they made online purchases **[*1155]** and there is no nonfunctional slack fill where "[t]he mode of commerce does not allow the consumer to view or handle the physical container or product." Doc. No. 44-1 at 23 (quoting *Cal. Bus. & Prof. Code § 12606.2(c)(8)*). Plaintiffs respond that federal law does not have a similar provision regarding "mode of commerce" and their UCL claim premised on violation of 21 C.F.R. § 100.100 remains viable even if their § 12606.2 predicate violation is not viable. *See* Doc. No. 62 at 33.

As a preliminary matter, Defendant's argument does not completely foreclose Plaintiffs' nonfunctional slack fill theory because some Plaintiffs allege that they purchased products in stores and online and other Plaintiffs allege that they only purchased products in stores. *See* FAC ¶¶ 17, 19, 21, 23, 27, 29, 31, 35, 37, 39, 49, 61. Thus, **[**100]** to the extent Plaintiffs allege they purchased products in stores, Plaintiffs overcome Defendant's motion to dismiss.

HN41[] As to Plaintiffs' online purchases, the CFPLA provides that there is no nonfunctional slack fill where "[t]he mode of commerce does not allow the consumer to view or handle the physical container or product." Cal. Bus. & Prof. Code § 12606.2(c)(8). "The CFPLA itself provides that it is to be interpreted consistently with federal law." Jackson, 2019 U.S. Dist. LEXIS 162447, 2019 WL 4599845, at *6; *see also* Cal. Bus. & Prof. Code § 12606.2(e). The CFPLA also states the following:

> If the requirements of this section do not impose the same requirements as are imposed by Section 403(d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 343(d)), or any regulation promulgated pursuant thereto, then this section is not operative to the extent that it is not identical to the federal requirements, and for this purpose those federal requirements are incorporated into this section and shall apply as if they were set forth in this section.

Cal. Bus. & Prof. Code § 12606.2(f).

HN42[] The plain language of § 12606.2(c)(8) prevents online purchases from falling under nonfunctional slack fill because online shopping does not allow a consumer to be in contact with the "*physical* container or product." Cal. Bus. & Prof. Code § 12606.2(c)(8) (emphasis added). However, 21 U.S.C. § 343(d) and federal regulation 21 C.F.R. § 100.100 do not contain the "mode of commerce" requirement **[**101]** found in Cal. Bus. & Prof. Code § 12606.2(c)(8). Thus, by the terms of § 12606.2(f), the mode of commerce requirement is "not operative." *See* Cal. Bus. & Prof. Code § 12606.2(f). Therefore, despite Defendant's argument, Plaintiffs also survive Defendant's motion to the extent they allege they purchased products online.

In sum, the Court finds that Plaintiffs plead a plausible predicate violation based on their viable FAL, CLRA, and fraudulent UCL prong causes of action. Plaintiffs also plead a plausible predicate violation based upon violation of the CFPLA. Accordingly, the Court **DENIES** Defendant's motion to dismiss Plaintiffs' unlawful UCL prong claim.

b. Unfair Prong

HN43[] As to the unfair prong, the California Supreme Court has defined "unfair" conduct in competitor cases to mean "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." Cel-Tech Commc'ns, Inc., 973 P.2d at 544; *see also* Drum v. San Fernando Valley Bar Ass'n, 182 Cal. App. 4th 247, 106 Cal. Rptr. 3d 46, 51 (Ct. App. 2010). However, the California Supreme Court has not established a test to determine whether a business practice is unfair in consum **[*1156]** er cases. Drum, 106 Cal. Rptr. 3d at 53; *see also* Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007); Cel-Tech Commc'ns, Inc., 973 P.2d at 544 n.12 (noting that the test does not relate to consumer actions).

HN44[] After the California **[**102]** Supreme Court's decision in *Cel-Tech Commc'ns, Inc.*, the California Courts of Appeal have created a split of authority through applying "three different tests for unfairness in consumer cases." Drum, 106 Cal. Rptr. 3d at 53. The first test requires "that the public policy which is a predicate to a consumer unfair competition action under the 'unfair' prong of the UCL must be tethered to specific constitutional, statutory, or regulatory provisions." *Id.* (first quoting Bardin v. DaimlerChrysler Corp., 136 Cal. App. 4th 1255, 39 Cal. Rptr. 3d 634, 636 (Ct. App. 2006); then quoting Davis v. Ford Motor Credit Co. LLC, 179 Cal. App. 4th 581, 101 Cal. Rptr. 3d 697, 708 (Ct. App. 2009); and then quoting Gregory v. Albertson's, Inc., 104 Cal. App. 4th 845, 128 Cal. Rptr. 2d

389, 395 (Ct. App. 2002)); *see also* Cel-Tech Commc'ns, Inc., 973 P.2d at 544 (requiring a finding of unfairness under the UCL be tethered to legislatively declared policy). The second test asks "whether the alleged business practice 'is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.'" *Id.* (first quoting Bardin, 39 Cal. Rptr. 3d at 636; and then quoting Davis, 101 Cal. Rptr. 3d at 708). The third test draws on the "unfair" definition in the Federal Trade Commission Act and requires that "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves **[**103]** could not reasonably have avoided." Id. at 54 (first quoting Davis, 101 Cal. Rptr. 3d at 710; and then quoting Camacho v. Auto. Club of S. California, 142 Cal. App. 4th 1394, 48 Cal. Rptr. 3d 770, 777 (Ct. App. 2006)).

Regardless of the test used to assess unfairness, the Court finds that Plaintiffs' allegations survive the motion to dismiss. Here, Plaintiffs sufficiently plead that Defendant violated the FAL, CLRA, fraudulent UCL prong, and unlawful UCL prong. *See supra* Section IV.B.1.iv; Section IV.B.1.v.a. Plaintiffs plausibly allege that a reasonable consumer would be deceived and that Defendant uses misleading packaging because of nonfunctional slack fill. *See* Section IV.B.1.iv.a; Section IV.B.1.v.a. Construing Plaintiffs' allegations in the light most favorable to them, these plausible allegations outweigh the utility of Defendant's current packaging or the burden that would be placed on Defendant to change its marketing. Additionally, Defendant does not directly address this prong. Accordingly, the Court **DENIES** Defendant's motion to dismiss Plaintiffs' unfair UCL prong claim.

c. Conclusion

Plaintiffs have pleaded sufficient facts to survive Defendant's motion to dismiss the unfair and unlawful UCL prongs. Accordingly, the Court **DENIES** Defendant's motion to dismiss Plaintiffs' unfair and unlawful UCL prong claims.

2. Breach [104] of Express Warranty Cause of Action**

Defendant criticizes Plaintiffs for failing to identify the applicable state law. *See* Doc. No. 44-1 at 20, 34; *see also* Doc. No. 65 at 9. Defendant further argues that Plaintiffs' warranty claim fails for the same reasons as their other claims. *See* **[*1157]** Doc. No. 44-1 at 34. Defendant adds that it is unclear whether Defendant created a warranty and Plaintiffs do not identify an explicit guarantee. *See id.* at 34-35; *see also* Doc. No. 65 at 24. Finally, Defendant asserts that Plaintiffs did not provide notice of the warranty issue. *See* Doc. No. 44-1 at 35. Plaintiffs respond they seek to recover under the laws of each state. *See* Doc. No. 62 at 25. Plaintiffs further argue that Defendant offers no reason that the marketing claims did not become part of the bargain. *See id.* at 41. Plaintiffs also argue that they issued pre-lawsuit notices and that "[n]o notice is required when claims are against a defendant in its capacity as a manufacturer, not a seller." *See id.* at 42 (citing Rosales v. FitFlop USA, LLC, 882 F. Supp. 2d 1168, 1178 (S.D. Cal. 2012)).

Plaintiffs allege their breach of express warranty claim on behalf of the nationwide class. *See* FAC ¶¶ 211-16. In their opposition brief, Plaintiffs elaborate that they "seek to recover under the laws of their 11 **[**105]** respective home states as well as seek[] redress on behalf of a nationwide class under state laws that are substantially similar." *See* Doc. No. 62 at 25. Although Plaintiffs argue in their opposition motion that they bring their warranty cause of action under laws of each individual state, *see* Doc. No. 62 at 25, they do not clearly allege the state laws that they seek to apply. Undercutting their own position, Plaintiffs list the separate laws in their first cause of action for violation of the consumer protection acts throughout the nation. *See* FAC ¶¶ 163 n.41, 166. The list appears to refer to consumer protection laws distinct from warranty laws, and Plaintiffs fail to provide similar applicable law as to their warranty claim. *Compare id.* ¶¶ 163 n.41, 166 (listing state slack-fill and consumer protection laws), *with id.* ¶¶ 211-216 (not listing a reference to an applicable state's law for breach of warranty).

HN45[] Plaintiffs must allege the applicable law to determine whether they plead a sufficient claim. *See* Augustine v. Talking Rain Beverage Co., Inc., 386 F. Supp. 3d 1317, 1333 (S.D. Cal. 2019) (dismissing under Rule 12(b)(6) the plaintiff's common law claims on behalf of a nationwide class because they failed to allege the applicable law). "Even if the basic elements of . . . breach **[**106]** of express warranties . . . are unlikely to differ much from state to state, 'there may be (and likely are) differences from state to state regarding issues such as applicable statute of limitations and various equitable defenses.'" *Id.* (quoting *In re TFT-LCD (Flat Panel) Antitrust Litig., 781 F. Supp. 2d 955, 966 (N.D. Cal. 2011))* (citing *In re Samsung Galaxy Smartphone Mktg. & Sales Practices Litig., No. 16-cv-06391-BLF, 2018 U.S. Dist. LEXIS 54850, 2018 WL 1576457, at *4 (N.D. Cal. Mar. 30, 2018))*. Plaintiffs cannot remedy the pleading defect through argument in their opposition brief. Plaintiffs fail to identify which state laws govern their breach of express warranty cause of action and, thus, fail to adequately plead their claims brought on behalf of the nationwide class. *See id.*; *In re Samsung Galaxy Smartphone Mktg. & Sales Practices Litig., 2018 U.S. Dist. LEXIS 54850, 2018 WL 1576457, at *4* (citing *In re Nexus 6P Prod. Liab. Litig., 293 F. Supp. 3d at 933*) ("[D]ue to variances among state laws, failure to allege which state law governs a common law claim is grounds for dismissal.").

Additionally, as with Plaintiffs' first cause of action, any separate state law claims should not be lumped together into one cause of action. *See supra* Section IV.B.1.i. Further, as already noted, the Court has dismissed the causes of action under laws of the states where named Plaintiffs do not reside or did not purchase **[*1158]** the at-issue products based on lack of Article III **[**107]** standing. *See supra* Section III.B.1.

Given the FAC's defects, the Court declines to address the parties' arguments as to whether Plaintiffs plead a viable breach of express warranty claim under California law. *See* *Augustine, 386 F. Supp. 3d at 1333* (not analyzing whether the California plaintiffs state a viable warranty claim under California law after finding they needed to allege the applicable law). Accordingly, the Court **GRANTS** Defendant's motion and **DISMISSES** Plaintiffs' breach of express warranty cause of action with leave to amend. If Plaintiffs wish to file a second amended complaint, the Court directs Plaintiffs to identify the applicable state laws and separate their allegations of various state law violations into separate causes of action.

3. "Restitution Based on Quasi-Contract and Unjust Enrichment" Cause of Action

Defendant asserts that a claim for "restitution based on quasi-contract and unjust enrichment" does not exist because restitution is only a remedy. *See* Doc. No. 44-1 at 35-36; Doc. No. 65 at 25. Similar to the warranty claim, Defendant argues that Plaintiffs fail to allege which law applies. *See* Doc. No. 44-1 at 20, 36; Doc. No. 65 at 9. Further, Defendant contends that a claim based on quasi-contract **[**108]** cannot stand where there is an express contract, such as Plaintiffs' direct purchases. *See* Doc. No. 44-1 at 36; Doc. No. 65 at 25. Finally, Defendant argues Plaintiffs cannot allege unjust enrichment because they purchased the products for years. *See* Doc. No. 44-1 at 36. Plaintiffs respond that restitution and unjust enrichment are viable causes of action. *See* Doc. No. 62 at 42.

Plaintiffs allege their "restitution based on quasi-contract and unjust enrichment" claim on behalf of the nationwide class. *See* FAC ¶¶ 217-22. As with their warranty claim, Plaintiffs do not clearly allege the state law that they seek to apply. Thus, Plaintiffs' claim fails for the same reasons as its warranty claim. *See supra* Section IV.B.2; *see also* *In re Samsung Galaxy Smartphone Mktg. & Sales Practices Litig., 2018 U.S. Dist. LEXIS 54850, 2018 WL 1576457* (dismissing the plaintiffs' unjust enrichment claim because it did not specify the applicable law because of potential differences between how states treat the claim), *2018 U.S. Dist. LEXIS 54850, [WL] at *4* (same); *In re Nexus 6P Prod. Liab. Litig., 293 F. Supp. 3d at 933* (same); *In re TFT-LCD (Flat Panel) Antitrust Litig., 781 F. Supp. 2d at 966* (same).

The Court now turns to separately address this claim to the extent Plaintiffs bring it under California law. ***HN46***[] "[I]n California, there is not a standalone cause of action for 'unjust enrichment,' which is synonymous **[**109]** with 'restitution.'" *Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 762 (9th Cir. 2015)* (first citing *Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 108 Cal. Rptr. 3d 682, 699 (Ct. App. 2010)*; and then citing *Jogani v. Superior Ct., 165 Cal. App. 4th 901, 81 Cal. Rptr. 3d 503, 511 (Ct. App. 2008))*; *see also* *Paracor Fin., Inc. v. Gen. Elec. Cap. Corp., 96 F.3d 1151, 1167 (9th Cir. 1996)* ("Under both California and New York law, unjust enrichment is an action in quasi-contract, which does not lie when an enforceable, binding agreement exists defining the rights of the parties."). "When a plaintiff alleges unjust enrichment, a court may 'construe the cause of action as a quasi-contract claim seeking restitution.'" Astiana, 783 F.3d at 762 (quoting Rutherford Holdings, LLC v. Plaza Del Rey, 223 Cal. App. 4th 221, 166 Cal. Rptr. 3d 864, 872 (Ct. App. 2014)). "[I]t is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject **[*1159]** matter." *See* O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2013 U.S. Dist. LEXIS 171813, 2013 WL 6354534, at *10 (N.D. Cal. Dec. 5, 2013) (*Lance Camper Mfg. Corp. v. Republic Indem. Co., 44 Cal. App. 4th 194, 51 Cal. Rptr. 2d 622, 628 (Cal App. 1996))*.

Here, Plaintiffs bring claims for breach of an express warranty and quasi-contract. *See* FAC ¶¶ 211-16, 217-22. To the extent Plaintiffs assert a claim under California law, the Court construes this claim as a quasi-contract claim. *See* Astiana, 783 F.3d at 762 (quoting Rutherford Holdings, LLC, 166 Cal. Rptr. 3d at 872). Plaintiffs do not respond to Defendant's argument that a quasi-contract claim cannot stand where there is an express contract. The allegations underlying Plaintiffs' express warranty claim overlap with their quasi-contract claim. *Compare* FAC ¶¶ **[**110]** 211-16, *with id.* ¶¶ 217-22. ***HN47***[] Under California law, "there cannot be a claim based on quasi contract where there exists between the parties a valid express contract covering the same subject matter." Smith v. Allmax Nutrition, Inc., No. 1:15-cv-00744-SAB, 2015 U.S. Dist. LEXIS 171897, 2015 WL 9434768, at *9 (E.D. Cal. Dec. 24, 2015) (citations omitted) (dismissing without leave to amend the plaintiff's unjust enrichment claim where he alleged damages based on a breach of express warranty over the same subject matter); *see also* Keegan v. Am. Honda Motor Co., 838 F. Supp. 2d 929, 949 (C.D. Cal. 2012) (citing A. A. Baxter Corp. v. Colt Indus., Inc., 10 Cal. App. 3d 144, 88 Cal. Rptr. 842, 848 (Ct. App. 1970)) ("An express warranty is a term of the parties' contract."). Therefore, the Court finds that Plaintiffs cannot bring a California quasi-contract claim while bringing an express warranty claim. *See* Roper v. Big Heart Pet Brands, Inc., No. 1:19-cv-00406-DAD-BAM, 510 F. Supp. 3d 903, 2020 U.S. Dist. LEXIS 244786, 2020 WL 7769819, at *15 (E.D. Cal. Dec. 30, 2020) ("Because plaintiff may not assert a quasi-contract claim while also alleging an express warranty claim, the court will grant defendant's motion to dismiss plaintiff's quasi-contract restitution claim."); *see also* Gerstle v. Am. Honda Motor Co., Inc., No. 16-cv-04384-JST, 2017 U.S. Dist. LEXIS 100580, 2017 WL 2797810, at *14 (N.D. Cal. June 28, 2017); Smith, 2015 U.S. Dist. LEXIS 171897, 2015 WL 9434768, at *9.

Accordingly, the Court **GRANTS** Defendant's motion and **DISMISSES** Plaintiffs' "restitution based on quasi-contract and unjust enrichment" cause of action with leave to amend. If Plaintiffs wish to file a second amended complaint, **[**111]** the Court directs Plaintiffs to identify the applicable state laws and separate their allegations of various state law violations into separate causes of action. Additionally, the Court **GRANTS** Defendant's motion and **DISMISSES** Plaintiffs' quasi-contract claim without leave to amend to the extent it is based under California law.

4. Equitable Relief Claims

Defendant separately argues that "Plaintiffs' claims for equitable relief fail on the ground that they do not and cannot plead that they lack an adequate remedy at law." *See* Doc. No. 44-1 at 37; *see also* Doc. No. 65 at 25-26. In doing so, Defendant relies on *Sonner v. Premier Nutrition Corp., 971 F.3d 834, 837 (9th Cir. 2020)*. *See* Doc. No. 44-1 at 37-38. Defendant asserts Plaintiffs' claims rest on overpayments, triggering an adequate monetary remedy at law. Plaintiffs respond they may pursue alternative or different types of relief. *See* Doc. No. 62 at 43 (citing Fed. R. Civ. P. 8(a)(3)). Plaintiffs fail to directly confront Defendant's *Sonner* argument. Rather, in a footnote without citing to support, Plaintiffs argue that *Sonner*'s facts "are inapposite considering the allegations and the posture of the FAC." *See id.* at 43 n.15.

[*1160] As the Court already noted in Defendant's Article III standing challenge, Plaintiffs do show future harm as to **[**112]** the "non-GMO" deceptive marketing statements. *See supra* Section III.B.2. Thus, Plaintiffs have plausibly shown that they lack an adequate remedy at law to at least some degree. The Court finds this finding sufficient to overcome Defendant's *Sonner* challenge at this stage. Additionally, unlike *Sonner*, Plaintiffs are not pursuing equitable remedies to the exclusion of a remedy at law. Accordingly, the Court declines to dismiss Plaintiffs' equitable claims at this time. *Cf.* Roper, 2020 U.S. Dist. LEXIS 244786, 2020 WL 7769819, at *9 (quoting Aerojet Rocketdyne, Inc. v. Glob. Aerospace, Inc., No. 2:17-cv-01515-KJM-AC, 2020 U.S. Dist. LEXIS 121802, 2020 WL 3893395, at *5 (E.D. Cal. July 10, 2020)) ("Although monetary damages may ultimately fully address plaintiff's harm, at this stage of the litigation there is 'an ongoing, prospective nature to [plaintiff's allegations]' given her contention that she and other future purchasers will continue to be misled.").

C. Conclusion

For the foregoing reasons, the Court **GRANTS in part and DENIES in part** Defendant's motion to dismiss brought under *Rule 12(b)(6)*.

V. Motion to Strike

A. Legal Standard

HN48[] A *Rule 12(f)* motion to strike allows a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. For the purposes of this rule, "'[i]mmaterial' matter is that **[**113]** which has no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)* (quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1382, at 706-07 (1990)), *rev'd on other grounds by Fogerty v. Fantasy, Inc., 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)*; *see also Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 974 (9th Cir. 2010)*. "'Impertinent' matter consists of statements that do not pertain, and are not necessary, to the issues in question." *Fantasy, Inc., 984 F.2d at 1527* (quoting 5 Charles A. Wright & Arthur R. Miller, at 711); *see also Whittlestone, Inc., 618 F.3d at 974*. "In order to show that a defense is insufficient, 'the moving party must demonstrate that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed.'" *Diaz v. Alternative Recovery Mgmt., No. 12-cv-1742-MMA (BGS), 2013 U.S. Dist. LEXIS 66520, 2013 WL 1942198, at *1 (S.D. Cal. May 8, 2013)* (quoting *S.E.C. v. Sands, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995))*. The purpose of a *Rule 12(f)* motion is "to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983)*. "Motions to strike are generally disfavored, unless 'it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation.'" *Haghayeghi v. Guess?, Inc., No. 14-cv-00020 JAH-NLS, 2015 U.S. Dist. LEXIS 43243, 2015 WL 1345302, at *5 (S.D. Cal. Mar. 24, 2015)* (quoting *LeDuc v. Kentucky Cent. Life Ins. Co., 814 F. Supp. 820, 830 (N.D. Cal. 1992))*; *see also Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1037 (C.D. Cal. 1998))*. In ruling on a motion to strike, the court may only consider **[**114]** the face of the pleading or matters subject to judicial notice. *See Fantasy, Inc., 984 F.2d at 1528*; *Sands, 902 F. Supp. at 1165*. "With a motion to strike, just as with a motion to dismiss, the court should view the pleading in the light most **[*1161]** favorable to the nonmoving party." *Snap! Mobile, Inc. v. Croghan, No. 18-cv-04686-LHK, 2019 U.S. Dist. LEXIS 28759, 2019 WL 884177, at *3 (N.D. Cal. Feb. 22, 2019)* (quoting *Platte Anchor Bolt, Inc. v. IHI, Inc., 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004))*. ***HN49***[] Ultimately, the decision about whether to strike allegations is a matter within the Court's discretion. *California Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002)* (citing *Fantasy, Inc., 984 F.2d at 1528*); *see also Whittlestone, Inc., 618 F.3d at 974* (quoting *Nurse v. United States, 226 F.3d 996, 1000 (9th Cir. 2000))*.

B. Discussion

In Defendant's notice of motion, it seeks to strike the following from Plaintiffs' FAC: (1) "[e]very reference to the laws of states in which the named plaintiffs do not reside"; (2) "Plaintiffs' slack-fill theory to the extent it relies on online purchases"; (3) "[a]ny representation or liability theory to the extent the Court finds that it fails"; and (4) "[a]ll requests for equitable relief including injunctive relief and restitution." Doc. No. 44 at 2. However, Defendant fails to argue why or how these allegations should be struck under the *Rule 12(f)* legal standard in their memorandum of points and authorities. It appears that Defendant seeks to strike these allegations under the same arguments underlying its motion to dismiss.

Defendant's motion to strike is an attempt **[**115]** to have certain portions of the FAC dismissed—"actions better suited for a *Rule 12(b)(6)* motion or a *Rule 56* motion, not a *Rule 12(f)* motion." *Whittlestone, Inc., 618 F.3d at 974*. ***HN50***[] Reading *Rule 12(f)* as a means to dismiss some or all of a pleading would create a redundancy within the Federal Rules of Civil Procedure "because a *Rule 12(b)(6)* motion (or a motion for summary judgment at a later stage in the proceedings) already serves such a purpose." *Id.*

Furthermore, the Court finds that the motion to strike does not meet the *Rule 12(f)* standard. First, the four strike requests do not pertain to an insufficient defense. Second, the allegations desired to be stricken are not redundant. Third, the allegations are not immaterial because they amount to Plaintiffs' asserted causes of action. Fourth, the allegations are not impertinent because the allegations desired to be stricken pertain directly to Plaintiffs' asserted claims. Fifth, the at-issue allegations, theories, or causes of action do not appear to be scandalous. Therefore, Defendant fails to satisfy *Rule 12(f)*'s requirements to show that Plaintiffs' allegations or causes of action should be stricken from their FAC.

C. Conclusion

Accordingly, the Court **DENIES** Defendant's motion to strike. *Cf. Howe v. Target Corp., No. 20-cv-252-MMA (DEB), 2020 U.S. Dist. LEXIS 172605, 2020 WL 5630273, at *15-16 (S.D. Cal. Sept. 21, 2020)* (denying the **[**116]** defendant's motion to strike the plaintiff's request for attorneys' fees where the request was improper under *Rule 12(f)* and the defendant did not meet the *Rule 12(f)* standard).

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS in part and DENIES in part** Defendant's motion to dismiss brought under *Rule 12(b)(1)*, **GRANTS in part and DENIES in part** Defendant's motion to dismiss brought under *Rule 12(b)(6)*, and **DENIES** Defendant's motion to strike brought under *Rule 12(f)*. Plaintiffs must file an amended complaint curing the deficiencies noted herein on or before **May 17, 2021**.

IT IS SO ORDERED.

Dated: April 28, 2021

/s/ Michael M. Anello

HON. MICHAEL M. ANELLO

United States District Judge

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Back v. GTL

United States District Court for the Northern District of Indiana, South Bend Division

April 29, 2021, Decided; April 29, 2021, Filed

CAUSE NO. 3:19-CV-947-RLM-MGG

Reporter

2021 U.S. Dist. LEXIS 81771 *; 2021 WL 1699531

ANDREW BACK, Plaintiff, v. GTL, Defendant.

Core Terms

video game, charging, alleges, anti trust law, Sherman Act, monopoly, movies, exclusive contract, different price, general public, pro se, Robinson-Patman Act, commodities, prohibits, products, pleaded, futile, immune, prices, seller, amend, music

Counsel: [*1] Andrew Back, Plaintiff, Pro se, Bunker Hill, IN.

Judges: Robert L. Miller, Jr., UNITED STATES DISTRICT JUDGE.

Opinion by: Robert L. Miller, Jr.

Opinion

OPINION AND ORDER

Andrew Back, a prisoner without a lawyer, filed a complaint alleging that defendant GTL's contract with the Indiana Department of Correction violates ***antitrust law***. ECF 2. "A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (quotation marks and citations omitted). The court must review the merits of a prisoner complaint and dismiss it if the action is frivolous or malicious, fails to state a claim, or seeks monetary relief against a defendant who is immune from such relief.

Mr. Back alleges as follows: GTL has an exclusive contract with the Department of Correction to provide prisoners with tablets that can support music, video games, and movies, among other functions. Prisoners aren't allowed to have any competing video game platforms, such as PlayStation or Xbox. ECF 2 at 2. GTL charges prisoners $8.00 per day to watch movies, $6.00 per month to play video games, and $22.16 per month to stream music. *Id.* Mr. **[*2]** Back says the selection of movies and video games is "pathetic," and the prices are "far more than the general public is charged." *Id.*

Mr. Back alleges that GTL has violated the Sherman Act, *15 U.S.C. § 2*, because its agreement with the Department of Correction prevents prisoners from using other video game systems, and so creates a monopoly for GTL. The Sherman Act prohibits only "individual and not state action," *Parker v. Brown, 317 U.S. 341, 352, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, and this state antitrust immunity extends to private parties acting pursuant to state policy. *S. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 56, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985)*.

In other words, a private company can't be sued under the Sherman Act for a "monopoly" that is explicitly arranged by the state.[1] *See, e.g.*, *Byrd v. Goord, No. 00 CIV. 2135 (GBD), 2005 U.S. Dist. LEXIS 18544, 2005 WL 2086321, at *5 (S.D.N.Y. Aug. 29, 2005)* (finding no Sherman Act liability for a telephone provider from its exclusive contract with a state's prisons); *McGuire v. Ameritech Servs., Inc., 253 F. Supp. 2d 988, 1010 (S.D. Ohio 2003)* (same); *see also* *Arsberry v. Illinois, 244 F.3d 558, 566 (7th Cir. 2001)* ("States and other public agencies do not violate the antitrust laws by charging fees or taxes that exploit the monopoly of force that is the definition of government. . . . Nor do the persons with whom the states contract violate the antitrust laws by becoming state concessionaires.").

Mr. Back next alleges that GTL has violated the Robinson-Patman Act by charging inflated prices for digital media. The Robinson-Patman Act **[*3]** prohibits a seller from charging different prices to different purchasers of like "commodities[2]," if it threatens to injure market competition. *15 U.S.C. § 13(a)*; *Department of Correction v. Volvo Trucks N. Am., 869 F.3d 598, 603 (7th Cir. 2017)*.

Mr. Back alleges that GTL is charging "far more money than the general public is charged" and "far more than similar, and far superior products, are charging." But there is no allegation that GTL itself is selling the same product to others for less. That other companies may offer similar products for less doesn't create a Robinson-Patman Act claim against GTL. *See* 2 Callmann on Unfair Comp., Tr. & Mono. § 7:25 (4th Ed.) (for a Robinson-Patman price discrimination claim, the commodity must be sold at different prices by the same seller).

Courts ordinarily give a *pro se* litigant a chance to replead before dismissing the case with prejudice, *Abu-Shawish v. United States, 898 F.3d 726, 738 (7th Cir. 2018)*; *Luevano v. Wal-Mart, 722 F.3d 1014, 1024-1025 (7th Cir. 2013)*, but the court isn't required to grant leave to amend where it would be futile. *Humid v. Aurora Loan Servs., 588 F.3d 420, 432 (7th Cir. 2009)* ("[C]ourts have broad discretion to deny leave to amend where . . . the amendment would be futile."). It doesn't appear that Mr. Back's allegations could support a cognizable claim.

For these reasons, this case is DISMISSED pursuant to *28 U.S.C. § 1915A*, for failure to state a plausible claim for relief.

SO ORDERED on April 29, 2021

/s/ Robert **[*4]** L. Miller, Jr.

JUDGE

UNITED STATES DISTRICT COURT

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[1] This immunity attaches only if the challenged restraint is "clearly articulated and affirmatively expressed as state policy" and "actively supervised" by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)* (quoting *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*). The alleged contract between GTL and the IDOC satisfies that requirement. *McGuire, v. Ameritech Servs., Inc., 253 F. Supp. 2d 988, 1007 (S.D. Ohio 2003)* (holding that this kind of arrangement "*is* the clear and articulated policy of [the state] . . . It is the State, acting through the [state agency], that solicited, implemented, and maintains" the contracted services).

[2] It is unclear whether the streaming media offered by GTL are "commodities" covered by the statute. *See* *Innomed Labs, LLC v. ALZA Corp., 368 F.3d 148, 156 (2d Cir. 2004)* (the term "commodity" is strictly construed to exclude "intangible" products or services).

Pittsburgh Logistics Sys. v. Beemac Trucking, LLC

Supreme Court of Pennsylvania

April 16, 2020, Submitted; April 29, 2021, Decided

No. 31 WAP 2019

Reporter
249 A.3d 918 *; 2021 Pa. LEXIS 1853 **

PITTSBURGH LOGISTICS SYSTEMS, INC., Appellant v. BEEMAC TRUCKING, LLC AND BEEMAC LOGISTICS, LLC, Appellees

Prior History: [1]** Appeal from the Order of the Superior Court entered January 11, 2019 at No. 134 WDA 2017, affirming the Order of the Court of Common Pleas of Beaver County entered December 22, 2016 at No. 11571 of 2016.

Pittsburgh Logistics Sys. v. BeeMac Trucking, LLC, 2019 PA Super 13, 202 A.3d 801, 2019 Pa. Super. LEXIS 36, 2019 WL 168477 (Pa. Super. Ct., Jan. 11, 2019)

Core Terms

no-hire, employees, hired, public policy, ancillary, restraint of trade, restrictive covenant, contracts, covenant, parties, void, provisions, customers, courts, restrictions, termination, soliciting, CARRIER, employment agreement, asserts, compete, drivers, legitimate interest, unenforceable, trial court, non-compete, therapists, poaching, argues, rights

LexisNexis® Headnotes

Contracts Law > Defenses > Public Policy Violations

HN1[] **Defenses, Public Policy Violations**

Generally, a clear and unambiguous contract provision must be given its plain meaning unless to do so would be contrary to a clearly expressed public policy. When examining whether a contract violates public policy, the supreme court is mindful that public policy is more than a vague goal which may be used to circumvent the plain meaning of the contract. It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring that the contract is against public policy.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Trade Secrets Law > Employee Duties & Obligations > Right to Compete > Covenants Not to Compete

HN2[] **Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements**

Covenants not to compete between employers and employees, which have the effect of limiting employment opportunities for employees, are enforceable provided they meet certain requirements.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Adequate Consideration

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Trade Secrets Law > Employee Duties & Obligations > Right to Compete > Covenants Not to Compete

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

HN3[] **Consideration, Adequate Consideration**

The Commonwealth has a long history of disfavoring restrictive covenants. While generally disfavored, Pennsylvania law, however, has recognized the validity and enforceability of covenants not to compete in an employment agreement, assuming adherence to certain requirements. Currently in Pennsylvania, restrictive covenants are enforceable only if they are: (1) ancillary to an employment relationship between an employee and an employer; (2) supported by adequate consideration; (3) the restrictions are reasonably limited in duration and geographic extent; and (4) the restrictions are designed to protect the legitimate interests of the employer.

Contracts Law > Defenses > Public Policy Violations

HN4[] **Defenses, Public Policy Violations**

Avoidance of contract terms on public policy grounds requires a showing of overriding public policy from legal precedents, governmental practice, or obvious ethical or moral standards.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > Employment Relationships > Employment Contracts > Contract Interpretation

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN5[] **Types of Contracts, Covenants**

The United States Supreme Court has stated that freedom in the making of contracts of personal employment is an elementary part of the rights of personal liberty. The Pennsylvania Supreme Court has held that the Commonwealth has a long, and virtually uniform, history of strongly disfavoring covenants in restraint of trade. While there are limited circumstances where an employment agreement containing a restrictive covenant may be enforced, consideration is crucial. That is so because employees must receive a meaningful benefit in exchange for a restriction on their rights to seek employment in their chosen fields.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

HN6[] **Types of Contracts, Covenants**

While no Pennsylvania statute applies to contractual restraints, case law makes clear that restrictive covenants are permitted only if they meet specific requirements including protection of the legitimate interests of the employer.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN7[] **Injunctions, Preliminary & Temporary Injunctions**

The supreme court's review of a trial court's order granting or denying preliminary injunctive relief is highly deferential. Accordingly, the supreme court examines the record to determine if there were any apparently reasonable grounds for the action of the court below.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN8[] **Injunctions, Preliminary & Temporary Injunctions**

The supreme court will find that a trial court had apparently reasonable grounds for its denial of injunctive relief where the trial court has properly found that any one of the essential prerequisites for a preliminary injunction is not satisfied. The six essential prerequisites are: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from refusing an injunction than from granting it; (3) the injunction will restore the parties to their status as it was immediately before the alleged wrongful conduct; (4) the activity sought to be restrained is actionable, the right to relief is manifest, and the moving party must show it is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) a preliminary injunction will not harm the public interest.

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

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN9[] **Standards of Review, De Novo Review**

In assessing whether the common pleas court acted properly, the supreme court reviews its factual findings deferentially while resolving issues of law de novo. In that latter regard, the supreme court will interfere with the court's decision only where the rule of law relied upon was palpably erroneous or misapplied.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Trade Secrets Law > Employee Duties & Obligations > Right to Compete > Covenants Not to Compete

Contracts Law > Defenses > Public Policy Violations

Labor & Employment Law > Employment Relationships > Employment Contracts > Contract Interpretation

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN10[] Types of Contracts, Covenants

Pennsylvania common law has treated restrictive covenants as restraints on trade that are void as against public policy unless they are ancillary to an otherwise valid contract. To determine the enforceability of a provision in restraint of trade that is ancillary, or supplementary, to the principal purpose of a contract, the supreme court employs a balancing test to determine the reasonableness of the restraint in light of the parties' interests that the restraint aims to protect and the harm to other contractual parties and the public. As part of that balancing test, courts also consider the reasonableness of the restraint's geographical scope as well as its duration of time. The reasonableness test is more stringent when examining restrictive covenants ancillary to an employment agreement than when evaluating restrictive covenants ancillary to the sale of a business.

Judges: JUSTICE MUNDY. Chief Justice Baer and Justices Saylor, Todd, Donohue, Dougherty and Wecht join the opinion.

Opinion by: MUNDY

Opinion

[*920] JUSTICE MUNDY

In this appeal we consider whether no-hire, or "no poach," provisions that are ancillary to a services contract between business entities are enforceable under the laws of this Commonwealth. For the reasons that follow, we hold the no-hire provision in this case is not enforceable, and therefore affirm the order of the Superior Court.

I.

Pittsburgh Logistics Systems, Inc. ("PLS") is a third-party logistics provider that arranges for the shipping of its customers' freight with selected trucking companies. Beemac Trucking ("Beemac")[1] is a **[*921]** shipping company that conducts non-exclusive business with PLS.

On August 30, 2010, PLS and Beemac entered into a one-year Motor Carriage Services Contract ("the Contract"), which automatically renewed on a year to year basis until either party terminated it. Contract, 8/30/10, at 2. It contained both a non-solicitation provision and **[**2]** the no-hire provision, which is the focus of this appeal. Those provisions are as follow:

> 14.3 The parties acknowledge that during the term of the Contract there may be disclosed to CARRIER [Beemac] confidential information concerning PLS' operations including, but not limited to, the names and addresses of Shippers and others who are clients of PLS, volumes of traffic and rate data. During the term of this Contract and for a period of one year after termination of this Contract, CARRIER hereby agrees that it will not, either directly or indirectly, solicit any individual Shipper or other client of PLS, back-solicit and/or transport for itself, without the involvement of PLS, any freight that CARRIER handles pursuant to this Contract or freight which first becomes known to CARRIER as a result of CARRIER'S past, present or future dealings with PLS.
>
> . . .
>
> 14.6 CARRIER agrees that, during the term of this Contract and for a period of two (2) years after the termination of this Contract, neither CARRIER nor any of its employees, agents, independent contractors or other persons performing services for or on behalf of CARRIER in connection with CARRIER'S obligations

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[1] Although Beemac Logistics appears in the caption, no injunctive relief was ordered against it. Accordingly, it is not involved in the instant appeal.

> under this Contract will, **[**3]** directly or indirectly, hire, solicit for employment, induce or attempt to induce any employees of PLS or any of its Affiliates to leave their employment with PLS or any Affiliate for any reason.

Id. at 9-10.

While the contract was in force, Beemac hired the following four PLS employees: Michael Ceravolo, Mary Coleman, Natalie Hennings, and Racquelle Pakutz. On November 29, 2016, PLS filed an action in the Court of Common Pleas of Beaver County against Beemac alleging breach of contract, tortious interference with contract, violation of the *Pennsylvania Uniform Trade Secrets Act, 12 Pa.C.S. §§ 5301-5308*, and civil conspiracy. PLS sought injunctive relief, and on December 1, 2016, the court issued an order enjoining Beemac from employing the former PLS employees and soliciting PLS customers pending a hearing.

In a related action, on November 18, 2016, PLS sued its former employees for breach of contract, alleging they had breached the non-competition and non-solicitation provisions of their employment contracts. On November 22, 2016, the court entered an order enjoining the former employees from employment with Beemac and soliciting certain PLS customers pending a hearing.

On December 8, 9, and 13, 2016, the court held **[**4]** a consolidated hearing on both actions, and on December 22, 2016, it vacated the injunction entered against Ms. Coleman because it determined that her employment agreement was void. It also concluded that the other three employees had valid employment agreements but that the worldwide non-compete clauses in their contracts were "unduly oppressive and cannot be subject to equitable modification." Trial Court Opinion, 12/22/2016, at 10. However, the court found that the provisions of the employment agreements which precluded Mr. Ceravolo from soliciting clients of PLS for one year, and Ms. Hennings and Ms. Pakutz from soliciting **[*922]** clients of PLS for two years, were reasonable. Accordingly, the court ordered no injunctive relief against Ms. Coleman, and enjoined the other three employees only from soliciting PLS clients in accordance with their employment agreements. The order specified that the employees were not enjoined from working for Beemac.[2]

With respect to the PLS action against Beemac, the court first addressed Section 14.3 of the Contract governing non-solicitation of PLS customers:

> [R]estrictions on trade are not always favored by the courts. Indeed, the **[**5]** Pennsylvania Supreme Court acknowledged that "it has long been the rule at common law, that contracts in restraint of trade made independently of a sale of a business or contract of employment are void as against public policy regardless of the valuableness of the consideration exchanged. *Jacobson & Co. v. Int'l Env't Corp., 427 Pa. 439, 235 A.2d 612, 617 (Pa. 1967)*. However, certain restrictive covenants are valid if they are ancillary to the main purpose of the contract. *Id.* The covenant must be inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. *Id.* The main purpose of the contract must suggest the measure of protection needed, and furnish a sufficiently uniform standard by which the validity of such a restraint may be judicially determined. *Id.* We believe that the restrictive covenant in section 14.3 of the . . . Contract meets these requirements; it was ancillary to the main purpose of the agreement, and [it] was necessary to protect PLS's interest in its customers.
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> In the instant case, the covenant contained in section 14.3 furthered PLS's legitimate interest in preventing Bee[m]ac from cutting PLS out of the equation.

Trial Court Opinion, 12/22/16, **[**6]** at 11-12.

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[2] The injunction entered in PLS's action against its former employees is not the subject of the instant appeal. Rather, PLS properly filed a separate appeal to the Superior Court which affirmed the trial court. ***Pittsburgh Logistics Sys., Inc. v. Ceravolo, 181 A.3d 412, 2017 Pa. Super. Unpub. LEXIS 4184, 2017 WL 5451759 (Pa. Super. 2017)***, *petition for allowance of appeal denied*, *646 Pa. 124, 183 A.3d 968 (Pa. 2018)* (per curiam).

With respect to Section 14.6, the court noted the lack of "case law in Pennsylvania on the issue of no-hire covenants between contracting companies." *Id.* at 13. It recognized that while some states have found such provisions to be void against public policy, *e.g.,* *Heyde Cos., Inc. v. Dove Healthcare LLC, 2002 WI 131, 258 Wis. 2d 28, 654 N.W.2d 830 (Wis. 2002)*, others have deemed them to be a permissible restraint on trade, *e.g.,* *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc., 209 Ill. 2d 52, 805 N.E.2d 1177, 282 Ill. Dec. 160 (Ill. 2004)*. The court concluded:

> We believe these types of no-hire contracts should be void against public policy because they essentially force a non-compete agreement on employees of companies without their consent, or even knowledge, in some cases. We believe that if an employer wishes to limit its employees from future competition, this matter should be addressed directly between the employer and employee, not between competing businesses. Moreover, in this case, such a restriction goes beyond the protected interest of PLS, which is its customers. So long as the former employee, or any employee of Bee[m]ac, does not contact former customers of PLS, for the time period in the contract, in this case one year under section 14.3 of the . . . Contract, there is **[*923]** no need to enforce the no-hire provision contained in Section 14.6. For these reasons, we do not believe PLS has a substantial likelihood of **[**7]** success on the merits of its claim under section 14.6, and we will vacate the injunction prohibiting Bee[m]ac . . . from hiring former PLS employees.

Trial Court Opinion, 12/22/16, at 13.

PLS filed an appeal to the Superior Court, which issued an *en banc* opinion on January 11, 2019, affirming the trial court. *Pittsburgh Logistics Sys. v. Beemac Trucking, LLC, 2019 PA Super 13, 202 A.3d 801 (Pa. Super. 2019)* (en banc).[3] The Superior Court recognized that pursuant to *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 573 Pa. 637, 828 A.2d 995, 1000 (Pa. 2003)*, it exercises a highly deferential standard of review with respect to the grant or denial of a preliminary injunction, and examines the record to determine if the trial court had any apparently reasonable grounds for its action.

The court noted:

> Here, there is no proof that the employees knew of the [no-hire] clause between the companies. While there was a restrictive covenant in the employees' contracts with PLS, the trial court determined it was unenforceable as being oppressive or an attempt to foster a monopoly, thereby demonstrating unclean hands on the part of PLS. It would be incongruous to strike the employees' restrictive covenant, finding PLS to have had unclean hands, yet allow PLS to achieve the same result via the contract between companies.

Pittsburgh Logistics Sys., 202 A.3d at 807 (citations omitted).

The court agreed with the trial court that "Paragraph 14.6 violated **[**8]** public policy by preventing non-signatories, PLS employees, from exploring alternate work opportunities in a similar business." *Id. at 808*. Furthermore, "each [motor carriage service contract] with a new carrier, results in a new restriction upon current employees[.]" *Id.* While such restrictions may be valid in a contract made between an employer and employee at the time of hiring, a new restriction must be supported by additional consideration. *Id.* Therefore, the court concluded, "[i]f additional restrictions to the agreement between employer and employee are rendered unenforceable by a lack of additional consideration, PLS should not be entitled to circumvent that outcome through an agreement with a third party." *Id.*

In a dissenting opinion, Judge Bowes observed that Section 14.6 "is a no-hire provision that binds Bee[m]ac, not a non-compete clause binding PLS's employees. In my view, the majority errs in conflating the two, as there is no basis in Pennsylvania law for treating a no-hire provision as a restrictive covenant between an employer and an employee." *Pittsburgh Logistics Sys., 202 A.3d at 810* (Bowes, J. dissenting). The dissent asserted that Section 14.6 is not:

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[3] A panel of the Superior Court affirmed the trial court on March 26, 2018. PLS sought reargument, which the court granted on June 6, 2018.

> a back-door restrictive covenant through which an employer signs away rights of its employees **[**9]** without supplying consideration. The no-hire provision does not restrict the employees' actions, but rather is a concession from Bee[m]ac that, in exchange for its access to PLS's specialized industry knowledge and contacts through PLS's employees, Bee[m]ac would not thereafter appropriate those employees and obviate the need for PLS's services. Bee[m]ac's contract with PLS does nothing to restrict PLS's employees from seeking employment with any other company.

[*924] *Id. at 811*. Instead, the dissent opined, "[t]he proper analysis of the issue in this appeal is whether the no-hire provision in the PLS-Bee[m]ac contract is a reasonable restraint upon trade." *Id.* Upon review of cases from other jurisdictions and an unpublished opinion from a federal district court, *GeoDecisions v. Data Transfer Solutions, LLC, 2010 U.S. Dist. LEXIS 128283, 2010 WL 5014514 (M.D. Pa. Dec. 3, 2010)*, the dissent concluded the restraint on trade was indeed reasonable. *Id. at 811-13*. The dissent also noted that while the agreement "had an indirect effect on those PLS employees seeking employment away from PLS . . . [it] prohibited [them] only from seeking employment with Bee[m]ac and its affiliates who deal with PLS." *Id. at 813*. Such limitation, the dissent concluded, does not violate public policy.

We granted allowance of appeal to address the following issue: **[**10]** "Are contractual no-hire provisions which are part of a services contract between sophisticated business entities enforceable under the law of this Commonwealth?" *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC & Beemac Logistics, LLC, 654 Pa. 574, 216 A.3d 1032 (Pa. 2019)* (per curiam).

II.

Due to the lack of Pennsylvania case law governing no-hire provisions, it is helpful to review the decisions from other jurisdictions on which the parties and lower courts rely. We begin with cases where the courts found such provisions unenforceable.

In *Heyde*, Greenbriar Rehabilitation (Greenbriar), a provider of rehabilitation services to nursing homes, entered into an agreement to place physical therapists at a Dove Healthcare (Dove) facility. The agreement contained a provision that Dove would not hire any Greenbriar therapists or therapist assistants for the duration of the contract and for a period of one year thereafter without the written consent of Greenbriar. If, after receiving Greenbriar's written consent Dove hired any Greenbriar therapists or therapist assistants, Dove would pay Greenbriar a fee of fifty percent of the Greenbriar employee's annual salary. On October 26, 1999, Dove terminated the agreement effective December 31, 1999. Shortly after terminating the agreement, Dove hired one current **[**11]** and three former Greenbriar employees without obtaining Greenbriar's written consent nor paying the fee outlined in the agreement.

Greenbriar filed suit against Dove on March 10, 2000, asserting that Dove breached the no-hire provision of the contract. The circuit court found for Greenbriar, awarding damages of $62,124.40 in its favor. However, as noted by the Wisconsin Supreme Court, "the court of appeals reversed the judgment of the circuit court and held that the no-hire provision was an unreasonable restraint of free trade because the employees had no knowledge of the provision and did not sign any covenant not to compete." *Heyde, 2002 WI 131, 258 Wis. 2d 28, 654 N.W.2d 830 at 833*.

The Wisconsin Supreme Court noted that restrictive covenants not to compete in employment contracts are permitted by statute but, "only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint." *W.S.A. 103.465*. "While a covenant not to compete is typically made between an employer and its employees, it is possible, **[**12]** as illustrated in this case, that a restrictive covenant may be made between employers that acts as a covenant not to compete on the employees." *Heyde, 654 N.W.2d at 834*. As summarized by the court:

> **[*925]** The *effect* of the no-hire provision is to restrict the employment of Greenbriar's employees; it is inconsequential whether the restriction is termed a "no-hire" provision between Dove and Greenbriar or a

> "covenant not to compete" between Greenbriar and its employees. Greenbriar is not allowed to accomplish by indirection that which it cannot accomplish directly.

Id. Because the no-hire provision acted as a restrictive covenant on Greenbriar's employees, the court concluded that the restrictive covenant must be necessary to protect the employee; provide a reasonable time limit; provide a reasonable territorial limit; not be harsh or oppressive to the employer; and not be contrary to public policy. *Id. at 835*. With respect to the first factor, the court held that the no-hire provision was not necessary for Greenbriar's protection because it could have protected itself through a reasonable covenant not to compete with its employees. The court noted that the one-year time limit appeared reasonable, but reached no conclusion with **[**13]** respect to the territorial limit. However, it determined the no-hire provision was harsh and oppressive to the employees because they had no knowledge of it and did not sign a non-compete. *Id. at 837*. The no-hire provision was contrary to public policy for the same reason, and because it violated "the fundamental right of a person to make choices about his or her own employment." *Id. at 836*.

The California Court of Appeal addressed no-hire contracts in *VL Systems, Inc. v. Unisen, Inc., 152 Cal. App. 4th 708, 61 Cal. Rptr. 3d 818 (Cal. Ct. App. 2007)*. VL Systems (VLS) was a provider of computer consulting services. In 2004, it entered into a contract with Star Trac to provide assistance for migrating to a new server. It estimated the work would be completed in sixteen hours.

The contract contained a provision that Star Trac would not attempt to hire VLS's personnel, and, "if, during the term of, or within twelve (12) months after the termination of the performance period of this agreement, [Star Trac] hires directly, or indirectly contracts with any of the seller's personnel for the performance of systems engineering and/or related services," VLS would be entitled to liquidated damages as detailed in the agreement. *Id. at 710*.

In April 2004, after the Star Trac contract was completed, VLS hired David Rohnow as **[**14]** a senior engineer. In July 2004, Star Trac posted an internet job listing for a director of information technology. Rohnow responded, was hired and began working for Star Trac on September 20, 2004. He had worked for VLS for twenty-two weeks.

VLS billed Star Trac for liquidated damages, which it refused to pay. VLS filed an action against Star Trac that proceeded to trial. The court determined that Star Trac breached the agreement, but concluded that the liquidated damages set forth in the contract did not bear a reasonable relation to the damage occurred. Instead, it entered judgment in favor of VLS in the amount of $28,500, which equaled 60 percent of the $47,500 salary Rohnow received from Star Trac during the amount of time he worked for VLS.

The Court of Appeal reversed. The court noted *Business and Professions Code Section 16600*, which states, "[e]xcept as provided in this chapter, every contact by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." *Cal. Bus. & Prof. Code § 16600*. "California courts have consistently declared this provision an expression of public policy to ensure that every citizen shall retain the right to pursue any lawful employment **[**15]** and enterprise **[*926]** of their choice." *VL Systems, 152 Cal. App. 4th at 713*. While recognizing that "[f]reedom of contract is an important principle, and courts should not blithely apply public policy reasons to void contract provisions," it noted:

> This type of contractual provision, however, may seriously impact the rights of a broad range of third parties. In this case, those third parties not only included the VLS employees who actually performed work for Star Trac under the contract, but all of those who did not, including Rohnow, who was not even employed by VLS at the time.

Id. While "[c]ourts have upheld narrowly drawn provisions which might limit the employment mobility of nonparties," *id. at 714*, the court noted that the contract at issue contains "a very broad provision covering not only solicitation by Star Trac, but all hiring, and it applies to all VLS employees, regardless of whether they worked for Star Trac or were even employed at the time." *Id. at 718*. Thus, the California Court of Appeal expressed its disapproval of an agreement between businesses that "results in a situation where the opportunities of employees are restricted without their knowledge and consent." *Id.*

Nearly seventy years ago, a Texas appellate court addressed **[**16]** the issue in *Texas Shop Towel, Inc. v. Haire, 246 S.W.2d 482 (Tx. Civ. App. 1952)*. W.S. Haire operated a business renting and delivering shop towels. On April 1, 1950, he sold the business to Texas Shop Towel. At the time of the sale, Haire had two deliverymen including Frank Bell. In exchange for $12,000, Haire agreed "that he, his agents, servants and employees" would not run a shop towel rental business in nineteen counties for a period of five years. On July 1, 1950, Bell opened a competing business.

Texas Towel initiated a lawsuit against Haire. Bell was not made a party to the action. Following a defense verdict, the appellate court affirmed, noting:

> It is one thing for an employee voluntarily to surrender his known rights; it is vastly different when an employee is placed under servitude by a contract to which he is not a party and about which he may know nothing. . . . [I]n a contract restricting trade, we do not think that an employee's individual right and freedom to contract may be traded away by a third person, even by the third party's express contract.

Id. at 484.

However, other courts have determined that similar no-hire agreements, although they are in restraint of trade, are permitted.

In *Therapy Services, Inc. v. Crystal City Nursing Center, Inc., 239 Va. 385, 389 S.E.2d 710, 6 Va. Law Rep. 1598 (Va. 1990)*, a case with certain factual similarities to *Heyde*, the Supreme **[**17]** Court of Virginia reached a different conclusion.

Therapy Services employed certified physical, occupational and speech therapists that it provided to health care facilities. In October of 1984 and December of 1985, Therapy Services entered into contracts with Crystal City Nursing Center to provide rehabilitation services to its patients. In November 1987, while ten Therapy Services employees were working for Crystal City, it informed Therapy Services that it was terminating the agreements in accordance with the contracts. Shortly thereafter, Crystal City attempted to hire the Therapy Services employees. Therapy Services sought an injunction asserting that "Crystal City breached paragraph 13 of the agreements, under which Crystal City agreed not to hire any of the staff which Therapy Services provided under the contract for the duration of the contract **[*927]** period and for six months following the termination thereof." *Id. at 711*.

At a hearing, the Therapy Services employees testified they were unaware of paragraph 13 before accepting employment with Therapy Services. Based on this testimony, the trial court determined the employees had unknowingly waived their right to seek a livelihood, and accordingly **[**18]** the agreements included in paragraph 13 were against public policy. Therefore, the court granted Crystal City's motion for summary judgment.

The Supreme Court of Virginia reversed. Recognizing this was a case where one party "agree[d] to forego the ability to hire certain people who are not parties to the contract[,]" "the contract [was] in restraint of trade and will be held void as against public policy if it is unreasonable as between the parties or is injurious to the public." *Id. at 711*.

The court agreed with Therapy Services that it had "a legitimate interest in protecting its ability to maintain professional personnel in its employ," *id. at 711-12*, "and that paragraph 13 affords fair protection to that interest." *Id. at 712*. The court then considered "whether the provision is so large as to interfere with the interest of the public." *Id.* (quotation and citation omitted). Therapy Services argued the provision only restricted the employees from working for Crystal City for six months after termination of the contract, and did not prohibit the employees from seeking work anywhere other than Crystal City. Furthermore, it asserted "the employees' lack of knowledge of the restriction is immaterial, pointing out that **[**19]** other restrictive agreements such as restrictive employment agreements and exclusive dealing arrangements impact on the interests of entities which are not parties to such agreements." *Id.*

The Virginia Supreme Court held that "[a]lthough the provision in question involves an employee's ability to secure future employment, it is neither a covenant not to compete nor a restrictive covenant between employer and employee. It is a contract between two businesses." *Id. at 711*. Accordingly, it reasoned that the contract would be void against public policy only "if it is unreasonable as between the parties or is injurious to the public." *Id.* The court concluded while "[t]he right to earn a livelihood is embraced in the constitutional concept of 'liberty[,]'" it "is conceptually and practically distinct from a claim of a right to specific employment." *Id.* Because the evidence indicated that therapists were in low supply and high demand in Northern Virginia, the court concluded they could find similar positions if they chose to leave Therapy Services' employ. Furthermore, the public interest would not be adversely impacted because the therapists could continue to work in Northern Virginia. Since the agreement **[**20]** protected the employer's interest and did not harm the employees' livelihoods nor the public, the court deemed valid the no-hire provision. *Id. at 712*.

The Illinois Supreme Court also weighed in on the issue in *H & M, supra.* H & M was in the business of providing truck drivers and related personnel to its customers. On January 10, 2000, H & M and Fox Valley entered into an agreement, paragraph 13 of which stated that for a period of one year from the termination of the contract, Fox Valley would not hire any of the drivers furnished by H & M. However, Fox Valley could hire any driver whose employment with H & M terminated at least one year prior to being hired by Fox Valley. Paragraph 13 also provided that if Fox Valley hired any driver in violation of the agreement, it would pay $15,000 per driver to H & M as liquidated damages plus costs and expenses including attorneys' fees. The length of the contract **[*928]** was indefinite until canceled by either party.

While the contract was in force, H & M provided driver James Booker to Fox Valley, and on February 11, 2000, Fox Valley hired Booker. H & M filed a complaint for breach of contract seeking damages as provided in paragraph 13. The circuit court rejected H & M's **[**21]** contention that paragraph 13 violated "public policy as it is a restraint of trade on a third party." *Id. at 1179*. The court entered judgment on the pleadings in favor of H & M in the amount of $18,747.00. The appellate court affirmed

The Supreme Court of Illinois noted that "in keeping with the principle of freedom of contract, [the court] has been reluctant to invoke its power to declare a private contract void as contrary to public policy." *Id. at 1180*. Furthermore, "[w]hether an agreement is contrary to public policy depends on the particular facts and circumstances of the case." *Id.* (citation omitted). Noting the public policy issue had "not been squarely addressed by the Illinois courts," *id. at 1182*, the court examined *Heyde* and *Therapy Services*. The court noted:

> This is not a case where the employee is arguing that he or she has been foreclosed from employment. In our view, the provision at issue restricted one employer's ability to hire former employees of the other employer. Thus, as the Virginia Supreme Court recognized [in *Therapy Services*], the contract provision acts as a restraint on trade. This court has held that "in determining whether a restraint [on trade] is reasonable it is necessary to consider **[**22]** whether enforcement will be injurious to the public or cause undue hardship to the promisor and whether the restraint imposed is greater than is necessary to protect the promisee." *Bauer v. Sawyer, 8 Ill.2d 351, 355, 134 N.E.2d 329 (1956)*.

Id. at 1183-84.

The court agreed with H & M that it had a legitimate interest in "protect[ing] its sole business asset, its drivers, from being hired away by its customers," *id. at 1184*, and that "paragraph 13 affords fair protection to that interest." *Id.* It further observed that H & M employees are not restricted from seeking employment as drivers with any employer other than Fox Valley, Fox Valley is only restricted from hiring H & M employees who had been provided to it by H & M, and that if Fox Valley wished to hire such employees, it could do so by paying liquidated damages to H & M. *Id.* In light of these facts and the lack of evidence in the record disclosing any adverse impact on the interests of the public, the court held, "paragraph 13 was not void as against public policy." *Id.*

In *GeoDecisions, supra*, the United States District Court for the Middle District of Pennsylvania also considered a no-hire provision. GeoDecisions and Data Transfer Solutions (DTS) were direct competitors in the information technology field. They agreed to team up **[**23]** on a project in California, and on May 28, 2010, entered into a mutual nondisclosure agreement. Paragraph 16 of the agreement provided, in full: "For a period of two (2) years from the date of this Agreement, neither party shall solicit for employment or employ any person employed by the other party, or otherwise encourage any person to terminate employment with such party." In October 2010, DTS extended offers of employment to twelve GeoDecisions employees, most of whom resigned their positions at GeoDecisions. GeoDecisions filed an action alleging breach of contract and seeking injunctive relief. On October 22, 2010, the court entered a temporary **[*929]** restraining order prohibiting DTS from hiring anyone employed by GeoDecisions since May 28, 2010. On December 3, 2010, the court entered a preliminary injunction to the same effect pending further order of court.

In reaching its decision, the court noted the lack of "any Pennsylvania cases squarely addressing a similar no-hire provision in an agreement between two corporations." *GeoDecisions, 2010 U.S. Dist. LEXIS 128283, 2010 WL 5014514 at *3*. The court recognized that "agreements containing such provisions are construed as contracts in restraint of trade," *id.* (citing *H & M, 805 N.E.2d at 1184*). As a restraint of trade, the **[**24]** court stated that the no-hire provision was void under Pennsylvania law unless "(1) it is ancillary to the main purpose of a lawful transaction; (2) it is necessary to protect a party's legitimate interest; (3) it is supported by adequate consideration; and (4) it is reasonably limited in both time and territory." *2010 U.S. Dist. LEXIS 128283, [WL] at *4* (citing *Volunteer Firemen's Ins. Servs., Inc. v. CIGNA Prop. & Cas. Ins. Agency, 693 A.2d 1330, 1337 (Pa. Super. 1997))*.

Analyzing whether the no-hire provision was ancillary, the court noted that "'contracts in restraint of trade made independently of a sale of a business or contract of employment are void as against public policy regardless of the valuableness of the consideration exchanged. *Jacobson [& Co., Inc. v. Int'l Env't Corp.], 427 Pa. 439, 235 A.2d [612,] 617 [(Pa. 1967)]*.'" *GeoDecisions, 2010 U.S. Dist. LEXIS 128283, 2010 WL 5014514, at *4*. Nevertheless, "[w]hile the rule appears to strictly limit the types of agreements to which restraints of trade may be ancillary, in practice courts have construed this restriction somewhat liberally." *Id.* For example, this Court "has upheld restraints of trade ancillary to sales of substantial equity interest or franchise rights." *Id.* (citing *Piercing Pagoda, Inc. v. Hoffner, 465 Pa. 500, 351 A.2d 207 (Pa. 1976)*; *Ala. Binder and Chem. Corp. v. Pa. Indus. Chem. Corp., 410 Pa. 214, 189 A.2d 180 (Pa. 1963))*. *GeoDecisions* noted that in *Jacobson*, we relied on *United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898)*, *aff'd*, *175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1889)*, which held that a covenant in restraint of trade is permissible where it is merely ancillary to the main purpose of agreement, and "is inserted only to protect one of the **[**25]** parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other."

The court concluded that the instant no-hire provision satisfied the ancillary rule, because, like the one in *Therapy Services*, it did not solely "restrict a corporation's ability to hire a competitor's employees. Rather, the purpose of the arrangement was to ensure a productive temporary cooperative relationship." *GeoDecisions, 2010 U.S. Dist. LEXIS 128283, 2010 WL 5014514 at *5*. The court further found that "both DTS and GeoDecisions had a legitimate business interest in including the no-hire provision in the Agreement" as it protected the parties' confidential information and prevented the poaching of employees who had specialized knowledge. *Id.* Additionally, the court found the agreement was supported by adequate consideration and was reasonably limited in geographic scope and duration. *2010 U.S. Dist. LEXIS 128283, [WL] at *6*.

With respect to the non-parties who were affected by the no-hire provision, the court noted:

> [T]here is no evidence of record to suggest that these employees were aware that DTS was in breach of contract by extending employment offers to them. Indeed they unwittingly placed themselves at the center of this dispute **[**26]** because neither party disclosed to them even the existence of the Agreement now at issue. However, . . . parties cannot **[*930]** avoid their contractual obligations by asserting a claim of hardship on behalf of a non-party.

*2010 U.S. Dist. LEXIS 128283, [WL] at *10*. The court therefore concluded that no-hire provision was not unreasonable. *2010 U.S. Dist. LEXIS 128283, [WL] at *7*.

III.

Against this background, we turn to the arguments of the parties, beginning with PLS, which relies on *Krauss v. M.L. Claster & Sons, Inc., 434 Pa. 403, 254 A.2d 1 (Pa. 1969)*, for the proposition that "arm's-length contracts between sophisticated entities are presumptively enforceable and will not be readily ignored by the courts."

Appellant's Brief at 24. Here, the record reflects that PLS and Beemac are sophisticated parties who negotiated a mutually beneficial arm's-length agreement resulting in revenue of $561,538.13 for Beemac in the last year of the contract. *Id.* at 25. PLS asserts that it "has a legitimate business interest in protecting its employee assets [from] poaching by its business partners." *Id.* Accordingly, PLS maintains that by voiding the no-hire provision, "the Superior Court disregarded Pennsylvania public policy which counseled it to enforce the terms of the agreement that these parties who were on a level playing field negotiated in good faith and entered **[**27]** at arm's length." *Id.*

PLS explains the purpose of Section 14.6 of the Contract as follows:

> A no-hire provision is aimed at a specific carrier in PLS's logistics chain; its intent is to disincentivize the carrier from poaching that which PLS values and needs most - its employees, who by virtue of PLS's involvement in training them, develop the specialized knowledge and expertise that makes them so attractive to one who might be inclined to transact business directly with a shipper. The tool that safeguards PLS's vital and legitimate interest in protecting it from those in the logistics chain who would steal its business model by poaching its employees is a no-hire provision.

Id. at 32-33.

HN1[] PLS recognizes that courts may declare a term in a contract unenforceable as a violation of public policy. As this Court has stated:

> Generally, a clear and unambiguous contract provision must be given its plain meaning unless to do so would be contrary to a clearly expressed public policy. When examining whether a contract violates public policy, this Court is mindful that public policy is more than a vague goal which may be used to circumvent the plain meaning of the contract.
>
> . . .
>
> It is only when a given policy is so obviously **[**28]** for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring [that the contract is against public policy].

Eichelman v Nationwide Ins. Co., 551 Pa. 558, 711 A.2d 1006, 1008 (Pa. 1998) (citations omitted).

PLS argues that the Superior Court "did not have the authority to impose its view of preferred business practices by declaring no-hire provisions, including Section 14.6, unenforceable as a matter of law in the absence of an established public policy rationale." Appellant's Brief at 27.

PLS views Section 14.6 as a promise made by Beemac to PLS, for valuable consideration, "to forego hiring certain persons who were not parties to the Contract." *Id.* at 28. It argues that the Superior Court erred by focusing on the interests of these non-parties who are only precluded from working for Beemac and are not barred from employment with any other entity in the trucking/logistics field.

HN2[] **[*931]** Covenants not to compete between employers and employees, which have the effect of limiting employment opportunities for employees, are enforceable provided they meet certain requirements. *See Rullex Co., LLC v. Tel-Stream, Inc., 232 A.3d 620, 2020 WL 3244343 (Pa. 2020)*; *Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 136 A.2d 838 (Pa. 1957)*. Accordingly, PLS maintains the "Superior **[**29]** Court's conclusion that all no-hire clauses are *per se* violations of public policy because of their limiting effect on the further employment opportunities of the contracting party's employees is incongruent with established Pennsylvania law." Appellant's Brief at 33.

PLS further argues that the weight of authority from other courts supports the enforcement of reasonable no-hire provisions that are incidental to commercial agreements between business entities. Significantly, in *GeoDecisions*, the court concluded that a no-hire provision comparable to Section 14.6 served the legitimate business interests of protecting confidential information and "preventing the poaching of staff who possess DTS's and GeoDecisions's 'know-how.'" *GeoDecisions, 2010 U.S. Dist. LEXIS 128283, 2010 WL 5014514 at *5*. Furthermore, the court determined the agreement was supported by adequate consideration and the scope and duration of the no-hire provision were reasonable. *Id.* at 6-7.

PLS also cites to the decision of the Illinois Supreme Court in *H & M*, where the court held the no-hire provision was necessary for the employer, "as it protects its sole business asset, its drivers, from being hired away by its customers. If customers could hire H & M's drivers on a permanent basis, then they would **[**30]** no longer need H & M's services." *H & M, 805 N.E.2d at 1184*.

In addition, PLS relies on *Therapy Services*, where the Virginia Supreme Court held that in the absence of a no-hire provision, the plaintiff "would become an involuntary and unpaid employment agency" for its customers. *Therapy Servs., 389 S.E.2d at 712*.

Along with criticizing the Superior Court for not following *GeoDecisions, H & M, and Therapy Services*, PLS takes issue with the cases from other jurisdictions that the Superior Court relied upon when declaring the no-hire provision unenforceable. It notes that *Heyde*, "involved the interplay of the no-hire clauses and Wisconsin's statutory regimen governing employee non-competition agreements. In Wisconsin, non-competition agreements are governed by statute and are strictly construed." Appellant's Brief at 38. Moreover, while the employer did not require its employees to sign a non-competition agreement, one employee testified she, "specifically asked [employer] whether she would be bound by a non-compete agreement and was told that she would not be bound by such restrictions." *Heyde, 654 N.W.2d at 836*. Arguing that the employer in *Heyde* actively deceived an employee, and that non-compete agreements in Wisconsin are regulated by statute while they are prima **[**31]** facie enforceable in Pennsylvania, PLS maintains that the Superior Court's reliance on *Heyde* was misplaced.

PLS further asserts that the Superior Court erred in relying on *VL Systems*, arguing that the decision was not a per se rejection of no-hire provisions but rather was fact-specific. Appellant's Brief at 40. In *VL Systems*, the California Court of Appeal held that where an employee was hired by a consulting firm after the firm had completed its contract with a customer, the employee was not subject to the 12-month no-hire restriction in the consulting firm/customer contract. The court recognized, "[t]his is not a case where the happy client of a consulting firm attempts to poach an employee." *VL Systems, 152 Cal. App. 4th at 715*. In **[*932]** contrast, PLS notes that the employees hired by Beemac "were specifically targeted because of their experience and expertise at PLS, and they now specifically perform those same services for Beemac." Appellant's Brief at 40.

PLS argues that the cases relied upon by the Superior Court in support of its conclusions are distinguishable, and that "cases enforcing no-hire provisions are not only based on sound jurisprudential grounds, but are properly appreciative of the economic context and **[**32]** business realities that lead intermediary companies, like PLS, to find them necessary to further their business interests." *Id.* at 41.

In contrast, Beemac suggests that the Superior Court correctly applied Pennsylvania law regarding restraints of trade in holding that the no-hire provision violates public policy. It argues that PLS, "fails to explain why a company, already in a superior bargaining position when hiring and negotiating with employees, should be free to contract away the rights of its employees by way of contracts to which they are not parties and for which they receive no consideration." Appellee's Brief at 21.

HN3[] As recognized by this Court, this Commonwealth has a "long history of disfavoring restrictive covenants." *Socko v. Mid-Atlantic Sys. of CPA, Inc., 633 Pa. 555, 126 A.3d 1266, 1268 (Pa. 2015)*. "While generally disfavored, Pennsylvania law, however, has recognized the validity and enforceability of covenants not to compete in an employment agreement, assuming adherence to certain requirements." *Id.*

> Consistent with this legal background, currently in Pennsylvania, restrictive covenants are enforceable only if they are: (1) ancillary to an employment relationship between an employee and an employer; (2) supported by adequate consideration; (3) the restrictions **[**33]** are reasonably limited in duration and geographic extent; and (4) the restrictions are designed to protect the legitimate interests of the employer.

Id. (citations omitted).

The only other situation in which this Court has approved a provision in restraint of trade is where it is part of a contract for the sale of a business. *Id.* (citing *Morgan's, 136 A.2d at 845*). Because the no-hire provision of Section 14.6 is not ancillary to an employment relationship or the sale of a business, Beemac asserts it is presumptively void. Appellee's Brief, at 24.

HN4[] Turning to the question of public policy, this Court has held that "avoidance of contract terms on public policy grounds requires a showing of overriding public policy from legal precedents, governmental practice, or obvious ethical or moral standards." *Tayar v. Camelback Ski Corp., 616 Pa. 385, 47 A.3d 1190, 1199 (Pa. 2012)* (citation omitted). Beemac notes that because the instant matter presents an issue of first impression regarding no-hire contracts, reliance on Pennsylvania precedent is not possible. However, it avers that "governmental practice, ethical and moral standards, and persuasive decision[s] of other jurisdictions all weigh against the enforcement of no-hire restrictions." Appellee's Brief at 28.

With respect to governmental practice, **[**34]** Beemac states that recently the Department of Justice (DOJ) has taken a strong stand against no-hire restrictions. It notes that the U.S. District Court for the Western District of Pennsylvania relied on a statement of interest filed by the DOJ in determining that the plaintiffs had sufficiently alleged that the no-poach agreements were a per se violation of antitrust laws. *See In re Ry. Indus. Employee No-Poach Antitrust Litig., 395 F.Supp.3d 464, 485 (W.D. Pa. 2019)* (The court's decision . . . is supported by the government's explanation . . . that the federal agencies charged with enforcing the antitrust laws **[*933]** consider naked no-poach agreements per se violations of the Sherman Act[4] and the DOJ will proceed criminally against those who enter into those kinds of agreements.").

Beemac further notes that the DOJ submitted a similar statement of interest in *Seaman v. Duke University, No. 1:15-CV-462, 2019 U.S. Dist. LEXIS 163811, 2019 WL 4674758 (M.D.N.C. Sept. 25, 2019)*, where it was alleged that "Duke had entered into an unlawful agreement with the University of North Carolina to prevent lateral hiring of certain medical employees." *2019 U.S. Dist. LEXIS 163811, [WL] at *1*. The case ended in a settlement that "requires Duke to pay $54,500,000 and will also result in significant injunctive relief." *Id.*

Amicus curiae Josh Shapiro, Attorney General of the Commonwealth, has filed a brief **[**35]** which, *inter alia*, supports Beemac's assertion that along with the DOJ, several state attorneys general have actively focused on no-hire restrictions. In 2019, the Attorneys General of Pennsylvania and Massachusetts led a 14-state settlement with four national franchisors "to cease using 'no-poach' agreements that restrict the rights of fast food workers to move from one franchisor to another within the same restaurant chain."[5] *Amicus* Brief, at 13-14. In 2020, the Attorneys General reached a settlement with three additional national franchisors.[6]

Beemac further argues that governmental rejection of no-hire restraints "is firmly rooted in long-established ethical and moral standards." *Id.* at 32. ***HN5***[] Almost a century ago, the United States Supreme Court stated, "freedom in the making of contracts of personal employment . . . is an elementary part of the rights of personal liberty[.]" *Prudential Ins. Co. of Am. v. Cheek, 259 U.S. 530, 536, 42 S. Ct. 516, 66 L. Ed. 1044 (1922)*. This Court has held, "our Commonwealth has a long, and virtually uniform, history of strongly disfavoring covenants in restraint of trade." *Socko, 126 A.3d at 1277*. While there are **[**36]** limited circumstances where an employment agreement containing a restrictive covenant may be enforced, "consideration is crucial." *Id. at 1274*. This is so because employees must receive a meaningful benefit in exchange for a restriction on their rights to seek employment in

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[4] *Section 1* of The Sherman Act provides, in relevant part, "Every contract . . . in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal." *15 U.S.C. § 1*.

[5] Press Release, *AG Shapiro Secures Win for Workers as Four Fast Food Chains Agree to End Use of No-Poach Agreements* (March 12, 2019), https://www.attorneygeneral.gov/taking-action/press-releases/ag-shapiro-secures-win-for-workers-as-four-fast-food-chains-agree-to-end-use-of-no-poach-agreements/ (last accessed August 6, 2020).

[6] Press Release, *Three Fast Food Chains Agree to End Use of No-Poach Agreements* (March 2, 2020), https://www.mass.gov/news/three-fast-food-chains-agree-to-end-use-of-no-poach-agreements (last accessed August 6, 2020).

their chosen fields. "No-hire restrictions, however, impose a restraint, without a corresponding benefit, which is adverse to the ethical and moral standards underpinning the limited circumstances in which restraints of trade may be enforced." Appellee's Brief at 33.

Beemac also asserts that the Superior Court properly relied on decisions from other jurisdictions when refusing to enforce Section 14.6. It notes that in *Heyde*, the Wisconsin Supreme Court struck down the provision precluding a nursing home from hiring or soliciting any Greenbriar employee during the term of employment and for one year after. The court noted the no-hire provision was oppressive to the employees because they had no knowledge of it, and received no consideration for the restraint on their right to make choices about their own employment. *Heyde, 654 N.W.2d at 836*.

[*934] Beemac argues that PLS's attempt to distinguish *Heyde* because it relied on a Wisconsin statute prohibiting restrictive covenants **[**37]** in employment agreements unless they are reasonably necessary for the protection of the employer is unavailing. ***HN6***[] While no Pennsylvania statute applies to contractual restraints, case law makes clear that restrictive covenants are permitted only if they meet specific requirements including protection of "the legitimate interests of the employer." *Socko, 126 A.3d at 1274*.

Beemac also takes PLS to task for asserting that *Heyde* is distinguishable because one of the employees hired by Dove testified that when she asked Greenbriar whether she would be bound by a non-compete agreement, she was told she would not be subject to such restriction. The holding of *Heyde* is not based on the alleged deception of the employer. Rather, it was but one of several factors that led the court to conclude that the no-hire provision was unenforceable.

Along with endorsing the Superior Court's reliance on *Haire* and *VLS Systems*, Beemac criticizes the decisions from other jurisdictions cited by PLS upholding no-hire provisions. It notes that in *H & M, Therapy Services*, and *GeoDecisions*, "the courts rejected the fundamental notion that no-hire restrictions directly and substantially impact non-party employees and, instead, viewed the **[**38]** restrictions as having no material impact on employees." Appellee's Brief at 40. It further asserts these decisions fail to give due weight to the absence of consideration.

In particular, it asserts that the *GeoDecisions* court erroneously concluded that Pennsylvania courts have liberally construed the ancillary rule to enforce restraints of trade outside the employment and buy-sell contexts. *GeoDecisions, 2010 U.S. Dist. LEXIS 128283, 2010 WL 5014514*. Beemac notes that *GeoDecisions*' reliance on *Piercing Pagoda* for this proposition is misplaced because in that case we held a covenant not to compete in a franchise agreement is analogous to one in an employment contract. *Piercing Pagoda, 351 A.2d at 212*. Furthermore, in *Ala. Binder*, this Court examined a restrictive covenant in an employment agreement made in conjunction with a buy-sell agreement. *Ala. Binder, 189 A.2d at 184*. Accordingly, Beemac argues that Pennsylvania case law does not support the district court's conclusion in *GeoDecisions* that we liberally construe the ancillary rule beyond the employment or buy-sell contracts. Appellee's Brief at 45.

IV.

HN7[] Our review of a trial court's order granting or denying preliminary injunctive relief is "highly deferential." *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 573 Pa. 637, 828 A.2d 995, 1000 (Pa. 2003)*. Accordingly, we "examine the record to determine if there were any apparently reasonable **[**39]** grounds for the action of the court below." *Id.* In denying the injunction, the trial court relied on its conclusion that PLS did not establish a substantial likelihood of success on the merits. ***HN8***[] "We will find that a trial court had apparently reasonable grounds for its denial of injunctive relief where the trial court has properly found that any one of the . . . essential prerequisites for a preliminary injunction is not satisfied." *Warehime v. Warehime, 580 Pa. 201, 860 A.2d 41, 46 (Pa. 2004)* (citation and quotations omitted).[7]

[7] The six essential prerequisites are: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from refusing an injunction than from granting it; (3) the injunction will restore the parties to their status as it was immediately before the alleged wrongful conduct; (4) the activity sought

HN9[] "In assessing whether the common pleas court acted properly, we review **[*935]** its factual findings deferentially while resolving issues of law *de novo*. In this latter regard, we will interfere with the court's decision only where the rule of law relied upon was palpably erroneous or misapplied." *Rullex, 232 A.3d 620, 2020 WL 3244343 at *4* (citations and quotations omitted).

HN10[] Pennsylvania common law has treated restrictive covenants as restraints on trade that are void as against public policy unless they are ancillary to an otherwise valid contract. *Socko, 126 A.3d at 1277* ("[O]ur Commonwealth has a long, and virtually uniform, history of strongly disfavoring covenants in restraint of trade."); *Morgan's, 136 A.2d at 843* ("It has long been the rule at common law, that contracts in restraint of trade made independently **[**40]** of a sale of business or contract of employment are void as against public policy regardless of the valuableness of the consideration exchanged therein."). To determine the enforceability of a provision in restraint of trade that is ancillary, or supplementary, to the principal purpose of a contract, we employ a balancing test to determine the reasonableness of the restraint in light of the parties' interests that the restraint aims to protect and the harm to other contractual parties and the public. *See Hess v. Gebhard & Co. Inc., 570 Pa. 148, 808 A.2d 912, 917-18* (discussing the development of the balancing test); *see also GeoDecisions, 2010 U.S. Dist. LEXIS 128283, 2010 WL 5014514 at *4*. As part of this balancing test, courts also consider the reasonableness of the restraint's geographical scope as well as its duration of time. *See Socko, 126 A.3d at 1274*. Similarly, the Restatement (Second) of Contracts delineates the following test, identified as "the rule of reason," for evaluating the reasonableness of ancillary restraints on competition:

> (1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if
>
> > (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or
> >
> > (b) the promisee's need **[**41]** is outweighed by the hardship to the promisor and the likely injury to the public.

RESTATEMENT (SECOND) OF CONTRACTS § 188(1). Further, this Court has explained that the reasonableness test is more stringent when examining restrictive covenants ancillary to an employment agreement than when evaluating restrictive covenants ancillary to the sale of a business. *Hayes v. Altman, 438 Pa. 451, 266 A.2d 269, 271 (Pa. 1970)*.

While the enforceability of a no-hire provision ancillary to a services contract between two businesses is an issue of first impression for this Court, we will apply the foregoing reasonableness test that applies to ancillary restraints on trade.[8] Here, the no-hire provision was ancillary **[*936]** to the principal purpose of the shipping contract between PLS and Beemac. The no-hire provision is a restraint on trade because the two commercial entities agreed to limit competition in the labor market by promising to restrict the employment mobility of PLS employees. *See RESTATEMENT (SECOND) OF CONTRACTS § 186(2)* ("A promise is in restraint of trade if its performance would limit competition in any business"). PLS had a legitimate interest in preventing its business partners from poaching its employees, who had developed specialized knowledge and expertise in the logistics industry during their training at PLS. *See* PLS's Brief **[**42]** at 25, 32; *Morgan's, 136 A.2d at 846* (recognizing an employer has an interest in preventing its employees from using their specialized knowledge and skills in competition with the employer).

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to be restrained is actionable, the right to relief is manifest, and the moving party must show it is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) a preliminary injunction will not harm the public interest. *Warehime, 860 A.2d at 46-47*.

[8] This is consistent with the United States Department of Justice's (DOJ) approach to enforcing federal ***antitrust law***. In 2016, the DOJ and Federal Trade Commission (FTC) issued guidance for human resources professionals explaining that non-ancillary no-poaching agreements between employers—short-handed as "naked" no-poach agreements—are per se illegal. DOJ/FTC Antitrust Guidance for HR Professionals (Oct. 2016), at 3, https://www.justice.gov/atr/file/903511/download. In contrast, the DOJ advised that legitimate joint ventures are not per se illegal and has advocated for the rule of reason to apply to ancillary restraints on trade. *Id.; see also* DOJ Antitrust Division Update, No-Poach Approach, 9/30/19, https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach (discussing the statement of interest the DOJ filed in cases involving no-poach agreements in fast food franchises).

However, the no-hire provision is both greater than needed to protect PLS's interest and creates a probability of harm to the public. It is overbroad because it precludes Beemac, and any of its agents or independent contractors, from hiring, soliciting, or inducing any PLS employee or affiliate for the one-year term of the contract plus two years after the contract ends. The no-hire provision precluded Beemac from hiring or soliciting all PLS employees, regardless of whether the PLS employees had worked with Beemac during the term of the contract. As the Superior Court noted, "[b]y the plain reading of the language of this restrictive provision, it was meant to have effect in the broadest possible terms." *Pittsburgh Logistics Sys., 202 A.3d at 808*.

Further, the no-hire provision creates a likelihood of harm to the public, *i.e.*, non-parties to the contract. The no-hire provision impairs the employment opportunities and job mobility of PLS employees, who are not parties to the contract, without their knowledge or consent and without providing consideration **[**43]** in exchange for this impairment. Further, the injury to PLS employees is not hypothetical. In this case, PLS enforced the no-hire provision by seeking to enjoin Beemac from employing the former PLS employees who had already left PLS and obtained employment with Beemac. If PLS was successful, the effect of its enforcement of the no-hire provision would have deprived its former employees of their current jobs and livelihoods.[9] Moreover, the no-hire provision undermines free competition in the labor market in the shipping and logistics industry, which creates a likelihood of harm to the general public. *See, e.g.*, Donald J. Polden, *Restraints on Workers' Wages and Mobility: No-Poach Agreements and the Antitrust Laws*, *59 SANTA CLARA L. REV. 579, 610* ("[T]he high percentage of U.S. workers who are subject to agreements and covenants restricting their employment opportunities are contributing to slow wage growth and rising inequality. For example, recent studies have demonstrated that worker wages are 4%-5% higher in states that do not recognize or enforce worker non-compete restraints.") (footnotes omitted). Balancing PLS's interest against the overbreadth of the no-hire provision and the likelihood of harm to the public, **[**44]** we conclude that the no-hire provision is unreasonably in restraint of trade and therefore unenforceable.

[*937] Accordingly, the order of the Superior Court is affirmed.

Chief Justice Baer and Justices Saylor, Todd, Donohue, Dougherty and Wecht join the opinion.

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[9] On December 1, 2016, the trial court granted injunctive relief precluding Beemac from employing the former PLS employees. The injunction remained in effect for three weeks, until the trial court vacated it on December 22, 2016.

AngioDynamics, Inc. v. C.R. Bard, Inc.

United States District Court for the Northern District of New York

May 5, 2021, Decided; May 5, 2021, Filed

1:17-cv-00598 (BKS/CFH)

Reporter

537 F. Supp. 3d 273 *; 2021 U.S. Dist. LEXIS 85578 **; 115 Fed. R. Evid. Serv. (Callaghan) 593; 2021 WL 1792394

ANGIODYNAMICS, INC., Plaintiff, v. C.R. BARD, INC. and BARD ACCESS SYSTEMS, INC., Defendants.

Prior History: *AngioDynamics, Inc. v. C.R. Bard, Inc., 2018 U.S. Dist. LEXIS 131206, 2018 WL 3730165 (N.D.N.Y., Aug. 6, 2018)*

Core Terms

Bard, customers, stylet, BioFlo, sales, Clinic, standalone, technology, products, competitors, benchmark, antitrust, damages, email, purchasing, navigation, estimate, patient, selling, argues, confirm, preloaded, coercion, factors, reasons, causation, pricing, pair, market power, tip

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

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

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

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

HN1[] **Summary Judgment, Burdens of Proof**

Under Fed. R. Civ. P. 56(a), summary judgment may be granted only if all the submissions taken together show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. A fact is material if it might affect the outcome of the suit under the governing law, and is genuinely in dispute if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. The movant may meet the burden by showing that the nonmoving party has failed to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

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

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

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

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

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

HN2[] **Entitlement as Matter of Law, Appropriateness**

If a party moving for summary judgment meets his burden, the nonmoving party must set out specific facts showing a genuine issue for trial. When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant. Still, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts, and cannot rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. Furthermore, mere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist.

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

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

HN3[] **Entitlement as Matter of Law, Appropriateness**

When considering cross-motions for summary judgment, a court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration. In the context of antitrust cases, summary judgment is particularly favored because of the concern that protracted litigation will chill pro-competitive market forces. Although all reasonable inferences will be drawn in favor of the non-movant, those inferences must be reasonable in light of competing inferences of acceptable conduct.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN4[] **Sherman Act, Claims**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different, or tied, product, or at least agrees that he will not purchase that product from any other supplier. To state a tying claim under the Sherman Act, a plaintiff must prove that: (1) the sale of one product, the tying product, is conditioned on the purchase of a separate product, the tied product; (2) the seller uses actual coercion to force buyers to purchase the tied product; (3) the seller has sufficient economic power in the tying product market to coerce purchasers into buying the tied product; (4) the tie-in has anticompetitive effects in the tied market; and (5) a not insubstantial amount of interstate commerce is involved in the tied market.

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

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

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

HN5[] **Scope, Monopolization Offenses**

The separate product element requires that the alleged tying product and tied product be separate, i.e., they must exist in separate and distinct product markets. That is because if there is no separate market for the allegedly tied product, there can be no fear of leveraging a monopoly in one market to harm competition in a second market. Courts apply a consumer demand test to determine whether two products are separate for ***antitrust law*** purposes. Two products are separate only if there is a sufficient demand for the purchase of the tied product separate from the tying product to identify a distinct product market in which it is efficient to offer the former separately from the latter. Separateness turns not on the functional relation between the products, but rather on the character of the demand for the two items. Factors relevant to whether there is separate and distinct consumer demand for the two products include, among others, the history of the products being, or not being, sold separately and the sale of the products separately in similar markets.

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

HN6[] **Tying Arrangements, Sherman Act Violations**

Actual coercion by a seller that in fact forces a buyer to purchase a tied product is an indispensable element of a tying violation. Indeed, the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such forcing is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated. The element of actual coercion is designed to weed out the many cases where the bundling of separate products is due to consumer demand. A seller's use of strong persuasion, encouragement, or cajolery to the point of obnoxiousness to induce a buyer to buy its full line of products does not amount to actual coercion, which is present only if the seller goes beyond persuasion and conditions its buyer's purchase of one product on the purchase of another product.

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

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

HN7[] **Tying Arrangements, Per Se Rule**

An unremitting policy of tie-in, if accompanied by sufficient market power in the tying product to appreciably restrain competition in the market for the tied product, constitutes the requisite coercion given foreclosure of a not insubstantial volume of interstate commerce. Thus, when a seller has a policy of never offering a tying product separately from a tied product, allegations of individual coercion are unnecessary.

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

HN8[] **Tying Arrangements, Sherman Act Violations**

Under Hill, an unremitting policy of a tie only transforms into actual coercion where the defendant has sufficient market power such that its policy can appreciably restrain competition in the market for the tied product and foreclose a not insubstantial volume of interstate commerce.

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

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

HN9[] **Actual Monopolization, Monopoly Power**

An unremitting policy of a tie constitutes actual coercion if, and only if, the other elements of a tying claim, market power, separate products, and the foreclosure of a not insubstantial amount of commerce, are met. Therefore, if a plaintiff proves that a defendant has an unremitting policy of a tie that applies to all customers, the plaintiff need not present proof of individualized coercion, but must still prove the other elements of its tying claim in order to establish that the unremitting policy in itself constitutes actual coercion.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

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

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

HN10[] **Robinson-Patman Act, Claims**

Without market power, there is little risk of anticompetitive harm from a seller's tie-in. Market power is the ability of a single seller to raise price and restrict output. It can be shown by specific evidence of a seller's ability to control prices or exclude competitors from the market. Market share is a proxy for market power. A high market share alone, however, is insufficient to infer a seller's market power if other characteristics of the product market, such as low barriers to entry, high cross elasticity of demand, or technological developments in the industry, interfere with the seller's control of prices. Indeed, in a tying case, the best way to plead market power is to allege facts that, if proven, establish directly that the price of the tied package is higher than the price of components sold in competitive markets.

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

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

HN11[] **Per Se Rule & Rule of Reason, Sherman Act**

There must be a substantial potential for impact on competition in the tied market in order to justify condemnation of an alleged tying arrangement. If only a single purchaser were forced with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of ***antitrust law***. "Substantial" in this context is defined as substantial enough in terms of dollar-volume so as not to be merely de minimis. There is no magic number that definitively establishes whether a plaintiff has foreclosed a not insubstantial amount of potential sales for the tied product.

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

HN12[] Tying Arrangements, Sherman Act Violations

For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of the total accounted for by the particular plaintiff who brings suit.

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

Evidence > Burdens of Proof > Allocation

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

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

HN13[] Per Se Rule Tests, Manifestly Anticompetitive Effects

To prove anticompetitive effects, a plaintiff must prove that the defendants' challenged behavior had an actual adverse effect on competition as a whole in the tied product market. Anti-competitive effects may be proven directly by control of prices or exclusion of competition. If plaintiffs establish anticompetitive effects, the burden shifts to defendants to justify their tying arrangement. Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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

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

HN14[] Sherman Act, Claims

Antitrust injury simply means injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. To establish antitrust injury, a private litigant must prove injury in its business or property by reason of the violation and that the violation was at least a material cause of the plaintiff's injury. In other words, a plaintiff must show (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the antitrust statute. The antitrust injury requirement thus ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN15[] Summary Judgment, Evidentiary Considerations

A court may only consider admissible evidence in ruling on a motion for summary judgment. At the same time, material relied on at summary judgment need not be admissible in the form presented to the district court. Rather, so long as the evidence in question will be presented in admissible form at trial, it may be considered on summary judgment. Thus, under Fed. R. Civ. P. 56(c)(2), a party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

Evidence > ... > Exemptions > Statements by Coconspirators > Members of Conspiracy

HN16[] Statements by Coconspirators, Members of Conspiracy

Under Fed. R. Evid. 803(3), statements of a customer as to his reasons for not dealing with a supplier are admissible for the limited purpose of demonstrating the customer's motive, although not as evidence of the facts recited as furnishing the motives.

Evidence > ... > Statements as Evidence > Hearsay > Hearsay Within Hearsay

HN17[] Hearsay, Hearsay Within Hearsay

Each hearsay statement within multiple hearsay statements must have a hearsay exception in order to be admissible.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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

HN18[] Remedies, Damages

To establish antitrust injury, there must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a material cause of or a substantial factor in the occurrence of damage. The fact of injury must be demonstrated with reasonable certainty and may not be speculative, and failure to satisfactorily prove that a plaintiff is injured by reason of the defendant's alleged antitrust violations is sufficient to defeat the antitrust claims.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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

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

HN19[] Remedies, Damages

While antitrust plaintiffs are entitled to a relaxed standard of proof with respect to the amount of damages they suffered as a result of a defendant's conduct, the relaxed standard of proof applies to the amount of damages, not to whether the violation caused damage. That said, the amount of harm a plaintiff needs to prove to meet its burden of demonstrating antitrust injury is not high; rather, a plaintiff need only demonstrate proof of some damage flowing from the unlawful conduct; inquiry beyond that minimum point goes only to the amount and not the fact of damage. Despite the relatively low burden, relevant decisions suggest that a trivial effect on a claimant's sales is insufficient to demonstrate antitrust injury.

Antitrust & Trade Law > Procedural Matters

HN20[] **Antitrust & Trade Law, Procedural Matters**

An antitrust plaintiff need not necessarily prove that the defendant's misconduct was the sole cause of the plaintiff's alleged injury, and a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN21[] **Sherman Act, Claims**

In addition to establishing injury-in-fact and causation, to establish antitrust injury, an antitrust plaintiff must prove that its injury is of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. Thus, allegations of an injury to a competitor are insufficient unless accompanied by allegations of injury to competition as well.

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

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

HN22[] **Standing, Requirements**

A competitor's exclusion from a market is a conventional form of antitrust injury because it is exactly the type of injury that antitrust laws were designed to prevent and flows from the competition-reducing aspect of defendant's conduct. Moreover, a competitor's loss of sales constitutes an injury of the sort protected by the antitrust laws if it stems from conduct that prevents potential customers from obtaining a desired product.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN23[] **Expert Witnesses, Daubert Standard**

Under Fed. R. Evid. 702, a court is charged with a gatekeeping obligation with respect to expert testimony: the trial judge must ensure that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN24[] Expert Witnesses, Qualifications

To determine whether a witness qualifies as an expert, courts compare the area in which the witness has superior knowledge, education, experience, or skill with the subject matter of the proffered testimony.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN25[] Expert Witnesses, Daubert Standard

Under Daubert, factors relevant to determining reliability include the theory's testability, the extent to which it has been subjected to peer review and publication, the extent to which a technique is subject to standards controlling the technique's operation, the known or potential rate of error, and the degree of acceptance within the relevant scientific community. The reliability inquiry is a flexible one, and the factors to be considered depend upon the particular circumstances of the particular case at issue. When applying the gatekeeping obligation to non-scientific testimony, a district court may choose to utilize some or all of the above Daubert factors, or it may look to other indicia of reliability. In undertaking the flexible inquiry, a district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN26[] Expert Witnesses, Daubert Standard

When an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, Daubert and Fed. R. Evid. 702 mandate the exclusion of that unreliable opinion testimony. In other words, a court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. Frequently, though, gaps or inconsistencies in the reasoning leading to an expert's opinion go to the weight of the evidence, not to its admissibility.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > ... > Examination > Cross-Examinations > Scope

Evidence > ... > Expert Witnesses > Credibility of Witnesses > Impeachment

HN27[] Expert Witnesses, Daubert Standard

Ultimately, a district court has the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination. Moreover, vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN28[] Remedies, Damages

The actual amount of an antitrust plaintiff's damages need not be proven to the same degree of certainty as proving some quantum of damages, given the difficulty of accurately constructing a hypothetical world untainted by the defendant's challenged conduct. The wrongdoer is not entitled to complain that the damages cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. Indeed, the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. Therefore, an antitrust plaintiff need only come forward with substantial evidence from which a jury can determine the amount of damages from a just and reasonable estimate of the damage based upon relevant data. At the same time, even where a defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Torts > Remedies > Damages > Proof

HN29[] **Remedies, Damages**

A more lenient standard in proving the amount of damages should only be applied where an antitrust plaintiff puts forth proof of the defendant's wrongful acts and their tending to injure plaintiffs' business, and from evidence in the decline of prices, profits and values, not shown to be attributable to other causes.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN30[] **Expert Witnesses, Daubert Standard**

Experts have wide latitude with respect to the data on which they rely, and challenges concerning the reliability of an expert's data often present questions of weight, rather than admissibility. Nonetheless, the general principle does not divest a court of its gatekeeping obligation to ensure that an expert's testimony is based on sufficient facts or data to pass muster under Fed. R. Evid. 702.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN31[] **Expert Witnesses, Daubert Standard**

An expert's lack of access to reliable data does not justify use of unreliable data, and militates against admission under Daubert.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN32[] **Remedies, Damages**

The general rule is that arguments regarding the comparability or appropriateness of a particular benchmark go to the weight, not the admissibility, of a benchmarking analysis. Moreover, a benchmark need not be perfectly comparable, so long as it allows the jury to calculate a reasonable estimate of damages as required under the antitrust laws. That is particularly true where a defendant's anticompetitive conduct has rendered selection of a perfectly comparable benchmark difficult or impossible. Nonetheless, there are some circumstances under which, even applying the foregoing liberal standard, a benchmarking analysis may be so utterly deficient as to warrant its exclusion. One such circumstance is where the expert did not merely select arguably inappropriate benchmarks, but utterly failed to perform any substantive analysis of those factors most relevant to comparability.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN33[] **Standing, Clayton Act**

Where there is insufficient proof of the amount of damages, proof of an antitrust violation and the fact of damage is a sufficient basis for an award of nominal damages under § 4 of the Clayton Act.

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

HN34[] **Standing, Requirements**

Typically, the inability to prove past damages does not compel a finding that the plaintiff faces no threat of antitrust injury in the future, and thus a plaintiff that fails to prove past damages may still pursue a claim for forward-looking injunctive relief. However, in certain situations, the lack of past injury may indicate that future injury is improbable.

Counsel: **[**1]** For Plaintiff: Philip J. Iovieno, Nicholas A. Gravante, Jr., Mark A. Singer, Cadwalader, Wickersham & Taft LLP, New York, NY; Adam R. Shaw, Anne M. Nardacci, Boies Schiller Flexner LLP, Albany, NY.

For Defendants: Andrew J. Frackman, Edward N. Moss, O'Melveny & Myers LLP, New York, NY; James P. Nonkes, Philip G. Spellane, Harris Beach PLLC, Pittsford, NY.

Judges: Hon. Brenda K. Sannes, United States District Judge.

Opinion by: Brenda K. Sannes

Opinion

[*283] MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff AngioDynamics, Inc. ("AngioDynamics") brings this antitrust action against Defendants C.R. Bard, Inc. and Bard Access Systems, Inc. (collectively, "Bard"), asserting a claim of illegal tying in violation of *section 1 of the Sherman Act* (codified at *15 U.S.C. § 1*) under "per se" and "rule of reason" theories of liability. (Dkt. No. 1). AngioDynamics seeks treble damages, a permanent injunction, and declaratory relief. (*Id.* at 29). Presently before the Court are: (1) AngioDynamics' motion for partial summary judgment on liability and antitrust injury, (Dkt. No. 134); (2) Bard's motion for summary judgment seeking dismissal of the complaint, (Dkt. No. 133); and (3) Bard's motion in limine to preclude the trial testimony of AngioDynamics' causation **[**2]** and damages expert, Dr. Alan Frankel, (Dkt. No. 132). The Court heard oral argument on the motions on April 6, 2021. For the reasons below, both parties' motions for summary judgment are denied, and Bard's motion in limine is granted.

II. FACTS [1]

This case centers on AngioDynamics' claim that Bard's policy of only selling the proprietary stylet for its Tip Location System ("TLS") preloaded into its own peripherally inserted central catheters ("PICCs"), and refusing to sell its TLS stylet separately for use with its competitors' PICCs, constitutes an illegal tie in violation of the Sherman Act. The facts and evidence relevant to the Court's resolution of the pending motions are summarized below.

[*284] A. Background on PICCs and TLSs

1. PICC and TLS Technology

Bard and AngioDynamics compete to develop, manufacture, market, and sell vascular access medical devices, including PICCs, to hospitals and other medical care providers. (Dkt. No. 133-2, ¶¶ 1-2; Dkt. No. 134-2, ¶ 1; Dkt. No. 144-1, ¶¶ 1-2; Dkt. No. 146, ¶ 1). PICCs are long, thin, soft, flexible catheters inserted into the body through a vein, most commonly the basilica vein in the upper arm, and navigated to the distal superior vena cava, **[**3]** the large vein leading to the right atrium of the heart. (Dkt. No. 133-2, ¶¶ 3-4; Dkt. No. 134-2, ¶ 2; Dkt. No. 144-1, ¶¶ 3-4; Dkt. No. 146, ¶ 2). Clinicians use PICCs to deliver medications, fluids, and nutrients into a patient's body, sample blood, and power-inject contrast media. (Dkt. No. 133-2, ¶ 3; Dkt. No. 134-2, ¶ 3; Dkt. No. 144-1, ¶ 3; Dkt. No. 146, ¶ 3). PICCs are generally suited for patients requiring long-term intravenous medical treatment. (Dkt. No. 134-2, ¶ 3; Dkt. No. 146, ¶ 3). PICCs can be placed either at a patient's bedside by a nurse or in an interventional radiology ("IR") suite, usually by a physician. (Dkt. No. 134-2, ¶ 14; Dkt. No. 146, ¶ 14).

During placement of a PICC, clinicians often use a guidewire (also known as a "stylet") inside the PICC to stiffen it so that it can be threaded through the patient's veins. (Dkt. No. 133-2, ¶ 5; Dkt. No. 144-1, ¶ 5). After completing the PICC placement procedure, the clinician will remove the stylet from the PICC and discard it. (Dkt. No. 133-2, ¶ 5; Dkt. No. 144-1, ¶ 5). Because there are several places where a patient's veins branch before reaching the superior vena cava, clinicians sometimes route PICCs incorrectly. **[**4]** (Dkt. No. 133-2, ¶ 6; Dkt. No. 144-1, ¶ 6). In addition, sometimes clinicians get the final placement incorrect. (Dkt. No. 133-2, ¶ 7; Dkt. No. 144-1, ¶ 7). Historically, clinicians used a chest x-ray or fluoroscopy (a medical imaging technique that uses x-rays) to confirm that a PICCs' final placement was correct. (Dkt. No. 133-2, ¶¶ 7, 12; Dkt. No. 134-2, ¶ 10; Dkt. No. 144-1, ¶¶ 7, 12; Dkt. No. 146, ¶ 10).

To assist with the PICC navigation process and minimize the complications associated with incorrect PICC placement, certain companies developed TLSs. (Dkt. No. 133-2, ¶ 8; Dkt. No. 144-1, ¶ 8). TLSs can offer two key functions: pinpointing the location of the stylet as it moves through the body ("navigation") and confirming the PICC's location once it has been placed ("confirmation"). (Dkt. No. 133-2, ¶ 8; Dkt. No. 144-1, ¶ 8). A TLS may feature navigation functionality, confirmation functionality, or both. (Dkt. No. 133-2, ¶ 9; Dkt. No. 144-1, ¶ 9). Navigation technology uses magnetic tracking or Doppler technology to provide information regarding directionality of the PICC as it moves through the patient's veins, assisting clinicians in threading the PICC. (Dkt. No. 133-2, ¶ **[**5]** 10; Dkt. No. 134-2, ¶ 13; Dkt. No. 144-1, ¶ 10; Dkt. No. 146, ¶ 13). Confirmation technology enables a clinician to confirm the final location of the PICC within the superior vena cava using a patient's electrocardiographic ("ECG") waveform. (Dkt. No. 133-2, ¶ 11; Dkt. No. 134-2, ¶ 11; Dkt. No. 144-1, ¶ 11; Dkt. No. 146, ¶ 11).

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[1] The following facts are drawn from the parties' statements of undisputed material facts and responses pursuant to *Local Rule 56.1* (formerly *Local Rule 7.1(a)(3)*), (Dkt. Nos. 133-2, 134-2, 144-1, 146), to the extent those facts are well-supported by pinpoint citations to the record, as well as the exhibits attached thereto and cited therein to the extent they could "be presented in a form that would be admissible in evidence" at trial. *Fed. R. Civ. P. 56(c)(2)*. In considering the parties' cross-motions for summary judgment, the Court "in each case constru[es] the evidence in the light most favorable to the non-moving party." *Krauss v. Oxford Health Plans, Inc., 517 F.3d 614, 621-22 (2d Cir. 2008)*.

While many clinicians now use TLSs to place PICCs because doing so is less expensive, less time consuming, and more accurate than placing PICCs without TLSs, not all clinicians use TLSs. (Dkt. No. 133-2, ¶ 12; Dkt. No. 134-2, ¶ 10; Dkt. No. 144-1, ¶ 12; Dkt. No. 146, ¶ 10). For example, physicians placing PICCs in an IR suite still typically use fluoroscopy, rather than a TLS, to confirm PICC placement. (Dkt. No. 133-2, ¶ 12; Dkt. No. 134-2, ¶ 16; Dkt. No. 144-1, ¶ 12; Dkt. No. 146, ¶ 16). There are also some hospitals in **[*285]** which nurses continue to place PICCs without navigation assistance or use chest x-rays rather than TLSs for confirmation. (Dkt. No. 133-2, ¶ 12; Dkt. No. 134-2, ¶ 17; Dkt. No. 144-1, ¶ 12; Dkt. No. 146, ¶ 17). However, a majority of PICCs placed by nurses at a patient's bedside use TLSs with navigation capabilities. (Dkt. No. 133-2, ¶ 12; Dkt. **[**6]** No. 134-2, ¶ 17; Dkt. No. 144-1, ¶ 12; Dkt. No. 146, ¶ 17).

2. PICC Purchasing Decisions

PICCs differ from each other in a variety of ways, including with respect to the material they are made from, the number of lumens (tubes or channels), the outside diameter, whether the PICC is valved (which can help prevent the backflow of blood into the PICC) or non-valved, and whether the PICC is preloaded with a TLS stylet. (Dkt. No. 133-2, ¶ 13; Dkt. No. 144-1, ¶ 13). Manufacturers typically sell PICCs in a kit that also contains various accessories, which vary depending on, among other things, whether the PICC will be placed by a nurse at the patient's bedside or by a physician in an IR suite. (Dkt. No. 133-2, ¶¶ 14-15; Dkt. No. 144-1, ¶¶ 14-15).

The process by which hospitals decide whether to purchase a particular manufacturer's PICC is "complex," "not monolithic" and "varies by hospital." (Dkt. No. 133-2, ¶¶ 15-17; Dkt. No. 144-1, ¶¶ 15-17). Depending on the hospital, various constituencies may be involved in the purchasing decision, including doctors, nurses and representatives from the supply chain, risk management and infection control departments. (Dkt. No. 133-2, ¶ 15). In some cases, **[**7]** hospitals have "value analysis committees," or "VACs," which play a role in the procurement process and consist of representatives from various hospital departments. (*Id.*). Some hospitals are part of Group Purchasing Organizations ("GPOs") or Integrated Delivery Networks ("IDNs"), which negotiate pricing for their member hospitals and have played an increasingly larger role in influencing the purchasing decisions of their member hospitals. (Dkt. No. 133-2, ¶ 16).

Hospitals consider a variety of factors when deciding whether to purchase PICCs, or particular types of PICCs, from a given supplier, including, among other things, price, quality of the PICCs, clinical outcomes, safety, PICC functionality and features (including whether they are preloaded with a TLS stylet or not, whether they are valved or not, and whether they have a flare-tip or small diameter, among other factors), the components of the kit in which the PICCs come (or the potential kit options), the breadth of a manufacturer's product portfolio, the benefits of dealing with a single vendor for multiple products, the manufacturer's clinical team and training and customer support, and the requirements of GPO and IDN contracts. **[**8]** (Dkt. No. 133-2, ¶ 17). Different hospitals may weigh and prioritize these factors differently, depending on their particular needs and concerns. (Dkt. No. 144-1, ¶¶ 15-17).

B. Relevant Competitors and their Key Products

Several companies compete in the sale of PICCs. The three largest competitors, in terms of market share, are Bard, AngioDynamics, and Teleflex Incorporated ("Teleflex"). (Dkt. No. 133-2, ¶ 21; Dkt. No. 144-1, ¶ 21). These competitors' products that are most relevant to this litigation are described below.

1. AngioDynamics' BioFlo PICCs

In 2012, AngioDynamics began selling PICCs known as BioFlo PICCs after acquiring the technology from another company. (Dkt. No. 133-2, ¶ 33; Dkt. No. 144-1, ¶ 33). BioFlo PICCs are the first PICCs in the market to use Endexo Technology, a technology designed to reduce thrombus **[*286]** accumulation (blood clots). (Dkt. No. 134-2, ¶ 4; Dkt. No. 146, ¶ 6). Thrombus accumulation is a common problem associated with PICC placement that can lead to serious complications such as deep vein thrombosis ("DVT") and pulmonary embolism ("PE"). (Dkt. No. 134-2, ¶¶ 5-6; Dkt. No. 146, ¶¶ 5-6). The parties dispute whether the clinical evidence and published literature **[**9]** establishes that BioFlo is actually effective at reducing thrombus accumulation and its resulting complications, with both parties citing record evidence in support of their respective positions. (Dkt. No. 133-2, ¶¶ 34-36; Dkt. No. 134-2, ¶¶ 4, 7; Dkt. No. 144-1, ¶¶ 34-36; Dkt. No. 146, ¶¶ 4, 7).

Bard has spent significant time, money and energy working to develop a PICC with an anti-thrombus coating, including with Endexo Technology, but has been unsuccessful. (Dkt. No. 134-2, ¶ 8; Dkt. No. 146, ¶ 8). Bard claims, however, that its FT PICC, which has a taper with a smaller diameter at the axillary arch in the arm vein where the majority of DVTs occur, has proven effective at reducing DVT rates. (Dkt. No. 146, ¶ 8).

2. Bard's TLS

Bard sells PICCs under several brand names, has been selling PICCs for decades, and sells the majority of PICCs in the U.S. (Dkt. No. 133-2, ¶ 22; Dkt. No. 144-1, ¶ 22). In 2006, Bard became the first company to develop a TLS with navigation technology, which it called the Sherlock tip navigation system. (Dkt. No. 133-2, ¶ 24; Dkt. No. 144-1, ¶ 24). In 2011, Bard received FDA approval for a tip confirmation system called Sapiens. (Dkt. No. 133-2, ¶ 24; Dkt. No. **[**10]** 144-1, ¶ 24). Then, in 2012, Bard launched the Sherlock 3CG TLS, which included both navigation and confirmation capabilities. (Dkt. No. 133-2, ¶ 24; Dkt. No. 144-1, ¶ 24). Bard's Sherlock 3CG system, which only works with Bard's special, patented proprietary stylet, is the first and only TLS to combine three technologies: (i) ultrasound technology to identify a suitable vein for inserting the PICC;[2] (ii) magnetic tracking navigation technology to monitor and guide the PICC through the venous system; and (iii) ECG technology to confirm the final location of the PICC's tip in the superior vena cava. (Dkt. No. 133-2, ¶¶ 25-26; Dkt. No. 134-2, ¶ 21; Dkt. No. 144-1, ¶¶ 25-26; Dkt. No. 146, ¶ 21).

Bard only sells its proprietary stylet pre-loaded into its PICCs; it does not sell the stylet "single sterile," i.e. as a standalone product that can be loaded into a different company's PICCs by a nurse or other medical professional at the patient's bedside. (Dkt. No. 133-2, ¶¶ 26-27, 30; Dkt. No. 134-2, ¶¶ 22-23; Dkt. No. 144-1, ¶¶ 26-27, 30; Dkt. No. 146, ¶¶ 22-23). As a result, a customer who wishes to use Bard's TLS can *only* do so by purchasing the stylet preloaded into a Bard PICC; there is **[**11]** no option to purchase a Bard TLS separately and combine it with a competitor's PICC. (Dkt. No. 133-2, ¶ 30; Dkt. No. 134-2, ¶ 22; Dkt. No. 144-1, ¶ 30; Dkt. No. 146, ¶ 22). To date, Bard has only made a single exception to its TLS policy: sales of a standalone stylet for a limited time to Cleveland Clinic, the circumstances of which are discussed further below in Section II.E.5.a *infra*. (Dkt. No. 133-2, ¶ 30; Dkt. No. 134-2, ¶ 23; Dkt. No. 144-1, ¶ 30; Dkt. No. 146, ¶ 23). While Bard does not sell its TLS stylets separately from its PICCs, it does sell its PICCs separately **[*287]** from its stylets and acknowledges that certain customers combine its PICCs with other companies' TLSs, though it does not expressly "condone the use of an alternative stylet with [its PICCs]." (Dkt. No. 134-2, ¶ 24; Dkt. No. 146, ¶ 24).

Bard executives' stated justification for its TLS policy is that loading Bard's TLS stylet into a PICC at a patient's bedside increases the risk of stylet breakage, serious patient injury, contamination of the sterile field and resulting patient infection. (Dkt. No. 133-2, ¶ 28). However, AngioDynamics challenges this justification, citing to analyses by several of its experts disputing **[**12]** that there is a clinical benefit to preloading a TLS stylet or an increased risk from loading the stylet bedside. (Dkt. No. 144-1, ¶ 28). Bard also claims that it designed its TLS stylet to be preloaded into its PICCs by trained operators in its manufacturing facilities and not by nurses at a patient's bedside, but AngioDynamics disputes this, noting that Bard has FDA approval to sell its TLS stylet single-sterile for bedside insertion, which it obtained in connection with its decision to sell Cleveland Clinic a single-sterile stylet. (Dkt. No. 133-2, ¶ 29; Dkt. No. 144-1, ¶ 29).

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[2] While Bard's TLS system combines ultrasound with navigation and confirmation technology, "ultrasound is universally available," "there are many [ultrasound systems] in the market," and a hospital can use any ultrasound system, including Bard's or another company's, in conjunction with Bard's TLS. (Dkt. No. 146, ¶ 21).

According to AngioDynamics, aside from Bard's sales of a single-sterile stylet to Cleveland Clinic, Bard "took steps to hide the fact that it had FDA approval to sell its stylet single sterile and attempted to block customers from ordering the stylet single sterile"; Bard disagrees with this characterization, and justifies its actions by claiming that Bard "did not want to release false information to the market by suggesting that the product was available to the market broadly when in fact it was not." (Dkt. No. 133-2, ¶ 39; Dkt. No. 146, ¶ 39). AngioDynamics cites to the following record evidence:

- A Bard **[**13]** executive wrote to team members, "Fucking A. Keep on down low!" when referring to Bard's application to the FDA to sell its TLS stylet as a standalone product. (Dkt. No. 138-12, at 2).
- A Bard vice president told others at Bard that Bard's decision to make the standalone stylet available to Cleveland Clinic was "top secret[.]" (Dkt. No. 138-13, at 2).
- A Bard product manager instructed Bard employees to keep any product information about the standalone TLS stylet "private as much as possible," explaining that "[w]e don't want to publicize that we offer a standalone Sherlock 3CG option to the masses." (Dkt. No. 138-14, at 3).

- When Bard's corporate representative was asked why Bard did not want to publicize the standalone option to the masses, he testified that Bard "would not have wanted to create demand for it." (Dkt. No. 138-15, at 8). He also testified that Bard did not want to publicize the "one-off experiment with the Cleveland Clinic" because "the only reason it worked for Cleveland was because we fully understood that risk and we had a complete connectivity with the clinical management in a hospital that satisfied us we could on-board this safely," and that Bard did not want **[**14]** to "promot[e] something when it was a limited market release." (Dkt. No. 147-16, at 22-23).
- The ordering information for Bard's standalone TLS stylet was not available on Bard's computer ordering system. (Dkt. No. 138-2, at 4).

- A Bard PICC Product Manager instructed that the product code for Bard's standalone TLS stylet "should remain 'invisible' to all of our customers" except for Cleveland Clinic and "should not be published **[*288]** in any pricing catalogs, online, etc." (Dkt. No. 138-18, at 2).

3. AngioDynamics' Attempts to Acquire a TLS

Since at least 2011, AngioDynamics has attempted to develop or acquire a TLS. (Dkt. No. 133-2, ¶ 48; Dkt. No. 134-2, ¶ 52; Dkt. No. 144-1, ¶ 48; Dkt. No. 146, ¶ 52). Since then, there have been times during which AngioDynamics offered a TLS. (Dkt. No. 133-2, ¶¶ 49-50; Dkt. No. 144-1, ¶¶ 49-50). For example, from 2013 through 2016, pursuant to a license from another company, AngioDynamics sold a confirmation-only TLS called Celerity, for which it attempted to develop a navigation component. (Dkt. No. 133-2, ¶ 51; Dkt. No. 134-2, ¶ 53; Dkt. No. 144-1, ¶ 51; Dkt. No. 146, ¶ 53). However, in January 2016, when the Celerity technology was up for sale, Teleflex **[**15]** outbid AngioDynamics and acquired the technology, at which point AngioDynamics ceased its efforts to obtain FDA approval for navigation-enabled Celerity and discontinued selling Celerity aside from a small number of units from its remaining inventory. (Dkt. No. 133-2, ¶ 52; Dkt. No. 134-2, ¶ 54; Dkt. No. 144-1, ¶ 52; Dkt. No. 146, ¶ 54).[3] In addition to Celerity, AngioDynamics has offered other TLSs at times in the past, but it has never offered a TLS with both navigation and confirmation capabilities. (Dkt. No. 133-2, ¶¶ 49-50; Dkt. No. 144-1, ¶¶ 49-50). In late 2019, AngioDynamics acquired a TLS called C3 Wave, which has confirmation, but not navigation, capabilities. (Dkt. No. 133-2, ¶ 56; Dkt. No. 144-1, ¶ 56). Several AngioDynamics executives have publicly stated their belief that C3 Wave will help AngioDynamics compete in the PICC market, though deposition testimony from AngioDynamics' General Manager of Vascular Access clarified that these statements refer to the more limited

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[3] In January 2017, Teleflex received FDA approval for a TLS that was based off the same technology that AngioDynamics would have used to develop Celerity with navigation. (Dkt. No. 144-1, ¶ 52). Several AngioDynamics executives have testified as to their frustration and disappointment that Teleflex outbid AngioDynamics for the Celerity technology, and their belief that navigation-enabled Celerity would have helped AngioDynamics compete in the PICC market. (Dkt. No. 133-2, ¶¶ 53-54; Dkt. No. 144-1, ¶¶ 53-54).

market for PICCs that use confirmation-only TLS technology, not the much larger market for PICCs that use navigation-enabled TLSs like Bard's. (Dkt. No. 133-2, ¶¶ 58-59; Dkt. No. 144-1, ¶¶ 58-59).

4. Teleflex's [**16] PICC and TLS Technology

Like Bard and AngioDynamics, Teleflex markets and sells PICCs. (Dkt. No. 133-2, ¶ 63; Dkt. No. 144-1, ¶ 63). Like Bard, but unlike AngioDynamics, it also markets and sells TLSs that provide both navigation and confirmation capabilities. (Dkt. No. 133-2, ¶ 63; Dkt. No. 144-1, ¶ 63). Unlike Bard, Teleflex historically has sold, and continues to sell, its TLSs both preloaded into its PICCs and as separate, standalone products that are compatible with third-party PICCs. (Dkt. No. 133-2, ¶ 64; Dkt. No. 134-2, ¶ 42; Dkt. No. 144-1, ¶ 64; Dkt. No. 146, ¶ 42). Therefore, hospitals that want to pair AngioDynamics' BioFlo PICCs with a navigation-enabled TLS are able to do so with Teleflex's TLSs. (Dkt. No. 133-2, ¶ 65; Dkt. No. 144-1, ¶ 65). AngioDynamics has, at times, marketed the option of pairing BioFlo with Teleflex's TLS technology to its customers, and some hospitals do utilize this option. (Dkt. No. 133-2, ¶¶ 66-67; Dkt. No. 144-1, ¶¶ 66-67).

C. Relevant Markets and the Competitors' Market Shares

The parties dispute the relevant product market for purposes of the Court's antitrust analysis. The parties appear to agree **[*289]** that PICCs constitute a distinct market from **[**17]** other types of vascular access devices; that all PICCs compete in the same market, regardless of the various distinctions between particular PICCs; and that the relevant geographic market is the United States. (Dkt. No. 144-1, ¶ 13; Dkt. No. 136-9, at 26-27, 36-37; Dkt. No. 147-13, at 13-14, 16). However, Bard contends that the only relevant product market is the market for "differentiated PICCs"—i.e. PICCs that differ from each other on a number of characteristics such as size, material, and others—and that Bard's preloaded TLS stylet is merely one way in which Bard's PICCs are differentiated, rather than a distinct product with its own market. (Dkt. No. 145, at 7-15, 17-19). AngioDynamics contends that PICCs and TLSs comprise two separate, distinct product markets. (Dkt. No. 134-1, at 14-19; Dkt. No. 152, at 7-9, 10-11).

Bard has historically captured the majority of the PICC market, with AngioDynamics and Teleflex capturing significantly smaller market shares. (Dkt. No. 133-2, ¶ 21; Dkt. No. 144-1, ¶ 21; Dkt. No. 138-78, at 2-3). [TEXT REDACTED BY THE COURT] (Dkt. No. 133-2, ¶ 21; Dkt. No. 144-1, ¶ 21).

PICCs used with TLSs constitute by far the largest segment of the PICC market. **[**18]** (Dkt. No. 133-2, ¶ 57; Dkt. No. 146, ¶ 57). The evidence cited by AngioDynamics suggests that, between 2013 and 2018, Bard sold the overwhelming majority of TLSs on the market—more than [TEXT REDACTED BY THE COURT] percent—and Bard has not offered evidence contesting that assertion. (Dkt. No. 134-2, ¶ 47; Dkt. No. 146, ¶ 47). Teleflex, the only other seller of navigation-enabled TLS stylets, sold a much smaller percentage of TLSs—only [TEXT REDACTED BY THE COURT] percent—over the same period. (Dkt. No. 134-2, ¶ 49; Dkt. No. 146, ¶ 49). Other TLSs sold today do not include navigation components and make up a negligible percentage of TLS sales. (Dkt. No. 138-20, at 25 n.107). Because Bard, which sells the majority of the TLSs, does not sell its TLS stylets single-sterile as a matter of policy, only a small percentage of all TLS stylets on the market are sold single-sterile. (Dkt. No. 146, ¶ 43). However, the percentage of stylets sold single-sterile by Teleflex, Bard's only meaningful competitor in the TLS space, is significant: between 2013 and 2018, [TEXT REDACTED BY THE COURT] of Teleflex's TLS stylets were sold separately from its PICCs. (Dkt. No. 134-2, ¶ 43; Dkt. No. 146, ¶ 43). **[**19]**

The parties dispute whether, assuming TLS stylets comprise a separate market from the PICC market, there are high barriers to entry in the TLS market that enable Bard to sustain such a high market share. AngioDynamics cites "high development costs, the requirement for FDA clearance of medical devices, and Bard's ownership of patented TLS technology" as such barriers to entry. (Dkt. No. 134-2, ¶ 50). The evidence cited by the parties on each of these issues may be summarized as follows:

• **High Development Costs**: The parties agree that both AngioDynamics and Bard have spent significant time, effort and money developing navigation-based TLSs (Bard successfully, and AngioDynamics unsuccessfully). (Dkt. No. 134-2, ¶¶ 51-52; Dkt. No. 146, ¶¶ 51-52). Bard nonetheless contests AngioDynamics' assertion that high development costs pose a significant barrier to entry, noting that AngioDynamics' own expert has identified seven different competing TLS products that have been developed by Bard's rivals in the past. (Dkt. No.146, ¶ 50).

• **FDA Approval**: AngioDynamics cites the need for FDA approval of medical products as a barrier to entry for developing a TLS with navigation. **[*290]** (Dkt. No. 134-2, ¶ 50). **[**20]** Bard points out, however, that AngioDynamics' own expert economist opined in his deposition that FDA clearance is "not [an] insurmountable" barrier, and that "[i]f you have a successful technology . . . simply getting the FDA approval shouldn't be that difficult." (Dkt. No. 146, ¶ 50).

• **Patents**: The parties agree that Bard has multiple patents on its TLS stylets. (Dkt. No. 134-2, ¶ 55; Dkt. No. 146, ¶ 55). AngioDynamics' liability expert, Professor George Alan Hay, opined that entry into the alleged TLS market is "complicated by the fact that both Teleflex's and Bard's navigation systems are patented," as this patent protection requires an entrant into the TLS market to "invent around" these companies' existing intellectual property, and "entry with a similar technology could lead to costly patent litigation, even if there is no infringement." (Dkt. No. 134-2, ¶ 56; Dkt. No. 146, ¶ 56). During his deposition, however, Dr. Hay admitted that he "ha[s] not studied the patents," does not know "which patents Bard has on tip location," and could only make general assumptions about "which specific technological features of the Bard tip location system are covered by patents." (Dkt. No. 146, **[**21]** ¶¶ 50, 56). As noted above, Dr. Hay also identified seven different TLS products developed by Bard's competitors, notwithstanding Bard's patent protection. (Dkt. No. 146, ¶ 56). Bard's corporate representative testified that "[a competitor] could easily have reverse engineered [Bard's 3CG] stylet, and they would have to change an approach to creating a magnetic field to avoid our intellectual property. But they could do that and . . . that has been done." (Dkt. No. 138-26, at 4).

D. General Explanations for AngioDynamics' Alleged Lost Sales

Citing record evidence, Bard contends that AngioDynamics has lost existing PICC business or been unable to win new PICC business because of a variety of factors other than Bard's TLS policy, including "price, contracts, quality issues, product recalls, competing technologies, incomplete product lines, lack of data, customer relationships, and product backorders." (Dkt. No. 133-2, ¶ 38). AngioDynamics does not appear to meaningfully dispute that these factors have impacted its PICC business, but it contends that Bard's TLS policy is at least one materially contributing factor to its loss of PICC sales to Bard and/or its failure to win PICC business **[**22]** from Bard. (Dkt. No. 144-1, ¶ 38). Some of the most significant factors Bard discusses with respect to the pending motions are discussed below.

1. Pricing

AngioDynamics' BioFlo PICCs are sometimes priced at a premium to other PICCs in the market at the point of sale. (Dkt. No. 133-2, ¶ 39; Dkt. No. 144-1, ¶ 39). According to Tom Aldrich, a former sales executive at AngioDynamics, AngioDynamics' former CEO believed that "customers should pay more for BioFlo than the other PICCs on the market." (Dkt. No. 133-2, ¶ 40; Dkt. No. 144-1, ¶ 40). AngioDynamics also believes that any price premium on BioFlo PICCs is justified by evidence that BioFlo PICCs' thrombus-accumulation-reducing properties result in long-term cost savings to the hospitals using them. (Dkt. No. 144-1, ¶¶ 39, 41-42). Nonetheless, AngioDynamics concedes that some hospitals are unwilling **[*291]** to pay a premium for BioFlo PICCs. (Dkt. No. 133-2, ¶ 43; Dkt. No. 144-1, ¶ 43).

AngioDynamics does not dispute that, as a result of this price premium, the combination of BioFlo PICCs with Teleflex's TLS stylets is "sometimes" more expensive than Bard's PICCs preloaded with its stylets. (Dkt. No. 133-2, ¶ 41; Dkt. No. 144-1, ¶ 41). However, **[**23]** AngioDynamics asserts that because AngioDynamics competes with

Bard and other competitors on price, its pricing of BioFlo is specific to each customer, and that therefore, its pricing of BioFlo is sometimes higher and sometimes lower than Bard's pricing of its PICCs. (Dkt. No. 144-1, ¶ 41; *see also* Dkt. No. 138-61, at 2).

2. Quality/Reputational Issues

AngioDynamics has suffered from "multiple quality issues across multiple product lines and areas." (Dkt. No. 133-2, ¶ 45; Dkt. No. 144-1, ¶ 45). As relevant to its PICC business, in 2015, AngioDynamics recalled its entire line of Morpheus PICCs due to quality issues. (Dkt. No. 133-2, ¶ 46; Dkt. No. 144-1, ¶ 46). There is evidence in the record suggesting that the Morpheus recall damaged AngioDynamics' relationship with at least some of its customers, and that these issues negatively impacted AngioDynamics' PICC sales. (Dkt. No. 133-2, ¶¶ 46-47). In internal correspondence, General Manager of Vascular Access Chad Campbell referred to a "Morpheus hangover"; Campbell testified that this merely referred to the fact that AngioDynamics had some "slow orders as [it] converted [its customers] to [its] other products," though he acknowledged that **[**24]** AngioDynamics also lost business entirely as a result of the Morpheus recall. (Dkt. No. 133-2, ¶ 46; Dkt. No. 144-1, ¶ 46; Dkt. No. 144-47, at 4). Unlike AngioDynamics, Bard has never recalled an entire line of its PICCs. (Dkt. No. 133-2, ¶ 23; Dkt. No. 144-1, ¶ 23).

3. AngioDynamics' Lack of a TLS

Because some customers value the convenience of preloaded PICCs and dealing with a single vendor, and thus prefer to purchase PICCs and TLSs from the same supplier even if they have the option to purchase them separately, (Dkt. No. 146, ¶¶ 65-66), Bard cites the fact that AngioDynamics does not offer its own TLS with both navigation and confirmation capabilities as a factor negatively impacting its PICC sales, independent of Bard's TLS policy. (Dkt. No. 133-2, ¶¶ 61-62). Bard cites to AngioDynamics' thus-far unsuccessful efforts to develop its own navigation-enabled TLS, as well as AngioDynamics' internal documents reflecting that it believes its lack of navigation-enabled TLS to be a reason for its loss of PICC market share and its difficulties competing with Bard's PICCs. (Dkt. No. 133-2, ¶¶ 48-62).

4. FDA Approval

Bard also cites regulatory issues as a factor impacting AngioDynamics' ability **[**25]** to win sales of PICCs against Bard independent of Bard's TLS policy. As discussed further below, *see* Section E.5.a *infra*, Bard first obtained FDA approval to sell its TLS stylet single-sterile in November 2014 in order to satisfy a request by Cleveland Clinic, which wanted to trial Bard's TLS with AngioDynamics' BioFlo PICCs. (Dkt. No. 133-2, ¶¶ 68-71; Dkt. No. 134-2, ¶¶ 28-29; Dkt. No. 144-1, ¶¶ 68-71; Dkt. No. 146, ¶¶ 28-29). Bard obtained FDA clearance to sell its stylet as a standalone product that could be combined with any "open-ended, nonvalved, polyurethane [PICCs]," including those sold by Bard's competitors. (Dkt. No. 133-2, ¶¶ 70-71; Dkt. No. 134-2, ¶ 29; Dkt. No. 144-1, ¶¶ 70-71; Dkt. No. 146, ¶ 29). While Bard's purpose for obtaining this FDA clearance was to accommodate Cleveland Clinic's request, the clearance it received did not limit Bard to selling its single-sterile stylet **[*292]** only to Cleveland Clinic. (Dkt. No. 134-2, ¶ 30; Dkt. No. 146, ¶ 30).

An important limitation on Bard's FDA clearance for its single-sterile stylet is that it is only approved to sell its stylet for use with competitors' *non-valved* PICCs; Bard has never sought nor obtained FDA clearance to sell **[**26]** its stylet single-sterile for use with competitors' *valved* PICCs. (Dkt. No. 133-2, ¶ 71; Dkt. No. 144-1, ¶ 71). Therefore, a hospital's use of Bard's stylet with AngioDynamics' *valved* PICCs would be considered an "off-label use," i.e. a use that is not included in the FDA's approved indication for the product. (Dkt. No. 133-2, ¶ 71; Dkt. No. 144-1, ¶ 71). Bard argues that this constitutes an independent barrier to AngioDynamics' ability to compete for customers who prefer valved PICCs, which comprise a significant percentage of both Bard's and AngioDynamics' PICC sales. (Dkt. No. 133-2, ¶¶ 72-74; Dkt. No. 144-1, ¶¶ 72-74). AngioDynamics rejects this contention, arguing that AngioDynamics or another competitor could seek FDA approval to market Bard's single-sterile stylet to such customers; that, based on its own testing of Bard's stylet with valved PICCs, AngioDynamics believes such approval could be obtained; and that in any event, the law does not prohibit medical professionals from choosing to use medical products in ways that are "off-label." (Dkt. No. 144-1, ¶ 71).

E. Customer-Specific Evidence of AngioDynamics' Alleged Lost Sales

1. Overview

A central dispute between the parties **[**27]** is whether there is evidence that specific customers would have purchased AngioDynamics' PICCs for pairing with Bard's TLS but for Bard's TLS policy. Bard concedes that "the topic of whether Bard sells Stylets separately from its PICCs and/or whether Bard would do so has arisen" in its discussions with 17 hospitals, though it claims that it has never received a formal Request for Proposal regarding a stand-alone stylet. (Dkt. No. 133-2, ¶¶ 84, 86; Dkt. No. 134-2, ¶ 40; Dkt. No. 144-1, ¶¶ 84, 86; Dkt. No. 146, ¶ 40).[4] AngioDynamics has its own list of at least 22 institutions that it believes have requested that Bard sell its stylets on a standalone basis and been refused. (Dkt. No. 133-2, ¶ 83; Dkt. No. 144-1, ¶ 83). AngioDynamics also has provided what it contends is a "non-exhaustive" list of 31 customers—including hospitals, IDNs, and GPOs—from which it claims that it "potentially" lost sales as a result of Bard's TLS policy. (Dkt. No. 133-2, ¶ 87; Dkt No. 144-1, ¶ 87).

2. Customer Requests to Bard Regarding Standalone Stylet

AngioDynamics points to a number of documents that reflect specific examples of customer inquiries to Bard regarding the possibility of purchasing a standalone **[**28]** TLS stylet to pair with AngioDynamics' or another competitor's PICCs, and of Bard preparing for such inquiries. The Court summarizes the relevant portions of these communications as follows:

> • In February 2015, in an internal email chain, a Bard employee wrote: "We need an official 'talk track' on the following subject so that everyone in Sales/Marketing/Nursing speaks with one voice on this issue. **[*293]** Not to make a big deal but it actually becomes more strategic and relevant now that Angio has a wire." (Dkt. No. 138-3, at 2). The employee was referring to the following passage from a District Manager's monthly report: "The AngioDynamics rep in Cincy is telling accounts '[Bard] got the indication to sell their wire with our BloFlo PICCs.' . . . I've coached [sales representatives] specifically how to handle with their customers if it's brought up to them. In short, our response is, 'That is not an option available at this time.'" (*Id.*).
>
> • In February 2015, another Bard employee described a phone call from a customer to a Bard clinical nurse "asking if they could get the 3CG standalone wire for there [sic] at risk patients so they could use a coated PICC." (Dkt. No. 138-5, at 2). The employee **[**29]** went on to write: "[The customer] said they had been told that the Cleveland Clinic is using a different PICC with 3CG. I will be able to squash this, but I think we will be hearing a lot of people bringing this up." (*Id.*).
> • In March 2015, Bard executives discussed the fact that a customer was "getting pressure . . . to evaluate bioflo" and "contacted [Bard personnel] about pulling a separate 3CG wire with the Bioflo PICC line." (Dkt. No. 138-75, at 2).
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> • In March 2015, in an internal email chain, Bard personnel discussed the "talk track . . . so that [Bard personnel are] armed with the correct verbiage in case someone comes calling." (Dkt. No. 138-2, at 3). One Bard employee wrote, "If you receive any inquiries from other hospitals/customers about [the standalone stylet], please tell them that it is not currently available for purchase. If they mention Cleveland Clinic

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[4] Bard contends that "[m]ost of the hospital communications to Bard regarding standalone stylets came from nurses, not personnel making decisions about PICC purchases," but AngioDynamics disputes this characterization, citing record evidence that the decision-making process and the personnel involved varies by hospital. (Dkt. No. 133-2, ¶ 85; Dkt. No. 144-1, ¶ 85).

specifically . . . you can tell them that Cleveland Clinic is doing an evaluation, but there are no plans to make the kit available at other facilities at the current time." (*Id.* at 2).

• In March 2015, a Value Access Coordinator from a customer reached out to a Bard Territory Manager, writing: "I did contact Supply Chain at **[**30]** Cleveland Clinic. They are using the Bard 3CG technology and separately ordered/stocked Bard 3CG stylets with 2 DIFFERENT PICC vendors (both NOT bard). So . . . there are facilities getting this single sterile 3CG stylet? Can you send me pricing on the separately stocked 3CG stylet for my comparison." (Dkt. No. 138-76, at 4).

• In March 2015, a representative of HealthTrust, a GPO, wrote to a Bard Vice President that "[i]f [Bard's single-sterile TLS stylet] is being sold to HealthTrust members, as I have been informed it is, then it needs to be added to contract." (Dkt. No. 138-7, at 2).

• In an April 2015 email, a Bard representative described a "very agitated" customer who "want[ed] something in writing stating [that the stand-alone stylet was unavailable] and the reason why," because "she has been told otherwise." (Dkt. No. 138-4, at 2).

• In April 2015, a customer contacted a Bard sales representative about "the BARD guide wire being made available separate from the PICC kit so it can be used to place any PICC," stating that the customer "would still like to try the antimicrobial PICC if possible." (Dkt. No. 138-77, at 3). In a subsequent internal email, the **[*294]** Bard employee wrote that **[**31]** "[w]e explained that there is not a coated PICC that comes with 3CG and the director stated that Cleveland Clinic utilizes our wire with [Teleflex] PICCs. I understand that this isn't going to happen, but I wanted to make sure you are aware they are taking [sic] about it." (*Id.* at 2-3). Another Bard employee wrote: "This came up today as well at Swedish . . They are telling everyone this that the clinic is using our wire. I had a call with IBC with this last week as well. Hasn't been a big deal thus far, but just an FYI on what Teleflex is doing." *(Id.* at 2).

• According to a February 2016 memo circulated among Bard personnel, a representative of a customer "tried ordering the Clinic stand alone 3CG wire," and Bard personnel "communicated [to the representative] that product is unavailable and we haven't had issues since." (Dkt. No. 138-6, at 2).

• April 2016 meeting notes written by a Bard District Manager reflect that a customer "[w]anted to know if we would sell the 3CG stylet to use with the Arrow [Teleflex] PICC," and that Bard responded: "We do not sell the Stylet by itself. Period." (Dkt. No. 138-30, at 4).

3. Bard Internal Documents

AngioDynamics also cites to internal Bard documents arguably suggesting **[**32]** that Bard employees "knew that AngioDynamics and others could not compete for PICC business in hospitals that were using Bard's TLS." (Dkt. No. 134-2, ¶ 45). For example:

• December 2014 talking points for a Bard Board of Directors presentation include the notes, "We are the only company who sells PICCs but can also provide the Ultrasound/Tip location and Tip confirmation technology and all of that is integrated," and that [TEXT REDACTED BY THE COURT] (Dkt. No. 138-11, at 2-3).

• In April 2015, a Bard employee wrote that he "th[ought] [AngioDynamics'] strategy [wa]s to pressure the market to pressure [Bard] into launching [the standalone stylet], so it will open the door for them to go after special patient populations in our 3CG [TLS] accounts and pick off 5-10%, which is better than the 0% they are getting at 3CG accounts now." (Dkt. No. 136-63, at 3; Dkt. No. 136-64, at 2).

• In July 2016, a Bard employee congratulated a sales representative on convincing Bard's "largest non-3CG nursing account nationally" to begin using Bard's 3CG stylet, commenting that "now this account is locked in with our best defense mechanism." (Dkt. No. 138-9, at 2).

• In September 2016, a Bard Strategic Accounts **[**33]** National Manager wrote: "We know AngioD is heavily focusing on our IR PICC and midline business since they obviously cannot compete with TLS and 3CG." (Dkt. No. 138-10, at 2).

4. Deposition Testimony of AngioDynamics Employees

The parties dispute whether the deposition testimony of AngioDynamics officers and employees demonstrates that AngioDynamics lost any sales to Bard as a result of Bard's TLS policy. That testimony is summarized below.

[*295] a. Tom Aldrich

Tom Aldrich worked for AngioDynamics from 2001 to 2017, and was the head salesperson in AngioDynamics' Vascular Access Group (the business segment that includes PICCs) from 2013 to 2017. (Dkt. No. 136-16, at 5-11). Aldrich testified that he "[knew] that [AngioDynamics] lost accounts as a result of our PICC line not being compatible with Bard's tip location," but did not know how many, and was only able to name one example of a customer that "might have been one that was interested in using our PICC line with the Bard tip location but [was] unable to." (*Id.* at 27-31). Aldrich also generally lacked knowledge regarding the entities on AngioDynamics' list of customers that it "potentially lost" as a result of Bard's tying policy. (*Id.* at 47-55). Aldrich did recall **[**34]** that AngioDynamics lost business from HealthTrust, a GPO, because some of the hospitals "wanted a navigation system" and AngioDynamics was "not able to convert them because they were using Bard," but he did not recall details about which hospitals within the GPO this applied to, or which individuals at those hospitals conveyed the information to him. (*Id.* at 52-54).

b. Chad Campbell

Chad Campbell is the General Manager of AngioDynamics' Vascular Access Group. (Dkt. No. 136-25, at 3-5). Campbell testified that "the number one reason [AngioDynamics loses business to Bard] is because customers prefer [Bard's] navigation and tip location" product, and are forced to use Bard's PICCs in order to gain access to that product. (Dkt. No. 136-25, at 19-23). However, he also testified that he lacked "firsthand personal information" regarding business AngioDynamics lost as a result of Bard's TLS policy, and that he has not directly communicated with any hospital regarding their interest in combining AngioDynamics' BioFlo PICCs with Bard's TLS. (Dkt. No. 144-48, at 8). His only knowledge of such lost business came "through reps, managers, heads of sales, marketing, clinical, my teammates on my team." (*Id.*). Campbell **[**35]** demurred when asked to name specific examples of a customer whose business AngioDynamics lost as a result of Bard's TLS Policy, responding that "whatever the team has produced is who" and that he could not name "anyone specifically that I've talked to from a customer standpoint." (*Id.*).

c. Scott Centea

Scott Centea is AngioDynamics' Senior Director of Global Marketing. When shown AngioDynamics' non-exhaustive list of 31 entities from which it believed it "potentially lost sales," Centea identified 21 of them that he knew AngioDynamics lost sales from "due to not having a tip location system or our PICC being able to work with the Bard tip location system." (Dkt. No. 136-30, at 6-8). When asked about the basis for his knowledge of these lost sales, he testified as follows:

> So as a corporate account manager during this time, I was responsible for helping set up contracts as well as remaining very close to the sales representatives. I was also responsible for managing some of the sales. And we would have discussions, as well as . . . quarterly business reviews and progress reports. It's never fun when we lose an account. And so they were always typically brought to my attention, or someone **[**36]** within the organization's attention, to better understand what we could have done differently to potentially save the business.

(*Id.* at 7-8).

Centea testified that AngioDynamics' sales representatives "were being asked daily, if [AngioDynamics'] BioFlo could be used with Sherlock and 3CG." (Dkt. No. 144-37, at 5). When asked whether he had **[*296]** ever had "an actual conversation where any of these accounts ever told [him] that they would rather buy [AngioDynamics'] PICC with Bard's single sterile stylet for more than Bard's PICC with Bard's Sherlock stylet," Centea testified that he has "had so many of those conversations, they all seem to run together." (Dkt. No. 136-30, at 13-14). However, because purchasing Bard's stylet single-sterile to combine with AngioDynamics' PICCs was not an option for customers, AngioDynamics was usually unable to reach the point where it could engage in discussions about the price of that option, and so Centea could not recall a situation in which a customer said that "we will, no matter what the price is, we will buy their single stylet, because it was never offered." (*Id.* at 16).

Centea specifically identified Community Health Systems and Florida Hospital as two customers with whom **[**37]** he was "pretty confident" that he "personally had a conversation" about pairing AngioDynamics' PICCs with Bard's TLS stylet. (*Id.* at 14). As to Community Health Systems, he could not "recall the exact conversation," but recounted the following details:

> [The conversation was with] either Sheila Jarrett or Marsha Hodge . . . I believe it was in person. We would hold monthly business reviews, updating them on . . . the progress of the conversion. And I believe Nicolas Abella was there as well . . . I remember Nicolas, who was their head of clinical or nursing I believe at the time, was saying that, based on some of the results, that if there was an option to receive the Bard single sterile stylet separately, that they would definitely take a look at . . . the pricing and run an economic analysis by knowing that that was what's going to be best for their accounts.

(*Id.* at 14-15). When pressed on whether the Community Health Systems representatives told him that they "would buy the Angio combined with Bard product if it was more expensive than the Bard product preloaded," Centea testified that "we never got to those conversations, because we knew that Bard was never willing to sell the single sterile stylet." **[**38]** (*Id.* at 16).

Similarly, as to Florida Hospital, Centea testified that his conversation "was one of those, well, if they do somehow decide to sell it to us, we . . . would take a look at, again, the BioFlo and the efficacy of the BioFlo and whatever price Bard was to offer, because we didn't have a price. It was really difficult to understand what the economic impact would [sic]. But if they said it was reasonable, that it would make sense for them to convert." (*Id.* at 16-17). Centea acknowledged that he "did not have conversations with specifics to the cost and/or price of what that stylet would be" and therefore did not know the price premium Florida Hospital would be willing to pay to combine AngioDynamics' PICCs with Bard's TLS. (*Id.* at 17-19).

d. William Millar

William Millar is AngioDynamics' Southeast Region Business Manager. Millar testified that, based on "a general conversation with PICC nurses and [AngioDynamics'] sales team," he understood that "there is interest out there for our technology if it can be made available with [Bard's] stylet," and that there were "definitely hypotheses going around in conversations in my field every day out there of when we're trying to offer our technologies to our solutions." **[**39]** (Dkt. No. 144-38, at 3). As one example, he testified that the Director of Supply Chain at St. Dominic's Hospital in Mississippi "had [AngioDynamics] come in to do a presentation of BioFlo, believed in the technology and we were provided the feedback that . . . we could not proceed with the trial because [St. Dominic's had] Bard 3CG in the facility **[*297]** and the nurses prefer to keep or require that technology to move forward" but that "[i]f it was made available, [St. Dominic's] would definitely consider the BioFlo technology but at this point cannot proceed . . . based on the inability of not being able to marry the Sherlock 3CG system with BioFlo PICCs." (*Id.* at 3-4). Millar also testified that facilities in the Community Health System Family told AngioDynamics that they would purchase AngioDynamics' PICCs if they had the option to pair them with Bard's 3CG TLS, but could not recall which specific facilities did so. (Dkt. No. 136-19, at 16-19).

When asked for additional examples of hospitals that would have purchased AngioDynamics' PICCs had Bard made its standalone stylet available, Millar provided the names of hospitals, which he testified was non-exhaustive, including, among others: JFK, Singing **[**40]** River, Biloxi Regional, and Christus Cabrini. (Dkt. No. 144-38, at 5-8). Millar testified that the information he had about AngioDynamics' potential lost sales came from his conversations with other AngioDynamics employees or, in some cases, hospital employees themselves. (Dkt. No. 133-2, ¶ 96; Dkt. No. 144-1, ¶ 96).

As to JFK, Millar testified that his knowledge that AngioDynamics lost business as a result of Bard's TLS policy came from conversations with either JFK's local clinical resource director or the AngioDynamics sales representative responsible for JFK; he could not recall which one. (Dkt. No. 154-4, at 16-17). He testified that AngioDynamics was the "incumbent supplier" and "the need for navigation tip location was a new initiative for [JFK]," which "changed" the "business landscape" and caused AngioDynamics to lose its PICC business when JFK opted to use Bard's TLS. (*Id.* at 16). He did not know whether JFK considered Teleflex's TLS a viable alternative solution, did not know how AngioDynamics' pricing compared to Bard's, and was not aware of whether the hospital realized any savings by switching to Bard PICCs, though he recalled that "pricing was not, to my knowledge, a decision-making **[**41]** factor into it." (*Id.* at 13-16).

As to Singing River Hospital, Millar testified that AngioDynamics was unable to win their PICC business because "they were using Bard's Sherlock device at the time and they required that stylet to place PICCs," and that hospital representatives told him that "if the technology was available to them to purchase separately . . . in order to buy our PICCs, they would consider a trial." (*Id.* at 27-28). When pressed on whether Singing River had *committed* to having a trial of the combined technologies (as opposed to merely considering it), Millar testified that the option "wasn't available so we couldn't go down the pathway of saying they would because Bard wasn't providing that opportunity for the customer to choose." (*Id.* at 28). He was unaware as to whether Singing River ever asked Bard about the possibility of a standalone stylet. (*Id.* at 28-29).

As to Biloxi Regional, Millar testified that Biloxi was an existing Bard PICC customer whose business AngioDynamics was unable to win, and that Biloxi's Director of Cardiology told him that if Bard's standalone stylet became available, Biloxi "would conduct a trial to move to our business." (*Id.* at 29-30). He testified that he had "numerous" conversations with the Director **[**42]** of Cardiology and several PICC nurses in which they conveyed that "if [the option to combine the technology] was made available and you could use that system, 'We would consider your PICCs.'" (*Id.* at 37-38). When asked whether he had reason to believe that Teleflex's TLS would not be a viable alternative for Biloxi, Millar testified that "[t]hey were already **[*298]** invested into the 3CG system — Sherlock system, and their interest was if they could maintain the — the current use of the 3CG Sherlock device and incorporate the BioFlo PICC, they would take interest in it." (*Id.* at 36).

As to Christus Cabrini, Millar testified that in the 2014-2016 timeframe, Christus was "interested in the BioFlo technology" and was "using it . . . on a couple of other platforms we have," and that AngioDynamics was "down the pathway of moving toward trial potentially based off the interest in the BioFlo." (*Id.* at 40-43). However, the nurses on the PICC team were "comfortable" with Bard's TLS, "were using that as a reliability tool for the Sherlock device, a navigation component," and "wanted that Sherlock device to continue to be used" because "that's how they were trained"; thus, because Bard's system could not be combined with AngioDynamics' **[**43]** PICCs, AngioDynamics "didn't have an offering . . . to continue down the pathway of trialing our PICCs." (*Id.*). As a result, although AngioDynamics "had a lot of meetings with them showing our technology [and] educating them on that" and "they had interest [in AngioDynamics'] technology," "that opportunity didn't come to fruition because we didn't have the Sherlock stylet available to them." (*Id.* at 42-43). Millar testified that his knowledge was based on direct, in-person conversations with the PICC team at Christus Cabrini, though he could not recall specifically who. (*Id.* at 43-44).

5. Other Evidence Regarding Specific Customers

Both parties also cite to documentary evidence—including internal correspondence among AngioDynamics and Bard employees, as well as correspondence between the parties' employees and customers—that purportedly demonstrate examples of customers switching from AngioDynamics' PICCs to Bard's PICCs or foregoing AngioDynamics' PICCs in favor of Bard's PICCs, and the reasons for those decisions. The Court summarizes this evidence below.

a. Cleveland Clinic

To date, Cleveland Clinic is the only customer to whom Bard has offered its TLS stylet as a stand-alone product. (Dkt. No. 133-2, ¶ 30; **[**44]** Dkt. No. 144-1, ¶ 30). In 2014, Cleveland Clinic began using AngioDynamics' BioFlo PICCs in an effort to lower its DVT rates, an effort which was successful. (Dkt. No. 134-2, ¶¶ 25-26; Dkt. No. 146, ¶¶ 25-26). Later that year, Cleveland Clinic made a request to Bard to purchase Bard's TLS stylet single sterile so that it could trial it with AngioDynamics' BioFlo PICCs as an alternative to Teleflex's TLS, which it was using to place the BioFlo PICCs. (Dkt. No. 133-2, ¶ 68; Dkt. No. 134-2, ¶¶ 27-28; Dkt. No. 144-1, ¶ 68; Dkt. No. 146, ¶¶ 27-28). At that time, Bard did not have FDA approval to market standalone Bard TLS stylets for pairing with other companies' PICCs, but it sought and obtained FDA approval to do so in order to accommodate Cleveland Clinic's request. (Dkt. No. 133-2, ¶¶ 70-71; Dkt. No. 134-2, ¶ 29; Dkt. No. 144-1, ¶¶ 70-71; Dkt. No. 146, ¶ 29).

Ultimately, Bard agreed to sell the standalone stylet to Cleveland Clinic for $101. (Dkt. No. 133-2, ¶ 69; Dkt. No. 134-2, ¶ 33; Dkt. No. 144-1, ¶ 69; Dkt. No. 146, ¶ 33). A Bard executive testified that Bard felt comfortable offering its standalone stylet to Cleveland Clinic, despite its general safety concerns regarding bedside **[**45]** loading of the product, because Bard felt that it "had a complete connectivity with the clinical management in a hospital that satisfied us we could on-board this safely." (Dkt. No. 146, ¶ 35 (quoting Dkt. No. 147-16, at 23)). A Bard internal weekly report indicates that Bard earned a fairly high margin **[*299]** on these sales, though Bard cites to evidence suggesting that the margin calculation does not include certain relevant costs associated with a standalone stylet (including liability, training and reputational risk costs), and that the price at which Bard sold its standalone stylet to the Celveland Clinic was a promotional price that was discounted from the price at which Bard would be willing to sell the standalone stylet to the market generally. (Dkt. No. 134-2, ¶ 48; Dkt. No. 146, ¶ 48).

Cleveland Clinic began its trial of Bard's TLS with AngioDynamics' BioFlo PICCs in early 2015, and found that, with the use of Bard's TLS, it was successfully able to place the BioFlo PICCs at the patient's bedside and confirm placement without the need for a chest x-ray. (Dkt. No. 133-2, ¶ 75; Dkt. No. 134-2, ¶ 36; Dkt. No. 144-1, ¶ 75; Dkt. No. 146, ¶ 36). However, beginning in October 2015, Cleveland **[**46]** Clinic conducted a three-month trial of Bard's FT PICC preloaded with Bard's TLS stylet, after which it chose to begin using that integrated product, rather than BioFlo, as its primary PICC product. (Dkt. No. 133-2, ¶¶ 76-77; Dkt. No. 134-2, ¶ 37; Dkt. No. 144-1, ¶¶ 76-77; Dkt. No. 146, ¶ 37). The parties dispute the reasons for Cleveland Clinic's decision, but the evidence they cite suggests that the following factors were relevant: (i) Bard agreed to sell Cleveland Clinic its integrated product at the same price it had been previously selling the stand-alone stylet, and thus the integrated product was less expensive than the combination of a BioFlo PICC and a Bard TLS stylet; (ii) Bard's PICC kit contained accessories that Cleveland Clinic's PICC team preferred; (iii) according to the head of Cleveland Clinic's PICC team, the team observed lower DVT rates using Bard's FT PICCs than with BioFlo (though AngioDynamics disputes the credibility and significance of this testimony, *see* Dkt. No. 144-1, ¶ 77); (iv) Cleveland Clinic's PICC team believed that the fact that Bard's PICCs were preloaded, which eliminated the need to load the stylet at the beside, reduced the risk of patient infection, **[**47]** a factor which "weighed heavy in the decision"; and (v) the relationship between AngioDynamics and Cleveland Clinic may have deteriorated after AngioDynamics released data concerning the results of Cleveland Clinic's use of BioFlo prematurely and without Cleveland Clinic's permission. (Dkt. No. 133-2, ¶ 77; Dkt. No. 134-2, ¶ 37; Dkt. No. 144-1, ¶ 77; Dkt. No. 146, ¶ 37).

b. University of Colorado

On April 24, 2015, a PICC team manager from the University of Colorado reached out to Bard to inquire about a standalone TLS stylet. (Dkt. No. 134-2, ¶ 78; Dkt. No. 144-1, ¶ 78). According to an email from a Bard representative, after Bard indicated a standalone stylet was not available, the customer became "very agitated" and "want[ed] something in writing stating" that the stylet was "not available as a standalone" and the reason why, because "she has been told otherwise." (Dkt. No. 136-57, at 2). Ultimately, the University of Colorado proceeded to combine AngioDynamics' PICCs with Teleflex's TLS stylets. (Dkt. No. 134-2, ¶ 79; Dkt. No. 144-1, ¶ 79).

In August 2017, the University of Colorado switched from AngioDynamics' BioFlo PICCs to Bard's preloaded PICCs. (Dkt. No. 133-2, ¶ 80; Dkt. No. **[**48]** 144-1, ¶ 80). According to an email written by an AngioDynamics employee, the decision was "based on contract savings and a corporate rebate agreement." (Dkt. No. 136-58, at 4). The email also noted that the "clinical champion for BioFlo" at the University of Colorado "has been disappointed in the [upper extremity DVT] results [from BioFlo] for the past few years and her **[*300]** data collection doesn't allow her to argue/justify the contract savings to supply chain anymore." (*Id.*). The email further referenced the fact that "[o]ther [h]ospitals within" the University's medical system were "HUGE Bard supporters," and that "[t]hey were told if University switched then [sic] the other teams could get their new equipment, if she didn't then [sic] no funding would be available for future requests this year." (*Id.* at 5).

c. Torrance Hospital

In August 2017, AngioDynamics lost its PICC business with Torrance Hospital to Bard. (Dkt. No. 133-2, ¶ 81; Dkt. No. 144-1, ¶ 81). In an email reporting on the loss, an AngioDynamics employee attributed the loss to "the discontinuance of Navigator [an audio-only tip navigation system AngioDynamics had offered] and the hospitals [sic] need for a Navigation piece for" its **[**49]** PICC placement. (Dkt. No. 136-59, at 3). The email explained that the decision "came down to ICU nurses, Administration and Radiology finding a safe and acceptable system from Bard, Teleflex or Medcomp that would allow them to place Piccs [sic] in the ICU for their patients . . . We have tried to influence the decision but in the end they chose Bard." (*Id.*). The email cited, as an additional reason for the change, the fact that Torrance Hospital received "a tremendous savings of over 15% with the change to Bard," and noted that the hospital was "never open to paying any type of premium for [AngioDynamics' BioFlo PICC] and remained steadfastly concerned about reducing acquisition costs." (*Id.*).

d. Hillcrest Medical Center

According to a 2013 internal Bard memo, in that year, AngioDynamics won the PICC business of Hillcrest Medical Center in Tulsa, Oklahoma from Bard "based on [BioFlo PICCs'] superior results during long evaluation period." (Dkt. No. 138-31, at 3). The memo noted that, at the time, Hillcrest did *not* use tip location to place PICCs, and that such non-tip-location accounts were "by far [Bard's] most vulnerable." (*Id.*).

Scott Centea testified that Hillcrest was a customer **[**50]** that had "collected data" and prepared a "poster presentation" for nursing conferences "show[ing] the efficacy of the BioFlo PICC and how it reduced . . . DVTs." (Dkt. No. 144-37, at 12-13). He also testified that he learned from other AngioDynamics employees that Hillcrest had "inquired [to Bard] about the ability or the opportunity . . . to potentially purchase a stylet from Bard" for use with AngioDynamics' PICCs after AngioDynamics had informed them that this "was an option in the market" based on Bard's selling of the stylet to Cleveland Clinic. (Dkt. No. 144-37, at 13-15).

In a February 2015 email, summarizing a three-month BioFlo trial being conducted at Hillcrest, a Bard employee wrote that Hillcrest had experienced "hemolysis and poor flow rates" with AngioDynamics' valved BioFlo PICC and "cracked/leaking hubs" with their non-valved BioFlo PICCs, and that Hillcrest ultimately "made the decision to stay with Bard Solo after having multiple issues with hemolysis." (Dkt. No. 144-29, at 2).

Later in 2015, Hillcrest decided to implement tip location and considered TLSs from Bard, Teleflex and AngioDynamics; an internal Bard memo speculated that the reason for evaluating all three **[**51]** vendors' technology, rather than merely using AngioDynamics' Celerity TLS that was available at the time, was dissatisfaction with the BioFlo PICCs' results. (Dkt. No. 138-32, at 3, 5).

In October 2015, the Clinical Resource Management Director at Ardent Health Services wrote to AngioDynamics representatives: **[*301]** "Following an extensive trial at Hillcrest Medical Center, to include a multitude of vendor product combinations, we will be standardizing to BARD PICC Lines and 3CG technology . . . I know you cannot be surprised by the decision, as currently AngioDynamics does not have similar technology." (Dkt. No. 144-12, at 2-3). In a subsequent follow-up email to Hillcrest's corporate parent, Scott Centea wrote, "This entire situation could have been avoided if Bard was willing to sell you their single sterile 3CG stylet. . . . If they were willing to offer you this product, like they have at other facilities, [then] your PICC nurses could have used the Sherlock/3CG system with our BioFlo." (Dkt. No. 138-35, at 2).

In November 2015, a Bard employee wrote, "Big win at Hillcrest to finally win PICCs back after 2 year[s] of Bioflo. Total growth should be about $700k . . . [T]hey did attest that **[**52]** they actually had used more Cathflo[, a product used to dissolve thrombus formations in or around the PICC,] while using Bioflo. They declined to evaluate Celerity, based on the fact that they didn't have an algorithm aspect like 3CG Diamon[d] and VPS did." (Dkt. No. 147-40, at 2).

e. Christus St. Patrick

In October 2014, Bard's Louisiana Territory Manager, Shane Beaudean, wrote to other Bard employees that a "Bio-Flo trial [at Christus St. Patrick] has concluded and the decision has been made to stick with Bard." (Dkt. No. 144-14, at 2). When asked for more details regarding why the hospital chose to stick with Bard, Beaudean responded:

> The PICC nurse really disliked Celerity. She said it felt like she was using 10 year old technology. She was required to screenshot a baseline P-wave, initial deflection P-wave, and max P-wave for each patient. She was instructed by the rep to do this. She really felt like this slowed her down and she missed our real-time navigation. On one patient she achieved max P and the catheter was up the U. She was instructed how to check for malpositions using our Site-Rite 6 which she really disliked due to sterility issues. The nurses hated the triple lumen **[**53]** PICC compared to ours. Nurses had problems with blood draws so much so that the Angio rep showed them "a new technique for drawing blood." They had issues with the flow rates of the PICC's [sic] to the point that the rep talked to BioMed about changing IV pump settings which they refused to do. At the end of the day, the PICC nurse felt that Bard's technology was far superior on all fronts.

(*Id.* at 2). A November 2014 email from an AngioDynamics territory manager provides a somewhat different explanation based on his own discussions with Christus St. Patrick representatives. The email says that the PICC nurse "gave us outstanding reviews on the overall performance of BioFlo" and "stated the data should reflect a switch to BioFlo," but that "one of the Executives brought up the fact that we do not have Navigation with Celerity" and "stated that Christus should look into converting once we have Navigation." (Dkt. No. 138-37, at 6). After a subsequent meeting, a different AngioDynamics employee confirmed that the PICC nurse's "feedback has been terrific regarding the performance of BioFlo," but that "as expected, [the nurse] (and Christus as a whole) enjoys the time saver and clinical benefit **[**54]** of eliminating [chest x-rays]" through TLS technology, and that Christus "advised that when we can eliminate [chest x-rays], then we can move to the next step with St Patrick as well as with Christus as a whole." (*Id.* at 4).

[*302] f. McLaren Oakland

In a March 2014 memo, a Bard employee wrote: "We have finalized a $120,000 PICC conversion [with McLaren Oakland] starting May 5th. This conversion will knock Angio D and Bioflo out of its only account in this system and gives us full compliance with Bard and 3CG. They are planning on eliminating X-Ray [with Bard TLS] on day one of placements." (Dkt. No. 144-15, at 3). In a subsequent May 2014 email describing the conversion, a Bard employee wrote that "[t]he biggest reasons for this conversion are clinical buy-in and McLaren's Corporate initiative to eliminate Chest X-Ray." (Dkt. No. 144-16, at 2). A Bard Regional Manager responded to that email, saying, "This [Bard] win brings AD's total lost business, in Michigan alone, to a staggering $880,000!!! Trust me when I say, Bioflo is a BioFLOP." (*Id.*). A spreadsheet prepared by Bard's sales team several months later reports that McLaren Oakland "has had great results going to solo from bioflo." (Dkt. No. **[**55]** 147-41, at 2).

g. Summerlin

In September 2015, an AngioDynamics territory manager wrote that the PICC Registered Nurse at Summerlin was "[o]pen to BioFlo, BUT SKEPTICAL," and listed concerns about, among other things, whether BioFlo would "do what we say it will," BioFlo's larger lumens size compared to the PICCs Summerlin was currently using, and the fact that the TLS AngioDynamics offered at the time, Celerity, did not yet have a navigation component. (Dkt. No. 147-

42, at 3). In October 2015, in connection with an upcoming trial of BioFlo PICCs with Celerity, a representative of Summerlin hospital wrote to AngioDynamics employees explaining that the PICC Nurse "has many concerns about the AngioDynamic catheters," but that "[h]is main concern is the inability to do tip navigation to prevent malpositions and the lack of some size catheters he uses." (Dkt. No. 138-42, at 3).

In his deposition, Scott Centea testified, based on his understanding from another AngioDynamics employee involved in the conversation, that Summerlin told AngioDynamics that it was "having difficulties . . . placing our BioFlo PICC without [Bard's] 3CG system," and that he believed Summerlin unsuccessfully requested **[**56]** a standalone stylet from Bard to pair with the BioFlo PICCs. (Dkt. No. 152-5, at 3-5).

In November 2015, a Bard Sales Trainer and Territory Manager wrote to other Bard employees describing his takeaways from a discussion with a PICC nurse at Summerlin Hospital who was "currently evaluating the BioFlo PICC and Celerity." (Dkt. No. 144-17, at 3). One of the "main takeaways" was that Bard's Sherlock TLS "is irreplaceable - by far this is our #1 competitive advantage - Celerity doesn't have a way to address malpositions." (*Id.*). However, the Summerlin team also expressed various other concerns about BioFlo and Celerity, including stylet stiffness, lumen sizes, cumbersomeness, and the fact that Celerity "doesn't come pre-loaded." (*Id.*). Approximately a month later, when Summerlin opted to discontinue the BioFlo evaluation, the customer provided feedback to Scott Centea in an email reflecting that "[t]he overriding concern was the lack of a navigation system" which led to "concern about inaccurate placement as well as the increased time to place and assure correct placement"; however, the customer also listed various other issues with the BioFlo/Celerity system, including TLS equipment failures, **[**57]** cumbersomeness, oozing and cracking of the PICCs (including one PICC cracking while inside a patient's body), and concerns about patient safety. (Dkt. No. 144-18, at 4). Reflecting on this feedback, another AngioDynamics employee wrote that, "[f]rom the sounds of **[*303]** it the biggest factor in them ending their trial mid-term was CELERITY . . . Definitely further supports the notion that tip location is often the deciding factor in many of our trials, and more often than not seems to trump the PICC performance and outcomes." (*Id.* at 2).

h. UHS Delaware

In May 2014, in discussing Universal Health Systems of Delaware's ("UHS Delaware") decision to purchase Bard's PICCs, a Bard National Accounts Manager wrote: "AngioDynamics/Bioflop was once again turned away as they could not compete against our clinically superior products. This is a perfect example of why we need all of our customers using 3CG technology. The proprietary technology including 3CG, HF, FT and PowerGlide help lockdown our business as our competition cannot offer these products." (Dkt. No. 138-44, at 2).

In December 2015, following a "multi site trial of AngioDynamics BioFlo and Celerity," the Value Analysis Program Director at UHS of **[**58]** Delaware, Patricia Tyrrell, wrote to a Bard National Accounts Manager: "I wanted to let you all know that the decision was made today by the PICC work group, that we will be staying with Bard. The biggest issue in moving forward was lack of navigation." (Dkt. No. 144-19, at 3). After receiving this email, the National Account Manager forwarded it to other Bard employees, writing: "All of you did a great job protecting what is yours with [TEXT REDACTED BY THE COURT] in PICC and Midline spend. Once again the significance of getting our facilities to 3CG played an important role here." (*Id.* at 2).

In subsequent correspondence between Tyrrell and Scott Centea, Centea wrote that "[t]he initial objective with this evaluation was to compare the merits of BioFlo against a non-BioFLo PICC (Bard)" but "[w]hat ended up happening is that our Celerity was being compared against 3CG Sherlock. Unfortunately, the primary objective of the evaluation was silenced rather quickly." (Dkt. No. 144-21, at 2). Tyrrell responded: "[W]hen we look [sic] PICCs again, we will again include Bioflow [sic] knowing that your navigation will be available at that time." (*Id.*).

i. Baycare

Bard emails reflect that, in 2012, Bard **[**59]** was able to capture "close to $1 million" in new PICC business from Navilyst (BioFlo's previous owner) by converting Baycare Health Systems to Bard's TLS with "help from dozens of our Clinical Specialists," which allowed the system to eliminate the use of chest x-rays for tip confirmation. (Dkt. No. 144-22, at 2). In an August 2013 email describing the conversion, a Bard employee wrote that, during Baycare's trial of Bard's TLS, Bard "strongly stressed the trial was not about [comparing PICC technology], it was about catheter tip position confirmation and eliminating X-ray," but that Bard also "just happened to have a proximal valved Picc as they were used to and if they function equally then no comparison needed." (Dkt. No. 144-23, at 2). The email also noted that Baycare "actually loved the [Bard] kit component upgrades . . . over current Navilyst" kits. (*Id.*).

Years later, in a January 2017 email from William Millar to Tom Aldrich listing "key losses and risks for Q2," Millar listed Baycare as a "$850,000 Loss due to no Tip Location/Confirmation." (Dkt. No. 144-20, at 2). In his deposition, Millar expanded on this, testifying that, based on his

> conversations with [Baycare personnel] **[**60]** . . . BayCare was interested in moving to a navigation tip location system. We conducted a trial head-to-head against Bard, our midlines versus their midlines, because at the time that was also an **[*304]** interest . . . they had clinical data outcomes proving that we had better outcomes with the BioFlo midline versus the Bard device, yet . . . they wanted tip location 3CG and they could not use our PICC lines with the Bard system, so they made the business decision to move [to] Bard PICCs and midlines from AngioDynamics because of the requirement of not being able to get provided that solution.

(Dkt. No. 138-46, at 3-4). Millar further testified that Baycare switched from AngioDynamics' midline catheters to Bard's midline catheters, even though better patient outcomes were observed with AngioDynamics' catheters, and that their stated reason was the need for Bard's TLS stylet and the inability to pair it with AngioDynamics' PICCs. (*Id.* at 5-20).

j. St. Vincent's

In an April 2016 email listing updates on PICC opportunities, Daniel Tighe, a Bard District Manager, wrote: "St. Vincent — Billings — Angio D competitive conversion . . . Scheduled for June 13th." (Dkt. No. 144-25, at 2). In a subsequent November **[**61]** 2016 memo, Tighe wrote to a sales representative: "Excellent job of converting [the St. Vincent's] account from Angio D to 3CG in the first quarter. The team seems very satisfied with 3CG." (Dkt. No. 138-40, at 2).

k. UH Cleveland

Internal Bard documents reflect that, in 2015, Bard was able to convert UH Cleveland to its TLS system, putting Bard "one step closer to OWNING Cleveland with both PICCs and Tip Confirmation." (Dkt. No. 144-26, at 3; Dkt. No. 144-27, at 3). Scott Centea testified that, after experiencing multiple complications with a particular patient using Bard's PICC lines, UH Cleveland decided to try a BioFlo PICC (which needed to be placed by a physician in the IR suite rather than at the patient's bedside, since it could not be paired with Bard's TLS), and the patient had "zero complications" with the BioFlo PICC. (Dkt. No. 144-37, at 6-11). Centea testified that a UH Cleveland representative informed an AngioDynamics representative that, following this "fantastic patient success story," UH Cleveland asked Bard whether it would be possible to buy Bard's stylet single-sterile, but Bard "said no," and therefore UH Cleveland continued purchasing Bard's PICCs with its preloaded **[**62]** stylet rather than AngioDynamics' BioFlo PICCs. (*Id.* at 7-8). Centea could not recall the specific AngioDynamics representative who relayed this information to him or the specific UH Cleveland representatives who were involved, but testified that the story was "pretty well-known because of how we worked closely with this patient," that the story became "pretty high profile testimony" regarding BioFlo's benefits, and that "a lot of people were asking within AngioDynamics, as well as other institutions," whether UH Cleveland had switched to BioFlo. (*Id.* at 10-11).

l. VA Little Rock

In a May 2014 email, in response to a question regarding whether AngioDynamics had lost or was going to lose VA Little Rock's business, Millar responded: "Lost. Bard 3CG was implemented as tip location/navigation was decided to be the requirement." (Dkt. No. 144-28, at 2). In February 2015, a Bard employee wrote that VA Little Rock "was an Angiodynamics account who used Bioflo and Navigator. To eliminate X-ray, they trialed 3CG and the Solo, changed to Bard with no increase in cathflo and less placement complications." (Dkt. No. 144-29, at 3).

III. STANDARD OF REVIEW

HN1[] Under *Rule 56(a)*, summary judgment may be granted only if all the submissions **[**63]** **[*305]** taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *see also* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex, 477 U.S. at 323*. A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson, 477 U.S. at 248*; *see also* *Jeffreys v. City of New York, 426 F.3d 549, 553 (2d Cir. 2005)* (citing *Anderson, 477 U.S. at 248*). The movant may meet this burden by showing that the nonmoving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, 477 U.S. at 322*; *see also* *Selevan v. N.Y. Thruway Auth., 711 F.3d 253, 256 (2d Cir. 2013)* (explaining that summary judgment is appropriate where the nonmoving party fails to "'come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on' an essential element of a claim" (quoting *In re Omnicom Grp., Inc. Sec. Litig., 597 F.3d 501, 509 (2d Cir.2010)))*.

HN2[] If the moving party meets this burden, the nonmoving party must "set out specific facts showing a genuine issue for trial." *Anderson, 477 U.S. at 248, 250*; *see also* *Celotex, 477 U.S. at 323-24*; *Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009)*. "When ruling on a summary judgment motion, the district **[**64]** court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Dallas Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775, 780 (2d Cir. 2003)*. Still, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, and cannot rely on "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," *Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986)* (quoting *Quarles v. Gen. Motors Corp., 758 F.2d 839, 840 (2d Cir. 1985))*. Furthermore, "[m]ere conclusory allegations or denials . . . cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010)* (quoting *Fletcher v. Atex, Inc., 68 F.3d 1451, 1456 (2d Cir. 1995))*.

HN3[] When considering cross-motions for summary judgment, a court "must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Hotel Emp. & Rest. Emp. Union, Local 100 of New York, N.Y. & Vicinity v. City of New York Dep't of Parks & Recreation, 311 F.3d 534, 543 (2d Cir. 2002)* (quoting *Heublein v. United States, 996 F.2d 1455, 1461 (2d Cir. 1993)* (internal quotation marks omitted)). "In the context of antitrust cases . . . summary judgment is particularly favored because of the concern that protracted litigation will chill pro-competitive market forces." *Pepsi Co, Inc. v. Coca-Cola Co., 315 F.3d 101, 104-05 (2d Cir. 2002)* (citing *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 95 (2d Cir.1998))*. "Although all reasonable inferences will be drawn in favor of the non-movant, those **[**65]** inferences 'must be reasonable **[*306]** in light of competing inferences of acceptable conduct.'" *Id.* (quoting *Tops Mkts., 142 F.3d at 95*).

IV. DISCUSSION

AngioDynamics moves for summary judgment on all liability elements of its tying claim, as well as on the issue of antitrust injury, leaving the amount of damages as the only triable issue. (Dkt. No. 134). Bard moves for summary judgment seeking dismissal of the complaint, asserting that AngioDynamics has failed to raise a triable issue of fact as to antitrust injury and damages. (Dkt. No. 133). In conjunction with its motion for summary judgment, Bard moves to exclude the testimony of AngioDynamics' causation and damages expert. (Dkt. No. 132). Bard contends that if its motion is successful, AngioDynamics would have "no evidence of any damages" with which it could "create a triable issue as to damages." (Dkt. No. 133-1, at 36). The Court addresses each element in turn, and addresses Bard's motion in limine in connection with its analysis of damages.

A. Liability Elements

HN4[] "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase **[**66]** that product from any other supplier.'" *Smugglers Notch Homeowners' Ass'n, Inc. v. Smugglers' Notch Mgmt. Co., Ltd., 414 F. App'x 372, 374 (2d Cir. 2011)* (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 464, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))*. To state a tying claim under the Sherman Act, a plaintiff must prove that: (1) "the sale of one product (the tying product) is conditioned on the purchase of a separate product (the tied product)"; (2) "the seller uses actual coercion to force buyers to purchase the tied product"; (3) "the seller has sufficient economic power in the tying product market to coerce purchasers into buying the tied product"; (4) "the tie-in has anticompetitive effects in the tied market"; and (5) "a not insubstantial amount of interstate commerce is involved in the tied market." *Kaufman v. Time Warner, 836 F.3d 137, 141 (2d Cir. 2016)* (citing *E&L Consulting, Ltd. v. Doman Indus. Ltd., 472 F.3d 23, 31 (2d Cir. 2006))*.

AngioDynamics' complaint alleges that Bard has violated *section 1 of the Sherman Act* by unlawfully tying the purchase of Bard TLS stylets to the purchase of Bard PICCs. (Dkt. No. 1, ¶ 95). The "tying products"—the products over which Bard allegedly has market power—are Bard's TLSs, and the "tied products"—the products that Bard allegedly coerces buyers to purchase—are Bard's PICCs. (*Id.* ¶¶ 96-96, 104). AngioDynamics argues that based on the record evidence, there is no genuine dispute of material fact as to any of the five elements. (Dkt. No. 134).

1. Separate Products

HN5[] "The 'separate **[**67]** product' element requires that the alleged tying product and tied product be separate, *i.e.*, they must exist in separate and distinct product markets." *Kaufman, 836 F.3d at 141*. "This is because if there is no separate market for the allegedly tied product, there can be no fear of leveraging a monopoly in one market to harm competition in a second market." *Id. at 142*. Courts apply a "consumer demand test" to determine whether two products are separate for ***antitrust law*** purposes. *Id.* Two products are separate only if "there is a sufficient demand for the purchase of [the tied product] separate from [the tying product] to identify a distinct product market in which it is efficient to offer [the former] separately from [the latter]." *Jefferson Par. Hosp. Dist. No. 2 v. **[*307]** Hyde, 466 U.S. 2, 21-22, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. Separateness "turns not on the functional relation between [the products], but rather on the character of the demand for the two items." *Id. at 19*. Factors relevant to whether there is "separate and distinct consumer demand" for the two products include, among others, "the history of the products being, or not being, sold separately" and "the sale of the products separately in similar markets." *Kaufman, 836 F.3d at 142*.

AngioDynamics contends that there is no genuine dispute of material fact **[**68]** as to whether Bard's PICCs and its TLSs constitute separate products. AngioDynamics cites the following evidence in support of its position that they are separate products: (1) documentary evidence and Bard's own admissions establishing that some customers have inquired about the possibility of purchasing a standalone TLS stylet, and that one (Cleveland Clinic) actually did for a time; (2) documentary evidence reflecting Bard's efforts to avoid publicizing to customers the fact that it had obtained FDA approval to sell its TLS stylet single-sterile, and was doing so with respect to Cleveland Clinic, at least partly out of a concern that customers might demand such a product; and (3) the fact that Teleflex, Bard's only competitor that sells navigation-enabled TLSs, "has always sold its TLS Stylets separately from its

PICCs and continues to offer this option to customers today," and a significant number of its TLS customers elect that option. (Dkt No. 134-1, at 16-19; Dkt. No. 152, at 8).

In arguing that there is a genuine dispute of material fact as to the separate products element, Bard relies on the analysis of its expert, Professor Fiona Scott Morton, who opines, among other things, **[**69]** that: (1) "the total demand for a separate 3CG stylet represented by [the hospitals the parties have identified as having inquired about a standalone stylet] is at most relatively small"; (2) based on this low demand and the costs of offering a standalone stylet, "Bard would reasonably conclude that there would likely be little demand for a separate 3CG stylet at a price that would make it profitable for Bard to sell the stylet separately"; and (3) "[t]he fact that Teleflex sells a relatively small number of . . . stylets separately is not evidence that there would be enough demand for a separate 3CG stylet to induce Bard to sell it separately," including because Teleflex and Bard Stylets "are based on different technology" and the two companies "face different costs for selling them separately," rendering it "not at all unreasonable or surprising that the two firms would come to different conclusions about selling their stylets separately." (Dkt. No. 145, at 8 (quoting Dkt. No. 147-13, at 33-34); *id.* at 10-11 (quoting Dkt. No. 147-13, at 31); *id.* at 13-14 (quoting Dkt. No. 147-13, at 35)). Bard also argues that: (1) Bard's witness testimony suggests that it developed its TLS stylets to be used exclusively **[**70]** as components in Bard's PICCs and that they were "not intended or designed to be loaded in the field"; (2) AngioDynamics' witness testimony establishes that, when it tracks its "market share at the PICC level," it does not separately track market share for "disposables" like TLS stylets; (3) neither "anecdotal" examples of customer inquiries regarding a standalone stylet nor documents reflecting Bard's "prepar[ation] for the possibility that a customer might make an inquiry" establish that there was significant enough demand for Bard's TLS as a separate product to satisfy the consumer demand test, particularly where **[*308]** none of the inquiring individuals submitted a formal Request for Proposal, discussed the price they would be willing to pay for a standalone stylet, or had complete decision-making authority on behalf of their hospitals; and (4) "AngioDynamics' own economic expert . . . agreed that one must evaluate whether there would be sufficient demand for Bard's standalone stylets at a price that covered all the relevant costs of offering the product," but "has not quantified the relevant costs Bard would have to cover if it offered the standalone stylet, nor did he determine at what **[**71]** price demand for standalone stylets would dry up." (Dkt. No. 145, at 9-13).

Based on the parties' arguments and the record before it, the Court finds that Bard has raised a genuine dispute of material fact sufficient to survive summary judgment with respect to the separate products element. AngioDynamics is correct that the record evidence of customer inquiries to Bard regarding a standalone stylet and Bard's efforts to conceal knowledge of the standalone stylet in the market, as well as the fact that Bard's only significant TLS competitor offers its standalone stylet separately from its PICCs and many of its TLS customers choose to purchase it that way, constitutes strong evidence that consumer demand exists for TLSs as a separate product from PICCs. However, Bard has presented expert analysis suggesting that, whatever demand for Bard's standalone stylet may have existed in the market, it was not significant enough to make it "efficient [for Bard] to offer [TLSs] separately from [PICCs]," and thus satisfy the "consumer demand" test for purposes of ***antitrust law***. *See* *Jefferson Par., 466 U.S. at 21-22*. Because, based on the record before the Court, both parties take positions that a reasonable fact-finder could credit, **[**72]** their disputes are appropriately resolved at trial, not at the summary judgment stage.

AngioDynamics relies on *Park v. Thomson Corp., No. 05-cv-2931, 2007 U.S. Dist. LEXIS 2001, 2007 WL 119461 (S.D.N.Y. Jan. 11, 2007)* and *In re Visa Check/Mastermoney Antitrust Litigation, No. 96-cv-5238, 2003 U.S. Dist. LEXIS 4965, 2003 WL 1712568 (E.D.N.Y. Apr. 1, 2003)* for the proposition that "[w]here the items have been sold separately, distinct products exist," and argues that under this case law, the fact that Teleflex sells its TLS separately from its PICCs establishes the existence of separate products. (Dkt. No. 134-1, at 14-15; Dkt. No. 152, at 7-8). However, the Court does not read either case to suggest that Teleflex's sale of a standalone TLS establishes the existence of separate products *as a matter of law*. In *Park*, the Court found that BAR/BRI's Multistate Bar Examination ("MBE") and state-specific bar review courses constituted separate products by relying on the fact that "numerous sellers offer an MBE-only or specific-state course to buyers every year," and granted summary judgment to the plaintiff on the separate products element. *Park, 2007 U.S. Dist. LEXIS 2001, at *9-10, 2007 WL 119461, at *3*. The *In re Visa* court found that "[o]verwhelming evidence establishes that merchant demand for credit card services is distinct from merchant demand for debit card services," including **[**73]** that "those services are sold separately; many merchants would refuse to use off-line debit services if given the choice to do so; and the defendants themselves have repeatedly acknowledged in their business strategy and marketing activities the distinctive attributes of their off-line debit services compared to their credit card services." *In re Visa, 2003 U.S. Dist. LEXIS 4965, at *8-9, 2003 WL 1712568 at *2*.

[*309] The evidence here is not so clear-cut. It establishes that there are only two competitors who sell navigation-enabled TLSs—one that sells its TLS stylet as a standalone product and one that does not. It also suggests that there are genuine technological distinctions between the two companies' products that may or may not affect the price at which they would need to offer their respective stylets single-sterile in order to cover their associated costs, and consequently, the level of consumer demand for each of them as standalone products when sold at that price. (Dkt. No. 136-6, at 33-34 (describing technological differences between Teleflex and Bard stylets); Dkt. No. 147-44, ¶¶ 4-10 (same); Dkt. No. 147-13, at 35 (opining that technological differences would impact the companies' costs of selling their respective TLS stylets single-sterile, the **[**74]** price at which those single-sterile stylets would be offered, and the resulting consumer demand)).[5] While the Court agrees with the *In re Visa* court that "[t]he proper question is not whether it was more efficient for [Bard] to offer [its PICCs and TLS stylets] together, but whether the nature of the demand is such that those services could be offered separately," *In re Visa, 2003 U.S. Dist. LEXIS 4965, at *9, 2003 WL 1712568 at *3*, here (unlike in *In re Visa*) the genuine disputes of fact do not merely relate to "whether it was more efficient for [Bard] to offer [its PICCs and TLS stylets] together," but to whether the "nature of the demand" for Bard's TLS stylet (as distinct from Teleflex's TLS stylet) is such that Bard could efficiently sell the products separately at all. Therefore, the Court denies AngioDynamics' motion for summary judgment with respect to the separate products element of its claim.

2. Coercion

HN6[] "Actual coercion by the seller that in fact forces the buyer to purchase the tied product is an indispensable element of a tying violation." *Unijax, Inc. v. Champion Int'l, Inc., 683 F.2d 678, 685 (2d Cir. 1982)*. Indeed, "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that **[**75]** the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Par., 466 U.S. at 12*. "When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Id.* "The element of actual coercion is designed to weed out the many cases where the bundling of separate products is due to consumer demand. If a consumer ***wants*** to purchase a bundle of the alleged tying and tied products, the seller is simply satisfying consumer demand and monopolization concerns are irrelevant." *Kaufman, 836 F.3d at 142*. A seller's "use of strong persuasion, encouragement, or cajolery to the point of obnoxiousness to induce [a buyer] to buy its full line of products does not . . . amount to actual coercion," which is present only if the seller "goes beyond persuasion and conditions its [buyer's] purchase of one product on the purchase of another product." *Unijax, 683 F.2d at 685* (internal quotation marks omitted).

[*310] ***HN7***[] An "unremitting policy of tie-in, if accompanied by sufficient market power in the tying product to appreciably restrain competition in the market for the tied product constitutes the requisite coercion . . . given foreclosure of a not insubstantial volume of **[**76]** interstate commerce." *Hill v. A-T-O, Inc., 535 F.2d 1349, 1355 (2d Cir. 1976)*. Thus, when the seller has "a policy of never offering the [tying product] separately from the [tied product]," *id.*, allegations of individual coercion are unnecessary. *See* *Park, 2007 U.S. Dist. LEXIS 2001, at *11-12, 2007 WL 119461, at *4* ("When a policy of conditioned sales is demonstrated, proof of coercion on an individual basis is unnecessary."); *cf.* *Reisner v. Gen. Motors Corp., 511 F. Supp. 1167, 1177 n.21 (S.D.N.Y. 1981)* ("The 'unremitting policy of tie-in,' which under some circumstances can substitute for coercion, is appropriate only in a situation . . . where the policy was applied to all buyers." (citation omitted)), *aff'd*, *671 F.2d 91 (2d Cir. 1982)*.

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[5] Moreover, the fact that Bard sold single-sterile stylets to Cleveland Clinic for a price at which Bard appeared to make a fairly high margin, (Dkt. No. 138-79, at 3), does not definitively resolve the question of whether sufficient demand existed to allow Bard to efficiently sell the products separately to the market at large, given the record evidence suggesting that this price was based on factors specific to Cleveland Clinic and was discounted from the price at which Bard would have been able to offer its single-sterile stylet to the market. (Dkt. No. 146, ¶ 48 (citing and summarizing record evidence)).

AngioDynamics argues that the element of coercion is met here because "Bard admits that it has a policy of only selling its TLS Stylets preloaded in its PICCs—forcing those who want to purchase Bard's TLS to also purchase its PICCs—and that it has only made one exception to that policy, for the Cleveland Clinic." (Dkt. No. 134-1, at 20-21; *see also* Dkt. No. 152, at 10). AngioDynamics also argues that "the record establishes, and Bard has admitted, that many institutions have requested to purchase Bard's TLS Stylets separately from its PICCs," and that "Bard refused these requests and has not sold its PICCs to any of these institutions—only to the Cleveland Clinic." **[**77]** (*Id.* at 21).

Bard responds that AngioDynamics "has a complete failure of proof" on the coercion element because "not a single hospital will testify that it 'either did not want [the Bard PICC] at all, or might have preferred to purchase [PICCs] elsewhere on different terms'"; to the contrary, "the only hospital that the jury will hear, Cleveland Clinic, will testify [that] it had the choice to purchase Bard's standalone stylets and use them with AngioDynamics' PICCs, but quickly decided that it preferred Bard's preloaded PICCs." (Dkt. No. 145, at 15-16 (quoting *Jefferson Par., 466 U.S. at 12*)). Bard also argues that AngioDynamics cannot satisfy the coercion element "by showing only that Bard does not offer its stylets separately from its PICCs," without any evidence that particular customers were actually coerced into purchasing the products together. (*Id.* at 16-17).

Here, it is undisputed that, with the sole exception of Cleveland Clinic for a limited period in the past, Bard has never, and does not, allow its customers to purchase its TLS stylets separately from its PICCs. In other words, as a matter of Bard's policy, customers who wish to purchase Bard's TLS stylet are forced to purchase Bard's PICCs along with it. (Dkt. No. 133-2, **[**78]** ¶¶ 26-27, 30; Dkt. No. 134-2, ¶¶ 22-23; Dkt. No. 144-1, ¶¶ 26-27, 30; Dkt. No. 146, ¶¶ 22-23). Thus, Bard's policy is precisely the type of "unremitting policy of a tie," i.e. the "policy of never offering the [tying product] separately from the [tied product]," that the Second Circuit has long held "constitutes the requisite coercion," assuming the other elements of market power and foreclosure of a not insubstantial amount of commerce are satisfied. *Hill, 535 F.2d at 1355*.

Bard's argument that AngioDynamics cannot prevail on the coercion element without proof that individual customers were coerced into purchasing the tied products together misses the mark. While Bard correctly states that the Second Circuit requires a showing of actual coercion to prevail on a tying claim, it has offered **[*311]** no rebuttal to the case law in this Circuit establishing that a "policy of never offering the [tying product] separately from the [tied product]," *Hill, 535 F.2d at 1355*, which "[is] applied to all buyers," *Reisner, 511 F. Supp. at 1177 n.21*, in itself constitutes such "actual coercion," since any customer who wants the tying product is, by definition, forced to purchase it with the tied product or not at all. *See* *Park, 2007 U.S. Dist. LEXIS 2001, at *11-12, 2007 WL 119461, at *4* ("When a policy of conditioned sales is demonstrated, proof **[**79]** of coercion on an individual basis is unnecessary."); *In re Visa, 2003 U.S. Dist. LEXIS 4965, at *7-8, 2003 WL 1712568, at *2* (holding, on a plaintiff's motion for summary judgment, that the defendants "indisputably" engaged in a tie because the defendants' "rules require merchants who accept [the tying product] to also accept [the tied product]" and "Defendants do not claim otherwise").

Bard argues that "AngioDynamics cannot meet the *Hill* standard," because *Hill* establishes that, "in addition to a policy of tying, a plaintiff must also show (i) market power in the tying market, and (ii) foreclosure of a not insubstantial amount of commerce." (Dkt. No. 145, at 17). ***HN8***[] Bard is correct that, under *Hill*, an "unremitting policy of a tie" only transforms into "actual coercion" where the defendant has sufficient market power such that its policy can "appreciably restrain competition in the market for the tied product" and "foreclos[e] a not insubstantial volume of interstate commerce." *Hill, 535 F.2d at 1355*. Indeed, without such market power, a defendant cannot actually coerce customers into purchasing its tied products, since those customers can simply purchase the desired products separately elsewhere. In its most recent discussion of the "actual coercion" element, while it did not **[**80]** address the continued validity of *Hill*, the Second Circuit took a consistent approach, noting that "the 'separate product' and 'market power' requirements are usually essential to the coercion element," since those separate elements are necessary to distinguish tying policies that result from the defendant's market power from situations where "the bundling of separate products is due to consumer demand." *Kaufman, 836 F.3d at 141-43*.

HN9[] The Court reads these cases to hold that an "unremitting policy of a tie" constitutes actual coercion if, and only if, the other elements of a tying claim—market power, separate products, and the foreclosure of a not insubstantial amount of commerce—are met. Therefore, if a plaintiff proves that a defendant has an unremitting policy of a tie that applies to all customers, the plaintiff need not present proof of individualized coercion, but must still prove the other elements of its tying claim in order to establish that that "unremitting policy" in itself constitutes "actual coercion." Here, the fact that Bard engages in an "unremitting policy of a tie" is not in dispute; given that, proof that Bard's TLS policy coerced individual customers who did not want Bard's PICCs into buying **[**81]** them is unnecessary to prove the "actual coercion" element of AngioDynamics' claim. However, the Court cannot conclude that Bard's "unremitting policy of a tie," in itself, satisfies that element unless it determines that Bard has sufficient market power, and forecloses a sufficiently "not insubstantial" amount of commerce, to transform that "unremitting policy" into "actual coercion" within the meaning of the antitrust laws. Because, as discussed below, genuine factual disputes remain as to these distinct elements of AngioDynamics' tying claim, the Court must, at this stage, deny AngioDynamics' motion for summary judgment on the actual coercion element.

3. Market Power in the Tying Product Market

With respect to the third element of AngioDynamics' tying claim—market power **[*312]** in the tying product market—the Second Circuit has explained:

> The third element at issue here—market power in the tying product—is essential to a would-be monopolist's coercion via tie-in. Without the leverage of market power, a seller's inefficient tie-in will fail because a rational consumer will buy the tying product from the seller's competitor. "As a simple example, if one of a dozen food stores in a community **[**82]** were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself." *N. Pac. Ry. Co., 356 U.S. at 6-7, 78 S. Ct. 514*. *HN10*[] Hence, without market power, there is little risk of anticompetitive harm from the seller's tie-in.
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> Market power is "the ability of a single seller to raise price and restrict output." *Eastman Kodak, 504 U.S. at 464, 112 S. Ct. 2072* (*quoting* *Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 503, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969))*. It can be shown by specific evidence of a seller's ability to control prices or exclude competitors from the market. *See* *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir. 1995)*. Market share is a proxy for market power. *See id.;* *Eastman Kodak, 504 U.S. at 464, 112 S. Ct. 2072*. A high market share alone, however, is insufficient to infer a seller's market power if other characteristics of the product market, such as low barriers to entry, high cross elasticity of demand, or technological developments in the industry, interfere with the seller's control of prices. *See* *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 98-99 (2d Cir. 1998)* ("A court will draw an inference of monopoly power only after full consideration of the relationship between market share and other relevant market characteristics."). Indeed, in a tying case, "the best way" to plead market power is to allege facts that, if proven, "establish directly that the price of the tied package is higher than the price of **[**83]** components sold in competitive markets." *Will v. Comprehensive Accounting Corp., 776 F.2d 665, 671-72 (7th Cir. 1985)* (Easterbrook, J.).

Kaufman, 836 F.3d at 143.

AngioDynamics argues that Bard's overwhelming share of the market for TLSs establishes its market power. (Dkt. No. 134-1, at 22-23; Dkt. No. 152, at 11-12). AngioDynamics also contends that Bard's significant market share is protected by high barriers to entry in the TLS market, including high development costs, the requirement for FDA clearance of medical devices, and Bard's ownership of patented TLS technology. (Dkt. No. 134-1, at 22-23; Dkt. No. 152, at 12). Bard argues that genuine factual disputes exist as to the market power element because: (1) the parties disagree as to whether the "TLS market" is a separate and distinct relevant antitrust market, or whether the relevant market is the market for "differentiated PICCs," and AngioDynamics has not presented evidence regarding Bard's market power in the "differentiated PICC" market; and (2) even assuming the market for TLSs constitutes its own antitrust market, there are factual disputes regarding the significance of barriers to entry in the TLS market, and whether "Bard has maintained high share because it has offered a good product at a cheaper price rather than because **[**84]** of high entry barriers." (Dkt. No. 145, at 17-21).

Bard does not meaningfully dispute that it sold over the overwhelming majority of all TLSs between 2013 and 2018. (Dkt. No. 134-2, ¶ 47; Dkt. No. 146, ¶ 47). Assuming the TLS market constitutes its own antitrust **[*313]** market, this extremely high market share alone would constitute significant evidence of market power*. See, e.g.,* *In re Visa, 2003 U.S. Dist. LEXIS 4965, at *11-12, 2003 WL 1712568, at *4* (finding that market share of "nearly 60 percent" "easily qualifies as 'appreciable economic power' for purposes of the per se [tying] rule"); *Park, 2007 U.S. Dist. LEXIS 2001, at *21-22, 2007 WL 119461, at *8* (noting that "[h]ow much market power is necessary to find a *per se* illegal tying arrangement is an unsettled issue of ***antitrust law***" but that the fact that "Defendants possess an 80-90% market share might, standing alone, permit an inference of market power"); *Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc., 920 F. Supp. 455, 473 (S.D.N.Y. 1996)*, *as corrected* (Mar. 15, 1996) (holding that "a market share above 30 percent is necessary to establish the requisite [market] power" for purposes of a tying claim under *Sherman Act § 1*). However, the Court nonetheless finds that there are factual disputes that preclude summary judgment for AngioDynamics on this element.

First, for the same reasons the Court found that a genuine dispute of material fact existed as to whether **[**85]** TLSs and PICCs are separate products, the Court finds that the contrasting expert analyses by Dr. Hay and Professor Scott Morton as to whether these products constitute separate relevant antitrust markets, (Dkt. No. 136-9, at 26-35; Dkt. No. 147-13, at 13-16; Dkt. No. 138-22, at 4-6), viewed together with the record evidence as a whole, raise a genuine factual dispute as to this question.[6] Because an analysis of market power "only makes sense with reference to a particular market," *Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 229 (2d Cir. 2006)*, the question of whether Bard has sufficient market power for purposes of AngioDynamics' tying claim must survive summary judgment as well.[7]

Second, even assuming the TLS market constitutes a distinct market, there are factual questions regarding the barriers to entry AngioDynamics identifies and their impact on Bard's market power. From the record evidence, there is little doubt that high development costs, the need for FDA approval, and patents held by Bard pose barriers for market entrants seeking to develop TLSs. (Dkt. No. 134-2, ¶¶ 50-56 **[*314]** (citing record evidence discussing these barriers to entry)). However, there are factual questions as to whether those barriers are significant enough to protect Bard's **[**86]** ability to raise price and restrict output in the TLS market, particularly given record evidence that Bard's competitors have developed TLS products in the past notwithstanding the associated development costs and Bard's patents, (Dkt. No. 146, ¶¶ 50, 56), that the price of Bard's PICCs preloaded with its TLS stylet has sometimes been *lower* than the combination of AngioDynamics' PICCs and Teleflex's TLS, (Dkt. No. 133-2, ¶¶ 39-41; Dkt. No. 144-1, ¶¶ 39-41), that [TEXT REDACTED BY THE COURT], (Dkt. No. 133-2, ¶ 21; Dkt. No. 144-1, ¶ 21), and that there is no record evidence suggesting that Bard has, in fact, raised prices or restricted output in the TLS market. These questions are best resolved by a fact-finder after development of a complete record at trial,

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[6] Indeed, at oral argument, AngioDynamics' counsel agreed that, should the Court find a genuine dispute of material fact as to whether Bard's PICCs constitute a separate product from its TLSs, it should also find a factual dispute as to the proper market definition for purposes of the "market power" element.

[7] AngioDynamics argues that Professor Scott Morton's opinion is based on the premise that there is no separate use for TLSs independent of their use with PICCs, and that this premise is contrary to law because "[t]he Supreme Court and courts in this Circuit have repeatedly held . . . that it does not matter whether 'there is no separate use' for the tying product." (Dkt. No. 152, at 11 (citing *Park, 2007 U.S. Dist. LEXIS 2001, at *10-11, 2007 WL 119461, at *4*; *Kodak, 504 U.S. at 463*)). AngioDynamics is correct that the mere fact that two products are interdependent does not preclude a finding that they are separate products or exist in separate antitrust markets. However, Professor Scott Morton's opinion is not based merely on the fact that Bard's TLSs have no use separate from Bard's PICCs. Rather, she opines that consumers "do not evaluate the price of [a TLS] stylet in comparison with the price of other stylets," but rather "evaluate the price of that stylet paired with a PICC in comparison with other combinations of stylets and PICCs," and "choose the differentiated PICC system that best suits its needs based on the system's overall features and price." (Dkt. No. 147-13, at 15). Professor Scott Morton concludes that, "[b]ecause the relevant competition between manufacturers occurs at the differentiated PICC level and not at the TLS or TLS stylet level . . . there is not a separate relevant product market for TLSs." (*Id.* at 16).

rather than the Court on summary judgment. Therefore, the Court denies AngioDynamics' motion for summary judgment on the market power element of its claim.

4. "Not Insubstantial" Amount of Interstate Commerce

HN11[] As to the fourth element of AngioDynamics' claim, the Supreme Court has stated that there must be a substantial potential for impact on competition in the tied market in order to justify condemnation of an alleged tying arrangement. **[**87]** *Jefferson Par., 466 U.S. at 16*. "If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of ***antitrust law***." *Id.* The Supreme Court has defined "substantial" in this context as "substantial enough in terms of dollar-volume so as not to be merely *de minimis*." *Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 501, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)* ("*Fortner I*"). "There is no magic number that definitively establishes whether a plaintiff has foreclosed a 'not insubstantial' amount of potential sales for the tied product." *Gonzalez v. St. Margaret's House Housing Dev. Fund Corp., 880 F.2d 1514, 1518 (2d Cir. 1989)*. In *Fortner I*, the Supreme Court held that a sum of almost $200,000 is not "paltry or 'insubstantial,'" while the Second Circuit has "said that $600,000 of commerce clearly meets 'any test of substantiality.'" *Id.* (quoting *Fortner, 394 U.S. at 502*; *Yentsch v. Texaco, Inc., 630 F.2d 46, 58 (2d Cir. 1980))*.

AngioDynamics argues that, for purposes of this element, the Court should look "solely to the amount of sales processed by the tied product." (Dkt. No. 134-1, at 24; Dkt. No. 152, at 12-14). It asserts that "the data produced by Bard in the litigation shows that Bard sold over [TEXT REDACTED BY THE COURT] PICCs pre-loaded with TLS, valued at over [TEXT REDACTED BY THE COURT] during the period 2013-2018." (Dkt. No. 134-1, at 24; Dkt. No. 152, at 12). Bard **[**88]** argues that the relevant measure is not the *total volume of tied sales*, but the *amount of foreclosed sales*, i.e. the amount of sales that would have occurred but for the challenged tie (subtracting those sales in which the customer would have voluntarily chose to purchase the tied package even if they had a different option). (Dkt. No. 145, at 21-22).

HN12[] The Supreme Court has held that, "[f]or purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice . . . the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit." *Fortner I, 394 U.S. at 502*. Clearly, then, the relevant metric is the amount of PICC sales Bard's TLS policy foreclosed with the respect **[*315]** to the *entire market*, not just AngioDynamics, and no party contends otherwise. The more difficult, and relevant, question is whether this language means that the Court should look simply to the total volume of Bard's tied sales, rather than the amount of sales that Bard's competitors actually were foreclosed from as a result of Bard's conduct. AngioDynamics cites several district **[**89]** court cases in support of its argument that the court should look solely to the total volume of tied sales, rather than the volume of sales that were actually foreclosed. *See In re Data Gen. Corp. Antitrust Litig., 490 F. Supp. 1089, 1117 (N.D. Cal. 1980)* ("In Fortner I and the earlier cases relied on therein, the Supreme Court looked solely at the total volume of the defendant's tied sales . . . Proof of actual foreclosure has never been required in order to satisfy the effect on commerce test." (citation omitted)); *In re Visa, 2003 U.S. Dist. LEXIS 4965, at *7, 2003 WL 1712568, at *2* ("In 1999 alone, merchants processed over one hundred and fifty billion dollars in sales through the defendants' off-line debit cards. This figure is 'not insubstantial.' . . . To the extent that the defendants contend that this element incorporates the need for a showing of 'foreclosure' or 'anticompetitive effect' in the tied product market, I disagree.").

However, the Second Circuit has noted that while "one might read *Fortner I* to require the district court to consider the [total amount of tied sales], we believe that the Supreme Court in *Fortner I* was primarily concerned with ascertaining the total sales lost to potential competitors due to the tying policy." *Gonzalez, 880 F.2d at 1519* (citation omitted). The *Gonzalez* court found that using the total amount of tied sales **[**90]** (in that case, mandatory meal charges collected from residents of a housing facility) "overstates the amount of commerce foreclosed because the record already indicates that many residents would continue to use the meal plan by choice," and that using only the amount of tied sales to the specific plaintiffs in the litigation "may also overstate the amount of commerce foreclosed by the mandatory meal policy because some plaintiffs would choose not to buy the product (the single, prepared meal) at all . . . for a variety of reasons; e.g., they might cook in their rooms at a lower cost." *Id. at 1518*. The Second Circuit remanded to the district court to "determine whether the impact of the alleged tying arrangement is substantial enough to warrant the protection of the antitrust laws" by "tak[ing] into consideration the actual number of people affected by the disputed policy," and noted that "[i]f the district court can ascertain [the total sales lost to potential competitors due to the tying policy], it may use that as the relevant figure." *Id. at 1519*.

Notwithstanding the somewhat ambiguous language in *Fortner I*, this Court is bound by the Second Circuit law in *Gonzalez*. Here, to estimate the amount of commerce **[**91]** foreclosed by Bard's TLS policy, AngioDynamics has simply provided its expert's valuation of the total volume of Bard's sales of PICCs preloaded with its TLS. (Dkt. No. 138-20, at 53-54). This, however, likely "overstates the amount of commerce foreclosed" by Bard's TLS policy, as it does not account for the near-certainty that at least *some* customers would have voluntarily purchased Bard's PICCs preloaded with its TLS stylet even if they had the option not to. *Gonzalez, 880 F.2d at 1518*; *cf., e.g., Park, 2007 U.S. Dist. LEXIS 2001, at *28, 2007 WL 119461, at *9* (finding that using a defendant's "total revenues" to measure the volume of commerce affected "would overstate the effect [of the alleged anticompetitive activity] because many consumers purchase the integrated BAR/BRI course by choice"). Of course, given that amounts as low as a few **[*316]** hundred thousand dollars are sufficient to find a "not insubstantial" amount of foreclosed commerce, if a fact-finder were to conclude that even a relatively small fraction of Bard's total PICC sales were actually foreclosed to competitors by its TLS policy, the fact-finder would likely have a basis to conclude that the amount of foreclosed commerce was "not insubstantial." However, as discussed below in connection with the "anticompetitive **[**92]** effects" element of AngioDynamics' claim, there are outstanding factual disputes as to whether Bard's TLS policy actually foreclosed *any* PICC sales at all. Therefore, the Court must deny AngioDynamics' motion for summary judgment on this element.[8]

5. Anticompetitive Effects[9]

HN13[] To prove anticompetitive effects, a plaintiff must prove that "the defendants' challenged behavior had an actual adverse effect on competition as a whole in the tied product market." *Geneva Pharms. Tech. Corp. v. Barr Labs., 386 F.3d 485, 506-07 (2d Cir. 2004)*. Anticompetitive effects may be proven directly by control of prices or exclusion of competition. *See Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256, 264 (2d Cir. 2001)*; *see also Yentsch, 630 F.2d at 57* (explaining that anticompetitive effects may be shown if "competitors were foreclosed from selling to [buyers] because of [the defendant's] policies"). If plaintiffs establish anticompetitive effects, the burden shifts to defendants to justify their tying arrangement. *Geneva, 386 F.3d at 507*. "Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means." *Id.*

AngioDynamics argues that Bard's TLS policy caused "substantial foreclosure in the PICC market, which harmed not only competitors but also **[**93]** the competitive environment in the PICC market." (Dkt. No. 134-1, at 25). AngioDynamics argues that, "[a]s a result of Bard's tie and its overwhelming market share in the TLS market . . .

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[8] The Court recognizes that AngioDynamics' damages expert, Dr. Frankel, puts forth a number of estimates of AngioDynamics' lost profits that resulted from Bard's TLS policy. If proven, any one of these estimates would far exceed the low threshold to allow this Court to find that a "not insubstantial" amount of commerce has been foreclosed, without even accounting for other PICC competitors' lost sales. (Dkt. No. 132-5, at 45). However, these lost profits estimates are obviously in dispute, and given that (as discussed below) there are genuine disputes of material fact as to whether *any* of AngioDynamics' lost profits may be fairly attributed to Bard's TLS policy, these estimates cannot, at this stage, serve as a basis for granting summary judgment in AngioDynamics' favor.

[9] As they did at the motion to dismiss stage, the parties disagree on whether AngioDynamics must prove anticompetitive effects as an element of its per se claim, as distinct from its rule of reason claim. (Dkt. No. 134-1, at 24-25; Dkt. No. 145, at 22 n.26; Dkt. No. 152, at 14 & n.8). Because the Court has found that genuine disputes of material fact exist as to the other elements of AngioDynamics' claim under either a per se or rule of reason theory, a decision on this issue would not affect the Court's ultimate decision on either party's motion for summary judgment. Therefore, the Court does not address this issue.

Bard has almost entirely foreclosed competition in the largest segment of the PICC market (PICCs used with TLS)." (Dkt. No. 152, at 15). AngioDynamics also argues that Bard's policy "suppressed innovation and investment in the PICC market and frustrated customer choice." (Dkt. No. 134-1, at 26). Bard argues that: (1) customers who wish to use non-Bard PICCs with a TLS have the option to pair those PICCs with Teleflex's TLS, so Bard's PICC competitors are not entirely **[*317]** foreclosed from competing for such customers; (2) [TEXT REDACTED BY THE COURT] (3) Bard's actions have benefitted consumers in the form of lower PICC prices and higher product quality; (4) AngioDynamics has failed to establish BioFlo's technological superiority to Bard's PICCs (a basis for AngioDynamics' belief that many customers prefer BioFlo to Bard's PICCs and that Bard's TLS policy is therefore thwarting customer access to a desired product); and (4) the record belies any argument that Bard's TLS policy "suppressed innovation and **[**94]** investment in the PICC market," as both AngioDynamics and Teleflex have made significant investments in the development of innovative antithrombogenic and antimicrobial PICC technology. (Dkt. No. 145, at 22-25).

AngioDynamics' argument is facially compelling. Because Bard's policy forces any customer who wishes to use Bard's TLS stylet to pair it with Bard's PICCs, Bard's PICC competitors are effectively unable to compete for the PICC business of any customer who opts to use Bard's TLS. And because the vast majority of customers within the market segment for TLS-paired PICCs use Bard's TLS, Bard's TLS policy arguably precludes Bard's competitors from competing with Bard in by far the largest segment of the PICC market.

Nonetheless, as Bard has demonstrated, factual disputes exist as to whether Bard's TLS policy has actually foreclosed any PICC sales by Bard's competitors, given the combination of the following factors: (1) customers who wish to use a TLS stylet with a non-Bard PICC have the option to pair the non-Bard PICC with Teleflex's TLS, meaning that Bard's PICC competitors are not *entirely* foreclosed from competing with Bard even in the market segment for PICCs paired with TLSs; **[**95]** (2) record evidence suggests that customers who use Bard's PICCs preloaded with its TLS may prefer Bard's integrated product for various reasons independent of its TLS policy, including price, quality, ease of use, concerns about heightened risks to patient safety from loading a TLS stylet at the patient's bedside, the convenience of dealing with a single supplier, and preferences for Bard's PICC technology over competitors' PICC technology, including BioFlo; and (3) as discussed more fully with respect to the Court's analysis of antitrust injury, *see* Section IV.B.2. *supra*, AngioDynamics has not adduced evidence establishing beyond dispute that Bard's TLS policy caused AngioDynamics or Teleflex to lose PICC sales to Bard that they otherwise would have made.

Given these factors, a reasonable jury could find that Bard's dominance of the market segment for PICCs paired with TLSs has resulted from customers' overwhelming preference for Bard's combined PICC-TLS product over the other PICC and TLS combinations currently available, and not because Bard's TLS policy prevented Bard's PICC competitors from competing in that market segment. [TEXT REDACTED BY THE COURT]

Moreover, AngioDynamics cites **[**96]** no evidence that Bard's conduct has increased prices, reduced output or reduced product quality in the market. *Cf. MacDermid Printing Solutions LLC v. Cortron Corp., 833 F.3d 172, 182-84 (2d Cir. 2016)* (explaining that "[o]ur cases suggest that it is possible, at least in theory, to prove that a challenged action harmed competition without offering evidence of higher prices, reduced output, or reduced quality," but "in no precedential opinion in this Circuit has a plaintiff successfully proved an adverse effect on competition without offering" such evidence, though "[w]e have suggested that actions that reduce consumer choice are inherently anticompetitive"). **[*318]** And the Court agrees with Bard that AngioDynamics' claim that Bard's TLS policy suppressed innovation in the PICC market is conclusory and without support in the record.

Therefore, the Court finds that genuine disputes of material fact exist as to the anticompetitive effects element of AngioDynamics' claim, and denies AngioDynamics' motion for summary judgment on this element.

6. Liability Summary

For the foregoing reasons, the Court finds that genuine disputes of material fact exist as to each of the liability elements of AngioDynamics' claim, for purposes of both its per se and rule of reason theories. Therefore, **[**97]** the Court denies AngioDynamics' motion for summary judgment as to liability.

B. Antitrust Injury

Both parties move for summary judgment on the antitrust injury element of AngioDynamics' claim. (Dkt. No. 133-1; Dkt. No. 134-1, at 26-34). The notion of "antitrust injury" grew from the recognition that a competitor may be injured not only by prohibited anticompetitive activity, but also by competition itself, and that the antitrust laws were not intended to afford the latter injuries a remedy. *See* *Balaklaw v. Lovell, 14 F.3d 793, 797 (2d Cir. 1994)*. ***HN14***[] Antitrust injury, then, simply means "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. "To establish antitrust injury, a private litigant must 'prove . . . "injur[y] in its business or property" by reason of the violation . . . [and that] the violation was at least a material cause of the plaintiff's injury.'" *Blue Tree Hotels Inv., Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 220 (2d Cir. 2004)* (citations omitted, alterations in original). In other words, "a plaintiff must show (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the [antitrust] statute." *Id.* The antitrust injury requirement thus ensures that a "plaintiff can recover **[**98]** only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*.

1. Preliminary Evidentiary Issues

Before turning to the merits of the parties' arguments, the Court must address a preliminary evidentiary issue. Throughout its briefing and its response to AngioDynamics' statement of material facts, Bard objects to certain evidence AngioDynamics relies on as inadmissible hearsay. Bard's overall argument is that, to the extent AngioDynamics cites statements from hospital employees (directly or as recounted second-hand by AngioDynamics employees), those statements are hearsay (and, in the latter case, double hearsay) and thus inadmissible. (Dkt. No. 145, at 26-30; Dkt. No. 146, ¶¶ 40(a)-(e), 59, 63-65 & "Statement of Additional Material Facts" ¶¶ 22(d), 23(c); Dkt. No. 154, at 10 & n.5, 12-13). AngioDynamics argues that this evidence is admissible under the "state of mind" exception to the hearsay rule to "show customer motive, such as a customer's reason for ceasing to do business with AngioDynamics." (Dkt. No. 144, at 29-30; Dkt. No. 152, at 19-20).

HN15[] The Court "may only consider admissible evidence" in ruling on a motion for summary judgment. *Humphrey v. Diamant Boart, Inc., 556 F. Supp. 2d 167, 173-74 (E.D.N.Y. 2008)* (citations **[**99]** omitted). At the same time, "material relied on at **[*319]** summary judgment need not be admissible in the form presented to the district court. Rather, so long as the evidence in question will be presented in admissible form at trial, it may be considered on summary judgment." *Smith v. City of New York, 697 F. App'x 88, 89 (2d Cir. 2017)* (internal quotation marks omitted). Thus, under *Rule 56(c)(2) of the Federal Rules of Civil Procedure*, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."

HN16[] As the Second Circuit has long held, under *Fed. R. Evid. 803(3)*, "[s]tatements of a customer as to his reasons for not dealing with a supplier are admissible for [the] limited purpose" of demonstrating the customer's motive, "although not as evidence of the facts recited as furnishing the motives." *Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 914 (2d Cir. 1962)* (citations and internal quotation marks omitted); *see also* *Hydrolevel Corp. v. Am. Soc. Of Mech. Eng'rs, Inc., 635 F.2d 118, 128 (2d Cir. 1980)* (same); *Sleepy's LLC v. Select Comfort Wholesale Corp., 779 F.3d 191, 204 (2d Cir. 2015)* (same, outside the antitrust context); *Discover Fin. Servs. v. Visa U.S.A. Inc., No. 04-cv-7844, 2008 U.S. Dist. LEXIS 80801, at *4, 2008 WL 4560707, at *1 (S.D.N.Y. Oct. 9, 2008)* ("Defendants argue that this Court should preclude [plaintiff's] current and former executives from testifying at trial about what Citibank's executives purportedly told them . . . However, testimony concerning the motivation of customers for ceasing to deal with a business is admissible **[**100]** under the 'state of mind' exception to the hearsay rule, *Rule 803(3) of the Federal Rules of Evidence*, provided that there is otherwise admissible proof that business was lost.").

While from a different Circuit, *Callahan v. A.E.V., 182 F.3d 237 (3d Cir. 1999)*, which AngioDynamics cites, is instructive. There, the court found that the plaintiff beer retailers' deposition testimony recounting statements by their customers as to the customers' reasons for no longer purchasing beer from the plaintiffs was admissible for the purpose of proving the customers' motives, but not for the fact of lost sales; that the plaintiffs' own testimony that "they knew of customers who used to purchase beer from them, but no longer did," was admissible as "direct evidence of an actual loss of customers," but not as evidence of "the reason therefore"; and that the "plaintiffs' testimony that certain customers no longer purchased beer from them, coupled with their testimony concerning the customers' statements of their motive, which is admissible hearsay under *Rule 803(3)*, are together evidence of the fact of damage." *Id. at 252-53*.

AngioDynamics argues that "show[ing] customer motive, such as a customer's reason for ceasing to do business with AngioDynamics," is "exactly how AngioDynamics relies on" the evidence Bard challenges, **[**101]** and thus that this evidence is admissible under *Rule 803(3)*. (Dkt. No. 144, at 29). Bard offers two responses.

First, Bard argues that "PICC purchases are complicated decisions made by hospital committees comprised of many stakeholders," and that "[a]t most, AngioDynamics' evidence [of statements by particular hospital employees regarding the hospitals' motivations] constitutes speculation by hospital personnel about what drove past decisions of other decision-makers." In support of this argument, Bard primarily relies on *Amerisource Corp. v. RxUSA Int'l Inc., No. 02-cv-2514, 2009 U.S. Dist. LEXIS 6864, 2009 WL 235648 (E.D.N.Y. Jan. 30, 2009)*. In that case, the court declined to apply the state-of-mind exception to admit deposition testimony and written notes from the plaintiffs' **[*320]** executives reflecting that "employees of various non-party distributors told [them] (i) that their companies would not deal with [the plaintiff]; (ii) that their companies would not deal with [the plaintiff] until [the defendant] gave its approval; and (iii) that their companies would not deal with [the plaintiff] because [the defendant] said that [the plaintiff] was a bad credit risk." *2009 U.S. Dist. LEXIS 6864, at *2, [WL] at *1*. As relevant to Bard's argument, the court reasoned:

> Here, the declarants are salespersons for various **[**102]** non-party pharmaceutical distributors with whom [the plaintiff] sought to do business. However, credit managers rather than salespersons decided whether or not to do business with prospective customers and the declarants in this case had no authority or involvement in the decision to decline RxUSA's business. Consequently, the salespersons' states of mind and intentions are not relevant. Indeed, their statements reveal not their own intention but rather their belief or memory as to the intention of the actual decision-maker, which is explicitly excluded by *Rule 803(3)*.

*2009 U.S. Dist. LEXIS 6864, at *4, [WL] at *2*.[10] This ruling may have some applicability to certain documents or testimony AngioDynamics relies on. The parties agree that the personnel involved in PICC purchasing decisions varies by hospital and can include nurses, doctors and other professionals. (Dkt. No. 133-2, ¶¶ 15-17; Dkt. No. 144-1, ¶¶ 15-17). Given this complexity, there are factual questions as to the roles the hospital employee speakers in the evidence AngioDynamics relies on played in the decision-making processes at their hospitals, and whether their statements can be fairly construed as reflections of their hospitals' "then-existing state of mind" so as to warrant **[**103]** admission under *Rule 803(3)*. However, at this stage of the proceedings, without further factual

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[10] The court also found that the third-party salespersons' "statements explaining why the company did not intend to do business with [the plaintiff] [were] expressly outside the state-of-mind exception" because they constituted "statement[s] of memory or belief to prove the fact remembered or believed." *2009 U.S. Dist. LEXIS 6864, at *4-5, 2009 WL 235648, at *2*. In *Amerisource*, there was "no dispute" that the hearsay statements were being offered not only to prove the third-party company's motivations, but also to prove the facts underlying those motives, i.e. "that [the defendant] said [plaintiff] was a bad credit risk." *2009 U.S. Dist. LEXIS 6864, at *3, [WL] at *1*. Here, to the extent AngioDynamics offers evidence of customers' then-existing states of mind solely to show its customers' motivations for switching away from or declining to purchase AngioDynamics' PICCs, and not for the fact of lost sales itself or the truth of the underlying facts asserted in those customers' statements, the evidence would be admissible under *Rule 803(3)* for that purpose.

development on these questions, the Court declines to find that the evidence of their statements AngioDynamics presents could not be presented in admissible form at trial.

Second, Bard argues that much of AngioDynamics' evidence "does not even quote customers directly but rather involves AngioDynamics' employees' (oftentimes, hazy) recollection of what either a hospital employee or another AngioDynamics sales representative told them about the hospital's PICC purchases." (Dkt. No. 154, at 13). ***HN17***[] As Bard correctly points out, "[e]ach hearsay statement within multiple hearsay statements must have a hearsay exception in order to be admissible." *United States v. Cruz, 894 F.2d 41, 44 (2d Cir. 1990)*. AngioDynamics does not respond to Bard's argument regarding "double hearsay."

Applying the foregoing principles, it appears to the Court that certain of the documents and deposition testimony that **[*321]** AngioDynamics relies on would be admissible at trial under *Rule 803(3)* for the limited purpose of showing AngioDynamics' customers' motivations for declining to purchase AngioDynamics' PICCs, or for switching from AngioDynamics' PICCs to Bard's PICCs. Other evidence is **[**104]** of more questionable admissibility, given the multiple layers of hearsay embedded in certain documents and testimony, as well as questions over whether certain documents truly reflect a hospital customer's "then-existing state of mind" as opposed to merely a statement of the speaker's "memory or belief to prove the fact remembered or believed." *Fed. R. Evid. 803(3)*. In the absence of fully developed briefing with respect to each piece of evidence Bard raises objections to, the Court cannot issue a formal ruling on the admissibility of each such piece of evidence at this time. Rather, applying the foregoing principles, the Court will determine whether there appears to be enough record evidence that could be presented in admissible form to raise a genuine dispute of material fact for trial with respect to antitrust injury.

2. Injury-in-Fact and Causation

a. Legal Standard

HN18[] To establish antitrust injury, "[t]here must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a 'material cause' of or a 'substantial factor' in the occurrence of damage." *Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970)*. "The fact of injury must be demonstrated with reasonable certainty and may not **[**105]** be speculative," and "failure to satisfactorily prove that a plaintiff is injured by reason of the defendant's alleged antitrust violations is sufficient to defeat the antitrust claims." *Erie Conduit Corp. v. MAPA, 102 F.R.D. 877, 879 (E.D.N.Y. 1984)* (citations omitted).

HN19[] While antitrust plaintiffs are entitled to a "relaxed standard of proof" with respect to the amount of damages they suffered as a result of a defendant's conduct, "this relaxed standard of proof applies to the amount of damages, not to whether the violation caused damage." *Hygrade Milk & Cream Co. v. Tropicana Products, Inc., No. 88-cv-2861, 1996 U.S. Dist. LEXIS 6598, at *52-54, 1996 WL 257581 at *16-17 (S.D.N.Y. May 16, 1996)* (citing *MCI Comms. Corp. v. Am. Tel. & Tele. Co., 708 F.2d 1081, 1161 (7th Cir. 1982))*. That said, the amount of harm a plaintiff needs to prove to meet its burden of demonstrating antitrust injury is not high; rather, a plaintiff need only demonstrate "proof of some damage flowing from the unlawful [conduct]; inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. Despite this relatively low burden, "[a]lthough there appear to be few precedents on point, the relevant decisions do suggest that a trivial effect on a claimant's sales is insufficient to demonstrate antitrust injury." *Drug Mart Pharm. Corp. v. Am. Home Prods. Corp., No. 93-cv-5148, 2012 U.S. Dist. LEXIS 115882, at *47-48, 2012 WL 3544771, at *14 (E.D.N.Y. Aug. 16, 2012)* (finding a de minimus amount of lost sales **[**106]** insufficient to establish antitrust injury in the context of a Robinson-Patman Act claim (discussing

Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17, 23 (1st Cir. 1981); *Hygrade Milk & Cream Co., 1996 U.S. Dist. LEXIS 6598, at *59-60, 1996 WL 257581 at *18-19))*.[11]

[*322] ***HN20***[] An antitrust plaintiff need "not necessarily [prove that the defendant's misconduct was] the sole cause" of the plaintiff's alleged injury, and "a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury." *In re Actos End-Payor Antitrust Litig., 848 F.3d 89, 97-98 (2d Cir. 2017)* (quoting *Zenith Radio Corp., 395 U.S. at 114 n.9*); *see also* *In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 66 (2d Cir. 2012)* (holding that "an antitrust defendant's unlawful conduct need not be the sole cause of the plaintiffs' alleged injuries; to prove a 'causal connection' between the defendant's unlawful conduct and the plaintiff's injury, the plaintiff need only 'demonstrate that [the defendant's] conduct was a substantial or materially contributing factor' in producing that injury" and that "the injuries alleged would not have occurred *but for* [the defendant's] antitrust violation") (citations omitted). "[R]equiring otherwise 'would effectively deny private remedies, because multiple causes always affect everyone.'" *In re Gabapentin Patent Litig., 649 F. Supp. 2d 340, 356 (D.N.J. 2009)* (quoting Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 338a at 317 (2d Ed. 2000)).

b. The Parties' Arguments

Bard argues, in summary, that: **[**107]** (1) no hospital witness will testify at trial that it would have purchased an AngioDynamics PICC to pair with Bard's TLS but for Bard's TLS policy;[12] (2) the evidence AngioDynamics relies on consists only of "[s]econd-hand, self-serving, and speculative" testimony from its own executives, anecdotal documentary evidence of discussions with specific customers, and "speculative comments" in Bard's internal emails and documents; and (3) none of that evidence establishes that any customer currently using Bard's preloaded PICCs would have purchased AngioDynamics' PICCs but for Bard's TLS policy or that Bard's TLS policy was a "material cause" of any PICC sales AngioDynamics lost, given the various reasons some customers prefer to purchase Bard's preloaded product independent of its TLS policy. As to these reasons, Bard has adduced evidence that they include: (1) the lack of FDA approval for the use of Bard's standalone stylet with other companies' *valved* PICCs; (2) hospital preferences for certain characteristics that Bard's PICCs have and AngioDynamics' PICCs do not; (3) the premium that AngioDynamics charges for BioFlo PICCs relative to other PICCs in the market; (4) AngioDynamics' inability **[**108]** to definitively prove BioFlo's superiority to other PICC technology through peer-reviewed clinical trials; (5) AngioDynamics' past product recalls and the resulting damage to its reputation in the market; (6) Bard's more substantial training and clinical support programs relative to AngioDynamics'; **[*323]** (7) Bard's wider breadth of product lines relative to AngioDynamics; (8) the effect of GPO and IDN contracts on purchasing decisions; (9) possible risks to patient safety and other inconveniences of loading a TLS stylet at a patient's bedside rather than purchasing it preloaded into a PICC; (10) some customers' preference for purchasing PICCs and TLSs from a single supplier; and (11) the fact that Bard would likely need to charge a premium for its single-sterile stylet in order to compensate for its additional costs of offering that product standalone, "including liability and reputational risks Bard would face in the event of stylet breakage and patient injury." (Dkt. No. 133-1, at 12-32; Dkt. No. 145, at 25-34; Dkt. No. 154, at 6-12).

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[11] Citing case law from other Circuits, AngioDynamics argues that the relaxed standard of proof typically applied to the *amount of damages* in antitrust cases also applies to the element of antitrust injury, and that an antitrust plaintiff need only prove a "trifle of injury" resulting from the defendant's conduct in order to satisfy this element. (Dkt. No. 134-1, at 27-29; Dkt. No. 144, at 12-13; Dkt. No. 152, at 15-16 (relying on *In re Data Gen. Corp. Antitrust Litig., 490 F. Supp. at 1117-18*; *In re K-Dur Antitrust Litig., No. 01-cv-1652, 2008 U.S. Dist. LEXIS 71772, at *21-22, 2008 WL 2660776, at *4 (D.N.J. Feb. 21, 2008)*; *Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336, 1339 n.1 (9th Cir. 1984))*). The Court applies the Second Circuit's standard for evaluating antitrust injury, as set forth above, and declines to follow the cases AngioDynamics cites to the extent they are inconsistent with that standard.

[12] Pursuant to a stipulation dated April 17, 2020, the parties agreed that neither party will call at trial any witnesses from third-party hospitals, hospital groups or representatives, except for two witnesses from Cleveland Clinic who have already been deposed. (Dkt. No. 136-27).

AngioDynamics argues, in summary, that: (1) the documentary evidence it relies on demonstrates specific (and non-exhaustive) examples in which customers declined **[**109]** to purchase AngioDynamics' PICCs, or chose to switch from AngioDynamics' PICCs to Bard's PICCs, because they had no option to pair AngioDynamics' PICCs with Bard's TLS stylet; (2) this same evidence demonstrates that, even if multiple factors were at play in any particular customer's purchasing decision, the inability to pair AngioDynamics' PICCs with Bard's TLS stylet was at least one "material factor" in that decision, which is all AngioDynamics needs to show in order to establish antitrust injury; (3) economic evidence also supports a finding of injury and causation, including that Bard sells the overwhelming majority of the TLSs on the market and that "in those segments of the PICC market where Bard's TLS is not a factor, or less of a factor," "AngioDynamics sells substantially more PICCs." (Dkt. No. 134-1, at 26-34; Dkt. No. 144, at 12-30; Dkt. No. 152, at 17-20).[13]

c. Bard's Motion for Summary Judgment

The record contains the following types of evidence that, viewed collectively and in the light most favorable to AngioDynamics for purposes of Bard's summary judgment motion, raises genuine issues of material fact as to whether AngioDynamics lost a more-than-de-minimus amount of PICC **[**110]** sales to Bard and whether Bard's TLS policy was a material cause of those lost sales: (1) evidence that Bard received inquiries from some customers regarding the possibility of purchasing a stand-alone TLS stylet to pair with AngioDynamics' or another competitor's PICCs, which Bard consistently rebuffed; (2) internal Bard communications reflecting Bard's efforts to avoid disseminating knowledge of its sale of single-sterile TLS stylets to Cleveland Clinic, at least in part out of a concern that customers would demand such an option if they knew it was available; (3) internal Bard documents which could be read to reflect the views of some Bard employees that Bard's TLS policy prevented competitors like AngioDynamics from effectively competing for some PICC customers that used Bard's TLS, including one employee's observation that being forced to sell a stand-alone TLS stylet would "open the door for [AngioDynamics]" to "pick off 5-10%" of customers currently using Bard's PICCs preloaded with its TLS, (Dkt. No. **[*324]** 136-63, at 3; Dkt. No. 136-64, at 2); (4) deposition testimony of AngioDynamics executives identifying particular PICC customers that AngioDynamics has lost to Bard; (5) deposition **[**111]** testimony from AngioDynamics executives recounting discussions with specific customers (some of which the witnesses participated in directly, and some of which they were informed about by sales representatives) in which those customers expressed interest in AngioDynamics' PICCs, but conveyed that they could not consider purchasing them because the PICCs could not be paired with Bard's TLS; (6) emails from customers explaining their reasons for choosing Bard's PICCs over AngioDynamics' PICCs, including, in some cases, because they wanted to use Bard's TLS, which could only be obtained by buying Bard's PICCs; and (7) emails from AngioDynamics or Bard employees recounting similar discussions with customers. *See* Section II.E *supra* (summarizing this record evidence in detail).

While, as Bard argues, some of AngioDynamics' evidence regarding discussions with customers appears to include multiple layers of hearsay or is otherwise of questionable admissibility, much of AngioDynamics' evidence does not suffer from these problems, and many of the "double hearsay" problems that do exist could be corrected by, for example, calling the Bard or AngioDynamics sales representatives who directly spoke with the relevant **[**112]** customers to testify at trial. *See, e.g., Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, No. 03-cv-30, 2005 U.S. Dist. LEXIS 25184, 2005 WL 8162569, at *5[14] (E.D. Tenn. Feb. 23, 2005) (finding that a "double hearsay" problem with the plaintiff's corporate representatives' testimony about what sales representatives told them regarding

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[13] The parties also present arguments as to whether the testimony of AngioDynamics' causation and damages expert, Dr. Frankel, is sufficient to establish injury-in-fact or causation. (Dkt. No. 133-1, at 17-24, 26-32; Dkt. No. 134-1, at 33; Dkt. No. 144, at 17, 24-26; Dkt. No. 154, at 14-16). For the reasons explained in Section IV.C.1 of this Decision, the Court is granting Bard's motion to exclude Dr. Frankel's causation opinion. Therefore, the Court does not consider Dr. Frankel's opinion in connection with its injury-in-fact or causation analysis and, consequently, does not address Bard's specific critiques of his opinion or AngioDynamics' responses here.

[14] No parallel LEXIS citation available.

conversations with customers was corrected by calling the sales representatives themselves as witnesses, and that the sales representatives' testimony was admissible under Fed. R. Evid. 803(3)). As discussed previously, *see* Section IV.B.1 *supra*, the combination of evidence that AngioDynamics did, in fact, lose PICC sales to Bard (in the form of deposition testimony from AngioDynamics witnesses and the parties' email communications) and evidence regarding customers' statements about their motivations for not purchasing, or switching away from, AngioDynamics PICCs (at least some of which is likely admissible under Fed. R. Evid. 803(3)) constitutes enough evidence that could be presented in admissible form to raise a genuine dispute of material fact that precludes summary judgment. *See, e.g.,* Callahan, 182 F.3d at 252-54, 260; Complete Entm't Res. LLC v. Live Nation Entm't, Inc., No. 15-cv-9814, 2017 U.S. Dist. LEXIS 183213, at *11 n.9, 2017 WL 6512223, at *4 n.9 (C.D. Cal. Oct. 16, 2017) (finding that "Plaintiffs' records of customer statements regarding their reasons for not using Plaintiffs' **[**113]** services" was "material from which a factfinder could decide that at least some artist-clients would have chosen Plaintiff if not for Defendants' allegedly anticompetitive conduct").[15]

[*325] Independent of its evidentiary objections, Bard also argues that the deposition testimony of AngioDynamics' witnesses is too speculative and self-serving to constitute evidence of injury or causation. (Dkt. No. 133-1, at 14-17; Dkt. No. 154, at 9-12). Bard's arguments attacking AngioDynamics' witnesses' testimony largely address the basis for their knowledge regarding certain lost opportunities they testified about, their unfamiliarity with particular "potential lost sales" AngioDynamics listed in its interrogatory responses, their failure to recall certain pertinent details of discussions with particular customers, and the inconsistency of some witnesses' recollections about particular customers with other record evidence regarding those customers' purchasing decisions. (Dkt. No. 133-1, at 14-17; Dkt. No. 154, at 10-12). While some of these arguments may have merit, **[**114]** they are questions of weight that are best resolved by a fact-finder at trial, rather than at the summary judgment stage.[16] Bard is correct that AngioDynamics witnesses cannot testify with certainty as to what a customer would have done had it had the option of pairing AngioDynamics' PICCs with Bard's TLS. However, as executives responsible for the sale of AngioDynamics' vascular access products, they can certainly testify as to their personal knowledge of PICC sales that AngioDynamics lost to Bard and what customers told them regarding their reasons for not purchasing AngioDynamics' PICCs. Thus, for summary judgment purposes, the Court finds that this testimony, when viewed

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[15] Bard attempts to distinguish *Callahan* on the ground that *Callahan* "featured extensive [expert] economic evidence on injury and causation that bolstered the plaintiffs' testimony." (Dkt. No. 154, at 9-10). While the Court is not considering Dr. Frankel's opinion on causation, and this case is thus distinguishable from Callahan in that respect, this distinction is not dispositive. While the *Callahan* court considered the evidence before it collectively, nowhere did it suggest that the evidence would have been insufficient to raise a triable issue of fact *without* the expert analysis, and it is well-established that a plaintiff may prove antitrust injury without the use of expert evidence. *See, e.g.,* Smith Wholesale Co., 2005 U.S. Dist. LEXIS 25184, 2005 WL 8162569, at *5 ("Contrary to defendant's insistence, expert testimony is not necessarily required to prove antitrust injury if the facts and circumstances otherwise fall within the ambit of F.R.E. 701, and here they do."); Cason-Merenda v. Detroit Med. Ctr., 862 F. Supp. 2d 603, 642-43 (E.D. Mich. 2012) ("Plaintiffs correctly note that they may forge the necessary link between Defendants' alleged antitrust violations and antitrust injury without expert testimony."); Valassis Communs., Inc. v. News Corp., No. 17-cv-7378, 2019 U.S. Dist. LEXIS 27770, at *37, 2019 WL 802093, at *12 (S.D.N.Y. Feb. 21, 2019) ("Any defect in [the plaintiff's damages expert's] opinion on the amount of damages does not undermine [the plaintiff's] ability to prove the fact of injury."). Here, the Court finds that the record as it stands is sufficient to raise a genuine dispute as to injury-in-fact and causation; whether that evidence is enough to prove AngioDynamics' case is a question for trial. Bard's attempt to distinguish *Complete Entm't Resources* on the grounds that that case "concerns 'records of customer statements' rather than plaintiff's own testimony and deals with admissibility rather than sufficiency" is also inapposite. (Dkt. No. 154, at 10 n.4). Here, AngioDynamics relies on both its own witnesses' testimony and documentary evidence regarding its customers' motivations, and the court in Complete Entm't Resources was not dealing solely with admissibility, but rather was (as here) considering whether there was sufficient admissible evidence in the record to raise a triable issue of fact as to antitrust injury. *Id.*

[16] The line of cases Bard cites for the proposition that the "'isolated self-serving statements' of a plaintiff's corporate officers may not provide substantial evidence upon which a jury can rely" is inapposite, as those cases involved conclusory statements by officers that found no support in, and in many cases flatly contradicted, the evidence in the record. *See* Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 41-46 (2d Cir. 1986); Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 581-82 (5th Cir. 1982). By contrast, the witness testimony here regarding lost sales and the reasons for those losses, as a general matter, is not inconsistent with, and finds some support in, the documentary evidence. *See* Section II.E.5 *supra* (reviewing evidence).

collectively with the record as a whole, constitutes competent evidence from which a genuine dispute of material fact can be found.[17]

[*326] Bard also spends a significant portion of its briefing attacking AngioDynamics' anecdotal examples of particular customers choosing Bard's PICCs over AngioDynamics' PICCs, arguing, with respect to each customer, that the relevant documentary evidence and deposition testimony: (1) demonstrates that the customer had numerous reasons for choosing Bard's PICCs independent of its **[**115]** TLS policy; (2) is ambiguous as to the precise reasons for the customer's purchasing decision; and/or (3) does not demonstrate that the customer would have chosen to pair AngioDynamics' PICCs with Bard's TLS if given the option to do so, particularly when accounting for other factors impacting the customer's decision. (Dkt. No. 133-1, at 20-22; Dkt. No. 145, at 26-31; Dkt. No. 154, at 6-9). Bard also more generally argues that AngioDynamics has not demonstrated that Bard's TLS policy caused AngioDynamics' injury, given the various other independent factors affecting customers' purchasing decisions. (Dkt. No. 133-1, at 25-32; Dkt. No. 145, at 25-34; Dkt. No. 154, at 6-12). The Court need not address each of Bard's arguments about each specific anecdote and relevant factor. Viewing the evidence as a whole and in the light most favorable to AngioDynamics, the Court finds that a reasonable fact-finder could conclude that the desire for Bard's TLS, which could only be purchased preloaded into Bard's PICCs, played a significant role in these customers' decision to choose Bard's PICCs over AngioDynamics' PICCs; that any customer that chose to use Bard's TLS was necessarily precluded from **[**116]** using a competitor's PICCs; that even accounting for other factors at play, at least *some* of the customers may have made a different PICC purchasing decision if given the option to pair AngioDynamics' PICCs with Bard's TLS; and that Bard's TLS policy was one material cause (even if not the *only* cause) of customers' decision not to purchase AngioDynamics' PICCs. *See* Section II.E.5 *supra* (summarizing the relevant evidence in detail). Given this, questions about the proper inferences to be drawn from particular pieces of evidence, whether Bard's TLS policy was both a but-for and material cause of each particular customer's purchasing decision in light of other factors at play, the precise significance of confounding factors independent of Bard's TLS policy, and whether the evidence sufficiently demonstrates that AngioDynamics lost more than a de minimus amount of sales as a result of Bard's TLS policy are all disputed factual questions to be resolved at trial.[18]

The Court rejects Bard's argument that Bard's internal emails and documents—and, particularly, an email from a Bard employee expressing his belief that **[*327]** AngioDynamics' strategy "[wa]s to pressure the market to pressure [Bard] into **[**117]** launching [the standalone stylet], so it will open the door for them to go after special patient populations in our 3CG [TLS] accounts and pick off 5-10%, which is better than the 0% they are getting at 3CG accounts now," (Dkt. No. 136-63, at 3; Dkt. No. 136-64, at 2)—cannot serve as evidence of injury or causation. (Dkt. No. 133-1, at 22-24). Statements by Bard's own employees regarding their beliefs about the impact of Bard's allegedly anticompetitive activity are clearly relevant to the question of whether that activity caused injury to AngioDynamics. Arguments about the proper inferences to be drawn from those statements or the weight they should be given merely raise factual disputes that are best reserved for trial.

The Court also rejects Bard's argument that AngioDynamics' failure to present any direct testimony from a hospital representative (at trial or via deposition) regarding the hospital's reasons for purchasing Bard's PICCs over

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[17] In a similar vein, Bard also argues that customers' statements to AngioDynamics regarding their reasons for not purchasing AngioDynamics' PICCs (even if admissible to show the customers' motivations) are inherently unreliable. (Dkt. No. 133-1, at 16-17). AngioDynamics takes issue with this characterization. (Dkt. No. 144, at 18-20). These arguments concern the weight the relevant evidence should be given, and are best resolved by a fact-finder at trial rather than at the summary judgment stage.

[18] While the Court need not address each of Bard's arguments with respect to the various factors it cites, there is one argument Bard makes that the Court sees fit to briefly address. Bard argues that the failure of AngioDynamics and its damages expert to account for the fact that Bard had not obtained FDA approval to market its TLS stylet for use with competitors' valved PICCs is fatal to any claim it has with respect to valved PICC sales, citing case law for the proposition that a "regulatory or legislative bar can break the chain of causation in an antitrust case." (Dkt. No. 133-1, at 31-32 (citing *In re Wellbutrin XL Antitrust Litig., 868 F.3d 132, 165 (3d Cir. 2017)*; *In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 206 (E.D.N.Y. 2003))*. Even assuming (without deciding) that the case law Bard cites applies here, it does not defeat AngioDynamics' claim of antitrust injury; this lack of FDA approval is not a factor for the large number of AngioDynamics' PICC sales that involve non-valved PICCs.

AngioDynamics' dooms its case. (Dkt. No. 133-1, at 13-14). For the reasons explained, there is sufficient evidence in the record regarding AngioDynamics' lost sales and customers' statements about the reasons for those losses to at least raise **[**118]** a genuine issue for trial; it is for a fact-finder to decide whether that evidence is sufficient to meet AngioDynamics' burden without direct testimony from AngioDynamics' customers.[19]

Bard also argues that AngioDynamics cannot prove injury or causation because it has, at most, presented evidence that, absent Bard's TLS policy, some customers would have been willing to *conduct a trial* of AngioDynamics' PICCs with Bard's TLS and compare the pricing of AngioDynamics' PICCs with other options; AngioDynamics has not presented evidence of the price at which any current Bard TLS customer would have been willing to purchase Bard's standalone TLS stylet to combine with AngioDynamics' PICCs, nor has it shown that any current Bard TLS customer would have been willing to pay a premium for that option. (Dkt. No. 133-1, at 14, 16, 24, 28; Dkt. No. 145, at 27, 31; Dkt. No. 154, at 6-9). The Court does not find that Bard is entitled to summary judgment based on this argument. Viewed in the light most favorable to AngioDynamics, the record suggests that at least some PICC customers were interested in exploring the option of combining BioFlo PICCs with Bard's TLS, but Bard's TLS policy precluded **[**119]** them from even considering that option, thus depriving AngioDynamics of the opportunity to *even attempt to compete* with Bard for those customers on other factors relevant to hospitals' purchasing decisions, such as price and clinical effectiveness. *See, e.g.*, Section II.E.4.c-d *supra* (summarizing testimony describing such examples). Moreover, record evidence suggests that PICC pricing is a customer-specific decision, and the question of whether pricing would deter customers from pairing AngioDynamics' PICCs with Bard's TLS absent Bard's TLS policy is rife with factual disputes, including how often AngioDynamics' BioFlo PICCs are actually priced at a premium to Bard's PICCs, the size of that premium, how much of a premium Bard would charge for its single-sterile TLS stylet, the value customers **[*328]** place on BioFlo for its purported clinical benefits and long-term cost-savings, and the extent to which AngioDynamics would be able to discount its BioFlo PICCs to induce customers to switch from Bard PICCs. *See* Section II.D.1 *supra* (summarizing the evidence and the parties' disputes regarding pricing). Therefore, on this record, the Court cannot conclude as a matter of law that AngioDynamics **[**120]** cannot demonstrate a more-than-de-minimus amount of injury directly resulting from Bard's TLS policy.

The Court has carefully considered all of Bard's remaining arguments for summary judgment and finds them to be without merit. Therefore, for the foregoing reasons, the Court denies Bard's motion for summary judgment with respect to injury-in-fact and causation.

d. AngioDynamics' Motion for Summary Judgment

While AngioDynamics has raised a triable issue of fact as to injury-in-fact and causation, it has failed to establish its entitlement to summary judgment with respect to these issues. Relying on deposition testimony from its own executives, email communications from customers, and the parties' internal correspondence, AngioDynamics cites a number of specific examples of customers who purportedly chose to purchase Bard's PICCs over AngioDynamics' because they desired Bard's TLS and, due to Bard's TLS policy, had no option to pair it with AngioDynamics' PICCs. (Dkt. No. 134-1, at 29-32; Dkt. No. 144, at 9-11, 16, 22-24; Dkt. No. 152, at 17-19). However, as Bard points out, much of this evidence is ambiguous as to the precise reasons for the customers' purchasing decisions or suggests **[**121]** that numerous factors were at play in addition to Bard's TLS policy, and none of it establishes beyond dispute that any customer would have purchased AngioDynamics' PICCs to pair with Bard's TLS but for Bard's TLS policy. (Dkt. No. 133-1, at 20-22; Dkt. No. 145, at 26-31; Dkt. No. 154, at 6-9). While the Court has already found that Bard's arguments were insufficient to win its own summary judgment motion, they *are* sufficient to raise genuine factual questions as to whether Bard's TLS policy was both a but-for and material cause of a more-than-de-minimus amount of PICC sales that AngioDynamics lost to Bard.

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[19] In a similar vein, the Court need not address the parties' arguments over whether a survey of hospitals or interviews of hospital representatives—which neither AngioDynamics nor its experts conducted—would have been appropriate in this case. (Dkt. No. 133-1, at 13, 19-20; Dkt. No. 144, at 24-25; Dkt. No. 154, at 15-16). The question for the Court is whether the record *as it stands* raises triable issues of material fact, and the Court finds that it does.

AngioDynamics' contention that AngioDynamics "sells substantially more PICCs" "in those segments of the PICC market where Bard's TLS is not a factor, or less of a factor," also does not entitle it to summary judgment; rather, this is, at most, an argument that AngioDynamics may use to support its claim at trial. (Dkt. No. 134-1, at 32-33).[20] Given other factors at play in customers' purchasing decisions—including some customers' preference for purchasing TLSs and PICCs from the same supplier, and possible differences in purchasing patterns and PICC preferences between hospitals that **[**122]** purchase PICCs for pairing with navigation-enabled TLSs and those in other segments of the PICC market, (Dkt. No. 146, at ¶ 66 (making this argument and citing record evidence))— **[*329]** the data AngioDynamics presents does not, in itself, establish beyond dispute that Bard's TLS policy is a but-for or material cause of AngioDynamics' relatively lower success with customers that use navigation-enabled TLS.

The Court has carefully considered all of AngioDynamics' remaining arguments for summary judgment and finds them to be without merit. For the foregoing reasons, the Court denies AngioDynamics' motion for summary judgment with respect to injury-in-fact and causation.

3. Type of Injury the Antitrust Laws Were Designed to Prevent

HN21[] In addition to establishing injury-in-fact and causation, to establish antitrust injury, an antitrust plaintiff must prove that its injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp., 429 U.S. at 489*. "Thus, allegations of an injury to a competitor are insufficient unless accompanied by allegations of injury to competition as well." *See Xerox Corp. v. Media Scis. Intern., Inc., 511 F. Supp. 2d 372, 380 (S.D.N.Y. 2007)*; *see also Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 547 (2d Cir. 1993)* ("[Plaintiff's] position is simply that it has been harmed **[**123]** as an individual competitor. It has not shown that defendants' activities have had any adverse impact on price, quality, or output of medical services offered to consumers in the relevant market."); *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 442-43 (2d Cir. 2005)* (holding that plaintiffs failed to demonstrate antitrust injury where their "economic expert conceded that he had performed no analysis of the consumer effect of defendants' purportedly anticompetitive conduct").

HN22[] "A competitor's '[e]xclusion from a market is a conventional form of antitrust injury' because it is 'exactly the type [of injury] that antitrust laws were designed to prevent and flows from the competition-reducing aspect of [defendant's] conduct.'" *Valassis Communs., Inc., 2019 U.S. Dist. LEXIS 27770, at *32, 2019 WL 802093, at *11* (collecting cases (quoting *Higgins v. New York Stock Exch., 755 F. Supp. 113, 116 (S.D.N.Y. 1991)*, *aff'd sub nom., Higgins v. New York Stock Exch., Inc., 942 F.2d 829 (2d Cir. 1991)))*; *Xerox Corp, 511 F. Supp. 2d at 381-82* ("This threatened injury (of direct exclusion from the marketplace) is exactly the type that antitrust laws were designed to prevent and flows from the competition-reducing aspect of [the defendant's] conduct." (collecting cases)). Moreover, a competitor's loss of sales constitutes an injury of the sort protected by the antitrust laws if "it stems from conduct that prevents potential customers from obtaining a desired product." *Id. at 382* (citing *National Assoc. of Pharmaceutical Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904, 913 (2d Cir. 1988))*.

Bard argues that, even if AngioDynamics can demonstrate **[**124]** that it lost sales as a result of Bard's TLS policy, AngioDynamics has failed to show that Bard's actions harmed competition in the PICC market as a whole, such as by increasing prices or reducing output. (Dkt. No. 133-1, at 32-35; Dkt. No. 145, at 34-35; Dkt. No. 154, at 17-18). AngioDynamics responds that Bard's TLS policy has led to substantial foreclosure of competition in the PICC

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[20] Bard objects to AngioDynamics' reliance on a chart purportedly showing AngioDynamics' share of particular PICC market segments, arguing that it "appears nowhere in Frankel's reports," was compiled by "AngioDynamics' lawyers pull[ing] numbers from three different appendices to Frankel's reports and perform[ing] additional calculations," is based on unreliable data, and was not timely disclosed as an expert opinion. (Dkt. No. 153, at 7-8 & n.4). For purposes of the parties' summary judgment motions, the Court need not decide whether or not consideration of this demonstrative is appropriate, as it finds that neither party is entitled to summary judgment whether or not the demonstrative is considered.

market, the threat of increased concentration in that market, and the restriction of consumer choice, all of which are the types of injuries the antitrust laws are aimed at. (Dkt. No. 144, at 30-34).

The Court finds that there are genuine disputes of material fact precluding summary judgment for either party on this issue. AngioDynamics' claim is that, by **[*330]** forcing customers who purchase its TLS to also purchase its PICCs, Bard effectively precludes AngioDynamics and other PICC competitors from competing in the largest segment of the PICC market. If proven true, this would be "exactly the type [of injury] that antitrust laws were designed to prevent," *Valassis Communs., Inc., 2019 U.S. Dist. LEXIS 27770, at *32, 2019 WL 802093, at *11*; *Xerox Corp, 511 F. Supp. 2d at 381-82*, and AngioDynamics "need not wait to make this claim until it is 'actually . . . driven from the market and competition is thereby lessened.'" *Id., 511 F. Supp. 2d at 381* (quoting **[**125]** *Brunswick Corp., 429 U.S. at 489 n. 14*). Moreover, there is a question as to whether Bard's TLS policy "prevents potential customers from obtaining a desired product," i.e. the combination of AngioDynamics' PICCs and Bard's TLS. *Id., 511 F. Supp. 2d at 382*. At the same time, for the reasons discussed in connection with the Court's analysis of the anticompetitive effects element of AngioDynamics' claim, *see* Section IV.A.5 *supra*, there are genuine disputes over whether the injuries AngioDynamics complains of are, in fact, a result of a "competition-reducing aspect" of Bard's conduct (i.e. Bard's purported foreclosure of competition in the PICC marketplace through its TLS policy), or are merely the result of lawful competition and many customers' preference for Bard's preloaded PICCs over the other options available to them. *Valassis Communs., Inc., 2019 U.S. Dist. LEXIS 27770, at *32, 2019 WL 802093, at *11*. Therefore, the Court denies both parties' motions for summary judgment on this issue.[21]

4. Antitrust Injury Summary

For the foregoing reasons, the Court finds that there are triable issues of fact with respect to every component of the antitrust injury element of AngioDynamics' claim. Therefore, the Court denies both parties' motions for summary judgment with respect to antitrust injury.

C. Damages/Bard's [**126] Motion to Exclude Dr. Frankel's Testimony

Bard moves to exclude the testimony of AngioDynamics' causation and damages expert, Dr. Frankel, (Dkt. No. 132), and argues that "[s]ince AngioDynamics offers no evidence of any damages other than through Dr. Frankel, the exclusion of his testimony means that AngioDynamics cannot create a triable issue as to damages." (Dkt. No. 133-1, at 36).

HN23[] Under *Rule 702 of the Federal Rules of Evidence*, the Court is charged with a "gatekeeping" obligation with respect to expert testimony: the trial judge must ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v.* ***[*331]*** *Merrell Dow Pharms., Inc., 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. *Rule 702* provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help

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[21] Bard analogizes to a Tenth Circuit case, *Suture Express, Inc. v. Owens & Minor Distribution, Inc., 851 F.3d 1029, 1044 (10th Cir. 2017)*, in which the Court observed that significant evidence of a "market that is becoming more, not less, competitive" "raise[d] questions about . . . whether it was really competition that was harmed instead of simply one competitor," and found that "[t]here is simply not enough probative evidence for a jury to find that [the defendants'] bundling practices constitute an injury of the kind the antitrust laws are intended to prevent." *Id. at 1045*. Here, while the record contains some indicia of a competitive PICC marketplace, *see* Section IV.A.5 *supra*, there is also evidence that Bard's TLS policy prevents competitors like AngioDynamics from being able to meaningfully compete for PICC customers that use Bard's TLS, and that Bard dominates the market (especially with respect to PICCs that use TLSs) to a much greater extent than any defendant in *Suture Express*. Thus, unlike in *Suture Express*, then, the evidence of robust competition notwithstanding Bard's TLS policy is not so overwhelming as to preclude a finding that Bard's actions have harmed competition in the market.

> the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. ***HN24***[] "To determine whether a witness qualifies as an expert, **[**127]** courts compare the area in which the witness has superior knowledge, education, experience, or skill with the subject matter of the proffered testimony." *United States v. Tin Yat Chin, 371 F.3d 31, 40 (2d Cir. 2004)*.

HN25[] "Under *Daubert*, factors relevant to determining reliability include the theory's testability, the extent to which it has been subjected to peer review and publication, the extent to which a technique is subject to standards controlling the technique's operation, the known or potential rate of error, and the degree of acceptance within the relevant scientific community." *Restivo v. Hessemann, 846 F.3d 547, 575-76 (2d Cir. 2017)* (internal quotation marks omitted). The reliability inquiry is "a flexible one," *Daubert, 509 U.S. at 594*, and the factors to be considered "depend[ ] upon the particular circumstances of the particular case at issue." *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. When applying the gatekeeping obligation to non-scientific testimony, a district court may choose to utilize some or all of the above *Daubert* factors, or it may look to other indicia of reliability. *Id.*

"In undertaking this flexible inquiry, the district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions." *Amorgianos v. Natl. R.R. Passenger Corp., 303 F.3d 256, 266 (2d Cir. 2002)*. "Thus, ***HN26***[] when **[**128]** an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and *Rule 702* mandate the exclusion of that unreliable opinion testimony." *Id.* In other words, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)*. "Frequently, though, 'gaps or inconsistencies in the reasoning leading to [the expert's] opinion . . . go to the weight of the evidence, not to its admissibility.'" *Restivo, 846 F.3d at 577* (quoting *Campbell ex rel. Campbell v. Metro. Prop. & Cas. Ins. Co., 239 F.3d 179, 186 (2d Cir. 2001))*.

HN27[] Ultimately, a district court has "the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." *Gen Elec. Co., 522 U.S. at 142*. Moreover, "[v]igorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert, 509 U.S. at 596*. With this framework in mind, the Court addresses Bard's arguments for exclusion of Dr. Frankel's opinions.[22]

[*332] 1. Causation

a. Dr. Frankel's Causation Opinion

As to causation, Dr. Frankel concludes that Bard's TLS policy caused injury to AngioDynamics based on the following facts (stated in Dr. Frankel's words): **[**129]**

- Bard's dominant share of TLS devices used in the United States and the large share of PICCs placed with the assistance of TLS devices.
- The ability of manufacturers to sell TLS devices and navigation stylets separately from their PICCs, and the actual use of alternative suppliers' PICCs with a TLS when that option is available.
- The preference some customers would have had for AngioDynamics BioFlo PICCs due to BioFlo's antithrombotic[23] properties.

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[22] In the following discussion, the Court summarizes only the portions of Dr. Frankel's opinions that are relevant to the pending motions.

- The interest expressed by customers seeking to use AngioDynamics PICCs with Bard TLS devices.
- Bard's recognition that some of its TLS customers would purchase BioFlo PICCs if Bard sold stylets separately.
- Bard's refusal to sell its stylets separately from its PICCs.

(Dkt. No. 132-5, at 13-14). To arrive at the foregoing factual predicates, Dr. Frankel reviews, interprets and draws inferences from documents and data in the record, much of which overlaps with the evidence AngioDynamics relies on in its summary judgment motion. (*Id.* at 14-23). Based on the evidence he reviews, Dr. Frankel concludes that "Bard's refusal to sell stylets separately from its PICCs harmed AngioDynamics by preventing it from selling PICCs to Bard TLS customers that otherwise **[**130]** would have preferred to use AngioDynamics PICCs for some or all of their bedside PICC placements," and that "Bard's tie enabled it to obtain a larger percentage of U.S. PICC sales than otherwise, and suppressed AngioDynamics' sales and profits." (*Id.* at 23-24).

b. Bard's Motion to Exclude Dr. Frankel's Causation Opinion

Bard moves to exclude Dr. Frankel's causation opinion, (Dkt. No. 132-5, at 13-23), on the grounds that: (1) Dr. Frankel "did no economic (or any other) analysis to determine whether Bard's conduct ***caused*** hospitals to purchase Bard's PICCs instead of AngioDynamics' PICCs, or whether hospitals would have purchased more AngioDynamics PICCs ***but for*** Bard's TLS policy," but instead "***assumes*** that the jury will find causation—the very opinion he claims to be offering"; (2) Dr. Frankel's opinion does little more than [serve] as a conduit to publish the [record] evidence, at least some of which is likely inadmissible, to the jury, adding the patina of an expert economist to mere fact information"; and (3) Dr. Frankel selectively relies on evidence that supports his opinion while ignoring evidence that contradicts it, and the evidence he relies on fails to establish that there are customers **[**131]** "who do not already purchase AngioDynamics' PICCs, who would purchase them but for the challenged conduct." (Dkt. No. 132-1, at 11-18; *see also* Dkt. No. 153, at 5-8).

AngioDynamics responds that: (1) Dr. Frankel's opinion does not assume a finding **[*333]** on *causation*, as Bard claims, but on the separate liability element of *coercion*, which is a proper assumption for a causation and damages report; (2) Dr. Frankel's opinion does not merely "'narrate' factual evidence," but "analyze[s] contemporaneous documents and data and reache[s] a conclusion based on that analysis," which is "precisely what expert economists do in antitrust litigation"; and (3) Dr. Frankel "review[s] the structure of the industry, sales data, and record evidence of Bard's conduct and applie[s] well-established economic principles to reach each of his conclusions," which is "precisely what *FRE 702* requires," and his opinion is well-supported by the evidence he relies on and the record as a whole. (Dkt. No. 143, at 13-20).

As an initial matter, the Court rejects Bard's argument that Dr. Frankel's opinion improperly assumes a conclusion. In his deposition, Dr. Frankel acknowledged that his analysis "assum[es] a finding of liability," **[**132]** i.e. "a conclusion by the fact-finder that Bard coerced some hospitals to purchase its PICCs . . . when otherwise they would have purchased Angio's PICCs," but he explicitly disavowed the suggestion that his analysis "assum[es] that Angio has suffered injury as a result of Bard's conduct," instead confirming that his analysis both "offer[s] [an] opinion [that AngioDynamics was injured by Bard's conduct]," and also "quantif[ies] the damages associated with that injury." (Dkt. No. 132-3, at 143-46). While the language Dr. Frankel and his examiner used in the deposition is somewhat imprecise, from a review of Dr. Frankel's expert report and testimony, it appears clear that his analysis presupposes a conclusion on liability, but not on the issues on which he was asked to opine, i.e. causation and damages. (Dkt. No. 132-5, at 13-23). Bard argues that the "supposed distinction [between coercion and causation] is irrelevant here because the nature of this tying claim requires that there be ***coercion*** in order for there to have been ***causation***." (Dkt. No. 153, at 5-6). However, as an expert on causation and damages rather than liability, it was appropriate for Dr. Frankel to do what he did here, **[**133]** i.e. assume a finding that Bard adopted a coercive

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[23] While AngioDynamics disavows any claim that it markets BioFlo PICCs as having "antithrombotic" properties and clarifies that it only claims BioFlo PICCs reduce "thrombus accumulation," (Dkt. No. 144-1, ¶¶ 34-36), Dr. Frankel uses the term "antithrombotic properties" throughout his report.

tying policy, and then perform an analysis of the separate question of whether that coercive policy actually caused AngioDynamics to lose any PICC sales that it otherwise would have made.

Nonetheless, the Court agrees with Bard that Dr. Frankel's causation opinion must be excluded because it does little more than summarize record evidence (including sales and market share data and documents produced in this litigation) and lend Dr. Frankel's expert credentials to AngioDynamics' interpretation of that evidence. Dr. Frankel offers no specialized economic analysis that would assist a fact-finder in interpreting the record evidence he relies on. Rather, he recites that evidence, draws inferences that a fact-finder could glean from merely examining the evidence itself, and concludes from those inferences that the evidence establishes causation—a conclusion a fact-finder is perfectly capable of making based on the evidence without the aid of expert testimony. Such an opinion, without more, does not pass muster under *Rule 702*. *See, e.g., In re Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 170-72 (S.D.N.Y. 2018)* (barring expert testimony that "adds nothing to the direct evidence that cannot be elicited from fact witnesses—nothing **[**134]** other than the use of [the expert's] impressive credentials to bolster the credibility of those witnesses impermissibly");[24] *Hernandez v. Leichliter, No.* ***[*334]*** *14-cv-5500, 2016 U.S. Dist. LEXIS 19728, at *5, 2016 WL 684038, at *2 (S.D.N.Y. Feb. 18, 2016)* ("To the extent [the expert] merely repeats or recasts the testimony of [Plaintiff] in order to arrive at a theory of causation, he is not testifying as an expert witness based upon specialized knowledge, but rather is acting as a conduit for another witness's testimony in the guise of an expert's opinion.") (citation omitted); *Palazzetti Import/Export, Inc. v. Morson, No. 98-cv-722, 2001 U.S. Dist. LEXIS 9538, at *8, 2001 WL 793322, at *2-3 (S.D.N.Y. July 13, 2001)* (holding that "proposed expert testimony regarding the elements of a franchise agreement and their alleged absence here does not meet the standard of *Rule 702*" because "neither of the elements of a franchise agreement requires knowledge beyond the ken of the average juror" and there was "nothing . . . to believe that the jurors would be assisted (rather than improperly swayed) by the testimony of the expert").

This case is unlike other antitrust cases involving claims of unlawful collusion (some of which AngioDynamics cites), in which experts have been permitted to testify as to whether conduct or market conditions reflected in the record **[**135]** evidence were consistent with the existence of an anticompetitive conspiracy, on the grounds that such an analysis requires specialized knowledge outside the province of an ordinary juror. *See, e.g., U.S. Info. Sys., Inc. v. Int'l Bhd. of Elect. Workers Local Union No. 3, AFL-CIO, 313 F. Supp. 2d 213, 239-41 (S.D.N.Y. 2004)* (finding that the plaintiff's expert could not draw a legal conclusion on whether or not the defendants engaged in anticompetitive conduct, but could "point to factors that would tend to show anticompetitive conduct in a market," "indicate whether he believed those factors existed here, and what the economic significance of those factors would be," "explain how certain conduct could affect a market through the use of hypothetical statements" and "hypothesize that if certain conduct did occur, economists would expect the market to react in a particular way"); *Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130, 151-52 (N.D.N.Y. 2010)* ("[Plaintiffs' expert] seeks to testify that the information exchanges, engaged in by the Defendant hospitals, made it easier for Defendants to form and maintain a wage agreement. This type of opinion may be helpful to the jury and is admissible."). Here, by contrast, Dr. Frankel brings no specialized economic analysis to bear in his interpretation of the record evidence. The conclusions he draws from that evidence consist of arguments **[**136]** AngioDynamics' lawyers can readily make without the aid of expert analysis, and are all well within the province of an ordinary, intelligent juror. Therefore, the Court grants Bard's motion to exclude Frankel's causation opinion.[25]

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[24] AngioDynamics argues that *Namenda* is distinguishable because there "the Court excluded the testimony of an expert who failed to analyze contemporaneous documents and data and instead relied only on her industry experience and fact witness testimony in forming her opinion," whereas "Dr. Frankel analyzed contemporaneous documents and data and reached a conclusion based on that analysis." (Dkt. No. 143, at 19). Bard points out that this distinction ignores the fact that the *Namenda* court "excluded the expert's testimony both because the expert failed to rely on sufficient facts or data, and for a separate reason (that Bard cites)—the proposed expert testimony would simply regurgitate information that could be introduced through fact witnesses." (Dkt. No. 153, at 7 n.3). The Court agrees with Bard.

[25] Because the Court has found that Dr. Frankel's causation opinion must be excluded on the foregoing grounds, it need not address the parties' remaining arguments regarding that opinion. To the extent these arguments amount to disputes over

[*335] 2. Damages

a. Legal Standard for Antitrust Damages

The Court evaluates Bard's motion to exclude Dr. Frankel's damages opinion in light of the legal standard for proving antitrust damages. ***HN28***[] "[T]he actual amount [of an antitrust plaintiff's damages] need not be proven to the same degree of certainty as proving some quantum of damages," given the difficulty (and, at times, impossibility) of accurately constructing a hypothetical world untainted by the defendant's challenged conduct. *Drug Mart Pharm. Corp. v. Am. Home Prods. Corp., 472 F. Supp. 2d 385, 424 (S.D.N.Y. 2007)* (citing *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562, 51 S. Ct. 248, 75 L. Ed. 544 (1931))*. The "wrongdoer is not entitled to complain that [the damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." *Story Parchment Co., 282 U.S. at 563*. Indeed, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-65, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*, *reh'g denied*, *327 U.S. 817, 66 S. Ct. 815, 90 L. Ed. 1040 (1946)*. Therefore, an antitrust plaintiff need only "come forward with substantial **[**137]** evidence from which a jury can determine the amount of damages from a 'just and reasonable estimate of the damage based upon relevant data.'" *Drug Mart Pharm. Corp., 472 F. Supp. 2d at 424* (quoting *Bigelow, 327 U.S. at 264*); *see also, e.g., New York v. Julius Nasso Concrete Corp., 202 F.3d 82, 88 (2d Cir. 2000)* ("Where . . . there is a dearth of market information unaffected by the collusive action of the defendants, the plaintiff's burden of proving damages, is, to an extent, lightened.").

At the same time, "even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork." *SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1212 (2d Cir. 1981)* (quoting *Bigelow, 327 U.S. at 264*). Moreover, ***HN29***[] a more lenient standard in proving the amount of damages should only be applied where the plaintiff puts forth "proof of defendant's wrongful acts and their tending to injure plaintiffs' business, and from evidence in the decline of prices, profits and values, ***not shown to be attributable to other causes***." *Bigelow, 327 U.S. at 264* (emphasis added); *see also* *MCI Communications Corp., 708 F.2d at 1162* ("When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damages. This is precisely the type of speculation or guesswork not permitted for **[**138]** antitrust jury verdicts.") (internal marks omitted).

b. Dr. Frankel's Damages Opinion

Dr. Frankel calculates AngioDynamics' purported damages resulting from Bard's TLS policy by estimating its lost profits, using a formula that includes, among other variables, the estimated percentage of Bard's TLS-paired PICC sales that would have been won by AngioDynamics had Bard not engaged in alleged tying. For purposes of its motion in limine, Bard only challenges Dr. Frankel's methodology for determining that variable, and that is therefore where the Court focuses its discussion.

Dr. Frankel determines this percentage using a "benchmark" or "yardstick" analysis. **[*336]** As a first step, Dr. Frankel "consider[s] a number of potential indicators of AngioDynamics' prospective success at selling PICCs to users of Bard TLS devices" based on documents in the record, and selects two of these "indicators" as benchmarks to use in calculating AngioDynamics' lost profits. (*Id.* at 28-29).[26]

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whether the record supports a finding of causation, the Court has addressed this question in resolving the parties' cross-motions for summary judgment on antitrust injury. *See* Section IV.B *supra*.

[26] At oral argument, AngioDynamics' counsel suggested that Dr. Frankel's other potential "indicators" could serve as a basis for a damages model if the Court excludes Dr. Frankel's benchmarking analysis; Bard's counsel disagreed. (Dkt. No. 187, at 64-67,

As his first benchmark ("Benchmark 1"), Dr. Frankel selects "AngioDynamics' share of PICCs used with Teleflex TLS devices." (*Id.* at 29). Dr. Frankel derives that percentage—[TEXT REDACTED BY THE COURT] percent—from an email sent by Teleflex's outside **[**139]** counsel containing a rough estimate of the percentage of its standalone stylets that are used with AngioDynamics PICCs. (*Id.* at 29-30; *see also id.* at 42 (explaining Dr. Frankel's calculation of Benchmark 1)). Dr. Frankel testified that he felt this benchmark was justified because Teleflex offers a single-sterile stylet and "Angio is able to sell PICCs that are used [TEXT REDACTED BY THE COURT] percent of the time with that system," which is an "obvious analogue to look at as a piece of information that bears on" how successful AngioDynamics would be if Bard offered a single-sterile stylet as Teleflex does. (Dkt. No. 132-3, at 232).

For his second benchmark ("Benchmark 2"), Dr. Frankel conducts "a comparison of Teleflex's share of sales of PICCs used with its own TLS devices and Teleflex's share of unguided nursing PICC sales," and "use[s] the ratio of . . . non-Teleflex shares — the non-Teleflex share of Teleflex TLS usage divided by the non-Teleflex share of unguided nursing PICCs used — as a benchmark for Bard." (Dkt. No. 132-5, at 31). This benchmark "assumes [that, absent the TLS policy,] Bard would have had the same relative increased success as Teleflex in selling PICCs for use with its own TLS devices," **[**140]** and that non-Bard PICC manufacturers "would have been relatively less successful at selling PICCs to Bard TLS users to the same extent non-Teleflex PICC manufacturers have less relative success selling PICCs to Teleflex TLS users." (*Id.*). Based on these assumptions, Dr. Frankel determines that "[d]uring the period 2013-2018 . . . [absent the TLS policy,] Bard would have sold [TEXT REDACTED BY THE COURT] percent of PICCs used with Bard TLS devices," while "[t]he remaining [TEXT REDACTED BY THE COURT] percent of PICCs—i.e., Bard TLS-guided PICCs that would not have been sold by Bard absent Bard's tie—would have been sold by the other PICC suppliers." (*Id.* at 31-32). Dr. Frankel then "allocate[s] those sales across those suppliers, including AngioDynamics, pro-rata based on their share of non-Bard unguided nursing PICCs sold in the United States." (*Id.* at 32). Using this methodology, Dr. Frankel finds that AngioDynamics "would have accounted for [TEXT REDACTED BY THE COURT] percent of U.S. PICC sales used with Bard TLS devices." (*Id.*). In his deposition testimony, Dr. Frankel described Benchmark 2 as a "more conservative alternative" to Benchmark 1, designed to account for the fact that "Bard might do particularly **[**141]** well in selling PICCs to its own customers, just as Teleflex does particularly well in selling PICCs to its TLS customers." (Dkt. No. 132-3, at 232).

Dr. Frankel testified that he "[doesn't] have a strong opinion as to which of [his benchmarks] is better." (*Id.*). He stated that his benchmark analysis is designed to "suggest[] to a jury that . . . we can't know with precision this variable because **[*337]** of [Bard's alleged anticompetitive] conduct, and there's a reasonable range spanning between these two benchmarks. And I leave it to them to make a reasonable choice or their own choice based on the best I can do, which is to present this range of outcomes." (*Id.* at 231).

c. Bard's Motion to Exclude Dr. Frankel's Damages Opinion

Bard moves to exclude Dr. Frankel's damages opinion on three grounds: (1) Dr. Frankel bases his analysis on unreliable data; (2) Dr. Frankel's analysis relies on benchmarks that have been affected and distorted by Bard's challenged conduct; and (3) Dr. Frankel failed to sufficiently analyze the comparability of his chosen benchmarks. (Dkt. No. 132-1, at 18-28). AngioDynamics generally responds that Bard's arguments regarding Dr. Frankel's benchmarking methodology go to the methodology's **[**142]** weight, not its admissibility, and do not provide grounds for exclusion. (Dkt. No. 143, at 20-31).

i. Reliability of Dr. Frankel's Data

Bard argues that Dr. Frankel's damages methodology must be excluded on the grounds that it is based on unreliable data. Specifically, the percentage of Teleflex standalone stylets used with AngioDynamics PICCs, which

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81-82). As Bard has only moved to exclude Dr. Frankel's benchmarking analysis, the Court only addresses the issue that has been presented and briefed by the parties.

Dr. Frankel uses as the basis of both of his benchmarks, comes from the following excerpt from an email sent by Teleflex's outside counsel several days before Dr. Frankel served his expert report:

> Teleflex believes that the vast majority (in excess of [TEXT REDACTED BY THE COURT]) of non-preloaded PICCs are being sold for use with another company's stylet. Based on sales personnel input in May 2019, Teleflex roughly estimates that approximately [TEXT REDACTED BY THE COURT] of the standalone stylet sales is [sic] used with AngioDynamics catheters and approximately [TEXT REDACTED BY THE COURT] with Bard Catheters. However, Teleflex's sales data does not capture this information and accordingly Teleflex cannot confirm these estimates.

(Dkt. No. 147-23, at 3). Bard contends that this "rough[] estimate[]" is insufficiently reliable to pass muster **[**143]** under *Daubert*, given that the email does not indicate (and Dr. Frankel does not know) the time frame to which it applies, how it was determined, what information it was based on, which sales personnel contributed, or what their titles or seniority levels were. (Dkt. No. 132-1, at 25-28; Dkt. No. 153, at 12-14). AngioDynamics replies that "experts are granted wide latitude with respect to the evidence and data on which they rely"; that Dr. Frankel testified that "the Teleflex estimate is precisely the type of information on which economists typically rely"; that the estimate was "provided by Teleflex in response to subpoenas by both parties in the normal course of discovery and was accepted in satisfaction of those subpoenas by both parties"; that "Teleflex sales personnel are in the best position to estimate [the number of Teleflex TLS Stylets that are paired with AngioDynamics' PICCs] based on their daily interactions with customers in the field"; and that "Dr. Frankel undertook independent analysis to verify the accuracy of the estimate." (Dkt. No. 143, at 27-31).

HN30[] As a preliminary matter, AngioDynamics is correct that experts have wide latitude with respect to the data on which they **[**144]** rely, and challenges concerning the reliability of an expert's data often present questions of weight, rather than admissibility. *See, e.g.,* *Allen v. Dairy Farmers of Am., Inc., No. 09-cv-230, 2014 U.S. Dist. LEXIS 8343, at *27, 2014 WL 266290, at *9 (D. Vt. Jan. 23, 2014)* ("Most 'challenge[s] to the facts or data relied upon by [an expert do] not go to the admissibility of his testimony, but only to the weight of his testimony.'" (quoting *Aventis Envtl* ***[*338]*** *Sci. USA LP v. Scotts Co., 383 F. Supp. 2d 488, 514 (S.D.N.Y. 2005)))*; *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 325 (D. Vt. 2007)* ("[L]imitations in some of the data on which [an expert] relied goes to the weight of [the expert's] testimony . . . , not its admissibility."); *Hartle v. FirstEnergy Generation Corp., No. 08-cv-1019, 2014 U.S. Dist. LEXIS 43033, at *29, 2014 WL 1317702, at *9 (W.D. Pa. Mar. 31, 2014)* ("Even if the data relied on by the expert is 'imperfect, and more (or different) data might have resulted in a 'better' or more 'accurate' estimate in the absolute sense, it is not the district court's role under Daubert to evaluate the correctness of facts underlying an expert's testimony.'" (quoting *i4i Ltd. P'ship v. Microsoft Corp., 598 F.3d 831, 856 (Fed. Cir. 2010)))*. Nonetheless, this general principle does not divest the Court of its gatekeeping obligation to ensure that an expert's testimony is "based on sufficient facts or data" to pass muster under *Rule 702*.

Bard relies heavily on *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012)*, a Third Circuit case that illustrates the circumstances under which an expert's data is so unreliable as to **[**145]** warrant exclusion. In that case, the plaintiff's expert based his analysis on a one-page forecast that the company prepared to project its estimated sales volume, prices, manufacturing costs, operating expenses, and other criteria. *Id. at 291 & n.23, 292*. The expert used that forecast to "estimate[] the incremental revenues that [the plaintiff] would have earned 'but for' [the defendant's] anticompetitive conduct, and then subtracted from that figure the incremental cost that [the plaintiff] would have had to incur to achieve such incremental sales." *Id. at 291-92*. The district court excluded the expert's testimony, finding it unreliable for "rel[ying] on a one-page set of profit and volume projections without knowing the circumstances under which such projections were created or the assumptions on which they were based." *Id. at 292*. The Third Circuit affirmed, explaining that "[a]n expert's lack of familiarity with the methods and the reasons underlying [someone else's] projections virtually preclude[s] any assessment of the validity of the projections through crossexamination." *Id. at 293*. Even though the expert "was generally aware of the circumstances under which the [one-page forecast] was created and the purposes for **[**146]** which it was used," he "did not know who initially calculated the . . . figures . . . [,] did not know whether the . . . projections were calculated by [the plaintiff's] management, lower level employees at [the plaintiff], or came from some outside source . . ., [and did not] know the methodology used to create the [one-page forecast] or the assumptions on which the . . . price and volume estimates were based." *Id.* Therefore, the Third Circuit held that the district court was justified in excluding his opinion. *Id.*

AngioDynamics argues that this case is more analogous to cases in which "*ZF Meritor* has been routinely distinguished." (Dkt. No. 143, at 30 n.15). AngioDynamics relies on *Apotex, Inc. v. Cephalon, Inc., 321 F.R.D. 220 (E.D. Pa. 2017)*. In *Apotex*, like in *ZF Meritor*, the plaintiffs' expert relied on the plaintiffs' internal market share projections. *Id. at 232*. However, the court found its case distinguishable from *ZF Meritor*, in part because the expert in *Apotex* had also considered corroborating sources such as "a series of [the plaintiff's] internal projections" and "the deposition testimony of . . . [the plaintiff's] former President" who "reviewed and signed off on the market share forecasts relied upon by [the expert], and generally explained **[**147]** how they were created." *Id. at 232-33*. Thus, the court found that the *Apotex* expert was "was clearly more informed **[*339]** about how the market share projections were created than the expert in *ZF Meritor*," and concluded that "[w]hether [the expert] relied on the best data in forming his opinions is a question for the jury." *Id. at 233*. AngioDynamics also cites other cases in which courts similarly distinguished *ZF Meritor*. *See e.g., In re SemCrude L.P., 648 Fed. Appx. 205, 214 (3d Cir. 2016)* (finding expert's use of contemporaneous valuation report reliable where the expert explained his reliance on the valuation and adjusted it based on his own analysis); *Insight Equity v. Transitions Optical, Inc., 252 F. Supp. 3d 382, 396 (D. Del. 2017)* (finding expert's use of projections reliable where "the estimates were actually used in the course of business and incorporated actual sales data"); *In re Mushroom Direct Purchaser Antitrust Litig., No. 06-cv-0620, 2015 U.S. Dist. LEXIS 120892, at *67-71 n.10, 2015 WL 5767415, at *17 n.10 (E.D. Pa. July 29, 2015)* (finding expert's use of contemporaneous internal estimates reliable, because the expert had "grounded his opinion on factual evidence in the record produced by defendants").

As the cases AngioDynamics cites demonstrate, *ZF Meritor* is not the typical case; rather, it represents an extreme category of cases in which the data relied on by an expert is so patently unreliable as to render it inadmissible. However, **[**148]** the Court finds that the data Dr. Frankel relies on here falls into that category. In his deposition, Dr. Frankel acknowledged that he "know[s] no further details [about the data] other than what's in" the email, including which sales personnel the email refers to, what their "seniority" or "experience base" was, what "products they were responsible for selling or the geographic region that they knew about," the "circumstances under which the unnamed Teleflex sales personnel came up with this estimate," what Teleflex did to "aggregate and estimate" the figure, or the specific time period the data covered. (Dkt. No. 132-3, at 260-63). Dr. Frankel's ignorance as to the most basic facts underlying the data he relies on is precisely the "lack of familiarity" that the Third Circuit in *ZF Meritor* found "preclude[s] any assessment of the validity of the projections through crossexamination," and thus warrants exclusion. *ZF Meritor, 696 F.3d at 293*. The cases cited by AngioDynamics are inapposite, as each of them involved experts who could point to at least *some* corroborating information or record evidence demonstrating how the data was created or validating its reliability, which is utterly lacking here.

It is no answer **[**149]** that "Teleflex is in the best position to estimate and report this information," as Dr. Frankel asserts in his rebuttal report, (Dkt. No. 132-6, at 14), or that the data was provided by Teleflex's counsel in response to discovery subpoenas, as AngioDynamics argues, (Dkt. No. 143, at 28). Assuming that the data provided in Teleflex's counsel's email is sufficiently reliable simply because Teleflex provided it, as Dr. Frankel did here, ignores the email's numerous caveats that the data constitutes a "rough estimate" and that "Teleflex cannot confirm these estimates." (Dkt. No. 147-23, at 3). It also ignores the fact that the email provides none of the information necessary to confirm that it is suitable for use in Dr. Frankel's analysis, including such information as how the "rough estimate" was determined, what form of "sales personnel input" was used to calculate it (given that "Teleflex's sales data does not capture this information"), and whether those estimates applied to the time period Dr. Frankel examined in his analysis. (*Id.*).

AngioDynamics also attempts to distinguish *ZF Meritor* on the grounds that the data at issue in *ZF Meritor* involved profit and volume projections, whereas **[**150]** the data at issue here is "an estimate concerning **[*340]** *actual* sales" that came from "sales personnel, who have direct knowledge on which to base such an estimate." (Dkt. No. 143, at 29). This argument fails in light of Teleflex's caveats that its "sales data does not capture this information" and that it "cannot confirm these estimates." (Dkt. No. 147-23, at 3). Indeed, nothing in the information Dr. Frankel utilized indicates what "sales personnel input" means, the methodology by which this "input" was gathered from salespeople and aggregated to compute the estimates in Teleflex's counsel's email, and whether that methodology was sufficiently sound and reliable to justify the use of the estimates in a damages analysis. .

AngioDynamics further contends that the Court should accept Dr. Frankel's data, despite its limitations, because it was the best data available in this litigation, and because Dr. Frankel testified that "the Teleflex estimate is precisely the type of information on which economists typically rely." (Dkt. No. 143, at 27-28; Dkt. No. 132-3, at 261-62, 266; Dkt. No. 132-6, at 14). ***HN31***[] But it is well established that an expert's "lack of access to reliable data does not justify **[**151]** use of unreliable data, and militates against admission under Daubert." *Danley v. Bayer (In re Mirena IUD Prods. Liab. Litig.), 169 F. Supp. 3d 396, 445 (S.D.N.Y. 2016)*. And Dr. Frankel's conclusory insistence that the Teleflex data is the type that an economist would normally rely on (at least in the absence of more precise data) does not establish that the data is sufficiently reliable to allow Dr. Frankel to craft a damages estimate that is "just and reasonable" and not based on "speculation or guesswork." *Drug Mart Pharm. Corp., 472 F. Supp. 2d at 424* (citations omitted).

Finally, AngioDynamics argues that Dr. Frankel confirmed the accuracy of Teleflex's estimates by conducting an independent analysis. (Dkt. No. 143, at 28-29). Specifically, according to Dr. Frankel's rebuttal report:

> Using AngioDynamics sales data . . . I reported that in 2018 AngioDynamics sold [TEXT REDACTED BY THE COURT] non-IR PICCs to customers AngioD amics was able to identify as using Teleflex TLS devices. Those sales alone represent [TEXT REDACTED BY THE COURT] percent of Teleflex separate stylet usage in 2018.

(Dkt. No. 132-6, at 14-15). In his deposition, Frankel described the process in greater detail:

> My staff . . . asked AngioDynamics, through counsel, to give us their best available list of hospitals that they knew were using Teleflex TLSs **[**152]** and stylets to place Angio nursing PICCs. And they did their best to assemble that list for us. And then my staff went through the data. And that was a process because . . . the right hospital names in the data wasn't always obvious, and so we did our best to match those up. I think they may have been confirming the communications with Angio to make sure we were on the right track. And that generated the [TEXT REDACTED BY THE COURT] percent of stylets that that are sold separately . . . [TEXT REDACTED BY THE COURT]

(Dkt. No. 132-3, at 273-74). Thus, through this independent analysis, Frankel came to a figure of [TEXT REDACTED BY THE COURT] percent, approximately half of the figure used in Benchmark 1 and slightly higher than the figure used in Benchmark 2. (Dkt. No. 132-3, at 268-70).[27]

[*341] This independent analysis, however, does not confirm the reliability of the figure Dr. Frankel used for Benchmark 1: at most, it confirmed a figure that is only *half of* the figure he computed using Teleflex's data of questionable reliability. Dr. Frankel insists that the list of customers AngioDynamics provided is not comprehensive since AngioDynamics personnel "knew some of [the customers **[**153]** that were using Teleflex TLS stylets with AngioDynamics PICCs], but not [all] of them," meaning the actual percentage of such customers is greater than the figure he was able to confirm. (Dkt. No. 132-3, at 268). Accepting this as true, this at most establishes that the actual percentage of Teleflex TLS customers using AngioDynamics PICCs is somewhere above the figure he was able to confirm; it says nothing about what that percentage actually is, and it certainly does not validate the figure Dr. Frankel used in Benchmark 1. For the foregoing reasons, the Court finds that Dr. Frankel's benchmarking analysis is based on unreliable data for purposes of *Daubert*.

ii. Bard's Other Arguments for Exclusion

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[27] At oral argument, the parties disputed whether the percent figure Dr. Frankel independently calculated should be reduced in order to represent the percentage of *total* (as opposed to *standalone)* Teleflex TLS stylets that are sold for use in AngioDynamics' PICCs. (Dkt. No. 185, at 44, 78-79). This issue was not addressed in the parties' briefing, and the Court does not address it here, as it makes no difference to the Court's analysis.

Bard offers two other reasons why Dr. Frankel's benchmarking analysis should be excluded under *Daubert*. First, Bard argues that Dr. Frankel's benchmarks are "tainted" by the challenged conduct. (Dkt. No. 132-1, at 18-21; Dkt. No. 153, at 8-11).[28] Second, Bard argues that Dr. Frankel "performed no analysis to ensure that Bard's customers are sufficiently similar to Teleflex's so that it is fair and reliable to assume that they would have combined their respective TLSs with AngioDynamics' PICCs **[**154]** in the same proportion"; Bard specifically points to Dr. Frankel's failure to account for the fact that Teleflex TLS users have already demonstrated "a strong preference for BioFlo, since this alternative is more expensive than a Bard preloaded PICC . . . and requires hospitals to use what Dr. Frankel alleges is an inferior TLS," whereas Bard TLS users "had the opportunity to make the same choice . . . but none decided that the purported advantages of AngioDynamics' PICCs were worth it." (Dkt. No. 132-1, at 21-25; *see also* Dkt. No. 153, at 11-12). AngioDynamics responds, in summary, that, given that: (1) Teleflex is Bard's only competitor to offer navigation-based TLS; (2) the two companies sell similar products to similar types of customers (hospitals, GPOs and IDNs), and even some of the same customers; and (3) Teleflex does *not* engage in an alleged tying scheme similar to Bard's, Teleflex's performance in the real world is the most economically reasonable comparator to use to estimate Bard's performance in a world without its TLS policy, and Bard's criticisms regarding taint and comparability are best addressed as questions of weight rather than admissibility. (Dkt. No. 143, at **[**155]** 20-27).

HN32[] As a starting premise, the general rule is that arguments regarding **[*342]** the comparability or appropriateness of a particular benchmark go to the weight, not the admissibility, of a benchmarking analysis. *See, e.g., In re Blood Reagents Antitrust Litig., MDL No. 09-2081, 2015 U.S. Dist. LEXIS 141909, at *68 n.18, 2015 WL 6123211, at *21 n.18 (E.D. Pa. Oct. 19, 2015)* ("Many courts . . . have held that the question whether plaintiffs have met their burden of proving comparability should be left to the trier of fact to resolve because comparability challenges generally involve weighing facts."); *Washington v. Kellwood Co., 105 F. Supp. 3d 293, 317 (S.D.N.Y. 2015)* ("[W]hile the evidence underlying [the expert's benchmark analysis] may, in defendant's view, be thin, questionable, or self-servingly selective, our role as gatekeeper is not to divest defendant of the task of challenging the weight of such evidence before the trier of fact."). Moreover, a benchmark need not be perfectly comparable, so long as it allows the jury to calculate a "reasonable estimate of damages" as required under the antitrust laws. *See, e.g., Fleischman, 728 F. Supp. 2d at 148* (citing *McDonough v. Toys R Us, Inc., 638 F. Supp. 2d 461, 491 (E.D. Pa. 2009))*. This is particularly true where a Defendant's anticompetitive conduct has rendered selection of a perfectly comparable benchmark difficult or impossible. *See, e.g., Dial Corp. v. News Corp., 314 F.R.D. 108, 118-19 (S.D.N.Y. 2015)* (finding arguments regarding benchmark companies' comparability go to weight, not admissibility, where, because **[**156]** the defendant "has allegedly maintained a monopoly in the market . . . since at least 2000," "creating a benchmark using [the defendant's] prices during a time of 'robust competition' is not feasible," and "the selection of perfectly comparable benchmark firms aside from [the defendant] is impossible where [the defendant's] alleged monopoly prevents comparable firms from operating within its market").

Nonetheless, there are some circumstances under which, even applying the foregoing liberal standard, a benchmarking analysis may be so utterly deficient as to warrant its exclusion. One such circumstance is where the expert did not merely select arguably inappropriate benchmarks, but utterly "failed to perform ***any*** substantive analysis of those factors most relevant to comparability." *In re Blood Reagents Antitrust Litig., 2015 U.S. Dist. LEXIS 141909, at *69, 2015 WL 6123211, at *22* (emphasis added); *see also El Aguila Food Prods., Inc. v. Gruma Corp., 131 F. App'x 450, 453 (5th Cir. 2005)* (affirming exclusion of expert testimony where the expert "made no effort to demonstrate the reasonable similarity of the plaintiffs' firms and the businesses whose earnings data he relied on as a benchmark"); *Loeffel Steel Prods., Inc. v. Delta Brands, Inc., 387 F. Supp. 2d 794, 810-17 (N.D. Ill. 2005)* (excluding expert testimony where expert used eight companies in the same "industry" as the plaintiff as

[28] As to Benchmark 1, Bard contends that "the percentage of Teleflex's stylets [paired with AngioDynamics' PICCs] would have been far lower in the but-for world because some hospitals currently using them with AngioDynamics' PICCs would have shifted to Bard's superior TLS," and thus using this figure as a benchmark overstates the percentage of Bard's TLS stylets that would be combined with AngioDynamics' PICCs in the but-for world. (Dkt. No. 132-1, at 18-21; Dkt. No. 153, at 8-11). As to Benchmark 2, Bard contends that "the higher the number of AngioDynamics PICCs paired with Teleflex TLS, the smaller the relative advantage Teleflex has in selling its PICCs to its own TLS users as compared to nurses who place PICCs without TLS, which inflates Benchmark 2." (Dkt. No. 132-1, at 20 n.15).

benchmarks but did not "consider[] such critical factors as what **[**157]** services the companies provided, their customer base, the products they sold, the geographic markets in which they operated, their prices and other critical aspects of the business" to determine whether the plaintiff's "customer base and the services and products it offered approximated those of the eight companies"). Similarly, courts have excluded benchmarking analyses that attribute all of plaintiff's claimed losses to a defendant's misconduct, without making any effort to isolate the losses actually attributable to that conduct from the impact of other significant differences between the plaintiff and the chosen benchmark. *See, e.g., Herman Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906, 911 (2d Cir. 1962)* (affirming exclusion of analysis using the plaintiff-appellant's share of clicking machines in the non-shoe industry as a benchmark for sales it would have attained in **[*343]** the shoe industry but for the defendant's antitrust violations, where the expert failed to account for relevant differences between the two industries or for "entirely lawful" factors accounting for the defendant's large share of the shoe machinery market); *Weiner v. Snapple Beverage Corp., No. 07-cv-8742, 2010 U.S. Dist. LEXIS 79647, at *23, 2010 WL 3119452, at *7 (S.D.N.Y. Aug. 5, 2010)* (finding an expert's testimony unreliable where the expert did "not explain **[**158]** how his approach would isolate the impact of [the anti-competitive conduct] from the other factors that purportedly affect the price of [defendant's product] and its competitors").[29]

Here, Dr. Frankel used PICC sales by Teleflex—which is Bard's only competitor in the navigation-enabled TLS space, and which does *not* engage in anticompetitive activity—as a benchmark for the PICC sales Bard would have made had *it* not engaged in that activity. This approach at least attempts to approximate a but-for world that "[has] not been affected by [Bard's alleged] antitrust violations," *Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1062 (E.D.N.Y. 2006)*, *rev'd sub nom., McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008)*, and to use a benchmark company that is comparable to Bard in some important ways, including the industry they compete in, the types of products they sell, and the customer base they serve, i.e. "hospitals that [] place PICCs," (Dkt. No. 132-3, at 283-94). Bard's arguments, however, raise valid questions about the reliability of Dr. Frankel's analysis, especially about whether he sufficiently considered important potential differences between the purchasing preferences of the two companies' customers that could impact the appropriateness of **[**159]** his benchmarks. The Court need not decide whether, standing alone, these issues would warrant exclusion of Dr. Frankel's opinion, or would be best addressed as questions of weight at trial. Given the Court's finding that the data on which Dr. Frankel's benchmarking analysis is based is so unreliable as to require exclusion, the Court grants Bard's motion to exclude that analysis without reaching Bard's remaining arguments.

3. Remaining Theories of Relief

While the Court excludes the benchmarking analysis that is the subject of Bard's motion in limine, the Court declines to grant Bard summary judgment on AngioDynamics' claim for damages under *Section 4 of the Clayton Act* at this time. At oral argument, the parties disagreed on whether the Court's granting of Bard's motion in limine would leave anything left of Dr. Frankel's testimony from which a jury could calculate a "just and reasonable" estimate of damages. As Bard has only moved to exclude Dr. Frankel's benchmarking analysis, and the reliability of that specific analysis is thus the only part of Dr. Frankel's analysis that is currently before the Court, the Court does **[*344]** not reach the question of whether other aspects of Dr. Frankel's analysis **[**160]** may serve as a valid basis for calculating damages. Moreover, even assuming AngioDynamics is left with no evidence from which a just

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[29] As noted, Bard also argues that courts have excluded benchmarking analyses where it found the proposed benchmarks to be "tainted" by the alleged misconduct at issue. However, the cases Bard cites for this proposition are distinguishable, as in contrast to Dr. Frankel, the excluded experts in those cases sought to use a defendant's anticompetitive profits as a benchmark for measuring the profits a competitor plaintiff would have made but for the defendant's conduct—in essence, seeking to reap the fruit of the defendant's anticompetitive conduct to provide a windfall to the plaintiff. *See, e.g.,* ***Farmington Dowel Prod. Co. v. Forster Mfg. Co., 421 F.2d 61, 82 & n.48 (1969)***; *Admiral Theatre Corp. v. Douglas Theatre Co., 437 F. Supp. 1268, 1297-99 (D. Neb. 1977)*, *modified*, *585 F.2d 877 (8th Cir. 1978)*; *cf. In re Urethane Antitrust Litig., No. 04-cv-1616, 2012 U.S. Dist. LEXIS 181506, at *42, 2012 WL 6681783, at *6 (D. Kan. Dec. 21, 2012)* ("[C]riticisms of [an expert's] consideration of possible taint from a conspiracy of potential benchmark years go to the weight of his opinions and not their admissibility."), *aff'd 768 F.3d 1245 (10th Cir. 2014)*.

and reasonable damages estimate can be determined, this does not require dismissal of AngioDynamics' claim for damages under *Section 4 of the Clayton Act*. ***HN33***[] Where, as here, "there is insufficient proof of the amount of damages . . . proof of an antitrust violation and the fact of damage is a sufficient basis for an award of nominal damages" under *Section 4*. *Valassis Communs., Inc., 2019 U.S. Dist. LEXIS 27770, at *34-35, 2019 WL 802093, at *12* (citations omitted); *U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1377 (2d Cir. 1988)* (confirming district courts' ability to award nominal damages in antitrust cases).

Also, even if AngioDynamics does not have a viable theory by which it can quantify its past damages, this would not preclude AngioDynamics from continuing to pursue its claim for injunctive relief under *Section 16 of the Clayton Act*. ***HN34***[] "Typically, the inability to prove past damages does not compel a finding that the plaintiff faces no threat of antitrust injury in the future," and thus a plaintiff that failed to prove past damages may still pursue a claim for forward-looking injunctive relief. *Cash & Henderson Drugs, Inc. v. Johnson & Johnson, 799 F.3d 202, 215 (2d Cir. 2015)* (citing *Zenith Radio Corp., 395 U.S. at 130*). "However, in certain situations, the lack of past injury may indicate that future injury is improbable." *Id.* For example, **[**161]** where the challenged conduct has been in place long enough for potential effects to manifest themselves and there is no evidence of injury, the difference between *Clayton Act Section 4*'s requirement of actual injury and *Section 16*'s requirement of threatened injury disappears. *Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp., 2007 U.S. Dist. LEXIS 93493, at *45-62, 2007 WL 4526618, at *10-15 (E.D.N.Y. Dec. 20, 2007)*. Here, the Court has found that there is sufficient evidence in the record to create triable issues of fact as to whether AngioDynamics has suffered injury as a result of an antitrust violation committed by Bard. Therefore, AngioDynamics may continue to pursue its claim for injunctive and declaratory relief.

V. CONCLUSION

For these reasons, it is hereby

ORDERED that Bard's motion in limine (Dkt. No. 132) is **GRANTED**; and it is further

ORDERED that Bard's motion for summary judgment (Dkt. No. 133) is **DENIED** in its entirety; and it is further

ORDERED that AngioDynamics' motion for summary judgment (Dkt. No. 134) is **DENIED** in its entirety.

IT IS SO ORDERED.

Dated: May 5, 2021

Syracuse, New York

/s/ Brenda K. Sannes

Brenda K. Sannes

U.S. District Judge

End of Document

Las Vegas Sun v. Adelson

United States District Court for the District of Nevada

May 5, 2021, Decided; May 5, 2021, Filed

2:19-cv-01667-GMN-VCF

Reporter

2021 U.S. Dist. LEXIS 99358 *; 2021 WL 2073812

LAS VEGAS SUN, INC., a Nevada corporation, Plaintiff, vs. SHELDON ADELSON, an individual and as the alter ego of News+Media Capital Group LLC and as the alter ego of Las Vegas Review Journal, Inc.; PATRICK DUMONT, an individual; NEWS+MEDIA CAPITAL GROUP LLC, a Delaware limited liability company; LAS VEGAS REVIEW-JOURNAL, INC., a Delaware corporation; and DOES, I-X, inclusive, Defendants.LAS VEGAS REVIEW-JOURNAL, INC., a Delaware corporation, Counterclaimant, vs. LAS VEGAS SUN, INC., a Nevada corporation; BRIAN GREENSPUN, an individual and as the alter ego of Las Vegas Sun, Inc.; GREENSPUN MEDIA GROUP, LLC, a Nevada limited liability company, as the alter ego of Las Vegas Sun, Inc., Counter-claim Defendants.

Subsequent History: Adopted by, Motion denied by, in part, Dismissed by, in part, Motion granted by *Las Vegas Sun, Inc. v. Adelson, 2022 U.S. Dist. LEXIS 53023 (D. Nev., Mar. 23, 2022)*

Prior History: *Las Vegas Sun v. Adelson, 2020 U.S. Dist. LEXIS 78217, 2020 WL 2114352 (D. Nev., May 4, 2020)*

Core Terms

treble damages, survive, substitution, attorney's fees, Anti-Trust, deceased, damages, costs

Counsel: **[*1]** For Greenspun Media Group, Interested Party: E. Leif Reid, Lewis Roca Rothgerber LLP, Reno, NV; Jordan T. Smith, Pisanelli Bice PLLC, Las Vegas, NV.

For Interface Operations LLC, Adfam, Interested Party: J. Randall Jones, LEAD ATTORNEY, Kemp Jones & Coulthard LLP, Las Vegas, NV; Richard Lee Stone, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; Michael J Gayan, LEAD ATTORNEY, Kemp Jones & Coulthard LLP, Las Vegas, NV; Mona Kaveh, LEAD ATTORNEY, Kemp Jones & Coulthard, Las Vegas, NV; David Ransen Singer, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; Amy Marshall Gallegos, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA.

For Interface Operations LLC, doing business as, Interested Party: Amy Marshall Gallegos, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; David Ransen Singer, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; J. Randall Jones, LEAD ATTORNEY, Kemp Jones & Coulthard LLP, Las Vegas, NV; Richard Lee Stone, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; Michael J Gayan, LEAD ATTORNEY, Kemp Jones & Coulthard LLP, Las Vegas, NV; Mona Kaveh, LEAD ATTORNEY, Kemp Jones & Coulthard, **[*2]** Las Vegas, NV.

For Las Vegas Review-Journal Inc., Counter Claimant: J. Randall Jones, LEAD ATTORNEY, Kemp Jones & Coulthard LLP, Las Vegas, NV; Mona Kaveh, LEAD ATTORNEY, Kemp Jones & Coulthard, Las Vegas, NV; Richard Lee Stone, LEAD ATTORNEY, Jenner & Block LLP, Los Angeles, CA; David Ransen Singer, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; Amy Marshall Gallegos, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; Richard Lee Stone, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; Amy Marshall Gallegos, LEAD ATTORNEY, Jenner & Block LLP, Los

Angeles, CA; David Ransen Singer, LEAD ATTORNEY, Jenner & Block LLP, Los Angeles, CA; Michael J Gayan, LEAD ATTORNEY, Kemp Jones & Coulthard LLP, Las Vegas, NV.

For Las Vegas Review-Journal Inc., Defendant: Amy Marshall Gallegos, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; David Ransen Singer, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; Amy Marshall Gallegos, LEAD ATTORNEY, Jenner & Block LLP, Los Angeles, CA; David Ransen Singer, LEAD ATTORNEY, Jenner & Block LLP, Los Angeles, CA; J. Randall Jones, LEAD ATTORNEY, Kemp Jones & Coulthard LLP, Las Vegas, **[*3]** NV; Richard Lee Stone, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; Michael J Gayan, LEAD ATTORNEY, Kemp Jones & Coulthard LLP, Las Vegas, NV; Mona Kaveh, LEAD ATTORNEY, Kemp Jones & Coulthard, Las Vegas, NV; Richard Lee Stone, LEAD ATTORNEY, Jenner & Block LLP, Los Angeles, CA.

For Las Vegas Sun Inc., Counter Defendant: Jordan T. Smith, Pisanelli Bice PLLC, Las Vegas, NV; Jordan T. Smith, LEAD ATTORNEY, Pisanelli Bice PLLC, Las Vegas, NV; Joseph Michaelang Alioto, LEAD ATTORNEY, PRO HAC VICE, Alioto Law Firm, San Francisco, CA; Marla J Hudgens, Lewis Roca Rothgerber LLP, Phoenix, AZ; E. Leif Reid, Lewis Roca Rothgerber LLP, Reno, NV; Nicole Scott, LEAD ATTORNEY, Lewis Roca Rothgerber Christie LLP, Reno, NV; James J. Pisanelli, LEAD ATTORNEY, Pisanelli Bice PLLC, Las Vegas, NV; Kristen L. Martini, LEAD ATTORNEY, Lewis Roca Rothgerber Christie LLP, Reno, NV; Todd L. Bice, LEAD ATTORNEY, Pisanelli Bice PLLC, Las Vegas, NV.

For Las Vegas Sun Inc., Plaintiff: Marla J Hudgens, Lewis Roca Rothgerber LLP, Phoenix, AZ; James J. Pisanelli, LEAD ATTORNEY, Pisanelli Bice PLLC, Las Vegas, NV; Jordan T. Smith, LEAD ATTORNEY, Pisanelli Bice PLLC, Las Vegas, NV; E. Leif Reid, Lewis **[*4]** Roca Rothgerber LLP, Reno, NV; Kristen L. Martini, LEAD ATTORNEY, Lewis Roca Rothgerber Christie LLP, Reno, NV; Todd L. Bice, LEAD ATTORNEY, Pisanelli Bice PLLC, Las Vegas, NV; Jordan T. Smith, Pisanelli Bice PLLC, Las Vegas, NV; Nicole Scott, LEAD ATTORNEY, Lewis Roca Rothgerber Christie LLP, Reno, NV; Joseph Michaelang Alioto, LEAD ATTORNEY, PRO HAC VICE, Alioto Law Firm, San Francisco, CA.

For Patrick Dumont, Defendant: J. Randall Jones, LEAD ATTORNEY, Kemp Jones & Coulthard LLP, Las Vegas, NV; Richard Lee Stone, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; Mona Kaveh, LEAD ATTORNEY, Kemp Jones & Coulthard, Las Vegas, NV; Michael J Gayan, LEAD ATTORNEY, Kemp Jones & Coulthard LLP, Las Vegas, NV; Amy Marshall Gallegos, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; David Ransen Singer, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA.

For Sheldon Adelson, Defendant: Michael J Gayan, LEAD ATTORNEY, Kemp Jones & Coulthard LLP, Las Vegas, NV; Mona Kaveh, LEAD ATTORNEY, Kemp Jones & Coulthard, Las Vegas, NV; David Ransen Singer, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; J. Randall Jones, LEAD ATTORNEY, Kemp **[*5]** Jones & Coulthard LLP, Las Vegas, NV; Amy Marshall Gallegos, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; Richard Lee Stone, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA.

For Brian Greenspun, Greenspun Media Group LLC, Counters Defendants: E. Leif Reid, LEAD ATTORNEY, Lewis Roca Rothgerber LLP, Reno, NV; Jordan T. Smith, Pisanelli Bice PLLC, Las Vegas, NV.

For Hon. Philip M. Pro, (Ret.), Special Master: Philip M. Pro, LEAD ATTORNEY, JAMS, Las Vegas, NV.

For News+Media Capital Group LLC, Defendant: J. Randall Jones, LEAD ATTORNEY, Kemp Jones & Coulthard LLP, Las Vegas, NV; Amy Marshall Gallegos, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; Richard Lee Stone, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA; Michael J Gayan, LEAD ATTORNEY, Kemp Jones & Coulthard LLP, Las Vegas, NV; Mona Kaveh, LEAD ATTORNEY, Kemp Jones & Coulthard, Las Vegas, NV; David Ransen Singer, LEAD ATTORNEY, PRO HAC VICE, Jenner & Block LLP, Los Angeles, CA.

For Ntooitive Digital LLC, Interested Party: Amanda Kathryn Baker, Holland & Hart LLP, Denver, CO; Robert J Cassity, LEAD ATTORNEY, Holland & Hart LLP, Las Vegas, NV.

Judges: CAM FERENBACH, UNITED **[*6]** STATES MAGISTRATE JUDGE.

Opinion by: CAM FERENBACH

Opinion

Report and Recommendation

PLAINTIFF'S MOTION TO SUBSTITUTE PARTY [ECF NO. 380]

Before the Court is plaintiff's motion to substitute party. (ECF No. 380). I recommend granting the motion.

I. Background

Plaintiff brings multiple claims against the defendants, three against defendant Sheldon Adelson: (1) First Claim for Relief: Violation of *Section 2 of the Sherman Act-Monopolization, 15 U.S.C. § 2*; (2) Second Claim for Relief: Violation of *Section 2 of the Sherman Act - Attempted Monopolization, 15 U.S.C. § 2*; and (3) Fifth Claim for Relief: Violation of the Nevada Unfair Trade Practices Act - NRS 598A. (ECF No. 1). The Sun and the Review-Journal have operated under an Amended and Restated [Joint Operating] Agreement since 2005 ("JOA"), which allowed the parties to combine the two newspapers into a single-media product that separately brands the RJ and the Sun and includes the Sun as a separate newspaper located inside the Review-Journal. (*Id.*) Defendant Las Vegas Review Journal brings counter claims for monopolization and attempted monopolization, along with a claim of violation of *Section 1 of the Sherman Act, Restraint of Trade, 15 U.S.C. § 1*, and it seeks declaratory judgment regarding the invalidity of the JOA. (ECF No. 296 at 52).

Earlier this year, defendant Sheldon Adelson, the owner of the Review-Journal, passed away. On February 22, 2021, the Review Journal filed a suggestion **[*7]** of death upon the record which states that Dr. Miriam Adelson is the Special Administrator of Defendant Sheldon Adelson's Estate. (ECF No. 358). Plaintiff now moves pursuant to *Rule 25(a) of the Federal Rules of Civil Procedure*, to substitute Dr. Adelson in place of Sheldon Adelson. (ECF No. 380 at 2). The defendants do not dispute the general survivability of the Sun's Sherman Act and state law claims against defendant Adelson or the substitution of Dr. Miriam Adelson. The defendants, however, dispute the survivability of the statutory trebling of damages and fee-shifting because defendants argue that those damages are penal rather than remedial. (ECF No. 386 at 3). Plaintiff argues in its reply that the Ninth Circuit has not ruled that treble damages for antitrust violations extinguish upon the death of a defendant as a penalty under a *Rule 25*. (ECF No. 392 at 4). Plaintiff also argues that the Ninth Circuit has expressly held that treble damages in this context are remedial. (*Id.*)

II. Discussion

Rule 25(a)(1) of the Federal Rules of Civil Procedure governs substitution when one party dies during litigation. A timely motion for substitution can be granted only with respect to a claim that is not extinguished by death, where the individual seeking to be substituted is the decedent's successor **[*8]** or representative:

> If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Rule 25(a)(1) "does not resolve the question of what law of survival of actions should be applied in this case. It simply describes the manner in which parties are to be substituted in federal court once it is determined that the applicable substantive law allows the action to survive a party's death." *Robertson v. Wegmann, 436 U.S. 584, 587 n.3, 98 S. Ct. 1991, 56 L. Ed. 2d 554 (1978)* (internal citation omitted).

Section 4 of the Clayton Act (*15 U.S.C. § 15(a)*) provides (1) a private cause of action for suits brought pursuant to sections 1 and *2 of the Sherman Act (15 U.S.C. §§ 1*, *2*) and (2) the right to treble damages, costs of suit, and reasonable attorneys' fees. See also *15 U.S.C. §15* generally. "The purpose of the Sherman Antitrust Act and of the Clayton Act is to prevent economic concentration in the American economy by keeping a large number of small competitors in business." *United States v Von's Grocery Co., 384 U.S. 270, 86 S. Ct. 1478, 16 L. Ed. 2d 555 (1966)*. Treble damages granted by *15 USCS § 15* are for redress of private injury. *United States v. Cooper Corp., 312 U.S. 600, 61 S. Ct. 742, 85 L. Ed. 1071, 1941 Trade Cas. (CCH) ¶56111, 1941 U.S. LEXIS 1088 (1941)*(superseded by statute amendment to allow the United States to also bring **[*9]** suit). When a federal statute contains no explicit statement on survival rights, the general rule under federal common law is that rights of action under federal statutes survive death if the statute is remedial, not penal. *Ex parte Schreiber, 110 U.S. 76, 80, 3 S. Ct. 423, 28 L. Ed. 65 (1884)*; see also Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1954 (3d ed.) ("It is still the rule that penal actions do not survive but courts generally have held that treble-damage provisions are remedial and that actions of that kind survive").

The Ninth Circuit has held that, "[a]n action to recover damages resulting from a violation of the Sherman Anti-Trust Act is not an action to recover a penalty." *Hicks v. Bekins Moving & Storage Co., 87 F.2d 583, 585 (9th Cir. 1937)*, citing to *Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 397, 27 S.Ct. 65, 51 L.Ed. 241*. "Such a cause of action [Sherman Anti-Trust] does survive the death of the injured party and is assignable." *Hicks., 87 F.2d at 585*, citing to multiple sister circuit courts e.g., see *Moore v. Backus, 78 F.2d 571, 573 (7th Cir. 1935)*; *Fazakerly v. E. Kahn's Sons Co., 75 F.2d 110, 114 (5th Cir. 1935)*; *United Copper Sec. Co. v. Amalgamated Copper Co., 232 F. 574, 577 (2d Cir. 1916)*. Statutory treble damages for antitrust violations are "designed primarily as a remedy," *John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 498 (9th Cir. 1977)*; see also *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701, 1977-1 Trade Cas. (CCH) ¶61255, 1977 U.S. LEXIS 37 (1977)* ("[A]lthough treble damages [provided by *15 USCS § 15*] also play important role in penalizing wrongdoers and in deterring wrongdoing, [treble damages are] designed primarily as remedy.")

"It has been repeatedly held that an action for damages under the Sherman Trust is not an action for a penalty. Under **[*10]** that Act the plaintiff, if successful, is expressly entitled to treble damages" *Armstrong v. Allen B. Du Mont Labs., 137 F. Supp. 659, 664 (D. Del. 1955)*, citing to *Hicks., 87 F.2d at 585*; *Chattanooga Foundry & Pipe Works, 203 U.S. at 397*; and *Brady v. Daly, 175 U.S. 148, 156, 20 S.Ct. 62, 44 L.Ed. 109*. *Contrast:* Treble damages may be considered punitive, however, in the context of a *Rule 23(b)(3)* determination, but putative class members are not barred from seeking treble damages individually. See *Kline v. Coldwell, Banker & Co., 508 F.2d 226, 235 (9th Cir. 1974)*. Regarding the Nevada Unfair Trade Practice Act ("NUTPA" at NRS 598A), Nevada's Claim Survival Statute states that "no cause of action is lost by reason of the death of any person," and all available damages are recoverable against the executor except for those "imposed primarily for the sake of example or to punish the defendant." *NRS 41.100(1)-(2)*. The remedies afforded under NRS Chapter 598A are treble damages, attorney fees, and costs. *NRS 598A.210*.

Hicks and its progeny direct that the Sun's federal claims against deceased defendant Sheldon Adelson survive his death. The defendants' reliance on the *Kline* court's rationale that treble damages are potentially punitive under a *Rule 23(b)(3)* determination is misplaced because the *Kline* court refused to certify the class on the basis that treble damages were punitive in that situation[1] . This is not a class action. The *Kline* court made no reference to *Hicks,*

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[1] In *Kline* the Ninth Circuit considered whether the superiority requirement of *Rule 23(b)(3)* precluded class certification of an antitrust class whose members had engaged in 400,000 to 800,000 transactions, generating excess commissions and treble damages in the amount of $1,875 per transaction, or an aggregate of at least $750,000,000 in damages. *Kline 508 F. 2d at 234* & n. 5. The court noted that although these damages were contemplated by the statute, the "amounts [were] staggering" in the class certification context. *Id.* The court also noted that comparable cases, where putative class members sought "outrageous amounts in statutory penalty cases," were similarly denied class action status. *Id. at 234*.

Hicks's progeny, or *Rule 25*. *Hicks* is good law and controls here. While the *Hicks* court did not discuss a distinction **[*11]** between a deceased plaintiff and a deceased defendant, given the remedial nature of treble damages, attorneys' fees, and costs, the *Hicks* court's rationale applies equally[2] regardless of whether the deceased litigant is the plaintiff or the defendant.

The Sun's claims for treble damages, attorneys' fees, and costs are available for both its Sherman Act and NUTPA claims. The purpose of the Sherman Act is not to punish—but to *prevent*—economic concentration in the American economy by keeping small competitors in business." See *Von's Grocery Co., 384 U.S. 270*. These claims survive the death of defendant Adelson because the treble damages, attorneys' fees, and costs provisions of both laws are primarily remedial in nature and may be enforced against the deceased defendant's estate. Under controlling Supreme Court and Ninth Circuit precedent, this is enough to conclude that the Sun's claims for treble damages, attorneys' fees, and costs against Adelson's estate should proceed. Dr. Adelson should properly be substituted in Sheldon Adelson's place and the plaintiff can proceed against Sheldon Adelson's estate. I recommend that the plaintiff's *Rule 25* motion be granted because none of the claims against Sheldon Adelson have **[*12]** been extinguished.

Accordingly,

IT IS RECOMMENDED that plaintiff's motion to substitute party (ECF No. 380) should be GRANTED.

DATED this 5th day of May 2021.

/s/ Cam Ferenbach

CAM FERENBACH

UNITED STATES MAGISTRATE JUDGE

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[2] Other courts have held that an antitrust action survives the death of a defendant. See, e.g., *Sullivan v. Associated Billposters & Distributors of United States and Canada, 6 F.2d 1000, 1012 (2d Cir.1925)* (explaining that a cause of action under the Sherman Act based on "acts which deprive one of his trade and diminish his profits certainly directly affect his business and may destroy it" survives the death of the defendant); *Fishman v. Estate of Wirtz, 807 F.2d 520, 560-61 (7th Cir. 1986)* (awarding treble damages based on violation of federal ***antitrust law*** despite the defendant's death).

In re Glumetza Antitrust Litig.

United States District Court for the Northern District of California

May 6, 2021, Decided; May 6, 2021, Filed

No. C 19-05822 WHA; No. C 19-06138 WHA; No. C 19-06839 WHA; No. C 19-07843 WHA; No. C 19-08155 WHA; No. C 20-01198 WHA; No. C 20-05251 WHA

Reporter

2021 U.S. Dist. LEXIS 87085 *; 2021 U.S.P.Q.2D (BNA) 508; 2021 WL 1817092

In re GLUMETZA ANTITRUST LITIGATION.This Document Relates to: ALL ACTIONS.

Core Terms

generic, patent, defendants', infringement, brand, settlement, manufacturer, launch, FDA, noninfringement, plaintiffs', pharmaceutical, prices, no-AG, market power, metformin, license, reasonable trier of fact, antitrust, conspiracy, parties, consumers, marketing, diabetes, motions, royalty, antitrust violation, rule of reason, anticompetitive, expiration

LexisNexis® Headnotes

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

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

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

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

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

HN1[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. Put plainly, it bars (1) concerted conduct which (2) unreasonably restrains trade. An unreasonable restraint comes either as a per se violation (when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination) or a violation of the rule of reason, meaning the restraint's harm to competition outweighs its procompetitive effects in light of the peculiarities of the business, the nature and history of the restraint, and its reason for being. In pharmaceutical reverse-payment cases, courts apply the rule of reason.

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

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

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN2[] **Actual Monopolization, Claims**

Section 2 of the Sherman Act condemns every person who shall monopolize, or attempt to monopolize any part of the trade or commerce among the several States. Unlike Sherman Act § 1's prohibition of concerted restraints, § 2 prohibits unilateral (as well a multilateral) conduct, but only that which threatens to or actually monopolizes. Such violation involves the (1) possession of power in the relevant market following (2) its willful acquisition or maintenance and (3) an injury resulting from abuse or leverage of that market power. This causal-harm element emphasizes the distinction between, on the one hand, the unlawful acquisition of market power and, on the other, its development as a consequence of a superior product, business acumen, or historic accident.

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

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

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

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

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

HN3[] **Actual Monopolization, Claims**

A court's threshold inquiry in a Sherman Act case asks whether defendants wielded power over the relevant market, the area of effective competition. Sherman Act § 2 carries this demand on its face; a monopolist unifies the market for a given good and wields the resulting anticompetitive power. Though less obvious a requirement of Sherman Act § 1, courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market, as the analysis requires the location of defendants within the market structure to gauge the results of their anticompetitive conduct.

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

Evidence > Weight & Sufficiency

HN4[] **Jury Trials, Province of Court & Jury**

Ultimately, the balancing of this evidence must be left to our trier of fact.

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

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

The ultimate issue in a rule of reason Sherman Act case is whether a challenged practice will produce adverse effects on price or output.

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

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

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

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN6[] Per Se Rule & Rule of Reason, Per Se Violations

By the patent laws, Congress has expressly sanctioned certain conduct that would otherwise constitute even a per se violation of Sherman Act § 1. A patent grants its owner the right to exclude others from practicing the claimed invention. Now, a patent owner may let the world make, use, or sell the invention. It may, in exchange for royalty payments, license to as many producers as necessary to create a competitive market. But the patent owner may also monopolize or restrain the market for the invention. It may license only a few producers. Or just one. Indeed, a patent owner may exclude all others from practicing the invention, and may even refrain from practice itself, thereby suppressing the invention from the market entirely. Certain contexts require courts, even those presented with otherwise per se violations, to step back to the rule of reason.

Evidence > Burdens of Proof > Allocation

Patent Law > Infringement Actions > Burdens of Proof

Evidence > Inferences & Presumptions > Presumptions

HN7[] Burdens of Proof, Allocation

Courts presume a patent's validity. But courts also presume noninfringement. The patent owner always bears that burden. In other words, courts presume a producer's right to market a good unless and until shown otherwise.

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

Patent Law > Infringement Actions > Summary Judgment > Claim Evaluation

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

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

HN8[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Patent fundamentals fit within the Sherman Act rule of reason's burden-shifting framework. After plaintiffs establish an antitrust violation, the burden falls to the defendants to offer a procompetitive rationale, which, if non-pretextual, plaintiffs must rebut. It follows, then, that to traverse a motion for summary judgment raising defendants' patents as the procompetitive justification, plaintiffs must show some evidence of noninfringement or invalidity. But noninfringement remains the baseline. Some anticompetitive conduct will fall within the scope of the patent; some will not. Whether a particular restraint lies beyond the limits of the patent monopoly is a conclusion that flows from the antitrust analysis and not its starting point.

Civil Procedure > ... > Discovery > Methods of Discovery > Expert Witness Discovery

Evidence > ... > Lay Witnesses > Opinion Testimony > Personal Perceptions

HN9[] Methods of Discovery, Expert Witness Discovery

Fed. R. Civ. P. 26(a)(2)(C) permits certain non-retained experts to testify as percipient witnesses. This usually arises in the context of a treating physician who may testify to opinions formed during the course of medical treatment, in contrast to a medical expert retained to review and opine on medical records provided by counsel and who must provide a written report.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Inferences

HN10[] Sherman Act, Claims

It is generally sufficient to show with reasonable probability some causal connection between an antitrust violation and the claimed injury. A jury may conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the effects, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs. In other words, plaintiffs need not rule out all possible alternative sources of injury, but satisfy the inquiry by showing the illegality to be a material cause of the injury.

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

Antitrust & Trade Law > Sherman Act

HN11[] Regulated Practices, Price Fixing & Restraints of Trade

Overcharging is a valid antitrust injuty. Price cutting is a practice the antitrust laws aim to promote.

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

HN12[] Conspiracy to Monopolize, Elements

Premising antitrust causation (and thus liability) on the notion that defendants must have contemplated a lawful course of action before abandoning it for the unlawful is both wrong on the law — the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created — and in reasoning — the actors have no reason to contemplate action they might have taken in the but-for world which never came to pass.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

HN13[] **Sherman Act, Defenses**

Antitrust laws impose a four-year statute of limitations. 15 U.S.C.S. § 15b.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN14[] **Statute of Limitations, Time Limitations**

A limitations period will be tolled where defendants affirmatively concealed their unlawful conduct and plaintiffs, acting reasonably, had neither actual nor constructive knowledge.

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

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

HN15[] **Entitlement as Matter of Law, Appropriateness**

The determination of whether a plaintiff knew or should have known of a cause of action presents a question for the trier of fact, though diligence is tested by an objective standard. Summary judgment will be appropriate only if uncontroverted evidence irrefutably demonstrates that a plaintiff discovered or should have discovered the cause of action but failed to file a timely complaint.

Evidence > ... > Testimony > Examination > Direct Examinations

Governments > Courts

HN16[] **Examination, Direct Examinations**

The duty of candor is not simply an obligation to answer honestly when asked a direct question by the trial court. It includes an affirmative duty to inform the court when a material statement of fact or law has become false or misleading in light of subsequent events.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN17[] **Civil Conspiracy, Elements**

Actions in furtherance of a conspiracy are imputed to all involved until its purpose has been achieved or abandoned. Withdrawal from a conspiracy requires disavowal of the unlawful goal, an affirmative act to defeat its purpose, or definite, decisive, and positive steps to show a sufficient disassociation.

Governments > Legislation > Statute of Limitations > Time Limitations

HN18[] **Statute of Limitations, Time Limitations**

A continuing violation accrues with each overt act, which is both new and independent, not a mere reaffirmation of previous conduct, and which inflicts new and accumulating injury.

Torts > ... > Multiple Defendants > Concerted Action > Civil Conspiracy

HN19[] **Concerted Action, Civil Conspiracy**

A defendant cannot be held liable for substantive offenses committed before joining or after withdrawing from a conspiracy.

Counsel: **[*1]** For Meijer, Inc., Plaintiff (3:19-cv-05822-WHA): Adam P Merrill, Daniel Abraham Shmikler, Sperling Slater, P.C., Chicago, IL; Alberto Rodriguez, David Paul Germaine, Eamon Padraic Kelly, John Paul Bjork, Joseph M Vanek, Sperling & Slater P.C., Chicago, IL; Barry Steven Taus, PRO HAC VICE, Taus, Cebulash & Landau, LLP, New York, NY; Brett H Cebulash, PRO HAC VICE, Taus, Cebulash and Landau, New York, NY; David S. Nalven, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Jessica R. MacAuley, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Kristen A. Johnson, Hagens Berman Sobol Shapiro, Cambridge, MA; Lauren G. Barnes, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Richard M Brunell, Hilliard and Shadowen, Austin, TX; Robert David Cheifetz, PRO HAC VICE, Sperling Slater, Chicago, IL; Rochella T. Davis, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Steve D. Shadowen, Hilliard & Shadowen, LLP, Austin, TX; Thomas M. Sobol, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Shana E. Scarlett, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Meijer Distribution, Inc., Plaintiff (3:19-cv-05822-WHA): Adam P Merrill, Daniel **[*2]** Abraham Shmikler, PRO HAC VICE, Sperling Slater, P.C., Chicago, IL; Alberto Rodriguez, David Paul Germaine, Eamon Padraic Kelly, John Paul Bjork, Joseph M Vanek, Sperling & Slater P.C., Chicago, IL; Barry Steven Taus, PRO HAC VICE, Taus, Cebulash & Landau, LLP, New York, NY; Brett H Cebulash, PRO HAC VICE, Taus, Cebulash and Landau, New York, NY; David S. Nalven, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Jessica R. MacAuley, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Kristen A. Johnson, Hagens Berman Sobol Shapiro, Cambridge, MA; Lauren G. Barnes, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Richard M Brunell, Hilliard and Shadowen, Austin, TX; Robert David Cheifetz, PRO HAC VICE, Sperling Slater, Chicago, IL; Rochella T. Davis, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Steve D. Shadowen, Hilliard & Shadowen, LLP, Austin, TX; Thomas M. Sobol, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Shana E. Scarlett, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For BI-LO, LLC, Winn-Dixie Logistics, Inc., Plaintiffs (3:19-cv-05822-WHA): Matthew C. Weiner, LEAD ATTORNEY, PRO HAC VICE, Hilliard & Shadowen **[*3]** LLP, Austin, TX; Nicholas William Shadowen, LEAD ATTORNEY, Steve D. Shadowen, Hilliard & Shadowen LLP, Austin, TX; Barry Steven Taus, PRO HAC VICE, Taus, Cebulash & Landau, LLP, New York, NY; Brett H Cebulash, PRO HAC VICE, Taus, Cebulash and Landau, New York, NY; David S. Nalven, Jessica R. MacAuley, Lauren G. Barnes, Rochella T. Davis, Thomas M. Sobol, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Kristen A. Johnson, Hagens Berman Sobol Shapiro, Cambridge, MA; Richard M Brunell, Hilliard and Shadowen, Austin, TX; Rudy F. Gonzales, Jr., PRO HAC VICE, Hilliard Munoz Gonzales, Corpus Christi, TX; Tina Joann Miranda, PRO HAC VICE, Hillard Shadowen LLC, Austin, TX; Shana E. Scarlett, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For UFCW Local 1500 Welfare Fund, Pensioned Operating Engineers Health and Welfare Fund, Plaintiffs (3:19-cv-05822-WHA): Domenico Minerva, LEAD ATTORNEY, PRO HAC VICE, New York, NY; Ethan H. Kaminsky, Jay L. Himes, Robin van der Meulen, LEAD ATTORNEYS, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; Matthew Perez, PRO HAC VICE, Gregory Asciolla, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; Steve D. Shadowen, Hilliard & Shadowen, LLP, Austin, **[*4]** TX.

For KPH Healthcare Services, Inc., Plaintiff (3:19-cv-05822-WHA): also known as, Kinney Drugs, Inc.; A.J. De Bartolomeo, LEAD ATTORNEY, Tadler Law LLP, San Francisco, CA; Debra G Josephson, Karen Sharp Halbert, Sarah E. DeLoach, Stephanie Smith, Stephanie Egner Smith, William Olson, LEAD ATTORNEYS, PRO HAC VICE, Roberts Law Firm, P.A., Little Rock, AR; Lauren G. Barnes, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Michael Roberts, LEAD ATTORNEY, Roberts Law Firm, P.A., Little Rock, AR; Brian R Morrison, PRO HAC VICE, Tadler Law LLP, New York, NY; Steve D. Shadowen, Hilliard & Shadowen, LLP, Austin, TX.

For Walgreen Co., C19-7843), Plaintiff (3:19-cv-05822-WHA): Anna Theresa Neill, LEAD ATTORNEY, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL; Scott Eliot Perwin, PRO HAC VICE, Richard Alan Arnold, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL; Lauren C. Ravkind, PRO HAC VICE, Kenny Nachwalter, PA, Austin, TX; William Francis Murphy, Dillingham & Murphy, San Francisco, CA.

For Kroger Co., The, Albertsons Companies, Inc., H-E-B LP, Plaintiffs (3:19-cv-05822-WHA): Anna Theresa Neill, LEAD ATTORNEY, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL; Richard **[*5]** Alan Arnold, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL.

For Bausch Health Companies Inc., Salix Pharmaceuticals, Ltd., Salix Pharmaceuticals, Inc., Santarus, Inc., Defendants (3:19-cv-05822-WHA): David R. Marriott, LEAD ATTORNEY, Cravath, Swaine Moore LLP, New York, NY; Jennifer Bridget Patterson, LEAD ATTORNEY, PRO HAC VICE, Arnold and Porter Kaye Scholer LLP, New York, NY; Laura S Shores, LEAD ATTORNEY, PRO HAC VICE, Arnold and Porter Kaye Scholer LLP, Washington, DC; Saul P. Morgenstern, LEAD ATTORNEY, Kaye Scholer LLP, New York, NY; Daniel B. Asimow, Matthew Harrison Fine, Arnold & Porter Kaye Scholer LLP, San Francisco, CA.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-05822-WHA): Eric Jonathan Stock, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn, New York, NY; Daniel B. Asimow, Arnold & Porter Kaye Scholer LLP, San Francisco, CA; Lauren Michelle Kole, PRO HAC VICE, Denver, CO; Leesa Nicole Haspel, PRO HAC VICE, Gibson, Dunn and Crutcher LLP, New York, NY; Victoria Leigh Weatherford, Gibson Dunn & Crutcher LLP, San Francisco, CA.

For Lupin Pharmaceuticals, Inc., Lupin Ltd., Defendants (3:19-cv-05822-WHA): Jeffrey Blumenfeld, LEAD ATTORNEY, PRO HAC VICE, Lowenstein Sandler, **[*6]** Washington, DC; Allison Marie Vissichelli, PRO HAC VICE, Leiv Hamilton Blad, Zarema Arutyunova Jaramillo, LEAD ATTORNEYS, Lowenstein Sandler LLP, Washington, DC; Daniel B. Asimow, Arnold & Porter Kaye Scholer LLP, San Francisco, CA; Meg T. Slachetka, PRO HAC VICE, Lowenstein Sandler LLP, New York, NY..

For CVS Pharmacy, Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Movants (3:19-cv-05822-WHA): Anna Theresa Neill, LEAD ATTORNEY, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL; Alexander J. Egervary, Caitlin V. McHugh, Chelsea M. Nichols, PRO HAC VICE, Hangley Aronchick Segal Pudlin & Schiller, Philadelphia, PA; Barry L. Refsin, PRO HAC VICE, Hangley Aronchick Segal Pudlin Schiller, Philadelphia, PA; Eric L Bloom, Monica L. Kiley, PRO HAC VICE, Hangley Aronchick Segal Pudlin & Schiller, Harrisburg, PA; William Francis Murphy, Dillingham & Murphy, San Francisco, CA.

For Hy-Vee, Inc., Movant (3:19-cv-05822-WHA): Anna Theresa Neill, LEAD ATTORNEY, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL.

For Humana Inc., Movant (3:19-cv-05822-WHA): Peter St. Phillip, LEAD ATTORNEY, PRO HAC VICE, Lowey Dannenberg, P.C., White Plains, NY; Todd Michael Schneider, LEAD ATTORNEY, Mark **[*7]** Francis Ram, Schneider Wallace Cottrell Konecky LLP, Emeryville, CA; Uriel Rabinovitz, LEAD ATTORNEY, Lowey Dannenberg, PC, White Plains, NY; Charles Z Kopel, Lowey Dannenberg, P.C., West Conshohocken, PA; Matthew Sinclair Weiler, Schneider Wallace Cottrell Konecky et al, Emeryville, CA.

For Cardinal Health, Inc., Interested Party (3:19-cv-05822-WHA): Robert James Tucker, BakerHostetler LLP, Columbus, OH.

For Teva Pharmaceuticals USA, Inc., Miscellaneous (3:19-cv-05822-WHA): Todd Andrew Boock, Goodwin Procter LLP, Los Angeles, CA.

For Sun Pharmaceutical Industries, Inc., Miscellaneous (3:19-cv-05822-WHA): Leah Romm, Winston & Strawn LLP, San Francisco, CA.

For BI-LO, LLC, Winn-Dixie Logistics, Inc., Plaintiffs (3:19-cv-06138-WHA): Shana E. Scarlett, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Lauren G. Barnes, Thomas M. Sobol, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Matthew C. Weiner, Steve D. Shadowen, PRO HAC VICE, Nicholas William Shadowen, Hilliard & Shadowen LLP, Austin, TX.

For Bausch Health Companies Inc., Salix Pharmaceuticals, Ltd., Salix Pharmaceuticals, Inc., Santarus, Inc., Defendants (3:19-cv-06138-WHA): Laura S Shores, LEAD ATTORNEY, PRO HAC VICE, **[*8]** Arnold and Porter Kaye Scholer LLP, Washington, DC; Saul P. Morgenstern, LEAD ATTORNEY, Kaye Scholer LLP, New York, NY; Daniel B. Asimow, Arnold & Porter Kaye Scholer LLP, San Francisco, CA.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-06138-WHA): Eric Jonathan Stock, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn, New York, NY; Victoria Leigh Weatherford, Gibson Dunn & Crutcher LLP, San Francisco, CA.

For Lupin Pharmaceuticals, Inc., Lupin Ltd., Defendants (3:19-cv-06138-WHA): Jeffrey C. Bank, LEAD ATTORNEY, PRO HAC VICE, Wilson Sonsini Goodrich and Rosati, New York, NY; Wendy Lynn Devine, Wilson Sonsini Goodrich Rosati PC, San Francisco, CA.

For KPH Healthcare Services, Inc., individually and on behalf of all others similarly situated, also known as, Kinney Drugs, Inc., Plaintiff (3:19-cv-06839-WHA): A.J. De Bartolomeo, LEAD ATTORNEY, Tadler Law LLP, San Francisco, CA; Stephanie Smith, LEAD ATTORNEY, PRO HAC VICE, Little Rock, AR; Debra G Josephson, Karen Sharp Halbert, Sarah E. DeLoach, PRO HAC VICE, Michael L. Roberts, Roberts Law Firm, P.A., Little Rock, AR; Michael Roberts, PRO HAC VICE, Roberts Law Firm, P.A., Little Rock, AR; Stephanie Egner Smith, PRO HAC VICE, Little Rock, **[*9]** AR; William Olson, PRO HAC VICE, Roberts Law Firm, P.A., Little Rock, AR.

For Bausch Health Companies Inc., Salix Pharmaceuticals, Ltd., Salix Pharmaceuticals, Inc., Santarus, Inc., Defendants (3:19-cv-06839-WHA): Laura S Shores, LEAD ATTORNEY, PRO HAC VICE, Arnold and Porter Kaye Scholer LLP, Washington, DC; Saul P. Morgenstern, LEAD ATTORNEY, Kaye Scholer LLP, New York, NY; Daniel B. Asimow, Arnold & Porter Kaye Scholer LLP, San Francisco, CA.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-06839-WHA): Eric Jonathan Stock, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn, New York, NY; Victoria Leigh Weatherford, Gibson Dunn & Crutcher LLP, San Francisco, CA.

For Lupin Pharmaceuticals, Inc., Lupin Ltd., Defendants (3:19-cv-06839-WHA): Jeffrey C. Bank, LEAD ATTORNEY, Wilson Sonsini Goodrich and Rosati, New York, NY; Wendy Lynn Devine, Wilson Sonsini Goodrich Rosati PC, San Francisco, CA.

For Walgreen Co., The Kroger Co., Albertsons Companies Inc., H-E-B LP, Plaintiffs (3:19-cv-07843-WHA): Anna Theresa Neill, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-07843-WHA): Eric Jonathan Stock, Gibson Dunn, New York, NY.

For CVS Pharmacy, **[*10]** Inc, Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Plaintiffs (3:19-cv-08155-WHA): Anna Theresa Neill, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-08155-WHA): Eric Jonathan Stock, Gibson Dunn, New York, NY.

For Hy-Vee, Inc., Plaintiff (3:20-cv-01198-WHA): Anna Theresa Neill, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL.

For Assertio Therapeutics, Inc., Defendant (3:20-cv-01198-WHA): Victoria Leigh Weatherford, LEAD ATTORNEY, Gibson Dunn & Crutcher LLP, San Francisco, CA; Eric Jonathan Stock, Gibson Dunn, New York, NY.

For Humana Inc., Plaintiff (3:20-cv-05251-WHA): Charles Z Kopel, Lowey Dannenberg, P.C., West Conshohocken, PA; Jason H. Kim, Todd Michael Schneider, Schneider Wallace Cottrell Konecky LLP, Emeryville, CA; Matthew Sinclair Weiler, Schneider Wallace Cottrell Konecky et al, Emeryville, CA; Peter St. Phillip, Uriel Rabinovitz, Lowey Dannenberg, P.C., White Plains, NY.

Judges: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM ALSUP

Opinion

ORDER RE SUMMARY JUDGMENT

INTRODUCTION

In a secret pharmaceutical-patent infringement settlement agreement, concealed from the district judge, brand and generic manufacturers of the type 2 diabetes **[*11]** drug Glumetza allegedly pledged not to compete with each other by agreeing to not introduce a generic version of the drug for several years. So, while generic competition should have driven drug prices *down*, the brand manufacturer instead hiked prices *up*. The generic manufacturer belatedly entered the market at premium pricing, and, as a result, the conspiring manufacturers allegedly extracted huge sums of money from consumers. In this resulting antitrust action, a certified class of direct purchasers move for partial summary judgment that our defendant brand and generic manufacturers wielded market power. For their part, defendants move for summary judgment, attacking the underlying antitrust violation and causal injury. All motions are **DENIED**.

STATEMENT

An estimated thirty million Americans suffer from type 2 diabetes. The condition, "caused by the combination of insulin resistance . . . and deficient insulin secretion," causes an alarming array of complications. Those with diabetes face nearly twice the average risk of stroke and heart disease. They may suffer foot ulcers that take months or years to heal, or may require amputation. Around forty percent suffer some degree of kidney **[*12]** disease, with one percent suffering kidney failure. In fact, "[p]ersons with diabetes make up the fastest growing group of kidney dialysis and transplant recipients in the United States." "Diabetes is the leading cause of new cases of blindness among adults aged 18-64 years." And, in 2017, diabetes was estimated to be the seventh leading cause of death in the United States. CTRS. DISEASE CTRL. & PREV., NAT'L DIABETES STATS. RPT. 12 (2020), https://www.cdc.gov/ diabetes/pdfs/data/statistics/national-diabetes-statistics-report.pdf; NAT'L INST. OF DIABETES & DIGESTIVE & KIDNEY DISEASES, DIABETES IN AMERICA, ch. 1, pp. 2-3, ch. 22, p. 1, fact sheet (3d ed. 2018), https://www.niddk.nih.gov/about-niddk/strategic-plans-reports/diabetes-in-america-3rd-edition.

Fortunately, modern medicine offers a battery of remedial medications. One such drug, metformin hydrochloride, helps control blood-sugar levels. Following approval by the Food and Drug Administration in June 2005, defendant Depomed, Inc. launched a new extended-release version of metformin in late 2006. Glumetza, introduced first in 500 mg and later in 1000 mg tablets, extended the release of metformin over a prolonged period by disbursing **[*13]** the active drug into a polymeric matrix. In the stomach, the metformin would more slowly diffuse out of the matrix and ensure its smooth delivery into the bloodstream over time, without the usual initial spike and later lull in drug level, to offer consistent blood-sugar control.

Depomed obtained several patents covering the developments embodied in Glumetza, United States Patent Nos. 6,340,475 and 6,635,280, which expired in September 2016, No. 6,488,962, which expired in June 2020, and No. 6,723,340, which will expire in October 2021. Depomed listed these patents as covering Glumetza in the FDA's "Orange Book." U.S. DEP'T HEATH & HUM. SERVS., FDA, APPROVED DRUG PRODUCTS WITH THERAPEUTIC EQUIVALENCE EVALUATIONS (41st ed. 2021), https://www.fda.gov/media/71474/download.

In 2009, defendants Lupin Pharmaceuticals, Inc. and Lupin Limited filed an Abbreviated New Drug Application with the FDA, seeking to manufacture and market generic versions of both 500 mg and 1000 mg Glumetza. Lupin certified to the FDA that Depomed's patents were either invalid or not infringed, yet Depomed sued anyway in November 2009, asserting several claims from the '475, '280, and '962 patents (it also asserted but later dropped the '340 patent). The case came before the Honorable Phyllis **[*14]** J. Hamilton of our district. Following a year of litigation, Judge Hamilton held a *Markman* hearing in January 2011 and issued a claim construction order in May. The parties fought for the rest of that year, but, before filing dispositive motions, settled in February 2012. As far as the parties told the judge, they would simply go their separate ways and Lupin would launch its generic on February 1, 2016. *Depomed, Inc. v. Lupin Pharms., Inc.*, No. C 09-05587 PJH, Dkt. No. 152 (N.D. Cal. Mar. 27, 2012). This, our plaintiffs now allege, concealed an underlying unlawful conspiracy.

* * *

Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984, more commonly known as the *Hatch-Waxman Act*, to lower pharmaceutical drug prices by speeding generics to market. In general, a pharmaceutical drug must undergo a grueling — and costly — testing regimen to obtain FDA approval to market. To ease generic entry, however, the Act permits a generic drug manufacturer to file an Abbreviated New Drug Application (ANDA) to piggyback on the approval efforts of the underlying brand-name drug that uses the same active ingredient and to which the proposed generic is biologically equivalent. **[*15]** The Act then implements a network of interlocking incentives to encourage faster introduction of these low-cost generics into the pharmaceutical market, yet still drive new drug development. *See* *FTC v. Actavis, 570 U.S. 136, 142, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*; *21 U.S.C. §§ 355(j)(2)(A)(ii)*, *(iv)*.

The ANDA relieves generic drug manufacturers of a significant burden by, in practical effect, placing it on brand manufacturers. So, to ensure generics cannot immediately hop aboard and profit from a brand manufacturers' costly investment, the ANDA scheme relies on, among others, patents to temporarily exclude generic manufacturers from use of the novel drug ingredient itself or its new formulation, delivery mechanism, or form of treatment. H. Hovenkamp, *Anticompetitive Patent Settlements & the Supreme Court's Actavis Decision*, 15 MINN. J.L. SCI. & TECH.S 3, 10-11 (2014). Recognizing that the long FDA approval process would otherwise eat into a substantial portion of a patent's twenty-year term, the Act provides for up to a five-year extension of a drug patent's term. *New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 644 (2d Cir. 2015)*. The Act adds a further layer to drug-patent protection, requiring an ANDA application to certify that the relevant patents have either expired or will expire before the generic reaches the market, or that the patents are **[*16]** either invalid or not infringed. *Actavis, 570 U.S. at 143*; *21 U.S.C. § 355(j)(2)(A)(vii)(I)-(IV)*.

Balancing this patent protection with its overall goal of expediting generic entry, the Act encourages generic manufacturers to challenge weak validity or infringement cases. *See* *King Drug Co. v. SmithKline Beecham Corp., 791 F.3d 388, 394 (3d Cir. 2015)*. The first generic to file an ANDA including a certification of invalidity or noninfringement (the "Paragraph IV" approach) wins 180 days of generic exclusivity, meaning that once it gains FDA approval and enters the market, the FDA can't approve any other generics during that time. This, however, doesn't stop the brand from launching its own "authorized generic" to win some market share back from the first filer, and the first filer can lose the exclusivity if fails to market promptly after a later generic filer gains FDA approval. But the exclusivity period can be "worth several hundred million dollars" to the first-filer generic and outweigh the risk of infringement suit. *Actavis, 570 U.S. at 143-44*; *In re Wellbutrin XL Antitrust Litig., 868 F.3d 132,* 144 fn. 7 (3d Cir. 2017); *See* Teva Pharm. v. Crawford, 410 F.3d 51, 55, 366 U.S. App. D.C. 203 (D.C. Cir. 2005); 21 U.S.C. § 355(j)(5)(B)(iv), (D).

To ease timely judicial resolution of ANDA patent challenges, a Paragraph IV certification operates as a technical act of patent infringement. And, to encourage prompt commencement, the Hatch-Waxman Act imposes a thirty-month stay against FDA approval of the ANDA if the patent owner sues **[*17]** within forty five days' notice of the certification. If a court resolves the infringement suit during that time, the FDA follows that result. If not, the FDA will then be free to approve the ANDA at the expiration of the statutory stay. Actavis, 570 U.S. at 143; 21 U.S.C. § 355(j)(5)(B)(iii); 35 U.S.C. § 271(e)(2)(A).

With FDA approval, a generic drug may enter the market. Though, if the infringement suit remains ongoing, the launch is commonly referred to as "at risk," given the brand manufacturer might still win a judgment of infringement, damages (perhaps enhanced for willfulness), and, where appropriate, an injunction. Wellbutrin, 868 F.3d at 168 fn. 59; 35 U.S.C. §§ 283-84. But once a generic drug makes it to market, the FDA's Orange Book broadcasts its availability to the public as an alternative to the underlying brand drug. All fifty states and the District of Columbia have some form of mandatory or permissive drug substitution law to help shift consumers from expensive brand drugs to their cheaper generics, without another visit to the doctor. *See* Schneiderman, 787 F.3d at 644-45.

This scheme is *supposed* to expedite our access to cheaper generics. But the pharmaceutical industry found a way around it. In some infringement cases, the brand manufacturer (the *patent owner*) pays the generic (the *accused infringer*) to settle. This may seem **[*18]** topsy-turvy but the patent owner actually comes out ahead. In exchange, the first-filer generic manufacturer agrees to stay off the market for a few years. So, instead of expedited generic entry, the brand maintains its monopoly and cuts the supposed-generic a share of the profits.

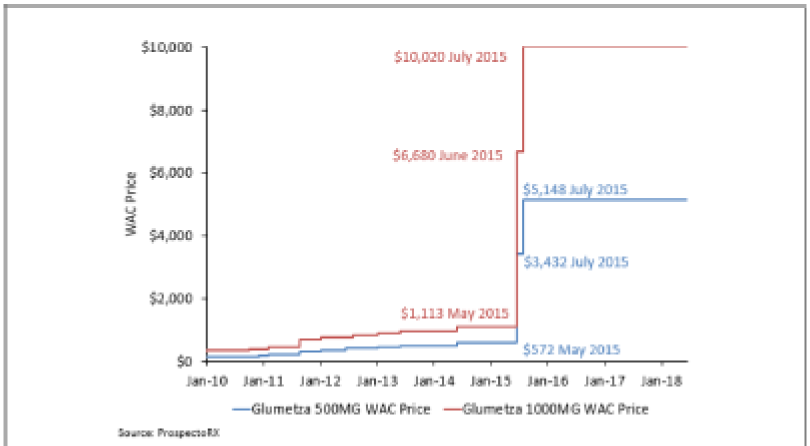
In 2013, the United States Supreme Court found that these "pay for delay" schemes can violate federal ***antitrust law***. True, a patent gives a brand drug the power to exclude competition within the bounds of the claims for its twenty-year term. But by paying the *accused infringer* to stay out of the market, the brand in essence concedes the weakness of the patent's validity or infringement case against the ANDA. Thus, the settlement suppresses generic competition and does so outside the bounds of the brand manufacturer's patent protection. *See* Actavis, 570 U.S. at 147-49, 153-58.

Our plaintiffs allege just a scheme here. The stipulated dismissal in 2012, which the parties submitted to Judge Hamilton, and which they characterized as permitting Lupin's *early* generic market entry, in fact *concealed from the judge* an extensive side agreement which preserved the brand monopoly and kept Lupin's generic Glumetza off the shelves for years.

Per the secret **[*19]** *quid pro quo*, dated February 22, 2012, Lupin agreed to walk away, leave the patents alone, and *delay* market entry of its generic Glumetza for four years, until February 1, 2016. Instead of a simple cash payment to stay away, Depomed gave Lupin something else of value — a guarantee that Depomed would not launch an authorized-generic to compete with Lupin for one year, atop the FDA-granted 180 days of market exclusivity from other generic competition. The settlement also included two clauses to protect Lupin from *other* generic competition, providing, first, that if any other manufacturer succeeded in marketing a generic Glumetza before February 2016, Lupin could market immediately, and, second, that Depomed would not license any other generic Glumetza manufacturers until at least 180 days following Lupin's market entry. These provisions undercut the incentive for any other generic manufacturer to enter the market before Lupin. But, as noted above, only the *first* of these terms, Lupin's February 2016 market entry, made it into the parties' stipulated dismissal. Crucially, as alleged, defendants did not disclose the no-authorized generic (no-AG) provision until a February 5, 2016, quarterly **[*20]** earnings call with Lupin executives.

This artificially-prolonged monopoly and synthesized duopoly proved a windfall to our defendants. Depomed had already sold its marketing rights in Glumetza to defendant Santarus, Inc., but then sold its royalty rights, estimated between $140 million and $180 million, to PDL Biopharma in October 2013 (Dkt. No. 464-1). The juiced Glumetza portfolio aided Santarus' sale to defendant Salix Pharmaceuticals for $2.6 billion in November 2013, and Salix's sale to defendant Valeant Pharmaceuticals for $14.5 billion in April 2015.

Then, in the summer of 2015, Valeant hiked the price of Glumetza on the order of 800%. *The wholesale acquisition cost of a 500 mg pill spiked from $5.72 in May to $51.48 by the end of July. In the same time, the cost of a 1000 mg pill spiked from $12.37 to $113.36*. Glumetza accounted for a three hundred fifty million dollar swell in Valeant's profits in the second half of 2015. When Lupin joined the market in February, the supposed affordable generic did so at around $45 for each 500 mg tablet. All in all, Lupin reaped to the tune of six hundred million dollars from Glumetza over the next few years.



Note: WACs are per 100-count bottle of 500 mg tablets and 90-count bottle of 1000 mg tablets.

Only adding to their spoils, defendants' **[*21]** scheme apparently dissuaded other generic manufacturers from marketing their own generic versions of Glumetza until after Lupin did. Sun Pharmaceuticals filed its ANDA in March 2011. But Depomed and marketing-partner Santarus promptly sued, and a January 2013 settlement kept Sun's generic off the market until August 2016. Watson Pharmaceuticals then filed its ANDA in March 2012. Another prompt lawsuit resulted in a November 2013 settlement keeping Watson's generic also off the market until August 2016. In the end, Watson (by then Teva Pharmaceutical Industries Ltd.) did not market its generic Glumetza until May 2017, and Sun not until July 2018.

Glumetza prices have to some extent slowly recovered, but not to pre-hike estimates. The most immediate fallout for our defendants? Bad press. So, in 2018, Depomed changed its name to Assertio Therapeutics, Inc., and Valeant changed its name to Bausch Health Companies Inc.

Plaintiffs started suing in August 2019. Ultimately, twelve cases by both direct and indirect purchasers arrived before the undersigned. An order dated March 5, 2020, largely denied defendants' motions to dismiss the direct purchasers but granted the motions in part against **[*22]** the indirect purchasers, who all subsequently dismissed. *In re Glumetza Antitrust Litig., No. C 19-05822 WHA, 2020 U.S. Dist. LEXIS 39649, 2020 WL 1066934 (N.D. Cal. Mar. 5, 2020)*. The remaining direct purchasers, several who sued as assignees of absent direct purchasers, have proceeded in two groups: (1) the direct-purchaser class, and (2) the retailer plaintiffs. An August 15 order certified the *Rule 23(b)(3)* direct-purchaser class comprising:

> All persons or entities in the United States and its territories who directly purchased Glumetza or generic Glumetza from a defendant from May 6, 2012 until the date of [the] order.

In re Glumetza Antitrust Litig., 336 F.R.D. 468 (N.D. Cal. 2020). Days prior, plaintiff Humana Inc. attempted to resurrect the slew of indirect-purchaser claims. Orders dated December 5 and February 2, 2021, rejected that ploy.

Over the past three months, our parties have filed ten *Daubert* motions and four motions for summary judgment. This order resolves the motions for summary judgment, reserves the *Daubert* motions for later, and follows full briefing and oral argument held via videoconference due to COVID-19.

ANALYSIS

HN1[] *Section 1* of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." Put plainly, it bars (1) concerted **[*23]** conduct which (2) unreasonably restrains trade. *F.T.C. v. Qualcomm Inc., 969 F.3d 974, 989 (9th Cir. 2020)*. An unreasonable restraint comes either as a *per se* violation ("when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination") or a violation of the rule of reason, meaning the "restraint's harm to competition outweighs its procompetitive effects" in light of the peculiarities of the business, the nature and history of the restraint, and its reason for being. *NCAA v. Bd. of Regents of Univ. Okla., 468 U.S. 85, 103-04, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*; *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)*; *United States v. Topco Assocs., 405 U.S. 596, 607, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. In pharmaceutical reverse-payment cases, such as ours, we apply the rule of reason. *Actavis, 570 U.S. at 158-59*.

HN2[] *Section 2* condemns "[e]very person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States." Unlike *Section 1*'s prohibition of *concerted* restraints, *Section 2* prohibits *unilateral* (as well a multilateral) conduct, but only that which threatens to or actually monopolizes. *Alaska Airlines v. United Airlines, 948 F.2d 536, 541 (9th Cir. 1991)*. Such violation involves the (1) possession of power in the relevant market following (2) its willful acquisition or maintenance and (3) an injury resulting from abuse or leverage of that market power. This causal-harm element emphasizes the distinction between, on the one hand, the unlawful acquisition of market power and, **[*24]** on the other, its "development as a consequence of a superior product, business acumen, or historic accident." *Qualcomm, 969 F.3d at 990* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*.

HN3[] Our threshold inquiry asks whether defendants wielded power over the relevant market, "the area of effective competition." *Section 2* carries this demand on its face; a monopolist unifies the market for a given good and wields the resulting anticompetitive power. Though less obvious a requirement of *Section 1*, "courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market," as the analysis requires our location of defendants within the market structure to gauge the results of their anticompetitive conduct. *Ohio v. Am. Express Co., 585 U.S. ___, 138 S. Ct. 2274, 2285, 201 L. Ed. 2d 678 (2018)*; *Qualcomm, 969 F.3d at 989-92*; *Rebel Oil Co. v. ARCO, 51 F.3d 1421, 1434 (9th Cir. 1995)*.

Plaintiffs establish the antitrust violation itself via a tripart burden shift, beginning with a *prima facie* concerted restraint under *Section 1* or willful or attempted monopoly under *Section 2*. The defendant must then offer a nonpretextual procompetitive rationale for the restraint or the monopolization, which plaintiffs must either rebut or show, under *Section 1*, that a less anticompetitive means would achieve the same ends, or under *Section 2*, that the anticompetitive harm outweighs the procompetitive benefit. *See* *Qualcomm, 969 F.3d at 991*; *Image Tech. Serv. v. Eastman Kodak Co., 903 F.2d 612, 618-19 (9th Cir. 1990)*, *aff'd*, *504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*.

If plaintiffs establish the antitrust **[*25]** violation, they must then prove their causal antitrust injury, *i.e.*, an injury both of the kind the antitrust laws seek to prevent and which flows from the unlawfulness of defendants' conduct, and offer a fair estimate of their damages. *Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-65, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*; *Qualcomm, 969 F.3d at 989-92*; *In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 19 fn. 18 (1st Cir. 2008)*.

This order denies plaintiffs' motion for partial summary judgment. True, a reasonable trier of fact could find that defendants wielded market power during the relevant time period. Compelling evidence illuminates classic indicators of power in the market for brand and generic Glumetza. In 2015, Bausch profitably hiked prices and reduced consumption. Lupin profitably maintained those supracompetitive prices for several years before competition with the authorized generic, Teva, and Sun finally brought prices back down. But a reasonable trier could reject these considerations in light of defendants' evidence of the cross-elasticity of demand between Glumetza and the many, and more prevalent, variants of metformin hydrochloride available to consumers.

This order also denies defendants' motions for summary judgment. A reasonable trier of fact could conclude that defendants violated the rule of reason. The challenged settlement included cross-covenants **[*26]** not to compete, one from Lupin to pause its generic Glumetza entry for four years, and the other from Assertio and Santarus to forego an authorized generic for one year. These horizontal restraints on competition mirrored classic *per se* antitrust violations. Defendants, however, contend these restraints fell within the scope of their patent rights. But given evidence calling into question the strength of defendants' infringement case, a reasonable trier of fact could find defendants' covenants exceeded those bounds.

A reasonable trier of fact could further conclude that defendants' restraint of the market delayed generic entry, stifled competition, and caused plaintiffs to pay more for brand and generic Glumetza than they would have otherwise. In the absence of the unlawful scheme, Lupin might have marketed its generic earlier via either an at-risk launch, by prevailing in the underlying suit, or by negotiating an earlier market entry date in the absence of the no-AG agreement, and other generics might have followed quickly thereafter. This earlier generic competition would have prevented or mitigated defendants' price gouging. A reasonable trier of fact could also find plaintiffs' **[*27]** suit timely and reject both Assertio and Lupin's solo defenses. Material questions abound. *Anderson v. Liberty Lobby, 477 U.S. 242, 248-49, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

1. DEFENDANTS' MARKET POWER.

A reasonable trier of fact could find that defendants' wielded power in the market for brand and generic Glumetza. It could also find otherwise. Up front, no one doubts that the market for brand Glumetza included both its authorized generic and those by Lupin, Sun, and Teva. Drug substitution laws nationwide permit or even require pharmacies to swap these cheaper generics in place of a brand drug. *Schneiderman, 787 F.3d at 644-45, 657*; ORANGE BOOK at vii—xvi, 3-284. If our relevant market stopped there, then defendants' market power would likely follow. Until the authorized generic joined in February 2017, our defendants retained 100% market share, the FDA approval regime posed a significant barrier to market entry, and others like Sun and Teva proved unable to ramp up production until mid-2017 and 2018. *Rebel Oil Co. v. ARCO, 51 F.3d 1421, 1434 (9th Cir. 1995)*.

Our parties, however, dispute whether the relevant market also encompassed *other* variants of metformin hydrochloride, such as Glucophage, Glucophage XR, and Fortamet (including their generics). This question of fact involves a broad inquiry into "the particular structure and circumstances" of the pharmaceutical **[*28]** context and into the cross-elasticity of demand between Glumetza and its proposed substitutes, including empirical study, to determine which, if any, would have been adequate and available enough to constrain prices. *Rebel, 51 F.3d at 1434-35*; *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*; *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 612 fn. 31, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*.

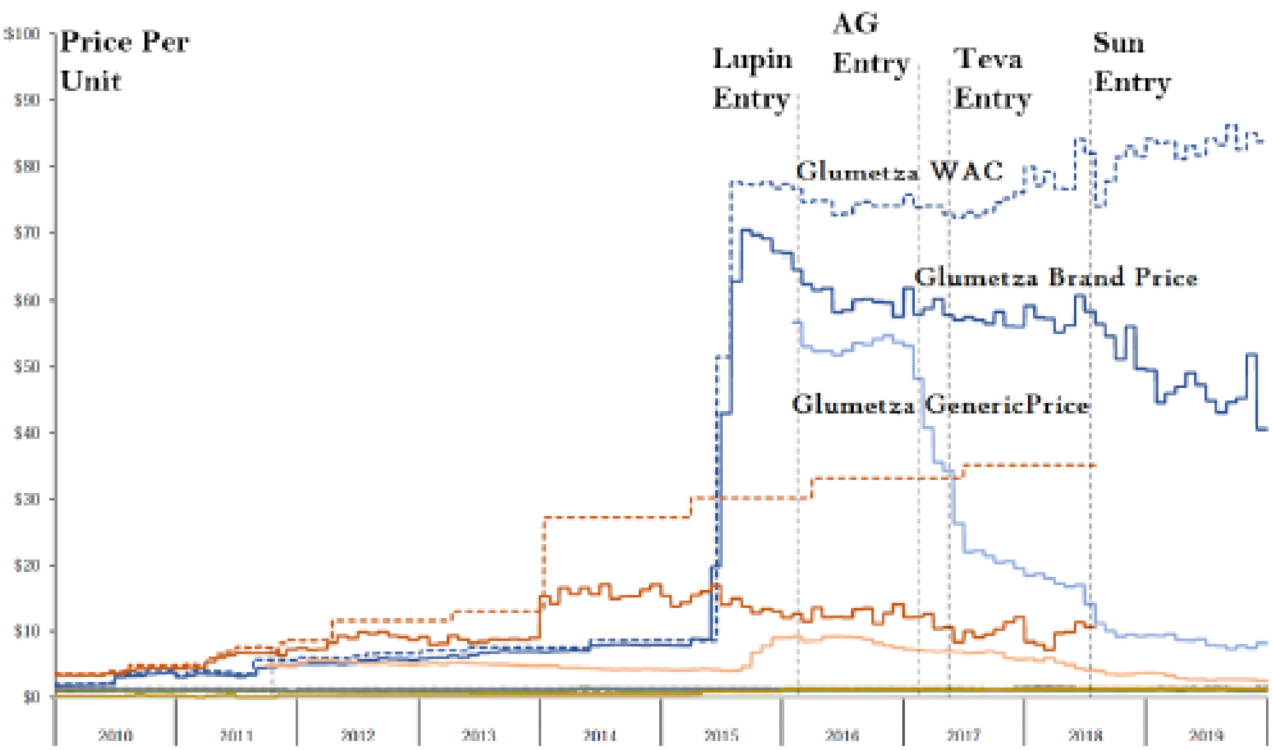
In the dysfunctional pharmaceutical market, the doctor who chooses the drug does not pay for it, and the consumer who pays does not choose. Insurance obfuscates the price the consumer sees. The prescription requirement, by corollary, limits alternatives. And, consumer "demand" for pharmaceutical drugs often manifests as degrees of desperation, because we consume these drugs to prevent illness, ease suffering, and even forestall death. *See Schneiderman, 787 F.3d at 645-47*; *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 429-30 (3d Cir. 2016)*; F.M. Scherer, *The Pharmaceutical Industry*, in I HANDBOOK OF HEALTH ECONOMICS 1300-01 (2000).

This all shifts bargaining power to the drug companies, but it only tells part of the story. Defendants' expert testimony indicates that physicians both account for price in prescribing and view Glumetza as therapeutically interchangeable with the numerous, and more prevalent, metformin variants (Glumetza has only ever accounted for about a two and a half percent share). Drug manufacturers then compete behind the scenes for preferred **[*29]** placement on health plan formularies which govern drug insurance coverage.

Both sides' experts also attack cross-elasticity empirically. Plaintiffs' expert submits studies indicating little to no cross-elasticity between Glumetza and other metformin variants. Defendants' expert presents the contrary. Plaintiffs' *Daubert* motion may narrow this battle of the experts, but the breadth of this inquiry ensures that sufficient, though perhaps lopsided, disputes will remain. ***HN4***[] Ultimately, the balancing of this evidence must be left to our trier of fact. *See Primiano v. Cook, 598 F.3d 558, 564-65 (9th Cir. 2010)*; *Provenz v. Miller, 102 F.3d 1478, 1490 (9th Cir. 1996)*.

Seeking to bypass this maze, plaintiffs offer direct evidence of defendants' market power. True enough, market power asks "whether an arrangement has the potential for genuine adverse effects on competition." Under either *Section 1* or *2*, "proof of actual detrimental effects . . . can obviate the need for an inquiry into market power." *F.T.C. v. Ind. Fed'n Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*; *United States v. Microsoft, 253 F.3d 34, 51, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (en banc).

Plaintiffs point to the "hallmarks of market power" — defendants' profitable maintenance of supracompetitive pricing and reduced output for several years. Bausch's 2015 price hike, which plaintiffs characterize as an 800% increase, though defendants would place the number around 275%, drove thousands of **[*30]** consumers from Glumetza to (we infer in defendants' favor) Glucophage and Fortamet, whose producers ably supplied the new demand. Meanwhile, Bausch reaped *three hundred fifty million* dollars more in profit over the latter half of 2015. Lupin joined the market at a similar premium in February 2016, quickly captured the brand consumer base, and maintained that profitable supracompetitive pricing for several years (Dkt. Nos. 493-79, 493-100). *Oltz v. St. Peter's Comm'ty Hosp., 861 F.2d 1440, 1448 (9th Cir. 1988)*; *NCAA, 468 U.S. at 85-86*; William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).



Prices & WAC of Extended-Release and Immediate-Release Metformin 2010–2019

Though the Supreme Court approved of direct proof of market power in *Indiana Federation*, there remains a broad gap between affirmance of a direct factual finding of market power versus plaintiffs' request here to take that question from the jury. Plaintiffs cite, and this order is aware of, no appellate decision stemming from *Indiana Federation* affirming the leap plaintiffs' seek. Additionally, *Indiana Federation* did, in fact, roughly define the market, emphasizing the locality of dentistry services and defendants' majority share in two specific cities. Defendants' evidence of the cross-elasticity of demand between Glumetza and other metformin variants, particularly given **[*31]**

Glumetza's small role in the broader metformin array, precludes our reliance on even a rough market definition here. *476 U.S. at 460-61*; *Oltz, 861 F.2d at 1448*.

A reasonable trier of fact could exclude other versions of metformin and include only Glumetza and its generics in our market. The reasonable trier could also find that defendants' have already wielded anticompetitive market power. ***HN5***[] But as our court of appeals has observed:

> The ultimate issue in a rule of reason case is whether a challenged practice will produce adverse effects on price or output. The only *direct* way to answer that question is to introduce evidence of actual price increases or reductions in output after the challenged practice. But even if a plaintiff is lucky enough to gather such evidence, he will face the momentous task of proving that the observed price or output effects were not attributable to any one of an infinite number of independent causes: exhaustion of raw materials, increases in labor costs, increases in the price of substitute goods, tax hikes, etc. Situations will arise where a plaintiff is able to meet this burden. But doubtless those occasions will be rare.

E.W. French & Sons, Inc. v. General Portland Inc., 885 F.2d 1392, 1404 (9th Cir. 1989) (Farris, J., concurring) (cleaned up). On this record, material questions of **[*32]** fact remain.

2. DEFENDANTS VIOLATED THE RULE OF REASON.

Armed with a finding that our relevant market encompassed Glumetza and its generics, and that defendants had power therein, a reasonable trier of fact could conclude that defendants' concealed settlement violated the rule of reason. In February 2012, faced with the prospect of Lupin's generic Glumetza entry as early as that May, our defendants conspired to allocate the market for brand and generic Glumetza between them for the foreseeable future. They first agreed to maintain Assertio and Santarus as the sole producer for four more years, delaying Lupin's generic entry until February 1, 2016. And, our brand defendants secured Lupin's assent to this delay with a covenant not to compete, the promise not to launch an authorized-generic version of Glumetza until February 1, 2017.

Following discovery, we've got the actual agreement. The terms of this exchange appear right there on its face. The delay:

> Effective upon the License Effective Date [February 1, 2016], Depomed hereby grants to Lupin, and Santarus hereby consents to and authorizes the grant to Lupin of, a fully paid up, royalty free, non-exclusive (except as otherwise provided **[*33]** herein) license with respect to the Depomed Patents.

And the payment:

> Depomed, Santarus and their Affiliates shall not, and shall not authorize any Third Party to, Market an Authorized Generic any earlier than twelve (12) months after the License Effective Date.

(Dkt. No. 493-12, §§ 3.1, 3.5). Or, in more classic antitrust terms, we have one covenant not to compete, providing four more years of Glumetza monopoly, in exchange for a second covenant not to compete, one year without marketing an authorized generic. In most cases, we could stop right here. Such naked horizontal restraints — an agreement to allocate a market, such as in time or space, between a select few competitors at the same level of the market — are a *per se* *Section 1* violation. *See* *Topco, 405 U.S. at 607-08*. The Court of Appeals for the Sixth Circuit held as much in one of the earliest appellate treatments of a pharmaceutical reverse-payment settlement. *See* *In re Cardizem CD Antitrust Litig., 332 F.3d 896, 907-08 (6th Cir. 2003)*, abrogated by *Actavis, 570 U.S. at 158-60*. Even defendants do not attempt to convince us that their agreement was not such a horizontal allocation.

But, as defendants take care to note, we have a twist. ***HN6***[] By the patent laws, Congress has expressly sanctioned certain conduct that would otherwise constitute even a *per se* violation. A patent **[*34]** grants its owner the right to exclude others from practicing the claimed invention. Now, a patent owner may let the world make, use, or sell the invention. It may, in exchange for royalty payments, license to as many producers as necessary to create a competitive market. But the patent owner may also monopolize or restrain the market for the invention. It may license only a few producers. Or just one. Indeed, a patent owner may exclude all others from practicing the invention, and may even refrain from practice itself, thereby suppressing the invention from the market entirely. 35 U.S.C. §§ 271, 283. As the Supreme Court recognized in *NCAA*, certain contexts require courts, even those presented with otherwise *per se* violations, to step back to the rule of reason. That is why here, even faced with a naked horizontal restraint, we must step back to evaluate the restraint in context to then determine whether, as defendants urge, it fell within the bounds of their patents. Actavis, 570 U.S. at 147-51, 158-59; NCAA, 468 U.S. at 100-01.

In arguing that the settlement agreement toed the line their patents drew, defendants would have us presume infringement and place the burden on plaintiffs to show otherwise. This argument runs afoul of patent fundamentals. True, we **[*35]** presume a patent's validity. *See* Microsoft Corp. v. i4i Ltd. Partnership, 564 U.S. 91, 100, 131 S. Ct. 2238, 180 L. Ed. 2d 131 (2011). But we also presume noninfringement. **HN7**[] The patent owner *always* bears that burden. In other words, we *presume* a producer's right to market a good unless and until shown otherwise. Medtronic v. Mirowski Family Ventures, 571 U.S. 191, 198-99, 203, 134 S. Ct. 843, 187 L. Ed. 2d 703 (2014).

The ANDA framework doesn't change this baseline; it illustrates it. The Paragraph IV certification just permits suit. It tells us nothing about whether the proposed generic, in fact, infringes the listed patent. Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661, 678, 110 S. Ct. 2683, 110 L. Ed. 2d 605 (1990); Glaxo, Inc. v. Novopharm, Ltd., 110 F.3d 1562, 1569 (Fed. Cir. 1997). The FDA is free to approve a Paragraph IV ANDA one hundred eighty days after filing, and the generic manufacturer will be free to market the drug unless the brand manufacturer sues within the forty five days and triggers the thirty-month stay. But, if the stay expires without a judgment of infringement, the FDA again becomes free to approve the ANDA, and the generic manufacturer would be free to market. *See* Actavis, 570 U.S. at 143; 21 U.S.C. § 355(j)(5). At that point, it would take a preliminary injunction in the shorter term or a judgment of infringement (or the parties' joint assessment of infringement) in the longer term to take the generic off the market. In other words, the brand patents alone bar nothing. The stay does at first. But after that, a judgment of (or settlement admitting **[*36]** to) infringement must do it.

HN8[] These fundamentals fit within the rule of reason's burden-shifting framework. After plaintiffs establish an antitrust violation, the burden falls to the defendants to offer a procompetitive rationale, which, if non-pretextual, plaintiffs must rebut. It follows, then, that to traverse a motion for summary judgment raising defendants' patents as the procompetitive justification, plaintiffs, as several courts have held, must show "some evidence" of noninfringement or invalidity. *See* Wellbutrin, 868 F.3d at 165; Nexium, 842 F.3d at 63; *see also* Teikoku Pharma, 296 F. Supp. 3d at 1152-55. *But noninfringement remains our baseline*. Some anticompetitive conduct will fall within the scope of the patent; some will not. This is why the Supreme Court explained in *Actavis* that "[w]hether a particular restraint lies beyond the limits of the patent monopoly is a *conclusion* that flows from [the antitrust] analysis and not, as [both our defendants and] the Chief Justice suggest[ed], its starting point." *See* 570 U.S. at 149 (quotes omitted); Medtronic, 571 U.S. at 198-99; Qualcomm, 969 F.3d at 991.

As already stated, plaintiffs have carried their initial burden. Defendants' pay-for-delay settlement agreement contained two cross-covenants not to compete within the market for Glumetza. These horizontal restraints place the burden upon **[*37]** defendants to show they go no further than their patents authorized. Our parties appear to agree that direct evidence of the parties' mental states will suffice, given that neither offers a limitation-by-limitation analysis of Lupin's ANDA in their briefs. This, of course, follows from the Supreme Court's recognition that "it is normally not necessary to litigate patent validity" — and infringement, by context — "to answer the antitrust question." Actavis, 570 U.S. at 157. It also follows from the pivotal role that intent plays in antitrust violations. A multiparty concerted restraint certainly requires some degree of intent. *Cf.* Alaska Airlines, 948 F.2d at 540-41. And, as the Supreme Court has noted, "no monopolist monopolizes unconscious of what he is doing." Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985).

This may seem a difficult logical leap, but patents already provide a common example of an antitrust analysis which avoids any limitation-by-limitation invalidity or infringement analysis, patent licensing. The license to market a good on payment of a royalty is a horizontal restraint on production of that good. But no one would challenge ordinary patent licensing as a violation of the antitrust laws because we understand that the parties' good-faith belief of infringement (or their **[*38]** belief that's a reasonable enough possibility) places the agreement within the scope of the patent. The royalty payment from the licensee to the patent owner flows as expected and, in contrast to most restraints, a patent license *brings* a product to market. This abbreviated rule of reason justifies ordinary patent licensing without a limitation-by-limitation infringement analysis.

So too here, defendants contend, arguing that both parties believed Lupin's ANDA infringed the relevant patents. At first glance, they tell a compelling story. Lupin, defendants say, knew its ANDA infringed the patents early on. Outside counsel said such a result was likely from the beginning, and once Judge Hamilton adopted claim constructions which both undermined Lupin's invalidity argument and made a judgment of infringement very likely, Lupin saw the light and came to the bargaining table. Thus, we are to believe, defendants' challenged settlement agreement manifested an intent to *accelerate* Lupin's generic entry and ran afoul of no antitrust concerns.

Our jury would be free to reject this narrative as a pretext. Questions of fact appear on its face, starting with the glaring oddity that *only one* of our **[*39]** three defendants involved in the underlying suit, Lupin, has waived attorney-client privilege to tell its tale of certain infringement. Besides, if the patents were so valid and infringed, why did Assertio and Santarus let Lupin practice them royalty free for, depending on the patent, several months to four years? And, if both parties so strongly believed Lupin's ANDA infringed, why did they stipulate that there remained "significant risk to each of them" given Judge Hamilton "ha[d] not adjudicated Depomed's charges of patent infringement or Lupin's defenses and counterclaims[?]" *Depomed*, No. C 09-05587, Dkt. No. 152.

More important, though, defendants' telling forgets a key fact — their *actual* settlement agreement. Defendants would have us believe that *both* parties *knew* Lupin infringed and would be barred from marketing a generic Glumetza for several years. And yet, to settle the suit, our brand defendants agreed to *expedite* Lupin's generic market entry, cede a year's worth of revenue that an authorized generic could recoup from Lupin (recall, the Supreme Court has recognized that even 180 days of generic exclusivity can be worth several hundred million dollars), *and* pay three million **[*40]** dollars in Lupin's legal fees (Dkt. No. 493-12, §§ 2.5, 3.1, 3.5). In other words, defendants would have us believe that they all knew *Lupin* was going to lose — yet Lupin emerged far and away the settlement victor? Our jury could reject these facial contradictions outright. *See* Kodak, 903 F.2d at 618-19.

Contrary to *Actavis*, defendants contend that here the large and otherwise unexplained payment to Lupin cannot be taken as suggesting that Assertio and Santarus doubted their infringement case. Their first basis for this argument, that the FTC labors under a lower causation standard than does a private plaintiff, fails to explain how a different burden of antitrust *causation* would change our analysis of whether defendants *violated* the antitrust laws. Indeed, nothing in the rationale of *Actavis* turned on the identity of the FTC as the plaintiff. *In re Cipro Cases I & II, 61 Cal.4th 116, 142, 187 Cal. Rptr. 3d 632, 348 P.3d 845 (2015)*; *see also,* *United Food & Commercial Workers Local 1776 & Participating Employers Health & Welfare Fund v. Teikoku Pharma USA, 296 F. Supp. 3d 1142, 1154 (N.D. Cal. 2017)* (Judge William H. Orrick). In a similar vein, defendants say that direct evidence of *Lupin's* confidence (recall, Assertio and Santarus did not also waive attorney-client privilege here) in the infringement case displaces the use of the payment as "proxy" for their doubt. This, however, ignores the plain language of *Actavis* ***[*41]*** . An unexplained payment "suggest[s] that the patentee has serious doubts" about its infringement case. Such evidence probes defendants' states of mind just as their later, direct testimony does. *570 U.S. at 157*.

Even if our jury does not go so far as to find defendants' justification a pretext, plaintiffs *do* present evidence that defendants doubted their infringement case. At bottom, we cannot forget defendants' own explicit admission of that doubt to Judge Hamilton, acknowledging in their consent decree that "there [was] significant risk to each of them associated with the continued prosecution of [the case.]" *Depomed*, No. C 09-05587 PHJ, Dkt. No. 152. Our jury will be entitled to place a certain amount of weight upon defendants' contemporaneous admissions to a federal judge.

Plaintiffs offer several batches of evidence, but sufficient here is the noninfringement testimony of *Lupin's* expert in the underlying litigation. In a summer 2011 draft noninfringement report, never submitted due to the settlement, Dr. Kinam Park applied Judge Hamilton's claim construction and explained the two different methods of controlling the extended release of metformin. Assertio's patents claimed the "matrix" form, where **[*42]** dispersion of the active drug within a polymeric matrix controls its release. Lupin's ANDA used the other form, a "reservoir," which surrounded the active drug in a membrane or coating to control its release. Indeed, plaintiffs say, evidence of Lupin's settlement negotiation preparations shows Lupin believed and acted upon Dr. Park's noninfringement report. Earlier in the summer Lupin had drafted an opening settlement offer with a May 2014 entry date in exchange for a royalty to Assertio. After Dr. Park's initial draft report circulated, Lupin revised its draft settlement offer, deleting the royalty payments and moving up its proposed entry date more than a year to January 2013 (Dkt. No. 493-1 at ¶¶ 14-16).

Instead of responding to the merits of Dr. Park's noninfringement report, defendants attack its weight and admissibility. That Dr. Park's report was unsigned and never tested in the underlying litigation says little. *None* of the infringement or noninfringement arguments were tested in the underlying litigation, as the parties admitted in their settlement stipulation. Defendants' frustrations with Dr. Park's memory of the circumstances surrounding his report go to the weight of his **[*43]** testimony, not its admissibility. And, plaintiffs will be more than welcome to cite Lupin's prior inconsistent statements against it at trial. *Fed. R. Evid. 801*.

Defendants also contend that plaintiffs misclassified Dr. Park as a *Rule 26(a)(2)(C)* nonreporting expert. Not so. ***HN9***[] *Rule 26(a)(2)(C)* permits certain non-retained experts to testify as percipient witnesses. This usually arises in the context of a "treating physician" who may testify to opinions formed during the course of medical treatment, in contrast to a medical expert retained to review and opine on medical records provided by counsel and who must provide a written report. Here, Dr. Park will act more as a percipient witness, testifying to the circumstances surrounding and the opinions contained in his previous report. Plaintiffs have not retained Dr. Park, and he will not opine on our present record. *Rule 26* requires no new report. And, defendants cannot claim prejudice, given they have had Dr. Park's report for nearly a decade. *See* *Goodman v. Staples, 644 F.3d 817, 824-26 (9th Cir. 2011)*.

It's also worth noting the ridiculousness of defendants' attempts to exclude Dr. Park's report. Defendants tout *Lupin's* decision to waive attorney-client privilege in the underlying litigation *ad nauseum*. Aside from the fact that this ploy presents **[*44]** a facially incomplete record (Assertio and Santarus did not also waive attorney-client privilege), defendants cannot both proclaim Lupin's transparency and bury inconvenient portions of Lupin's underlying record.

In sum, on this record a reasonable trier of fact could conclude that defendants unreasonably restrained the production of Glumetza via cross-covenants not to compete and that that these restraints did not fall within the scope of their patents.

3. PLAINTIFFS' CAUSAL ANTITRUST INJURY.

Armed with the findings that defendants' settlement violated the rule of reason and that defendants' wielded market power, a reasonable trier of fact could next conclude that the settlement caused plaintiffs' antitrust injury. ***HN10***[] "It is generally sufficient to show with *reasonable probability* some causal connection between the antitrust violation and [the claimed injury.]" *Catlin v. Wash. Ener. Co., 791 F.2d 1343, 1347 (9th Cir. 1986)*. The Supreme Court has long held that a "jury [may] conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the [effects], not shown to be attributable to other causes, that defendants' wrongful acts had caused damage **[*45]** to the plaintiffs." *Bigelow, 327 U.S. at 264*. In other words, plaintiffs need not rule out "all possible alternative sources of injury," but satisfy the inquiry by showing the illegality "to be a material cause of the injury." *Zenith Rad. Corp. v. Hazeltine Rsch., Inc., 395 U.S. 100, 114 fn. 9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*.

Plaintiffs' claimed injury is the overcharge they actually paid compared to the price they would have paid absent the unlawful settlement. As detailed at class certification:

> Generic drugs crash brand monopolies, entering the market at significant discounts. Studies show this discount increases over time (*and* as more generics enter the market) and quickly pervades the market as the generics capture the prescription base through permissive or (often, state or locally) mandated generic-substitution at the pharmacy. And, this generic market penetration increases over time.

336 F.R.D. at 476. Delayed generic entry delays the resultant price cuts. So plaintiffs' theory of causation distills to this: defendants delayed Lupin's generic entry. Absent that delay, Lupin would have marketed a generic version of Glumetza earlier. The price-suppressing competition which (as seen above) actually played out over the last several years would have arrived sooner, cutting prices earlier. Thus, at each point in time, plaintiffs **[*46]** paid more for brand or generic Glumetza than they should have.

This certainly counts as ***HN11***[] a valid antitrust injury; "price cutting is a practice the antitrust laws aim to promote." *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 896 (9th Cir. 2008)*. *Actavis* itself recognized the overcharge as the relevant harm. *570 U.S. at 157*. Defendants (with one exception, detailed below) concede this cognizable injury; instead they challenge the causation itself, arguing that generic competition would have come to the market no earlier than it did in reality.

Plaintiffs offer three scenarios of earlier generic competition, positing that either Lupin would have prevailed in the underlying suit, entered the market at-risk, that is, upon FDA approval following the expiration of the 30-month stay even as the underlying litigation continued, or that Lupin and our brand defendants would have agreed to an earlier entry date if their settlement agreement had not included the unlawful no-AG provision. Plaintiffs also argue that both Sun and Watson (now Teva) would have entered the market earlier on Lupin's heels, further speeding generic competition and reduced prices.

Defendants' running argument on this front is that plaintiffs can point to no evidence that defendants, or their officers, **[*47]** or any third parties contemplated any of plaintiffs' but-for scenarios. In other words, defendants would ***HN12***[] premise causation here (and thus their liability) on the notion that they must have contemplated a lawful course of action before abandoning it for the unlawful. This is both wrong on the law — "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created" — and in reasoning — our actors have no reason to contemplate action they might have taken in the but-for world *which never came to pass*. Our jury will craft the but-for world, in which defendants acted rationally and lawfully, based on measured deviation from the record. *See Bigelow, 327 U.S. at 265*; *Dolphin Tours, Inc. v. Pacifico Creative Service, Inc., 773 F.2d 1506, 1511 (9th Cir. 1985)*.

First, plaintiffs offer cogent evidence that Lupin may have marketed their generic Glumetza at risk or upon prevailing in the underlying suit. As above, defendants' patents may justify their agreement. But noninfringement remains our baseline. *See, e.g., Nexium, 842 F.3d at 63*; *Medtronic, 571 U.S. at 198-99*. With this understanding, then, this order agrees with defendants that "[t]he clear import of Nexium and WELLBUTRIN is that a plaintiff must offer some evidence of non-infringement or patent invalidity **[*48]** in order to proceed on an at-risk launch theory of causation." *Apotex, Inc. v. Cephalon, Inc., 255 F. Supp. 3d 604, 614 (E.D. Pa. 2017)* (Judge Mitchell S. Goldberg).

Again, the circumstances of the settlement itself betray defendants' doubts in the infringement case, and plaintiffs have provided direct evidence of noninfringement in Dr. Park's noninfringement analysis, this without even addressing plaintiffs' expert evaluation of Lupin's noninfringement case. Whether this and plaintiffs' other evidence of noninfringement would have supported a judgment of noninfringement, traversed a preliminary injunction, or encouraged a rational actor to market at risk presents a question of evidence weighing and balancing reserved for the jury.

We also have evidence that Lupin, if it could have outlasted Assertio and Santarus, would have pressed that advantage. Congress *designed* the ANDA scheme to encourage generic entry, especially if Lupin believed in its noninfringement case. The 180 days of generic exclusivity, often worth several hundred million dollars, would have paid Lupin's legal fees and then some. Indeed, here Lupin's actual 12-month exclusivity period generated a gross margin of over one hundred twenty million dollars (Dkt. No. 493-79 at 2).

More important, **[*49]** in thirty seven times as the first filer, plaintiffs count four times that Lupin has launched at risk, including another generic version of metformin, our active drug here. Plaintiffs also highlight that Lupin, to this point, had never quit a patent suit when it was the first ANDA filer. And, as late as *nine days* before the challenged settlement, Lupin had still been internally circulating production calendars listing a generic Glumetza launch for as early as November 2012. Evidence shows that Lupin may have been able to ramp-up its production in time for such a launch. Between October and December 2011, Lupin made three commercial-size batches of generic Glumetza, and only needed three months to produce the validation batches for its February 2016 launch (Dkt. No. 493-1 at ¶¶ 45-51).

Defendants contest this evidence, in their telling Lupin only launched at risk once, and minimize the proffered production calendars as mere placeholders carrying little weigh. But as above, plaintiffs need not show that the Lupin of our world actually contemplated a given scenario within the but-for world. In the end, whether Lupin, looking ahead to those green pastures of profit, would have pressed its **[*50]** contemporaneous noninfringement theory to victory, or at least stood firm behind it long enough to dissuade our brand defendants from further litigation, is a question for our jury.

Second, plaintiffs offer competent evidence that if their settlement had not included the unlawful no-AG provision, defendants would have agreed to an *earlier* entry date for Lupin. Defendants' attempt to reject this hypothetical bargain as speculative fails. Contrary to defendants' assertions, the California Supreme Court's discussion of the interplay between an antitrust *violation* under the state's Cartwright Act and federal patent law does not counsel otherwise and, indeed, defendants' oft-cited *Wellbutrin* agreed that juries frequently predict the outcomes of hypothetical scenarios by assessing individual or corporate motive, thought processes, and behavior. *61 Cal. 4th at 149-50*; *868 F.3d at 167 fn. 57*; *Teikoku, 296 F. Supp. 3d at 1161-62*. At bottom, this method requires no speculation. It merely asks the jury to project how rational actors in defendants' shoes would have proceeded in the absence of the unlawful settlement term. *Dolphin, 773 F.2d at 1511*.

Simply put, the February 1, 2016, generic entry date for Lupin, is not, and never was, set in stone. It was always mobile based on (among other factors) **[*51]** defendants' competing evaluations of the patent merits and their projection of the revenue they could extract from the market as Lupin's entry date shifted. If, as our jury could conclude based on the above, doubts about infringement animated our defendants' settlement, then our brand defendants paid Lupin's attorney's fees plus the amount their authorized generic could recoup in the first twelve months of generic entry in exchange for Lupin staying off the market for some amount of time. The value to Lupin of those twelve months without an authorized generic corresponded to the value to Assertio and Santarus of some number of months of their preserved monopoly. Remove the pay, remove the delay.

Though this order doubts whether plaintiffs need to provide evidence that our defendants contemplated or signaled willingness to entertain an earlier entry date (again, given plaintiffs have provided sufficient evidence for a jury to conclude defendants reached an unlawful agreement, it makes little sense to condition recovery on a showing that defendants first contemplated a lawful settlement before pursing their ultimate course) plaintiffs do offer evidence on this point. Lupin's original **[*52]** August 2011 settlement offer sought a January 1, 2013, entry date in exchange for a shorter six-month no-AG period. Our brand defendants countered with a January 1, 2018, entry date. In October, Lupin responded with the twelve month no-AG period and a January 1, 2016, entry, remarkably close to the ultimate agreement. Taken in plaintiffs favor, as we must on summary judgment, this provides direct evidence that the increase in the no-AG period extended Lupin's delay (Dkt. No. 493-1 at ¶¶ 23-24).

Plaintiffs also provide expert testimony to nail down the generic entry date our defendants would have agreed to absent the no-AG provision. Defendants seek to exclude this testimony, and we need not address it here. It suffices that plaintiffs have provided evidence above that defendants could have agreed to an earlier date absent their unlawful conduct; any more detail at this point goes to the measure of damages. *See* *Zenith, 395 U.S. at 114, fn. 9*.

Third, our record offers adequate evidence that other generics would have followed Lupin to market earlier absent the unlawful settlement. Ordinarily, the ANDA scheme encourages a first-filer generic with the prospect of 180-days of market exclusivity, and the later-filer generics **[*53]** follow. A delay by the first-filer creates a bottleneck, discouraging later-filers from leading the charge, as each faces a near certain thirty months of litigation with no exclusivity at the end to defray the risk. *See* *Actavis, 570 U.S. at 142-44*; *Wellbutrin, 868 F.3d at 144-45 fn. 7*; *Nexium, 842 F.3d 34 at 41*; *21 U.S.C. § 355(j)(5)(B)(iii)-(iv)*, *(D)*; *Cf*. Hovenkamp, *Anticompetitive Patent Settlements*, *15 Minn. J.L. Sci. & Tech.s at 7 fn. 19*.

Lupin filed the first ANDA to market a generic form of Glumetza in July 2009. Tentative FDA approval came in January 2012 and Lupin could have expected final approval in (or shortly after) May 2012 on expiration of the thirty-month stay. Instead Lupin settled with our brand defendants and did not market until February 1, 2016. In that time, Sun and Teva had filed their Paragraph IV ANDAs around March of 2011 and 2012, respectively. But after Lupin settled, the two follow-ons promptly settled themselves in January and November 2013, agreeing to August 2016 launches. Teva did not launch until May 2017, Sun not until July 2018. "[A] reverse payment settlement with the first filer . . . removes from consideration the most motivated challenger, and the one closest to introducing [generic] competition." *Actavis, 570 U.S. at 155* (quotes omitted). The just and reasonable inference being, or so our jury could find, that Lupin's bottleneck **[*54]** contributed to Sun and Teva's delay.

Defendants point to manufacturing and regulatory difficulties that delayed Teva and Sun's market entries. But the facial defect in this argument is that if Lupin marketed when it should have, and Sun and Teva followed when they should have, resolution of their difficulties would move up accordingly. Following up on this point, plaintiffs add that Sun's regulatory issues with the FDA in December 2015 would not have mattered for our purposes if it had succeeded in launching its generic Glumetza before then.

Plaintiffs further offer evidence (including expert testimony) of Sun's strong noninfringement case, arguing that Sun might have attempted to jump the line by winning a judgment of noninfringement and triggering Lupin's 75-day forfeiture clock. Now, the settlement would have let Lupin market immediately to maintain its exclusivity period, posing a major threat to Sun's early market share and ability to recoup its litigation costs. But, as defendants point out, "[p]laintiffs do not and cannot dispute that there is no evidence that either Sun or [Teva] knew about the acceleration terms" (Dkt. No. 500 at 19).

To each of these theories, defendants again **[*55]** fault plaintiffs for not pointing to evidence from Sun or Teva to the effect that either contemplated such action. But as described above, this argument rests upon the befuddling notion that our actors must have contemplated what they would have done in a but-for world which, due to defendants' antitrust violation, *never happened*. Not so. We construct the but-for world not out of whole cloth, but as a matter of reasoned deviation from the actual world based upon our changed assumption of defendants' lawful conduct. Whether those changed circumstances, within the interlocking-incentive scheme of the pharmaceutical-patent regulatory apparatus, would merely have driven rational actors in Sun and Teva's positions through the same course of conduct, just shifted forward in time, or driven one in Sun's position to pursue Lupin more aggressively, remains a question for our jury. *See* *Bigelow, 327 U.S. at 264-65*.

4. PLAINTIFFS' SUIT REMAINS TIMELY.

A reasonable trier of fact could also find plaintiffs' suit timely. ***HN13***[] Our antitrust laws impose a four-year statute of limitations. *15 U.S.C. § 15b*. The March 5 order resolving defendants' motions to dismiss found that plaintiffs had adequately alleged both defendants' continuing violations **[*56]** of the antitrust laws, permitting plaintiffs to recover (on the pleadings at least) for all Glumetza purchases from August 29, 2015, and defendants' fraudulent concealment of the scheme, permitting recovery back to the beginning. Together, defendants assail only the second finding here.

HN14[] A limitations period will be tolled where defendants affirmatively concealed their unlawful conduct and plaintiffs, acting reasonably, had neither actual nor constructive knowledge. *Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012)*. Defendants do not contest their affirmative concealment, but contend that facts available to plaintiffs in mid-2015 would have excited the inquiry of a reasonable person and prompted diligent investigation. *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc., 858 F.2d 499, 504 (9th Cir. 1988)*.

Specifically, defendants argue that Lupin's launch calendars and an earnings call with executives in mid-2015 informed plaintiffs of Lupin's expectation that Bausch would not launch an authorized generic for some time, exciting the line of inquiry in a reasonable person that, if diligently pursued, would have led plaintiffs to discovery of the pay-for-delay scheme. ***HN15***[] "The determination of whether a plaintiff knew or should have known of a cause of action presents a question for the trier of fact," though "diligence is **[*57]** tested by an objective standard."

Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1417 (9th Cir. 1987). Summary judgment here will be appropriate "only if uncontroverted evidence irrefutably demonstrates that a plaintiff discovered or should have discovered [the cause of action] but failed to file a timely complaint." *Hexcel, 681 F.3d at 1063* (quotes omitted). Questions remain.

As early as February 2015, Lupin began distributing launch calendars to several plaintiffs (including at least H-E-B, Kroger, Walgreen, AmerisourceBergen, CVS, Cardinal Health, and Humana), indicating both Lupin's status as the first-ANDA filer on Glumetza, entitling it to the 180-days of generic exclusivity, and the expectation that there would be "no AGx [authorized generic] expected" at launch. Then, on July 5, Vinita Gupta, Lupin's CEO, announced that "Glumetza launches in February and we have a sole exclusivity for 6-months on Glumetza" (Dkt. Nos. 464-22 at 8; 464-31 at 9).

Defendants say this information provided constructive notice of the no-AG provision because plaintiffs admitted that Lupin's expectation that Bausch would not launch an authorized generic for some time was an unusual piece of knowledge. Indeed, defendants note, plaintiff Kroger *did* inquire, asking Bausch about its plans for an **[*58]** authorized generic, albeit within the four year limitations period in December 2015 (Dkt. No. 464-29). No matter, defendants assure us. If the information prompted Kroger to ask later, it should have had the same effect earlier.

A reasonable jury could reject this argument and find that plaintiffs still lacked constructive notice of their claims. Lupin knew good and well that Bausch would not launch an authorized generic for at least one year after Lupin's own generic launch because both had signed the secret side-settlement agreement. It remains difficult to overemphasize that our entire inquiry rests on the baseline that on March 26, 2012, our defendants *concealed* the existence of the no-AG provision from Judge Hamilton. *Depomed*, No. C 09-05587 PJH, Dkt. No. 151 (N.D. Cal. Mar. 26, 2012). ***HN16***[] "The duty of candor is not simply an obligation to answer honestly when asked a direct question by the trial court. It includes an affirmative duty to inform the court when a material statement of fact or law has become false or misleading in light of subsequent events." *Levine v. Berschneider, 56 Cal. App. 5th 916, 921, 270 Cal. Rptr. 3d 768 (2020)*. Defendants' omission of the material no-AG provision from their disclosure to a *federal judge* meant that the term *did not exist* ***[*59]*** . And, from that angle, the evidence that Lupin only began hinting of the no-AG provision in mid-2015 means that our defendants continued to suppress public knowledge of the no-AG provision for three years. The conceptual leap defendants propose, from "no-AG expected" to "we should investigate whether Bausch secured the Lupin settlement with a no-AG provision," would have required our plaintiffs to conclude that their regular business partners had both *misled a federal judge* and spent three years covering it up. This hazy record does not mandate that jump and, in fact, permits a jury to conclude plaintiffs did not have constructive notice of the no-AG provision.

5. Assertio's Individual Defenses Fail.

Assertio, on its own, proclaims that it washed its hands of the alleged unlawful scheme long ago, arguing that it withdrew from the conspiracy in 2013, that it committed none of the overt acts contributing to defendants' continuing violation, and that it bears no culpability for Bausch's unforeseeable price hikes.

The story goes that Assertio granted Santarus control of most marketing for Glumetza in July 2008, though the two shared price control. In August 2011, Assertio transferred all **[*60]** Glumetza commercialization rights to Santarus, including sole price control, though Assertio retained a royalty on sales. But that link severed in October 2013, when Assertio sold "substantially all its royalty interests for Glumetza" to PDL Biopharma (Dkt. No. 464 at 9-10). In other words, as Assertio tells us, the last thing it did in service of the conspiracy was sign the settlement agreement in February 2012.

On its face, this story leaves a curious omission, one highlighted by defendants' repeating chorus that the challenged settlement agreement effected no more than the patent rights granted to, who else but, Assertio. Who lists the patents as covering Glumetza in the Orange Book? Who must be present in any infringement suit to trigger the thirty-month stay and exclude new generics? Who grants or withholds licenses? Who holds the rights which might exculpate defendants' alleged scheme? The patent owner, Assertio. *See Lone Star Silicon Innovs. v. Nanya Techs., 925 F.3d 1225, 1228-29 (Fed. Cir. 2019)*; *In re Actos End-Payor Antitrust Litig., 848 F.3d 89, 94 (2d Cir.*

2017); Nexium, 842 F.3d at 63. If Assertio maintained the patents throughout the conspiracy, and as far as defendants have told us it did, then *Assertio* maintained both the primary regulatory scarecrow against generic competition *and* the primary (indeed only, thus far) justification for defendants' **[*61]** scheme. In for a penny, in for a pound.

HN17[] *First*, actions in furtherance of a conspiracy are imputed to all involved "until its purpose has been achieved or abandoned." *U.S. v. Inryco, Inc., 642 F.2d 290, 293 (9th Cir. 1981)*; *Arandell Corp. v. Centerpoint Ener. Servs., 900 F.3d 623, 634 (9th Cir. 2018)*. Withdrawal from a conspiracy requires disavowal of the unlawful goal, an affirmative act to defeat its purpose, or "definite, decisive, and positive steps" to show a sufficient disassociation. *United States v. Lothian, 976 F.2d 1257, 1261 (9th Cir. 1992)* (quotes omitted). While Assertio covered its coconspirators' exits, even from afar, it cannot be said to have withdrawn, and will answer alongside them.

HN18[] *Second*, a continuing violation accrues with each overt act, which is both new and independent, not a mere reaffirmation of previous conduct, and which inflicts new and accumulating injury. *Samsung, 747 F.3d at 1202-03*. True, as Assertio notes, the Honorable Lucy H. Koh, relying on our court of appeals' language in *Pace Industries v. Three Phoenix Company* that "an overt act *by the defendant* is required to restart the statute of limitations," concluded that the continuing violation doctrine does not impute acts between coconspirators. *Garrison v. Oracle Corp., 159 F. Supp. 3d 1044, 1072* (quoting *813 F.2d 234, 237 (9th Cir. 1987))*. But this appears an unduly literal interpretation of the language in *Pace* given, first, that our court of appeals did not raise the distinction that Judge Koh later **[*62]** raised and, second, because the Supreme Court does appear to approve of imputing a continuing violation across a conspiracy, explaining famously that "[i]n the context of a *continuing conspiracy* to violate the antitrust laws . . . each time a plaintiff is injured by *an act of the defendants*[,] a cause of action accrues to him to recover the damages caused by that act." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)* (emphasis added). This order thus respectfully disagrees with Judge Koh's ruling, though, regardless, we have such an overt act here. Assertio provided, and *maintained control of throughout*, the patents, the regulatory leverage that enabled defendants' entire alleged scheme. *Samsung Elects. v. Panasonic Corp., 747 F.3d 1199, 1203 (9th Cir. 2014)*.

HN19[] *Third*, "a defendant cannot be held liable for substantive offenses committed before joining or after withdrawing from a conspiracy." *Lothian, 976 F.2d at 1262*. But our record supports the conclusion that Assertio, by maintaining the regulatory levers permitting and perhaps justifying defendants' conspiracy, never withdrew from it. It's also worth noting that if Assertio retained the patents, it too retained, potential contract breaches aside, the power to stop Valeant's apparently unforeseeable price hikes by pulling the patent license or permitting other generics to enter **[*63]** earlier. *Cf. Samsung, 747 F.3d at 1203*.

6. LUPIN'S INDIVIDUAL DEFENSES FAIL.

Alone, Lupin argues that its distribution contracts insulated distributors AmerisourceBergen, Cardinal Health, and McKesson, whose assignees comprise a large portion of our direct purchasers, from actual injury. According to Lupin, it sold drugs to the distributors at the wholesale acquisition price and the distributers primarily derived revenue not from any markup they might have added but from nonrefundable service fees Lupin paid. The distributors made more money as the percentage fees grew with drug prices.

This argument mistakes plaintiffs' cognizable injury, which encompasses the immediate extent of the overcharge without regard to plaintiffs' later profit. *Hanover Shoe*'s cut-and-dry treatment of the overcharge works no injustice here. What *Hanover Shoe* takes, *Illinois Brick* has given. And, to this point Lupin and its codefendants have enjoyed *Illinois Brick*'s shield against indirect-purchaser liability several times over. *Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 489-93, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*; *Illinois Brick v. Illinois, 431 U.S. 720, 749, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* (Brennan, J., dissenting); *Glumetza, 336 F.R.D. at 480-81* (quoting *In re Skelaxin (Metaxalone) Antitrust Litigation, No. MD 12-02343 CLC, 2014 U.S. Dist. LEXIS 66707, 2014 WL 2002887, *5 (E.D. Tenn. May 15, 2014)* (Judge Curtis L. Collier)).

Lupin also argues that Bausch would have raised the price of Glumetza as it did **[*64]** in 2015 even if generics had already entered the market. Even taking this as true, the presence of cheaper generic alternatives in 2015 would have both shielded consumers from the full brunt of the price hikes and helped bring the prices back down to a competitive level sooner. Yet plaintiffs also offer evidence that Bausch had never raised prices to the extent it did with Glumetza on any drug already subject to generic competition. Of the 206 drugs for which Bausch raised the price over 100%, it did so following generic entry only 15 times, and none of those reached anywhere close to the nearly 800% increases seen in our case (Dkt. No. 493-1 at ¶¶ 67-69). A reasonable trier of fact could conclude that generic competition would have suppressed the 2015 price hikes.

CONCLUSION

All motions for summary judgment are **DENIED**. This order has trodden carefully to resolve the parties' four dispositive motions without requiring full resolution of the parties' ten pending *Daubert* motions. Argument on the *Daubert* motions will be set midsummer. A future order will resolve those motions. The Court trusts that if resolution of the *Daubert* motions fundamentally undercuts a party's ability to make a **[*65]** certain argument, the party will own up to it and not waste our time at trial. For that matter, trial remains set for and *voir dire* will commence on **OCTOBER 4 AT 7:30 A.M.** The Court is looking forward to it.

IT IS SO ORDERED.

Dated: May 6, 2021.

/s/ William Alsup

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

Mehta v. Robinhood Fin. LLC

United States District Court for the Northern District of California

May 6, 2021, Decided; May 6, 2021, Filed

Case No. 21-cv-01013-SVK

Reporter
2021 U.S. Dist. LEXIS 253782 *; 2021 WL 6882377

SIDDHARTH MEHTA, et al., Plaintiffs, v. ROBINHOOD FINANCIAL LLC, et al., Defendants.

Subsequent History: Dismissed by, in part, Without prejudice, Motion denied by, in part *Mehta v. Robinhood Fin. LLC, 2021 U.S. Dist. LEXIS 253790, 2021 WL 6882392 (N.D. Cal., Sept. 8, 2021)*

Core Terms

customers, Plaintiffs', privacy, motion to dismiss, unauthorized, consumer, financial information, prong, judicial notice, losses, incorporate by reference, unauthorized access, unfair, funds, allegations, parties, Notice, constitutional right to privacy, economic loss, marks, personal information, quotation, users, business practice, right to privacy, disclosure, violations, documents, promise, security measures

Counsel: **[*1]** For Siddharth Mehta, Plaintiff: Elizabeth Antonia Kramer, LEAD ATTORNEY, Erickson Kramer Osborne LLP, United Sta, San Francisco, CA; Julie C. Erickson, LEAD ATTORNEY, Erickson Kramer Osborne, San Francisco, CA; Kevin M. Osborne, LEAD ATTORNEY, Erickson Kramer Osborne LLP, San Francisco, CA.

For Robinhood Financial LLC, Robinhood Securities, LLC, Defendants: Mark David McPherson, LEAD ATTORNEY, Morrison Foerster LLP, San Francisco, CA; Michael Burshteyn, Tiffany Cheung, Morrison & Foerster LLP, San Francisco, CA; Nicole V. Ozeran, Morrison & Foerster LLP, Los Angeles, CA.

Judges: SUSAN VAN KEULEN, United States Magistrate Judge.

Opinion by: SUSAN VAN KEULEN

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Re: Dkt. Nos. 15, 17, 22

I. INTRODUCTION

Defendants Robinhood Financial LLC and Robinhood Securities, LLC ("Defendants" or "Robinhood") move to dismiss Plaintiffs Siddharth Mehta ("Mehta"), Kevin Qian ("Qian"), and Michael Furtado's ("Furtado") (collectively, "Plaintiffs") First Amended Class Action Complaint ("FAC") (Dkt. 10) pursuant to *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim upon which relief can be granted and *Rule 9(b)* on the grounds that Plaintiffs fail to plead some claims with the particularity required **[*2]** by *Rule 9(b)*. Dkt. 15. The Parties have consented to the jurisdiction of a magistrate judge. Dkts. 9, 14.

The Court held a hearing on April 27, 2021. Dkt. 29. After considering the Parties' submissions, arguments at the hearing, the case file and relevant law, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' motion to dismiss the FAC for the reasons discussed below.

II. BACKGROUND

This discussion of the background facts is based on the allegations of Plaintiffs' FAC. Plaintiffs allege that Robinhood failed to keep their promise to maintain the highest security standards. Dkt. 10 ¶ 15. As a result, in the summer and fall of 2020, and perhaps even earlier, unauthorized users accessed approximately 2,000 Robinhood customers' accounts containing the customers' sensitive personal and financial information and looted their funds. *Id.* ¶¶ 4, 18. Plaintiffs allege that Robinhood does not offer a phone number for customer service, forcing customers to attempt to contact Robinhood by email. *Id.* ¶¶ 4, 21. Robinhood customers were left waiting for days or weeks while their account funds were depleted. *Id.* ¶¶ 4, 21. Plaintiffs further allege that Robinhood failed to freeze the affected accounts or alert **[*3]** their customers of the breach right away and did nothing until news outlets reported on the breach. *Id.* ¶¶ 5, 20. After the security breaches were widely reported, Robinhood sent push notifications to customers encouraging them to enable two-factor authentication. *Id.* ¶ 20. Plaintiffs allege that many individuals who were affected by the breach already had two-factor identification enabled when the unauthorized access occurred. *Id.* Collectively, Robinhood customers lost millions of dollars and have spent substantial amounts of their time attempting to remedy the losses and prevent further losses. *Id.* ¶¶ 18, 22, 23. Plaintiffs allege that while Robinhood promised it would cover 100 percent of any losses due to unauthorized activity, Robinhood has only compensated some individuals while refusing other individual's requests. *Id.* ¶¶ 6, 22.

Plaintiff Mehta held an investment account with Robinhood and was a purchaser of their services in 2020. *Id.* ¶ 27. As early as July 22, 2020, or possibly sooner, there was unauthorized access to Mehta's personal and financial information, funds Mehta had deposited into a Robinhood account, and control of securities positions Mehta purchased through Robinhood. **[*4]** *Id.* As a result of Robinhood's negligent and illegal conduct, Mehta lost tens of thousands of dollars and "spent hours of his own time attempting to research and remedy the loss and securing his other assets and information from further breach." *Id.* Robinhood did not inform Mehta of this breach and only acknowledged the breach after Mehta confronted Robinhood about the loss of funds 85 days after the initial breach occurred. *Id.*

Similarly, Plaintiff Qian held an investment account with Robinhood and was a purchaser of their services in 2020. *Id.* ¶ 28. As early as October 10, 2020, and possibly sooner, there was unauthorized access to Qian's personal and financial information, access to funds he had deposited into a Robinhood account, and control of securities positions he had purchased through Robinhood. *Id.* Plaintiffs allege that Robinhood neglected to inform him of this breach and only acknowledged the breach after Qian confronted Robinhood about the loss days after the initial breach. *Id.* As a result, Qian has also lost tens of thousands of dollars and spent hours of his own time attempting to research and remedy the loss and protect his assets and information from further breach. **[*5]** *Id.*

Plaintiff Furtado held an investment account with Robinhood and was a purchaser of their services in 2021. *Id.* ¶ 29. As early as February 12, 2021 and possibly sooner, there was unauthorized access to Furtado's personal and financial information, access to the funds he had deposited into a Robinhood account, and control of securities positions Furtado purchased through Robinhood. *Id.* Furtado attempted to contact Robinhood by email, because Robinhood does not provide a customer service phone number. *Id.* However, he did not receive a response regarding the breach for thirteen days. *Id.* As a result, Furtado lost over ten thousand dollars, purchased identity theft protection services, and has spent time attempting to research and remedy the loss and protect his assets and information from further breach. *Id.*

Plaintiffs bring this action to seek monetary and equitable relief as a class action on behalf of themselves and the following classes:

> Class: All Robinhood customers whose accounts were accessed by unauthorized users from January 1, 2020 to the present.
>
> Reimbursement Subclass: All Class members who suffered direct losses due to unauthorized activity and were not compensated in full **[*6]** by Robinhood for said losses.
>
> California Subclass: All Class members who were California residents.

Id. ¶¶ 34-36.

III. REQUEST FOR JUDICIAL NOTICE AND INCORPORATION BY REFERENCE

A. Legal Standard

There are two doctrines that allow district courts to consider material outside the pleadings without converting a motion to dismiss into a motion for summary judgment: judicial notice under *Federal Rule of Evidence 201* and incorporation by reference. *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018)*, *cert. denied sub nom. Hagan v. Khoja, — U.S. —, 139 S. Ct. 2615, 204 L. Ed. 2d 264 (2019)*. "The court may judicially notice a fact that is not subject to reasonable dispute." *Fed. R. Evid. 201(b)*. A fact is "not subject to reasonable dispute" if it "is generally known" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)(1)-(2)*. However, "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja, 899 F.3d at 999*.

Incorporation by reference is a judicially created doctrine that allows a court to consider certain documents as though they are part of the complaint itself. *Khoja, 899 F.3d at 1002*. "The doctrine prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents **[*7]** that weaken—or doom—their claims." *Id.* A defendant can seek to incorporate a document into the complaint "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *U.S. v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)* (citations omitted). While the "mere mention" of the existence of a document is insufficient to incorporate a document, it is proper to incorporate a document if the claim "necessarily depended" on them. *Khoja, 899 F.3d at 1002*.

After a defendant offers such a document, the district court can treat the document as part of the complaint, and "thus may assume that its contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*." *Ritchie, 342 F.3d at 908*. However, "[w]hile this is generally true, it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint." *Khoja, 899 F.3d at 1003*. Indeed, using extrinsic documents to "resolve competing theories against the complaint risks premature dismissals of plausible claims that may turn out to be valid after discovery" and it is "improper to do so only to resolve factual disputes against the plaintiff's well-pled allegations in the complaint." *Id. at 998, 1014*.

B. Analysis

Defendants ask the Court to take judicial notice of or incorporate **[*8]** by reference the following documents:

> (1) Robinhood's publicly available webpage titled "Our 6 commitments to you," including archived versions of the webpage throughout the alleged class period (Dkt. 15-2 Ex. 1);
> (2) Robinhood's July 24, 2019 e-mails entitled "Protecting your information" (Dkt. 15-3 Ex. 2);
> (3) Robinhood's October 9-13, 2020 "Inbox Message" advising customers to "Enable Two-Factor Authentication" (Dkt. 15-4 Ex. 3);
> (4) Robinhood's October 9-13, 2020 "Push Notification" advising customers to "Enable Two-Factor Authentication to add another layer of protection to your account" (Dkt. 15-5 Ex. 4);

(5) Robinhood's October 21-23, 2020 "Enable 2FA" follow up campaign e-mail reminding customers to enable 2FA (Dkt. 15-6 Ex. 5); and
(6) Robinhood's October 28-29, 2020 2FA application "Card" advising customers to "Add an extra layer of protection to your account. Enable 2FA now" (Dkt. 15-7 Ex. 6).

Dkt. 16.

Plaintiffs ask the Court to take judicial notice of or incorporate by reference the following documents:
(1) Bloomberg news article, "Robinhood Users Say Accounts Were Looted, No One to Call," dated October 9, 2020 (Dkt. 20-1 Ex. 1);

(2) Bloomberg news article, "Robinhood Internal Probe **[*9]** Finds Hackers Hit Almost 2,000 Accounts," dated October 15, 2020 (Dkt. 20-2 Ex. 2);
(3) Bloomberg news article, "Digital Thieves Are Hacking Brokerage Accounts: Is Your Money Safe?" dated October 13, 2020 (updated October 15, 2020) (Dkt. 20-3 Ex. 3);
(4) Robinhood Customer Agreement from April 28, 2020 (Dkt. 20-4 Ex. 4); and
(5) Robinhood Financial Privacy Notice (Dkt. 20-5 Ex. 5).

Dkt. 19.

As stated on the record at the hearing, the Court rules as follows:

Document	Ruling
Defendants' Exhibit 1 (Dkt. 15-2)	Request for judicial notice is **GRANTED** without any commentary or markings added to the document. Request to incorporate by reference is **DENIED**.
Defendants' Exhibit 2 (Dkt. 15-3)	Request for judicial notice and request to incorporate by reference are **DENIED AS MOOT**.
Defendants' Exhibit 3 (Dkt. 15-4)	Request for judicial notice is **GRANTED**. Request to incorporate by reference is **DENIED**.
Defendants' Exhibit 4 (Dkt. 15-5)	Request for judicial notice and request to incorporate by reference are **DENIED**.
Defendants' Exhibit 5 (Dkt. 15-6)	Request for judicial notice is **GRANTED**. Request to incorporate by reference is **DENIED**.
Defendants' Exhibit 6 (Dkt. 15-7)	Request for judicial notice and request to incorporate by **[*10]** reference are **DENIED**.
Plaintiffs' Exhibit 1 (Dkt. 20-1)	Request for judicial notice is **GRANTED**. Request to incorporate by reference is **DENIED**.
Plaintiffs' Exhibit 2 (Dkt. 20-2)	Request for judicial notice is **GRANTED**. Request to incorporate by reference is **DENIED**.
Plaintiffs' Exhibit 3 (Dkt. 20-3)	Request for judicial notice is **GRANTED**. Request to incorporate by reference is **DENIED**.
Plaintiffs' Exhibit 4 (Dkt. 20-4)	Request for judicial notice is **GRANTED**. Request to incorporate by reference is **DENIED**.
Plaintiffs' Exhibit 5 (Dkt. 20-5)	Request for judicial notice is **GRANTED**. Request to incorporate by reference is **DENIED**.

IV. MOTION TO DISMISS

A. Legal Standard

Under *Rule 12(b)(6)*, a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. In ruling on a motion to dismiss, the court may consider only "the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1061 (9th Cir. 2008)* (citation omitted). In deciding whether the plaintiff has stated a claim, the court must assume the plaintiff's allegations are true and draw all reasonable inferences in the plaintiff's favor. *Usher v. City of L.A., 828 F.2d 556, 561 (9th Cir. 1987)*. However, the court is not required to accept as true **[*11]** "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (citation omitted).

To survive a motion to dismiss under *Rule 12(b)(6)*, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

Courts should freely give leave to amend unless the district court determines that it is clear that the complaint's deficiencies cannot be cured by amendment. *Lucas v. Dep't of Corr., 66 F.3d 245, 248 (9th Cir. 1995)*. When amendment would be futile, the court may dismiss without leave to amend. *Dumas v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996)*.

B. Analysis

Plaintiffs allege that due to Robinhood's failure to maintain proper industry-standard security measures, customers were needlessly exposed to the risk of data and identity theft. Dkt. 10 ¶¶ 16, 17. As a result of Robinhood's security measures, unauthorized third parties accessed approximately 2,000 customers' personal and financial information, customers' funds, and control over securities positions customers purchased through Robinhood. *Id.* ¶ 18. Plaintiffs allege that Robinhood "has repeatedly neglected to fully inform **[*12]** customers regarding the nature and scope of security failures and unauthorized activity." *Id.* ¶ 20. Further, "[c]ontrary to Robinhood's 'commitment' to cover losses caused by unauthorized use, Robinhood has failed to compensate millions of dollars of losses claimed by those affected by the breach." *Id.* ¶ 22. From these allegations, Plaintiffs assert eight claims: (1) negligence; (2) breach of contract; (3) violation of the California Consumer Privacy Act; (4) violation of the Customer Records Act; (5) violation of the Consumers Legal Remedies Act; (6) violation of the right to privacy; (7) violation of the Unfair Competition Law; and (8) violation of the False Advertising Law.

Defendants assert an overarching argument that Robinhood's computer network did not suffer a data breach and Plaintiffs fail to adequately plead that Robinhood maintained inadequate security measures. Defendants also assert arguments as to why each claim individually should be dismissed.

1. Unauthorized Access

Defendants first argue that Plaintiffs fail to allege a breach of Robinhood's network and that Plaintiffs cannot do so, because there was no such breach. Dkt. 15 at 16. Defendants contend that "third parties **[*13]** were able to access customer accounts by identity theft originating outside the Robinhood system." *Id.* at 16-17 (citing Dkt. 10 ¶ 20) (internal quotation marks omitted). Defendants further argue that "Plaintiffs plead no facts tying any account takeovers to Robinhood's security measures." *Id.* at 17. Without such allegations, Plaintiffs' FAC is "too conclusory and must be dismissed." *Id.* Defendants further argue that Robinhood has more than 13 million customers and that the number of alleged takeovers is no more than .01 percent of their customers. Dkt. 22 at 6.

In opposition, Plaintiffs argue that the FAC does allege that Robinhood used inadequate data security. Dkt. 17 at 11. Plaintiffs contend that alleging that thousands of customer accounts accessed by unauthorized users in a matter of days is "more than enough for a reasonable inference of a breach of a computer system in a data security case." *Id.*

The Court finds that Plaintiffs' factual allegations are sufficient to support their claims at the pleading stage. Plaintiffs allege that Robinhood "does not keep its promise to maintain the highest security standards" and "[i]ts system lacks simple and almost universal security measures" **[*14]** that could "prevent unauthorized users from transferring customer funds from an account without substantial verification." Dkt. 10 ¶ 15. Plaintiffs allege that as a result, Robinhood "negligently and illegally allowed unauthorized third-party access to approximately 2,000 customers' personal and financial information." *Id.* ¶ 18. Thus, at this stage of the proceedings, Plaintiffs' allegations that unauthorized third parties were able to access approximately 2,000 Robinhood customers' accounts and deplete their funds due to Robinhood's security measures are sufficient. *Usher, 828 F.2d at 561* ("On a motion to dismiss for failure to state a claim, the court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party.") (citation omitted). Accordingly, the Court finds that Plaintiffs have adequately alleged that a breach occurred.

2. Negligence Claim

a. Economic Loss Doctrine

Defendants argue that the economic loss rule bars Plaintiffs from recovering for any alleged account losses in tort. Dkt. 15 at 23. Defendants further argue that the exception to the economic loss rule where a special relationship exists between the parties does not apply **[*15]** here. *Id.* at 24. At the hearing, Defendants acknowledged that there were non-economic losses alleged, but argues that they were too vague and speculative to be redressable.

"Quite simply, the economic loss rule prevents the law of contract and the law of tort from dissolving one into the other." *Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal.4th 979, 988, 22 Cal.Rptr.3d 352, 102 P.3d 268, 273 (2004)*. "Under the economic loss rule, purely economic losses are not recoverable in tort." *R Power Biofuels, LLC v. Chemex LLC, No. 16-CV-00716-LHK, 2016 U.S. Dist. LEXIS 156727, 2016 WL 6663002, at *4 (N.D. Cal. Nov. 11, 2016)* (internal quotation marks and citation omitted). If Plaintiffs' harms were purely economic, the Court would then be required to reach the question of whether any exception, such as a "special relationship," exists. *Flores-Mendez v. Zoosk, Inc., No. C 20-04929 WHA, 2021 U.S. Dist. LEXIS 18799, 2021 WL 308543, at *3 (N.D. Cal. Jan. 30, 2021)* (citing *J'Aire Corp. v. Gregory, 24 Cal.3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60 (1979)* (discussing the six-factor test for special relationship that can overcome the economic loss doctrine)).

Plaintiffs allege that their harms and losses include "the loss of control over the use of their identity, harm to their constitutional right to privacy, lost time dedicated to the investigation of and attempt to recover the loss of funds and cure harm to their privacy, the need for future [] time dedicated to the recovery and protection of further loss, and privacy injuries associated with having their sensitive personal and financial information disclosed." Dkt. 10 ¶ 48; *see* *Flores-Mendez, 2021 U.S. Dist. LEXIS 18799, 2021 WL 308543, at *3* (determining **[*16]** that plaintiffs do not allege pure economic loss because they allege "loss of time, risk of embarrassment, and enlarged risk of identity theft"); *Bass v. Facebook, Inc., 394 F. Supp. 3d 1024, 1039* ("Here, plaintiff alleged his loss of time as a harm and so does not allege pure economic loss."); *see also* *In re Solara Medical Supplies, LLC Customer Data Security Breach Litigation, __ F. Supp. 3d __, No. 3:19-cv-2284-H-KSC, 2020 U.S. Dist. LEXIS 80736, 2020 WL 2214152, at *4 (S.D. Cal. May 7, 2020)* (finding that plaintiffs do not allege pure economic loss because they alleged that they "lost time responding to the Breach as well as suffering from increased anxiety"); *but see* *Gardiner v. Walmart Inc.,* No. 20-cv-04618-JSW, 2021 U.S. Dist. LEXIS 75079, at *24 (N.D. Cal. Mar. 5, 2021) (finding that "[p]laintiff's allegations about the value of his lost time constitutes economic loss").

Based upon the allegations in the FAC, the Court finds that Plaintiffs do not allege solely economic loss. *See, e.g.*, Dkt. 10 ¶ 48 (alleging that Defendants' actions "caus[ed] [Plaintiffs] harms and losses including but not limited to [] the loss of control over the use of their identity, harm to their constitutional right to privacy, lost time dedicated to the investigation of and attempt to recover the loss of funds and cure harm to their privacy, the need for future [] time dedicated to the recovery and protection of further loss, and privacy injuries associated with having their sensitive personal and financial information disclosed"). Accordingly, **[*17]** the Court need not address whether a special relationship exists and turns to the elements of a negligence claim.

b. Negligence

To state a claim for negligence, a plaintiff must plead a duty, a breach of duty, proximate cause, and damages. *See* Corales v. Bennett, 567 F.3d 554, 572 (9th Cir. 2009).

Defendants argue that the FAC fails to adequately allege any breach of a general duty of care. Dkt. 15 at 34. Plaintiffs contend that Robinhood owed a duty to Plaintiffs because it was the custodian of their highly sensitive personal and financial information. Dkt. 17 at 13. The Court agrees with Plaintiffs. Plaintiffs have sufficiently alleged that Defendants owed a duty of reasonable care to Plaintiffs. Dkt. 10 ¶ 45 (alleging that "Defendants owed a duty of reasonable care . . . based upon Defendants' contractual obligations, custom and practice, right to control information and funds in its possession, exercise of control over the information and funds in its possession, authority to control the information and funds in its possession, and the commission of affirmative acts that resulted in said harms and losses"); *see* Flores-Mendez, 2021 U.S. Dist. LEXIS 18799, 2021 WL 308543, at *4 (determining that plaintiffs have adequately alleged a duty of care); *see also* Stasi v. Immediata Health Group Corp., --- F. Supp. 3d ----, No. 19cv2353 JM (LL), 2020 U.S. Dist. LEXIS 217097, 2020 WL 6799437, at *7 (S.D. Cal. Nov. 19, 2020) (citing cases that found that defendants had **[*18]** a duty to safeguard personal information and maintain adequate security measures).

Plaintiffs further allege that Defendants breached their duty of care in their manner of collecting, maintaining, and controlling their customers' sensitive personal and financial information. Dkt. 10 ¶ 46. Specifically, Plaintiffs contend that Defendants breached this duty by "stor[ing] customers' information in an unsecure format (¶ 16), fail[ing] to require multi-factor authentication at login (¶ 20), allow[ing] unauthorized users to link bank accounts to customer accounts without verification (¶ 15), and otherwise implement[ing] lax security practices that allowed unauthorized access to Plaintiffs' accounts (¶¶ 17, 46)." Dkt. 17 at 12-13. In Flores-Mendez, the Court reasoned that "[t]he consuming public has come to believe that internet companies, which take in their private information, have taken adequate security steps to protect the security of that information from any and all hackers or interventions." 2021 U.S. Dist. LEXIS 18799, 2021 WL 308543, at *4 ("The breach would not have occurred but for inadequate security measures, or so it can be reasonably inferred at the pleadings stage.").

Third, Plaintiffs have sufficiently alleged proximate cause, alleging **[*19]** that "unauthorized users gained access to, exfiltrated, stole, and gained disclosure of the sensitive personal and financial information of Plaintiffs and the Class, access to the funds customers had deposited into their accounts, and control over securities positions customers purchased." Dkt. 10 ¶ 48.

As to damages, Plaintiffs adequately allege damages, including "the loss of control over the use of their identity, harm to their constitutional right to privacy, lost time dedicated to the investigation of and attempt to recover the loss of funds and cure harm to their privacy, the need for future [] time dedicated to the recovery and protection of further loss, and privacy injuries associated with having their sensitive personal and financial information disclosed." *Id.*; *see* Flores-Mendez, 2021 U.S. Dist. LEXIS 18799, 2021 WL 308543, at *4.

c. Negligence Per Se

Plaintiffs also allege that Defendants "committed *per se* breaches of said duty by negligently violating the dictates of *California Civil Code sections 1798.82, et seq.*, and *1798.100, et seq.*, and the provisions of the California Constitution enshrining the right to privacy." Dkt. 10 ¶ 47. "In California, there are four elements required to establish a viable negligence *per se* theory: (1) the defendant violated a statute or regulation; (2) the violation **[*20]** caused the plaintiff's injury; (3) the injury resulted from the kind of occurrence the statute or regulation was designed to prevent; and (4) the plaintiff was a member of the class of persons the statute or regulation was intended to protect." *Carson v. Depuy Spine Inc., 365 F. App'x. 812, 815 (9th Cir. 2010)*. "District courts have relied on allegations of negligence per se to deny *Rule 12(b)(6)* motions to dismiss." *Stasi, 2020 U.S. Dist. LEXIS 217097, 2020 WL 6799437, at *12*.

As discussed below, Plaintiffs plead a plausible violation of the California Consumer Privacy Act (Section IV.B.4) and their constitutional right to privacy (Section IV.B.7). It is reasonable at this stage in the litigation to determine that Plaintiffs' alleged injuries are the injuries the California Consumer Privacy Act and constitutional right to privacy were intended to prevent and that Plaintiffs are members of the class of persons the California Consumer Privacy Act and constitutional right to privacy were intended to protect.

Accordingly, for the foregoing reasons, Defendants' motion to dismiss Plaintiffs' negligence claim is **DENIED**.

3. Breach of Contract Claim

To plead a claim for breach of contract, Plaintiffs must allege: "(1) the existence of a contract with Defendants, (2) their performance under that contract, (3) Defendants breached that **[*21]** contract, and (4) they suffered damages." *In re Google Assistant Privacy Litig., 457 F. Supp. 3d 797, 831 (N.D. Cal. 2020)* (citation omitted). Defendants contend that Plaintiffs' breach of contract claim fails because Plaintiffs' allegation that Robinhood promised to reimburse customers for account losses due to unauthorized activity is not enforceable. Dkt. 15 at 18. Defendants argue that this statement was made only after Plaintiffs opened their Robinhood accounts and after Plaintiffs Mehta's and Qian's accounts were taken over. *Id.* at 18-19. Further, Defendants contend that the statements that Robinhood is "[d]edicated to maintaining the highest security standards" and that "we take privacy and security seriously" are "not the kind of sufficiently definite promise that can support any legal claim." *Id.* at 19-21. Defendants also argue that Plaintiffs' injuries are not recoverable under a breach of contract claim because unauthorized collection of personal information does not create an economic loss and "[n]ominal damages, speculative harm, or threat of future harm do not suffice to show legally cognizable injury." *Id.* at 26 (quoting *In re Solara, 2020 U.S. Dist. LEXIS 80736, 2020 WL 2214152, at *5*) (citation omitted).

Plaintiffs contend that a Robinhood spokesperson stated that "[i]f we determine that our investigation that **[*22]** the customer has sustained losses because of unauthorized activity, we will compensate the customer fully for those losses." Dkt. 17 at 20 (citing Dkt. 20-3 Ex. 3). Further, Plaintiffs contend that the December 30, 2020 Robinhood Customer Agreement, which is attached to the FAC as Exhibit 2, states that Robinhood "will correct any error promptly." Dkt. 17 at 20. Plaintiffs argue that this same representation was also made in the April 28, 2020 version of the Robinhood Customer Agreement, prior to the alleged unauthorized access of Mehta's and Qian's accounts, although this document is not referenced in the FAC. *Id.* They contend that this statement would "presumably [] include unauthorized transfers." *Id.* Plaintiffs also reference, in their opposition but not in the FAC, the Robinhood Financial Privacy Notice, arguing that this document also contains actionable promises. *Id.* at 21 (citing Dkt. 20-5 Ex. 5). Finally, Plaintiffs contend that they plead appreciable and actual damage, as well as future economic loss. Dkt. 17 at 26.

Plaintiffs do not sufficiently allege a breach of contract claim. First, the version of the Robinhood Customer Agreement attached to the FAC is not the Customer **[*23]** Agreement that was effective at the time of the alleged breach of Plaintiffs Mehta's and Qian's accounts. *See* Dkt. 10 ¶ 50. Similarly, while Plaintiffs reference the Bloomberg statement and Financial Privacy Notice in their opposition for the assertion that these documents also show actionable promises, there is no specific reference to these documents in the FAC. *See* Dkt. 17 at 21. Plaintiffs have not met their burden of pleading the basis of their breach of contract claim. Accordingly, Defendants' motion to dismiss Plaintiffs' breach of contract claim is **GRANTED**.

4. California Consumer Privacy Act ("CCPA") Claim

The CCPA permits "[a]ny consumer whose nonencrypted and nonredacted personal information . . . is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information may institute a civil action." *Cal. Civ. Code § 1798.150(a)(1)*. Defendants argue that Plaintiffs' CCPA claim fails because Plaintiffs cannot allege any qualifying unauthorized disclosure or that any such disclosure was the result of a violation **[*24]** of "the duty to implement and maintain reasonable and appropriate security procedures and practices." Dkt. 15 at 27. Defendants further contend that CCPA's private right of action provision applies only to an unauthorized access of personal information from Robinhood's network, rather than independent third-party breaches of Plaintiffs' individual accounts. *Id.* at 28. Defendants also contend that Plaintiffs did not allege theft or disclosure of each required data element. *Id.* at 27. On the other hand, Plaintiffs contend that the California Legislature "intended for a broad range of activity or inactivity to constitute violations of the CCPA." Dkt. 17 at 15. Further, Plaintiffs contend that courts have defined "disclosure" under CCPA to include circumstances when personal information is accessible through the internet by unauthorized persons. *Id.* at 14 (citing *Stasi, 2020 U.S. Dist. LEXIS 217097, 2020 WL 6799437, at *16*).

The Court previously determined that Plaintiffs plausibly allege that a breach occurred. *See* Section IV.B.1. The Court finds *Stasi* instructive, where the parties determined that allegations that plaintiffs' personal and medical information were accessible via the internet constitute a "disclosure" under the CCPA. *Stasi, 2020 U.S. Dist. LEXIS 217097, 2020 WL 6799437, at *16*. Defendants have **[*25]** not met their burden of showing otherwise. Plaintiffs allege that Robinhood has customers'"sensitive personal and financial information, including but not limited to their names, social security numbers, dates of birth, mailing addresses, telephone numbers, bank account numbers, details of their income, bank account balances, financial transaction histories, credit histories, tax information, and credit scores" as well as "cell phone and mobile computing device location data, IP addresses, and Wi-Fi network data." Dkt. 10 ¶¶ 12-13. Plaintiffs also allege that Defendants violated their duty to implement and maintain reasonable security procedures by "allow[ing] unauthorized users to view, use, manipulate, exfiltrate, and steal the nonencrypted and nonredacted personal information of Plaintiffs and other customers, including their personal and financial information." *Id.* ¶ 58. At the pleadings stage, Plaintiffs sufficiently allege a plausible claim that their personal and financial information was subject to an unauthorized access based on violation of the CCPA. Accordingly, Defendants' motion to dismiss Plaintiffs' CCPA claim is **DENIED**.

5. Customer Records Act ("CRA") Claim

The CRA states **[*26]** that "[a] person or business that conducts business in California, and that owns or licenses computerized data that includes personal information, shall disclose a breach of the security of the system following discovery or notification of the breach in the security of the data to a resident of California . . . whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person . . . in the most expedient time possible and without unreasonable delay." *Cal. Civ. Code § 1798.82(a)*. Similar to the CCPA claim, Defendants contend that this claim fails without any allegation of any unauthorized access to Robinhood's computer network. Dkt. 15 at 12, 29; Dkt. 22 at 15. Further, Defendants argue that Plaintiffs fail to allege when Robinhood first learned of any incident for which it should have notified Plaintiffs sooner. Dkt. 15 at 30; Dkt. 22 at 15. Plaintiffs contend that "the Court can reasonably infer that Robinhood suffered a 'breach of the security system' for the purposes of the CRA" from the FAC. Dkt. 17 at 16. While not addressed in the opposition, Plaintiffs argued at the hearing that they allege in the FAC that Robinhood only disclosed the security breach **[*27]** after reports were leaked by anonymous sources to news outlets (Dkt. 10 ¶ 20) and that thousands of Robinhood customers attempted to contact Robinhood by email (*Id.* ¶ 4). Plaintiffs also acknowledged at the hearing that this claim can be amended.

As stated above, the Court finds that Plaintiffs plausibly allege a breach. *See* Section IV.B.1. However, the Court agrees with Defendants that Plaintiffs have not sufficiently alleged when Robinhood actually discovered that the unauthorized access took place. *See* *In re Yahoo! Inc. Customer Data Security Breach Litigation, 313 F. Supp. 3d 1113, 1146 (N.D. Cal. 2018)* (dismissing plaintiffs' CRA claim because plaintiffs failed to allege anything suggesting when defendants learned of the breach, which is necessary to determine whether there was unreasonable delay). Accordingly, Defendants' motion to dismiss Plaintiffs' CRA claim is **GRANTED**.

6. Consumers Legal Remedies Act ("CLRA") Claim

The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." *Cal. Civ. Code § 1770*. To state a claim under CLRA, a plaintiff must allege: "(1) a misrepresentation; (2) reliance on that misrepresentation; and (3) damages caused by that misrepresentation." *In re Sony PS3 Other OS Litigation, 551 F. App'x 916, 920 (9th Cir. 2014)*. "CLRA claims are governed by the 'reasonable consumer' test, under which a plaintiff must allege that **[*28]** 'members of the public are likely to be deceived.'" *Id.* (quoting *Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir.2008)*).

First, Defendants contend that this claim is subject to the heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)*, and Plaintiffs fail to adequately allege any enforceable promise. Dkt. 15 at 16, 18-22. Defendants contend that the statement "to fully reimburse direct losses that happen due to unauthorized activity that is not your fault" was never made before the alleged third-party takeovers of Plaintiffs Mehta's and Qian's accounts. *Id.* at 11, 19-20. Additionally, Defendants contend that the statements made regarding Robinhood's security commitments such as "tak[ing] privacy and security seriously" and that Robinhood is "[d]edicated to maintaining the highest security standards" are "non-actionable puffery." *Id.* at 21-22 (citing *In re Yahoo! Inc. Customer Data Sec. Breach Litig., No. 16-MD-02752-LHK, 2017 U.S. Dist. LEXIS 140212, 2017 WL 3727318, at *26 (N.D. Cal. Aug. 30, 2017)*. Specifically, Defendants argue that these statements "say nothing about the specific characteristics" of Robinhood's security systems or practices. *Id.* at 22 (citing *In re Yahoo!, 2017 U.S. Dist. LEXIS 140212, 2017 WL 327318, at *26*). Finally, Defendants contend that Plaintiffs' failure to allege any economic losses undermines their statutory standing to pursue a CLRA claim. *Id.* at 26.

Plaintiffs contend that their allegations "are more than sufficient to put Robinhood **[*29]** on notice of the specific conduct for which relief is sought." Dkt. 17 at 27. Plaintiffs argue that "Robinhood makes specific, non-subjective guarantees of the sort courts find actionable when broken," contending that Robinhood's guarantees are "actionable, non-puffery." *Id.* at 21. Plaintiffs point to the statements that Robinhood offers "robust security tools" and that it maintains "the highest security standards," as well as the Financial Privacy Notice which states that Robinhood uses "computer safeguards and secured files and buildings." *Id.* at 21 (citing Dkt. 10 ¶ 14; Dkt. 20-5 Ex. 5). Further, Plaintiffs contend that Plaintiffs sufficiently allege economic loss. *Id.* at 29 (citing Dkt. 10 ¶¶ 27-29).

As stated on the record at the hearing, the Financial Privacy Notice is the only document presented by the Parties that may contain actionable, non-puffery statements. The statements Plaintiffs point to in the Privacy Policy and the 6 Commitments stating that Robinhood "take[s] privacy and security seriously" and that they are "[d]edicated to maintaining the highest security standards" are non-actionable puffery. "[G]eneralized, vague and unspecified assertions[] constitute[] mere puffery **[*30]** upon which a reasonable consumer could not rely." *Glen Holly Entm't, Inc. v. Tektronix Inc., 343 F.3d 1000, 1005 (9th Cir. 2003)* (internal quotation marks and citation omitted). A reasonable consumer could not rely on these statements as "specific, non-subjective guarantee[s]." *In re Yahoo!, 2017 U.S. Dist. LEXIS 140212, 2017 WL 3727318, at *26*. Additionally, while Plaintiffs reference the Financial Privacy Notice in their opposition, as stated in Section IV.B.3, there is no reference to this document in the FAC. *See* Dkt. 17 at 21. Plaintiffs have not met their burden of pleading with particularity the basis of their CLRA claim. Because this conclusion requires dismissal of Plaintiffs' CLRA claim, the Court need not address Defendants' argument regarding economic losses. Accordingly, Defendants' motion to dismiss Plaintiffs' CLRA claim is **GRANTED**.

7. Right to Privacy Claim

"The California Constitution creates a privacy right that protects individuals' privacy from intrusion by private parties." *In re Google Location History Litigation, 428 F. Supp. 3d 185, 196 (N.D. Cal. 2019)*. To allege a violation of California's constitutional right to privacy, a plaintiff must allege "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by the defendant that amounts to a serious invasion of the protected privacy interest." *Low v. LinkedIn Corp., 900 F. Supp. 2d 1010, 1024 (N.D. Cal. 2012)* (citing *Hill v. Nat'l Collegiate Athletic Ass'n, 7 Cal. 4th 1, 35-37, 26 Cal. Rptr. 2d 834, 865 P.2d 633 (1994)*). The California Supreme **[*31]** Court has explained that "[l]egally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." *Hill, 7 Cal. 4th at 35, 26 Cal. Rptr. 2d 834, 865 P.2d 633*. Further, "[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." *Id. at 37*.

Defendants contend that unauthorized access to Plaintiffs' personal and financial information is not conduct by Defendants for purposes of California's constitutional right to privacy. Dkt. 15 at 30-31. Defendants further argue that even if Plaintiffs could allege that Defendants were responsible for the unauthorized access, the unauthorized access does not rise to the level of a violation of California's constitutional right to privacy. *Id.*

The FAC alleges that Defendants' conduct resulted in a serious invasion of privacy due to the release of personal and financial information "including but not **[*32]** limited to names, social security numbers, dates of birth, mailing addresses, telephone numbers, bank account numbers, details of income, bank account balances, financial transaction histories, credit histories, tax information, credit scores, cell phone and mobile computing device location data, IP addresses, and Wi-Fi network data." Dkt. 10 ¶ 85. As alleged, the Court finds that Plaintiffs have adequately pleaded a claim for invasion of privacy. The unauthorized access to Plaintiffs' personal and financial information rises to the requisite level of an egregious breach of social norms. *See Richmond v. Mission Bank, No. 1:14-cv-0184-JLT, 2015 U.S. Dist. LEXIS 48452, 2015 WL 1637835, at *4 (E.D. Cal. Apr. 13, 2015)* ("[I]t is indisputable that the disclosure of details regarding one's personal finances or other financial information is a serious invasion of privacy.") (internal quotation marks and citation omitted). Accordingly, Defendants' motion to dismiss Plaintiffs' invasion of privacy claim is **DENIED**.

8. Unfair Competition Law ("UCL") Claim

The UCL creates a cause of action for business practices that are: (1) unlawful; (2) unfair, or (3) fraudulent. *Cal. Bus. & Profs. Code § 17200*. Each "prong" of the UCL provides a separate and distinct theory of liability. *Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 731 (9th Cir. 2007)*. Further, to have standing to **[*33]** pursue this claim, plaintiffs must show that they "lost money or property" because of Defendants' conduct. *Cal. Bus. & Prof. Code § 17204*; *see* *In re Facebook, Inc., Consumer Privacy User Profile Litig., 402 F. Supp. 3d 767, 804 (N.D. Cal. 2019)*.

a. Standing

Defendants contend that Plaintiffs have no statutory standing to assert the UCL claims, because their alleged losses are not recoverable. Dkt. 15 at 31. Additionally, Defendants argue that Plaintiffs cannot obtain restitution or injunctive relief. *Id.* To establish standing for a UCL claim, "[a] plaintiff must show he personally lost money or property because of his own actual and reasonable reliance on the allegedly unlawful business practices." *In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1071* (citing *Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 330, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*). However, there are "innumerable ways in which economic injury from unfair competition may be shown." *Kwikset Corp., 51 Cal.4th at 323, 120 Cal.Rptr.3d 741, 246 P.3d 877*. For example, "[a] plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary." *Id.* (citation omitted).

Plaintiffs alleged that Mehta, Qian, and Furtado have all lost thousands of dollars. Dkt. **[*34]** 10 ¶¶ 27-29. Further, Plaintiffs allege that they have also lost control over the use of their identity, lost time, and future economic loss. *Id.* ¶¶ 21, 27-29, 93. Additionally, Plaintiffs allege that they "made these above-market rate payments that they would not have made, or would have paid less, but for Defendants' representations." *Id.* ¶ 92. Thus, Plaintiffs have sufficiently alleged a loss of money or property as a result of the UCL violation.

In their opposition, Plaintiffs state that they do not intend to seek restitution under the UCL or FAL. Dkt. 17 at 30 n.2. Plaintiffs allege that unauthorized user access is an "ongoing dilemma" that "will continue into the future." Dkt. 10 ¶¶ 19. Further, Plaintiffs allege that "Robinhood has repeatedly neglected to fully inform customers regarding the nature and scope of security failures and unauthorized activity." *Id.* ¶ 20. Plaintiffs face a "real and immediate threat" of future injury. *In re Yahoo!, 2017 U.S. Dist. LEXIS 140212, 2017 WL 3727318, at *31* (citing *City of Los Angeles v. Lyons, 461 U.S. 95, 111, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)*). Accordingly, at this stage of the litigation, Plaintiffs have adequately alleged standing to seek injunctive relief under the UCL. As Plaintiffs have pleaded their UCL claim under all three prongs, the Court will address in turn whether Plaintiffs **[*35]** have sufficiently alleged a claim under the UCL.

b. Unlawful Prong

"The unlawful prong of the UCL prohibits anything that can properly be called a business practice and that at the same time is forbidden by law." *In re iPhone Application Litig., 844 F. Supp. 2d at 1072* (citing *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (internal quotation marks omitted)). *Section 17200* of the Business and Professions Code permits injured customers to "borrow" violations of other laws and treat them as unfair competition that is independently actionable. *Id.*

Plaintiffs allege that Defendants engaged in unlawful business practices in violation of the CCPA, CRA, CLRA, California Constitution right to privacy, and negligence. Dkt. 17 at 28. The Court has already considered the adequacy of Plaintiffs' allegations as to the CCPA (Section IV.B.4), CRA (Section IV.B.5), CLRA (Section IV.B.6), California Constitution right to privacy (Section IV.B.7), and negligence (Section IV.B.2). Accordingly, the Court must **DISMISS** any claims based on violation of CRA and CLRA. *See* Sections IV.B.5-IV.B.6. On the other hand, Plaintiffs have stated a UCL claim based on CCPA, California Constitution right to privacy, and negligence, which the Court found to be sufficient pleaded. *See* Sections IV.B.2, IV.B.4, IV.B.7. Thus, Plaintiffs' **[*36]** UCL claim survives to the extent it is based upon the alleged violations of CCPA, California Constitution right to privacy, and negligence, and Defendants' motion to dismiss is **DENIED**.

c. Unfair Prong

"The UCL also creates a cause of action for a business practice that is 'unfair' even if not specifically proscribed by some other law." *In re iPhone Application Litig., 844 F. Supp. 2d at 1072* (citing *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1143, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*). "The UCL does not define the term 'unfair.' In fact, the proper definition of 'unfair' conduct against consumers 'is currently in flux' among California courts." *Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018)* (quoting *Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1169 (9th Cir. 2012)*). "Before *Cel-Tech*, courts held that 'unfair' conduct occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *Davis, 691 F.3d at 1169* (citing *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301, 316 (1999)*). The balancing test in *S. Bay Chevrolet* requires the Court to "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Davis, 691 F.3d at 1169* (internal quotation marks and citation omitted). In *Cel-Tech*, the California Supreme Court established a more concrete definition of "unfair," defining it as "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable **[*37]** to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *20 Cal. 4th at 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527*. Further, "any finding of unfairness to competitors under *section 17200* [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id. at 186-87*. While the *Cel-Tech* test did not apply to actions by consumers, "some courts in California have extended the *Cel-Tech* definition to consumer actions." *Davis, 691 F.3d at 1170*.

Defendants argue that Plaintiffs' claim under the unfair prong fails, because Plaintiffs cannot adequately allege a violation of California privacy laws. Dkt. 15 at 31. Plaintiffs contend that Plaintiffs' claim under the unfair prong is "validly 'tethered' to the adequately pled violations of the CCPA, CRA, California Constitution, and CLRA." Dkt. 17 at 28. Further, Plaintiffs also argue that their allegations are sufficient under the balancing test. *Id.* at 28-29. Specifically, Plaintiffs argue that they adequately alleged that Robinhood's business practices has caused injury to customers, "far greater than any alleged countervailing benefit." *Id.* At the motion to dismiss stage, the Court cannot say that the benefits from Robinhood's business practices of allegedly emphasizing **[*38]** growth and profit over protecting their customers' personal and financial information and failing to implement industry-standard security measures outweighs the harm. *See* *In re Google Assistant Privacy Litig., 457 F. Supp. 3d at 844*; *In re iPhone Application Litig., 844 F. Supp. 2d at 1073* ("While the benefits of Apple's conduct may ultimately outweigh the harm to consumers, this is a factual determination that cannot be made at this stage of the proceedings."). Accordingly, Defendants' motion to dismiss on the unfair prong of the UCL is **DENIED**.

d. Fraudulent Prong

"In order to state a cause of action under the fraud prong of the UCL, a plaintiff must show that members of the public are likely to be deceived." *In re iPhone Application Litig., 844 F. Supp. 2d at 1073* (citing *Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1167, 93 Cal. Rptr. 2d 439 (2000)*). "The challenged conduct 'is judged by the effect it would have on a reasonable consumer.'" *Davis, 691 F.3d at 1169* (quoting *Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 72 Cal. Rptr. 3d 903, 909 (2008)*). *Rule 9(b)*'s heightened pleading requirements apply to UCL claims under this prong. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*. Thus, claims under this prong must allege "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)* (internal quotation marks and citation omitted).

Defendants make the same arguments for the fraud prong that they make regarding Plaintiffs' CLRA claim. *See* Section IV.B.6. Here, Plaintiffs have not met their burden **[*39]** of pleading with particularity the basis of their UCL claim under the fraudulent prong. As stated in Section IV.B.6, the Financial Privacy Notice is the only document presented by the Parties that may contain actionable, non-puffery statements, which is not referenced in the FAC. As alleged in the FAC, there are no statements by which a reasonable consumer would be likely to be deceived. Accordingly, Defendants' motion to dismiss on the fraudulent prong of the UCL is **GRANTED**.

9. False Advertising Law ("FAL") Claim

California's False Advertising Law makes it unlawful for any person to "induce the public to enter into any obligation" based on a statement that is "untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *Cal. Bus. & Prof. Code § 17500*. "Whether an advertisement is 'misleading' must be judged by the effect it would have on a reasonable consumer." *Davis, 691 F.3d at 1161-62* (citing *Williams, 552 F.3d at 938*). "A reasonable consumer is the ordinary consumer acting reasonably under the circumstances." *Id. at 1162* (internal quotation marks and citation omitted). "In applying this test, we are mindful that whether a business practice is deceptive will usually be a question of fact not appropriate **[*40]** for decision on a motion to dismiss." *Id.* (citing *Williams, 552 F.3d at 938*) (internal quotation marks omitted).

Defendants make similar arguments for the FAL claim that they make regarding Plaintiffs' UCL claim. *See* Section IV.B.8. While Plaintiffs have adequately alleged a "real and immediate threat" of injury from Defendants, Plaintiffs have not met their burden of pleading with particularity the basis of their FAL claim. Like Plaintiffs' CLRA claim (Section IV.B.6) and UCL claim under the fraudulent prong (Section IV.B.8.d), the FAC does not reference the Financial Privacy Notice. As alleged in the FAC, there are no statements by which a reasonable consumer would have been misled to enter into any obligation. Accordingly, Defendants' motion to dismiss Plaintiffs' FAL claim is **GRANTED**.

V. CONCLUSION

For the reasons stated above, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' motion to dismiss pursuant to *Rule 12(b)(6)*. Specifically, Defendants' motion to dismiss Plaintiffs' claims for negligence, violations of the CCPA, constitutional right to privacy, and unlawful and unfair prongs of the UCL are **DENIED**. Defendants' motion to dismiss Plaintiffs' claims against Defendants for breach of contract, violations of **[*41]** CRA, CLRA, fraudulent prong of the UCL, and FAL are **GRANTED WITH LEAVE TO AMEND**.

Plaintiffs may file an amended complaint by **May 20, 2021**. Plaintiffs may not add new causes of action or parties without leave of the Court or stipulation of the parties pursuant to *Federal Rule of Civil Procedure 15*. Failure to cure the defects identified by this Order will be subject to dismissal with prejudice.

SO ORDERED.

Dated: May 6, 2021

/s/ Susan Van Keulen

SUSAN VAN KEULEN

United States Magistrate Judge

Gorrio v. Francis

United States District Court for the Western District of Pennsylvania

May 7, 2021, Decided; May 7, 2021, Filed

Civil Action No. 2:19-1297

Reporter
2021 U.S. Dist. LEXIS 87570 *; 2021 WL 3023736

MICHAEL GORRIO, Plaintiff, v. CORRECTIONAL OFFICER FRANCIS, et al., Defendants.

Subsequent History: Adopted by *Gorrio v. Francis, 2021 U.S. Dist. LEXIS 132585, 2021 WL 3021975 (W.D. Pa., July 16, 2021)*

Magistrate's recommendation at *Gorrio v. Corr. Officer Francis, 2023 U.S. Dist. LEXIS 48473 (W.D. Pa., Mar. 22, 2023)*

Core Terms

alleges, amended complaint, grievance, asserting, Amend, Defendants', retaliation, conspiracy, lawsuit, respondeat superior, inmate, solitary confinement, deprivation, official capacity, Imprisonment, recommended, destroyed, cause of action, misconduct, quotations, fail to state a claim, Clayton Act, confinement, immunity, sexual, documentation, violations, housed, dismissal with prejudice, constitutional right

Counsel: **[*1]** MICHAEL GORRIO, Plaintiff, Pro se, Collegeville, PA.

For CORRECTIONAL OFFICER FRANCIS, CORRECTIONAL OFFICER CARASELLY, CORRECTIONAL OFFICER FETCHCO, SERGEANT WALSHAN, LIEUTENANT RHODES, LIEUTENANT PARKER, CORRECTIONAL OFFICER EMMINGER, CORRECTIONAL OFFICER POLAND, CORRECTIONAL OFFICER SCOLES, SUPERINTENDENT MARK V. CAPOZZA, CORRECTIONAL OFFICER EVANS, CORRECTIONAL OFFICER TERRAVECHIA, CORRECTIONAL OFFICER DICKS, CORRECTIONAL OFFICER ROCKRIDGE, CORRECTIONAL OFFICER HAILEY, CORRECTIONAL OFFICER BURRIE, CORRECTIONAL OFFICER MINOR, SERGEANT MCKILEEN, LIEUTENANT ALBERT WOOD, LIEUTENANT DAILEY, LIEUTENANT RUSNAK, RHONDA HOUSE, Superintendent Assistant, LUIS ALLEN, EDWARD BOHNA, BRITTANY KIMMEL, CORRECTIONAL OFFICER REGINA, CORRECTIONAL OFFICER COX, CORRECTIONAL OFFICER OHRMAN, CORRECTIONAL OFFICER TWARDZIK, CORRECTIONAL OFFICER SAXION, CORRECTIONAL OFFICER HENRY, SERGEANT HAINES, SERGEANT WILES, BETH RUDZINSKI, DEPARTMENT OF CORRECTIONS, Defendants: Scott A. Bradley, LEAD ATTORNEY, Office of the Attorney General, Litigation Section, Mezzanine Level, Pittsburgh, PA.

Judges: PATRICIA L. DODGE, United States Magistrate Judge. Judge J. Nicholas Ranjan.

Opinion by: PATRICIA L. DODGE

Opinion

REPORT AND RECOMMENDATION

I. Recommendation [*2]

It is respectfully recommended that the Court grant in part and deny in part Defendants' Motion to Dismiss (ECF No.78) the Amended Complaint (ECF No. 43.) It is further recommended that the Court dismiss three of the defendants named in the Amended Complaint pursuant to the screening provisions set forth in *28 U.S.C. § 1915(e)(2)(B)(ii)*.

II. Report

A. Relevant Procedural History

Plaintiff Michael Gorrio is a state prisoner in the custody of the Pennsylvania Department of Corrections ("DOC") who is currently housed at SCI Phoenix. The events in question in this lawsuit occurred between December 2018 and February 2020 when Plaintiff was housed at SCI Fayette. Plaintiff alleges that the numerous defendants in this case, all of whom worked at SCI Fayette during the relevant time period, engaged in a wide-ranging conspiracy to commit violations under the Racketeer Influenced and Corrupt Organization ("RICO") Act, *18 U.S.C. §§ 1961-1968*. Plaintiff also claims Defendants violated the Hobbs Act, *18 U.S.C. § 1951* and the Clayton Act, *15 U.S.C. §§ 12-15*, and brings numerous constitutional tort claims under *42 U.S.C. § 1983* as well as related state-law claims.

Plaintiff is proceeding *pro se*. He commenced this action in October 2019 when he was housed at SCI Fayette. In December 2019 the Court granted **[*3]** his motion for leave to proceed *in forma pauperis*, and his Complaint (ECF No. 6) was docketed. In May 2020 Plaintiff filed a motion for leave to file an amended complaint, which the Court granted. (*See* ECF Nos. 40, 41). Plaintiff then filed the Amended Complaint (ECF No. 43), which is the operative pleading, in June 2020. He also filed a RICO Case Statement. (ECF No. 44.)

Plaintiff names as defendants the following thirty-four officials and employees of SCI Fayette: (1) Superintendent Mark V. Capozza; (2) CO Scoles; (3) CO Evans; (4) CO Terravechia; (5) CO Dicks; (6) CO Emminger; (7) CO Rockridge; (8) CO Francis; (9) CO Caraselly; (10) CO Fetchco; (11) CO Hailey; (12) CO Burrie; (13) CO Minor; (14) CO Poland; (15) CO Regina; (16) CO Cox; (17) CO Ohrman; (18) CO Twardzik; (19) CO Saxion; (20) CO Henry; (21) Sgt. McKileen; (22) Sgt. Walshan; (23) Sgt. Haines; (24) Sgt. Wiles; (25) Lt. Wood; (26) Lt. Dailey; (27) Lt. Rusnak; (28) Lt. Parker; (29) Lt. Rhodes; (30) Superintendent Assistant Rhonda House and (31) Luis Allen, who were the Grievance Coordinators at SCI Fayette; (32) Edward Bohna, the Certified School Principal at SCI Fayette; (33) Brittany Kimmel, the School Guidance Counselor **[*4]** at SCI Fayette; and, (34) Beth Rudzinski, the Hearing Examiner at SCI Fayette. (Amend. Compl. ¶¶ 6-8.) Plaintiff sued each defendant in his or her official and individual capacities. (*Id.*)

Plaintiff also states in the Amended Complaint that he seeks to bring claims against numerous John/Jane Doe defendants who worked at SCI Fayette, including medical personnel and other correctional officers and lieutenants. (*Id.* ¶¶ 7-8.)

Defendants have filed a Motion to Dismiss (ECF No. 78) the Amended Complaint pursuant to *Rule 12(b)(6)* in which they seek to dismiss certain claims asserted by Plaintiff. (*See also* Brief in Support, ECF No. 79.) As explained below, Defendants are seeking dismissal of eleven of the seventeen causes of action Plaintiff brings in the Amended Complaint. They are not seeking dismissal of his constitutional tort claims related to incidents of excessive force, sexual assault, the interference with and/or deprivation of his education, or his state law claim of assault and battery. In his brief in opposition to Defendants' motion, Plaintiff contends that the Court should not dismiss any of his claims. (ECF No. 86.)

B. Standard of Review

At the pleading stage, *Rule 8* requires a "short plain statement" **[*5]** of facts, not legal conclusions, "showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. *Federal Rule of Civil Procedure 12(b)(6)* provides for the dismissal of a complaint, in whole or in part, for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. The Supreme Court held that, pertaining to *Rule 12(b)(6)*'s standard of review, a complaint must include factual allegations that "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "[W]ithout some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only 'fair notice' but also the 'grounds' on which the claim rests." *Phillips v. County of Allegheny, 515 F.3d 224, 232 (3d Cir. 2008)*.

In determining whether a plaintiff has met this standard, a court must reject legal conclusions unsupported by factual allegations, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements;" "labels and conclusions;" and "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal, 556 U.S. at 678* (citations omitted). Mere "possibilities" of misconduct are insufficient. *Id. at 679*.

The Court of Appeals has summarized this inquiry as follows:

> To determine the sufficiency of a complaint, a court must take three steps. First, the court must "tak[e] note of the elements a plaintiff must **[*6]** plead to state a claim." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1947, 173 L.Ed.2d 868 (2009)*. Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id. at 1950*. Third, "whe[n] there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Id.* This means that our inquiry is normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged.

Malleus v. George, 641 F.3d 560, 563 (3d Cir. 2011).

"A document filed *pro se* is to be liberally construed and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers[.]" *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (internal citation and quotation marks omitted); *see also* *Higgs v. Att'y Gen., 655 F.3d 333, 339 (3d Cir. 2011)* ("The obligation to liberally construe a pro se litigant's pleadings is well-established.").

C. Facts Alleged in the Amended Complaint

1. The December 16, 2018 excessive force incident and Plaintiff's subsequent confinement in the RHU for 18 days

On December **[*7]** 16, 2018, Plaintiff was in the HC Unit attempting to negotiate the sale of chicken pieces to another inmate. CO Francis approached Plaintiff, accused him of being high on drugs, and handcuffed him. (Amend. Compl. ¶¶ 10-11.) Other officers arrived on the scene to escort Plaintiff to the medical unit and/or the "level 5" or Restrict Housing Unit ("RHU"). (*Id.* ¶ 14) Plaintiff alleges that Sgt. Walshan and other corrections officers subjected him to excessive force when they restrained him during this incident. (*Id.* ¶¶ 15-18.) Afterwards, Plaintiff was examined by medical personnel and taken to the Psychiatric Observation Center ("POC") where he spent the night. (*Id.* ¶¶ 19-21.)

The following day, on December 17, 2018, Plaintiff was placed in the RHU in solitary confinement and he remained there for approximately 18 days. (*Id.* ¶ 21.) During this time Plaintiff submitted a Request to Staff. On December 29, 2018, Lt. Wood responded: "You become a problem you stay in the hole." (*Id.* ¶ 28.) Plaintiff was released from the RHU to the general population after his toxicology tests came back negative. (*Id.* ¶ 21.)

2. Plaintiff's allegations pertaining to his college correspondence courses

Plaintiff **[*8]** was taking correspondence college courses with Colorado State University and Adams State University while he was incarcerated at SCI Fayette. (*Id.* ¶ 51.) In January 2019, Plaintiff sent a Request to Staff Member to Kimmel, the Guidance Counselor at SCI Fayette, in which he inquired about education-related matters. In a response dated January 25, 2019, Kimmel informed Plaintiff: "Per institutional policy any inmate pursuing correspondence courses must be 6-month misconduct free. You can write me in July. You misbehave we revoke your education completely and place you in the RHU, per Supt. Capozza." (*Id.* ¶ 24.)

Plaintiff contacted Edward Bohna, SCI Fayette's Certified School Principal, in February 2019 inquiring about the completion of his ongoing college courses. Similar to Kimmel, Bohna advised Plaintiff that he would have to wait six months to take his exams. (*Id.* ¶ 25.) Plaintiff avers that the delay would have resulted in the automatic disqualification of the courses in which he was enrolled at the time. (*Id.*)

Plaintiff's father contacted the Chief Education Administrator of the Western Region. (*Id.* ¶ 26.) According to the Amended Complaint, the Administrator stated that Plaintiff **[*9]** was "authorized and entitled to impending college correspondence courses, and that Bohna and Kimmel were directed to administer the examinations and rectify the issue at bar." (*Id.*)

Around this same time, Plaintiff submitted a Request to Staff Member to Lt. Wood, who responded: "You already went to the hole for using drugs. The answer is NO and we are not going to do more work after you make us do more work. Your education is a privilege not a right." (*Id.* ¶ 28.) On another occasion, Lt. Wood wrote to Plaintiff in a response to a Request to Staff Member: "Staff at this institution are becoming very irritated of your actions. You continue to harass education and wonder why we put you in the hole. Keep up the crap and you will NEVER leave the hole. Capozza gives us discretion to do what we want to whom we want." (*Id.*)

Superintendent Capozza, in another response to a Request to Staff Member, wrote to Plaintiff: "It is your responsibility to complete college course material—NO ONE ELSE. Also, you are starting to become a problem here. The next time I hear your name I will personally [E]NSURE that you go to the RHU to stay and NOT complete your education AT ALL." (*Id.* ¶ 29.)

Plaintiff alleges **[*10]** that Kimmel and Bohna's actions were in retaliation for his filing of unidentified grievances and "filing legal action." (*Id.* ¶ 26.)

3. <u>The April 25, 2019 excessive force incident</u>

According to the allegations of the Amended Complaint, on April 25, 2019 CO Hailey and CO Burrie escorted Plaintiff to a misconduct hearing and while doing so they slammed Plaintiff "into miscellaneous stationary objects along the way." (*Id.* ¶ 32.) Officer Hailey also slammed Plaintiff's head into the wall multiple times after they entered the hearing room. (*Id.* ¶ 33.)

Plaintiff required medical treatment for the head and face injuries he sustained. (*Id.* ¶¶ 36-37.) Following this incident, Plaintiff alleges, Officer Hailey filed a "fraudulent" misconduct report that falsely accused Plaintiff of refusing to obey an order during the hearing. (*Id.* ¶ 35.)

4. <u>The May 4, 2019 excessive force incident and confiscation of Plaintiff's legal papers and eyeglasses</u>

When Plaintiff was housed at SCI Forest in 2015, he filed a civil rights lawsuit against six staff members of that institution. That civil action was filed in this Court at *Gorrio v. C.O. Sheffer, et al.*, No. 1:15-cv-312. The Court may take judicial notice of the **[*11]** information on the docket of this case, which is a matter of public record. The docket reflects that by 2019, there were two remaining claims against two of the defendants Plaintiff had sued, and the trial in that case was scheduled to commence on May 20, 2019. While Plaintiff had litigated much of that lawsuit *pro se*, John F. Mizner entered his appearance as Plaintiff's counsel on May 8, 2019. *See* ECF Nos. 115, 129, 130 in *Gorrio v. C.O. Sheffer*, No. 1:15-cv-312.

Several days before, on May 4, 2019, unidentified officers arrived at Plaintiff's cell to conduct a "random search." (Amend. Compl ¶ 38.) Plaintiff avers that the officers stated to him: "give us all your paperwork, you think this is a fucking game filing lawsuits against us, now you fucked up, pass out all legal work!" (*Id.* ¶ 39.) According to the allegations in the Amended Complaint, the unidentified officers accused Plaintiff of being insubordinate and, as a result, Lt. Dailey arrived at his cell and deployed OC spray directly onto Plaintiff's face. (*Id.* ¶¶ 40-42.) Plaintiff alleges that Sgt. McKileen subsequently filed a false misconduct report against Plaintiff in order to cover up and justify Lt. Daily's use of excessive **[*12]** force. (*Id.* ¶ 41.)

After the May 4, 2019 incident, Plaintiff was removed from his cell, was administered decontamination solutions, and was moved to the L-Unit. (*Id.* ¶ 42.) He remained in that unit for two weeks. During much of that time, Plaintiff had access to some of his litigation materials for his case that was scheduled to begin trial on May 20, 2019. Plaintiff avers that approximately two days before his trial, and out of "sheer vindictiveness" and retaliation for him proceeding with that lawsuit, "a large portion" of his litigation materials (such as trial exhibits and direct and cross examination questions) as well as "grievance documentation" were removed from his cell and destroyed. The Amended Complaint does not indicate who participated in this incident and/or allegedly destroyed his documents.

Plaintiff also noticed that his prescription eyeglasses were missing. (*Id.* ¶ 43.) The Amended Complaint indicates that Lt. Dailey was responsible for the confiscation of Plaintiff's eyeglasses. (*Id.* ¶ 44.)

Plaintiff alleges that he was not able to proceed forward with his trial without his legal documents and eyeglasses. (*Id.* ¶ 43.) Consequently, he entered into a settlement. Plaintiff **[*13]** claims that the actions to which he was subjected in May 2019 were taken to obstruct his ability to litigate this case. (*Id.* ¶¶ 41-43, 51.) The docket confirms, however, that Plaintiff was represented by counsel as of May 8, 2019. On August 29, 2019, his attorney filed a stipulation of voluntary dismissal pursuant to *Rule 41(a) of the Federal Rules of Civil Procedure*. On September 4, 2019, the Court dismissed the case because the parties reached a settlement. *See* ECF Nos. 143, 144 and 145 in *Gorrio v. C.O. Sheffer*, No. 1:15-cv-312.

5. Lt. Wood and Lt. Daily allegedly coerced Plaintiff to withdraw Grievance #804846, which Plaintiff filed following the May 4, 2019 incident

Plaintiff filed Grievance #804846 regarding the alleged excessive use of force administered against him by Lt. Dailey and "RHU staff" during the May 4, 2019 incident. (Amend. Compl. ¶ 44.) Lt. Wood interviewed Plaintiff about the incident on June 18, 2019. During this interview, Plaintiff alleges, Lt. Wood coerced him into withdrawing Grievance #804846 by threatening that Plaintiff would have to stay "in the hole" "for an indefinite amount of time" if he did not withdraw this grievance. (*Id.*) Plaintiff further alleges that Lt. Wood told him that if he withdrew the grievance **[*14]** Lt Wood would "do away with the misconduct [he received regarding the May 4, 2019 incident] and the seventy-five (75) days" he was currently serving "in the hole" as a sanction. (*Id.*)

Plaintiff further alleges that Lt. Wood "instigated Lt. Dailey to further intimidate the Plaintiff and coerce him" into withdrawing Grievance #804846. (*Id.*) Specifically, Lt. Dailey informed Plaintiff that he had his eyeglasses and would return them if he withdrew the grievance. Thereafter, Plaintiff submitted a letter withdrawing Grievance #804846. (*Id.*)

Sgt. Reichart subsequently returned Plaintiff's eyeglasses to him. (*Id.* ¶ 49.) Plaintiff alleges that Sgt. Reichart stated to him that "next time" his eyeglasses would be "confiscated indefinitely" and that "Superintendent Capozza authorizes officers to do what they please to inmates who file grievances and lawsuits." (*Id.*)

6. Grievance #817811 challenging the alteration of two of Plaintiff's publications

Plaintiff alleges that on August 6, 2019 he filed Grievance #817811 because two of his publications—Atomic Habits and 10 Things Successful People Do—were altered from their original forms by cutting their cardboard bindings in accordance with DOC policy. **[*15]** (Amend. Compl. ¶ 45.) The Amended Complaint does not indicate against whom, if anyone, Plaintiff filed Grievance #817811.

7. The incident in which CO Terravechia and CO Evans allegedly planted drugs in the binding of one of Plaintiff's books

Plaintiff alleges that on October 15, 2019, CO Terravechia and CO Evans planted drugs in the binding of one of his books on the orders of Lt. Wood. (*Id.* ¶ 49.) Plaintiff received a misconduct because drug content was found among his possessions. He alleges that he was "falsely imprisonment" in the RHU as a result. (*Id.*)

8. <u>The alleged confiscation and destruction of Plaintiff's "legal documentation or material" in December 2019 and February 2020</u>

Plaintiff alleges that on December 12, 2019, after he filed the instant lawsuit, Sgt. Wiles and CO Saxon (who were not named defendants in the original complaint) searched his RHU cell at the direction of the security search team. (*Id.* ¶ 52.) During their search they allegedly confiscated and threw in the trash "legal documentation" such as requests to staff and other "critical courthouse documentation[.]" (*Id.*)

Plaintiff further alleges that between February 10, 2020 and February 19, 2020, CO Ohrman, CO Cox, **[*16]** CO Twardzik, CO Regina and Sgt. Haines (who were not named defendants in the original complaint) "targeted" him by "unjustifiably destroying his property and legal material." (*Id.* ¶ 59.) The Amended Complaint does not indicate what property or legal material they allegedly destroyed.

9. <u>CO Henry and CO Saxion allegedly planted paperclips in Plaintiff's food</u>

Plaintiff alleges that on December 17, 2019, CO Henry and CO Saxion (who were not named defendants in the original complaint) planted paper clips in the garden burger on his lunch tray. (*Id.* ¶¶ 54, 55.) Plaintiff was unaware that they had done so and he bit into the burger. One of the pieces lodged into Plaintiff's gums and he required "minor dental procedure for front tooth crack/chip." (*Id.* ¶ 55.)

10. <u>The February 21, 2020 strip search and destruction of Plaintiff's legal and personal property</u>

Plaintiff alleges that on February 21, 2020 CO Regina conducted a "sexually deviant" strip search of Plaintiff in the presence of CO Cox, CO Ohrman and Sgt. Haines. (*Id.* ¶ 60.) (None of these individuals were named defendants in the original complaint). During this incident the officers made sexually harassing and other inappropriate and insulting **[*17]** comments to Plaintiff. (*Id.*)

Plaintiff alleges that CO Ohrman and Sgt. Haines then entered his cell "and began destroying legal, business, educational and personal property." (*Id.* ¶ 61.) Sgt. Haines stated to Plaintiff: "these are the orders of Superintendent Capozza, to destroy property and legal material of jailhouse lawyers and who file grievances and lawsuits." (*Id.*) CO Ohrman said to Plaintiff: "I don't care if there is absolutely no contraband here, I am going to write you up and give you more [disciplinary conduct] time," and "I am talking about all the contraband that is in there, and if I cannot find it, I will make it appear." (*Id.*)

Plaintiff alleges that during this incident Sgt. Haines and CO Ohrman destroyed: (1) numerous photographs of Plaintiff's family members; (2) 325 pages of legal documents from his prior civil action at No. 1:15-cv-312 and 125 pages of evidence related to the instant civil action; (3) 215 songs composed and created by Plaintiff; (4) "1200 pages of business blueprints, articles of incorporate[ion], construct[ion] designs, and intellectual property, original, invaluable and irreplaceable in value"; and (5) "125 pages of study guide notes and handwritten **[*18]** notes on college course curriculums[.]" (*Id.*)

11. <u>The Grievance Coordinators' alleged failure to respond to grievances within the allotted time frame set forth in DCO-ADM 804 Policy</u>

Finally, Plaintiff alleges that he filed numerous grievances pertaining to the events discussed in the Amended Complaint. (*Id.* ¶ 50.) He avers that Superintendent Assistant Rhonda House and Luis Allen, who were the Grievance Coordinators at SCI Fayette, failed to respond to many of those grievances. (*Id.* ¶¶ 9, 50.)

11. <u>Plaintiff's Claims</u>

Plaintiff states in the Amended Complaint that he is bringing against all or some of the defendants the following causes of action:

- Civil RICO (Count A)

- Deliberate Indifference to Safety (Count B)
- Deliberate Indifference to Healthcare (Count C) (this claim is brought only against unknown "Jane Doe" medical personnel)
- Excessive Use of Force (Count D)
- Retaliation (Count E)
- Respondeat Superior (Count F)
- Wrongful Imprisonment (Count G)
- Conspiracy (Count H)
- Deprivation of the Right to an Education and Property Interest (Count I)
- Assault and Battery (Count J)
- Negligence (Count K)
- Intentional Infliction of Emotion Distress (Count L)
- Due Process (Count M)

- Sexual Harassment **[*19]** (Count N)
- Slavery/Involuntary Servitude (Count O)
- the Hobbs Act (Count P)
- the Clayton Act (Count Q).

(*Id.* at pp. 15-19.)

Plaintiff seeks compensatory and punitive damages against each defendant. He also seeks an injunction ordering that he be released from unlawful segregation and transferred to another correctional institution. (*Id.* at pp. 20-21.)

Defendants move for the dismissal of all claims asserted against them in their official capacities and for his claim of injunctive relief. They also contended that the Court should dismiss the following causes of action for failure to state a claim: Civil Rico (Count A); Retaliation (Count E); Respondeat Superior (Count F); Wrongful Imprisonment (Count G); Conspiracy (Count H); Negligence (Count K); Intentional Infliction of Emotional Distress (Count L); Due Process (Count M); Slavery/Involuntary Servitude (Count O); the Hobbs Act (Count P); and the Clayton Act (Count Q).

D. Discussion

1. Plaintiff's official capacity and injunctive relief claims

In the Amended Complaint, Plaintiff has asserted claims against all Defendants in both their official and individual capacities. Defendants contend that Plaintiff's official capacity claims are barred by their immunity from such **[*20]** claims under the *Eleventh Amendment*, and that Plaintiff's claim for injunctive relief is moot since he is no longer housed at SCI Fayette.

The *Eleventh Amendment* protects States and their agencies and departments from suit in federal court. *See, e.g., Lavia v. Pa., Dep't of Corr., 224 F.3d 190, 195 (3d Cir. 2000)*; *Kentucky v. Graham, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)*; *Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)* ("[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the *Eleventh Amendment*."). Individual state employees sued in their official capacity are also entitled to *Eleventh Amendment* immunity because "official capacity suits generally represent only another way of pleading an action against the state." *Betts v. New Castle Dev. Ctr., 621 F.3d 249, 254 (3d Cir. 2010)* (citing *Lombardo v. PA. Dept. of Pub. Welfare, 540 F.3d 190, 194 (3d Cir. 2008))*.

As part of the executive department of the Commonwealth, the DOC is entitled to *Eleventh Amendment* immunity. *Lavia, 224 F.3d at 195*. Therefore, its employees share in the Commonwealth's *Eleventh Amendment* immunity to the extent that they are sued in their official capacities. *Jones v. Unknown D.O.C. Bus Driver & Transportation Crew, 944 F.3d 478, 482 (3d Cir. 2019)*. Accordingly, the official capacity claims against Defendants are barred by the *Eleventh Amendment*.

Moreover, although suits seeking purely prospective relief against a state official in his or her official capacity for ongoing violations of federal law are not barred by the Eleventh Amendment, Ex Parte Young, 209 U.S. 123, 159-60, 28 S. Ct. 441, 52 L. Ed. 714 (1908); Graham, 473 U.S. at 167 n.14, Plaintiff no longer has a viable claim for prospective relief against any of the defendants. *See, e.g.,* Christ the King Manor, Inc. v. Sec'y U.S. Dep't of Health & Human Servs., 730 F.3d 291, 318 (3d Cir. 2013) (while claims against state officers **[*21]** in their official capacity for prospective relief are not barred by the Eleventh Amendment, "remedies are limited to those that are 'designed to end a continuing violation of federal law.'") (quoting Green v. Mansour, 474 U.S. 64, 68, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985)). Here, Plaintiff's claim for injunctive relief is moot since he has been transferred from SCI Fayette and is now housed as SCI Phoenix. *See, e.g.,* Sutton v. Rasheed, 323 F.3d 236, 248 (3d Cir. 2003) ("An inmate's transfer from the facility complained of generally moots the equitable and declaratory claims."); Johnson v. Wenerowicz, 440 F. App'x 60, 62 (3d Cir. 2011) ("As the District Court correctly determined, Johnson's requests for injunctive and declaratory relief against the named DOC defendants were rendered moot by his transfer to SCI-Fayette[.]"); Santiago v. Sherman, No. 1:05-cv-153, 2007 U.S. Dist. LEXIS 5365, 2007 WL 217353, *3 (W.D. Pa. Jan. 25, 2007) ("In the prison context, the transfer of an inmate from the facility complained of moots claims for injunctive relief involving that facility.").

Accordingly, the Court should grant Defendants' motion to the extent that it seeks dismissal with prejudice of the official capacity claims against Defendants. Additionally, the Court also should dismiss with prejudice Plaintiff's claim for injunctive relief because it was rendered moot by his transfer to SCI Phoenix.

2. Civil RICO

Plaintiff's first claim, "Count A," is labeled as **[*22]** a Civil RICO claim against all Defendants. The basis of this claim is that Defendants "exert[ed] sadistic and malicious force, failing to intervene, imposing adverse action, disregarding the psychological and emotional state, and unjustifiably seizing and apprehending [him] resulting in repeated placement in solitary confinement, amongst other 'predicate acts'" thereby committing civil RICO violations. (Amend. Compl. at p. 15, ¶ 64.). Throughout the Amended Complaint, and in his RICO Case Statement (ECF No. 44), Plaintiff also asserts that all of the alleged wrongful conduct committed by Defendants was part of their conspiracy to commit RICO violations. He further asserts that they committed fraud, obstructed justice, conspired to injure him in various ways, and repeatedly engaged in "patterns of racketeering." Such legal conclusions are not relevant when evaluating a motion to dismiss, however. *See, e.g., Fowler*, 578 F.3d at 210-11.

The federal civil RICO statute provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter[, which prohibits racketeering activity,] may sue therefor in any appropriate United States district court[.]" 18 U.S.C. § 1964(c). A civil RICO claimant must **[*23]** show a violation of the substantive RICO statute (18 U.S.C. § 1962) and also that he sustained (1) an injury to his *business or property* by reason of a violation of § 1962; and (2) that his injury was caused by the defendants' racketeering activities. *See, e.g.,* Maio v. Aetna, Inc., 221 F.3d 472, 482-84 (3d Cir. 2000).

Here, Plaintiff's RICO claim is premised upon all of the alleged wrongful acts that he contends Defendants committed in the Amended Complaint, and he asserts that they did so as part of a conspiracy to violate RICO. However, no allegation in the Amended Complaint or Plaintiff's RICO Case Statement[1] provides a plausible basis for concluding that Defendants engaged in "racketeering activity" as defined by 18 U.S.C. § 1961. *See, e.g.,* Brookhart v. Rohr, 385 F. App'x 67, 70 (3d Cir. 2010) ("Conclusory allegations of a pattern of racketeering activity, in this case, a fraudulent scheme, are insufficient to survive a Rule 12(b)6) motion.")

Additionally, Defendants are correct that Plaintiff lacks standing to bring a civil RICO claim against them because he has failed to identify a specific loss to his "business or property" as those terms are defined under the statute. *See, e.g.,* Maio, 221 F.3d at 481 n.7. Importantly, personal injuries do not qualify as an injury under RICO. *See, e.g.,*

[1] "Courts may consider the RICO case statement in assessing whether plaintiffs' RICO claims should be dismissed." Glessner v. Kenny, 952 F.2d 702, 712 n. 9 (3d Cir.1991), overruled on other grounds by Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 260 (3d Cir.1995).

Williams v. BASF Catalysts LLC, 765 F.3d 306, 323 (3d Cir. 2014) ("[I]n construing the federal RICO law, [the Third] Circuit has rejected **[*24]** the argument that personal injuries qualify as RICO injuries to 'business or property.'") (citing *Maio, 221 F.3d at 492*). Thus, the injuries Plaintiff alleges he sustained as a result of the excessive force incidents, the sexual assault incident, the paperclip incident, his housing in the RHU and/or solitary confinement and his resulting inability to complete is college coursework, are not injuries to his "business or property" under RICO. *See, e.g., Ettiben-Issaschar v. ELI Am. Friends of the Israel Ass'n for Child Prot., Inc., No. 15-cv-6441, 2016 U.S. Dist. LEXIS 1554, 2016 WL 97682, *3 (E.D. Pa. Jan. 7, 2016)* ("The type of harm suffered by [plaintiff] for which she seeks to recover in this action—*i.e.*, harm related to her detention and the alleged abuse she suffered while detained—is not an injury to 'business or property' that is cognizable under the RICO laws.").

Plaintiff also claims that he was injured when his legal materials and other personal items, such as photographs, songs he composed, business blueprints and designs, and documents related to his college coursework were destroyed. To establish the requisite injury for civil RICO purposes, however, Plaintiff must "demonstrate a 'concrete financial loss' in the form of an 'ascertainable out-of-pocket' deprivation." **[*25]** *Dipplito v. United States, No. 13-cv-175, 2015 U.S. Dist. LEXIS 170498, 2015 WL 9308238 (D. N.J. Dec. 21, 2015)* (citing *Magnum v. Archdiocese of Philadelphia, 253 F. App'x 224, 226 (3d Cir. 2007))*. He has not done so. *See, e.g., Whitney v. Lt. Posika, et al., 2:19-cv-1237, 2021 U.S. Dist. LEXIS 8893, 2021 WL 1566431, *4 (W.D. Pa. Jan. 12, 2021)* (prisoner's allegation that defendants "stole his mail, which in turn resulted in a civil case being dismissed, which in turn cost [him] to be subject to high fines and court costs as well as high fines for postage and copies" did not amount to "they type of injury...compensable under the RICO Act.") (internal quotations omitted), report and recommendation adopted, *2021 U.S. Dist. LEXIS 54279, 2021 WL 1099633 (W.D. Pa. Mar. 2021)*. Moreover, speculative damages that are "predicated exclusively on the *possibility* that future events might occur" cannot form the basis of a RICO injury. *See, e.g., Maio, 221 F.3d at 495*; *Clark v. Conahan, 737 F. Supp.2d 239, 255 (M.D. Pa. 2010)* (observing that "[m]ental distress, emotional distress, and harmed reputations do not constitute injury to business or property sufficient to confer standing on a RICO plaintiff" and explaining that "injury for RICO purposes requires proof of concrete financial loss, not mere injury to an intangible property interest"). For these reasons, the alleged destruction of the above-cited items does not qualify as an "injury" for RICO purposes.

Thus, based upon the foregoing, it is recommended that the Court should grant Defendants' motion **[*26]** to the extent that it seeks dismissal of "Count A" for civil RICO violations. The dismissal of this claim should be with prejudice because Petitioner lacks standing to bring a civil RICO claim since, even accepting his allegations as true, he did not suffer an injury to his business or property that would qualify as a compensable injury under that statute.

3. Retaliation

Plaintiff asserts in "Count E" that all Defendants retaliated against him. The Amended Complaint alleges that Plaintiff believes that all defendants were engaged in a conspiracy to retaliate against him.

To state a claim for retaliation under the *First Amendment*, a prisoner must allege that: (1) he was engaged in constitutionally protected conduct; (2) the defendant at issue took adverse action against him; and (3) his constitutionally protected conduct was a substantial or motivating factor in the decision to take that adverse action. *See, e.g., Mitchell v. Horn, 318 F.3d 523, 530 (3d Cir. 2003)*; *Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001)*.

Since Plaintiff is bringing his retaliation claim under *§ 1983*, he must also plead each defendant's personal involvement in the alleged retaliation. *See, e.g., Rode v. Dellarciprete, 845 F.2d 1195, 1207 (1988)*. That is because, as stated in the text of *§ 1983* itself, only a person who "subjects, or causes to be subjected" another person to a civil **[*27]** rights violation can be held liable under *§ 1983*. Thus, each defendant can be held liable only for his or her own conduct. *See, e.g., id.; see also Parkell v. Danberg, 833 F.3d 313, 330 (3d Cir. 2016)*; *Barkes v. First Correctional Medical, 766 F.3d 307, 316 (3d Cir. 2014)* (*rev'd sub. nom. on other grounds 575 U.S. 822, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015))*; *C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 173 (3d Cir. 2005)* ("To impose liability on the individual defendants, Plaintiffs must show that each one individually participated in the alleged constitutional violation or approved of it.") (citing *C.H. v. Oliva, 226 F.3d 198, 201-02 (3d Cir. 2000)* (en banc)).

In the "Facts" section of the Amended Complaint, Plaintiff asserts that Kimmel and Bohna retaliated against him with respect to the matters related to his college correspondence courses because he "utilize[ed] the grievance system and file[d] legal action." (Amend. Compl. ¶ 26.) However, Plaintiff has not sufficiently alleged facts to show that he filed a grievance against Kimmel and Bohna, or that they were aware that he filed a grievance or lawsuit that plausibly could have a causal link to the adverse actions to which he claims they subjected him. For example, although at the time of Kimmel's and Bohna's alleged wrongful conduct Plaintiff had filed Grievance #780007, Plaintiff does not allege that he filed that grievance against them or that that specific grievance was the cause of their actions. Moreover, although **[*28]** Plaintiff was litigating his civil action at No. 1:15-cv-312, that lawsuit was filed against officials and employees at SCI Forest and not anyone at SCI Fayette. Accordingly, Plaintiff has failed to state a claim of retaliation against Kimmel and Bohna.

Plaintiff also alleges in the "Facts" section of the Amended Complaint that the May 2019 destruction of his legal materials for his civil action at No. 1:15-cv-312 was retaliatory. (Amend. Compl. ¶ 43.) However, the Amended Complaint does not indicate which defendants, if any, were involved in the taking of legal materials. (*See id.* ¶¶ 33-39, 43.) Therefore, Plaintiff has failed to sufficiently plead that any of the defendants had the requisite personal involvement in that incident to proceed with a retaliation claim regarding it.

Finally, Plaintiff alleges throughout the Amended Complaint that the alleged wrongful conduct of the other defendants was retaliatory, but he must do more than assert threadbare allegations that defendants' conduct was due to him filing unspecified grievances or a lawsuit, or was part of "patterns of retaliation," since such allegations are mere legal conclusions that do not satisfy the pleading requirements **[*29]** of *Rule 8* and do not support the requisite elements of a retaliation claim.

Based upon the foregoing, therefore, the Court should grant Defendants' motion to the extent that it seeks the dismissal of "Count E" Retaliation.

4. Respondeat Superior

Plaintiff asserts in "Count F" a claim identified as "Respondeat Superior" against all Defendants. (Amend. Compl. at p. 16, ¶ 57.) In support of this claim, Plaintiff alleges that each defendant "knowingly and intentionally participated in constitutional violations and failed to remedy the wrong successively after reporting the occurrences of such violations, resulting in *eighth amendment* violations." (*Id.*)

As Defendants correctly point out, *respondeat superior* is a theory of liability based on agency principles and is not a cause of action. *See, e.g., Sherman v. John Brown Ins. Agency Inc., 38 F. Supp.3d 658, 669-70 (W.D. Pa. 2014)* ("District Courts have found that under Pennsylvania law the doctrine of *respondeat superior* does not establish a separate tort, but merely a principle by which employers can be held liable for the tortious acts of their employee'") (internal citation and quotation omitted); *Care v. Reading Hosp. & Med. Ctr., No. 03-cv-04121, 2004 U.S. Dist. LEXIS 5485, 2004 WL 728532 (E.D. Pa. Mar. 31, 2004)* ("*respondeat superior* merely connotes a doctrine of imputation once an underlying theory of **[*30]** liability has been established. It is not a separate cause of action.") (internal citations and quotations omitted).

Additionally, *respondeat superior* is not a sufficient basis upon which any of the constitutional tort claims Plaintiff brings under *42 U.S.C. § 1983* can be asserted.[2] The doctrine of *respondeat superior*, which makes an employer automatically responsible for the wrongdoing of employees, does not apply to claims brought under that statute. *Iqbal, 556 U.S. at 676* ("Because vicarious liability is inapplicable to *Bivens* and *§ 1983* suits, a plaintiff must plead

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[2] Plaintiff brings his constitutional tort claims under *42 U.S.C. § 1983*, which "provides a cause of action against state actors who violate an individual's rights under federal law." *Filarsky v. Delia, 566 U.S. 377, 380, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012)*. *Section 1983* does not create substantive rights but instead "provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws." *Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996)*. "To state a claim under *§ 1983*, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)*.

that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *see, e.g.,* Rode, 845 F.2d at 1207; Maddox v. Gilmore, No. 2:19-cv-1163, 2020 U.S. Dist. LEXIS 36672, 2020 WL 1026799, *4 (W.D. Pa. Mar. 3, 2020) (granting superintendent's motion for judgment on the pleadings because "liability for Eighth Amendment claims cannot be predicated upon *respondeat superior*[.]") (citing Rode, 845 F.2d at 1207-08).

Therefore, based upon the foregoing, the Court should grant Defendant's motion to the extent that it seeks dismissal of "Count F" asserting "Respondeat Superior" for failure to state a claim. The dismissal should be with prejudice because "Respondeat Superior" is not a viable cause of action.

5. Wrongful Imprisonment

Plaintiff claims in "Count **[*31]** G" that as a result of the alleged unlawful action of Defendants he was "wrongfully imprisoned" in solitary confinement for over 153 days in violation of the Eighth Amendment's prohibition against "cruel and unusual punishment." (Amend. Compl. at pp. 16-17, ¶¶ 58.)

The Eighth Amendment's prohibition against cruel and unusual punishment guarantees that prison officials must provide humane conditions of confinement. Prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must "'take reasonable measures to guarantee the safety of the inmates[.]'" Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 526-27, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)). To state a claim for an Eighth Amendment violation based on the conditions of confinement, a prisoner must plausibly allege that prison officials' acts or omissions denied him "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981); Betts v. New Castle Youth Dev. Ctr., 621 F.3d 249, 256 (3d Cir. 2010) (stating that the Eighth Amendment's prohibition of cruel and unusual punishment requires that prison officials provide "humane conditions of confinement."). As set forth above, such necessities include food, clothing, shelter, medical care and reasonable safety. *See, e.g.,* Farmer, 511 U.S. at 832; Rhodes, 452 U.S. at 347; Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 418 (3d Cir. 2000).

A prisoner must also allege that the defendants acted with deliberate indifference. Id. at 835. "Deliberate indifference" is a subjective standard. The official **[*32]** must have known of and disregarded "an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 838.

In the Amended Complaint, Plaintiff alleged only that he was placed in solitary confinement for a period of 153 days. He did not allege with any specificity the conditions under which he was confined. Therefore, even taking his allegations as true, no plausible reading of the Amended Complaint could support a conclusion that Plaintiff was denied "the minimal civilized measure of life's necessities." Rhodes, 452 U.S. at 347. *See, e.g.,* Kokinda v. Pennsylvania Dep't of Corr., 779 F. App'x 938 943 (3d Cir. 2019) ("Where conditions are not 'cruel and unusual' but merely 'restrictive and even harsh, they do not violate the Eight Amendment but rather 'are part of the penalty that criminal offenders pay for their offenses against society") (citing Rhodes, 452 U.S. at 347); Powell v. McKeown, No. 1:20-cv-348, 2020 U.S. Dist. LEXIS 140479, 2020 WL 4530727, *8 (M.D. Pa. Aug. 6, 2020) ("It appears that Plaintiff bases his Eighth Amendment claim upon his placement in the RHU. Placement in the RHU, however, without allegations concerning the denial of any of life's necessities, is insufficient to state an Eighth Amendment violation.") Therefore, Plaintiff failed to state **[*33]** an Eighth Amendment claim related to his confinement in the RHU and/or solitary confinement.

Further, Plaintiff cannot establish a claim under the Fourteenth Amendment based on his alleged solitary confinement. To establish a due process violation in the prison context, a plaintiff must show that he was deprived of a liberty interest protected by the Constitution or a statute. Sandin v. Conner, 515 U.S. 472, 479 n.4, 483-84, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). A prisoner's liberty interests are not violated, however, unless a condition "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id. at 484. Therefore, in determining whether a prisoner's due process rights have been violated, courts first consider whether there has been a denial of a liberty or property interest. *See* Ky. Dep't of Corrs. v. Thompson, 490 U.S.

454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989). In determining whether a condition of confinement creates a protected liberty interest, a court must consider (1) the duration of the challenged conditions and (2) whether the conditions overall imposed a significant hardship in relation to the ordinary incidents of prison life. Williams v. Sec'y Pennsylvania Dep't of Corr., 848 F.3d 549, 560 (3d Cir. 2017) (citing Shoats v. Horn, 213 F.3d 140, 144 (3d Cir. 2000)). If a prisoner makes such a showing, the next step for the courts is to evaluate "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Id.*

To the extent that **[*34]** the Amended Complaint alleges that certain defendants issued "fraudulent" misconduct reports against Plaintiff and that, as a result, he was "wrongfully imprisoned" in the RHU in solitary confinement, these allegations fail to state a claim. Plaintiff avers that he was housed a total of 153 days in solitary confinement. However, he does not allege he was in solitary confinement for 153 consecutive days. For example, Plaintiff alleges that he spent 18 days in the RHU after the December 16, 2018 incident and then was released to the general population. In any event, the allegation that Plaintiff spent 153 days in the RHU in solitary confinement, without more, is insufficient to establish the kind of atypical deprivation of prison life necessary to implicate a protected liberty interest. *See, e.g.,* Mutschler v. Tritt, 765 F. App'x 653, 655 (3d Cir. 2019) (district court properly dismissed prisoner's due process claim because his "amended complaint does not allege that any conditions of [his confinement in the RHU for 180 days] involved an atypical and significant hardship sufficient to create a protected liberty interest. We have held that even longer stays in restrictive confinement under otherwise similar circumstances did not implicate **[*35]** a prisoner's liberty interests.") (citing Smith v. Mensinger, 293 F.3d 641, 652 (3d Cir. 2002) (seven months in disciplinary custody insufficient to trigger a due process violation)).

Additionally, even if Plaintiff had plausibly alleged that his solitary confinement placement amounted to a denial of a protected liberty interest, the Amended Complaint contains no allegation that he was denied any of the process he may have been due through misconduct hearings and/or subsequent appeals. For example, he names Beth Rudzinski, the Hearing Examiner at SCI Fayette, as a defendant in this action, but he does not attribute any wrongdoing to her in the "Facts" section of the Amended Complaint. (Amend. Compl. ¶ 8; *see also id.* ¶¶ 10-62.)

In his response to Defendants' motion, Plaintiff indicates that he is also raising a state law claim of wrongful imprisonment. He does not cite to any Pennsylvania law that would support a conclusion that he has even arguably pleaded a state law claim for wrongful imprisonment, which typically is synonymous with a claim of false arrest and which does not apply to this case. *See, e.g.,* Manley v. Fitzgerald, 997 A.2d 1235, 1241 (Pa. Commw. Ct. 2010) ("The elements of false arrest/false imprisonment are: (1) the detention of another person (2) that is unlawful. An arrest based **[*36]** upon probable cause would be justified, regardless of whether the individual arrested was guilty or not.") (internal citation and quotations omitted).

Accordingly, based upon the foregoing, the Court should grant Defendant's motion to the extent that it seeks dismissal of "Count G" asserting a "Wrongful Imprisonment" cause of action under the Eighth and Fourteenth Amendments or under state law because it fails to state a claim upon which relief may be granted.

6. Conspiracy

In "Count H," Plaintiff claims that Defendants conspired to interfere with his "federal court prosecution proceedings" and his education, and to destroy his property in violation of his Eighth Amendment rights. (Amend. Compl. at p. 17 ¶ 59.)

"To prevail on a conspiracy claim under § 1983, a plaintiff must prove that persons acting under color of state law reached an understanding to deprive him of his constitutional rights. This requires that the state actors took concerted action based on an agreement to deprive the plaintiff of his constitutional rights, and that there was an actual underlying constitutional violation of the plaintiff's rights." Harvard v. Cesnalis, 973 F.3d 190, 207 (3d Cir. 2020) (internal quotations and citation omitted); *see, e.g.,* Jutrowski v. Township of Riverdale, 904 F.3d 280, 293-94 (3d Cir. 2018) ("To prevail on a conspiracy claim under § 1983, a plaintiff must prove **[*37]** that persons acting under color of state law reached an understanding to deprive him of his constitutional rights.") (internal citations and quotations omitted). Although the agreement can be shown by direct or circumstantial evidence, a plaintiff cannot base his claim solely on suspicion and speculation. *See, e.g.,* Talley v. Varner, 786 F. App'x 326, 329 (3d Cir. 2019) (citing *Young v. Kann, 926 F.2d 1396, 1405 n.16 (3d Cir. 1991))* ("mere general allegation...[or] averment of conspiracy or collusion without alleging the facts which constituted such conspiracy or collusion is a conclusion of law and is insufficient [to state a claim]" (alterations in original) (quoting *Kalmanovitz v. G. Heileman Brewing Co., 595 F. Supp. 1385, 1400 (D. Del. 1984))*; *Jackson v. Shouppe, 17-cv-1135, 2018 U.S. Dist. LEXIS 113830, 2018 WL 3361270, *2 (W.D. Pa. 2018)* (same).

Here, Plaintiff has failed to allege any facts whatsoever beyond conclusory statements of conspiracy, let alone any facts that plausibly suggest a meeting of the minds, agreement or plan between any of the defendants. Therefore, there are no allegations in the Amended Complaint to support a plausible conspiracy claim. *See, e.g., Brandon v. Burkhart, No. 1:16-cv-177, 2020 U.S. Dist. LEXIS 187760, 2020 WL 5992281, *1 (W.D. Pa. Oct. 9, 2020)* (plaintiff "pled only conclusory averments of a conspiracy, which is not enough to satisfy federal pleading standards.")

Thus, the Court should grant Defendants' motion to the extent that it seeks dismissal of "Count H" **[*38]** that asserts a "Conspiracy" cause of action against Defendants for allegedly conspiring to deprive him of any of his constitutional rights.

7. Negligence

Plaintiff claims in "Count K" that the Defendants were negligent for failing to "use reasonable care to avoid foreseeable risk" to him "in violation of the State Tort Claims Act of the state constitution." (Amend. Compl. at p. 18, ¶ 62.)

Defendants argue that Plaintiff's negligence claim is barred by Pennsylvania state sovereign immunity. In general, employees of the Commonwealth of Pennsylvania acting within the scope of their duties are immune from liability. *1 PA. CONS. STAT. § 2310*; *see, e.g., Moss v. Pennsylvania, 838 F. App'x 702, 707 (3d Cir. Dec. 9, 2020)*. To this end, Pennsylvania's sovereign immunity statute affords broad immunity to state officials from state-law tort claims. With respect to claims of negligence, there are certain specifically delineated exceptions to this general rule of sovereign immunity, including, in relevant part, when the claim pertains to the "care, custody or control of personal property in the possession or control of Commonwealth parties[.]" *42 PA. CONS. STAT. § 8522(b)(3)*. That exception may apply here with respect to certain allegations made in the Amended Complaint. *See, e.g., Williams v. Stickman, 917 A.2d 915, 918 (3d Cir. 2007)*. Defendants do not address this issue **[*39]** in their brief in support of their motion.

Specifically, the Amended Complaint alleges that some defendants destroyed Plaintiff's personal property. Specifically, according to the allegations in the Amended Complaint, CO Henry, CO Saxion, Co Ohrman, CO Cox, CO Twardzik, CO Regina and Sgt. Haines destroyed Plaintiff's legal paperwork and/or other personnel property.[3] (*Id.* ¶¶ 52, 59-61.) Therefore, at this stage of the litigation, the Court cannot conclude that these seven defendants are immune from suit with respect to any negligence claim Plaintiff may be asserting against them for the alleged destruction of his property.[4]

Defendants also contend that, to the extent Plaintiff attempts to assert any claim in "Count K" under the Pennsylvania Constitution, any such claim must fail. They are correct in this regard. In affirming the dismissal of an inmate's assertion of state constitutional claims, the Court of Appeals has observed that "Pennsylvania does not have a statutory equivalent to *§ 1983* and does not recognize a private right of action for damages stemming from

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[3] Plaintiff avers that following the May 4, 2019 incident, during his subsequent stay in the L-Unit, his legal paperwork related to his civil action at No. 1:15-cv-312 was removed from his cell and destroyed. (Amend. Compl. ¶ 43.) As set forth above, however, the Amended Complaint does not identify who was involved in removing those documents.

[4] In his response to Defendants' motion, Plaintiff contends that the defendants involved in the alleged excessive force incidents, alleged sexual assault incident, and in the incident in which the paperclip was placed in Plaintiff's food are not entitled to immunity. The claims against the defendants involved in these incidents are not claims of negligence, however. Rather, if Plaintiff's allegations against these defendants are true, they violated Plaintiff's *Eighth Amendment* rights and/or committed state law intentional torts such as assault and battery but do not implicate a negligence cause of action.

alleged violation of the state constitution." *Miles v. Zech, 788 F. App'x 164, 167 (3d Cir. 2019)* (citing *Gary v. Braddock Cemetery, 517 F.3d 195, 207 n. 4 (3d Cir. 2008))*. *See also* *Whitenight v. Elbel, No. 2:16-cv-00646, 2017 U.S. Dist. LEXIS 199273, 2017 WL 6026379, *6 (W.D. Pa. Dec. 5, 2017)* ("Any claim which Plaintiff **[*40]** purports to state under the Pennsylvania Constitution against the Defendants is dismissed with prejudice, as there is no Pennsylvania statute that establishes and no Pennsylvania court has recognized a private cause of action for damages under the Pennsylvania Constitution.") (internal quotations and citations omitted).

Based upon the forgoing, it is recommended that the Court grant Defendants' motion to the extent that it seeks dismissal of "Count K" negligence against all Defendants except for CO Henry, CO Saxion, Co Ohrman, CO Cox, CO Twardzik, CO Regina and Sgt. Haines. It is further recommended that the Court grant Defendants' motion to the extent it seeks dismissal with prejudice of a claim based upon a violation of the Pennsylvania Constitution.

8. Intentional Infliction of Emotional Distress

In "Count L," Plaintiff asserts a state law claim of intentional infliction of emotional distress against all Defendants. (Amend. Compl. at p. 18, ¶ 63.)

To state a claim for the state tort of intentional infliction of emotional distress ("IIED"), a plaintiff must allege: (1) extreme and outrageous conduct; (2) intentional or reckless conduct; (3) conduct caused the emotional distress; and **[*41]** (4) severe emotional distress. *See, e.g.,* *Smith v. Washington Area Humane Soc'y, No. 2:19-cv-1672, 2020 U.S. Dist. LEXIS 201740, 2020 WL 6364762, *8 (W.D. Pa. Oct. 29, 2020)* (citation omitted). Importantly, the "[p]laintiff must allege *physical manifestations of the emotional distress*." *Id.* (emphasis added) (citing *Reeves v. Middletown Athletic Ass'n, 2004 PA Super 475, 866 A.2d 1115, 1122 (Pa. Super. Ct. 2004))*.

Thus, "a plaintiff 'must suffer some type of resulting physical harm due to the defendant's outrageous conduct.'" *Richardson v. Barbour, No. 2:18-cv-1758, 2020 U.S. Dist. LEXIS 149513, 2020 WL 4815829, *14 (E.D. Pa. Aug. 19, 2020)* (quoting *Reedy v. Evanson, 615 F.3d 197, 231 (3d Cir. 2010))*. "It is not enough for a plaintiff to generically plead the elements of a claim for IIED, but rather, sufficient detail must be asserted to make out a plausible claim." *Id.* (quoting *M.S. ex rel. Hall v. Susquehanna Twp. School Dist., 43 F. Supp.3d 412, 430-31 (M.D. Pa. 2014)* ("Although Plaintiffs allege M.S. suffered 'physical harm' as a result of the emotional distress, such a general, non-specific averment has been found insufficient to survive motions to dismiss.") and citing *Dobson v. Milton Hershey School, 356 F. Supp.3d 428, 439-40 (M.D. Pa. 2018)* (holding plaintiff's bald allegations of "physical harm" and "physical manifestations of emotional distress" were not enough, without more, to set forth a plausible IIED claim)); *see also* *Hoy v. Angelone, 554 Pa. 134, 720 A.2d 745, 755 (Pa. 1998)* (identify IIED as a "most limited" tort); *Gomez v. Markley, No. 2:07-cv-868, 2011 U.S. Dist. LEXIS 3385, 2011 WL 112886, *1 (W.D. Pa. Jan. 13, 2011)* ("in order to state a claim for [IIED] under Pennsylvania Law, a plaintiff must establish physical injury or harm...at the very least, **[*42]** existence of the alleged emotional distress must be supported by competent medical evidence.") (internal citations and quotation omitted).

Defendants are correct that Plaintiff did not make sufficient allegations in the Amended Complaint with respect to the nature and type of injury or injuries he suffered as a result of the conduct alleged on the part of Defendants to support his IIED claim. Therefore, as currently pled, the Amended Complaint fails to state a claim for IIED against any defendant.

Thus, it is recommended that the Court grant Defendants' motion to the extent that they seek dismissal of "Count L" for IIED.

9. Due Process

In the claim labeled "Count M," Plaintiff asserts that Defendants violated his due process rights under the *Fifth* and *Fourteenth Amendments* by "impeding his access to the grievance system and the courts[.]" (Amend. Compl. at p. 18, ¶ 64.)

Because Plaintiff's claims are brought only against state officials and employees, he cannot assert a claim against them under the *Fifth Amendment*. Therefore, his *Fifth Amendment* claim must be dismissed. *See, e.g.,* *Fauntleroy*

v. Clark, No. 1:19-cv-182, 2020 U.S. Dist. LEXIS 136167, 2020 WL 5351063, *3 (W.D. Pa. July 30, 2020) ("it is axiomatic that '[t]he limitations of the [F]ifth [A]mendment restrict only federal government action.") (quoting Nguyen v. U.S. Catholic Conference, 719 F.2d 52, 54 (3d Cir. 1983)), report **[*43]** and recommendation adopted, 2020 U.S. Dist. LEXIS 161899, 2020 WL 5350532 (W.D. Pa. Sept. 4, 2020).

To the extent that in "Count M" Plaintiff is generally attacking the DOC's grievance process at SCI Fayette under the Due Process Clause of the Fourteenth Amendment, inmates "do not have a constitutionally protected right to a grievance process." Jackson v. Gordon, 145 F. App'x 774, 777 (3d Cir. 2005). Because access to prison grievance procedures is not a constitutionally mandated right, "allegations of improprieties in the handling of grievances do not state a cognizable claim under § 1983." Glenn v. DelBalso, 599 F. App'x 457, 459 (3d Cir. 2015). *See, e.g.,* Walker v. Mathis, No. 15-cv-5134, 2016 U.S. Dist. LEXIS 65843, 2016 WL 2910082, *9 (E.D. Pa. May 19, 2016) ("an inmate does not have a constitutional right to an inmate grievance process and therefore cannot, as a matter of law, state a claim under the Fourteenth Amendment based upon a prison's failure to provide one.") Accordingly, Plaintiff's Fourteenth Amendment due process claim based generally on the prison's grievance procedures should be dismissed.

The same is true for Plaintiff's specific allegations that House and Allen failed to respond to many of his grievances (Amend. Compl. ¶ 50), and that Lt. Wood and Lt. Daily coerced him to withdraw Grievance #804846. (*Id.* ¶ 44). While those defendants' actions may be relevant to a potential affirmative defense of non-exhaustion, the fact that House and Allen allegedly failed to ensure that Plaintiff's grievances were **[*44]** processed in accordance with DOC policy, or that Lt. Wood and Lt. Daily allegedly coerced Plaintiff to withdraw one of his grievances, does not in itself give rise to a Fourteenth Amendment due process claim for the reasons set forth above.

Finally, to the extent that Plaintiff is asserting in "Count M" that he was denied access to the court, such a claim implicates the First Amendment. Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). In order to proceed with such a claim, a plaintiff must show that he (1) suffered an "actual injury," meaning he "lost a chance to pursue a 'nonfrivolous' or 'arguable'" legal claim; and (2) that he has "no other 'remedy that may be awarded as recompense' for the lost claim other than in the present denial of access suit." Monroe v. Beard, 536 F.3d 198, 205 (3d Cir. 2008) (quoting Christopher v. Harbury, 536 U.S. 403, 415, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)). "To that end, prisoners must satisfy certain pleading requirements: The complaint must describe the underlying arguable claim well enough to show that it is 'more than mere hope,' and it must describe the 'lost remedy.'" Id. at 205-06 (quoting Christopher, 536 U.S. at 416-17).

The Amended Complaint fails to identify any actual injury Plaintiff suffered in the form of "a nonfrivolous claim, or one of arguable merit" that has been lost as a result of any defendant's alleged interference with his access to courts.[5] Thus, Plaintiff failed to state a claim **[*45]** that he was denied access to the courts.

Accordingly, based upon the foregoing, it is recommended that the Court grant Defendants' motion to the extent that it seeks dismissal of "Count M." Specifically, "Count M" should be dismissed with prejudice to the extent that Plaintiff raised a due process claim under the Fifth Amendment, and dismissed to the extent that it seeks to raise claims under the Fourteenth and First Amendments.

10. Slavery/Involuntary Servitude

In "Count O," Plaintiff claims that Defendants "subjected [him] to labor servitude or sexual servitude" in violation of his rights under the Eight Amendment. (Amend. Compl. at p. 19, ¶ 66.)

The Court should dismiss Count O. There are no allegations in the Amended Complaint that could even arguably constitute a cognizable cause of action for "slavery/involuntary servitude." For example, there are no averments regarding Plaintiff's labor at SCI Fayette. Moreover, it would be futile to grant Plaintiff leave to cure his deficient pleading with respect to this claim because it is "well settled that prisoners have no inherent constitutional right to

[5] The Court notes that although Plaintiff alleges that the legal documents for his case at No. 1:15-cv-312 were taken from him in May 2019, he had an attorney in that case as of May 8, 2019.

wages for work performed while incarcerated." *Calipo v. Wolf, No. 1:18-cv-320, 2019 U.S. Dist. LEXIS 200431, 2019 WL 6879570, *10 (W.D. Pa. Nov. 15, 2019)* (internal quotations and citations omitted), report **[*46]** and recommendation adopted, *2019 U.S. Dist. LEXIS 216763, 2019 WL 6877181 (W.D. Pa. Dec. 17, 2019)*. Additionally, Plaintiff's allegation that he was sexually assaulted on February 21, 2020 provides no basis to support a claim of "sexual servitude" at SCI Fayette, and he is pursuing specific claims related to that alleged incident at other counts of the Amended Complaint.

Based upon the foregoing, the Court should grant Defendants' motion to the extent it seeks the dismissal with prejudice of "Count O" asserting a cause of action of slavery/involuntary servitude.

11. Hobbs Act

In "Count P," Plaintiff asserts a claim under the Hobbs Act, *18 U.S.C. § 1951*, for allegedly "interfering with commerce by threats of violence[.]" (Amend Compl. at p. 19, ¶ 67.) Plaintiff's allegations fail to state a claim. "The Hobbs Act, *18 U.S.C. § 1951*, a criminal statute, does not permit a private right of action." *Farrar v. McNesby, No. 13-cv-5683, 2015 U.S. Dist. LEXIS 37420, 2015 WL 1383096, *1 (E.D. Pa. Mar. 24, 2015)*. *See also* *Brookhart, 385 F. App'x at 70* ("The Hobbs Act provides only for criminal sanctions and not civil relief.").

Therefore, based upon the foregoing, the Court should grant Defendants' motion to the extent it seeks the dismissal with prejudice of "Count P," Plaintiff's claim alleging a Hobbs Act violation.

12. Clayton Act

In "Count Q," Plaintiff claims that the Defendant applied "barriers **[*47]** and obstructions in monopolies and combination in restraint of trade" in violation of the Clayton Act, *15 U.S.C. §§ 15-27*.

The Amended Complaint does not state a claim under the Clayton Act, which is an ***antitrust law*** that concern the regulation of interstate commerce and protects competition in the marketplace. The Clayton Act provides a private right of action for violations of the Sherman Act. *See, e.g.,* *Fields v. Doe, No. 14-cv-4573, 2015 U.S. Dist. LEXIS 72172, 2015 WL 3513367, *4 n.14 (E.D. Pa. June 4, 2015)* (citing *In re Mushroom Direct Purchaser Antitrust Litigation, 655 F.3d 158, 165 (3d Cir. 2011)* and *15 U.S.C. §§ 15*, *26*). Plaintiff makes no plausible allegation in Amended Complaint against any defendant that implicates the Clayton Act.

Accordingly, it is recommended that the Court grant Defendants' motion to the extent that it seeks the dismissal with prejudice of Plaintiff's claim at "Count Q" under the Clayton Act as that statute does not apply to the events alleged in this case.

13. Dismissal of House, Allen and Rudzinski

Although Defendants do not move for the dismissal of any specific individual defendant, the Court should dismiss House, Allen and Rudzinski from this lawsuit pursuant to the screening provisions set forth in *28 U.S.C. § 1915(e)(2)(B)(ii)*.

Under the Prison Litigation Reform Act, *Pub. L. No. 104-134, 110 Stat. 1321 (1996)* ("PLRA"), courts are required to screen complaints at any time where, as is the case here, the plaintiff **[*48]** has been granted leave to proceed *in forma pauperis*. *28 U.S.C. § 1915(e)(2)(B)(ii)*. It requires the Court to dismiss a complaint that, among other things, fails to state a claim on which relief may be granted. The legal standard for dismissing a complaint under the PLRA for failure to state a claim is identical to the legal standard used when ruling on a motion to dismiss under *Rule 12(b)(6)*. *Tourscher v. McCullough, 184 F.3d 236, 240 (3d Cir. 1999)*.

Here, Plaintiff seeks to hold House and Allen liable because they failed to ensure he received a response to his grievance in accordance with DOC policies. (Amend. Compl. ¶¶ 8, 9, 50.) As explained above, Plaintiff cannot state a claim against them for this alleged misconduct because "allegations of improprieties in the handling of grievances do not state a cognizable claim under *§ 1983*." *Glenn, 599 F. App'x at 459*. Accordingly, the Court should dismiss House and Allen from this lawsuit.

As for Rudzinski, who is the Hearing Examiner at SCI Fayette, Plaintiff failed to allege any wrongdoing on her part. As set forth above, a plaintiff must plead a defendant's personal involvement in the alleged deprivation of his constitutional right. *See, e.g.,* *Rode, 845 F.2d at 1207*. Thus, Plaintiff failed to state a claim against Rudzinski and the Court should dismiss her from this lawsuit for that reason. **[*49]**

E. Leave to Amend

When dismissing a civil rights case for failure to state a claim, a court must give a plaintiff the opportunity to amend a deficient complaint, irrespective of whether it is requested, unless doing so would be "inequitable or futile." *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 482 F.3d 247, 251 (3d Cir. 2007)*. "An amendment is futile if the amended complaint would not survive a motion to dismiss for failure to state a claim upon which relief could be granted." *Alston v. Suzuki, 227 F.3d 107, 121 (3d Cir. 2000)*.

Under the circumstances presented here, Plaintiff may, if he so chooses, file another amended complaint to attempt to cure the pleading deficiencies with respect to those claims that the Court does not dismiss with prejudice. Alternatively, he may choose to proceed with the Amended Complaint as it stands but only with respect to his claims in "Count B" Deliberate Indifference to Safety; "Count C" Deliberate Indifference to Healthcare; "Count D" Excessive Use of Force; "Count I" Deprivation of the Right to an Education and Property Interest; "Count J" Assault and Battery; and "Count N" Sexual Harassment.

III. Conclusion

Based upon the foregoing, it is respectfully recommended that the Court grant in part and deny in part Defendants' Motion to Dismiss (ECF No. 78), and dismiss House, Allen **[*50]** and Rudzinski from this action pursuant to the screening provisions set forth in *§ 1915(e)(2)(B)(ii)*. Specifically, it is recommended that the Court:

- dismiss with prejudice the official capacity claims against Defendants and Plaintiff's claim for injunctive relief;
- dismiss with prejudice "Count A" asserting a civil RICO claim;
- dismiss "Count E," which brings claims for Retaliation;
- dismiss with prejudice "Count F" asserting a claim for Respondeat Superior;
- dismiss "Count G" asserting a claim for Wrongful Imprisonment;
- dismiss "Count H" asserting a claim for Conspiracy;
- dismiss "Count K" asserting a claim of Negligence against all Defendants except for CO Henry, CO Saxion, Co Ohrman, CO Cox, CO Twardzik, CO Regina and Sgt. Haines;
- dismiss with prejudice any claim based upon a violation of the Pennsylvania Constitution;

- dismiss "Count L" asserting a claim for intentional infliction of emotional distress; • dismiss "Count M" with prejudice to the extent that Plaintiff is asserting a due process claim under the *Fifth Amendment*;

- dismiss "Count M" to the extent that it seeks to raise claims under the *Fourteenth* and *First Amendments*;
- dismiss with prejudice "Count O" asserting a claim for Slavery/Involuntary Servitude;

- dismiss with prejudice **[*51]** of "Count P" asserting a violation of the Hobbs Act;
- dismiss with prejudice "Count Q" asserting a claim under Clayton Act; and,
- dismiss Hobbs, Allen and Rudzinski from this action for failing to state a claim against them.

Pursuant to the Magistrate Judges Act, *28 U.S.C. § 636(b)(1)(B)* and *(C)*, and Rule 72.D.2 of the Local Civil Rules, the parties are allowed fourteen (14) days from the date of this Order to file objections to this Report and Recommendation. Failure to do so will waive the right to appeal. *Brightwell v. Lehman, 637 F.3d 187, 193 n.7 (3d Cir. 2011)*.

Dated: May 7, 2021

/s/ Patricia L. Dodge

PATRICIA L. DODGE

United States Magistrate Judge

Edge Sys. LLC v. Ageless Serums LLC

United States District Court for the Central District of California

May 11, 2021, Decided; May 11, 2021, Filed

2:20-cv-09669-FLA (PVCx)

Reporter
2021 U.S. Dist. LEXIS 164868 *

Edge Systems LLC v. Ageless Serums LLC

Subsequent History: Sanctions disallowed by, Motion granted by, in part, Motion denied by, in part *Edge Sys. LLC v. Ageless Serums LLC, 2021 U.S. Dist. LEXIS 191012, 2021 WL 4497505 (C.D. Cal., Aug. 20, 2021)*

Request denied by *Edge Sys. LLC v. Ageless Serums LLC, 2021 U.S. Dist. LEXIS 254696, 2021 WL 7286036 (C.D. Cal., Oct. 24, 2021)*

Request granted, in part, Sanctions allowed by *Edge Sys. Llc v. Ageless Serums Llc, 2021 U.S. Dist. LEXIS 254697, 2021 WL 7286039 (C.D. Cal., Nov. 15, 2021)*

Request denied by, Without prejudice *Edge Sys., LLC v. Ageless Serums LLC, 2021 U.S. Dist. LEXIS 254695, 2021 WL 7286038 (C.D. Cal., Nov. 19, 2021)*

Later proceeding at *Edge Sys. Llc v. Ageless Serums Llc, 2021 U.S. Dist. LEXIS 254688 (C.D. Cal., Nov. 19, 2021)*

Costs and fees proceeding at, Sanctions disallowed by *Edge Sys. LLC v. Ageless Serums LLC, 2022 U.S. Dist. LEXIS 106098, 2022 WL 2093850 (C.D. Cal., Feb. 1, 2022)*

Request denied by, Without prejudice *Edge Sys. LLC v. Ageless Serums LLC, 2022 U.S. Dist. LEXIS 85347 (C.D. Cal., Apr. 15, 2022)*

Summary judgment granted by, in part, Summary judgment denied by, in part *Edge Sys. LLC v. Ageless Serums LLC, 2023 U.S. Dist. LEXIS 53267 (C.D. Cal., Mar. 28, 2023)*

Core Terms

counterclaim, serums, Trademark, affirmative defense, motion to dismiss, license agreement, tortious interference, tying arrangement, tied product, violation of antitrust laws, tying product, market power, customer-licensee, allegations, purchasing, antitrust, Licensee, unfair competition, hydradermabrasion, customer, products, license, argues, motion to strike, disruption, commerce, agrees, fails

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

Attorneys for Defendants: Not Present.

Judges: FERNANDO L. AENLLE-ROCHA, UNITED STATES DISTRICT JUDGE.

Opinion by: FERNANDO L. AENLLE-ROCHA

Opinion

CIVIL MINUTES — GENERAL

Proceeding: (IN CHAMBERS) ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS AND STRIKE AFFIRMATIVE DEFENSE [DKT. 15]

Ruling

Before the court is Plaintiff Edge Systems LLC's ("Edge" or "Plaintiff") Motion to Dismiss Defendant Ageless Serums LLC's ("Ageless" or "Defendant") counterclaims and strike Ageless' ninth affirmative defense for unlawful tying and illegality. Dkt. 15. For the reasons set forth below, the court GRANTS Edge's Motion with 20 days' leave to amend.

Background

Edge is a California corporation that designs and manufactures "skin resurfacing and rejuvenation systems, including microdermabrasion and hydradermabrasion systems." Dkt. 1 ("Compl.") ¶¶ 5, 8.[1] Edge alleges it has continuously used the mark "HYDRAFACIAL®" to advertise and promote its hydradermabrasion systems since 2005 and registered the mark on April 9, 2013 as Trademark Registration No. 4,317,059. *Id.* ¶¶ 11-12. Edge contracts with customer-licensees pursuant to a license agreement (the "Trademark License Agreement" or "Agreement"). **[*2]** *Id.* ¶ 20; Dkt. 1-2. Under the Trademark License Agreement, Edge authorizes customer-licensees to use the HYDRAFACIAL® mark in connection with the sale and promotion of hydradermabrasion treatments, "so long as those treatments are performed solely using genuine HydraFacial® Systems and genuine HydraFacial® Serums." Compl. ¶ 20.

Ageless is a Texas limited liability company that develops serums for use with hydradermabrasion systems and is a customer-licensee of Edge. *Id.* ¶¶, 21. According to Edge, Ageless urges Edge's customers to use Ageless' serums with Edge's hydradermabrasion equipment instead of Edge's own serums. *Id.* ¶¶ 21, 31-32. Edge contends Ageless is aware that if an Edge customer-licensee uses Ageless' serums with Edge's systems, the customer-licensee is in violation of its Trademark License Agreement with Edge. *Id.* ¶¶ 28-30.

Edge filed the Complaint on October 21, 2020, alleging six causes of action against Ageless for: (1) contributory trademark infringement; (2) unfair competition and contributory false designation of origin; (3) inducing breach of contract; (4) tortious interference with contractual relations; (5) unfair competition under *Cal. Bus. & Prof. Code § 17200 et seq.*; and (6) common law unfair competition. **[*3]** *Id.* ¶¶ 41-88.

Ageless filed the operative First Amended Answer and Counterclaims ("FAAC") on December 15, 2020, in which it asserts the following counterclaims against Edge: (1) "violation of antitrust laws"; (2) unfair competition under *Cal. Bus. & Prof. Code § 17200 et seq.* and California common law, based in part on "unlawful tying"; (3) defamation and false advertising; and (4) tortious interference with business relations. Dkt. 14 at 13 ("FAAC Counterclaims") ¶¶

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[1] While the subject motion concerns Ageless' counterclaims and affirmative defense, the court includes details from the operative Complaint solely for additional context and does not presume the allegations in the Complaint are true.

13-36. Ageless also asserts affirmative defenses, including its ninth affirmative defense that Edge has violated federal and state antitrust laws. *Id.* (Affirmative Defenses) ¶ 9.[2]

Ageless alleges Edge's Trademark License Agreement constitutes an unlawful tying agreement. FAAC Counterclaims at ¶ 15. According to Ageless, the Agreement provides that a customer-licensee may purchase Edge's skincare equipment only on condition the customer-licensee also purchases Edge's serums. *Id.* Ageless further alleges Edge "has market power in the market for the equipment it sells, including the HydraFacial equipment," and that Edge has "restrained commerce" and "exclude[d] competition." *Id.* at ¶¶ 16-17.

On December 20, 2020, Edge filed the present motion to dismiss Ageless' (1) **[*4]** antitrust counterclaim, (2) unfair competition claim to the extent it relies on violations of ***antitrust law***, and (3) tortious interference claim. Dkt. 15. Edge simultaneously moves to strike Ageless' affirmative defense based on alleged violations of federal and state antitrust laws. *Id.*

The court finds this matter appropriate for resolution without oral argument. *See Fed. R. Civ. P. 78(b)*; Local Rule 7-15.

Discussion

I. Legal Standards

A. Motion to Dismiss under *Rule 12(b)(6)*

The standard for evaluating a motion to dismiss a counterclaim is the same as for a motion to dismiss a complaint. *See, e.g., Portney v. CIBA Vision Corp., 593 F. Supp. 2d 1120, 1122 (C.D. Cal. 2008)* (evaluating motion to dismiss counterclaims under *Rule 12(b)(6)*). Under *Fed. R. Civ. P. 12(b)(6)*, a party may file a motion to dismiss a complaint for "failure to state a claim upon which relief can be granted." The purpose of *Rule 12(b)(6)* is to enable defendants to challenge the legal sufficiency of the claims asserted in the complaint. *Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987)*.

A district court properly dismisses a claim under *Rule 12(b)(6)* if the complaint fails to allege sufficient facts "to support a cognizable legal theory." *Caltex Plastics, Inc. v. Lockheed Martin Corp, 824 F.3d 1156, 1159 (9th Cir. 2016)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter ... to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss **[*5]** does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* (internal citations omitted). "Determining whether a complaint states a plausible claim for relief is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Ebner v. Fresh, Inc., 838 F.3d 958, 963 (9th Cir. 2016)* (quoting *Iqbal, 556 U.S. at 679*).

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[2] Ageless asserts "Edge's claims are barred because they are illegal and constitute unlawful tying in violation of federal and state antitrust laws." Dkt. 14 at 10 ("FAAC Affirmative Defenses") ¶ 9. Ageless cites to "the *California Copyright Act § 16700 et. seq.*" (italics in original), by which Ageless presumably intended to cite the Cartwright Act, California's state antitrust statute, codified at *Cal. Bus. & Prof. Code § 16700 et seq.* The analysis under the Cartwright Act mirrors the analysis under federal law because the Cartwright Act was modeled after the Sherman Act. *Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*. Thus, the court will only address Ageless' claims under the Sherman Act.

When evaluating a complaint under *Rule 12(b)(6)*, the court "must accept all well-pleaded material facts as true and draw all reasonable inferences in favor of the plaintiff." *Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1140 (9th Cir. 2012)*. Legal conclusions, however, "are not entitled to the assumption of truth" and "must be supported by factual allegations." *Iqbal, 556 U.S. at 679*. A court must normally convert a *Rule 12(b)(6)* motion into a *Rule 56* motion for summary judgment if it considers evidence outside the pleadings. *United States v. Ritchie, 342 F.3d 903, 907-08 (9th Cir. 2003)*. "A court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting **[*6]** the motion to dismiss into a motion for summary judgment." *Id.*[3]

B. Motion to Strike Affirmative Defenses under *Rule 12(f)*

"Affirmative defenses plead matters extraneous to the plaintiff's prima facie case, which deny plaintiff's right to recover, even if the allegations of the complaint are true." *Fed. Deposit Ins. Corp. v. Main Hurdman, 655 F. Supp. 259, 262 (E.D. Cal. 1987)* (citing *Gomez v. Toledo, 446 U.S. 635, 640-41, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980)*). *Fed. R. Civ. P. 12(f)* permits a court to strike an insufficient defense. *Id. at 263*. The purpose of *Rule 12(f)* is "to avoid the expenditure of time and money that must arise from litigating spurious issues by disposing of those issues prior to trial." *Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 973 (9th Cir. 2010)* (quoting *Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)*).

On a motion to strike, the court must treat as admitted all material factual allegations underlying the challenged defenses and all reasonable presumptions that can be drawn therefrom. *State of Cal. ex rel. State Lands Comm'n v. United States, 512 F. Supp. 36, 39 (N.D. Cal. 1981)* (citation omitted). The grounds for a motion to strike must appear on the face of the pleading under attack or from matter which the court may judicially notice. *SEC v. Sands, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995)*. If an affirmative defense is stricken, such as for failure to plead sufficient facts, leave to amend should be freely given when doing so would not cause prejudice to the opposing party. *Vogel v. Huntington Oaks Delaware Partners, LLC, 291 F.R.D. 438, 440, 441-42 (C.D. Cal. 2013)*.

II. Sufficiency of Antitrust Counterclaim

A. Legal Standard

Sections 4 and *16* of the Clayton Act, codified in *15 U.S.C. §§ 15(a)*, *26*, create causes of action for private parties **[*7]** to seek damages and injunctive relief for violations of the federal antitrust laws. *Section 1* of the Sherman Act, codified in *15 U.S.C. § 1* ("*Section 1*"), proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations ...."

To establish a claim under *Section 1*, a plaintiff must show: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce in interstate or foreign commerce; (3) which actually injures competition; and (4) that the plaintiff suffered "antitrust injury," that is, that the plaintiff was harmed by the defendant's anticompetitive contract, combination, or conspiracy, and that this harm flowed from an "anti-competitive aspect of the practice under scrutiny." *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)*.

[3] Because the Trademark License Agreement forms the basis of Ageless' counterclaims and affirmative defense and Ageless refers extensively to the Agreement in its counterclaims, the court incorporates the Agreement (Dkt. 1-2) into Ageless' counterclaims. *See* *Ritchie, 342 F.3d at 908* ("Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim.").

"A tying arrangement is a device used by a competitor with market power in one market to extend its market power to an entirely distinct market. To accomplish this objective, the competitor agrees to sell one product (the tying product) but only on the condition that the buyer also purchase a different product (the tied product), **[*8]** or at least agrees that he will not purchase the tied product from any other supplier." *Paladin Assocs. v. Mont. Power Co., 328 F.3d 1145, 1159 (9th Cir. 2003)* (internal quotation marks and citation omitted). Tying is unlawful under *Section 1* "on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product.'" *Blough v. Holland Realty, Inc., 574 F.3d 1084, 1089 (9th Cir. 2009)* (quoting *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 912 (9th Cir. 2008)*).

"Tying can be either a per se violation or a violation under the rule of reason." *See Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1157 (9th Cir. 2001)*.[4] "A per se tying violation 'is proscribed without examining the actual market conditions, when the seller has such power in the tying product or service market that 'the existence of forcing is probable,' ... and there is 'a substantial potential for impact on competition.' A tying arrangement which is not unlawful per se may be invalidated under the 'rule of reason' if the party challenging the tie demonstrates that it is 'an unreasonable restraint on competition in the relevant market.' Both per se rules and the Rule of Reason are employed to form a judgment about the competitive significance of the restraint." *Id.* (internal quotation marks and citations omitted).

Tying arrangements are unlawful per se **[*9]** where a plaintiff shows: (1) the defendant tied together the sale of two distinct products or services; (2) the defendant possesses sufficient economic power, i.e., market power, in the tying product market to coerce its customers into purchasing the tied product; and (3) the tying arrangement affects a "not insubstantial volume of commerce" in the tied product market, such that there is reduced competition in the market for the tied product. *Blough, 574 F.3d at 1089* (brackets omitted); *Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 46, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* ("[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.").

B. Existence of a Tying Condition

"It is well settled that there can be no unlawful tying arrangement absent proof that there are, in fact, two separate products, the sale of one (i.e., the tying product) being conditioned upon the purchase of the other (i.e., the tied product)." *Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348. 1352 (9th Cir. 1982)*. As the Supreme Court has observed, "where the buyer is free to take either product by itself there is no tying problem ...." *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 6 n.4, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*.

Edge argues Ageless' antitrust counterclaims fail because the Trademark License Agreement does not condition purchase of Edge's equipment on purchase of Edge's serum. Dkt. 16 ("Mot. Br.") **[*10]** at 11-12. According to Edge, "There simply is not a word in the trademark license suggesting that dermatologists and other customers may not purchase Edge's equipment unless they also purchase Edge's serums." *Id.*

Ageless responds it has pleaded Edge sells two separate products, Edge's hydradermabrasion equipment and Edge's serum, and that the Trademark License Agreement establishes an unlawful tie between the two products. Opp. 9-12. According to Ageless, the clear language of the agreement "states that the equipment (the 'tying product' is to be used solely and exclusively by purchasing Edge's serum (the 'tied product') so that Edge's system will 'function properly and effectively." Opp. 11 (quoting Compl. Ex. 2 at ¶ 3.1).

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[4] A plaintiff that fails to state a per se unlawful tying claim may still prevail under the rule of reason. *See Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, *overruled on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. "[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978)*.

After reviewing the Trademark License Agreement, the court agrees with Edge. While Ageless argues the terms of the Trademark License Agreement condition the purchase of Edge's equipment on the purchase of Edge's serums, Opp. 11, FAAC Counterclaims at ¶ 15, the Agreement does not contain any such limitation and only governs a licensee's authorization to use Edge's trademarks. The "Grant of License" provision states, in relevant part:

> Licensor grants to Licensee the **[*11]** nonexclusive, royalty free right to reproduce and display the trademarks listed in Exhibit A attached hereto (collectively "Licensed Trademarks") solely in connection with the advertising and promotion of HydraFacial treatments and/or Perk treatments only within the Licensee's Territory as defined below. In addition, Licensor may grant to Licensee these same or lesser rights, with respect to select trademarks for use in marketing campaigns for future products or services....

Dkt. 1-2 (Ex. 2) at § 1, ¶ 1.1.

The purported tying provision, meanwhile, states that the agreement which grants the customer a license to use Edge's trademarks is conditioned upon the trademark "Licensee" purchasing Edge's serums from Edge or one of Edge's authorized distributors. *Id.* ¶ 3.1. The provision reads, in full:

> In recognition that the HydraFacial system and equipment and the Perk system and equipment only function properly and effectively with the use of Licensor's serum solutions and consumables, Licensee agrees to purchase the serum solutions and consumables used in the Purchased Equipment solely and exclusively from Licensor or its authorized distributor in good standing. Any unauthorized use of solutions **[*12]** other than Licensor's is not allowed, will void the warranty, and will result in an automatic termination of this License Agreement.

Dkt. 1-2 (Exhibit 2) ¶ 3.1 (underline added). Under this term of the Agreement, if a customer-licensee uses non-Edge serums with Edge's equipment, the Agreement automatically terminates, and the licensee may no longer use Edge's marks. *Id.*

Neither the grant of license nor the provision requiring the purchase of Edge's serums requires a purchaser of Edge's equipment to also purchase Edge's serum. These provisions only require licensees of Edge's trademarks to purchase Edge's serums to use the HydraFacial® mark in connection with their skincare services. Indeed, the Agreement is silent as to equipment purchasers who do not license Edge's mark, and nothing in the Agreement precludes a customer from purchasing Edge's equipment without purchasing Edge's serums. Ageless' allegations and arguments that the Trademark Licensing Agreement imposes any limitations on the purchase or use of Edge's equipment thus, fail.

Because Ageless' antitrust counterclaims are predicated on the existence of a tying arrangement between Edge's equipment and its serums, "the facts as **[*13]** pleaded do not fit the definition of a tying arrangement," and Ageless' antitrust counterclaims and affirmative defense of violation of antitrust laws fail. *See* *RealPage, Inc. v. Yardi Sys., No. CV-11-00690-ODW (JEMx), 2011 U.S. Dist. LEXIS 90095, at *14-15 (C.D. Cal. Aug. 11, 2011)* (dismissing tying claim for failure to allege plausibly existence of a tying condition); *see* *SEC, 902 F. Supp. at 1165*.[5]

Edge further argues Ageless' counterclaim fails on several additional dispositive grounds, namely, that Ageless fails to allege: (1) Edge ties two products in separate markets; (2) Ageless has suffered antitrust injury; (3) the existence of relevant antitrust markets as to either the tying or the tied product; (4) Edge enjoys market power with respect to the tying product; and (5) Edge has harmed competition. Mot. Br. at 2-4, 14-16. As Ageless has failed to allege the existence of an agreement that imposes a tying condition, the court need not address the parties' arguments as to these remaining grounds.

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[5] Plaintiff Edge additionally argues its trademarks cannot qualify as a separate tying product under *Krehl, 664 F.2d 1348 (9th Cir. 1982)*. Mot. Br. 11-14. Ageless responds the counterclaim does not allege Edge's trademark, but rather Edge's skincare device, is the tying product. Opp. at 11-13. As Ageless expressly asserts it is not alleging the existence of a tie between Edge's serums and its trademarks, the court need not address the parties' arguments regarding *Krehl*.

For the foregoing reasons, the court GRANTS Edge's Motion to Dismiss Ageless' first counterclaim for violation of antitrust laws and second counterclaim for unfair competition, to the extent the latter is premised on violation of antitrust laws. The court further GRANTS Edge's Motion to Strike Ageless' ninth affirmative defense **[*14]** for violation of antitrust laws, finding "there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed." *See* SEC, 902 F. Supp. at 1165. Defendant Ageless is granted 20 days' leave to amend to allow it the opportunity to plead sufficient facts to state these counterclaims and this affirmative defense.

III. Ageless' Tortious Interference With Business Relations Claim

The elements of tortious intentional interference with contract are: (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. *Guidiville Band of Pomo Indians v. NGV Gaming, LTD 531 F.3d 767, 774 (9th Cir. 2008)* (citation omitted).

The elements of tortious intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the **[*15]** relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by the acts of the defendant. *Packaging Sys. v. PRC-Desoto Int'l, Inc., 268 F. Supp. 3d 1071, 1089-90 (C.D. Cal. 2017)* (citing *Blank v. Kirwan, 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58 (1985)*). In addition to these elements, a plaintiff must show the defendant's conduct was wrongful by some legal measure other than the fact of the interference itself. *Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 393, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (1995)*. Wrongful, in this context, means the act of interference "is independently unlawful, that is, [] it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*.

Ageless does not specify whether its claim is for tortious interference with contract or tortious interference with prospective economic advantage. However, Edge argues Ageless fails to bring either claim because Ageless does not identify any actual or prospective contract with which Edge allegedly interfered. Mot. Br. at 20-21.[6] To the extent Ageless intends to bring a tortious interference with prospective economic advantage claim, Edge also argues such claim would fail because Ageless fails to allege Edge engaged in any wrongful conduct as the means of interference. *Id.*

The court agrees with Edge. The FAAC does not identify any contractual or prospective business relationship **[*16]** with which Edge allegedly interfered. *See* FAAC Counterclaims at ¶¶ 29-36. Although Ageless states it is prepared to allege these specific relationships as well as Edge's knowledge, acts of interference, and disruption of customer relationships in an amended counterclaim, Ageless implicitly concedes it has not done so in the current pleading. Opp. at 22. Instead, Ageless argues Edge has engaged in "obvious hypocrisy" since it has not met the same standard for its "Inducement to Breach Contract" claim. *Id.* Although a failure to plead all necessary elements of its inducement to breach contract claim may support a challenge to Plaintiff's corresponding claim, Plaintiff's failure to meet the pleading standards would not excuse Ageless from sufficiently pleading this cause of action in the FAAC.

Accordingly, the court GRANTS Edge's Motion to Dismiss Ageless' tortious interference claim with 20 days' leave to amend.

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[6] Ageless argues Edge's Complaint suffers from the same defect but does not cite any authority for the proposition that Ageless is entitled to avoid dismissal because Edge's Complaint purportedly does not name specific contractual relationships in connection with Edge's interference claim. Opp. at 22.

Conclusion

For the foregoing reasons, the court GRANTS Edge's Motion to Dismiss Ageless' first counterclaim for violation of antitrust laws, second counterclaim for unfair competition claim to the extent it relies on violations of ***antitrust law***, and fourth counterclaim for tortious **[*17]** interference with business relations, and GRANTS Edge's Motion to Strike Ageless' ninth affirmative defense for unlawful tying and illegality. Ageless shall have 20 days from the date of this order to file an amended answer and counterclaims.

IT IS SO ORDERED.

Sheet Metal Workers Local No. 20 Welfare & Ben. Fund v. CVS Pharm., Inc.

United States District Court for the District of Rhode Island

May 11, 2021, Decided; May 18, 2021, Filed

C.A. No. 16-046 WES; C.A. No. 16-447 WES

Reporter

540 F. Supp. 3d 182 *; 2021 U.S. Dist. LEXIS 93752 **; 2021 WL 1986564

SHEET METAL WORKERS LOCAL NO. 20 WELFARE AND BENEFIT FUND, and INDIANA CARPENTERS WELFARE FUND, on behalf of themselves and all others similarly situated, Plaintiffs, v. CVS PHARMACY, INC., et al., Defendants.PLUMBERS WELFARE FUND, LOCAL 130, U.A., on behalf of itself and all others similarly situated, Plaintiffs, v. CVS PHARMACY, INC., et al., Defendants.

Prior History: *Sheet Metal Workers Local No. 20 Welfare & Ben. Fund v. CVS Health Corp., 221 F. Supp. 3d 227, 2016 U.S. Dist. LEXIS 150804 (D.R.I., Nov. 1, 2016)*

Core Terms

prices, arbitration, damages, contracts, drugs, pharmacy, class certification, class member, named plaintiff, generic, health plan, predominate, parties, calculate, putative class member, putative class, Defendants', proposed class, reconciliation, consumer, rights, individual issues, prescription drug, class-wide, offset, class action, class period, common issue, aggregate, email

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

HN1[] **Arbitration, Arbitrability**

On a motion to dismiss in favor of arbitration, a court considers whether a valid arbitration clause exists, whether the movant is entitled to invoke the clause, whether the non-moving party is bound by it, and whether the clause covers the claims asserted. A court may then consider whether a party has waived the right to arbitrate.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

HN2[] **Arbitration, Arbitrability**

Even where a contract provides that an arbitrator shall decide issues of arbitrability, waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Orders to Compel Arbitration

HN3[] **Arbitration, Arbitrability**

Generally, a party may waive its right to arbitration explicitly or through its conduct. Under federal law, when deciding whether a litigant has waived its right to compel arbitration through litigation conduct, a court must consider several factors: (1) whether the parties participated in a lawsuit or took other action inconsistent with arbitration; (2) whether the litigation machinery has been substantially invoked and the parties are well into preparation of a lawsuit by the time an intention to arbitrate is communicated; (3) whether there has been a long delay and trial is near at hand; (4) whether the party seeking to compel arbitration has invoked the jurisdiction of the court by filing a counterclaim; (5) whether discovery not available in arbitration has occurred; and, (6) whether the party asserting waiver has suffered prejudice. In weighing the factors, no one factor carries the day, but rather, each case is to be judged on its particular facts. Waiver is not to be lightly inferred, thus reasonable doubts as to whether a party has waived the right to arbitrate should be resolved in favor of arbitration.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Arbitration & Award

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

HN4[] **Arbitration, Arbitrability**

It is not sufficient to assert in an answer the right to arbitrate as an affirmative defense.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN5[] **Arbitration, Arbitrability**

Where the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even where the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

HN6[] Arbitration, Arbitrability

A district court has the discretion to dismiss claims where one party has a right to arbitrate all claims.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN7[] Prerequisites for Class Action, Adequacy of Representation

In ruling on a motion for class certification, the court must undertake a rigorous analysis' to determine whether the putative class satisfies each of the four prerequisites set forth in Fed. R. Civ. P. 23(a): numerosity, commonality, typicality, and adequacy of representation. In addition to the Rule 23(a) prerequisites, to be certified, a putative class must demonstrate that it satisfies one of the requirements set forth in Rule 23(b).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

HN8[] Class Actions, Certification of Classes

The U.S. Supreme Court has cautioned that Fed. R. Civ. P. 23 does not set forth a mere pleading standard but rather, a plaintiff must affirmatively demonstrate its compliance with the Rule. This inquiry frequently overlaps with the merits of the plaintiff's underlying claim.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN9[] Prerequisites for Class Action, Numerosity

To be certified under Fed. R. Civ. P. 23, the members of a class must be so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). As a general rule, if the named plaintiffs demonstrate that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN10[] Prerequisites for Class Action, Commonality

Fed. R. Civ. P. 23(a)(2) requires questions of law or fact common to the class. A common question is one that is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Even a single common question will do.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN11[] **Prerequisites for Class Action, Adequacy of Representation**

For a class to be certified under Fed. R. Civ. P. 23, the proposed class representatives must demonstrate that they will fairly and adequately protect the interests of the class, Fed. R. Civ. P. 23(a)(4), and the claims or defenses of the representative parties are typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN12[] **Prerequisites for Class Action, Adequacy of Representation**

Only fundamental conflicts that go to the heart of the litigation prevent a plaintiff from meeting the Fed. R. Civ. P. 23(a)(4) adequacy requirement.

Pensions & Benefits Law > ERISA > Federal Preemption > State Laws

HN13[] **Federal Preemption, State Laws**

To the extent an employee benefit plan is subject to ERISA, courts have concluded that ERISA provides it with the capacity to sue under state law.

Business & Corporate Law > Unincorporated Associations

Civil Procedure > Parties > Capacity of Parties > Representative Capacity

HN14[] **Business & Corporate Law, Unincorporated Associations**

Fed. R. Civ. P. 17(b)(3)(A) of the Federal Rules of Civil Procedure provides that an unincorporated association may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws, and therefore, named Plaintiffs have capacity to pursue their federal RICO claims. Fed. R. Civ. P. 17(b)(3)(A)).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

HN15[] **Class Actions, Certification of Classes**

To meet their burden on a motion for class certification, named plaintiffs must demonstrate, by a preponderance of the evidence, that the class is currently and readily ascertainable based on objective criteria.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN16[] **Prerequisites for Class Action, Commonality**

Under Fed. R. Civ. P. 23(b)(3), a putative class must demonstrate that common issues predominate over individual issues. Class members' claims must depend upon a common contention. That common contention, moreover, must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. What matters to class certification is not the raising of common questions' — even in droves — but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Pervasive dissimilarities within the proposed class may serve to prevent the generation of common answers. To find predominance, the district court must determine that it can dispose of any differences among class members' claims in a manner that is not inefficient or unfair.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN17[] **Class Actions, Certification of Classes**

Where a putative class action raises individual issues for adjudication, a class may be certified only if the proposed adjudication will be both administratively feasible and protective of defendants' Seventh Amendment and due process rights.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN18[] **Class Actions, Certification of Classes**

Before certifying a class, a district court must offer a reasonable and workable plan for how that opportunity will be provided in a manner that is protective of the defendant's constitutional rights and does not cause individual inquiries to overwhelm common issues.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN19[] **Class Actions, Certification of Classes**

As in any action in which determining whether any given class member was injured (and therefore has a claim) turns on an assessment of the individual facts. But the need to assess individual circumstances does not alone foreclose class certification. Instead, class certification is precluded only where such challenges are reasonably plausible in a given case and the plaintiff cannot demonstrate that allowing for such challenges in a manner that protects the defendant's rights will be manageable and superior to the alternatives.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN20[] Class Actions, Certification of Classes

The court will not allow arguments woven entirely out of gossamer strands of speculation and surmise to tip the decisional scales in a class certification ruling.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN21[] Class Actions, Certification of Classes

Affirmative defenses are appropriate for consideration in the class certification calculus. Although a necessity for individualized statute-of-limitations determinations invariably weighs against class certification under Fed. R. Civ. P. 23(b)(3), the courts reject any per se rule that treats the presence of such issues as an automatic disqualifier. In other words, the mere fact that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

HN22[] Class Members, Absent Members

The court will take full advantage of its authority to place class members with potentially barred claims in a separate subclass or exclude them from the class altogether where evidence later shows that an affirmative defense is likely to bar claims against at least some class members.

Contracts Law > Contract Interpretation > Intent

HN23[] Contract Interpretation, Intent

It is not enough for a nonsignatory to have some resulting benefit from a signatory's exercise of its contractual rights. Instead, the contract must mention or manifest an intent to confer specific legal rights upon nonsignatory.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN24[] Arbitration, Arbitrability

Federal courts have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues to resolve in arbitration are intertwined with the agreement that the estopped party has signed. Arbitration with a nonsignatory can be compelled where the parties to the contract agreed to arbitrate any action arising out of, or relating in any way to the agreement. Where contract language explicitly limits the agreement to disputes between the signatories and there is no evidence of the signatory's intent to arbitrate with the nonsignatory, arbitration cannot be compelled.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN25[] **Arbitration, Arbitrability**

Some putative class members may be subject to mandatory arbitration is not a bar to class certification. Where common issues otherwise predominated, courts have usually certified Fed. R. Civ. P. 23(b)(3) classes even though individual issues were present in one or more affirmative defenses.

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

Governments > Legislation > Statute of Limitations > Time Limitations

HN26[] **Racketeer Influenced & Corrupt Organizations, Claims**

A RICO, 18 U.S.C.S. § 1961, et seq., claim has not accrued where injury to a plaintiff's property is speculative.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN27[] **Class Actions, Certification of Classes**

A class may be certified without each putative class member first establishing standing, and Fed. R. Civ. P. 23 does not require the district court to establish injury in fact for each class member prior to class certification. But, the defendants must be afforded a meaningful opportunity to challenge injury in fact and pick off uninjured class members before or at trial.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN28[] **Class Actions, Certification of Classes**

To satisfy the predominance requirement for class certification, not only must liability be established through common proof, but the plaintiffs must also demonstrate that any resulting damages would likewise be established by sufficiently common proof. To do so, the plaintiffs must establish that damages are both capable of measurement on a classwide basis and tied to their theory of liability.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN29[] Class Actions, Certification of Classes

A model measuring class-wide damages in a class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Fed. R. Civ. P. 23(b)(3). Calculations need not be exact, but at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN30[] Class Actions, Certification of Classes

For the final prerequisite to class certification, the plaintiffs bear the burden of establishing that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). In undertaking this analysis, the court examines four factors: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3). The court is mindful that the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. The superiority and predominance inquiries thus ensure that class action litigation will achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

Counsel: **[**1]** For Sheet Metal Workers Local No. 20 Welfare and Benefit Fund, Indiana Carpenters Welfare Fund, On behalf of themselves and all others similarly situated, Plaintiffs (1:16-cv-00046-WES-PAS): Ben M Harrington, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Elizabeth A. Fegan, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Chicago, IL; Jennifer Fountain Connolly, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Washington, DC; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; William N. Riley, PRO HAC VICE, Riley Williams & Piatt, LLC, Indianapolis, IN; Stephen M. Prignano, McIntyre Tate LLP, Providence, RI.

For CVS Health Corporation, Defendant (1:16-cv-00046-WES-PAS): Enu A. Mainigi, LEAD ATTORNEY, PRO HAC VICE, Williams & Connolly LLP, Washington, DC; Grant Andrew Geyerman, LEAD ATTORNEY, PRO HAC VICE, Williams & Connolly LLP, Washington, DC; Robert Clark Corrente, LEAD ATTORNEY, Whelan, Corrente, Flanders, Kinder & Siket LLP, Providence, RI; Christopher N. Dawson, Whelan, Corrente, Flanders, Kinder & Siket LLP, Providence, RI; Frank Lane Heard, III, PRO HAC VICE, Williams & Connolly LLP, Washington, DC; Kathryn E. Hoover, PRO HAC VICE, Williams **[**2]** & Connolly LLP, Washington, DC; William T. Burke, PRO HAC VICE, Williams & Connolly LLP, Washington, DC.

For Plumbers Welfare Fund, Local 130, U.A., on behalf of itself and all others similarly situated, Plaintiff (1:16-cv-00447-WES-PAS): Ben M Harrington, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Donald F. Harmon, PRO HAC VICE, Burke Burns & Pinelli, Ltd., Chicago, IL; Elizabeth A. Fegan, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Chicago, IL; Ivy Arai Tabbara, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Jennifer Fountain Connolly, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Washington, DC; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Stephen M. Prignano, McIntyre Tate LLP, Providence, RI.

For CVS Health Corporation, Defendant (1:16-cv-00447-WES-PAS): Robert Clark Corrente, LEAD ATTORNEY, Whelan, Corrente, Flanders, Kinder & Siket LLP, Providence, RI; Enu A. Mainigi, PRO HAC VICE, Williams & Connolly LLP, Washington, DC; Grant Andrew Geyerman, PRO HAC VICE, Williams & Connolly LLP, Washington, DC; Kathryn E. Hoover, PRO HAC VICE, Williams & Connolly LLP, Washington, DC; William T. Burke, PRO HAC VICE, Williams **[**3]** & Connolly LLP, Washington, DC.

Judges: William E. Smith, United States District Judge.

Opinion by: William E. Smith

Opinion

[*189] MEMORANDUM AND ORDER

WILLIAM E. SMITH, District Judge.

Plaintiffs Sheet Metal Workers Local No. 20 Welfare and Benefit Fund ("Sheet Metal Workers"), Indiana Carpenters Welfare Fund ("Indiana Carpenters"), and Plumbers Welfare Fund Local 130 ("Plumbers") (collectively, "Plaintiffs" or "named Plaintiffs") move to certify four classes of third-party payors ("TPPs") or health plans in two consolidated cases. Pls.' Mem. in Supp. of Pls.' Mot. for Class Certification ("Pls.' Mot.") 1-3, ECF No. 123;[1] see also Reply in Supp. of Pls.' Mot. for Class Certification ("Pls.' Reply") 3-4, ECF No. 145-1 (amending the class definition for the "Omissions Consumer Protection Class").[2] They allege that Defendant CVS Pharmacy, Inc. ("CVS") and five pharmacy benefit managers ("PBMs") — Defendant Caremark, L.L.C. ("Caremark", together with CVS, "Defendants"), Express Scripts, Inc., OptumRx, Inc., Medco Health Solutions, Inc.,[3] and MedImpact Healthcare Systems, Inc. — engaged in a nationwide scheme and conspiracy to overcharge TPPs, in violation of the *Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq.*, and various state laws. First Am. Compl. ("FAC") 5-9, 52-84, ECF **[**4]** No. 171. Specifically, Plaintiffs allege that CVS defrauded and overcharged the health plans in failing to treat its Health Savings Pass ("HSP") membership prices as its "Usual and Customary" ("U&C") prices when reporting U&C prices to the PBMs. Moreover, Plaintiffs claim that CVS and the PBMs conspired to conceal from the TPPs that the HSP prices were not included in its U&C prices.

In addition, Caremark moves to dismiss Sheet Metal Workers' claims against Caremark, on the basis that the parties have agreed to arbitrate any disputes between them. See generally Mem. in Supp. of Caremark LLC's Mot. under the FAA to Dismiss the Claims of Sheet Metal Workers ("Caremark Mot. to Dismiss") 1, ECF No. 163-1.

For the reasons that follow, Plaintiffs' Motion for Class Certification, ECF No. 120, is GRANTED, and Caremark's Motion to Dismiss, ECF No. 163, is also GRANTED. The Court DENIES WITHOUT PREJUDICE Plaintiffs' Motions to Exclude the Expert Testimony of Catherine Graeff, Michael P. Salve, Ph.D., and Brett E. Barlag, ECF Nos. 140-42.

I. Background[4]

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[1] All docket entries refer to the docket in C.A. No. 16-046.

[2] Defendants make much of the term "health plans" as overly vague, but Plaintiffs clarify that it is used as a synonym for "third-party payor" — "namely, any entity (other than the patient or health care provider) that reimburses the patient's health care expenses (e.g., pharmaceutical purchases)." Pls.' Reply 18. In this opinion, "TPPs" and "health plans" are used interchangeably.

[3] Express Scripts purchased MedCo in 2012. FAC ¶¶ 12, 111. During the life of the HSP Program, Indiana Carpenters' PBM was MedCo. Id. ¶ 12.

Retail pharmacy chains generally sell their prescription drugs to two groups of consumers: those with prescription insurance, and **[**5]** those without insurance, also referred to as cash payors. FAC ¶ 29. Customers with insurance make up well **[*190]** over 90 percent of CVS's prescription drug business, and their prescription purchases are processed and paid for (in part or in full) by health plans, including health insurance companies, third-party administrators, health maintenance organizations, self-funding health and welfare benefit plans, health plans, and other health benefit providers (collectively referred to herein as "health plans" or "TPPs"). Id.

Pharmacies, including CVS, report the prices they charge cash customers, known as the "Usual and Customary" or "U&C" price, to PBMs and TPPs to comply with the National Council for Prescription Drug Program's ("NCPDP") requirements. Id. ¶¶ 1, 33-35. This arrangement (and the contracts between CVS and the PBMs), in part, guarantees that TPPs and insured consumers do not pay more for a prescription drug than an uninsured consumer would pay for the same drug. Id. ¶ 1.

Pharmacy benefit managers, or PBMs, facilitate transactions between TPPs and pharmacies. Id. ¶ 28. TPPs contract with PBMs to perform services "including the negotiation of drug prices with drug companies, creation **[**6]** of formularies, management of prescription billing, construction of retail pharmacy networks for insurers, and provision of mail-order services." Id. PBMs set up how pharmacy claims are adjudicated consistent with instructions from their TPP clients. Id. ¶ 36. Pursuant to PBM/TPP contracts, TPPs pay their PBMs for generic drugs purchased by their members based on the "lower of" three benchmark prices: average wholesale price ("AWP") less a defined percentage (i.e., AWP - %); U&C; or Maximum Allowable Cost ("MAC"). Id. ¶¶ 39-41. A drug's AWP is set and published by third parties. Id. ¶ 40. PBMs set the MAC for each generic drug on their proprietary MAC lists. Id. ¶ 41. The U&C is set by the pharmacy and is typically the highest of the three prices. Id. ¶ 42.

PBMs also contract with pharmacies to dispense drugs to their TPP clients. Id. ¶ 43. In those contracts, PBMs also typically agree to pay pharmacies based on benchmark prices, such as AWP, U&C, and MAC. Id. As the middlemen, PBMs make their profit from charging their TPP clients more for drugs than they pay the pharmacy for the transactions. Id. Thus, PBMs do not disclose the prices they charge their TPP clients, nor what they pay **[**7]** pharmacies. Id.

It was against this backdrop that, in September 2006, "Walmart turned the world of generic prescription drugs upside-down" by announcing that it would charge $4 for a 30-day supply, and $10 for a 90-day supply, of hundreds of generic prescription drugs. Id. ¶¶ 2, 52. Target, Walgreens, Rite Aid, and other retailers with pharmacies followed suit. Id. ¶ 52. Walmart and Target (until CVS acquired Target pharmacies in 2015) reported $4 as their U&C prices. Id. Tweaking the model a bit, Walgreens and Rite Aid required customers to "join" their generic prescription drug programs to reap the benefits. Id. ¶ 57.

Plaintiffs allege that CVS joined with Caremark (and later ScriptSave), a fellow subsidiary of CVS Health Corporation, to sketch out a discount generic drug program that shielded CVS from reporting the discount price as its U&C to PBMs. Id. ¶¶ 56-57, 71-83. In March 2008, prior to launching the HSP program, CVS and Caremark analyzed how adopting a generic discount program would impact CVS's revenue from TPPs. Id. ¶ 59. An analyst at CVS determined that the impact to TPP revenue would be $866 million annually if CVS included all the drugs on the Walmart list, and, if CVS **[**8]** included all the drugs on the Walgreens list, the impact would be an additional $329 million. Id. As a result, CVS structured its HSP differently, **[*191]** citing concerns that "[m]aking the program 'too attractive' creates higher risk for our 3rd party plan pricing and profitability." Id. ¶ 61 (quoting CVSSM-0002427, at 2430 (May 8, 2008 presentation given to Larry Merlo, as edited by Bari A. Harlam at Caremark)). Unlike Walmart and Walgreens, CVS decided to charge consumers a $10 annual fee to join the program. Id. ¶ 65. Plaintiffs allege that, in addition to collaborating with Caremark, CVS also "enlisted the participation of" three of the largest PBMs in the country, Express Scripts, OptumRx, and MedImpact, to embark on a scheme to conceal from health plans its HSP drug prices when reporting U&C prices. Id. ¶ 3.

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[4] The Court gleans the background from Plaintiffs' First Amended Complaint. See generally First Am. Compl. ("FAC"), ECF No. 81-1.

In November 2008, the HSP program went live. Id. ¶ 64. From November 9, 2008 through 2010, customers paid a $10 annual fee to join the program, which gave them access to a 90-day supply of 400 commonly prescribed generic drugs for $9.99. Id. ¶¶ 64-65. Starting in 2011, the annual fee went up to $15, and CVS raised the price for HSP-listed drugs to $11.99 for a 90-day supply and $3.99 **[**9]** for a 30-day supply. Id. ¶ 65. From November 2008 to February 2016, CVS did not report the HSP price as the U&C price for HSP-eligible drugs. Id. ¶ 66. Caremark administered the HSP program from its inception until July 2013, when ScriptSave took over its administration; the program was discontinued on January 31, 2016. Id. ¶¶ 23, 70, 83. Caremark played a dual rule in this saga: in addition to administering the HSP program, many TPPs used Caremark as a PBM. Id. ¶ 3.

Importantly, PBMs have incentive to encourage or conceal inflated U&C prices — PBMs make more money when U&C prices are higher. Id. ¶ 47. When a PBM pays a pharmacy the U&C price for a generic drug transaction, the TPP also pays the U&C price to the PBM. Under those circumstances, the PBM makes no profit or "spread" between what it pays the pharmacy and what the TPP pays the PBM. Id. ¶ 49. During the HSP program, CVS's HSP prices were often lower than the price a TPP would have paid under a formula using AWP or MAC as the benchmark price. Id. ¶ 50. Therefore, if CVS had reported its HSP prices as U&C prices, the U&C price generally would have been the lowest benchmark price. Id. Thus, PBMs stood to lose "hundreds of millions **[**10]** of dollars in 'spread' opportunities" were HSP prices to be reported as U&C prices. Id.

Plaintiffs allege that, for this reason, Caremark, Express Scripts, OptumRx, and MedImpact not only failed to intervene and prevent CVS's alleged fraudulent scheme, but concealed it "by adopting 'policies' that contradicted the language of their own contracts and provider manuals . . . ." Id. ¶ 51. Specifically, in its role as a PBM, Caremark instituted a policy that differentiated between Walmart's $4 generic program and "Club Plans" — like the HSP program — that required consumers to join and pay a membership fee. Id. ¶ 4. Under this policy, generic programs without membership fees were required to report their plan prices as U&C prices, and "Club Plans" were not. Id. Caremark did not disclose this policy to its TPP clients, other than those members of its Client Advisory Board. As a result, Plaintiffs allege, CVS and Caremark — both as HSP administrator and PBM — concealed from TPPs that CVS was not reporting HSP prices as U&C prices for HSP-eligible drugs. Id. ¶¶ 3-5.

II. Discussion

A. Defendant Caremark's Motion to Dismiss Sheet Metal Workers' Claims under the Federal Arbitration Act

Caremark moves **[**11]** to dismiss Sheet Metal Workers' claims under the *Federal Arbitration Act ("FAA")*, **[*192]** arguing that the operative agreements between Caremark and Sheet Metal Workers include arbitration clauses. See generally Caremark Mot. to Dismiss 1. Caremark argues that Sheet Metal Workers violated the parties'[5] agreements by initiating this suit against Caremark and by refusing to engage in dispute-resolution negotiations. See id. Caremark highlights that, under the parties' dispute-resolution provisions, Sheet Metal Workers agreed to do the following in advance of litigation: (1) give notice of any dispute; (2) designate a dispute-resolution representative; (3) negotiate in good faith to resolve the dispute; and (4) submit to binding arbitration in Cook County, Illinois if negotiations did not resolve the dispute in 90 days. Id.

HN1[] On a motion to dismiss in favor of arbitration, a court considers "whether a valid arbitration clause exists, whether the movant is entitled to invoke the clause, whether the non-moving party is bound by it, and whether the clause covers the claims asserted." *FPE Found. v. Cohen, 801 F.3d 25, 29 (1st Cir. 2015)* (citing *Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino, 640 F.3d 471, 474 (1st Cir. 2011)*). A court may then consider whether a party has waived the right to arbitrate. Id. Here, Sheet Metal Workers argues only that Caremark has **[**12]** forfeited its arbitration rights by sitting on its hands, and that not all claims asserted fall within the relevant arbitration provisions. See Resp. in Opp'n to Def. Caremark's Mot. for Leave to File Mot. under the FAA to Dismiss the Claims of Sheet Metal Workers ("Pls.' Opp'n to Mot. to Dismiss") 5, ECF No. 132; Sheet Metal Workers

[5] In this section, "parties" refers only to Plaintiff Sheet Metal Workers and Defendant Caremark.

Sur-Reply in Opp'n to Def. Caremark's Mot. For Leave to File Mot. Under FAA to Dismiss ("Sheet Metal Workers Sur-Reply") 8-9, ECF No. 164.

But before the Court can pass on whether Caremark waived its right to arbitration, the Court must first address a threshold issue: whether the Court or an arbitrator should decide whether Caremark forfeited its right to arbitrate through litigation-conduct waiver.[6]

1. Who Decides Litigation-Conduct Waiver?

Caremark argues that whether it waived its right to arbitrate under the relevant contracts is an issue of arbitrability for an arbitrator, not the Court, to decide. Reply in Supp. of Caremark's Mot. for Leave to File Mot. under the FAA to Dismiss the Claims of Sheet Metal Workers ("Caremark Reply") 1, ECF No. 135. This is because, Caremark says, the contracts at issue here incorporate the commercial rules of the **[**13]** American Arbitration Association ("AAA"), which delegate the issue of arbitrability to an arbitrator. Id. at 4-5 (citing Prescription Benefit Services Agreement ¶ 13.16 (Jan. 1, 2015) ("PBSA"), ECF No. 131-32).

[*193] ***HN2***[] In *Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 14-15 (1st Cir. 2005)*, the First Circuit held that, even where a contract provides that an arbitrator shall decide issues of arbitrability, "waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court." Applying this rule, courts in this Circuit have decided issues of litigation-conduct waiver, distinct from issues of arbitrability. See, e.g., *In re Intuniv Antitrust Litig., No. 1:16-CV-12653-ADB, 2021 WL 517386, at *8 (D. Mass. Feb. 11, 2021)* (citing *Christensen v. Barclays Bank Del., No. 18-cv-12280, 2019 U.S. Dist. LEXIS 72239, 2019 WL 1921710, at *5 (D. Mass. Apr. 30, 2019)*; *Binienda v. Atwells Realty Corp., No. 15-cv-00253, 2018 U.S. Dist. LEXIS 38765, 2018 WL 1271443, at *2-3 (D.R.I. Mar. 9, 2018)*; *Cutler Assocs., Inc. v. Palace Constr., LLC, 132 F. Supp. 3d 191, 199-200 (D. Mass. 2015)*).

Caremark contends that after the Supreme Court's decisions in *BG Group, PLC v. Republic of Argentina, 572 U.S. 25, 134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014)*, and *Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 202 L. Ed. 2d 480 (2019)*, Marie is no longer good law, and issues of litigation-conduct waiver are now consigned to an arbitrator. Caremark Reply 3. This argument gets no traction.

In BG Group, the Supreme Court recognized that "courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." *572 U.S. at 34* (citation omitted). "These procedural matters include claims of 'waiver, delay, or a like defense to arbitrability.'" *Id. at 35* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)*). This Court **[**14]** previously considered, in *Binienda, 2018 U.S. Dist. LEXIS 38765, 2018 WL 1271443, at *2-3*, whether BG Group displaced the reasoning in Marie, and concluded that it did not.

In BG Group, the Supreme Court emphasized that parties typically expect a forum-based decisionmaker to decide forum-specific procedural gateway matters, including "the satisfaction of 'prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate.'" *572 U.S. at 34-35* (quoting *Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)*). Thus, "waiver", as contemplated in *BG Group*, does not include "litigation-conduct waiver". See *Binienda, 2018 U.S. Dist. LEXIS 38765, 2018 WL 1271443, *2*. As it did in Binienda, this Court concludes that "[n]othing in BG Group undercuts the holding in Marie, that the Supreme Court did not intend to alter [the] traditional rule that courts presumptively decide

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[6] Caremark argues that Illinois law, not federal law, applies to this dispute. Caremark Reply 8-9. While the Court need not reach the issue, the First Circuit has signaled that litigation-conduct waiver is an issue of federal law. See *Rankin v. Allstate Ins. Co., 336 F.3d 8, 12 n.3 (1st Cir. 2003)* (noting that, while not argued, "arbitration-related issues in this case are probably governed by the" FAA and, if so, "federal law would automatically govern waiver issues" (citation omitted)). Under either body of law, the result here is the same. See *LRN Holding, Inc. v. Windlake Capital Advisors, LLC, 409 Ill. App. 3d 1025, 949 N.E.2d 264, 270-72, 350 Ill. Dec. 776 (Ill. App. 3d Dist. 2011)* (noting that, under Illinois law, where a contract contains a choice-of-law provision and incorporates the American Arbitration Association rules of arbitration, federal law applies to questions regarding arbitration).

issues of litigation-conduct waiver." Id. (citation omitted); see also *Rankin v. Allstate Ins. Co., 336 F.3d 8, 12 (1st Cir. 2003)* (pre-dating BG Group, but emphasizing that "an arbitration provision has to be invoked in a timely manner or the option is lost" and, "[u]nder federal law, such a forfeiture is an issue for the judge" (citations omitted)).

Nor does Henry Schein come to Caremark's aid. In Henry Schein, the Supreme Court held that when a contract delegates arbitrability to an arbitrator, courts must give full **[**15]** meaning to that delegation and refrain from passing on any issues of arbitrability. *139 S. Ct. at 529*. Here, in contrast, whether Caremark waived its right to arbitrate through litigation conduct in this judicial forum is a distinct issue from the underlying arbitrability of the dispute. See *In re Intuniv Antitrust Litig., 2021 WL 517386, at *8* (concluding that the Supreme Court's decision in Henry Schein did not upset Marie's **[*194]** holding); see also *Sabatelli v. Baylor Scott & White Health, 832 F. App'x 843, 848 n.3 (5th Cir. 2020)* (noting that litigation-conduct waiver "is an issue for the court, rather than the arbitrator, to decide . . . because it 'implicates courts' authority to control judicial procedures or to resolve issues . . . arising from judicial conduct'" (quoting *Vine v. PLS Fin. Servs., 689 Fed. Appx. 800, 802-03 (5th Cir. 2017)*); *Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 219, 48 V.I. 1034 (3d Cir. 2007)*.[7]

The Court therefore concludes that litigation-conduct waiver is presumptively an issue for the Court, not an arbitrator, to decide.

2. Litigation-Conduct Waiver

Next, Caremark argues that it has not waived its right to arbitrate Sheet Metal Workers' claims through its participation in this litigation. Caremark Reply 8-15. ***HN3***[] Generally, a party may waive its right to arbitration explicitly or through its conduct. *FPE Found., 801 F.3d at 29*. Under federal law, when deciding whether a litigant has waived its right to compel arbitration through litigation conduct, a court must **[**16]** consider several factors:

> (1) whether the parties participated in a lawsuit or took other action inconsistent with arbitration; (2) whether the litigation machinery has been substantially invoked and the parties [are] well into preparation of a lawsuit by the time an intention to arbitrate [is] communicated; (3) whether there has been a long delay and trial is near at hand; (4) whether the party seeking to compel arbitration has invoked the jurisdiction of the court by filing a counterclaim; (5) whether discovery not available in arbitration has occurred; and, (6) whether the party asserting waiver has suffered prejudice.

Id. (citation and quotation omitted) (alterations in original). In weighing the factors, no one factor carries the day, but rather, "each case is to be judged on its particular facts." *Tyco Int'l Ltd. v. Swartz (In re Tyco Int'l Ltd. Sec. Litig.), 422 F.3d 41, 46 (1st Cir. 2005)* (citation omitted). "'[W]aiver is not to be lightly inferred,' thus reasonable doubts as to whether a party has waived the right to arbitrate should be resolved in favor of arbitration." *Id. at 44* (quoting *Restoration Pres. Masonry, Inc. v. Grove Eur. Ltd., 325 F.3d 54, 61 (1st Cir. 2003)*). Here, the question is whether Caremark invoked its arbitration right in a timely manner consistent with its desire to arbitrate. See id.

While Plaintiffs initiated this suit against CVS in **[**17]** 2016, they did not seek leave to amend their Complaint to add Caremark as a defendant until June 5, 2017. See Pls.' Mot. for Leave to File First Am. Compl., ECF No. 56. After being granted that leave, on May 4, 2018, Plaintiffs filed the First Amended Complaint, naming Caremark as a defendant. FAC, ECF No. 81-1. Caremark answered on July 3, 2018, asserting that "putative class members and at

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[7] Caremark further highlights that the current version of the AAA's Commercial Rules states that "[n]o judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate." Caremark Reply 5 (quoting American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, *Rule 52(a)* (2013)). However, the AAA's Commercial Rules contained this same language when the First Circuit decided Marie, and thus, this argument is not persuasive. See *In re Intuniv Antitrust Litig., 2021 WL 517386, at *8*. Moreover, one could interpret the text "judicial proceeding by a party" as denoting that a plaintiff does not waive its right to arbitrate by filing suit. But in any event, the Rules only govern arbitration, they have no bearing on the Court's determinations.

least one Plaintiff have agreed to, and failed to comply with, dispute **[*195]** resolution procedures for their claims . . . ." Caremark L.L.C.'s Answer to FAC ¶ 29, ECF No. 90.

On October 31, 2018, Caremark began the dispute-resolution process and sent Sheet Metal Workers a Dispute Notice requesting a response within ninety days in accordance with the arbitration clause. See Caremark Dispute Resolution Ltr 1, ECF No. 129-79. In that letter, Caremark designated a representative and requested that Sheet Metal Workers do the same. Id. at 1-2. Sheet Metal Workers responded on January 22, 2019, declining to participate in the dispute resolution process and asserting that Caremark had forfeited its right to compel that process. Sheet Metal Worker Dispute Resolution Ltr 1-2, ECF No. 129-80. Caremark responded, **[**18]** denying Sheet Metal Workers' forfeiture argument, on January 26, 2019. Caremark Dispute Resolution Ltr, ECF No. 129-81. The 90-day period expired on January 29, 2019, and Sheet Metal Workers did not respond to Caremark's final letter. See Caremark Mot. to Dismiss 3. Plaintiffs filed their Motion for Class Certification on April 29, 2019, and on July 17, 2019, Caremark filed its Motion for Leave to File Motion under the FAA to Dismiss the Claims of Sheet Metal Workers, ECF No. 127.

The upshot is that Caremark was added as a defendant on May 4, 2018, engaged in the dispute-resolution process from October 31, 2018 to January 29, 2019, and sought dismissal based on arbitration on July 17, 2019.[8] While the down time before and after the dispute resolution process (May to October 2018, and January to July 2019) remains somewhat unexplained, it was not particularly long. Importantly, prior to its filing this Motion, Caremark's litigation-related activity vis-à-vis Sheet Metal Workers was limited to responding to discovery requests. Caremark Reply 12. Caremark further filed its Motion to Dismiss prior to any summary judgment deadline and well in advance of (a yet-to-be-scheduled) trial. Id. **[**19]** at 13.

Thus, turning to the six factors the Court must consider, the first five factors lean in Caremark's favor. During the period of delay, Caremark and Sheet Metal Workers participated very little in the lawsuit, no substantive motions were litigated, trial was still far off, Caremark filed no counterclaims against Sheet Metal Workers, and Sheet Metal Workers does not claim that Caremark secured discovery that is unavailable in arbitration.[9] See *FPE Found., 801 F.3d at 29*. Notably, Caremark did not, for instance, file counterclaims against Sheet Metal Workers, serve discovery requests on Sheet Metal Workers, file motions against Sheet Metal Workers, or seek adjudication of any arbitrable issue involving Sheet Metal Workers. Caremark Reply 12. Caremark further filed its Motion to Dismiss well in advance of any trial date, and before any other substantive deadlines, aside from class certification. **[*196]** See *FPE Found., 801 F.3d at 29*; see also *Creative Sols. Grp., Inc. v. Pentzer Corp., 252 F.3d 28, 33-34 (1st Cir. 2001)* (holding that the right to arbitrate had not been waived where party moving to compel arbitration had not invoked formal discovery).

On the last of the six factors, Sheet Metal Workers contends that it has been prejudiced by Caremark's dilatory effort to move for arbitration. In particular, it **[**20]** argues that if it is sent to arbitration now, Sheet Metal Workers will be prejudiced by the need to litigate potential defenses related to statutes of limitations and laches (even assuming that the defenses eventually fail). Moreover, it contends that Caremark may argue that its claims are barred for failure to comply with the dispute-resolution procedures. Pls.' Opp'n to Mot. to Dismiss 6-7. However, the only relevant prejudice is that which is a product of a defendant's failure to timely invoke the arbitration procedure, not a product of arbitration itself. See *In re Citigroup, Inc., 376 F.3d 23, 26 (1st Cir. 2004)*). For that reason, Sheet Metal Workers' claims that it may face new defenses in arbitration (statute of limitations, laches, and failure to

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[8] While Caremark makes much of putting Sheet Metal Workers on notice of its intent to arbitrate by asserting it as an affirmative defense, this Motion is the first time Caremark properly asserted its right. See *In re Citigroup, Inc., 376 F.3d 23, 27 (1st Cir. 2004)* (noting that ***HN4***[] it is not sufficient to assert in an answer the right to arbitrate as an affirmative defense).

[9] The Court does understand Sheet Metal Workers to argue that CVS conducted discovery that would not have been available at arbitration and that CVS and Caremark have the same attorneys. See Feb. 27, 2020 Hr'g Tr. 123-24, ECF No. 170. While the Court is sympathetic to the realities of this situation, it is not confident that Sheet Metal Workers would have found itself in any different of a position had Caremark asserted its arbitration right earlier. Presumably CVS and Sheet Metal Workers would have engaged in that same discovery.

comply with dispute-resolution procedures) fail because Caremark already has alleged those affirmative defenses in its Answer. Caremark Reply 14.

Sheet Metal Workers further argues that it is prejudiced because it did not have the opportunity to add a substitute named plaintiff without an arbitration clause in its relevant agreement; this argument, however, also fails as it is not the product of any alleged delay. Moreover, named Plaintiffs and the putative class suffer no prejudice because, **[**21]** as discussed below, the Court is not persuaded that the absence of a named plaintiff that contracted with a specific PBM advances Defendants' typicality argument.

Having considered all the relevant factors, the Court concludes that Caremark has not waived its right to arbitration through its litigation conduct. See *FPE Found., 801 F.3d at 29*.

3. Claims Subject to Arbitration

Sheet Metal Workers further argues that, even if the Court finds no litigation-conduct waiver, Caremark is still not entitled to arbitrate all of Sheet Metal Workers' claims. Sheet Metal Workers highlights that the contracts containing the arbitration clause do not cover the entire class period — they are dated January 1, 2011 and January 1, 2015. Sheet Metal Workers Sur-Reply 9. Sheet Metal Workers thus argues that Caremark has no right to arbitrate claims arising prior to January 1, 2011. Further, Sheet Metal contends that it is unclear whether the parties entered into the January 11, 2011 agreement. Id.

In pertinent part, the dispute resolution provision in the January 1, 2015 contract provides:

> Dispute Resolution. In the event of a dispute between the parties and prior to commencing any litigation or other legal proceeding, each party shall, **[**22]** by giving written notice to the other party ("Dispute Notice"), request a meeting of authorized representatives of the parties for the purpose of resolving the dispute.

PBSA ¶ 13.16; see also id. ¶ 13.12 (providing that the dispute resolution clause survives termination of the agreement). Whether this dispute-resolution provision requires the parties to arbitrate disputes arising out of contracts entered prior to or after the January 1, 2015 contract is an issue of arbitrability. The parties have delegated the issues relating to arbitrability to an arbitrator, see PBSA ¶ 13.16 (incorporating the AAA rules), and therefore, these arbitrability questions must be decided **[*197]** by an arbitrator. See *Henry Schein, Inc. v. Archer and White Sales, Inc., 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019)* (holding that, ***HN5***[] where "the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract", even where "the argument that the arbitration agreement applies to a particular dispute is wholly groundless").

In conclusion, because Caremark has not waived its right to arbitrate Sheet Metal Workers' claims against it through its conduct in this litigation, the Court GRANTS Caremark's Motion to Dismiss.[10]

B. Plaintiffs' Motion for Class Certification

Plaintiffs Sheet Metal **[**23]** Workers, Indiana Carpenters, and Plumbers now move to certify the following classes under *Rule 23(a)* and *(b)(3) of the Federal Rules of Civil Procedure*:

> **Nationwide Class**. All health plans that, at any time between November 2008 and February 1, 2016, (1) had Caremark, L.L.C., Express Scripts, Medco, OptumRx, or MedImpact (or any of their predecessors) as their pharmacy benefit managers, (2) paid for generic prescription drugs purchased from CVS that were included in

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[10] Neither party argues that a stay, rather than dismissal, is the more appropriate remedy. See *Dialysis Access Ctr., LLC v. RMS Lifeline, Inc., 638 F.3d 367, 372 (1st Cir. 2011)* (noting that ***HN6***[] a district court has the discretion to dismiss claims where one party has a right to arbitrate all claims (citing *Next Step Med. Co. v. Johnson & Johnson Int'l, 619 F.3d 67, 71 (1st Cir. 2010)*)).

> CVS's Health Savings Pass program, and (3) paid for those drugs based on a formula containing Usual and Customary price.
>
> **Unjust Enrichment Class**. All health plans that, at any time between November 2008 and February 1, 2016, (1) had Caremark, L.L.C., Express Scripts, Medco, OptumRx, or MedImpact (or any of their predecessors) as their pharmacy benefit managers, (2) paid for generic prescription drugs purchased from CVS that were included in CVS's Health Savings Pass program in Arkansas, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Missouri, New Mexico, New York, Oklahoma, and West Virginia, and (3) paid for those drugs based on a formula containing Usual and Customary price.
>
> **Unfair and Deceptive Conduct Consumer Protection Class**. All health plans **[**24]** that, at any time between November 2008 and February 1, 2016, (1) had Caremark, L.L.C., Express Scripts, Medco, OptumRx, or MedImpact (or any of their predecessors) as their pharmacy benefit managers, (2) paid for generic prescription drugs purchased from CVS that were included in CVS's Health Savings Pass program in California, Florida, Illinois, Iowa, Massachusetts, New Jersey, New York, Ohio, and Washington, and (3) paid for those drugs based on a formula containing Usual and Customary price.
>
> **Omissions Consumer Protection Class**. All health plans that, at any time between November 2008 and February 1, 2016, (1) had Caremark, L.L.C., Express Scripts, Medco, OptumRx, or MedImpact (or any of their predecessors) as their pharmacy benefit managers, (2) paid for generic prescription drugs purchased from CVS that were included in CVS's Health Savings Pass program in Illinois, Michigan, Nevada, and New Jersey, and (3) paid for those drugs based on a formula containing Usual and Customary price.

Pls.' Reply 3-4.

Plaintiffs have excluded the following payors from the proposed classes: (1) any **[*198]** governmental payors, including Medicare and Medicaid; (2) any health plans that served on Caremark's **[**25]** Client Advisory Committee since January 1, 2008; (3) any health plans that have had parent, subsidiary, or affiliate relationships with any pharmacy benefit manager at any time since January 1, 2008; and (4) health plans making payments processed by OptumRx after January 29, 2015. They further exclude: (1) CVS, and its management, employees, subsidiaries, and affiliates; and (2) CVS Caremark and its officers and directors. See id. (amending the class definition).

1. Legal Standard

HN7[] In ruling on a motion for class certification, the Court must "undertake a 'rigorous analysis'" to determine whether the putative class satisfies each of the four prerequisites set forth in *Rule 23(a) of the Federal Rules of Civil Procedure*: numerosity, commonality, typicality, and adequacy of representation. *In re Nexium Antitrust Litig., 777 F.3d 9, 17-18 (1st Cir. 2015)* (quoting *Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*). In addition to the *Rule 23(a)* prerequisites, to be certified, a putative class must demonstrate that it satisfies one of the requirements set forth in *Rule 23(b)*. Here, Plaintiffs contend that they have satisfied *Rule 23(b)(3)*, that is, that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." **[**26]** *Fed. R. Civ. P. 23(b)(3)*.

HN8[] The Supreme Court has cautioned that *Rule 23* "does not set forth a mere pleading standard" but rather, a plaintiff "must affirmatively demonstrate [its] compliance with" the Rule. *Comcast, 569 U.S. at 33* (quoting *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*). This inquiry "frequently . . . 'overlap[s] with the merits of the plaintiff's underlying claim.'" *Id. at 33-34* (quoting *Dukes, 564 U.S. at 351*).

Here, Plaintiffs argue that each of the prerequisites of *Rule 23* has been met and that the Court should certify the proposed classes accordingly. Defendants disagree, of course, arguing that Plaintiffs fail to satisfy the requirements of *Rule 23*, and thus, class certification is not appropriate. Specifically, Defendants argue that the named class representatives do not satisfy the typicality and adequacy requirements, the proposed classes are not ascertainable, and Plaintiffs have failed to demonstrate that issues common to the classes predominate over individual issues, as required by *Rule 23(b)(3)*.

2. Numerosity and Commonality

HN9[] To be certified under *Rule 23*, the members of a class must be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. As a general rule, if the named plaintiffs demonstrate "that the potential number of plaintiffs exceeds 40, the first prong of *Rule 23(a)* has been met." *Garcia-Rubiera v. Calderon, 570 F.3d 443, 460 (1st Cir. 2009)* (quoting *Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)*). The Court concludes that **[**27]** the proposed class — comprising hundreds if not thousands of TPPs — is too numerous to render joinder practical, and thus numerosity is established.

HN10[] *Rule 23(a)(2)* requires "questions of law or fact common to the class." A common question is one that is "capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one **[*199]** stroke." *Dukes, 564 U.S. at 350*. "[E]ven a single [common] question will do[.]" *Id. at 359* (quotations omitted). The Court is satisfied that a common question exists regarding whether Defendants engaged in a scheme to defraud TPPs by failing to report HSP prices as U&C prices, and accordingly, the commonality prerequisite is also met.

3. Typicality and Adequacy of Representation

HN11[] For a class to be certified under *Rule 23*, the proposed class representatives must demonstrate that they "will fairly and adequately protect the interests of the class[,]" *Fed. R. Civ. P. 23(a)(4)*, and the "claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" *Fed. R. Civ. P. 23(a)(3)*.

Named Plaintiffs assert that their claims are typical of the claims of class members because they allege a singular fraudulent scheme: that CVS overcharged **[**28]** class members for drugs by not reporting HSP prices as the drugs' U&C prices. Pls.' Reply 9. Moreover, named Plaintiffs assert they are adequate representatives with knowledge of the claims and no conflicts. Id. at 11-14.

Defendants counter that named Plaintiffs are neither typical of the putative class members nor adequate to represent the proposed classes. Specifically, Defendants argue that named Plaintiffs cannot adequately represent health plans that contracted with PBMs with whom named Plaintiffs had no relationship; named Plaintiffs are subject to additional unique defenses; they lack familiarity with the basic elements of their claims; and they had actual knowledge of the alleged scheme. Mem. in Supp. of Defs.' Obj. to Pls.' Mot. for Class Certification ("Defs.' Opp'n") 58-64, ECF No. 133.

OptumRx and MedImpact. Defendants contend that because none of the named Plaintiffs contracted with the PBMs OptumRx or MedImpact, they are not suitable to represent putative class members who did. Defs.' Opp'n 6; see also Defs.' Sur-Reply in Opp'n to Pls.' Mot. for Class Certification ("Defs.' Sur-Reply") 22, ECF No. 166-1.[11] Defendants insist that named Plaintiffs have no incentive to develop **[**29]** or present evidence that the specific language about U&C pricing in OptumRx's and MedImpact's contracts support the absent class members' claims. Defs.' Opp'n 60-61. These arguments ring hollow. Named Plaintiffs, represented by a reputable, national plaintiffs-side firm, have every incentive to develop the claims of those health plans that did contract with OptumRx and MedImpact in order to establish the strongest trial and/or settlement position as a class. See, e.g., *In re Loestrin 24 FE Antitrust Litig., No. 1:13-MD-2472, 2019 U.S. Dist. LEXIS 118308, 2019 WL 3214257, at *12 (D.R.I. July 2, 2019)* (noting that the plaintiffs, represented by the same law firm as the TPPs here, were "in blunt, strategic terms"

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[11] Defendants also advance this argument as to Caremark in pressing its Motion to Dismiss. See Feb. 27, 2020 Hr'g Tr. 110:20-111:2, ECF No. 170. The argument fails for the same reasons it fails as to OptumRx and MedImpact.

motivated to pursue the full extent of absent class members' claims "[b]ecause the bigger the claim, the bigger the leverage on [the defendants] and hopefully the bigger the settlement").

Moreover, Defendants' theory of the case on the merits is that "all of the U&C definitions should be interpreted, in light of the uniform industry understanding, to mean that membership program prices like HSP are not U&C prices." Defs.' Opp'n 30. This focus on industry understanding provides ample motivation for **[*200]** named Plaintiffs to pursue evidence regarding OptumRx and MedImpact, as well as all PBMs more generally. Thus, **[**30]** the Court is confident that the named Plaintiffs have the incentive to address contract language or other evidence unique to health plans that contracted with these two PBMs. Any purported conflict arising from different U&C contract terms is merely speculative. See *Matamoros v. Starbucks Corp., 699 F.3d 129, 138 (1st Cir. 2012)* (holding that***HN12***[] only fundamental conflicts that "go to the heart of the litigation prevent a plaintiff from meeting the *Rule 23(a)(4)* adequacy requirement" (citation and quotation omitted)).

Additional Unique Defenses. Defendants argue that named Plaintiffs are subject to additional defenses — rendering them atypical — because they have sued in the name of trusts, rather than in the name of their trustees. Defs.' Opp'n 6. Whether named-Plaintiff trusts have the capacity to sue under state law presents an interesting legal question — but not one that undermines their ability to serve as adequate and typical class representatives.

The First Amended Complaint alleges that named-Plaintiff trusts are "employee welfare benefit plan[s]" and "employee benefit plan[s]" as defined in the *Employee Retirement Income Security Act ("ERISA")*. FAC ¶¶ 9, 11, 13. Named Plaintiffs have staked out the position that they are not traditional trusts, but rather Voluntary Employees Beneficiary Association Plans **[**31]** ("VEBAs"), which are welfare benefit plans under *Section 501(c)(9) of the Internal Revenue Code*. See Ltr from E. Fagen to K. Hoover 1 (May 4, 2018), ECF No. 144-12. "A VEBA is subject to some aspects of ERISA, but is not considered to be a qualified retirement plan." Id.

It is not clear at this juncture whether ERISA conveys to named Plaintiffs, as VEBAs, the capacity to sue as discussed below. That said, were Defendants to convince the Court on summary judgment that named Plaintiffs do not have the capacity to sue as trusts, it would not undermine named Plaintiffs' ability to serve as adequate and typical class representatives. As a remedy in those circumstances, First Circuit authority favors directing plaintiff-trusts to substitute their trustees as plaintiffs, not dismissal of the claims. See *Yan v. Rewalk Robotics Ltd., 973 F.3d 22, 37 (1st Cir. 2020)* (stating that *Rule 17* "expressly anticipates the possibility that a complaint might be brought by someone who turns out not to be the party in interest" and "expressly admonishes that '[t]he court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action'" (quoting **[**32]** *Fed. R. Civ. P. 17(a)(3)*)).

HN13[] To the extent an employee benefit plan is subject to ERISA, courts have concluded that ERISA provides it with the capacity to sue under state law. See *Int'l Union of Bricklayers & Allied Craftsmen, Local No. 1 of Rhode Island v. Menard & Co. Masonry Bldg. Contractors, 619 F. Supp. 1457, 1462 (D.R.I. 1985)* (Selya, J.) (construing *29 U.S.C. § 1132(d)(1)* as providing employee benefit plans with the "right . . . to sue and be sued like corporations and other legal entities, thereby eliminating artificial state law capacity-to-sue barriers and authorizing suits brought by funds in situations where there would properly be jurisdiction" (citing *Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co., 700 F.2d 889, 893 (2d Cir. 1983)*)); see also *Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc., 185 F.3d 978, 984 (9th Cir. 1999)* (holding that *§ 1132(d)(1)* gives ERISA plans the capacity to sue where the court otherwise has **[*201]** jurisdiction); *Labul v. XPO Logistics, Inc., No. 3:18-CV-2062 (VLB), 2019 U.S. Dist. LEXIS 56080, 2019 WL 1450271, at *6 (D. Conn. Apr. 2, 2019)* (rejecting a similar challenge to pension funds' appointment as lead plaintiff in a class action, holding that the funds had capacity to sue under *§ 1132(d)(1)*); *29 U.S.C. § 1132(d)(1)* ("An employee benefit plan may sue or be sued under this subchapter as an entity.").

The Second Circuit in Pressroom and then-District Judge Selya in Menard specifically spoke to the capacity of ERISA trusts to bring state law claims in federal court, noting that

> "if a fund became involved in a contract dispute, and wished to pursue a state law contract claim, *§ 1132(d)(1)* would allow the fund to bring such an action in its own name."

> . . .
>
> And, insofar as § 1132(d)(1) does cede to trust **[**33]** funds capacity to sue as entities in their own behalf, it satisfies an obvious need. Conferral of entity status on an [employee benefit plan] eliminates an artificial impediment to the prosecution of actions by such a fund . . . and thereby enhances an important purpose of ERISA: furtherance of the stability and integrity of [employee benefit plans].

Menard, 619 F. Supp. at 1462 (quoting *Pressroom, 700 F.2d at 893*). Thus, to the extent named Plaintiffs are subject to ERISA, they would have capacity to sue. ***HN14***[] Moreover, *Rule 17(b)(3)(A) of the Federal Rules of Civil Procedure* provides that an unincorporated association "may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws", and therefore, named Plaintiffs have capacity to pursue their federal RICO claims. *Fed. R. Civ. P. 17(b)(3)(A)*).

For these reasons, Defendants' capacity-based argument does not undermine Plaintiffs' ability to serve as adequate and typical class representatives.

Class Representatives' Lack of Familiarity with Basic Elements of their Claims. Defendants next argue that the named Plaintiffs are inadequate class representatives because they are unfamiliar with the basic elements of their claims. Defs.' Opp'n 6. Defendants say that, during depositions, the funds' representatives did not know **[**34]** basic facts about the suit and could not speak to the veracity of the allegations. Id. at 64-65. The record belies this argument. Plaintiffs' proposed class representatives have "the minimal degree of knowledge" necessary to satisfy the *Rule 23* adequacy requirement. See *In re Pharm. Indus. Average Wholesale Price Litig., 277 F.R.D. 52, 60 (D. Mass. 2011)* ("[I]n a complex [pharmaceutical] case such as this, a plaintiff need not have expert knowledge of all aspects of the case to qualify as a class representative, and a great deal of reliance upon the expertise of counsel is to be expected." (citation and quotation omitted)); *In re Advance Auto Parts, Inc., Sec. Litig., No. CV 18-212-RGA, 2020 U.S. Dist. LEXIS 208085, 2020 WL 6544637, at *6 (D. Del. Nov. 6, 2020)* ("It is well-settled that a class representative need only possess a minimal degree of knowledge necessary to meet the adequacy standard." (quoting *Roofer's Pension Fund v. Papa, 333 F.R.D. 66, 77 (D.N.J. 2019)*). Each named Plaintiffs' 30(b)(6) representative provided a brief and broad overview of his understanding of the case and testified that he relied on the advice of counsel. See, e.g., Sheet Metal Workers Trustee Scott Parks Dep. 40:16-19, ECF No. 144-5 ("My understanding is CVS Caremark inflated their pricing by not incorporating their drug program, and it was not factored into the usual and customary pricing."); Indiana Carpenters Trustee Michael Joseph Lauer Dep. 141:8-11, ECF No. 144-13 (confirming **[*202]** that **[**35]** the representative understood from the Complaint that Carpenters was "suing CVS in this case for not reporting its HSP prices as its U&C prices"); Plumbers Trustee Joseph Ohm Dep. 14:21-25, ECF No. 144-14 (describing the pending claims as addressing "various retail generic drug programs offered at the retail level by various pharmacies").

Actual Knowledge. As explained in more detail below, the Court disagrees that any purported actual knowledge of the HSP pricing scheme on the part of the named Plaintiffs renders them inadequate or atypical class representatives. The Court is prepared to manage any such knowledge issues with subclasses.

For these reasons, the Court concludes that named Plaintiffs are adequate and typical class representatives for the proposed classes. See *Fed. R. Civ. P. 23(a)(3)* & *(a)(4)*.

4. Ascertainability

HN15[] To meet their burden on a motion for class certification, named Plaintiffs must demonstrate, "by a preponderance of the evidence, that the class is currently and readily ascertainable based on objective criteria." *Nexium, 777 F.3d at 19* (quoting *Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013)*). Defendants argue that the proposed classes in the instant case are not ascertainable.

a. Whether Plaintiffs' Class Definition is Too Vague

Defendants argue that Plaintiffs **[**36]** have used overly vague terms to define the proposed classes of "health plans" and the class exclusions (namely, "governmental payor" and "affiliates") and that Plaintiffs have not provided a reliable methodology for identifying the universe of health plans from electronic claims data. Defs.' Sur-Reply 4; see also Defs.' Opp'n 3, 26-27. The Court disagrees.

The Court is satisfied that the universe of TPPs is identifiable in an administratively feasible manner through requests for production to Caremark and subpoenas to third-party PBMs. See Pls.' Reply 16 n.75. At this juncture, the Court need only be satisfied that Plaintiffs can execute their plan; they do not need to have the information in hand. See *In re Asacol Antitrust Litig., 907 F.3d 42, 58 (1st Cir. 2018)* ("And to determine whether a class certified for litigation will be manageable, the district court must at the time of certification offer a reasonable and workable plan . . . .").

Plaintiffs' expert, Dr. Rena Conti,[12] has detailed her method for excluding pharmacy claims paid by government payors, and, in response to input from Mr. Brett Barlag, Defendants' expert, she updated her CVS Condor Codes (i.e., the CVS data field used to identify the PBM associated with each claim) for identifying **[**37]** and excluding government payors to be more inclusive. See Expert Report of Rena Conti, ("Conti Report") ¶ 71, ECF No. 123-6; see also Reply Report of Rena Conti, ("Conti Reply") ¶ 47, ECF No. 145-2; *In re Loestrin 24 FE Antitrust Litigation, 410 F. Supp. 3d 352, 386, 394, 401 (D.R.I. 2019)* **[*203]** (approving a similar methodology for removing governmental payors from the proposed class).

Moreover, Dr. Conti has set forth a method for excluding Caremark's Client Advisory Committee and those health plans with affiliate relationships with PBMs once discovery is completed. See Conti Report 5 n.11; see also Conti Reply ¶ 39 (detailing plans to exclude Caremark's Client Advisory Committee once CVS provides the pertinent data). It strains credulity for Defendants to suggest they do not have access to data on their own Client Advisory Committee and affiliates, and indeed, they have every incentive to come forward with data on Plaintiffs' exclusions, as Mr. Barlag's expert report plainly demonstrates. Thus, the Court is satisfied by a preponderance of the evidence that Plaintiffs have the tools — and Defendants the motivation to sharpen those tools — to precisely identify class members and apply class exclusions.

Plaintiffs have thus established by a preponderance of the evidence that they **[**38]** can identify the universe of TPPs, as well as apply the class definition and class exclusions in an administratively feasible way on a class-wide basis.

b. Identifying TPPs that Contracted for U&C Pricing Terms[13]

At the crux of this suit is the allegation that CVS failed to report its HSP prices as its U&C prices for eligible generic drugs, and as a result, putative class members paid more than they should have. Thus, to fall within the putative class, a TPP or health plan must have been entitled to "lower-of U&C pricing" (hereinafter, "lower-of pricing") during the class period. Lower-of pricing provides that, for specified prescription drugs, a TPP will pay the lowest of several pricing metrics, often including the U&C.[14] Pls.' Mot. 4-5.

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[12] Dr. Conti is an Associate Research Director of Biopharma & Public Policy for the Boston University Institute for Health System Innovation & Policy, an Associate Professor at the Boston University Questrom School of Business, Department of Markets, Public Policy and Law, and an Academic Affiliate of Greylock McKinnon Associates. Expert Report of Rena Conti, ¶ 1, ECF No. 123-6. She received a B.A. from Kenyon College and a Ph.D. in Health Policy (Economics Track) from Harvard University. Id. ¶ 5. Defendants do not dispute her qualifications to offer expert opinion. They do, however, offer counter expert opinion.

[13] To the extent Plaintiffs assert that (challenged) testimonial affidavits and declarations from class members may be used to establish class membership, Pls.' Reply 15 (citing *In re Dial Complete Mktg. and Sales Practices Litig., 312 F.R.D. 36, 50 (D.N.H. 2015)*), they are incorrect. See *In re Asacol Antitrust Litig., 907 F.3d 42, 52-53 (1st Cir. 2018)* (rejecting rebutted, testimonial affidavits as proof of injury at class certification).

[14] [TEXT REDACTED BY THE COURT]

While many TPP/PBM and CVS/PBM contracts provided for lower-of pricing during the class period, some did not. See, e.g., Conti Reply ¶¶ 46, 48 (updating her damages calculation to "exclude [] claims identified by Mr. Barlag that may not have had U&C in the lower-of pricing formula"). Complicating matters, some TPPs had different contracts over the course of the class period, which in turn may have contained different pricing provisions and covered different **[**39]** prescriptions. Defendants high light Sheet Metal Workers as an example: "For part of the class period, Sheet Metal didn't get U&C pricing at all. For part of the class period, it did. And for part of the class period, it got U&C for some prescriptions but not other[s] . . . ." Feb. 27, 2020 Hr'g Tr. 43:16-19. The parties forecast that there may be upward of 40,000 TPP contracts. Id. at 49-50.

Seizing on this, Defendants next argue that there is no manageable way to identify which health plans or TPPs paid for HSP drugs based on a formula that incorporates U&C as a pricing metric. Defs.' Sur-Reply 1. Instead, they say, to determine class membership, one would need to review thousands of contracts. Defs.' Opp'n 3. To do so, Defendants' expert, Brett Barlag, states that "one would likely need to (1) link the individual prescription transactions to the individual TPP associated with that transaction and (2) review the **[*204]** contract between the PBM and that TPP to determine whether the contract entitled the TPP to U&C pricing — and, if so, for what time periods." Decl. of Brett E. Barlag ("Barlag Decl.") ¶ 119, ECF No. 131-1.

Plaintiffs counter that the process doesn't need to be that complicated. **[**40]** They say that class members can be identified from the PBM/TPP contracts and existing PBM data. Pls.' Reply 15-16 (citing Defs.' Opp'n 3; Conti Reply ¶¶ 10-17); see also Conti Reply ¶ 11 (stating that "PBMs maintain electronic claims data for each TPP and electronically store generic price algorithms" that could be used to "identify whether a TPP's generic pricing algorithm contained the U&C price as a term"). Plaintiffs would develop and deploy a computer program to identify whether a TPP's generic pricing algorithm contained the U&C price as a term, and if it did, to determine whether that TPP had paid for any HSP drugs at CVS during the class periods. Conti Reply ¶ 11. According to Plaintiffs, any TPPs that satisfy these two conditions and do not fall into a class exclusion are properly included in the putative classes. Id. If their classes are certified, Plaintiffs will seek the information through requests for production to Caremark and document subpoenas to the third-party PBMs. Pls.' Reply 16 n.75; see also Conti Reply ¶¶ 12-13 (confirming a data field in the Caremark/Sheet Metal Workers data containing a variable that can be used to identify price basis by which a claim is **[**41]** adjudicated, such as U&C price); Expert Report of Catherine Graeff 2, ECF No. 129-2 (noting that the NCPDP developed the Universal Claim Form in 1980 in an effort to standardize pharmacy benefit claims and that pharmacies and TPPs contract for which data fields on the UCF shall be filled out for claims adjudication).

As a fallback position, if the PBMs fail to produce the requisite data, Plaintiffs also offer to review each of the contracts — estimated to number upwards of 40,000 — for lower-of U&C pricing provisions. See Conti Reply ¶ 14; Feb. 27, 2020 Hr'g Tr. 19-20. Under this method, Plaintiffs would identify PBM/TPP contracts with the U&C price included in the generic pricing formula. Once identified, Plaintiffs would review the PBM claims data to confirm that the TPP paid for an HSP drug purchased at CVS during the class period. Conti Reply ¶ 15. Dr. Conti's team reviewed the 450 contracts in its possession from Caremark, Express Scripts, MedImpact, and OptumRx to test this method, and confirmed they could determine whether each contract indicated "presumptive class membership." Id. ¶ 16.

After carefully reviewing the expert reports and considering Plaintiffs' proposed methodology, **[**42]** the Court is satisfied that Plaintiffs have demonstrated an administratively feasible method by which to determine which TPPs were entitled to lower-of U&C pricing during the class period. At bottom, whether a health plan or TPP is a member of the proposed class is objectively ascertainable from either documents (i.e., contracts) or datasets. This case is clearly distinguishable from, for example, the landmark case of *In re Asacol, 907 F.3d at 51-53*. In Asacol, class membership depended on brand loyalty, which was only knowable by questioning a putative class member. Id. Here, in contrast, class membership can be determined either from "identify[ing] whether a TPP's generic pricing algorithm contained the U&C price as a term," Conti Reply ¶ 11, or an objective contract review.[15] Thus, Plaintiffs'

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[15] The Court is not convinced that any differences in the contracts' U&C pricing provisions render this exercise unmanageable. To the extent the parties need to litigate whether certain TPPs' contract language entitled them to U&C pricing, Defs.' Opp'n 23 &

[*205] proffered methodology presents a workable plan to ascertain class membership from objective criteria. See *Matamoros v. Starbucks Corp., 699 F.3d 129, 139 (1st Cir. 2012)* ("For a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria." (quoting 5 James Wm. Moore et al., *Moore's Federal Practice § 23.21[3][a]* (3d ed. 2012))); see also *Asacol, 907 F.3d at 52*; *Byrd v. Aaron's Inc., 784 F.3d 154, 171 (3d Cir. 2015)*, as amended (Apr. 28, 2015) (stating that "'the size of a potential **[**43]** class and the need to review individual files to identify its members are not reasons to deny class certification'" because "[t]o hold otherwise would seriously undermine the purpose of a *Rule 23(b)(3)* class to aggregate and vindicate meritorious individual claims in an efficient manner" (quoting *Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 539-40 (6th Cir. 2012)*)).

The cases cited by Defendants do not convince this Court otherwise. In Skelaxin, the district court concluded that the class was not ascertainable where class member identification required "individual inquiry into contracts covering millions of [prescription] purchases" and the putative class had "not identified what in each transaction would be required to determine" class membership. *In re Skelaxin (Metaxalone) Antitrust Litig., 299 F.R.D. 555, 570, 572 (E.D. Tenn. 2014)*. That is not the case here. As recited in detail above, Plaintiffs have demonstrated that they can employ either an algorithm or contract review to determine whether a TPP paid for drugs during the class period using U&C pricing.

In Manson, the second case Defendants rely upon, the court held that the putative class was not ascertainable because the public records proposed by the plaintiffs established only "the possibility that a particular homeowner might fall within the class." *Manson v. GMAC Mortg., LLC, 283 F.R.D. 30, 38 n.26 (D. Mass. 2012)*. Here, Plaintiffs' proposed methodology **[**44]** will be able to identify class members with a far greater degree of certainty. Thus, the Court concludes that Plaintiffs have set forth an administratively feasible plan for ascertaining the contours of their proposed class.

5. Predominance

HN16[] Under *Rule 23(b)(3)*, a putative class must demonstrate that common issues predominate over individual issues. *Asacol, 907 F.3d at 51* (citing *Amgen, Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 469, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)*). Class members' "claims must depend upon a common contention." *Dukes, 564 U.S. at 350*. "That common contention, moreover, must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. The Supreme Court emphasized that "[w]hat matters to class certification . . . is not the raising of common 'questions' — even in droves — but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the **[*206]** resolution of the litigation." Id. (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, *84 N.Y.U. L. Rev. 97, 132 (2009)*). Pervasive "[d]issimilarities within the proposed class" may serve to prevent "the generation of common answers." Id. (quoting Nagareda, *84 N.Y.U. L. Rev. at 132*). To find predominance, the district **[**45]** court must determine that it can dispose of any differences among class members' claims "in a manner that is not 'inefficient or unfair.'" *Asacol, 907 F.3d at 51* (quoting *Amgen, 568 U.S. at 469*).

In Asacol, the First Circuit described inefficiency "as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues." Id. The flip side of this inefficiency is unfairness, illustrated well as "an attempt to eliminate inefficiency by presuming to do away with the rights a party would customarily have to raise plausible individual challenges on those issues." *Id. at 51-52*. Thus, ***HN17***[] where a putative class action raises individual issues for adjudication, a class may be certified only if "the proposed adjudication will be both

n.6, this can be done in subclasses. If Defendants have actual proof that some contracts are ambiguous (which the Court understands to not be Defendants' primary merits position) the Court will proceed to develop subclasses to litigate individual issues. The Court always has the option of decertifying a class where such an inquiry proves overwhelming; that said, at this point, Plaintiffs have met their burden in establishing that the classes are ascertainable.

'administratively feasible' and 'protective of defendants' Seventh Amendment and due process rights.'" Id. at 52 (quoting Nexium, 777 F.3d at 19).

HN18[] To this end, and before certifying a class, a district court must "offer a reasonable and workable plan for how that opportunity will be provided in a manner that is protective of the defendant's constitutional rights and does not cause individual inquiries to overwhelm common issues." Id. at 58; see also In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 20 (1st Cir. 2008) ("Under the predominance inquiry, 'a district court must formulate some prediction as to **[**46]** how specific issues will play out in order to determine whether common or individual issues predominate in a given case.'" (quoting Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 298 (1st Cir. 2000))).

Defendants argue that common issues do not predominate because the differences between class members — in their contracts, their purported knowledge of the alleged fraud, and their payment structures — would render a class action "inefficient" and/or "unfair." Defs.' Opp'n 27-28 (quoting Asacol, 907 F.3d at 51).

Here, the Court is satisfied that the common issues to be tested by the proposed classes — namely, whether CVS fraudulently failed to include its HSP prices in its U&C pricing — will provide common answers. See Dukes, 564 U.S. at 350 (emphasizing that a Rule 23(b)(3) action must have the capacity to produce common answers); see also Corcoran v. CVS Health Corp., 779 F. App'x 431, 433 (9th Cir. 2019) (holding, in consumer suit with similar allegations against CVS, that there existed triable issue of fact as to whether contract language supported finding that PBM contracts required CVS to include HSP prices as U&C prices in consumer class action). Thus, after careful consideration, the Court concludes that common issues predominate, and as discussed further below, any issues relating to subsets of classes — in particular, those relating to contract interpretation, knowledge, **[**47]** statute of limitations, and arbitration issues — can be adjudicated in an administratively feasible manner with the use of subclasses.[16]

[*207] a. Injury

With respect to injury, Defendants contend that several issues must be litigated individually, and thus individual issues predominate over common ones. The Court takes them up seriatim.

i. Contract Interpretation

Defendants contend that common issues do not predominate because there are too many issues requiring individual contract interpretation. For a TPP to have sustained injury under the alleged scheme at issue, it must have paid an overcharge when CVS failed to include HSP prices in its U&C prices. In Defendants' view, that determination is dependent on the drug-pricing formula dictated by individual contracts, including generic effective rate discounts ("GERs"). To sort this out, they contend, one must review thousands of individual contracts between CVS and PBMs, as well as between the five PBMs at issue and the putative class members. What is more, some putative class members had multiple PBMs and/or multiple contracts with a single PBM during the class period. Defs.' Opp'n 36.

Assuming that the parties do not convince this Court on **[**48]** summary judgment that either all TPPs or no TPPs were entitled to receive HSP prices as U&C prices, the contract language will make a difference. See Corcoran, 779 F. App'x at 433 (holding that there existed a triable issue of fact as to whether the contract language supported a finding that the PBM contracts required CVS to include HSP prices as their U&C prices in a consumer class action). The parties have forecasted that each will argue at summary judgment that industry standard dictates the

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[16] Indeed, Defendants themselves compiled a chart purporting to reflect the individual issues at play in 39 MedImpact contracts proposed in this case. See Defs.' App'x B, ECF No. 133-1. In doing so, they also demonstrate that each of these issues is capable of resolution before trial.

result here: Defendants will argue that "when the varying U&C price definitions . . . are interpreted in light of industry understanding, the only conclusion is that the U&C definitions do not include membership program prices", Defs.' Sur-Reply 9 (emphasis omitted), and Plaintiffs will argue that HSP prices were — without exception — U&C prices per industry standard, see Pls.' Reply 1.

While this merits question is not before the Court now, contract review — by human or computer — appears inescapable. First, some TPPs have no colorable claim to being entitled to lower-of U&C pricing, and thus must be removed from any putative classes, as discussed above. Second, those TPPs entitled to lower- of U&C pricing for some or all **[**49]** of the class period may or may not have been entitled to receive the HSP price as its U&C price. Some contracts expressly exclude membership programs from U&C prices, some are silent, and still others may expressly include or exclude discounts. If Defendants do not prevail on summary judgment, some or all of these differences in contract language will likely present fact issues for trial. See *Corcoran, 779 F. App'x at 433*.

There may be upwards of 40,000 contracts, and while the relevant language in each contract must be isolated to ensure that Defendants are afforded the opportunity to litigate the merits as it pertains to the various TPPs, see *Asacol, 907 F.3d at 53*, there will be a small universe of answers to the common question posed. In the Court's view the contract language can be sorted into various buckets and litigated group by group. See *Byrd v. Aaron's Inc., 784 F.3d 154, 171 (3d Cir. 2015)*, as amended (Apr. 28, 2015) ("[T]he size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification . . . ." (quoting *Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 539-540 (6th Cir. **[*208]** 2012)*)); cf. *Asacol, 907 F.3d at 53* (denying class certification to a putative class that included brand loyal consumers, in part because the plaintiffs had not been "provided any basis from which [the court] could conclude that the **[**50]** number of affidavits to which the defendants will be able to mount a genuine challenge is so small that it will be administratively feasible").

In sum, Plaintiffs have demonstrated through their expert that they are capable of using algorithms, or undertaking contract-by-contract review, to identify the universe of lower-of U&C pricing. Plaintiffs have further demonstrated that they can organize the relevant contract language into various buckets or subclasses for the jury to consider. It is not fathomable (or supported by evidence) that the putative class TPPs and the at-issue PBMs drafted 40,000 contracts with 40,000 distinct lower-of-U&C pricing provisions. Cf. *Corcoran, 779 F. App'x at 434* (noting, in addressing typicality, that there was no "meaningful differences in the PBM agreements that would result in the interests of the class representatives being misaligned with those of the absent class members"). Instead, the record evidence suggests that some of the U&C language expressly included discount programs, and other language was silent on discount programs.

Assuming the case proceeds to trial, a jury may find that some, none, or all of the class TPPs' contracts entitled them to HSP pricing, but this factual **[**51]** determination is not as overwhelming as Defendants have suggested. See *Asacol, 907 F.3d at 61* (Barron, J., concurring) (stating that *Rule 23(b)(3)* "'does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof' but only to show that there is no 'reason to think that [individualized] questions will overwhelm common ones and render class certification inappropriate'" (quoting *Nexium, 777 F.3d at 21*)).

ii. Actual Knowledge

Defendants next argue that individualized issues of knowledge defeat class certification because Plaintiffs' claims are undermined where class members were aware that U&C pricing did not include HSP prices. Defs.' Opp'n 41. They argue that some health plans knew they were not receiving HSP prices, pointing to evidence purporting to demonstrate this for two of the three named plaintiffs. Defs.' Opp'n 4. Defendants argue that actual knowledge both undermines injury for each claim in the Complaint and provides an affirmative defense. To mount this defense, Defendants say, requires an individualized review of class-member communications and other class-member-specific evidence. Defs.' Opp'n 39; Defs.' Sur-Reply 11. Alongside most of Defendants' arguments, the **[**52]** road leads back to Asacol: if some members of the putative class were uninjured because they had actual knowledge of the underlying fraud, Defendants must have the opportunity to challenge and remove those uninjured class members in an administratively feasible and efficient fashion. Defs.' Sur-Reply 12-13 (citing *Asacol, 907 F.3d at 53-54*).

While this argument is compelling at first blush, upon closer review, Defendants have not put forth evidence of actual knowledge as to the named Plaintiffs, nor the broader putative class, sufficient to block Plaintiffs' bid for class certification.

First, the evidence presented as to the named Plaintiffs is notably thin. With respect to Sheet Metal Workers, Defendants offer a June 2009 email chain between Dan Tibus, a Caremark account executive, and Sheet Metal Workers' prescription benefits consultants "regarding prescription benefits, including drug prices." Decl. of Daniel Tibus ¶ 4, ECF No. 131-9; Email from **[*209]** Daniel Tibus to Rick Gerasta (June 23, 2009) ("Tibus Email"), at CAREMARKSM_0006154, ECF No. 131-43. In this email, the account manager explained to the outside consultants that the HSP "does not integrate with the RX benefit. . . . This retail program was initially **[**53]** launched as a benefit for uninsured customers. Naturally, consumers with insurance use it as a substitute if the Health Savings Pass provides a richer benefit than their employer plan." Tibus Email at CAREMARKSM_0006154. In addition, Defendants point to evidence that one of the Sheet Metal Workers trustees signed up for HSP for himself. That trustee's deposition makes plain that he did not recall signing up for the HSP, did not recall whether it required a membership fee, and did not recall the pricing under the program. See Michael Jones Dep. 83:3-12, ECF No. 129-21 ("I couldn't even tell you if I signed up, but I think I did.").

It is not clear at all to the Court that this is sufficient to conjure an issue of material fact on the issue of knowledge. Defendants offer nothing to suggest that the knowledge of Sheet Metal Workers' outside consultants is imputable to the health plan, nor is there any mention in the email chain of U&C price or CVS's failure to report its HSP price as its U&C price. What is more, there is nothing in this record suggesting that a reasonable juror could conclude from this sole HSP-enrolled trustee's deposition that he had knowledge of the alleged fraudulent **[**54]** scheme simply because he signed up for the HSP program. See *Corcoran v. CVS Health, Case No. 15-cv-03504-YGR, 2017 U.S. Dist. LEXIS 143327, 2017 WL 3873709, at *7 (N.D. Cal. Sept. 5, 2017)*, rev'd on other grounds *Corcoran v. CVS Health Corp, 779 Fed. App'x 431 (9th Cir. 2019)* ("[T]he evidence proffered by defendants does not sufficiently demonstrate that potential [consumer] class members, even those who were members of HSP, knew of the allegedly deceptive practices. . . . Putative class members likely did not understand the relationship between the pharmacy's U&C and what the pharmacy charges them, which may be at times less than or more than the HSP program prices.").

The same is true of Indiana Carpenters. In support of its contention that Indiana Carpenters had actual knowledge of the alleged fraud, Defendants offer a single email from Indiana Carpenters' MedCo account executive to Indiana Carpenters' client services manager. The email contains broad talking points about generic prescription drug programs ("such as Walmart & Kmart"), and a notice providing more detail. See Email from Bart Gerber to Irene Newman (Apr. 2, 2010), ECF No. 129-64. In that notice, MedCo account executive, Bart Gerber, never once mentions CVS or the HSP program specifically; instead, the notice states:

> Medco has found that the low cost generic programs vary from retailer to retailer; some programs **[**55]** are offered free of charge to patients whereby the low cost generic price can be submitted via the U&C field through Medco's TelePAID system (for example, the $4 Wal*Mart generic program), other programs include membership fees to gain access to a member-only price that differs from the pharmacy's U&C price (for example the program offered by Walgreens)[.]

Id. The client services manager did not understand from the email that CVS was not reporting the HSP price as the U&C price, and more generally, she had no understanding of the role U&C prices played in the claims adjudication process or how drug prices were set. See, e.g., R. Irene Newman Dep. 35:15-36:18, 52:10-53:7, ECF No. 144-8; see also Lauer Dep. 89:3-21; 90:22-24, ECF 145-8 (indicating that person **[*210]** copied on email did not understand the meaning of "a member-only price that differs from the pharmacy's U&C price" and that he did not know what the email sender and recipient "were talking about"); David Tharp Dep. 60:12-61:12, ECF No. 144-10; William Nix Dep. at 101:11-24, 102:25-103:5, ECF No. 144-11. Simply put, there is no evidence that anyone at Indiana Carpenters had actual knowledge of the alleged scheme here.

Second, even **[**56]** with all the incentive to do so, Defendants offer very little to suggest that a significant number of putative class members other than the named Plaintiffs had actual knowledge of the alleged scheme. Defendants offer evidence suggesting that no more than a dozen TPPs were informed they had not received HSP prices as their U&C pricing. See Defs.' Opp'n 15-17, 42-43 (setting forth summary of eleven TPPs' knowledge); Pls.' Reply 32, 34-35 (noting that, of the TPPs Defendants have identified, five are not class members for other reasons).

HN19[] As in any action in which "determining whether any given [class member] was injured (and therefore has a claim) turns on an assessment of the individual facts[,]" Defendants here must be afforded "the opportunity to challenge each class member's proof that the defendant is liable to that class member." *Asacol, 907 F.3d at 55* (citing *Dukes, 564 U.S. at 366-67*). But the need to assess individual circumstances — here, with respect to individual TPPs' knowledge of the facts underlying the alleged fraud — does not alone foreclose class certification. Instead, class certification is precluded only where "such challenges are reasonably plausible in a given case" and "the plaintiff cannot demonstrate that **[**57]** allowing for such challenges in a manner that protects the defendant's rights will be manageable and superior to the alternatives." Id. (citing *Fed. R. Civ. P. 23(b)(3)*). In the instant case, Plaintiffs have demonstrated that successful challenges to individual TPPs based on actual knowledge will be few and far between. To the extent these challenges present genuine issues of material fact, the Court will manage them in subclasses and afford Defendants the opportunity to challenge the class member(s)' proof. See *Manning v. Bos. Med. Ctr. Corp., 725 F.3d 34, 60 (1st Cir. 2013)* ("Moreover, the district court has many tools at its disposal to address concerns regarding the appropriate contours of the putative class, including redefining the class during the certification process or creating subclasses." (citing *Fengler v. Crouse Health Found., Inc., 595 F. Supp. 2d 189, 197 (N.D.N.Y. 2009)*)).

That said, the Court does not anticipate being bogged down with requests to perform thousands upon thousands of depositions to explore issues of knowledge with each class member. There can be no question that there is room for large classes under *Rule 23*. See *Asacol, 907 F.3d at 59* (Barron, J., concurring) ("*Rule 23* was clearly written to facilitate large consumer class actions." (citations omitted)). Defendants have access to their own emails and documents. If they present colorable claims of knowledge, **[**58]** the Court will entertain those concerns, thus protecting Defendants' *Seventh Amendment* rights. However, ***HN20***[] the Court will not allow "arguments woven entirely out of gossamer strands of speculation and surmise to tip the decisional scales in a class certification ruling." See *Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 298 (1st Cir. 2000)* (citing *Zeigler v. Gibralter Life Ins. Co., 43 F.R.D. 169, 173 (D.S.D. 1967)*); see also id. ("[W]hen the court supportably finds that an issue which, in theory, requires individualized factfinding is, in fact, highly unlikely to survive typical pretrial screening . . . , a concomitant finding that the issue neither renders the case unmanageable nor **[*211]** undermines the predominance of common issues generally will be in order.").[17]

Defendants also argue that individual knowledge issues will predominate insofar as they dictate when class TPPs' statute-of-limitations periods began to run. The First Circuit has made clear that ***HN21***[] affirmative defenses, such as statute-of-limitations defenses, "are appropriate for consideration in the class certification calculus." *Mowbray, 208 F.3d at 295*. That said, the First Circuit has explained:

> Although a necessity for individualized statute-of-limitations determinations invariably weighs against class certification under *Rule 23(b)(3)*, we reject any per se rule that treats the presence of such issues as an automatic **[**59]** disqualifier. In other words, the mere fact that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones.

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[17] To the extent Defendants argue that CVS's alleged fraudulent pricing scheme cannot be the proximate cause of overpayment under the civil RICO statute because it did not "directly" lead to the violation, Defs.' Opp'n 39, the Court rejects the argument. As pleaded, and given the record before the court on class certification, Plaintiffs have plainly established that the putative class members were "the primary and intended victim[s] of the scheme to defraud, and that the injury suffered was a foreseeable and natural consequence of the fraudulent scheme." *In re Neurontin Mktg. & Sales Practices Litig., 712 F.3d 51, 58 (1st Cir. 2013)* (internal quotations and citations omitted).

Id. at 296 (citing 5 James Wm. Moore et al., Moore's Federal Practice § 23.46[3], at 23-210 to —211 (3d ed. 1999)); Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 39 (1st Cir. 2003) ("[W]here common issues otherwise predominated, courts have usually certified Rule 23(b)(3) classes even though individual issues were present in one or more affirmative defenses." (citation omitted)). In Mowbray, the First Circuit affirmed the district court's certification of the class despite "possible differences in the application of a statute of limitations to individual class members" because the district court properly engaged in a "case-specific analysis". 208 F.3d at 296-97 (quotation and citation omitted). As in Mowbray, the Court is confident that, here, "most class members' claims [are] unaffected by possible limitations defenses", Mowbray, 208 F.3d at 297 (citation omitted), and accordingly, that the application of individual statute-of-limitation defenses do not bar certification. **HN22**[] The Court will take full advantage of its authority to "place class members with potentially barred claims in a separate subclass or exclude them from the class altogether" where **[**60]** "evidence later shows that an affirmative defense is likely to bar claims against at least some class members". Smilow, 323 F.3d at 39-40 (internal citations omitted).

iii. Arbitration Clauses

Defendants aver that many absent class members may be subject to arbitration clauses in their PBM/TPP contracts. If a class is certified, Defendants state they will move to dismiss or to compel arbitration, causing individual issues to predominate. Defs.' Opp'n 53-54 & n.29. Importantly, these contracts are between TPPs and PBMs — CVS is a party to none of these contracts, and Caremark is only a party where the contracting PBM was Caremark. See id. at 5; Pls.' Reply 37-38.

First, in arguing that CVS will move to compel arbitration under any PBM/TPP contracts containing an arbitration clause, Defendants overstate the number of absent class members subject to mandatory arbitration. Under First Circuit **[*212]** precedent, CVS — as a nonparty and nonsignatory to these contracts — would only succeed at compelling a TPP to arbitrate as a third-party beneficiary where it could "demonstrate with 'special clarity that the contracting parties intended to confer a benefit on'" CVS Hogan v. SPAR Grp., Inc., 914 F.3d 34, 39 (1st Cir. 2019) (quoting McCarthy v. Azure, 22 F.3d 351, 362 (1st Cir. 1994)). **HN23**[] It is not enough for a nonsignatory to have some **[**61]** resulting benefit from "a signatory's exercise of its contractual rights". Id. at 40 (quoting Ouadani v. TF Final Mile LLC, 876 F.3d 31, 39 (1st Cir. 2017)). Instead, the PBM/TPP contract must "mention [or] manifest an intent to confer specific legal rights upon" CVS. Id. (quoting InterGen N.V. v. Grina, 344 F.3d 134, 147 (1st Cir. 2003)) (alteration in original).

A TPP would further only be equitably estopped from avoiding arbitration under narrow circumstances. "**HN24**[] [F]ederal courts 'have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues . . . to resolve in arbitration are intertwined with the agreement that the estopped party has signed." Id. at 40-41 (quoting Ouadani, 876 F.3d at 38). The First Circuit has held that arbitration with a nonsignatory can be compelled where the parties to the contract agreed to arbitrate any action "arising out of, or relating in any way to" the agreement. Sourcing Unlimited, Inc. v. Asimco Int'l, Inc., 526 F.3d 38, 48 (1st Cir. 2008. Where contract language explicitly limits the agreement to disputes between the signatories and there is no evidence of the signatory's intent to arbitrate with the nonsignatory, arbitration cannot be compelled. See Hogan, 914 F.3d at 42 (finding "no legal basis for forcing [signatory] to arbitrate his claims against [nonsignatory] when he demonstrated no intent to do so").

Plaintiffs point to the arbitration clauses of over twenty PBM/TPP **[**62]** contracts that explicitly state that the parties did not intend to create rights for third parties. See Pls.' Reply 37 n.179 ("This agreement . . . is intended solely for the benefit of each party hereto and their respective successors or permitted assigns, and it is not the intention of the parties to confer third party beneficiary rights, and this Agreement does not confer any such rights, upon any other third party . . . ." (quoting Service Agreement, at MI-SM_00000539, ECF No. 145-22)). No one suggests that the PBM/TPP contracts created any legal rights or duties for CVS; indeed, CVShad its own contracts with the PBMs. Thus, CVSfinds support in neither the third-party beneficiary doctrine nor the equitable estoppel doctrine.

Second, that ***HN25***[] some putative class members may be subject to mandatory arbitration is not a bar to class certification. See *Smilow, 323 F.3d at 39* (noting that, "where common issues otherwise predominated, courts have usually certified *Rule 23(b)(3)* classes even though individual issues were present in one or more affirmative defenses"); see also *Walsh v. Gilbert Enters., No. CV 15-472-WES, 2019 U.S. Dist. LEXIS 41225, 2019 WL 1206885, at *4 (D.R.I. Mar. 14, 2019)* (holding that named plaintiff — whose contract did not have an arbitration clause - was typical of class that included individuals subject to arbitration **[**63]** clauses because common issues otherwise predominated). Defendants may pursue those rights under motions to compel arbitration and/or dismiss following class certification, and the Court will employ the procedural tools at its disposable to exclude those TPPs from the class or place them in a subclass. For these reasons, the Court is confident that the existence of arbitration clauses in some PBM/TPP contracts will not result in individual **[*213]** issues predominating over common issues.

b. Generic Effective Rate

Defendants argue that individual issues further predominate because many PBM/TPP contracts contain "aggregate discount guarantees" (also called "generic effective rate guarantees" or "GERs") that, in their view, negate injury in fact and/or any damages from alleged overstated U&C prices. Defs.' Opp'n 4, 45-48. A common PBM/TPP contract provision, a GER clause guarantees that a TPP will receive an average percentage discount off a benchmark price (e.g., average wholesale price) for all drugs in a category (e.g., all generic drugs) for a specified period of time (e.g., one calendar year). Expert Report of Alan Sekula ("Sekula Report") ¶ 10, ECF No. 129-4. In practice, it looks something **[**64]** like this: a PBM guarantees its contracting TPP that it will receive an average discount of 70% off the average wholesale price ("AWP") for generic prescription drugs for calendar year 2021. For any one generic drug, the TPP's discount may be higher than 70% and for any other, lower. But in the aggregate, the health plan is entitled to a 70% (or greater) discount off AWP for generic drugs. Id. In this example, if the TPP paid more than 30% of AWP for the generic drugs purchased in 2021, the PBM would issue a reconciliation payment to make up the difference. Id. ¶ 15.

Defendants offer Sheet Metal Workers as an example; once Sheet Metal Workers' 2014 GER reconciliation is considered, it incurred no damages in 2014, a stark contrast to the $21,498 alleged. Defs.' Opp'n 52; Feb. 14, 2020 Hr'g Tr. 69-70; see also Barlag Decl. ¶¶ 137-38.[18] In such situations, Defendants contend, health plans would be left without damages. Furthermore, Defendants suggest that removing these uninjured putative class members — as required by *Asacol* - would be unduly laborious, and individual issues therefore predominate. See Defs.' Opp'n 49-52.

Plaintiffs retort that GERs are not relevant to injury; at most, they **[**65]** say, GERs may offset damages for some putative class members. For this proposition, Plaintiffs point to ***antitrust law*** where injury accrues the moment an overcharge is incurred, regardless of whether it is later offset. See *In re Nexium Antitrust Litig., 777 F.3d 9, 27 (1st Cir. 2015)*; see also *Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 267-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)* (concluding that Congress used the same words in drafting RICO as it had in the already-enacted *Sherman Act* and *Clayton Act*, and thus the Court could "only assume it intended them to have the same meaning that courts had already given them" (citation omitted)).

The Court concludes that, on this record, GERs are not relevant to putative class TPP injury in fact. Still, as discussed below, Plaintiffs must demonstrate an administratively feasible way to identify and apply GER offsets to damages in order to ensure that the proposed classes' damages calculations are accurate, and Defendants' due process rights are honored.

First, PBMs do not make GER reconciliation payments at the transaction level; instead, GER reconciliation payments are calculated in the aggregate, across a subset of drugs, for a defined period, after claims have been

[18] To fall within one of the class definitions, a TPP need only have suffered an injury during the class period; a TPP may not have incurred damages in any one single calendar year, but still aptly be included in one of the classes for injury incurred during another year covered by the class period.

adjudicated and paid. Conti Reply ¶ 54; see also Sekula Report **[*214]** ¶ 15. Thus, this arrangement is factually distinguishable from **[**66]** those in which an injury offset could be traced back to a specific transaction. See Barlag Decl. ¶ 136 (recognizing that GERs are not applied at the transaction level, but rather in the aggregate, by noting that "[e]ven if one assumes submitting the HSP price as the U&C price would have changed the amount paid by Sheet Metal on an individual claim, it does not change the aggregate annual amount paid by Sheet Metal across all claims").

The First Circuit authority dictates that ***HN26***[] a RICO claim has not accrued where injury to a plaintiff's property is speculative. *DeMauro v. DeMauro, 115 F.3d 94, 97-98 (1st Cir. 1997)*. In DeMauro, plaintiff-wife sued defendant-husband, and others, alleging that they had fraudulently concealed separate and marital assets during protracted and contentious divorce proceedings. *Id. at 95*. The First Circuit held that any injury to the plaintiff's legal claim had not accrued because it was too speculative, as no one yet knew whether the alleged concealment would diminish her award in the divorce proceeding. *Id. at 97* (citing *Lincoln House, Inc. v. Dupre, 903 F.2d 845, 847 (1st Cir. 1990)*). The First Circuit noted concern that "it is hard to see how a court would calculate damages now, given the dual uncertainties of what [the plaintiff] will be awarded and how it will be affected by concealment." **[**67]** Id. (citing *First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 768 (2d Cir. 1994)*). This concern did not arise, however, where the plaintiff alleged concealment of property in which she held a present ownership interest; for that property, the court concluded she had alleged injury under RICO. *Id. at 98* (citing *Grimmett v. Brown, 75 F.3d 506, 516-17 (9th Cir. 1996)*).

Here, each alleged injury stems from an overcharge paid by a TPP as a result of an inflated U&C price. The injury fully accrued when the claim was adjudicated and paid. At that point, the only loose end was the possibility of an aggregate offset in the form of a GER reconciliation payment. "[T]he injury has occurred and is known, but it is speculative whether the damages might be reduced or even eliminated"; this is not a case in which "the injury is speculative because it is not known whether it will occur at all" due to some future event that may or may not occur. See *Grimmett, 75 F.3d at 517*; see also *DeMauro, 115 F.3d at 97*; cf. *Gastronomical Workers Union Local 610 & Metro. Hotel Ass'n Pension Fund v. Dorado Beach Hotel Corp., 617 F.3d 54, 61-62 (1st Cir. 2010)* ("Fairly viewed, that claim does not suggest that the trustees have alleged a speculative injury, the existence of which depends upon future events that may or may not occur. Rather, the claim is that a future event may change the type of remedy available to redress an existing injury. Consequently, it is the future event, not the trustees' injury, that is speculative."). **[**68]**

Defendants' cited cases do not counsel otherwise, as each involves speculative, future events that may undermine the purported RICO injury. See, e.g., *Maio v. Aetna, 221 F.3d 472 (3d Cir. 2000)* ("There is no factual basis for appellants' conclusory allegation that they have been injured in their 'property' because the health insurance they actually received was inferior and therefore 'worth less' than what they paid for it."); *In re Bridgestone/Firestone Inc. v. Wilderness Tires Prods. Liab. Litig., 155 F. Supp. 2d 1069, 1091 (S.D. Ind.)*, on reconsideration in part, *No. MDL NO. 1373, 2001 U.S. Dist. LEXIS 27217, 2001 WL 34691976 (S.D. Ind. Nov. 14, 2001)*, rev'd on other grounds *288 F.3d 1012 (7th Cir. 2002)* ("RICO affords a monetary remedy only to plaintiffs who have actually realized the diminished value or experienced product **[*215]** failure, and not to those who allege a risk (or even a probability) of such loss.").

The Court is satisfied that, on this record, Plaintiffs' injury from overcharge accrued at the time of payment.

Second, regardless of whether the GER reconciliation payments go to injury or damages, Defendants will get their day in court to meaningfully challenge the effect of GER payments on class damages. In the wake of Asacol, the Court can be confident of a few things.

HN27[] A class may be certified without each putative class member first establishing standing, and *Rule 23* does not require the district court to establish injury in fact for each class member **[**69]** prior to class certification. *Asacol, 907 F.3d at 58*. But, Defendants must be afforded a meaningful opportunity to challenge injury in fact and pick off uninjured class members before or at trial. Id. And there is no question, post-Asacol, that a district court may not certify a class where a body of uninjured class members stand to recover, regardless of whether the defendants are found liable for the aggregate damages amount. See generally id.

The circumstances presented here are clearly distinguishable from those in *Asacol*. In Asacol, the First Circuit was presented with a putative class with a small percentage of members known to be uninjured — the so-called brand loyalists. Moreover, there was no administratively feasible way to allow the defendants a meaningful opportunity to challenge the uninjured class members' inclusion. See *id. at 53*. As a result, the uninjured class members were all but guaranteed to collect damages from the defendants. Here, in contrast, we don't inhabit the theoretical but-for world of ***antitrust law***; instead, a world where alleged injury and damages are knowable and well documented. Even if a subset of putative class members incurred overcharges that were later offset by GER reconciliation **[**70]** payments, Defendants will have the opportunity to challenge them at (or before) trial. No uninjured putative class members stand to recover.

Finally, the Court is satisfied that Plaintiffs' expert, Dr. Rena Conti, will be able to incorporate GER offsets into her damages calculations on a class-wide basis. She offers two methods. First, if provided with reconciliation payment data, Dr. Conti will perform the following calculation. Dr. Conti will first isolate a TPP's measured effective rate and compare it to its contracted GER guaranteed rate (i.e., the guaranteed GER in that TPP's contract). Conti Reply ¶ 55. A measured effective rate is 1 minus (the sum of all ingredient costs paid/the sum of all AWP amounts). Id. If a TPP pays less in the aggregate for the specified drugs than it would under its GER provision (e.g., paying an aggregate of AWP minus 76%, where its contract provides that it pay no more than AWP minus 75%), the PBM would submit no reconciliation. Id. ¶ 56. If the TPP pays more (e.g., its aggregate payment was equal to AWP minus 72%, where its GER was AWP minus 75%), the PBM would reconcile this with a payment equal to the 3% (75%-72%) difference. Id. ¶ 57. Dr. Conti **[**71]** incorporates reconciliation-payment offsets into her damages calculation, and where a reconciliation payment is greater than the calculated damages, the damages are bottomed out at $0. Id. ¶¶ 58-61. Dr. Conti's formula appropriately errs on the side of being conservative in response to Defendants' expert's critique. See id. ¶¶ 59 (formula 8), 62-64 (noting additional exclusions to provide for a conservative damages model).

In the alternative, if Dr. Conti is not provided with reconciliation payments data, she sets forth a conservative method for calculating the effect of GERs on a class-wide basis. Id. ¶ 65. Under this method, **[*216]** Plaintiffs would first review all PBM contracts for a range of annual GER guarantees and identify each PBM's highest GER guarantee for each year. Id. ¶¶ 65-66. Next, using claims data for the generic drugs included in each PBM's GER calculation and a list of the HSP-eligible drugs, Plaintiffs would calculate the impact of adjusting the HSP price on the conservative GER reconciliation payment. Id. ¶¶ 66, 69. This delta in GER reconciliation payment would be used to offset Plaintiffs' overcharge calculation. Id. ¶ 66.

The Court concludes that Plaintiffs have demonstrated **[**72]** by a preponderance of the evidence that they have a "reasonable and workable plan" for determining the effect of a GER on the putative class members' damages "that is protective of the defendant[s]'s constitutional rights and does not cause individual inquiries to overwhelm common issues." *Asacol, 907 F.3d at 58*. Though Defendants' experts have declared the process overly burdensome, they acknowledge that an expert ostensibly could, for any health plan, identify any applicable GER provisions, determine the periods they cover, the drugs to which they apply, whether the health plan received reconciliation payments, and the effect any reconciliation payments had on offsetting any alleged overcharge to the health plan. See Sekula Report ¶¶ 19; Defs.' Opp'n 47-48.

In the Court's view, the need to account for GER damages offsets does not impede certification. The parties will confer before trial on which putative class members fall away as incurring no damages. Should there be a dispute over a subset of health plans, Defendants will have the opportunity to challenge their inclusion in the classes. *Asacol, 907 F.3d at 53* (suggesting a class would be ripe for certification where "a very small absolute number of class members might be **[**73]** picked off in a manageable, individualized process at or before trial"). Because this information is knowable from PBM/TPP contracts and data, individual issues will not predominate — not now, and not at trial.

c. Damages

HN28[] To satisfy the predominance requirement, not only must liability be established through common proof, but Plaintiffs must also demonstrate that "any resulting damages would likewise be established by sufficiently common proof." *Nexium, 777 F.3d at 18* (quoting *New Motor Vehicles, 522 F.3d at 20*). To do so, Plaintiffs must establish that damages are both "capable of measurement on a classwide basis" and tied to their theory of liability. See *Comcast, 569 U.S. at 34-36*.

HN29[] A model measuring class-wide damages in a class action "must measure only those damages attributable to that theory." *Id. at 35*. "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of *Rule 23(b)(3)*." Id. "Calculations need not be exact, but at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case . . . ." Id. (internal citations and quotations omitted).

In support of their Motion for Class Certification, Plaintiffs offer the **[**74]** expert opinion of Dr. Rena Conti. See generally Conti Report; Conti Reply. Using her model, Dr. Conti measures damages for the Nationwide Class as the delta between what a TPP paid for certain HSP-eligible drugs and the amount it would have paid for those HSP drugs had the U&C price incorporated the HSP price. Conti Report ¶ 62. For this model, Dr. Conti used CVS pharmacy claims data for HSP drugs **[*217]** across 14 states[19], as well as HSP price data. Id. ¶¶ 11, 63. Under her model, damages for these 14 states total $334.2 million, exclusive of any GER offsets. Conti Reply ¶ 4. The model is flexible and can be adjusted to account for more or higher quality data as discovery proceeds. Id. ¶ 5.

After careful review of Dr. Conti's reports, the Court concludes that her model reflects a reliable and sound methodology[20] by which to measure Plaintiffs' alleged damages given that she intends to procure and incorporate additional data to strengthen the model. A summary of the model is helpful. Dr. Conti began with all the CVS pharmacy patient claims data for the 14 states covering transactions occurring between November 2008 and December 2015. Conti Report ¶ 70. She then excluded drugs that never appeared **[**75]** on the HSP formulary drug list during the relevant time, limited the claims to the five PBMs implicated in this case, and excluded government payors. Id. ¶ 71. She further excluded claims that were paid based on lesser-of pricing formulas that do not include U&C. Conti Reply ¶ 48.

Using the remaining claims, Dr. Conti calculated the TPP overpayment amount as the TPP adjudicated payment amount less the HSP price, adjusting for the amount paid by the pharmacy customer. Conti Report ¶ 73. Moreover, Dr. Conti applied a damages offset for the annual HSP membership fees paid by cash customers to access the HSP prices, and explained the technique she could apply to incorporate GER offsets, if the Court deemed them relevant. Conti Reply ¶¶ 54-69; Conti Report ¶¶ 75-76.

Dr. Conti opined that, after discovery produces the requisite PBM data, she will use this same method to calculate damages on a classwide basis using the updated data. Conti Report ¶ 77. From PBM data, she will also be able to identify individual class members. Id. Indeed, she demonstrated this by using the PBM data for named Plaintiffs to calculate their damages during the class period. Id. Dr. Conti further **[**76]** extrapolated the damages for the 14

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[19] The data cover thirteen states and the District of Columbia. For ease of reference, the Court refers to them as the "14 states" in this decision.

[20] While Defendants have not yet filed a Daubert motion to exclude Dr. Conti's expert opinion, it was inescapable for the Court to consider the soundness of her methodology in determining whether damages are capable of measurement on a class-wide basis and tied to Plaintiffs' liability theory. Moreover, the Court considered the expert reports offered by Defendants criticizing Dr. Conti's report. The Court otherwise DENIES WITHOUT PREJUDICE the Motions as premature and will consider them once refiled as the case proceeds. See Pls.' Mots. to Exclude the Expert Testimony of Brett E. Barlag, Catherine Graeff, Michael P. Salve, Ph.D., ECF Nos. 140-42. To the extent those reports conclude Dr. Conti's methodology is unreliable or inaccurate, the Court disagrees for the reasons set forth herein; the Court understands the experts as largely offering competing views that go to the weight, and not admissibility, of the opinion. See *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co., 161 F.3d 77, 85 (1st Cir. 1998)* ("Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance. It demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion." (citation omitted)).

states to the remaining 36 states using state-specific data (viz., demographic information, total retail prescription sales, Medicaid claims, and CVS's dominance in that market). Id. ¶ 78.

Defendants argue that Plaintiffs' proposed damages model both cannot measure damages on a class-wide basis and is not tied to Plaintiffs' liability theory. In **[*218]** particular, they take issue with Plaintiffs' failure to test certain data.

Defendants' argument implicates a joint stipulation that had resolved a May 2017 discovery dispute between the parties. See Joint Stipulation Regarding Pls.' Motion to Compel CVS to Produce Nationwide Data ("Joint Stipulation Nationwide Data"), ECF No. 54. In the stipulation, Plaintiffs agreed to accept the subset of data produced in the Corcoran case in the Northern District of California, which involved twelve states and the District of Columbia. See id. In exchange for Plaintiffs' agreeing to abandon their claim to CVS's nationwide transaction data, Defendants agreed that Plaintiffs could rely upon this subset of data to demonstrate that damages could be calculated on a class-wide basis. See id. To this end, the stipulation states: **[**77]**

> CVS will not challenge Plaintiffs' methodology for calculating classwide damages (a) on the basis that the data fields that CVS has produced to date for the Corcoran States represent different types of information than is available for states other than the Corcoran States or (b) by using data from states other than the Corcoran States, which has not been produced to Plaintiffs.

Id. at 2. Caremark produced claims data only for HSP drugs purchased in Indiana and Illinois at CVS pharmacies between November 2008 and January 2016. Pls.' Reply 30.

Under Plaintiffs' theory, the damages of any given TPP are the difference between the amount it actually paid for certain HSP drugs and the amount it would have paid for those drugs if the HSP price had been reported as the U&C price. Conti Report ¶ 62. In preparing Plaintiffs' damages model, Dr. Conti did not have TPP payments data — due to the Joint Stipulation — and thus based Plaintiffs' model on PBM payments data. Defendants now complain that Dr. Conti did not calculate the class TPP damages at all, instead she calculated the difference between what the PBMs paid and what they would have paid had HSP prices included U&C prices. Defs.' Opp'n **[**78]** 49.

For purposes of class certification, and given that Dr. Conti asserts that she intends to update this model once more data are made available, the Court finds that PBM data are a reliable proxy for TPP data for purposes of class certification. See *New Eng. Carpenters Health Benefits Fund v. First DataBank, Inc., 248 F.R.D 363, 370 (D. Mass. 2008)* (stating, in a RICO case involving fraudulently reported average wholesale drug prices, that the "data [were] a reasonable proxy of TPP reimbursements for drugs"). Plaintiffs' model generates a conservative damages estimate, or, in other words, "underestimates the overcharges attributable to Defendants' alleged fraud", because TPPs compensate "PBMs for their services at a markup of what PBMs pay pharmacies." Conti Reply ¶ 40; see also Pls.' Reply 27-28 & n.130 (noting that for any one HSP drug, CVS would submit the inflated U&C price to the adjudicating PBM, the PBM would pay CVS , and the inflated price would "ultimately be passed to the Class member in the form of an even higher price so that the PBM would profit from the 'spread' between what it paid CVS and what the Class member paid the PBM" (citing Conti Report ¶¶ 62, 73)).

In addition to modeling damages using PBM claims data as a proxy for TPP claims data, Dr. Conti provides that **[**79]** once more PBM data are produced for the HSP drugs, her "method is flexible to accommodate their inclusion in estimating damages." Conti Reply ¶ 40. Indeed, the model's flexibility is on display where Dr. Conti updates her estimate of named-Plaintiff Sheet Metal Workers' damages to reflect **[*219]** coinsurance payments and the effect of the Maintenance Choice Program. Id. ¶ 53 & n.70; see also id. ¶¶ 54-69 (describing how model can take GERs into account).

Given that this methodology produces a conservative damages model using PBM claims data, and has the demonstrated flexibility to be adjusted to accommodate additional data, the Court is satisfied that, while not "exact[,]" the model is "consistent with [the proposed classes'] liability case." *Comcast, 569 U.S. at 35* (citations and quotation omitted). It is true that the model has not been tested using TPP data, but the shortcomings of Plaintiffs' data are directly attributable to Defendants' strategic decision and will be resolved at the liability stage. Moreover, the record supports a finding that, in the aggregate, any overcharges incurred by PBMs were passed on to the putative class. See Conti Reply ¶ 40. In sum, Dr. Conti's methodology is solid and the data are **[**80]** forthcoming.[21]

Defendants also challenge the amount of individualization necessary to calculate damages under Plaintiffs' model. See *Royal Park Invs. SA v. Wells Fargo Bank, N.A., No. 14-CV-09764, 2018 U.S. Dist. LEXIS 9087, 2018 WL 739580, at *15 (S.D.N.Y. Jan. 10, 2018)* (noting that expert's method was sufficiently reliable and he was not required to present a "comprehensive model at the class certification stage" but concluding that the methodology required individualized determinations). While there can be no question that some individualized inquiry is required under the instant damages model, the Court is satisfied that damages can "be established by sufficiently common proof." *Nexium, 777 F.3d at 18*.

Accordingly, the Court concludes that Plaintiffs have demonstrated that common issues predominate as to damages and that the damages are both "capable of measurement on a classwide basis" and tied to their theory of liability. See *Comcast, 569 U.S. at 34-36*.

6. Superiority

HN30[] For the final prerequisite to class certification, Plaintiffs bear the burden of establishing that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. In undertaking this analysis, the Court examines four factors:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent **[**81]** and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Id. The Court is mindful that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (quoting *Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)*). The superiority and predominance inquiries thus ensure that class action litigation will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing **[*220]** procedural fairness or bringing about other undesirable results." Id. (quoting Advisory Committee's Notes on *Fed. R. Civ. P. 23*).

Defendants argue that class adjudication is not superior to other methods of adjudication because (1) the elements of the state law causes of action are materially different, and (2) the putative class members are sophisticated entities capable of bringing suit on their own. Defs.' Opp'n 6, 68-69.

The Court is satisfied that class **[**82]** adjudication is the superior method of adjudication. Though some putative class members may be capable of suing on their own, and there may be some opportunity to recover fees for a successful suit under RICO and some state statutes, judicial economy plainly favors certification. Managing subclasses within this action alleging a single fraudulent scheme is superior to managing several thousand suits.

Moreover, variations in the underlying state law claims do not undermine Plaintiffs' certification efforts. The classes are narrowly tailored and are not unlike numerous other nationwide class actions that courts have certified. See, e.g., *In re Loestrin 24 FE Antitrust Litig., 410 F. Supp. 3d 352, 375-76, 406-07 (D.R.I. 2019)* (certifying class action

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[21] Defendants' other criticisms are sufficiently addressed in Dr. Conti's Reply Report. See Conti Reply ¶ 48 (adjusting model to exclude claims that may have been paid based on formulas that do not include U&C pricing); id. ¶¶ 52-53 (adjusting model to account for patient payment structures). And as addressed at length above, the Court is satisfied that Dr. Conti's damages model can accurately and reliably account for GERs.

brought under numerous state laws and analyzing viability of pharmaceutical antitrust claims under those state statutes).[22] For these reasons, the Court concludes that, in this case, a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." See *Fed. R. Civ. P. 23(b)(3)*.

III. Conclusion

For the above reasons, Caremark's Motion to Dismiss, ECF No. 163, is GRANTED; Plaintiffs' Motion for Class Certification, ECF No. 120, is GRANTED; Plaintiffs' Motions to Exclude the Expert Testimony of Brett E. Barlag, **[**83]** Catherine Graeff, Michael P. Salve, Ph.D., ECF Nos. 140-42, are DENIED WITHOUT PREJUDICE. The Court further appoints Hagens Berman Sobol Shapiro LLP as Class Counsel and appoints named Plaintiffs as Class Representatives.

IT IS SO ORDERED.

/s/ William E. Smith

William E. Smith

District Judge

Date: May 11, 2021

End of Document

[22] The Court gives Plaintiffs fifteen days from the entry of this order to show cause why the Unfair and Deceptive Conduct Consumer Protection Class definition should not be amended to exclude health plans that paid for generic prescription drugs in New Jersey, Ohio, and Iowa, as Defendants assert these state laws were never pleaded in the Amended Complaint and/or were dropped earlier in this suit. See Defs.' Sur-Reply 27.

In re Rail Freight Fuel Surcharge Antitrust Litig. (No. II.)

United States District Court for the District of Columbia

May 12, 2021, Decided; May 12, 2021, Filed

MDL Docket No. 2925; Misc. Action No. 20-00008 (BAH)

Reporter

2021 U.S. Dist. LEXIS 90200 *; 2021 WL 1909777

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION (NO. II). This document relates to: ALL CASES

Prior History: *In re Rail Freight Fuel Surcharge Antitrust Litig. (No. II), 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922 (D.D.C., Aug. 25, 2020)*

Core Terms

Tolling, lingering-effects, damages, plaintiffs', allegations, discovery, contracts, defendants', conspiracy, authorities, railroads, purchases, effects, transportation, lingering, nondefendant, fuel, surcharges, interline, parties, statute of limitations, class period, rail-freight, time-barred, multidistrict litigation, evergreen, putative class, reconsideration, offers, reconsideration motion

Counsel: **[*1]** For NORTHERN INDIANA PUBLIC SERVICE COMPANY LLC, UNION ELECTRIC COMPANY, doing business as AMEREN MISSOURI, AMEREN DEVELOPMENT COMPANY, ALABAMA POWER COMPANY, GEORGIA POWER COMPANY, MISSISSIPPI POWER COMPANY, Plaintiffs: David E. Benz, David Andrew Wilson, Joseph Andrew Smith, Sandra Lee Brown, THOMPSON HINE LLP, Washington, DC.

For KELLOGG COMPANY, Plaintiff: David P. Germaine, PRO HAC VICE, SPERLING & SLATER, P.C., Chicago, IL; Joseph M Vanek, Sperling & Slater,P.C., United Sta, Chicago, IL.

For AK STEEL CORPORATION, CF INDUSTRIES, INC., DAIRYLAND POWER COOPERATIVE, DYNO NOBEL, INC., ENTERGY ARKANSAS, LLC, ENTERGY LOUISIANA, LLC, EXELON GENERATION COMPANY, LLC, NORTH STAR BLUESCOPE STEEL LLC, STEELSCAPE, LLC, WISCONSIN ELECTRIC POWER COMPANY, doing business as WE ENERGIES, Plaintiffs: Craig Philip Seebald, LEAD ATTORNEY, Alden Lewis Atkins, David C Smith, Lindsey R. Vaala, VINSON & ELKINS LLP, Washington, DC; Frank J. Pergolizzi, John H. Leseur, Peter Anthony Pfohl, SLOVER & LOFTUS LLP, Washington, DC.

For IPSCO TUBULARS INC., IPSCO KOPPEL TUBULARS, L.L.C., IPSCO TUBULARS (KY), LLC, TMK NSG, LLC, MOTIVA ENTERPRISES, LLC, KIA MOTORS AMERICA, INC, TALEN ENERGY MARKETING, LLC, formerly **[*2]** known as PPL ENERGYPLUS, LLC, TALEN GENERATION, LLC, formerly known as PPL GENERATION, LLC, TALEN MONTANA, LLC, formerly known as PPL MONTANA, LLC, MARTINS CREEK, LLC, formerly known as PPL MARTINS CREEK LLC, BRUNNER ISLAND, LLC, formerly known as PPL BRUNNER ISLAND, LLC, MONTOUR, LLC, formerly known as PPL MONTOUR, LLC, HYUNDAI MOTOR AMERICA, INC., NOVA CHEMICALS, INC., NOVA CHEMICALS CORPORATION, NOVA CHEMICALS (CANADA) LTD., VIRGINIA ELECTRIC AND POWER COMPANY, DOMINION ENERGY FUEL SERVICES, INC., DOMINION ENERGY SOUTH CAROLINA, INC., Plaintiffs: Sami H. Rashid, Stephen R. Neuwirth, LEAD ATTORNEYS, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, QUINN EMANUEL URQUHART & SULLIVAN, LLP, LEAD ATTORNEY, Los Angeles, CA.

For COFFEYVILLE RESOURCES NITROGEN FERTILIZERS, LLC, COFFEYVILLE RESOURCES REFINING & MARKETING, LLC, WYNNEWOOD REFINING COMPANY, LLC, EAST DUBUQUE NITROGEN FERTILIZERS, LLC, Plaintiffs: Sami H. Rashid, Stephen R. Neuwirth, LEAD ATTORNEYS, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, QUINN EMANUEL URQUHART & SULLIVAN, LLP, LEAD ATTORNEY, Los Angeles, CA; Michael Flynn McBride, VAN NESS FELDMAN LLP, Washington, DC.

For H.A. **[*3]** WAGNER LLC, BRANDON SHORES LLC, Plaintiffs: Sami H. Rashid, Stephen R. Neuwirth, LEAD ATTORNEYS, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY.

For DUKE ENERGY GENERATION, SERVICES, INC., LAFARGE NORTH AMERICA, INC., HOLCIM (US) INC., AGGREGATE INDUSTRIES MANAGEMENT, INC., AGGREGATE INDUSTRIES - SWR, INC., AGGREGATE INDUSTRIES NORTHEAST REGION, INC., AGGREGATE INDUSTRIES - MWR, INC., BARDON, INC., doing business as, AGGREGATE INDUSTRIES MID-ATLANTIC REGION, CEMENT TRANSPORT, LTD, GEOCYCLE LLC, SYSTECH ENVIRONMENTAL CORPORATION, LAFARGE PNW, INC., LATTIMORE MATERIALS CORP., CONAGRA BRANDS, INC., formerly known as, CONAGRA FOODS, INC., AXIALL CORP, Plaintiffs: Sami H. Rashid, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Stephen R. Neuwirth, LEAD ATTORNEY, PRO HAC VICE, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA.

For VULCAN MATERIALS COMPANY, LEGACY VULCAN LLC, FLORIDA ROCK INDUSTRIES, INC., ATLANTIC GRANITE COMPANY, CALMAT CO, VULCAN AGGREGATES COMPANY LLC, VULCAN CONSTRUCTION MATERIALS LLC, FULTON CONCRETE COMPANY LLC, MCCARTNEY CONSTRUCTION COMPANY INC, HARPER **[*4]** BROTHERS LLC, VIRGINIA CONCRETE COMPANY LLC, AZUSA ROCK LLC, TRIANGLE ROCK PRODUCTS LLC, AGGREGATES USA, LLC, CHEM-MARINE CORPORATION OF SOUTH CAROLINA, DMG EQUIPMENT COMPANY LLC, R C SMITH COMPANIES LLC, AGGREGATES USA (MACON) LLC, AGGREGATES USA (SAVANNAH) LLC, AGGREGATES USA (SPARTA) LLC, CALHOUN ASPHALT COMPANY INC, MERCEDES-BENZ USA, LLC, Plaintiffs: Sami H. Rashid, Stephen R. Neuwirth, LEAD ATTORNEYS, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA.

For PCS SALES (USA), INC., AGRIUM (U.S.), INC., PCS PHOSPHATE COMPANY, INC., WHITE SPRINGS AGRICULTURAL CHEMICALS, INC., PCS NITROGEN, INC., BASF CORPORATION, BASF CATALYSTS LLC, COGNIS USA LLC, PROCAT TESTING LLC, AP MOLLER - MAERSK A/S, MAERSK INC., MAERSK LINE UK LIMITED, CANADA IMPERIAL OIL LIMITED, IMPERIAL OIL LIMITED, IMPERIAL OIL, EXXONMOBIL GLOBAL SERVICES COMPANY, EXXONMOBIL OIL CORPORATION, EXXON MOBIL CORPORATION, WESTROCK COMPANY, WESTROCK COATED BOARD, LLC, WESTROCK VIRGINIA, LLC, WESTROCK TEXAS, L.P., WESTROCK CP, LLC, WESTROCK SOUTHEAST, LLC, WESTROCK NORTHWEST, LLC, WESTROCK MILL COMPANY, LLC, WESTROCK MINNESOTA CORPORATION, **[*5]** WESTROCK KRAFT PAPER, LLC, WESTROCK CONTAINER, LLC, WESTROCK LONGVIEW, LLC, Plaintiffs: Sami H. Rashid, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Stephen R. Neuwirth, LEAD ATTORNEY, PRO HAC VICE, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA.

For CALIFORNIA STEEL INDUSTRIES, INC., Plaintiff: Sami H. Rashid, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Stephen R. Neuwirth, LEAD ATTORNEY, PRO HAC VICE, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, LEAD ATTORNEY, PRO HAC VICE, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA.

For NORFALCO LLC, NORFALCO SALES, A division of Glencore Canada Corporation, Plaintiff: Alden Lewis Atkins, Craig Philip Seebald, LEAD ATTORNEYS, VINSON & ELKINS LLP, Washington, DC; Lindsey R. Vaala, LEAD ATTORNEY, VINSON & ELKINS, L.L.P., Washington, DC.

For TOTAL PETROCHEMICALS & REFINING USA, INC., Plaintiff: Catriona Lavery, LEAD ATTORNEY, SUSMAN GODFREY LLP, Los Angeles, CA; Geoffrey L. Harrison, LEAD ATTORNEY, SUSMAN GODFREY LLP, Houston, TX; Shawn L. Raymond, LEAD ATTORNEY, PRO HAC VICE, **[*6]** SUSMAN GODFREY LLP, Houston, TX; Adam Carlis, SUSMAN GODFREY, LLP, Houston, TX; Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX.

For WESTROCK-REX, LLC, WESTROCK-SOLVAY, LLC, Plaintiffs: Sami H. Rashid, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Stephen R. Neuwirth, LEAD ATTORNEY, PRO HAC

VICE, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA.

For ARCELORMITTAL USA LLC, ARCELORMITTAL DOFASCO G.P., Plaintiffs: Carrie C. Mahan, David J. Lender, Eric S. Hochstadt, Luna Ngan Barrington, Sarah Ryu, LEAD ATTORNEYS, WEIL GOTSHAL & MANGES LLP; New York, NY.

For CONSOL ENERGY INC., TMS INTERNATIONAL, LLC, CALUMET SPECIALTY PRODUCTS PARTNERS, L.P., CALUMET REFINING, LLC, CALUMET MONTANA REFINING, LLC, CALUMET KARNS CITY REFINING, LLC, CALUMET COTTON VALLEY REFINING, LLC, CALUMET PRINCETON REFINING, LLC, CALUMET DICKINSON REFINING, LLC, CALUMET OPERATING, LLC, CALUMET BRANDED PRODUCTS, LLC, Plaintiffs: Carrie C. Mahan, David J. Lender, Eric S. Hochstadt, Luna Ngan Barrington, Sarah Ryu, LEAD ATTORNEYS, WEIL GOTSHAL & MANGES LLP; New York, NY; Melinda R Coolidge, Michael David **[*7]** Hausfeld, Sathya S. Gosselin, Seth R. Gassman, HAUSFELD LLP, Washington, DC.

For DOW CHEMICAL COMPANY, on behalf of itself and its subsidiaries and affiliates, UNION CARBIDE CORPORATION, AMERCHOL CORPORATION, Plaintiffs: Benjamin Waldin, Ryan Walsh, LEAD ATTORNEYS, EIMER STAHL LLP, Chicago, IL.

For UMETCO MINERALS CORPORATION formerly known as UNION CARBIDE ETHYLENE OXIDE/GLYCOL COMPANY, GERDAU AMERISTEEL CORPORATION, GERDAU AMERISTEEL US INC., GERDAU AMERISTEEL PERTH AMBOY INC., GERDAU AMERISTEEL SAYREVILLE INC., CHAPARRAL STEEL COMPANY, CHAPARRAL STEEL MIDLOTHIAN, LP, CHAPARRAL (VIRGINIA) INC., SHEFFIELD STEEL CORPORATION, GERDAU MACSTEEL, INC., Plaintiffs: Benjamin Waldin, LEAD ATTORNEY, EIMER STAHL LLP, Chicago, IL.

For INTERNATIONAL PAPER COMPANY, Plaintiff: Benjamin Waldin, Susan M. Razzano, LEAD ATTORNEYS, EIMER STAHL LLP, Chicago, IL.

For LOTTE GLOBAL LOGISTICS (NORTH AMERICA), INC., formerly known as HYUNDAI INTERMODAL, INC., BOISE CASCADE COMPANY, LANSING BOARD OF WATER AND LIGHT, PEABODY INVESTMENTS CORP., PEABODY ENERGY CORPORATION, PEABODY NATURAL RESOURCES COMPANY, PEABODY MIDWEST MINING LLC, Plaintiffs: Brian A. Ratner, Melinda R Coolidge, Michael David Hausfeld, LEAD ATTORNEYS, **[*8]** HAUSFELD LLP, Washington, DC; Catriona Lavery, LEAD ATTORNEY, SUSMAN GODFREY LLP, Los Angeles, CA; Geoffrey L. Harrison, Shawn L. Raymond, LEAD ATTORNEYS, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX; Sathya S. Gosselin, LEAD ATTORNEY, PRO HAC VICE, HAUSFELD LLP, Washington, DC; Seth R. Gassman, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Theodore Francis DiSalvo, LEAD ATTORNEY, HAUSFLED, Washington, DC; Adam Carlis, SUSMAN GODFREY, LLP, Houston, TX.

For LINDE AG, PRAXAIR, INC., Plaintiffs: Brian A. Ratner, Melinda R Coolidge, Michael David Hausfeld, LEAD ATTORNEYS, HAUSFELD LLP, Washington, DC; Sathya S. Gosselin, LEAD ATTORNEY, PRO HAC VICE, HAUSFELD LLP, Washington, DC; Seth R. Gassman, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Theodore Francis DiSalvo, LEAD ATTORNEY, HAUSFLED, Washington, DC.

For CEMEX, INC., CLEARWATER PAPER CORPORATION, GOODYEAR TIRE AND RUBBER COMPANY, KRAFT HEINZ FOODS COMPANY, POTLATCHDELTIC CORPORATION, RAYONIER ADVANCED MATERIALS INC., UPM-KYMMENE, INC., UNILEVER ASCC AG, Plaintiffs: Robert D.W. Landon, III, LEAD ATTORNEY, KENNY NACHWALTER, P.A., Miami, FL; William J. Blechman, LEAD ATTORNEY, Michael Anthony Ponzoli, KENNY NACHWATER, P.A., **[*9]** Miami, FL.

For PEABODY COULTERVILLE MINING, LLC, PEABODY COALSALES, LLC, formerly known as COALSALES, LLC, COALSALES II, LLC, formerly known as PEABODY COALSALES COMPANY, PEABODY COALTRADE, LLC, formerly known as COALTRADE, LLC, formerly known as PEABODY COALTRADE, INC, TWENTYMILE COAL, LLC, formerly known as TWENTYMILE COAL COMPANY, FRITO-LAY, INC., BOTTLING GROUP, LLC, Operating as Pepsi Beverages Company, Plaintiffs: Brian A. Ratner, Melinda R Coolidge, Michael David Hausfeld, LEAD ATTORNEYS, HAUSFELD LLP, Washington, DC; Geoffrey L. Harrison, Shawn L. Raymond, LEAD ATTORNEYS, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX; Sathya S. Gosselin, LEAD ATTORNEY, PRO HAC VICE, HAUSFELD LLP, Washington, DC; Seth R. Gassman, LEAD ATTORNEY, Hausfeld

LLP, San Francisco, CA; Theodore Francis DiSalvo, LEAD ATTORNEY, HAUSFLED, Washington, DC; Adam Carlis, SUSMAN GODFREY, LLP, Houston, TX.

For NEWELL RECYCLING SOUTHEAST, LLC, Plaintiff: Brian A. Ratner, Melinda R Coolidge, Michael David Hausfeld, LEAD ATTORNEYS, HAUSFELD LLP, Washington, DC; Sathya S. Gosselin, LEAD ATTORNEY, PRO HAC VICE, HAUSFELD LLP, Washington, DC; Seth R. Gassman, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Theodore **[*10]** Francis DiSalvo, LEAD ATTORNEY, HAUSFLED, Washington, DC.

For TROPICANA PRODUCTS, INC., ROSEBURG FOREST PRODUCTS CO., U.S. SILICA COMPANY, Plaintiffs: Brian A. Ratner, Melinda R Coolidge, Michael David Hausfeld, LEAD ATTORNEYS, HAUSFELD LLP, Washington, DC; Catriona Lavery, LEAD ATTORNEY, SUSMAN GODFREY LLP, Los Angeles, CA; Geoffrey L. Harrison, Shawn L. Raymond, LEAD ATTORNEYS, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX; Sathya S. Gosselin, LEAD ATTORNEY, PRO HAC VICE, HAUSFELD LLP, Washington, DC; Seth R. Gassman, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Theodore Francis DiSalvo, LEAD ATTORNEY, HAUSFLED, Washington, DC; Adam Carlis, SUSMAN GODFREY, LLP, Houston, TX.

For GRAND RIVER DAM AUTHORITY, Plaintiff: Brian A. Ratner, Melinda R Coolidge, Michael David Hausfeld, LEAD ATTORNEYS, HAUSFELD LLP, Washington, DC; Catriona Lavery, LEAD ATTORNEY, SUSMAN GODFREY LLP, Los Angeles, CA; Geoffrey L. Harrison, Shawn L. Raymond, LEAD ATTORNEYS, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX; Sathya S. Gosselin, LEAD ATTORNEY, PRO HAC VICE, HAUSFELD LLP, Washington, DC; Seth R. Gassman, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Theodore Francis DiSalvo, LEAD ATTORNEY, **[*11]** HAUSFLED, Washington, DC; Adam Carlis, SUSMAN GODFREY, LLP, Houston, TX; Larry D. Lahman, MITCHELL & DECLERK, PLLC, Enid, OK; Roger L. Ediger, MITCHELL DECLERCK, Enid, OK.

For U.S. SILICA COMPANY, SUZUKI MOTOR OF AMERICA, INC., Plaintiffs: Brian A. Ratner, Melinda R Coolidge, Michael David Hausfeld, LEAD ATTORNEYS, HAUSFELD LLP, Washington, DC; Catriona Lavery, LEAD ATTORNEY, SUSMAN GODFREY LLP, Los Angeles, CA; Geoffrey L. Harrison, LEAD ATTORNEY, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX; Sathya S. Gosselin, LEAD ATTORNEY, PRO HAC VICE, HAUSFELD LLP, Washington, DC; Seth R. Gassman, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Shawn L. Raymond, LEAD ATTORNEY, PRO HAC VICE, SUSMAN GODFREY LLP, Houston, TX; Theodore Francis DiSalvo, LEAD ATTORNEY, HAUSFLED, Washington, DC; Adam Carlis, SUSMAN GODFREY, LLP, Houston, TX.

For DOMTAR CORPORATION, FORD MOTOR COMPANY, SOUTH CAROLINA PUBLIC SERVICE, AUTHORITY, David C. Eddy, LEAD ATTORNEY, NEXSEN PRUET LLC, Columbia, SC.

For J. R. SIMPLOT COMPANY, Plaintiff: Plaintiff: Catriona Lavery, LEAD ATTORNEY, SUSMAN GODFREY LLP, Los Angeles, CA; Geoffrey L. Harrison, LEAD ATTORNEY, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX; Melinda **[*12]** R Coolidge, LEAD ATTORNEY, HAUSFELD LLP, Washington, DC; Shawn L. Raymond, LEAD ATTORNEY, PRO HAC VICE, SUSMAN GODFREY LLP, Houston, TX; Adam Carlis, SUSMAN GODFREY, LLP, Houston, TX; Larry D. Lahman, MITCHELL & DECLERK, PLLC, Enid, OK; Roger L. Ediger, MITCHELL DECLERCK, Enid, OK.

For MILLERCOORS, LLC, Plaintiff: Catriona Lavery, LEAD ATTORNEY, SUSMAN GODFREY LLP, Los Angeles, CA; Geoffrey L. Harrison, LEAD ATTORNEY, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX; Melinda R Coolidge, LEAD ATTORNEY, HAUSFELD LLP, Washington, DC; Shawn L. Raymond, LEAD ATTORNEY, PRO HAC VICE, SUSMAN GODFREY LLP, Houston, TX; Adam Carlis, SUSMAN GODFREY, LLP, Houston, TX.

For GENON ENERGY MANAGEMENT, LLC, GENON POWER MIDWEST LP, GENON REMA, LLC, Plaintiffs: Benjamin Waldin, LEAD ATTORNEY, EIMER STAHL LLP, Chicago, IL.

For SIMS GROUP USA HOLDINGS, CORPORATION, formerly known as, SIMS HUGO NEU CORPORATION, METAL MANAGEMENT, INC., SIMSMETAL EAST LLC, formerly known as, SIMS HUGO NEU EAST LLC, formerly known as, HUGO NEU SCHNITZER EAST, METAL MANAGEMENT NORTHEAST, INC., METAL MANAGEMENT PITTSBURGH, INC., SMM NEW ENGLAND CORPORATION, formerly known as, METAL MANAGEMENT

CONNECTICUT, INC., SMM SOUTHEAST LLC, **[*13]** METAL MANAGEMENT MIDWEST, INC., METAL MANAGEMENT INDIANA, INC., Plaintiffs: Brian A. Ratner, Melinda R Coolidge, Michael David Hausfeld, LEAD ATTORNEYS, HAUSFELD LLP, Washington, DC; Geoffrey L. Harrison, LEAD ATTORNEY, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX; Sathya S. Gosselin, LEAD ATTORNEY, PRO HAC VICE, HAUSFELD LLP, Washington, DC; Seth R. Gassman, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Shawn L. Raymond, LEAD ATTORNEY, PRO HAC VICE, SUSMAN GODFREY LLP, Houston, TX; Theodore Francis DiSalvo, LEAD ATTORNEY, HAUSFLED, Washington, DC; Adam Carlis, SUSMAN GODFREY, LLP, Houston, TX.

For METAL MANAGEMENT INDIANA, INC., METAL MANAGEMENT OHIO, INC., SIMS SOUTHWEST CORPORATION, formerly known as, PROLER SOUTHWEST LP, formerly known as, PROLER SOUTHWEST CORPORATION, SMM SOUTH CORPORATION, formerly known as, METAL MANAGEMENT ALABAMA, INC., METAL MANAGEMENT MEMPHIS, LLC, SIMS GROUP USA CORPORATION, SIMSMETAL WEST LLC, formerly known as, SIMS HUGO NEU WEST LLC, SCHIABO LAROVO CORPORATION, Plaintiffs: Brian A. Ratner, Melinda R Coolidge, Michael David Hausfeld, LEAD ATTORNEYS, HAUSFELD LLP, Washington, DC; Geoffrey L. Harrison, LEAD ATTORNEY, SUSMAN GODFREY LLP, Houston, **[*14]** TX; Sathya S. Gosselin, LEAD ATTORNEY, PRO HAC VICE, HAUSFELD LLP, Washington, DC; Seth R. Gassman, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Shawn L. Raymond, LEAD ATTORNEY, PRO HAC VICE, SUSMAN GODFREY LLP, Houston, TX; Theodore Francis DiSalvo, LEAD ATTORNEY, HAUSFLED, Washington, DC; Adam Carlis, SUSMAN GODFREY, LLP, Houston, TX; Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX.

For GRAIN CRAFT, INC., PHILLIPS 66 COMPANY, Plaintiffs: Sami H. Rashid, Stephen R. Neuwirth, LEAD ATTORNEYS, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, LEAD ATTORNEY,QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA.

For TAMINCO CORPORATION, SOLUTIA INC., EASTMAN CHEMICAL COMPANY, Plaintiffs: Jimmie C. Miller, LEAD ATTORNEY, HUNTER, SMITH & DAVIS, LLP, Kingsport, TN; Sami H. Rashid, Stephen R. Neuwirth, LEAD ATTORNEYS, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, LEAD ATTORNEY,QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA; Michael Flynn McBride, VAN NESS FELDMAN LLP, Washington, DC.

For J.M. SMUCKER COMPANY, Plaintiff: Brandon Boulware, LEAD ATTORNEY, BOULWARE LAW LLC, Kansas City, MO; Chelsea Mikula, LEAD ATTORNEY, TUCKER ELLIS, **[*15]** LLP, Cleveland, OH; Jeremy Suhr, BOULWARE LAW LLC, Kansas City, MO.

For EQUISTAR CHEMICALS, LP, Plaintiff: Geoffrey L. Harrison, LEAD ATTORNEY, SUSMAN GODFREY LLP, Houston, TX; Shawn L. Raymond, LEAD ATTORNEY, PRO HAC VICE, SUSMAN GODFREY LLP, Houston, TX; Vineet Bhatia, LEAD ATTORNEY, SUSMAN GODFREY LLP, Houston, TX; Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX.

For LYONDELLBASELL ACETYLS, LLC, Plaintiff: Geoffrey L. Harrison, Vineet Bhatia, LEAD ATTORNEYS, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX; Shawn L. Raymond, LEAD ATTORNEY, PRO HAC VICE, SUSMAN GODFREY LLP, Houston, TX.

For LYONDELL CHEMICAL COMPANY, Plaintiff: CCatriona Lavery, LEAD ATTORNEY, SUSMAN GODFREY LLP, Los Angeles, CA; Geoffrey L. Harrison, Vineet Bhatia, LEAD ATTORNEYS, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX; Shawn L. Raymond, LEAD ATTORNEY, PRO HAC VICE, SUSMAN GODFREY LLP, Houston, TX; Brian Douglas Wallach, LEAD ATTORNEY, Gregory W. Langsdale, CADWALADER, WICKERSHAM & TAFT LLP, Washington, DC; James F. Bennett, LEAD ATTORNEY, DOWD BENNETT LLP, St. Louis, MO; Jeremy Suhr.

For ANHEUSER-BUSCH COMPANIES LLC, Plaintiff: Brandon Boulware, LEAD ATTORNEY, BOULWARE LAW LLC, Kansas City, MO; **[*16]** Brian Douglas Wallach, LEAD ATTORNEY, Gregory W. Langsdale, CADWALADER, WICKERSHAM & TAFT LLP, Washington, DC; James F. Bennett, LEAD ATTORNEY, DOWD BENNETT LLP, St. Louis, MO; Jeremy Suhr.

For LANSING ETHANOL SERVICES, LLC, LANSING TRADE GROUP, LLC., LANSING GRAIN CO., LANSING VERMONT, INC., LANSING-LOUISIANA, LLC, ANDERSONS, INC., Plaintiffs: Kirk T. May, LEAD ATTORNEY, GM LAW PC, Kansas City, MO.

For SAINT-GOBAIN CERAMICS & PLASTICS, INC., BIRD INCORPORATED, CERTAINTEED CANADA, INC., CERTAINTEED GYPSUM & CEILING MANUFACTURING, INC., CERTAINTEED GYPSUM MANUFACTURING, INC., CERTAINTEED GYPSUM NC, INC., CERTAINTEED GYPSUM, INC., CERTAINTEED CEILINGS CORPORATION, CERTAINTEED GYPSUM AND CEILINGS USA, INC., CERTAINTEED LLC, SHELL CHEMICAL LP, PENNZOIL-QUAKER STATE COMPANY, formerly doing business as, SOPUS PRODUCTS, EQUILON ENTERPRISES LLC, doing business as, SHELL OIL PRODUCTS US, doing business as, SOPUS, SHELL CHEMICALS CANADA, by its managing partner Shell Canada Ltd., formerly known as, SHELL CHEMICALS CANADA LTD., SHELL TRADING (US) COMPANY, Plaintiffs: Sami H. Rashid, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Stephen R. Neuwirth, LEAD ATTORNEY, PRO HAC **[*17]** VICE, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA.

For CERTAINTEED GYPSUM WEST VIRGINIA, INC., Plaintiff: Sami H. Rashid, Stephen R. Neuwirth, LEAD ATTORNEYS, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA.

For BRADY MCCASLAND, INC., also known as, CC CONSULTANTS, Plaintiff: David B. Helms, LEAD ATTORNEY, GM LAW PC, St. Louis, MO.

For YANG MING MARINE TRANSPORT CORP., Plaintiff: Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; Leonardo Chingcuanco, COHEN MILSTEIN, Washington, DC; Robert Abraham Braun, COHEN, MILSTEIN, SELLERS & TOLL, Washington, DC.

For YANG MING (AMERICA) CORP., Plaintiff: Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; Leonardo Chingcuanco, COHEN MILSTEIN, Washington, DC; Robert Abraham Braun, LEAD ATTORNEY, COHEN, MILSTEIN, SELLERS & TOLL, Washington, DC.

For NLMK USA, INC, NLMK PENNSYLVANIA, LLC, SHARON COATING, LLC, Plaintiffs: Eric G. Soller, LEAD ATTORNEY, PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP, **[*18]** Pittsburgh, PA; Sami H. Rashid, Stephen R. Neuwirth, LEAD ATTORNEYS, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA.

For UNITED PARCEL SERVICE, INC., an Ohio Corporation, Plaintiff: Milton Russell Wofford, Jr., LEAD ATTORNEY, PRO HAC VICE, KING & SPALDING LLP, Atlanta, GA; Sami H. Rashid, Stephen R. Neuwirth, LEAD ATTORNEYS, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Steig D. Olson, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN LLP, San Francisco, CA; Viola Trebicka, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA.

For UPS GROUND FREIGHT, INC., Plaintiff: Milton Russell Wofford, Jr., LEAD ATTORNEY, PRO HAC VICE, KING & SPALDING LLP, Atlanta, GA; Sami H. Rashid, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Steig D. Olson, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN LLP, San Francisco, CA; Stephen R. Neuwirth, LEAD ATTORNEY, PRO HAC VICE, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA.

For DOMINO FOODS, INC., Plaintiff: James Michael Grippando, **[*19]** Stuart Harold Singer, LEAD ATTORNEYS, BOIES SCHILLER FLEXNER LLP, Fort Lauderdale, FL.

For NIPPON YUSEN KABUSHIKI KAISHA, NYK LINE (NORTH AMERICA), INC. Plaintiffs: Robert Abraham Braun, Benjamin D. Brown, LEAD ATTORNEYS, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; Leonardo Chingcuanco, COHEN MILSTEIN, Washington, DC.

For SOUTHEASTERN MILLS, INC., Plaintiff: Stephen R. Neuwirth, LEAD ATTORNEY, PRO HAC VICE, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY.

For MITSUI O.S.K. LINES, LTD., Plaintiff: Conte Cicala, LEAD ATTORNEY, CLYDE & CO LLP, San Francisco, CA.

For TRAMMO, INC., formerly known as, TRANSAMMONIA, INC., Plaintiff: Catriona Lavery, LEAD ATTORNEY, SUSMAN GODFREY LLP, Los Angeles, CA; Sathya S. Gosselin, LEAD ATTORNEY, PRO HAC VICE, HAUSFELD LLP, Washington, DC; Shawn L. Raymond, LEAD ATTORNEY, PRO HAC VICE, SUSMAN GODFREY LLP, Houston, TX; Adam Carlis, SUSMAN GODFREY, LLP, Houston, TX; Geoffrey L. Harrison, LEAD ATTORNEY, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX.

For TRANSRAIL, INC., Plaintiff: Sathya S. Gosselin, LEAD ATTORNEY, PRO HAC VICE, HAUSFELD LLP, Washington, DC; Shawn L. Raymond, LEAD ATTORNEY, PRO HAC VICE, SUSMAN GODFREY LLP, Houston, TX; Adam **[*20]** Carlis, SUSMAN GODFREY, LLP, Houston, TX; Geoffrey L. Harrison, LEAD ATTORNEY, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX.

For CENTURY ALUMINUM COMPANY, CENTURY ALUMINUM OF KENTUCKY, GP, CENTURY ALUMINUM OF SOUTH CAROLINA, INC, CENTURY ALUMINUM OF WEST, VIRGINIA, INC., HIGH LEVEL MANAGEMENT, VENTURERS, NSA, GP, Plaintiffs: Daniel J. Walker, LEAD ATTORNEY, BERGER MONTAGUE PC, Washington, DC; Michael Dell'Angelo, LEAD ATTORNEY, Michael J. Kane, Michaela Wallin, BERGER MONTAGUE PC, Philadelphia, PA.

For CALPORTLAND COMPANY, Plaintiff: Leo Caseria,LEAD ATTORNEY, SHEPPARD MULLIN RICHTER &, HAMPTON LLP, Washington, DC; Helen C. Eckert, SHEPPARD MULLIN LLP, San Francisco, CA; Joy O. Siu, SHEPPARD MULLIN RICHTER HAMPTON, LLP, San Francisco, CA.

For STERLING STEEL CO., LLC, Plaintiff: David M. Peterson, LEAD ATTORNEY, PETERSON & ASSOCIATES, PC, Kansas City, MO; Joseph A. Kronawitter, LEAD ATTORNEY, HORN, AYLWARD & BANDY, LLP, Kansas City, MO; R. Keith Johnston, LEAD ATTORNEY, WALTERS BENDER STROHBEHN & VAUGHAN, PC, Kansas City, MO; Robert D.W. Landon, III, LEAD ATTORNEY, KENNY NACHWALTER, P.A., Miami, FL.

For PROCTER & GAMBLE COMPANY, PROCTER & GAMBLE DISTRIBUTING, LLC, PROCTER & GAMBLE, **[*21]** MANUFACTURING COMPANY, PROCTER & GAMBLE PAPER PRODUCTS COMPANY, Plaintiffs: Daniel B. Goldman, LEAD ATTORNEY, KRAMER LEVIN NAFTALIS & FRANKEL LLP, New York, NY; Erin E. Rhinehart, LEAD ATTORNEY, FARUKI PLL, Cincinnati, OH; Steven Sparling, LEAD ATTORNEY, KRAMER LEVIN NAFTALIS & FRANKEL LLP, New York, NY; Daniel Lennard, KRAMER LEVIN NAFTALIS & FRANKEL LLP, New York, NY; Zachary C. Naidich, KRAMER LEVIN NAFTALIS & FRANKEL LLP, New York, NY.

For CROWLEY LINER SERVICES, INC., Plaintiff: Geoffrey L. Harrison, LEAD ATTORNEY, SUSMAN GODFREY LLP, Houston, TX; Shawn L. Raymond, LEAD ATTORNEY, PRO HAC VICE, SUSMAN GODFREY LLP, Houston, TX; Adam Carlis, SUSMAN GODFREY, LLP, Houston, TX; Melinda R Coolidge, LEAD ATTORNEY, HAUSFELD LLP, Washington, DC; Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX.

For CROWLEY LINER SERVICES, INC., CROWLEY LOGISTICS, INC., Plaintiffs: Geoffrey L. Harrison, Shawn L. Raymond, LEAD ATTORNEYS, Adam Carlis, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX; Melinda R Coolidge, LEAD ATTORNEY, HAUSFELD LLP, Washington, DC.

For CROWLEY MARITIME CORPORATION, Plaintiff: Catriona Lavery, LEAD ATTORNEY, SUSMAN GODFREY LLP, Los Angeles, CA; Geoffrey L. Harrison, Shawn **[*22]** L. Raymond, LEAD ATTORNEYS, Adam Carlis, Matthew David Wood, SUSMAN GODFREY LLP, Houston, TX; Melinda R Coolidge, LEAD ATTORNEY, HAUSFELD LLP, Washington, DC.

For HB CHEMICAL CORPORATION, INTERNATIONAL POLYMERS CORPORATION, RAVAGO AMERICAS LLC, RAVAGO CHEMICAL DISTRIBUTION, INC., formerly known as, TH HILSON COMPANY, Plaintiffs: Sami H. Rashid, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Stephen R. Neuwirth, LEAD ATTORNEY, PRO HAC VICE, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA.

For LEHIGH HANSON, INC., Plaintiff: Robert D.W. Landon, III, LEAD ATTORNEY, KENNY NACHWALTER, P.A., Miami, FL.

For BMW MANUFACTURING CO., LLC, BMW OF NORTH AMERICA, LLC, Plaintiffs: Brian A. Ratner, LEAD ATTORNEY, HAUSFELD LLP, Washington, DC.

For CENTRAL TRANSPORT INTERNATIONAL, INC., CENTRAL TRANSPORT, INC., LOGISTICS INSIGHT CORP., TRANSPORT COMMUNICATIONS SYSTEMS II, L.L.C., Plaintiffs: Brian A. Ratner, Halli E Spraggins, Melinda R Coolidge, Michael David Hausfeld, LEAD ATTORNEYS, HAUSFELD LLP, Washington, DC; Sathya S. Gosselin, LEAD ATTORNEY, PRO HAC VICE, HAUSFELD LLP, Washington, DC; **[*23]** Seth R. Gassman, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Swathi Bojedla, LEAD ATTORNEY, HAUSFELD, LLP, DC, Washington, DC; Theodore Francis DiSalvo, LEAD ATTORNEY, HAUSFLED, Washington, DC.

For AIR PRODUCTS AND CHEMICALS, INC., Plaintiff: Fletcher Strong, Ronald J. Aranoff, William Hagan, III, LEAD ATTORNEYS, WOLLMUTH MAHER & DEUTSCH LLP, New York, NY.

For SMURFIT-STONE CONTAINER CANADA INC, Plaintiff: Sami H. Rashid, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Stephen R. Neuwirth, LEAD ATTORNEY, PRO HAC VICE, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY; Viola Trebicka, LEAD ATTORNEY, PRO HAC VICE, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Los Angeles, CA.

For TRONOX INC., TRONOX US HOLDINGS INC., Plaintiffs: Barry Coburn, LEAD ATTORNEY, COBURN & GREENBAUM, PLLC, Washington, DC; Daniel B. Goldman, Steven Sparling, LEAD ATTORNEYS, Daniel Lennard, Zachary C. Naidich, KRAMER LEVIN NAFTALIS & FRANKEL LLP, New York, NY.

For ABF FREIGHT SYSTEMS INC, ANDRE M. TOFFEL, Trustee, on behalf of New Wei, Inc., et al., jointly administered bankruptcy estates, Plaintiffs: Daniel J. Walker, LEAD ATTORNEY, BERGER MONTAGUE PC, Washington, DC.

For E.I. DU PONT DE NEMOURS **[*24]** AND COMPANY, Plaintiff: James Peter Denvir, III, LEAD ATTORNEY, BOIES, SCHILLER & FLEXNER LLP, Washington, DC.

For UNION PACIFIC RAILROAD COMPANY, Defendant: Allyson M. Maltas, LEAD ATTORNEY, LATHAM & WATKINS LLP, Washington, DC; Christopher Campbell, LEAD ATTORNEY, Tyler P. Young, LATHAM & WATKINS LLP, San Francisco, CA; Daniel M Wall, Timothy L. O'Mara, LEAD ATTORNEYS, PRO HAC VICE, LATHAM & WATKINS LLP, San Francisco, CA; John M. Majoras, LEAD ATTORNEY, JONES DAY, Washington, DC; Linda Sue Stein, LEAD ATTORNEY, STEPTOE & JOHNSON LLP, Washington, DC; Matthew M. Collette, LEAD ATTORNEY, MASSEY & GAIL LLP, Washington, DC; Tyrone R. Childress, LEAD ATTORNEY, Kelsey Bryan, JONES DAY, Los Angeles, CA.

For BNSF RAILWAY COMPANY, Defendant: Andrew Santo Tulumello, LEAD ATTORNEY, GIBSON, DUNN & CRUTCHER, LLP, Washington, DC; Glenn D. Pomerantz, LEAD ATTORNEY, MUNGER TOLLS & OLSON, LLP, Los Angeles, CA; Anne Conley, Esteban Martin Estrada, Kuruvilla Joseph Olasa, MUNGER, TOLLES & OLSON LLP, Los Angeles, CA; Benjamin Joseph Horwich, MUNGER, TOLLES & OLSON LLP, San Francisco, CA; Jacobus P. van der Ven, MUNGER, TOLLES & OLSON LLP, Washington, DC; Linda Sue Stein, LEAD ATTORNEY, Molly Bruder Fox, **[*25]** STEPTOE & JOHNSON LLP, Washington, DC.

For CSX TRANSPORTATION, INC., Defendant: Andrew H. Marks, LEAD ATTORNEY, COFFEY BURLINGTON, Miami, FL; Christopher W. Cardwell, LEAD ATTORNEY, GULLETT, SANFORD, ROBINSON & MARTIN, PLLC, Nashville, TN; Jeffrey D. Cohen, LEAD ATTORNEY, KEENAN COHEN & HOWARD P.C., Jenkintown, PA; Kent Alan Gardiner, LEAD ATTORNEY, Luke P. van Houwelingen, CROWELL & MORING LLP, Washington, DC; Linda Sue Stein, LEAD ATTORNEY, STEPTOE & JOHNSON LLP, Washington, DC; Anne Coxe Mesrobian, GUNSTER, Jacksonville, FL; David Matthew Wells, GUNSTER, YOAKLEY & STEWART P.A., Jacksonville, FL; Eric Fanchiang, CROWELL& MORING LLP, Irvine, CA; Mara Lieber, PRO HAC VICE, Juan Arteaga, CROWELL & MORING LLP, New York, NY.

For NORFOLK SOUTHERN RAILWAY COMPANY, Defendant: Linda Sue Stein, LEAD ATTORNEY, STEPTOE & JOHNSON LLP, Washington, DC; Noelle M. Reed, LEAD ATTORNEY, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Houston, Tx; Matthew Aaron Tabas, ARNOLD & PORTER KAYE SCHOLER LLP, Washington, DC; Ron Wray, GALLIVAN, WHITE & BOYD PA, Greenville, SC; Tara L. Reinhart, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Washington, DC.

For CALUMET SHREVEPORT REFINING LLC, Defendant: Craig Philip Seebald, **[*26]** LEAD ATTORNEY, Alden Lewis Atkins, VINSON & ELKINS LLP, Washington, DC; Frank J. Pergolizzi, John H. Leseur, Peter Anthony Pfohl, SLOVER & LOFTUS LLP, Washington, DC; Lindsey R. Vaala, VINSON & ELKINS, L.L.P., Washington, DC.

For PAO TMK, CVR PARTNERS, LP, CVR REFINING, LP, CVR NITROGEN, LP, CVR ENERGY, INC., SHELL CHEMICAL LP, SHELL OIL COMPANY, RAVAGO HOLDINGS AMERICA, INC., Interested Parties: Stephen R. Neuwirth, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY.

For NORFOLK SOUTHERN CORPORATION, Interested Party: Noelle M. Reed, LEAD ATTORNEY, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Houston, Tx.

Judges: BERYL A. HOWELL, Chief United States District Judge.

Opinion by: BERYL A. HOWELL

Opinion

MEMORANDUM OPINION

After nearly fifteen years of litigation in this District related to their central allegations that defendants, the four largest railroads operating in the United States, engaged in a multi-year price-fixing conspiracy to increase the price of rail-freight transport, plaintiffs in this multidistrict litigation, *In re Rail Freight Fuel Surcharge Antitrust Litigation* ("*MDL II*"), MDL No. 2952, Misc. A. No. 20-00008 (BAH) (D.D.C.), seek an order requiring extensive new discovery, including **[*27]** four years, or even more, of additional transaction data for certain plaintiffs' purchases of rail-freight transport from defendants. Pls.' Mot. Compel Produc. Post-2008 Transaction Data & Price Authorities ("Pls.' Mot.") at 1, ECF No. 543. Defendants, for their part, oppose plaintiffs' request and move for reconsideration of this Court's unambiguous conclusion in its decision on their motions to dismiss ten individual complaints that "'Plaintiffs' allegations of harm caused by effects of the July 1, 2003-December 31, 2008 conspiracy that extended beyond December 31, 2008 are tolled'" under the exception to the running of the statute of limitations for former putative class members set forth in *American Pipe & Construction Co. v. Utah ("American Pipe"), 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*, and may proceed. Defs.' Mot. Recons. & Opp'n Pls.' Mot. Compel ("Defs.' Mot.") at 1, ECF No. 561 (quoting *In re Rail Freight Fuel Surcharge Antitrust Litig. (No. II) ("Tolling Decision"), MDL No. 2925, Misc. A. No. 20-00008 (BAH), 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *24 (D.D.C. Aug. 25, 2020)*).

A hearing on the pending motions was held on May 6, 2021. *See* Min. Entry (May 6, 2021); Tr. of Hr'g (May 6, 2021) ("May 6 Hr'g Tr."), ECF No. 620. For the reasons set forth below, defendants' Motion for Reconsideration is denied and plaintiffs' Motion to Compel is granted in part and denied in part.

I. BACKGROUND

The extensive factual and procedural background of this multidistrict litigation **[*28]** has been fully summarized in the *Tolling Decision* denying defendants' motions to dismiss, in whole or part, ten individual complaints in *MDL II. See Tolling Decision, 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *1-6*. Only those facts necessary for resolving the instant motions are provided herein.

A. Creation of MDL II and the *Tolling Decision*

The more than 300 rail-freight-shipper plaintiffs in *MDL II* allege that defendants "engaged in a multi-year price-fixing conspiracy to increase the price of rail freight transport through their coordinated efforts to cause an industry trade group to adopt a new cost index that excluded the cost of fuel and then to implement, in lockstep, artificially inflated fuel surcharges, in violation of *Section 1 of the Sherman Act, 15 U.S.C. § 1*, and *Section 4 of the Clayton Act, 15 U.S.C. § 15*." *2020 U.S. Dist. LEXIS 153826, [WL] at *1*. This theory was originally advanced in another multidistrict litigation created in 2007 and still pending in this District, *In re Rail Freight Fuel Surcharge Antitrust Litigation* ("*MDL I*"), MDL No. 1869, No. 07-mc-00489-PLF-GMH (D.D.C.), "in which a putative class of direct purchasers of unregulated rail freight services alleged the same conspiracy, occurring from 2003 to 2008, against the same defendants," *Tolling Decision, 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *1* (citing *In re Rail Fuel Surcharge Antitrust Litig., 287 F.R.D. 1, 13 (D.D.C. 2012)*). The class was defined as direct purchasers of rail-freight transport who paid "a standalone rail **[*29]** freight fuel surcharge applied as a percentage of the base rate" at "any time from July 1, 2003 until December 31, 2008" (the "*MDL I* class period"). *2020 U.S. Dist. LEXIS 153826, [WL] at *4* (internal quotation marks and citation omitted); *see also* *2020 U.S. Dist. LEXIS 153826, [WL] at *14-17*. Class certification was denied in 2019, *see* *In re Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869, 934 F.3d 619, 627, 443 U.S. App. D.C. 86 (D.C. Cir. 2019)*, and plaintiffs, former absent putative class members in *MDL I*, subsequently brought individual complaints largely repeating the claims of the putative class, *Tolling Decision, 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *1, *5-6*.

On February 6, 2020, the Judicial Panel on Multidistrict Litigation ("JPML") consolidated twenty-six individual cases brought by former putative class members in *MDL I* for pretrial proceedings in this Court in *MDL II*. Transfer Order at 1, ECF No. 1. Since its creation, another eighty-one cases initiated by former putative class members have been consolidated in this multidistrict litigation, for a total of 107 individual cases and over 300 plaintiffs as of this writing. The *MDL II* plaintiffs, like the putative *MDL I* class, allege that defendants' conspiracy took place between July 1, 2003 and December 31, 2008, but their individual actions were filed between November 2019 and April 2021. Their claims would therefore be untimely under the Clayton Act's four-year statute of limitations, **[*30]** *see* *15 U.S.C. § 15b*, but for the tolling made generally available to former putative class members under *American Pipe*. The *American Pipe* rule "suspends the applicable statute of limitations," *414 U.S. at 554*, as to all putative class members' individual claims concerning "the same evidence, memories, and witnesses as the subject matter of the original class suit," *United Airlines, Inc. v. McDonald, 432 U.S. 385, 393 n.14, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977)* (internal quotation marks and citation omitted), "until class certification is denied," *Crown, Cork & Seal Co. v. Parker ("Crown"), 462 U.S. 345, 354, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)*. The statute of limitations as to most of the *MDL II* plaintiffs' claims, which are substantively identical to the claims of the *MDL I* class, thus began to run only after the 2019 denial of class certification in *MDL I. See* *Tolling Decision, 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *12*.

A handful of the *MDL II* complaints contain allegations that differ from the allegations of the putative *MDL I* class, including, as relevant here, allegations that certain plaintiffs experienced continuing harm from the conspiracy after December 31, 2008, the date on which the putative class period in *MDL I* ended, because they "continued to pay supracompetitive [fuel surcharges] to [d]efendants for several years after the conspiracy ended, pursuant to the multi-year contracts [they] had entered or renegotiated with [d]efendants prior to the end **[*31]** of the conspiracy." *2020 U.S. Dist. LEXIS 153826, [WL] at *9* (first, second, and fourth alterations in original) (internal quotation marks and citation omitted). Defendants moved to dismiss or strike allegations in these ten complaints, arguing that their divergence from the former class's allegations deprived them of the benefit of *American Pipe* tolling and rendered them untimely. *See* *2020 U.S. Dist. LEXIS 153826, [WL] at *6-9, *12*. Their motions were denied. *2020 U.S. Dist. LEXIS 153826, [WL] at *29-30*. As to the challenged complaints' allegations of post-2008 lingering effects of the 2003-2008 conspiracy, the *Tolling Decision* found that "[n]o undue prejudice to defendants results from tolling plaintiffs' allegations of harm resulting from lingering effects of the conspiracy outside the class period: because the underlying conduct occurred during the class period, defendants have fair notice of their substance, and the number and identities of potential plaintiffs, from the earlier class proceedings." *2020 U.S. Dist. LEXIS 153826, [WL] at *24*. Under this logic, "plaintiffs' allegations of harm resulting from lingering effects of the conspiracy outside the [*MDL I*] class period" of July 1, 2003 to December 31, 2008 stemming from defendants' conduct during the class period were tolled, *id.*, but allegations of continuing conspiratorial conduct after December **[*32]** 31, 2008 were time-barred, *see* *2020 U.S. Dist. LEXIS 153826, [WL] at *25*.[1]

B. Discovery in MDL II

At the time of *MDL II*'s creation in early 2020, plaintiffs represented to the JPML that "all the fact discovery as to Defendants ha[d] been done" in *MDL I*, Tr. of Proceedings ("JPML Hr'g Tr.") at 11:15-16, *MDL II*, MDL No. 2925 (J.P.M.L. Jan. 30, 2020), ECF No. 136, and that, as a result, any new fact discovery needed in *MDL II* would be "proportionately . . . much, much smaller than what's been done to date" and would be largely restricted to "things related to specific new Plaintiffs," *id.* at 11:20-22, in particular, "individualized damages discovery," Related Pls.' Joint Resp. Defs.' Mot. Transfer, Consol. &/or Coordination of Rail Freight Fuel Surcharge Antitrust Actions, *MDL II*, MDL No. 2925 (J.P.M.L. Dec. 12, 2019), ECF No. 87. The Panel thus reported that plaintiffs would "have access to the full discovery record developed in [*MDL I*], and that any remaining discovery in the new cases will be very limited and case-specific." Transfer Order at 2.

Plaintiffs made similar representations at the initial scheduling conference in *MDL II*, indicating that "all of the defendants' transaction **[*33]** data including for all shippers that were alleged to have been in the [putative *MDL I*] class" had been produced and subject to expert analysis in *MDL I*, Tr. of Video-Tel. Scheduling Conf. (May 22, 2020) at 53:19-22, ECF No. 110, and, as a result, the most burdensome and time-consuming discovery needed in *MDL II* was already complete, with the exception of "some particular additional transaction data" that might be required, *id.* at 53:18-19. Based on the parties' discussion of their anticipated discovery needs at the scheduling conference, an initial Scheduling Order was entered, setting a deadline of October 1, 2021 for the completion of all fact discovery. Order (May 22, 2020) ("Scheduling Order") ¶ 5, ECF No. 102.

C. The Present Dispute

On February 2, 2021, two days before a previously scheduled status conference was to be held, plaintiffs submitted an email to the Court in accordance with the procedure for discovery disputes outlined in the Scheduling Order, *see* Scheduling Order at 3, advising that the parties had reached impasse about "the extent to which Defendants will produce . . . transaction data from 2009-2012." Defs.' Mot., Ex. 2, Email from Alden L. Atkins, Partner, Vinson **[*34]** & Elkins LLP, to the Court (Feb. 2, 2021, 3:59 PM) ("Disc. Dispute Email") at 1, ECF No. 561-3. Such information had been provided in *MDL I* for transactions made by defendants for all shipments with any customer for the nine-year period from January 1, 2000 to December 31, 2008 (the "*MDL I* data set"), but was neither requested nor produced for the years after 2008 in that multidistrict litigation. *See id.* at 3-4; Tr. of Status Conf. (Feb. 4, 2021) ("Feb. 4 Status Conf. Tr.") at 15:22-23, ECF No. 516.[2] As an early step in fact discovery in *MDL II*, defendants

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[1] Plaintiffs Nippon Yusen Kabushiki Kaisha and NYK Line (North America) Inc. (together, the "NYK plaintiffs"), whose complaint was among those targeted by defendants' motions to dismiss, *see* *Tolling Decision, 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *8-9*, sought clarification or reconsideration of the *Tolling Decision*'s determination that their "allegations about [a] 2009-2013 contract" between NYK plaintiffs and defendants that they claimed contained the same artificially high fuel surcharge as contracts entered during the 2003-2008 conspiracy period "are time-barred," *2020 U.S. Dist. LEXIS 153826, [WL] at *27*; *see* *In re Rail Freight Fuel Surcharge Antitrust Litig. (No. II) ("NYK Recons. Decision"), MDL No. 2925, Misc. A. No. 20-00008 (BAH), Civ. A. No. 20-790 (BAH), 2020 U.S. Dist. LEXIS 195908, 2020 WL 6198487, at *1 (D.D.C. Oct. 22, 2020)*. This request was denied on the grounds, previously articulated in the *Tolling Decision*, that "allegations concerning a supracompetitive fuel surcharge formula in a 2009 contract do not satisfy the criteria for tolling because they are 'factually separate from the 2003-2008 conspiracy pursued by the putative class' in *MDL I* and defendants therefore did not have fair notice that the contract was at issue." *NYK Recons. Decision, 2020 U.S. Dist. LEXIS 195908, 2020 WL 6198487, at *2* (quoting *Tolling Decision, 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *27*).

[2] *MDL I* was filed in November 2007, *see* Transfer Order, *MDL I*, MDL No. 1869, No. 07-mc-00489-PLF-GMH (D.D.C. Nov. 14, 2007), ECF No. 1, more than a year before the class-period end date of December 31, 2008, and discovery began in late 2008, after disposition of defendants' motion to dismiss, *see* *In re Rail Freight Fuel Surcharge Antitrust Litig., 587 F. Supp. 2d 27, 37*

produced the full *MDL I* data set to *MDL II* plaintiffs. Disc. Dispute Email at 1; Decl. of Daniel M. Jaffe Supp. Pls.' Mot. Compel Produc. Post-2008 Transaction Data & Price Authorities ("Jaffe Decl.") ¶ 6, ECF No. 543-2.

Despite having received this extensive body of information for 2000-2008, plaintiffs requested, in their February 2 email, that defendants be compelled to "produce all transaction data for 2009-2012 for the same data fields that Defendants have produced for 2000-2008" for all rail-freight shippers, claiming that broad set of data was "necessary to assess and prove damages for the continuing **[*35]** effects of Defendants' conspiracy." Disc. Dispute Email at 1. Defendants opposed production of any post-2008 transaction data, arguing that the *MDL I* data set "sufficed in *MDL I* and should suffice in *MDL II*," *id.* at 4, but offered "to produce relevant transaction data for those Plaintiffs that have actually alleged or could at least provide a basis to allege that they paid a rate-based fuel surcharge after 2008 under a pre-2009 contract" by citing an applicable contract or other relevant price authority, *id.* at 5.[3] Plaintiffs rejected this compromise, contending that defendants' approach "would lead to endless disputes, would cause delay, would be enormously burdensome, and would create substantial risk that Defendants' data production would be incomplete." *Id.* at 2. They expressed further concern that "[m]any plaintiffs have incomplete records due to the passage of time." *Id.* This limitation, in combination with defendants' incomplete and slow production of relevant price authorities to this point, therefore meant that these plaintiffs would be unable to demonstrate to defendants' satisfaction that they qualified for production of post-2008 transaction data. *Id.* As a result, the parties **[*36]** reached impasse.

The transaction-data dispute was discussed, but not resolved, at the previously scheduled February 4, 2021 status conference. When asked why *MDL II* plaintiffs were seeking 2009-2012 transaction data that had not been produced or discussed in *MDL I*, plaintiffs' counsel stated that "the damage period that was the focus of [*MDL I*] and that remains the focus of the case ends on December 31st, 2008; and there has been no claim ever made in that case, which was filed in 2007, for damages in the period after December 13th, 2008 [sic]." Feb. 4 Status Conf. Tr. at 14:15-19. He emphasized that "[t]here was really no claim for lingering effects damages" in *MDL I*. *Id.* at 16:13-14; *see also, e.g., id.* at 31:8-14. The parties were encouraged "to meet and confer again" on the transaction data dispute, and to "propose a briefing schedule" if they were unable to reach a solution. *Id.* at 51:18, 21.

The parties accordingly resumed negotiations. During this second conferral process, defendants offered to "provide 2009 transaction data related to all Plaintiffs and those affiliated entities Plaintiffs identified in their answers to interrogatories for whom **[*37]** Plaintiffs claim they are seeking damages," without "requir[ing] Plaintiffs to identify a specific contract or rate authority entitling them to receive this data." Defs.' Mot., Ex. 7, Email from Ronald K. Wray, II, Partner, Gallivan, White & Boyd P.A., to Pls.' Counsel (Feb. 15, 2021, 2:51 PM) ("Defs.' Feb. 15 Email") at 2, ECF No. 561-8. In exchange, they asked that plaintiffs "agree to drop their requests for non-Plaintiff data and for data after 2009." *Id.* Plaintiffs counter-proposed the following terms: (1) plaintiffs would "agree to accept 2009 data" restricted to "the named plaintiffs and the entities they named in their recent interrogatory responses"; (2) defendants "would produce transaction data for longer time periods for plaintiffs for which Defendants have already agreed . . . to produce such data" in the parties' conferral process; (3) defendants "would also agree to produce data after 2009 for plaintiffs that can document a pricing authority/contract in effect during this period"; and (4) defendants would locate the data by "search[ing] for variations of plaintiff names," including names and spellings "previously identified in MDL I transactional data." Defs.' Mot., **[*38]** Ex. 8, Email from Alden L. Atkins, Partner, Vinson & Elkins LLP, to Defs.' Counsel (Feb. 18, 2021, 11:07 AM) at 1, ECF No. 561-9. Defendants sought clarification of the scope of the post-2009 data anticipated by the counterproposal, specifically, "whether . . . Plaintiffs are seeking data beyond 2012"; whether plaintiffs are "seeking post-2009 data for price authorities that were essentially open offers of transportation or for evergreen contracts that remained in effect unless canceled by either party"; and whether plaintiffs "seek to include contracts" with nondefendant railroads in assessing the

(D.D.C. 2008); Feb. 4 Status Conf. Tr. at 15:2-10. Of course, post-2008 lingering-effects damages had not yet occurred at that time. As a result, the central focus of discovery in *MDL I* was defendants' allegedly conspiratorial conduct and damages incurred by plaintiffs during the 2003-2008 class period. *See* Feb. 4 Status Conf. Tr. at 15:22-16:15.

[3] A price authority, in the rail-freight context, is a "[c]ontract, quote, circular, or tariff containing rates and rules governing their application." Jaffe Decl., Ex. 2, Ass'n of Am. R.R.s, *Railway Accounting Rules* ("*R.R. Rules*") 59 (2021), ECF No. 543-3 (emphasis omitted).

relevant post-2009 transaction data. *Id.*, Ex. 9, Email from Ronald K. Wray, II, Partner, Gallivan, White & Boyd P.A., to Pls.' Counsel (Feb. 22, 2021, 11:07 PM) at 1-2, ECF No. 561-10.[4]

As to the post-2012 data, plaintiffs confirmed that "some Plaintiffs have contracts or price authorities from the conspiracy period that were in effect after 2012," while others lacked sufficient information to determine whether their conspiracy-period pricing lasted past 2012, and that plaintiffs were therefore "unwilling to consent to a discovery agreement that could effectively waive claims for damages **[*39]** after 2012 due to a lack of transaction data." *Id.*, Ex. 10, Letter from Pls.' Counsel to Defs.' Counsel (Mar. 2, 2021) ("Pls.' Lingering-Effects Letter") at 2, ECF No. 561-11. They offered a compromise under which "Defendants would agree to produce data through 2012 for contracts in effect through that time," while plaintiffs "would reserve their right to request data after 2012 for pre-2009 contracts and price authorities in effect after 2012, and Defendants would reserve their right to oppose such a request." *Id.* As to the question of evergreen contracts and open offers, plaintiffs clarified that, in their view, they "reserve their rights to request any relevant data demonstrating lingering effects . . . whether based on open offers of transportation, evergreen contracts, or other price authorities." *Id.* Finally, as to contracts with nondefendant railroads, plaintiffs proposed "that they would not use a contract with a non-Defendant . . . to justify a request for data after 2009 at this time," but "would reserve their right to seek such data later." *Id.* at 3.

On March 11, 2021, the parties indicated that they had again reached impasse and requested entry of a stipulated briefing schedule **[*40]** on plaintiffs' planned motion to compel production of post-2008 transaction data and an anticipated motion by defendants for reconsideration of the *Tolling Decision*'s holding that plaintiffs' claims for lingering-effects damages are tolled under *American Pipe*. Mot. Stipulated Briefing Schedule & Proposed Order, ECF No. 542. A schedule for briefing on these two motions was accordingly set, *see* Min. Order (Mar. 12, 2021); Min. Order (Apr. 16, 2021), with the last brief submitted on April 23, 2021, *see* Defs.' Reply Mem. L. Supp. Defs.' Mot. Recons. ("Defs.' Reply"), ECF No. 619. A hearing on both motions was held on May 6, 2021, as part of a previously scheduled status conference. *See* Min. Entry (May 6, 2021). The two motions are now ripe for resolution.

II. LEGAL STANDARDS

A. Motion for Reconsideration

Motions to reconsider interlocutory orders may be granted at any time before the entry of a final judgment, pursuant to *Federal Rule of Civil Procedure 54(b)*, "'as justice requires.'" *Cobell v. Jewell, 802 F.3d 12, 25, 419 U.S. App. D.C. 370 (D.C. Cir. 2015)* (quoting *Greene v. Union Mut. Life Ins. Co. of Am., 764 F.2d 19, 22 (1st Cir. 1985)* (Breyer, J.)); *see also* *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc., 630 F.3d 217, 227, 394 U.S. App. D.C. 73 (D.C. Cir. 2011)* (noting that *Rule 54(b)* "recognizes [a court's] inherent power to reconsider an interlocutory order 'as justice requires'" (quoting *Greene, 764 F.2d at 22*)). In this District, that "abstract phrase" is interpreted "narrowly" to permit reconsideration **[*41]** "'only when the movant demonstrates: (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error in the first order.'" *King & Spalding, LLP v. United States HHS, 395 F. Supp. 3d 116, 119-20 (D.D.C. 2019)* (quoting *Bernier v. Trump, 299 F. Supp. 3d 150, 156 (D.D.C. 2018)*); *see also* *Bayshore Cmty. Hosp. v. Azar, 325 F. Supp. 3d 18, 22 (D.D.C. 2018)*; *Hispanic Affs. Project v. Perez, 319 F.R.D. 3, 6 (D.D.C. 2016)*; *Murphy v. Exec. Off. for U.S. Att'ys, 11 F. Supp. 3d 7, 8 (D.D.C. 2014)*. Although this list may not exhaust the potential justifications for reconsideration, exercise of the discretion granted under *Rule 54(b)* to revisit earlier rulings in the same case is "'subject to the caveat that where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.'" *U.S. Tobacco Coop. Inc. v. Big S. Wholesale of Va., LLC, 899 F.3d 236, 257 (4th*

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[4] An "evergreen contract is a contract that simply renews each year unless canceled by one of the parties," May 6 Hr'g Tr. at 64:8-10 (statement by Ronald K. Wray, II, Gallivan, White & Boyd, P.A., Counsel for Defendant Norfolk Southern Railway Co.), while an "open offer of transportation" is an offer published by a railroad, for example, on its "website," via "a circular," or through "some other mechanism" that "a shipper can accept" by placing an order for rail-freight transportation under the offer, *id.* at 65:5-15 (statement by Mr. Wray).

Cir. 2018) (quoting Off. Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003)); *see also* NRDC, Inc. v. EPA, 490 F. Supp. 3d 190, 194-95 (D.D.C. 2020) (same); Jordan v. U.S. Dep't of Justice, Civ. No. 17-2702 (RC), 2019 U.S. Dist. LEXIS 77342, 2019 WL 2028399, at *2 (D.D.C. May 8, 2019) (same). "'The burden is on the moving party to show that reconsideration is appropriate and that harm or injustice would result if reconsideration were denied.'" Lovely-Coley v. District of Columbia, 255 F. Supp. 3d 1, 9 (D.D.C. 2017) (quoting United States ex rel. Westrick v. Second Chance Body Armor, Inc., 893 F. Supp. 2d 258, 268 (D.D.C. 2012)).

B. Motion to Compel

Under *Federal Rule of Civil Procedure 26*, a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." *Fed. R. Civ. P. 26(b)(1)*. Thus, in assessing a motion to compel discovery, "courts must look carefully to the complaint's allegations to determine if the requested discovery" satisfies *Rule 26*'s relevancy and proportionality requirements. Strike 3 Holdings, LLC v. Doe, 964 F.3d 1203, 1210, 448 U.S. App. D.C. 159 (D.C. Cir. 2020). "Relevancy in this context is 'broadly **[*42]** construed and encompasses any material that bears on, or that reasonably leads to other matters that could bear on, any issue that is or may be in the case.'" In re Veiga, 746 F. Supp. 2d 8, 19 (D.D.C. 2010) (quoting Alexander v. FBI, 194 F.R.D. 316, 325 (D.D.C. 2000)); *see also* Food Lion, Inc. v. United Food & Com. Workers Int'l Union, 103 F.3d 1007, 1012-13, 322 U.S. App. D.C. 301 (D.C. Cir. 1997).

If the requested discovery is found to be relevant, *Rule 26*'s proportionality prong "requires district courts in all discovery matters 'to consider a number of factors potentially relevant to the question of undue burden,' including: (1) whether the discovery sought is 'unreasonably cumulative or duplicative'; (2) whether the discovery sought 'can be obtained from some other source that is more convenient, less burdensome, or less expensive'; and (3) whether the discovery sought is 'proportional to the needs of the case,' taking into account 'the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.'" Buzzfeed, Inc. v. United States DOJ, 318 F. Supp. 3d 347, 358 (D.D.C. 2018) (first quoting Watts v. SEC, 482 F.3d 501, 509, 375 U.S. App. D.C. 409 (D.C. Cir. 2007); and then quoting *Fed. R. Civ. P. 26(b)(1)*, *(2)*); *see also* Strike 3 Holdings, LLC, 964 F.3d at 1207 (noting that, under *Rule 26*, "[c]ourts are directed to assess proportionality by reference to" these factors); *Fed. R. Civ. P. 26(b)*.

"The party seeking **[*43]** discovery must first demonstrate that the information sought" is both relevant and proportional and therefore falls "within the scope of discoverable information under *Rule 26*." United States v. All Assets Held at Bank Julius Baer & Co., Ltd., 202 F. Supp. 3d 1, 6 (D.D.C. 2016). "If that party carries its burden, the party resisting discovery then must show 'why discovery should not be permitted.'" *Id.* (quoting Alexander, 194 F.R.D. at 326). Notwithstanding "[t]he broad presumption in favor of discovery of relevant information embodied in *Rule 26*," Oxbow Carbon & Minerals LLC v. Union Pac. R.R., 322 F.R.D. 1, 6 (D.D.C. 2017), a "district court has broad discretion to limit the scope of discovery pursuant to *[Rule] 26(b)*," Webb v. U.S. Vets. Initiative, 993 F.3d 970, 974, 451 U.S. App. D.C. 507 (D.C. Cir. 2021); *see also* Gilmore v. Palestinian Interim Self-Gov't Auth., 843 F.3d 958, 968, 427 U.S. App. D.C. 53 (D.C. Cir. 2016) ("'*Rule 26* vests the trial judge with broad discretion to tailor discovery narrowly . . . .'" (omission in original) (quoting Crawford-El v. Britton, 523 U.S. 574, 598, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998))).

III. DISCUSSION

Plaintiffs seek an order compelling defendants (1) to "produce the same fields of transaction data for 2009 that they produced in [*MDL I*] for all Plaintiffs"; (2) to "produce [transaction] data for 2010 to 2012 for Plaintiffs who identify a price authority entered into or in effect on or before December 31, 2008 that they reasonably believe continued beyond 2009 within 30 days of presentment of the price authority"; and (3) to "substantially complete the production of [conspiracy-period] price authorities applicable to the Plaintiffs by" June 1, **[*44]** 2021. Pls.' Mot. at 1; *see also*

Pls.' Mem. P. & A. Supp. Mot. Compel Produc. Post-2008 Transaction Data & Price Authorities ("Pls.' Mem.") at 5, 15, ECF No. 543; Pls.' Mem. P. & A. Opp'n Defs.' Mot. Recons. & Reply Supp. Mot. Compel Produc. Post-2008 Transaction Data & Price Authorities ("Pls.' Reply") at 24 n.9, ECF No. 612.[5] They contend that this information is necessary "to prove and calculate" their lingering-effects damages and therefore falls within the scope of discoverable information under *Rule 26*. Pls.' Mem. at 1.

Defendants oppose production of the requested materials, and move instead for the Court to "reconsider its ruling" in the *Tolling Decision* that plaintiffs' allegations regarding the harm they suffered from post-2008 lingering effects of the alleged 2003-2008 conspiracy are tolled and then, upon granting defendants' Motion for Reconsideration, deny plaintiffs' Motion to Compel as moot. Defs.' Mot. at 1. Alternatively, they ask that plaintiffs' request for production of 2010-2012 transaction data for certain plaintiffs be denied, and that defendants be "require[d] . . . only to produce 2009 transactional data for all Plaintiffs and affiliated entities." *Id.* ***[*45]*** Whether plaintiffs' Motion to Compel presents a live dispute depends on resolution of defendants' Motion for Reconsideration, which itself turns on a correct understanding of the scope of the lingering-effects damages tolled in the *Tolling Decision*. Consideration of the pending motions thus follows review of the *Tolling Decision*'s holding with respect to lingering-effects damages and evaluation of how the *Tolling Decision*'s reasoning applies to theories of lingering-effects damages not presented in the motions to dismiss.

A. Application of the *Tolling Decision's* Conclusion that Certain Lingering-Effects Damages Are Tolled

1. *Description of the* Tolling Decision*'s Holding with Respect to Lingering-Effects Damages*

The *Tolling Decision* evaluated the timeliness of plaintiffs' allegations of continuing harm from defendants' conspiracy after December 31, 2008 against the background principles of *American Pipe* tolling. As described *supra* Part I.A and explained in detail in the *Tolling Decision, American Pipe* stops the running of the statute of limitations "'for all members of the putative class until class certification is denied'" as to "individual actions concerning 'the same evidence, memories, **[*46]** and witnesses as the subject matter of the original class suit.'" *Tolling Decision, 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *11* (first quoting *Crown, 462 U.S. at 354*; and then quoting *United Airlines, Inc., 432 U.S. at 393 n.14*). This rule is designed to promote both *Federal Rule of Civil Procedure 23*'s "goals of 'efficiency and economy of litigation[,]' by eliminating the need for putative class members to file protective motions to intervene in the pending class action to preserve their claims, and thus preventing a 'needless multiplicity of actions,'" *id.* (first quoting *Am. Pipe, 414 U.S. at 553*; and then quoting *Crown, 462 U.S. at 351*), and "the functions of statutes of limitations, which . . . [']promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared,'" *id.* (quoting *Am. Pipe, 414 U.S. at 554*).

The D.C. Circuit takes a "'functional'" approach to application of these guideposts of *American Pipe* tolling "that emphasizes 'whether tolling under [the] circumstances would serve the purposes underlying the class-action tolling doctrine.'" *Id.* (alteration in original) (first quoting *McCarthy v. Kleindienst, 562 F.2d 1269, 1274, 183 U.S. App. D.C. 321 (D.C. Cir. 1977)*; and then quoting *Menominee Indian Tribe of Wis. v. United States, 614 F.3d 519, 527, 392 U.S. App. D.C. 202 (D.C. Cir. 2010)*). "Under this approach, tolling for putative class members is appropriate so long as 'the defendant has received fair notice' through the former class action 'of the number and generic identity **[*47]** of the potential [plaintiffs] and their substantive claims.'" *Id.* (alteration in original) (quoting *McCarthy, 562 F.2d at 1274*). The central inquiry within this framework is whether the claims of former putative class members are "'predicated on the same acts'" as the conduct challenged in the original class action, "such that 'there can be

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[5] Plaintiffs originally requested that defendants be compelled to produce all price authorities applicable to plaintiffs "by May 1, 2021," Pls.' Mot. at 1, but subsequently extended that request to "June 1," Pls.' Reply at 24 n.9. In addition, though plaintiffs represented that they sought to compel production of "their own post-2008 transaction data and transaction data for which no shipper is identified" through their pending motion, *id.* at 3 n.2, they clarified at the May 6, 2021 motions hearing that they are "no longer asking for" unidentified shipper data, May 6 Hr'g Tr. at 36:9; *see also id.* at 36:6-10, 37:12-15.

no doubt that the defendants have received sufficient notice of the contours of potential claims.'" *Id.* (quoting *McCarthy, 562 F.2d at 1275*). The timeliness of plaintiffs' allegations of continuing harm from defendants' conspiracy after December 31, 2008, the closing date of the *MDL I* class period, was evaluated in light of the foregoing principles and the black-letter rule of ***antitrust law*** that "[t]he lingering effects of a completed conspiracy may be remediated upon successful proof of the underlying anticompetitive conduct." *2020 U.S. Dist. LEXIS 153826, [WL] at *24* (collecting cases); *see also* *Zenith Radio Corp. v. Hazeltine Rsch. Inc., 401 U.S. 321, 338-39, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)* (finding that, "[i]n the context of a continuing conspiracy," "each separate cause of action that . . . accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably **[*48]** suffer after trial").

Balancing *American Pipe*'s requirement of fair notice to defendants against its aim of preventing duplicative litigation, the *Tolling Decision* reasoned that "[s]ubstantial factual overlap between the original allegations [made in *MDL I*] and the new allegations [raised by *MDL II* plaintiffs], the touchstone of *American Pipe* analysis, remains essential," and that tolling is therefore permitted only for allegations "with a sufficient factual nexus" to the conduct alleged by the putative *MDL I* class "to ensure fair notice to defendants." *2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *25*. On this basis, the *Decision* distinguished allegations that defendants' conduct in furtherance of the conspiracy continued past the 2003-2008 period alleged by the putative *MDL I* class from allegations of lingering harms after 2008 resulting from defendants' purported conspiratorial conduct during the 2003-2008 class period. It concluded that "[n]o undue prejudice to defendants result[ed] from tolling" of allegations as to which "the underlying conduct occurred during the class period" because "defendants ha[d] fair notice of their substance, and the number and identities of potential plaintiffs, from the earlier class proceedings" **[*49]** in *MDL I*. *2020 U.S. Dist. LEXIS 153826, [WL] at *24*. Consequently, "plaintiffs' allegations of harm resulting from lingering effects of the conspiracy outside the [*MDL I*] class period" of July 1, 2003 to December 31, 2008 stemming directly from defendants' conduct during the class period are timely. *Id.* In contrast, "allegations outside the class period that address conduct or harm completely unrelated to conduct or harm that occurred within the class period are untimely," *2020 U.S. Dist. LEXIS 153826, [WL] at *25*, because they "spring[] an unfair surprise on defendants by adding conduct that is factually separate from the 2003-2008 conspiracy pursued by the putative class" to the conduct on which defendants' eventual liability might be premised, *2020 U.S. Dist. LEXIS 153826, [WL] at *27*. Thus, plaintiffs' allegations in the challenged complaints that defendants' conspiratorial conduct lasted past December 31, 2008 and that contracts between certain plaintiffs and defendants entered after December 31, 2008 contained artificially high fuel surcharges as a result of the conspiracy were time-barred. *See* *2020 U.S. Dist. LEXIS 153826, [WL] at *25-27*.

The *Tolling Decision* hesitated, at the pleadings stage, to assess "[t]he duration and scope of the alleged effects of the conspiracy . . . before discovery and expert analysis." *2020 U.S. Dist. LEXIS 153826, [WL] at *24*. Now, some months later and **[*50]** with fact discovery well underway, the parties rely on the *Tolling Decision* to dispute the scope of discovery and, in so doing, seek to extend the *Tolling Decision*'s reasoning and holdings to types of price authorities and lingering-effects theories that were not directly at issue in the ten motions to dismiss resolved in that ruling. Of course, information sought in discovery solely to prove time-barred allegations is irrelevant and therefore beyond the scope of discoverable information under *Rule 26*. *See, e.g.,* *Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 352, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* ("[I]t is proper to deny discovery of matter that is relevant only to claims or defenses that have been stricken, or to events that occurred before an applicable limitations period, unless the information sought is otherwise relevant to issues in the case."); *Meijer, Inc. v. Biovail Corp., 533 F.3d 857, 868, 382 U.S. App. D.C. 385 (D.C. Cir. 2008)* (noting that, because allegations for which plaintiffs sought discovery "were untimely," "any [related] information . . . is likewise immaterial"); *Neals v. ParTech, Inc., No. 19-cv-05660, 2021 U.S. Dist. LEXIS 24542, 2021 WL 463100, at *6 (N.D. Ill. Feb. 9, 2021)* (observing that "rulings on the applicable statute of limitations may impact the scope of discovery requests" (emphasis omitted)).

The instant dispute between the parties involves plaintiffs' representations during the parties' conferral process and, again, at the May 6, 2021 motions **[*51]** hearing, that they may at some point seek, under the rubric of lingering-effects damages, alleged harms from purchases made more than four years after the end of the conspiracy period; for post-2008 purchases made pursuant to open offers of transportation, evergreen contracts, or other price authorities; or for contracts with nondefendant railroads and the possibility of related requests for post-2008 transaction data. *See* May 6 Hr'g Tr. at 51:24-54:9; *supra* Part I.C. Plaintiffs' claimed entitlement to potentially expansive post-2008 discovery from defendants highlights the need for clarification of how the *Tolling Decision*'s treatment of lingering-effects damages applies to then-undefined iterations of plaintiffs' claims of continuing harm resulting from the alleged 2003-2008 conspiracy in order to structure effectively the remaining fact discovery.

2. *Principles Guiding Application of the* Tolling Decision *to New Lingering-Effects Theories*

At the outset, it bears repeating that all claims raised by the *MDL II* plaintiffs would be untimely under the Clayton Act's four-year statute of limitations but for the benefit of *American Pipe* tolling. *See* 15 U.S.C. § 15b; *supra* Part I.A. The policies underlying **[*52]** statutes of limitations and *American Pipe* tolling therefore inform application of the *Tolling Decision*'s reasoning to new lingering-effects theories advanced by plaintiffs. As the Supreme Court recognized in *American Pipe*, statutes of limitation are "'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" Am. Pipe, 414 U.S. at 554 (quoting Order of R.R. Telegraphers v. Ry. Exp. Agency, 321 U.S. 342, 348-49, 64 S. Ct. 582, 88 L. Ed. 788 (1944)), with a "'primar[y]' purpose . . . 'to protect defendants against stale or unduly delayed claims,'" Maalouf v. Islamic Republic of Iran, 923 F.3d 1095, 1109, 440 U.S. App. D.C. 451 (D.C. Cir. 2019) (alteration in original) (quoting John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008)). Statutes of limitations further "advance[e] 'the basic policies of . . . repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities,'" Gabelli v. SEC, 568 U.S. 442, 448, 133 S. Ct. 1216, 185 L. Ed. 2d 297 (2013) (quoting Rotella v. Wood, 528 U.S. 549, 555, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)), by "'encourag[ing] plaintiffs to pursue diligent prosecution of known claims,'" Intel Corp. Inv. Pol'y Comm. v. Sulyma, 140 S. Ct. 768, 774, 206 L. Ed. 2d 103 (2020) (quoting Calif. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2049, 198 L. Ed. 2d 584 (2017)). These ends reflect "a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" United States v. Kubrick, 444 U.S. 111, 117, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979) (quoting Order of R.R. Telegraphers, 321 U.S. at 349).

The ***[*53]*** *American Pipe* exception to the running of statutes of limitations balances these goals against Federal Rule of Civil Procedure 23's aim of preventing "a needless multiplicity of actions," Crown, 462 U.S. at 351, through its restriction of tolling to individual actions concerning "the same evidence, memories, and witnesses as the subject matter of the original class suit," United Airlines, Inc. 432 U.S. at 393 n.14 (quoting Am. Pipe, 414 U.S. at 562 (Blackmun, J., concurring)). When an individual action satisfies this requirement, the defendant is "on notice as to the content of the claims against it and the set of potential plaintiffs who might assert those claims," which notice "satisfie[s] the purposes of the statute of limitations," even though time has run. Calif. Pub. Emps.' Ret. Sys., 137 S. Ct. at 2053. *MDL II* plaintiffs' allegations, including those concerning lingering-effects damages, are tolled under the *Tolling Decision* only to the extent that they align with these polices underlying *American Pipe* tolling.

Second, although "[t]he statute of limitations is an affirmative defense that [a] defendant must prove" by the applicable standard at each successive stage of litigation, Firestone v. Firestone, 76 F.3d 1205, 1210, 316 U.S. App. D.C. 152 (D.C. Cir. 1996), "the burden shifts back to a plaintiff who invokes an exception to the statute of limitations," Minebea Co., Ltd. v. Papst, 444 F. Supp. 2d 68, 175 (D.D.C. 2006) (collecting cases); *see also* Campbell v. Grand Trunk W. R.R. Co., 238 F.3d 772, 775 (6th Cir. 2001) ("Because the statute of limitations is **[*54]** an affirmative defense, the burden is on the defendant to show that the statute of limitations has run. If the defendant meets this requirement then the burden shifts to the plaintiff to establish an exception to the statute of limitations."); McGary v. Hessler-Radelet, 156 F. Supp. 3d 28, 35 (D.D.C. 2016) ("Defendants must first carry their burden of showing that Plaintiff failed to file in a timely manner. Only at that point does the burden shift to Plaintiff to show that the statute of limitations was . . . tolled."). Plaintiffs therefore carry the burden of proving that their claims, which presumptively fall outside the Clayton Act's statute of limitations, are not time-barred because they qualify for *American Pipe* tolling. The requisite showing at the pleadings stage, at which time "dismissal is appropriate only if the complaint on its face is conclusively time-barred," Bregman v. Perles, 747 F.3d 873, 875, 409 U.S. App. D.C. 143 (D.C. Cir. 2014) (internal quotation marks and citation omitted), is minimal. Nonetheless, the *Tolling Decision* concluded that this showing was not made with respect to *MDL II* plaintiffs' allegations involving conduct after December 31, 2008, which allegations lacked the necessary factual nexus with the claims pursued by the putative *MDL II* class to benefit from *American Pipe* tolling and **[*55]** therefore were found to be time-barred. *See* [2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *24-27](). The same is true of any new efforts by plaintiffs to secure lingering-effects damages that similarly would require litigation of post-2008 conduct.

Relatedly, the *Tolling Decision*'s reasoning and holding with respect to lingering-effects damages was framed around bilateral, term-limited contracts between certain *MDL II* plaintiffs and a defendant for the purchase of rail-freight transportation services, the only type of "price authority" identified as at issue in the ten motions to dismiss. *See id.* In concluding that allegations of lingering effects related to purchases under such agreements were timely, the *Decision* emphasized that all of the "underlying conduct" relevant to proving that pre-2009 contracts were impacted by the conspiracy would have "occurred during" the 2003-2008 putative *MDL I* class period, leaving no doubt that defendants had fair notice of these claims. *2020 U.S. Dist. LEXIS 153826, [WL] at *24*. Extension of the *Tolling Decision*'s holding to lingering-effects damages for purchases made pursuant to types of price authorities other than the bilateral, fixed-term model of purchasing rail-freight transportation from defendants was not raised in the motions to dismiss. **[*56]** Such an extension is appropriate only if, like the bilateral and finite contracts evaluated in the *Decision*, proof that the alleged conspiracy caused plaintiffs to pay allegedly supracompetitive fuel surcharges under the identified price authority rests solely on litigation of conduct occurring before December 31, 2008.

Assessment of whether this criterion is satisfied should take into account that plaintiffs were on notice from 2007, when the Surface Transportation Board ("STB") "determined . . . that defendants' practice of imposing rate-based fuel surcharges for regulated rail freight traffic was an unreasonable practice," *2020 U.S. Dist. LEXIS 153826, [WL] at *7* (internal quotation marks omitted); *see also* STB Ex Parte No. 661, ID No. 37341, at 1 (Jan. 25, 2007), and *MDL I* began, advancing the same theory with respect to unregulated rail-freight traffic, that their agreements with defendants might contain artificially high rate-based fuel surcharges. To the extent that proof of plaintiffs' post-2008 lingering-effects allegations raised under a price authority other than a bilateral, fixed-term contract would require litigation of why plaintiffs, after being put on notice of the alleged conspiracy, did not, for example, **[*57]** object to an allegedly conspiratorial fuel surcharge term, terminate an agreement without a fixed end date, refuse to renew a conspiracy-period agreement, or decline to purchase rail-freight transportation from defendants under an allegedly tainted open price authority after December 31, 2008, such allegations necessitate litigation of post-2008 conduct that was not at issue in *MDL I* and are time-barred.

The *Tolling Decision*'s application to each of the new lingering-effects theories suggested by plaintiffs during discovery and contested in the parties' briefing of the instant motions is considered in light of these principles.

3. *Application to New Lingering-Effects Theories*

Plaintiffs represented during the parties' conferral process that, in addition to the lingering-effects damages resulting from bilateral, fixed-term contracts entered during the pre-2009 class period identified in the *Tolling Decision*, they may seek lingering-effects damages, and related discovery, based on (1) "pre-2009 contracts and price authorities in effect after 2012"; (2) "open offers of transportation, evergreen contracts, or other price authorities"; and (3) contracts with nondefendant railroads. Pls.' Lingering-Effects **[*58]** Letter at 2-3; *see also* Pls.' Reply at 23, 28-29, 29 n.12. They complain that consideration of these categories of potential damages is inappropriate at this stage, where "the question . . . is only whether Plaintiffs' claims are barred by the statute of limitations," Pls.' Reply at 23, relying on the *Tolling Decision*'s observation that "[w]hether plaintiffs can prove that their alleged post-2008 harms in fact resulted from defendants' pre-2008 conduct is an issue for future stages of litigation," *id.* (quoting *Tolling Decision, 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *24*); *see also id.* at 29-30. While the issue of proof still remains for another day, as explained above, resolution of the instant motions and assessment of the appropriate scope of discovery requires some evaluation of whether these additional lingering-effects claims are likely to be tolled under *American Pipe*. This determination affects both defendants' contention, in support of their Motion for Reconsideration, that undue prejudice results from the tolling of *any* lingering-effects damages here, and plaintiffs' claim, in support of their Motion to Compel, that the extensive post-2008 transaction data they seek is in fact relevant to this multidistrict litigation.

Moreover, the **[*59]** *Tolling Decision* cabined its reservation of judgment only as to those post-2008 lingering-effects allegations for which the underlying conduct to be proven at future stages of litigation "occurred during the class period." *2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *24*. The *Decision* unambiguously held that claims of continuing harm from the conspiracy that would require proof of conduct after December 31, 2008 were time-barred. *See* *2020 U.S. Dist. LEXIS 153826, [WL] at *24-27*. Thus, plaintiffs' allegations with respect to lingering-effects damages are tolled under *American Pipe*, as applied to the facts of this multidistrict litigation in the *Tolling Decision*, only for bilateral, fixed-term contracts entered into before December 31, 2008 with an end date in 2009 or later, and for post-2008 purchases of rail-freight transportation made pursuant to similarly constrained price authorities for which all of the underlying conduct, including any relevant acts or omissions by plaintiffs, occurred prior to December 31, 2008. Allegations concerning lingering-effects damages are otherwise time-barred. This bright-line distinction provides a basis on which to draw some categorical conclusions at this time about the availability of lingering-effects damages resulting from purchases **[*60]** under price authorities other than the bilateral, fixed-term contracts with post-2008 end dates identified by the *Tolling Decision*.

a) Post-2012 Purchases

First, plaintiffs leave open the possibility that they may seek lingering-effects damages for post-2012 purchases of rail-freight transportation made under "pre-2009 contracts and price authorities in effect after 2012." Pls.' Lingering-Effects Letter at 2; *see also* May 6 Hr'g Tr. at 54:1-5. For these lingering-effects allegations to be timely under the *Tolling Decision*'s reasoning, they must allege harms resulting from contracts or other forms of price authorities entered into or in effect before January 1, 2009 with a fixed end date, agreed to at the time of creation, after 2012. Post-2012 claims resulting from purchases made under pre-2009 pricing agreements as to which a plaintiff could have avoided further transactions or mitigated harm after December 31, 2008, including by terminating the agreement or refusing to renew it, necessarily require evidence of post-2008 conduct to establish that plaintiffs paid artificially high fuel surcharges after 2012 because of the alleged 2003-2008 conspiracy. By January 1, 2009, plaintiffs were **[*61]** aware from the STB's ruling and the filing of *MDL I* that their agreements with defendants might include artificially inflated fuel surcharge terms. *See supra* Part III.A.2. Evidence concerning their decision, with that knowledge, to continue purchasing rail-freight transportation under terms set during the conspiracy period, as well as the parties' negotiations after December 31, 2008, would therefore be required to litigate the issue of causation. *See, e.g.,* *Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc., 902 F.3d 735, 743 (7th Cir. 2018)* ("Proximate causation is an essential element that plaintiffs must prove in order to succeed on any of their [antitrust] claims. The purpose of the proximate causation requirement . . . is to avoid speculative recovery by requiring a direct relation between the plaintiff's injury and the defendant's behavior." (citing *Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*)); Defs.' Mem. L. Supp. Defs.' Mot. Recons. & Opp'n Pls.' Mot. Compel ("Defs.' Opp'n") at 17, ECF No. 561-1. Defendants further highlight that, for some multiyear agreements, the parties entered additional, related contracts during the original contract period, May 6 Hr'g Tr. at 67:4-68:11, or "a change in the relationship for the parties, like an amendment to the contract," occurred, *id.* at 68:7-8. Proof of post-2012 **[*62]** lingering effects from the 2003-2008 conspiracy under such altered agreements would likewise require inquiry into the parties' post-2008 conduct.

As to these more complicated multiyear agreements, under the *Tolling Decision*'s logic, *American Pipe* tolling of lingering effects is unavailable because the expansion of plaintiffs' factual allegations, and the concomitant expansion of the scope of discovery, encompasses conduct not litigated and evidence not sought by the putative class. *See* *Tolling Decision, 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *24-27*. Given this restriction on tolling, and plaintiffs' representation that most of their agreements with defendants were "one-year term contracts" that, if entered in 2008, would have ended at some point in 2009, Pls.' Mem. at 3, the subset of timely post-2012 lingering-effects allegations is likely to be extremely small, if such allegations exist at all. Nonetheless, in the unlikely event that a plaintiff can show that it suffered continuing harms from purchases made pursuant to a pricing agreement entered before January 1, 2009 with an end date after December 31, 2012, as to which no proof of post-

2008 conduct by either side is needed, these post-2012 lingering-effects allegations may be tolled under **[*63]** the *Tolling Decision*. As plaintiffs "do not . . . ask the Court to order the production of data beyond 2012" in their instant Motion to Compel, Pls.' Mem. at 11 n.12; *see also* May 6 Hr'g Tr. at 54:1-5, no final determination of whether allegations for such damages will ultimately be tolled under *American Pipe* need be reached here.

b) Evergreen Contracts and Open Offers of Transportation

Next, plaintiffs' potential lingering-effects damages for post-2008 purchases of rail-freight transportation pursuant to "open offers of transportation, evergreen contracts, or other price authorities," Pls.' Lingering-Effects Letter at 2, are mostly time-barred.[6] As defendants explain, "an evergreen contract is a contract that simply renews each year unless canceled by one of the parties." May 6 Hr'g Tr. at 64:8-10. These types of price authorities typically anticipate long-term, repeat shipments. *See id.* In contrast, "open offers of transportation" are offers published by railroads on their website, via a circular, or through some other mechanism, setting out the terms under which a prospective customer may purchase rail-freight transportation. The shipper accepts the open offer by ordering a shipment **[*64]** under its terms. *See id.* at 65:5-15. Open offers are frequently used in the context of "spot moves," or situations in which a shipper has a short-term need to "mov[e] freight from point A to point B," but does not "need a formal contract or a long-term contract" because "they just want to address one shipment." *Id.* at 65:11-15. The agreement between the parties is thus fully performed upon completion of the single shipment for which the shipper accepted the open offer, and a subsequent purchase by the same shipper under the open offer constitutes a new contract rather than a continuation of the former agreement.

Under the *Tolling Decision*'s reasoning, as plaintiffs concede, *see* May 6 Hr'g Tr. at 44:13-14, allegations related to offers made and accepted after 2008, including offers presented as evergreen contracts and open offers of transportation, are time-barred. In contrast, allegations related to agreements entered into by December 31, 2008, as to which the parties' obligations continued after that date, are tolled. Plaintiffs thus may recover lingering-effects damages for purchases made pursuant to an evergreen contract that was renewed in 2008 until its expiration date one year **[*65]** later, in 2009. In such cases, as explained above, the underlying conduct at issue, of forming the 2008-2009 agreement, occurred entirely during the class period. Lingering-effects damages for purchases made until the one-year term of the evergreen contract ran, at some point in 2009, are tolled.

Allegations of lingering effects resulting from purchases made under an evergreen contract after its annual renewal in 2009 or later present a different case. Though they may include identical terms, the 2009 renewal of the agreement after the conspiracy period is a separate contract from the 2008 initiation or renewal of the agreement finalized during the conspiracy period. Allegations arising under the 2009 or later renewal of an evergreen contract therefore require inquiry into plaintiffs' decision, after December 31, 2008, not to cancel the evergreen agreement after information was publicly available about the alleged conspiracy, any conversations between the parties in relation to that choice, and defendants' motivations for leaving identical terms in place for the 2009-2010 renewal and subsequent annual terms. That conduct is not fairly encompassed by the putative class's claims and would **[*66]** require additional discovery beyond that undertaken in *MDL I*. Allegations for lingering-effects damages under evergreen contracts after the expiration of their 2008 term of renewal are therefore untimely.

A similar distinction controls the availability of lingering-effects damages for allegations of continuing harm resulting from post-2008 purchases of rail-freight transportation under open offers of transportation. Plaintiffs may pursue claims related to their open-offer purchases undertaken prior to January 1, 2009, as to which no litigation of post-

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[6] Plaintiffs stated at the May 6, 2021 motions hearing that they "don't understand what an evergreen contract is and we don't know that we have any," May 6 Hr'g Tr. at 42:4-5, and that they are "not clear on what [an open offer of transportation] is," *id.* at 42:21. In their March 2, 2021 letter to defendants, however, plaintiffs disputed "Defendants' characterization" of open offers of transportation and evergreen contracts "as not being 'bilateral contracts,'" and "reserve[d] their rights to request any relevant data demonstrate lingering effects . . . whether based on open offers of transportation, evergreen contracts, or other price authorities," Pls' Lingering-Effects Letter at 2, suggesting that plaintiffs have some familiarity with these terms of art and have not disclaimed the possibility of recovering lingering-effects damages under these types of price authorities.

2008 conduct is necessary. Lingering-effects allegations related to open-offer purchases after that date, however, are time-barred. As explained above, each purchase of rail-freight transportation under an open offer forms a new contract. Thus, any purchase made pursuant to these price authorities after December 31, 2008 constitutes an offer and acceptance undertaken after the close of the *MDL I* class period, and related lingering-effects allegations are plainly untimely under the *Tolling Decision*'s bar on litigation of post-2008 contracts. *See* *2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *25, *26-27*. Moreover, linking these purchases, like purchases made under evergreen contracts renewed during **[*67]** the 2009 calendar year or later, to the alleged conspiracy compels litigation of both plaintiffs' post-2008 decision to buy rail-freight transportation under a possibly tainted price authority after being put on notice of defendants' potentially conspiratorial conduct and defendants' decision not to modify the terms of the open offer. These factual issues were not litigated by the putative class in *MDL I* and would call for new evidence. *American Pipe* therefore does not toll allegations of lingering effects from purchases under open offers of transportation after December 31, 2008.

c) Interline Contracts and Contracts with Nondefendant Railroads

The question of the extent to which plaintiffs may seek lingering-effects damages based on interline contracts and contracts with nondefendant railroads entered during the conspiracy period, Pls.' Lingering-Effects Letter at 3; *see* May 6 Hr'g Tr. at 45:5-11, is reserved.[7] The nature of the price authorities to which these terms refer, in the context of this dispute, remains unclear. Plaintiffs assert that they may seek lingering-effects damages under interline "contract[s] between a plaintiff and a defendant railroad," May 6 Hr'g Tr. at 45:25-46:1, **[*68]** meaning that one of the defendants negotiated the contract with a plaintiff, but at least one other railroad, either a second defendant or a nondefendant railroad, carried the plaintiffs' goods part of the way to their final destination, *see id.* at 48:15-24. This category of interline contracts was the focus of their statements at the May 6, 2021 motions hearing, but plaintiffs' March 2, 2021 letter to defendants indicated that "none of the Plaintiffs has reached a decision about whether any might seek damages under a contract with a non-Defendant railroad," and reserved their rights to do so. Pls.' Lingering-Effects Letter at 3. Plaintiffs describe these potentially relevant agreements as "contract[s] with a nondefendant railroad that ha[ve] a fuel surcharge that is an interline with a nondefendant railroad and one of the defendants." May 6 Hr'g Tr. at 49:2-4.

Defendants further complicate this picture. Their emphasis is on the status of claims and related discovery for lingering-effects damages from "[re]ceived traffic." *Id.* at 73:3. As they explain, a contract for interline rail-freight transportation involves an "originating railroad," defined as the railroad **[*69]** that moves the freight from its point of origin, *id.* at 73:4, 73:14-15, and any number of "receiving railroad[s]," *id.* at 73:4, that "receive" the traffic at some point after it leaves its point of origin en route to its final destination. A receiving railroad may complete the transportation of goods to their final destination or hand them off to another railroad. The terms of an interline agreement are "mostly set by the originating railroad," while receiving railroads "simply receive the traffic and receive revenues from it." *Id.* at 73:6-9. Thus, for interline contracts as to which defendants are receiving railroads, they are unlikely to have set the terms of the agreement, including any relevant fuel surcharge term, and may or may not be parties to it. *See id.* at 73:22-24. Depending on the particular interline contract, however, the controlling agreement with the shipper may be a either bilateral contract with the originating railroad or a three-or four-way contract to which "all of the interlining railroads," whether originating or receiving, are parties. *Id.* at 73:18; *see also id.* at 73:17-19.

The lingering effects of interline contracts with either defendant or nondefendant railroads **[*70]** entered after 2008 are, of course, time-barred under the *Tolling Decision*. As to conspiracy-period interline agreements with nondefendant railroads, beyond the immediate issue of the availability of post-2008 lingering-effects damages, no

[7] An "interline" is "[a] rail shipment involving two or more linehaul carriers," *R.R. Rules, supra*, at 58 (emphasis omitted), which are "rail carrier[s] that collect[] or receive[] revenue . . . for the movement of freight between two stations that are not located with the switch limits of each other," *id.* at 59 (emphasis omitted). An interline contract thus is a contract for a shipment from an originating destination to a final destination, as to which a railroad other than the originating railroad carries the shipment part of the way.

ruling has been reached in either *MDL I* or this multidistrict litigation as to whether the *MDL I* and *MDL II* plaintiffs may recover any damages for pre-2009 interline contracts under which one or more of the defendants was a receiving railroad, but a nondefendant railroad was the originating railroad. *See* May 6 Hr'g Tr. at 45:20-46:5.[8] The *Tolling Decision* found allegations in the challenged complaints that nondefendant railroads participated in defendants' conspiracy to be untimely because "*American Pipe* tolling does not apply to entities or individuals not named as defendants by the putative class." 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *18 (collecting cases). It held that, "[t]o the extent that any allegations involving . . . alleged non-party co-conspirators are intended to change 'the contours of potential claims' against defendants by increasing the number of claimants to include direct purchasers of unregulated rail freight services from [nondefendant railroads] and the scope of potential **[*71]** damages claims from defendants' customers who also purchased rail freight services from [nondefendant railroads], such potential claims would be time-barred." *Id.* (quoting McCarthy, 562 F.2d at 1275); *see also* May 6 Hr'g Tr. at 45:7-11. This reasoning would, on its face, appear to deprive allegations related to interline contracts for which nondefendant railroads were the originating railroads of *American Pipe* tolling. The complexity of this issue, however, warrants resolution at a later date, with the benefit of full briefing.

In any event, resolution of the instant motions does not turn on whether allegations of lingering effects from purchases made under conspiracy-period interline contracts with nondefendant railroads are tolled. Plaintiffs confirm that they are not currently seeking transaction data after 2009 with respect to these agreements. Pls.' Lingering-Effects Letter at 3; May 6 Hr'g Tr. at 50:11-18. As to 2009 data, plaintiffs request only "that same data [on interline contracts with nondefendant railroads] . . . as was produced in *MDL I*." May 6 Hr'g Tr. at 50:16-17. Likewise, defendants' parallel offer during the parties' conferral process "to produce 2009 data for all Plaintiffs and affiliated **[*72]** entities" for the same fields produced in *MDL I*, Defs.' Opp'n at 10; *see also* Defs.' Feb. 15 Email at 2, would result in production of the same data on interline contracts with nondefendant railroads for 2009 that was included in the *MDL I* data set for 2000 to 2008. That data set "include[s] revenues from . . . [re]ceived traffic," May 6 Hr'g Tr. at 73:2-3, that is, information on transactions under interline contracts for which a nondefendant railroad was the originating railroad and at least one defendant was a receiving railroad. Under either plaintiffs' request or defendants' previous offer, then, 2009 data for nondefendant interline contracts would be produced. Thus, the appropriateness of producing 2009 transaction data for nondefendant interline contracts is not contested by the parties, and the scope of fact discovery can be refined at this time without determining the status of lingering-effects claims stemming from interline agreements involving nondefendant railroads.

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In sum, plaintiffs' allegations of lingering-effects damages resulting from pre-2009 price authorities extending past 2012 are tolled only for purchases made under price authorities entered before January **[*73]** 1, 2009 with a fixed-term end date after December 31, 2012. To benefit from *American Pipe* tolling, allegations related to these purchases must not implicate post-2008 conduct by either plaintiffs or defendants, including the issue of whether plaintiffs could have ended their purchases under a challenged conspiracy-period price authority before December

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[8] Plaintiffs assert that "the Court held at the hearing on March 26, 2021 that Plaintiffs are not foreclosed from seeking damages under price authorities issued by other railroads and said that limited discovery may be subsequently obtained if a Plaintiff seeks such damages." Pls.' Reply at 29 n.12 (citing Tr. of Disc. Dispute (Mar. 26, 2021) ("Mar. 26 Hr'g Tr.") at 65-67, ECF No. 557). No such holding was reached. The March 26, 2021 hearing concerned a request by defendants, in part, to compel production of information about fuel surcharges paid by plaintiffs to defendants' competitors during the conspiracy period. *See* Email from Luke von Houwelingen, Defs.' Counsel, to the Court (Mar. 18, 2021, 12:48 PM), at 1-2, ECF No. 556. In rejecting that request, the Court said: "To the extent that defendants intend to use information about other railroads' fuel surcharges at the damages stage to rebut particular plaintiffs' claims about the degree to which they paid more for shipping than they otherwise would have paid due to the alleged conspiracy, discovery can be reopened as to a refined set of data and contracts relevant to the damages claims of specific plaintiffs at that time." Mar. 26 Hr'g Tr. at 65:16-23. While the Court noted that "discovery can be reopened at the damages stage . . . if plaintiffs prevail on liability . . . and are seeking damages on those specific contracts" with nondefendant railroads, *id.* at 66:18-21, the request at issue sought only data from 2000-2008, not the post-2008 data requested in plaintiffs' pending motion, and the availability of damages under nondefendant contracts was not being disputed by the parties. The Court's statements at the March 26 hearing therefore did not constitute a holding on an issue not raised by the parties in relation to the dispute resolved.

31, 2012. The lingering effects of evergreen contracts are tolled only through the expiration of the 2008-2009 renewal of such contracts at some point in 2009. Lingering effects after the date of the 2009-2010 annual renewal of any evergreen contract are time-barred. Likewise, the lingering effects from purchases made under open offers of transportation published before January 1, 2009 are not tolled for purchases made after that date. Judgment is reserved as to whether plaintiffs may recover damages under interline agreements as to which a nondefendant railroad was a party. The pending motions are evaluated in light of this analysis, starting with defendants' Motion for Reconsideration.

B. Reconsideration of Availability of Lingering-Effects Damages Is Not Warranted

Defendants argue that reconsideration of "whether claims of lingering **[*74]** effects damages are time-barred" is warranted, Defs.' Opp'n at 2, based solely on representations made by plaintiffs' counsel at the February 4, 2021 status conference, described *supra* Part I.C, indicating that the putative class in *MDL I* did not pursue claims for lingering-effects damages, *see* Defs.' Opp'n at 11-19; Defs.' Reply at 2-13. In defendants' view, these statements constitute "new evidence that compels the Court to revisit its lingering effects ruling," Defs.' Opp'n at 15, because they supply proof that defendants "had no fair notice of the claims for post-2008 damages that Plaintiffs now seek to assert," as *American Pipe* tolling requires, *id.* at 16. As explained below, defendants have neither uncovered "new evidence" that makes reconsideration appropriate nor demonstrated that the *Tolling Decision* incorrectly tolled plaintiffs' lingering-effects claims.

1. *Statements by Plaintiffs' Counsel Are Not "New Evidence"*

Though the availability of new evidence is among the recognized circumstances when justice may require reconsideration, *see supra* Part II.A, the statements made by plaintiffs' counsel at the February 4, 2021 hearing do not qualify as new evidence warranting reconsideration. **[*75]** "While it is certainly true that newly-*discovered* evidence may be considered on a motion for reconsideration, a party may not rely on facts that could have been alleged in the underlying motion but were not." *Davis v. Joseph J. Magnolia, Inc., 893 F. Supp. 2d 165, 169 (D.D.C. 2012)*. Thus, "[e]ven if evidence is 'newly raised,' it is not considered 'new' evidence if it was 'previously available'" to the party seeking reconsideration. *Olson v. Clinton, 630 F. Supp. 2d 61, 63 (D.D.C. 2009)* (quoting *Schoenbohm v. FCC, 204 F.3d 243, 250, 340 U.S. App. D.C. 205 (D.C. Cir. 2000)*). As noted, defendants have been parties in *MDL I* since its inception in 2007, and therefore possess extensive firsthand knowledge of the particulars of how that case has been litigated. The premise advanced by defendants that statements made by plaintiffs' counsel at a status conference nearly fifteen years after *MDL I* began provided the first available indication that the plaintiffs in that multidistrict litigation did not pursue lingering-effects damages thus strains credulity. Defendants explain at length their belief that "the *MDL I* docket [and discovery record] provided more than ample notice to absent class members that there was no claim for damages beyond 2008 in *MDL I*," Defs.' Reply at 5; *see also id.* at 3-7, but conspicuously overlook the apparent corollary to this claim, that the *MDL I* record provided **[*76]** equally detailed and longstanding notice to defendants themselves well before the *Tolling Decision*. Plaintiffs' counsel did not provide any information previously inaccessible to defendants at the February 4 status conference; he merely restated aspects of the procedural history in *MDL I* that should have been well-known to all parties. His statements therefore do not fit the definition of "new evidence" warranting reconsideration.

In an effort to avoid this obvious conclusion, defendants attempt to reframe the relevant inquiry as whether the allegedly "new" evidence they proffer was known to the Court at the time of the *Tolling Decision*. To this end, they suggest plaintiffs made "representations that were at best misleading" with respect to the role of lingering-effects damages in *MDL I* in their briefing on the motions to dismiss and "prevailed" in the *Tolling Decision* "at least in part[] based on" these misrepresentations. Defs.' Reply at 11. The dispositive inquiry for *Rule 54* purposes is not, however, whether the reviewing court had prior knowledge of the purportedly new information, but instead whether the information was accessible to the moving party prior to the challenged decision. **[*77]** This standard prevents parties from seeking reconsideration on the basis of evidence that was or should have been in their possession at the time of the interlocutory order because "motions for reconsideration are not vehicles for either reasserting arguments previously raised and rejected by the court or presenting arguments that should have been raised previously with the court." *Lovely-Coley, 255 F. Supp. 3d at 9* (citing *Estate of Gaither ex rel. Gaither v. District of Columbia, 771 F. Supp. 2d 5, 10 & n.4 (D.D.C. 2011)*); *see also* *Cornish v. United States, 934 F. Supp. 2d 105, 109 (D.D.C. 2013)* ("[A] motion for reconsideration is not an opportunity to relitigate claims previously decided and is not a vehicle for presenting theories or arguments that could have been raised previously." (internal quotation marks and citation omitted)); *North v. United States DOJ, 17 F. Supp. 3d 1, 5 (D.D.C. 2013)* (denying a motion for reconsideration in part because "[t]he fact that Plaintiff could have made these arguments before but did not is itself a sufficient basis for the Court to reject these arguments"). Defendants were in possession of all information related to the role of lingering-effects damages in *MDL I* long before the *Tolling Decision* was issued and had ample opportunity to submit that evidence and any related arguments to the Court in their briefing on their ten motions to dismiss.

Moreover, even if defendants' suggested standard were **[*78]** the correct one, they in fact brought the "new" information on which they now rely to the Court's attention in their previous briefing.[9] Defendants may now regret that they did not pursue their argument that the putative *MDL I* class did not seek lingering-effects damages more vigorously, but they had every chance to do so. Their claim that this omission was because "[t]he primary focus of the parties' motion to dismiss briefing was the allegations of post-2008 conspiratorial conduct rather than the allegations of post-2008 lingering effects," Defs.' Reply at 12, is belied by the fact that defendants specifically argued in at least two briefs that plaintiffs' lingering-effects allegations were not tolled "under the well-established 'continuing violations' doctrine." Defs.' Reply Supp. Mot. Partial Dismissal, or in the Alternative, Mot. Strike Compls. Pls. Kawasaki & Yang Ming at 10, ECF No. 308; *see also id.* at 10-12; Defs.' Reply Supp. Mot. Dismiss Pls.' Compl. or, in the Alternative, Mot. Strike at 12-14, ECF No. 309. Defendants now recast their opposition to the tolling of lingering-effects damages as an argument rooted in *American Pipe, see* Defs.' Opp'n at 13-19; Defs.' Reply at **[*79]** 2-10, but "[w]hen a party first argues an unavailing theory . . ., and then attempts to argue an alternative or contrary position in a motion for reconsideration, this constitutes neither new evidence nor a clear error of law sufficient to support a motion for reconsideration," *Foster v. Sedgwick Claims Mgmt. Servs., Inc., 842 F.3d 721, 735, 426 U.S. App. D.C. 403 (D.C. Cir. 2016)*. Statements made by plaintiffs' counsel at a status conference nearly six months after the *Tolling Decision* was issued do not excuse defendants' failure to advance their current argument at the appropriate time or supply a reason to grant them an opportunity to relitigate the lingering-effects issue.

In addition, the *Tolling Decision* makes plain that the Court was aware at the time of that ruling that the putative *MDL I* class did not pursue post-2008 lingering-effects damages. The *Decision* enumerates a list of "novel allegations that defendants contend warrant the dismissal or striking, in whole or in part, of ten of the *MDL II* complaints," including the allegation that "defendants' conspiratorial conduct, and its effects, transpired outside of the 2003-2008 period defining the *MDL I* putative class." *2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *17*. It elsewhere contrasts the putative class's claims, asserting a class period of July 1, 2003 **[*80]** to December 31, 2008, with allegations in the challenged complaints that "the alleged conspiracy and its effects continue to the present," *2020 U.S. Dist. LEXIS 153826, [WL] at *7*, that plaintiffs "experienced continuing harm from defendants' conspiracy after 2008," and "that the conspiracy 'and/or' its effects lasted until September 30, 2012," *2020 U.S. Dist. LEXIS 153826, [WL] at *9*. In short, defendants' claim that the remarks made at the February 4 status hearing constitute new information sufficient to warrant reconsideration fails to carry their burden, as the moving party, "to show that reconsideration is appropriate." *Lovely-Coley, 255 F. Supp. 3d at 9* (internal quotation marks and citation omitted).

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[9] *See, e.g.*, Defs.' Mem. Supp. Mot. Dismiss Pls.' Compl. or, in the Alternative, Mot. Strike at 6, ECF No. 196-1 ("Plaintiffs in *MDL I* never asserted any conspiracy or damages for the period before July 1, 2003 or after December 31, 2008."); Defs.' Reply Supp. Mot. Partial Dismissal, or in the Alternative, Mot. Strike Compls. Pls. Kawasaki & Yang Ming at 9-10 ("The putative class never amended their complaint to allege a longer conspiracy, never amended their certification request to include additional purchases beyond 2008, and never pushed to broaden the scope of discovery into post-2008 claims."), 9 n.9 ("Here, the Class Complaint clearly does not assert a claim for post-2008 damages[.]"), 10 n.11, 11, ECF No. 308; Defs.' Reply Supp. Mot. Dismiss Pls.' Compl. or, in the Alternative, Mot. Strike at 8-9 n.8, 10 n.11, 11, ECF No. 309 (similar).

2. *The* Tolling Decision *Correctly Concluded that Lingering-Effects Damages Are Tolled*

Even if defendants had demonstrated one of the recognized circumstances when justice may require reconsideration, their argument on the merits, that lingering-effects damages for pre-2009 contracts that extended beyond December 31, 2008 should be time-barred under *American Pipe* because "*MDL I* did not provide Defendants fair notice of claims for lingering effects damages after December 31, 2008," Defs.' Opp'n at 16, fails. As the *Tolling Decision* explained in detail, *American Pipe* tolls the claims of former **[*81]** putative class members that are "'predicated on the same acts'" as the conduct challenged in the original class action, "such that 'there can be no doubt that the defendants have received sufficient notice of the contours of potential claims.'" *2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *11* (quoting *McCarthy, 562 F.2d at 1275*); *see also supra* Part III.A. The putative class in *MDL I* alleged a July 1, 2003 to December 31, 2008 class period, asserting that supracompetitive fuel surcharge formulas were inserted in contracts entered during that time. *2020 U.S. Dist. LEXIS 153826, [WL] at *3-4*. Unlike allegations concerning supracompetitive fuel surcharge formulas in post-2008 contracts, which do not satisfy the criteria for tolling because they are "factually separate from the 2003-2008 conspiracy pursued by the putative class" and defendants therefore lacked fair notice that such contracts were at issue, allegations related to supracompetitive fuel surcharges paid under contracts entered between 2003 and 2008 were litigated by the putative class in *MDL I* and therefore were fairly encompassed by the putative class's claims, even though they may have resulted in lingering effects damages after the *MDL I* class period ended. *2020 U.S. Dist. LEXIS 153826, [WL] at *27*.

Defendants contend that this reasoning was erroneous because, even though the **[*82]** putative *MDL I* class litigated the very contracts for which the *Tolling Decision* found lingering-effects damages to be time-barred, *MDL I* did not provide specific "fair notice" of post-2008 damages claims. Defs.' Opp'n at 16-19; Defs.' Reply at 2-13. In making this argument, they distort the applicable law. Defendants insist that *American Pipe* tolling does not apply to claims for lingering-effects damages "because these claims were not pursued in *MDL I*." Defs.' Reply at 2. As the *Tolling Decision* emphasized, however, "claims raised by former putative class members need not be identical to those alleged by the putative class to be tolled." *2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *28* (citing *Tosti v. City of Los Angeles, 754 F.2d 1485, 1489 (9th Cir. 1985)*). Rather, "tolling . . . is appropriate so long as 'the defendant has received fair notice' through the former class action 'of the number and generic identity of the potential [plaintiffs] and their substantive claims.'" *2020 U.S. Dist. LEXIS 153826, [WL] at *11* (alteration in original) (quoting *McCarthy, 562 F.2d at 1274*). Courts determine whether this notice requirement is satisfied by "assess[ing] whether defendants' 'liability' in the former class action and the present individual action 'is predicated on the same acts,'" *id.* (quoting *McCarthy, 562 F.2d at 1275*), not whether defendants were aware of the exact form plaintiffs' **[*83]** remedy might take if they prevail at the liability stage. The *MDL I* class sought damages resulting from their payment of allegedly supracompetitive rate-based fuel surcharges because of defendants' 2003-2008 conspiracy. Viewed in light of the black-letter antitrust principle that plaintiffs "[i]n the context of a continuing conspiracy" may "recover not only those damages which [they] ha[v]e suffered at the date of accrual, but also those which [they] will suffer in the future" from the initial conspiratorial conduct, *Zenith Radio Corp., 401 U.S. at 338-39*, the putative class's claims provided more than sufficient notice to defendants of the substantive claims at issue here, of economic harm resulting directly from the alleged 2003-2008 conspiracy.

Defendants repeatedly quote the Supreme Court's admonition that tolled claims should "'concern the same evidence, memories, and witnesses as the subject matter of the original class suit,'" Defs.' Opp'n at 13 (quoting *Crown, 462 U.S. at 354-55* (Powell, J., concurring)); *see also* Defs.' Reply at 1, 2, 8, 9, pointing to plaintiffs' requests for extensive new transaction data in their pending Motion to Compel as proof that tolling lingering-effects damages does not satisfy this requirement and therefore **[*84]** prejudices defendants, *see* Defs.' Opp'n at 16-19; Defs.' Reply at 7-10. This emphasis is misplaced for two reasons.

First, in arguing that plaintiffs' lingering-effects allegations prejudice defendants, defendants rely heavily on plaintiffs' representations during the conferral process that they may seek discovery and, eventually, damages for purchases made after 2012, purchases made under evergreen contracts or open offers, and purchases made under contracts with nondefendant railroads. *See* Defs.' Opp'n at 16-17; Defs.' Reply at 9-10. These new allegations, in defendants' view, would require extensive and burdensome new discovery into post-2008 conduct, showing that they were not litigated by the putative *MDL I* class. As explained *supra* Part III.A.3, however, the majority of these novel claims of post-2008 lingering effects fall outside the scope of the lingering-effects allegations tolled under the *Tolling Decision*, and so any discovery related exclusively to proof of these claims is not relevant to this multidistrict litigation and falls outside the scope of discoverable information under *Rule 26*. The burden or prejudice to defendants that might result from substantiating these time-barred **[*85]** claims is therefore inapposite to assessing the accuracy of the *Tolling Decision*'s lingering-effects holding. As to the discovery necessary to prove plaintiffs' timely lingering-effects allegations, defendants have already accepted the burden of producing 2009 transaction data for all plaintiffs and affiliated entities both during the parties' conferral process and in their briefing of the instant Motion to Compel, *see* Defs.' Opp'n at 20-22; *infra* Part III.C, mitigating any burden this discovery may impose on defendants. Any post-2009 transaction data that may eventually be required will be limited in scope to the discovery necessary to substantiate the extremely limited set of post-2009 lingering-effects allegations that are tolled, and will therefore create only minimal burdens. Altogether, defendants' obligation to produce discovery in relation to the very cabined category of timely lingering-effects allegations falls far short of the prejudice needed to foreclose *American Pipe* tolling.

Second, the contours of the "same evidence" requirement emphasized by defendants are tied to the *American Pipe* doctrine's focus on the "substantive claims" raised by plaintiffs. *McCarthy, 562 F.2d at 1275*. This limitation **[*86]** on tolling is thus best understood as a requirement that the underlying conduct at issue in both the former class action and former putative class members' individual actions, not the specific relief sought by plaintiffs, be susceptible to proof by the same evidence. *See* *Tolling Decision, 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *28*. Defendants do not dispute that, as the *Tolling Decision* noted, they "have now spent over a decade litigating these exact allegations [that they engaged in a 2003-2008 conspiracy to impose supracompetitive rate-based fuel surcharges] in *MDL I*" and that proof of "these overlapping allegations" of their conspiratorial conduct from 2003-2008 "involve[s] the 'same evidence, memories, and witnesses' as the putative class action." *Id.* (quoting *Am. Pipe, 414 U.S. at 562* (Blackmun, J., concurring)). The lingering effects actually tolled by the *Tolling Decision*, for purchases made after 2008 under bilateral, fixed-term contracts or other similarly restricted price authorities entered into before December 31, 2008, do not implicate discovery into any additional conduct. *See supra* Part III.A. Rather, defendants' liability for the continuing-effects claims they challenge are based on the allegation, pursued by the putative *MDL I* class, that defendants **[*87]** set artificially high rate-based fuel surcharges during the conspiracy and therefore will be proven or disproven on this same body of evidence. Given this fact, plaintiffs rightly point out that the 2009-2012 transaction data related to these purchases they seek as "new evidence" is not intended "to prove the fact of their injury," a consideration that would weigh against *American Pipe* tolling, but rather "to quantify the amount of their damages." Pls.' Reply at 18. Their request for limited post-2008 transaction data for this exclusively remedial purpose does not show that lingering-effects damages resulting from defendants' alleged conspiratorial conduct from 2003-2008 were improperly tolled.

In sum, the limited lingering-effects allegations tolled by the *Tolling Decision* were correctly found to fall within the scope of *American Pipe*'s exception to the running of the statute of limitations because they are "predicated on the same acts" and will be proven by the same evidence as the claims advanced by the putative class in *MDL I*. None of this analysis breaks new ground, because defendants seek to relitigate issues already twice decided in an attempt to compel a conclusion more to their **[*88]** liking. *See* *Tolling Decision, 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *24-27*; *NYK Recons. Decision, 2020 U.S. Dist. LEXIS 195908, 2020 WL 6198487, at *2-3*. Defendants' renewed opposition to plaintiffs' lingering-effects allegations remains, as it was at the time of the *Tolling Decision*, "a barely-concealed attempt to limit their potential liability for plaintiffs' post-2008 damages claims for the alleged continuing effects of defendants' conspiracy at the outset of this litigation." *Tolling Decision, 2020 U.S. Dist. LEXIS 153826, 2020 WL 5016922, at *24* (internal quotation marks omitted).

Defendants' Motion for Reconsideration is denied and lingering-effects damages are tolled within the parameters set forth *supra* Part III.A. Plaintiffs' Motion to Compel the production of information to substantiate their timely lingering-effects allegations is considered next.

C. Defendants Are Required to Produce Only 2009 Transaction Data

Plaintiffs, relying on the *Tolling Decision*'s tolling of limited lingering-effects damages, move for an order compelling production of information they describe as "evidence to prove those damages," Pls.' Mem. at 4, namely: (1) the same fields of transaction data included in the *MDL I* data set for all plaintiffs, including data located by searching for entity names and spellings provided by plaintiffs, and (2) transaction data for 2010-2012 for plaintiffs who identify a **[*89]** price authority entered into or in effect on or before December 31, 2008 that they reasonably believe continued beyond 2009, with production of such data to be made "within 30 days of presentment of the price authority," Pls.' Mot. at 1. They further ask that defendants be required, by June 1, 2021, to complete production of all price authorities entered into or in effect on or before December 31, 2008 applicable to any plaintiff. Pls.' Mot. at 1; Pls.' Mem. at 5, 14-15; Pls.' Reply at 24 n.9. As explained below, in light of the *Tolling Decision*'s substantial limitations on the availability of lingering-effects damages and the significant burden of plaintiffs' request for 2010-2012 transaction data, defendants will be compelled to produce only 2009 transaction data for all plaintiffs and affiliated entities. The application of *Rule 26*'s relevancy and proportionality requirements to the information of which plaintiffs seek to compel production follows review of the interaction between the procedural history of this multidistrict litigation and the *Rule 26* factors.

1. *Relevance of Procedural History and* American Pipe *Tolling*

As the standards for plaintiffs to demonstrate relevancy and proportionality **[*90]** under *Rule 26* make clear, *see supra* Part II.B, evaluation of any discovery dispute under *Rule 26* is highly context-specific. Thus, as previously described at the March 26, 2021 hearing, *see* Mar. 26 Hr'g Tr. at 51:13-55:6, several considerations specific to the procedural posture and extensive history of this multidistrict litigation guide application of the *Rule 26* factors to requests for discovery raised by any party.

First, as explained *supra* Part I.A, this multidistrict litigation is the second multidistrict litigation pending in this District, alleging that defendants engaged in a 2003-2008 price-fixing conspiracy to impose inflated rate-based fuel surcharges. Many of these same parties have been litigating plaintiffs' claims in *MDL I* for well over a decade, and have already undertaken extensive fact and expert discovery on identical or substantially similar issues. Additional discovery requested by any party in *MDL II* that has already been produced in *MDL I* is duplicative and unduly burdensome. It therefore falls outside the scope of allowable discovery under *Rule 26* and will not be permitted. *See Fed. R. Civ. P. 26(b)(2)(C)* ("[T]he court must limit the frequency or extent of discovery . . . if it determines that: (i) the discovery **[*91]** sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive."); *Dorris v. Unum Life Ins. Co. of Am., 949 F.3d 297, 307 (7th Cir. 2020)* (noting that "duplicative discovery" was "properly denied" by the lower court); *BuzzFeed, Inc., 318 F. Supp. 3d at 358*.

Second, consistent with this procedural history, when the JPML created *MDL II*, after the 2019 denial of class certification in *MDL I*, plaintiffs represented to the Panel that "all the fact discovery as to Defendants ha[d] been done" in *MDL I*, JPML Hr'g Tr. at 11:15-16, and that, as a result, any new fact discovery would be case-specific and substantially limited to individualized damages discovery. Plaintiffs thus anticipated, and accordingly informed both the JPML and the Court, that only some additional transaction data particular to specific parties would be required. *See supra* Part I.B. These statements suggest that discovery as to defendants' liability, which is not case-specific, was completed in *MDL I*, and that any allowable new discovery should presumably be limited to the issue of plaintiffs' damages claims. Moreover, the scope of additional discovery outlined by plaintiffs aligns with the principles of *American Pipe* tolling. *See supra* Part **[*92]** I.A, Part III.A. To the extent that new discovery is required to establish defendants' liability, rather than to quantify plaintiffs' damages, the need for that discovery strongly suggests that the *MDL II* plaintiffs seek to litigate conduct that was not at issue in *MDL I* and lacks a sufficient factual nexus with the claims pursued by the putative class in that case. Consequently, the related allegations are likely time-barred.

Finally, assessment of any request for additional discovery is colored by the background fact that the *MDL II* plaintiffs' claims would have been untimely in their entirety if class certification in *MDL I* had not been denied. *See supra* Part I.A. Although the statute of limitations has been tolled for the majority of the *MDL II* plaintiffs' claims, the policies underlying statutes of limitations and *American Pipe*'s exception to the running of the statute of limitations, outlined *supra* Part III.A.2, inform evaluation of discovery disputes. As relevant to the resolution of such disputes, it bears repeating that, to promote the goals of statutes of limitations, *American Pipe* tolling is available only in individual actions concerning "the same evidence, memories, and **[*93]** witnesses as the subject matter of the original class suit." *Am. Pipe, 414 U.S. at 562* (Blackmun, J., concurring). When these requirements are satisfied, a defendant is "on notice as to the content of the claims against it and the set of potential plaintiffs who might assert those claims," and the purposes of the statute of limitations are thus met even though the claims are facially untimely. *Calif. Pub. Emps.' Ret. Sys., 137 S. Ct. at 2053*. At the same time, this restriction on the availability of tolling weighs heavily against allowing additional discovery in individual actions that was not produced in the original class suit, even if the additional discovery is sought in relation to tolled claims.

Against the backdrop of these three considerations contextualizing fact discovery in *MDL II*, requests from either side for additional discovery not produced in *MDL I* must overcome a very high hurdle of relevancy, probativeness of claims and defenses, and proportionality, in light of the extensive discovery already produced in *MDL I* and the presumption that an otherwise-untimely individual action that stands on the shoulders of a former class action through *American Pipe* tolling will rely on the "same evidence" as the original suit. This framework guides application **[*94]** of the *Rule 26* factors to the requests set forth in plaintiffs' Motion to Compel.

2. *Agreed-Upon Production of 2009 Transaction Data for All Plaintiffs Is Relevant and Proportional*

First, plaintiffs ask that defendants be compelled to "produce the same fields of transaction data for 2009 that they produced in [*MDL I*] for all Plaintiffs [and affiliated entities], and to search the data for entity names and spellings provided by Plaintiffs." Pls.' Mot. at 1.[10] In their view, this data is relevant "because many price authorities that were entered into or issued at the end of the conspiracy period in 2008 would have continued in effect into 2009." Pls.' Mem. at 8. Thus, transaction data for 2009 "will enable Plaintiffs to determine whether there were any lingering effects of Defendants' conspiracy" in that year and, in turn, to both establish their damages for purchases made in 2009 and determine which plaintiffs "can identify a price authority entered or in effect during the conspiracy period that continued in effect after 2009." *Id.* Plaintiffs further contend that their request for the blanket production of 2009 transaction data is proportional because the burden of collecting data for all plaintiffs **[*95]** and affiliated entities is lower than the burden imposed on both sides by an alternative approach, originally suggested by defendants, under which data is produced only for plaintiffs who can demonstrate that an applicable conspiracy-period price authority continued into 2009. *Id.* at 11; *see also* Pls.' Reply at 28. In addition, plaintiffs "believe that many of the price authorities did not continue beyond 2009," such that the 2009 data will be sufficient to fully establish lingering-effects damages for most plaintiffs. Pls.' Mem. at 11. Defendants claim that "the vast majority of Plaintiffs have not alleged they suffered lingering effects damages beyond 2008 and post-2008 data for those Plaintiffs is therefore irrelevant," but otherwise do not contest any of this analysis. Defs.' Opp'n at 25; *see also id.* at 20-28. They in fact remain willing "to produce 2009 transactional data for all Plaintiffs and affiliated entities" named in plaintiffs' interrogatory responses, *id.* at 1; *see also id.* at 20-22; May 6 Hr'g Tr. at 61:5-63:2, as they previously offered during the parties' most recent conferral process, *see supra* Part I.C.

The 2009 transaction data sought by plaintiffs is both relevant **[*96]** and proportional, as the parties' consensus around production of this information confirms. As explained *supra* Part III.A, plaintiffs may pursue claims for lingering-effects damages related to conspiracy-period price authorities that continued past December 31, 2008 for which no litigation of post-2008 conduct is required. Plaintiffs represent that most of their agreements with

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[10] Plaintiffs argue that searches for entity names and spellings proposed by plaintiffs are necessary "to ensure that the search covers the names of entities recently identified by Plaintiffs in Interrogatory responses and the different spellings of Plaintiffs' names found in the MDL I data." Pls.' Mem. at 10-11 n.11. Defendants do not object to that component of plaintiffs' request for 2009 transaction data. *See* May 6 Hr'g Tr. at 61:5-63:2.

defendants were "one-year term contracts" that, if entered in 2008, would have ended at some point in 2009. Pls.' Mem. at 3; Pls.' Reply at 34. The 2009 transaction data is clearly relevant to establishing lingering-effects damages from these price authorities, and, as plaintiffs submit, to identifying the price authorities, if any, pursuant to which plaintiffs might seek post-2009 lingering-effects damages despite the restrictions set forth *supra* Part III.A.3. *See, e.g., Eagle Railcar Servs.-Roscoe v. NGL Crude Logistics, LLC, No. 1:16-CV-0153-BL, 2018 U.S. Dist. LEXIS 85415, 2018 WL 2317696, at *18 (N.D. Tex. May 22, 2018)* ("Discovery about recoverable damages stemming from asserted claims is undoubtedly relevant and thus discoverable so long as the requested discovery is proportional."); *In re Domestic Drywall Antitrust Litig., MDL No. 13-2437, Civ. A. No. 15-cv-1712, 2018 U.S. Dist. LEXIS 82956, 2018 WL 2184391, at *1 (E.D. Pa. May 10, 2018)* ("An important part of an antitrust case is the Plaintiffs' burden of proving the 'fact of injury'—that the illegal conduct resulted in damages, and providing discovery relevant **[*97]** on the amount of damages claimed.").

For similar reasons, production of the 2009 transaction data for all plaintiffs and affiliated entities is proportional. This data was not produced in *MDL I, see supra* Part I.C, and therefore is neither cumulative nor duplicative. Although plaintiffs ought to have much of the data sought in their possession, they represent that their records are lacking due to "the passage of time," Pls.' Mem. at 1, such that defendants' records are the most convenient and least burdensome source of this information. The remaining *Rule 26(b)* factors likewise favor production. *See Fed. R. Civ. P. 26(b)*; *BuzzFeed Inc., 318 F. Supp. 3d at 358*; *supra* Part II.B. Consideration of damages is, of course, somewhat premature at this stage of litigation, before defendants' liability for the alleged conspiracy has been established, and is secondary in importance to that ultimate issue. In addition, relative to the overall amount in controversy in this multidistrict litigation, lingering effects are likely only a small portion of the recovery plaintiffs seek. Lingering-effects damages for 2009 purchases, however, represent the bulk of the tolled post-2008 damages claims for which plaintiffs may seek recovery, *see supra* Part III.A, and, according **[*98]** to plaintiffs, the 2009 transaction data will fully capture most plaintiffs' lingering-effects damages, *see* May 6 Hr'g Tr. at 29:2-5; Pls.' Reply at 34. The requested information will therefore help to establish the majority of plaintiffs' claims in this category, and is in fact critical to plaintiffs' ability to do so. Moreover, that defendants have access to their records related to all plaintiffs for 2009 and have already undertaken significant efforts to collect and produce this same data for 2000-2008 suggests that they have both greater access to the relative information and the resources in place to process it.

Crucially, defendants do not object to the potential burden of conducting searches to identify all transaction data associated with any plaintiffs and any affiliated entity. Though less burdensome alternatives for defendants are available and might be feasible—for example, the production of transaction data for all shippers with any searches to be conducted by plaintiffs on their own—defendants have expressed a preference for the seemingly more onerous proposal to them of limiting production to plaintiff-specific data. *See* Defs.' Opp'n at 20-22; May 6 Hr'g Tr. at 60:21-63:2. **[*99]** They will be required to make good on this offer, and are ordered to promptly produce 2009 transaction data for the same fields produced in *MDL I* for all plaintiffs and affiliated entities identified by plaintiffs in their responses to defendants' interrogatories, and to search the data for entity names and spellings provided by plaintiffs.

3. *Production of 2010-2012 Transaction Data Is Not Proportional at This Stage of Litigation*

Plaintiffs next seek "[transaction] data from 2010 to 2012 for Plaintiffs who identify a price authority entered into or in effect on or before December 31, 2008 that they reasonably believe continued beyond 2009." Pls.' Mot. at 1. They contend that "[d]ata for 2010-2012 is just as relevant and just as proportionate for Plaintiffs with conspiracy period contracts that continued after 2009," Pls.' Reply at 25, as the 2009 transaction data defendants offered to produce and that "Defendants identify no particular burdens of producing this information that would outweigh its importance to the case, nor do they identify any other factor . . . that would suggest this request is anything but proportionate and reasonable," *id.* at 25-26; *see also id.* at 25-30, 33-36. **[*100]** Defendants, for their part, note that, for most plaintiffs, "Plaintiffs admit that there is no reason to believe they would need any data beyond the 2009 data offered by Defendants," Defs.' Opp'n at 25, and therefore no factual nexus between most 2010-2012 transaction data and the claims alleged by the putative *MDL I* class exists, such that the requested information is irrelevant. On the basis of this assumption, defendants argue that "requiring [them] to produce irrelevant data . . . relating to contracts or other price authorities that could not support . . . a [lingering-effects] claim[] creates an enormous and expensive burden on Defendants." *Id.* at 26. Thus, in their view, the requested transaction data falls outside the scope of discoverable information under *Rule 26* because it is disproportionate. *See id.* at 25-28.

Defendants' relevancy argument sweeps too broadly. The *Tolling Decision* leaves open the possibility, however unlikely, that some plaintiffs may be able to demonstrate that they suffered lingering effects after 2009 from a price authority, which was entered into or took effect during the alleged 2003-2008 conspiracy, such that their lingering-effects allegations would be tolled. **[*101]** *See supra* Part III.A.3. Though, as defendants claim, plaintiffs repeatedly emphasize that most of their lingering-effects damages claims will be confined to 2009, *see* Pls.' Mem. at 2-3, 8-9; Pls.' Reply at 34-35; May 6 Hr'g Tr. at 29:2-5, to the extent that any plaintiff can successfully show that purchases made under a conspiracy-period price authority extended past 2009 and do not necessitate litigation of post-2008 conduct, lingering-effects damages for 2010-2012 may be available. For the extremely limited number of plaintiffs who can make this threshold showing that their post-2009 lingering-effects allegations satisfy the requirements of *American Pipe*, 2010-2012 transaction data would therefore be relevant to establishing their damages. Moreover, plaintiffs' request for 2010-2012 transaction data, seeking such information only for plaintiffs who can "identify a price authority entered into or in effect on or before December 31, 2008 that they reasonably believe continued beyond 2009," Pls.' Mot. at 1, is appropriately tailored to require production only of relevant information.

Nonetheless, plaintiffs' request is not proportional. In arguing that the *Rule 26(b)* factors tilt in their favor, **[*102]** plaintiffs contend that discovery of 2010-2012 transaction data "goes to a central issue in cases with billions of dollars in damages on the line." Pls.' Reply at 26. Their characterization overstates the importance of lingering-effects damages, and particularly of post-2009 lingering-effects damages, in the context of this multidistrict litigation as a whole. The central issue in the case is whether defendants in fact engaged in a price-fixing conspiracy from 2003-2008 to artificially increase the cost of rail-freight transportation through the imposition of rate-based fuel surcharges. The requested information is not at all connected to this essential question of defendants' liability, which has yet to be decided in either *MDL I* or *MDL II*. The 2010-2012 transaction data may be important to the issue of establishing certain plaintiffs' full damages, but only if plaintiffs successfully carry their burden of proof at summary judgment or trial will their damages need to be quantified. The requested 2010-2012 transaction data does not even relate to the core of plaintiffs' potential recovery, their damages for alleged harms incurred during the 2003-2008 conspiracy period. Further indicating **[*103]** the peripheral nature of this issue, plaintiffs themselves state that only a small minority of their number might be able to pursue claims for post-2009 lingering-effects damages. *See* Pls.' Mem. at 11-12; May 6 Hr'g Tr. at 29:2-5. The importance of plaintiffs' 2010-2012 lingering-effects allegations to *MDL II* overall is minimal, at best. Relatedly, potential recovery from these claims will necessarily constitute a relatively small portion of the total amount in controversy.

Unsurprisingly, in light of the foregoing analysis, the burden of plaintiffs' request for 2010-2012 transaction data outweighs its likely benefit. The data sought is not duplicative, but in the context of *MDL II*, the fact that this information was not produced in *MDL I*, in combination with the attenuated relationship between plaintiffs' central allegations and the post-2009 lingering-effects allegations the data is meant to substantiate, indicates that the benefit of compelling production is relatively low, at least at the liability stage. Plaintiffs protest that allowing defendants to withhold 2010-2012 transaction data is tantamount to allowing them "to evade liability for lingering effects damages after 2009, **[*104]** even though . . . legitimate post-2009 damages may exist." Pls.' Reply. at 28. This risk is mitigated by defendants' obligation to produce both 2009 transaction data and, as discussed below, applicable conspiracy-period price authorities. As plaintiffs concede, they can use these two sources of information to identify both the conspiracy-period price authorities that they believe continued past 2009 and the plaintiffs who they believe purchased rail-freight transportation under the price authorities. *See* Pls.' Reply at 33-34; May 6 Hr'g Tr. at 38:7-12. These inferences will allow plaintiffs to evaluate now, at the liability stage, which of them has a reasonable basis on which to assert post-2009 lingering-effects damages claims. Before defendants' responsibility for plaintiffs' alleged economic harms is established at summary judgment or trial, the additional benefit offered by production of 2010-2012 transaction data to quantify plaintiffs' potential post-2009 damages is of little utility.

On the other side of the equation, defendants assert that "the discovery stemming from Plaintiffs' lingering effects allegations would be significant," necessitating "additional related productions, **[*105]** expert reports and depositions, and likely fact depositions as well, all of which would likely take months to complete." Defs.' Opp'n at 18; *see also id.* at 26. They further contend that, if they are required to produce 2009 transaction data for all plaintiffs, they should not "also be required to engage with Plaintiffs in a contract-by-contract analysis of whether Plaintiffs[] can have additional data from 2010 to 2012—and possibly beyond." *Id.* at 21. The burden to defendants of producing 2009 transaction data for all plaintiffs, though appropriately imposed under *Rule 26*, is substantial. They correctly anticipate the expansion of both fact and expert discovery, as well as additional obligations on their part to carry out further searches on their data to facilitate production. Granting plaintiffs' request for still more plaintiff-specific transaction data outside the conspiracy period would only exacerbate the burden, in exchange for slight gains.

Indeed, plaintiffs previously condemned the process they now suggest for the production of post-2009 transaction data, under which plaintiffs would proffer an applicable conspiracy-period price authority that they believe continued in effect after **[*106]** 2009, as "enormously burdensome," Disc. Dispute Email at 2, "unworkable and inefficient," and likely to lead to numerous "small disputes at this discovery stage over the proper categorization of Defendants' price authorities," *id.* at 3. Plaintiffs now argue that undertaking this procedure with the benefit of complete production of price authorities will "avoid the inevitable squabbling and time-consuming inefficiency" surrounding the issue of "whether a particular price authority that could give rise to lingering effects damages." Pls.' Reply at 35. As previously explained, however, a number of unresolved questions about the timeliness of post-2009 lingering-effects damages claims remain. *See supra* Part III.A.3. Though plaintiffs' model may restrict the squabbling and inefficiency to a narrower set of price authorities, the risk of time-consuming and burdensome disputes stemming from the implementation of this proposal is substantial. These considerations clearly show that the burden of plaintiffs' request for 2010-2012 transaction data outweigh the benefits.

The remaining *Rule 26(b)* factors weigh in plaintiffs' favor. As to the parties' relative access to relevant information and resources, **[*107]** and the availability of the requested information from another source, including plaintiffs' own files, plaintiffs claim that "they do not have access to Defendants' data and that their own data (if they still have it) is not a substitute for Defendants' data" in terms of its completeness. Pls.' Reply at 26-27. Similarly, as to the importance of the discovery in resolving the issue of lingering-effects damages, the parties do not dispute that 2010-2012 transaction data would be necessary to quantify any timely 2010-2012 lingering-effects damages. These factors, however, are not sufficient to overcome either the minimal relevance and importance of the requested information or the significant burdens of production, particularly in light of the heightened showing of relevancy and proportionality necessary in this multidistrict litigation to compel the production of discovery that was not produced in *MDL I. See supra* Part III.C.1. Should plaintiffs prevail at the liability stage, the relevance of post-2009 transaction data will increase, as will the centrality of 2010-2012 lingering-effects allegations to the outstanding issue of quantifying their damages. Accordingly, if the parties reach **[*108]** the damages stage, discovery may be reopened on a limited basis to allow plaintiffs to seek information to substantiate their claims for post-2009 lingering-effects damages.

In short, the limited relevance of the requested post-2009 data to only a tiny subset of a handful of plaintiffs' claims, the fact that these claims are divorced from the central issue of defendants' liability, the burden to defendants of collecting and producing the requested information, and the possibility of reopening discovery as to 2010-2012 lingering-effects allegations if plaintiffs prove their claims and this multidistrict litigation advances to the damages stage all counsel against compelling the production of 2010-2012 transaction data at this time. The requested information, though potentially relevant, is disproportionate to the needs of the litigation at this stage. Defendants therefore will not be required to produce any 2010-2012 transaction data.

4. *Defendants Will Not Be Compelled to Produce Price Authorities by June 1, 2021*

Finally, plaintiffs "seek an order requiring Defendants to substantially complete the production of [conspiracy-period] price authorities" by June 1, 2021. Pls.' Mem. at 14; **[*109]** *see also* Pls.' Mot. at 1; Pls.' Reply at 24 n.9. They contend that this expedited production order is warranted "because Plaintiffs need the price authorities" to establish that they bought rail-freight transportation from defendants after 2009 pursuant to a conspiracy-period price authority "under . . . [their] proposal for [the compelled production of] data after 2009." Pls.' Mem. at 14. In opposing this request, defendants emphasize that they "have spent the last several months searching for and producing approximately 2,800,000 pages of contracts and rate authorities to Plaintiffs, on top of the millions of pages of documents Defendants previously produced in *MDL I*, which Defendants have provided to Plaintiffs at their request." Defs.' Opp'n at 27. They do not, however, contest their obligation under *Rule 26* to produce the applicable conspiracy-period price authorities. *See* May 6 Hr'g Tr. at 74:16-84:7.

At the May 6, 2021 motions hearing, defendants described the productions of conspiracy-period price authorities they have so far made to plaintiffs and their anticipated timeline to complete production.[11] Norfolk Southern Railway indicated that it had produced all contracts and price authorities **[*110]** for all shippers from 2001-2008, May 6 Hr'g Tr. at 58:2-11, 58:15-21, 75:2-5, and "supplement[ed]" that production "with additional hard copy documents" totaling "over 100,000 pages," *id.* at 59:18-20. It expected to make its last supplemental production on May 6, 2021. *Id.* at 59:20-22. BNSF Railway stated that it was, as of May 6, "substantially complete in producing [its] contracts." *Id.* at 75:16-17. CSX Transportation said that its "contracts and price authority production" would likely be complete "within a week or so" of the May 6 hearing. *Id.* at 76:20-23. All three of these defendants noted that additional productions might be necessary due to difficulties locating interline price authorities with nondefendant railroads, steel mill contracts, and documents related to recently added plaintiffs, but stated that, even with these possible outliers, their productions could be completed by June 1, 2021. *See id.* at 75:17-76:13, 76:20-23, 83:8-21, 83:23-84:7. Union Pacific Railroad's production of contracts and price authorities significantly lags behind its codefendants, but the company still intends to complete its productions by June 30, 2021. *Id.* at 82:24-25. In light of these representations, **[*111]** defendants will not be compelled to complete production of price authorities by June 1, 2021. They are nonetheless expected to make every good-faith effort to produce all applicable price authorities to plaintiffs promptly, consistent with their representations to the Court.

IV. CONCLUSION

For the foregoing reasons, defendants' Motion for Reconsideration is denied and plaintiffs' Motion to Compel is granted in part and denied in part. Defendants are required to produce the same fields of transaction data for 2009 that they produced in *MDL I* for all plaintiffs and the affiliated entities plaintiffs identified in their answers to defendants' interrogatories, and to search the data for entity names and spellings provided by plaintiffs. Defendants will not, however, be compelled to produce any transaction data for 2010-2012 at this time, nor to complete the production of price authorities applicable to plaintiffs by June 1, 2021, in light of defendants' representations at the May 6, 2021 hearing that they will complete such production in the coming weeks.

An order consistent with this Memorandum Opinion will be entered contemporaneously.

Date: May 12, 2021

/s/ Beryl A. **[*112]** Howell

BERYL A. HOWELL

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[11] Plaintiffs explain at length their belief that "Defendants have delayed producing the price authorities Plaintiffs need." Pls.' Mem. at 15; *see also id.* at 2, 14-16; Pls.' Reply at 30-33; Jaffe Decl. ¶¶ 13-19. They emphasize in particular defendant Union Pacific Railroad's failure to produce any contracts or price authorities until April 7, 2021, and question Union Pacific's representations that it lacked a central pricing database that would have facilitated speedier production. *See* Pls.' Reply at 32-33; Decl. of Daniel M. Jaffe Supp. Pls.' Mem. P. & A. Opp'n Defs.' Mot. Recons. & Reply Supp. Mot. Compel Produc. Post-2008 Transaction Data & Price Authorities ¶¶ 7-18, ECF No. 612-2; May 6 Hr'g Tr. at 54:16-55:22, 87:11-88:6. Defendants, unsurprisingly, challenge this characterization of their efforts to date. *See* Defs.' Opp'n at 26-28; May 6 Hr'g Tr. at 74:16-84:7. In light of defendants' statements at the May 6, 2021 hearing that their productions of price authorities will be substantially complete by June 30, 2021 at the latest, *see* May 6 Hr'g Tr. at 82:24-25, 83:3-21, 83:23-84:7, this dispute need not be resolved.

Chief Judge

ORDER

Upon consideration of the plaintiffs' Motion to Compel, ECF No. 543, the defendants' Motion for Reconsideration, ECF No. 561, the memoranda, declarations, and exhibits submitted in support and opposition, the arguments presented at the motions hearing held on May 6, 2021, and the entire record therein, for the reasons stated in the accompanying Memorandum Opinion issued contemporaneously with this Order, it is hereby

ORDERED that defendants' Motion for Reconsideration, ECF No. 561, is DENIED; and it is further

ORDERED that plaintiffs' Motion to Compel, ECF No. 543, is GRANTED IN PART AND DENIED IN PART; and it is further

ORDERED that plaintiffs' Motion to Compel is GRANTED with respect to the production of 2009 transaction data for all plaintiffs and affiliated entities. Defendants shall promptly produce the same fields of transaction data for 2009 that were produced in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL No. 1869, No. 07-mc-00489-PLF-GMH (D.D.C.), for all plaintiffs and the affiliated entities plaintiffs identified in their answers to defendants' interrogatories. They are instructed to search the data for entity names and spellings **[*113]** provided by plaintiffs; and it is further

ORDERED that plaintiffs' Motion to Compel is otherwise DENIED.

SO ORDERED.

Date: May 12, 2021

/s/ Beryl A. Howell

BERYL A. HOWELL

Chief Judge

Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop.

United States District Court for the Eastern District of Pennsylvania

May 12, 2021, Decided; May 12, 2021, Filed

CIVIL ACTION No. 15-6480

Reporter

2021 U.S. Dist. LEXIS 90488 *; 2021 WL 1907501

WINN-DIXIE STORES, INC., et al., Plaintiffs, v. EASTERN MUSHROOM MARKETING COOPERATIVE, et al., Defendants.

Prior History: Winn-Dixie Stores, Inc. v. Eastern Mushroom Mktg. Coop., 2019 U.S. Dist. LEXIS 3091, 2019 WL 130535 (E.D. Pa., Jan. 8, 2019)

Core Terms

purchaser, mushrooms, conspiracy, damages, Certification, antitrust, subsidiary, indirect, prices, entities, co-conspirator, Defendants', argues, sales, class action, ownership, Fresh, summary judgment, automatic stay, material fact, discovery, retail, vertical, partial summary judgment, conspirator, overcharge, packaging, personal knowledge, joined, eggs

Counsel: **[*1]** For WINN-DIXIE STORES, INC., BI-LO HOLDINGS, LLC, Plaintiffs: KRISHNA B. NARINE, LEAD ATTORNEY, LAULETTA BIRNBAUM, PHILADELPHIA, PA; PATRICK J. AHERN, LEAD ATTORNEY, AHERN & ASSOCIATES PC, CHICAGO, IL.

For EASTERN MUSHROOM MARKETING COOPERATIVE, INC., BROWNSTONE MUSHROOM FARMS, INC., TO-JO FRESH MUSHROOMS, INC., COUNTRY FRESH MUSHROOM CO., FOREST MUSHROOM INC., GINO GASPARI & SONS, INC., GASPARI BROS. INC., KAOLIN MUSHROOM FARMS, INC., SOUTH MILL MUSHROOM SALES, INC., MODERN MUSHROOM FARMS, INC., SHER-ROCKEE MUSHROOM FARM, C & C CARRIAGE MUSHROOM CO., OAKSHIRE MUSHROOM FARM, INC., PHILLIPS MUSHROOM FARMS, INC., LOUIS M. MARSON, JR., INC., MONTEREY MUSHROOMS, INC., JOHN PIA, MICHAEL PIA, Defendants: WILLIAM A. DESTEFANO, STEVENS & LEE, PHILADELPHIA, PA.

For CARDILE MUSHROOMS, INC., Defendant: DANA A. FELMLEE, GARY J. MCCARTHY, LEAD ATTORNEYS, MCCARTHY WEIDLER PC, PHILADELPHIA, PA.

For FRANKLIN FARMS, INC., Defendant: JAMES J. RODGERS, LEAD ATTORNEY, DILWORTH PAXSON, PHILADELPHIA, PA.

For GIORGI MUSHROOM COMPANY, GIORGIO FOODS, INC., Defendants: JOSHUA SARNER, SARNER & ASSOCIATES, PHILADELPHIA, PA; MATTHEW C. BRUNELLI, TERRI A. PAWELSKI, WILLIAM A. DESTEFANO, STEVENS & LEE, PHILADELPHIA, **[*2]** PA.

For MARIO CUTONE MUSHROOM CO., INC., Defendant: JOEL I. FISHBEIN, LEAD ATTORNEY, LITCHFIELD CAVO LLP, PHILADELPHIA, PA.

For M.D. BASCIANI & SONS, INC., Defendant: DONNA M. ALBANI, LEAD ATTORNEY, LAW OFFICES OF DONNA M. ALBANI, GLEN MILLS, PA; THOMAS K. SCHINDLER, SCHINDLER LAW GROUP LLC, KENNETH SQUARE, PA.

For MUSHROOM ALLIANCE, INC., Defendant: MATTHEW J. BORGER, LEAD ATTORNEY, KLEHR HARRISON HARVEY BRANZBURG L.L.P., PHILADELPHIA, PA.

For CREEKSIDE MUSHROOMS LTD., Defendant: BARBARA T. SICALIDES, LEAD ATTORNEY, PEPPER HAMILTON LLP, PHILADELPHIA, PA.

For J-M FARMS, INC., Defendant: JASON S. TAYLOR, LEAD ATTORNEY, CONNER & WINTERS LLP, TULSA, OK; FRANCESCO P. TRAPANI, Kreher & Trapani LLP, Philadelphia, PA.

For UNITED MUSHROOM FARMS COOPERATIVE, INC., Defendant: JANE M. SHIELDS, MACELREE HARVEY, LTD., WEST CHESTER, PA; WILLIAM J. GALLAGHER, MAC ELREE, HARVEY, LTD., WEST CHESTER, PA.

Judges: Berle M. Schiller, J.

Opinion by: Berle M. Schiller

Opinion

MEMORANDUM

Schiller, J.

Winn-Dixie has accused the Eastern Mushroom Marketing Cooperative, its members, and various affiliates of unlawfully colluding to inflate the price of fresh agaricus mushrooms. The instant motion, however, does not deal with whether antitrust laws **[*3]** were violated. Instead, it asks whether Winn-Dixie can maintain an action for antitrust damages against Defendants based on its purchase of mushrooms from a non-party. Defendants[1] move for partial summary judgment arguing that Winn-Dixie was not a direct purchaser from Defendants for a portion of the claimed conspiracy period, and therefore, it lacks antitrust standing to pursue some of its claims for damages. For the following reasons, the Court will deny the motion.

I. FACTUAL BACKGROUND

This case is one of a related series of actions dealing with alleged price fixing and collusion in the market for fresh agaricus mushrooms. In February 2006, WM Rosenstein & Sons Co. filed a class action complaint alleging that various players in the mushroom industry colluded to inflate the price of mushrooms by agreeing on minimum prices and by decommissioning various mushroom farms in order to reduce mushroom supply. That complaint was later consolidated with six similar class actions, and a consolidated class action complaint was filed on November 13, 2007. Winn-Dixie, along with co-plaintiff Bi-Lo, opted out of the class action and initiated this action in 2015. Plaintiffs' Complaint was similar **[*4]** in all meaningful respects to the class action complaint that preceded it. Plaintiffs' First Amended Complaint, filed in January 2019, asserts claims pursuant to the *Sherman Act* and *Clayton Act* and alleges that Winn-Dixie "purchased Agaricus mushrooms directly from one or more Defendants." (First Am. Compl. ¶ 18.)

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[1] The motion was filed by Eastern Mushroom Marketing Cooperative, Inc. (EMMC); Robert A. Feranto, Jr., t/a Bella Mushroom Farms; Brownstone Mushroom Farms, Inc.; To-Jo Fresh Mushrooms, Inc.; Country Fresh Mushroom Co.; Gino Gaspari & Sons, Inc.; Kaolin Mushroom Farms, Inc.; South Mill Mushroom Sales, Inc.; Modern Mushroom Farms, Inc.; Sher-rockee Mushroom Farm, LLC; C&C Carriage Mushroom Co.; Oakshire Mushroom Farm, Inc.; Phillips Mushroom Farms, Inc.; Louis M. Marson, Jr., Inc.; Monterey Mushrooms, Inc.; John Pia; and Forrest Mushrooms (collectively, "Certain Defendants"), Giorgi Mushroom Co.; Giorgio Foods, Inc.; and Franklin Organic Mushrooms, Inc. (f/k/a Franklin Farms, Inc.). While the motion was pending, claims against Franklin Organic Mushrooms, Inc. (f/k/a Franklin Farms, Inc.) were dismissed with prejudice.

Now before this Court is Defendants' motion for partial summary judgment against Winn-Dixie, which argues that Winn-Dixie cannot maintain an action for antitrust damages during a portion of the alleged conspiracy period because it did not purchase mushrooms directly from an alleged conspirator. Defendants argue that from late 2004 through 2010, Winn-Dixie purchased mushrooms from Oakshire Mushroom Sales, LLC (OMS), which is not a party to this action and was not a member of the alleged conspiracy, thereby rendering Winn-Dixie an indirect purchaser.

In support of this argument, Defendants present the Certification of Gary Schroeder, sole shareholder and President of both OMS and Defendant Oakshire Mushroom Farm, Inc. (OMF). (Ex. A to Defs.' Mot. for Summ. J. [Schroeder Cert.] ¶ 1.) Schroeder states that OMF was incorporated in 1985 for the purpose of growing, packaging, and **[*5]** selling specialty mushrooms. (*Id.* ¶ 3.) In 2001, OMF joined the EMMC, and Schroeder was also elected Treasurer of the EMMC. (*Id.*) OMS was formed in 2002 to market and sell mushrooms under the brand name "Dole." (*Id.* ¶ 4.) OMS "kept separate books and records from OMF," but "the two companies shared some common employees and used a common ordering system." (*Id.* ¶ 10.)

OMS began selling mushrooms to Winn-Dixie in 2004. (*Id.* ¶ 6.) Schroeder states that OMS purchased all of the mushrooms that it resold to Winn-Dixie either from OMF "at prices that included the packaging and delivery costs[,]" or from South Mill Mushrooms and Country Fresh Mushrooms "at negotiated prices which included the packaging and delivery costs." (*Id.* ¶ 8.) Schroeder states the prices negotiated between OMS and Winn-Dixie "were not affected or influenced by any rule, regulation or program adopted by the EMMC." (*Id.* ¶ 7.) Schroeder states that OMS did not offer or attempt to join the EMMC, nor did Schroeder ever agree "that OMS would follow any of the rules[,] regulations or pricing policies adopted by the EMMC." (*Id.* ¶ 5.)

Defendants present two supply agreements between Winn-Dixie and OMS that were signed in 2005 **[*6]** and 2007. (*Id.* ¶ 6; Exs. A-B to Schroeder Cert.) Winn-Dixie does not dispute that it entered into a two-year supply agreement in 2005 and a three-year supply agreement in 2007 to purchase mushrooms "from the Oakshire companies, including OMS." (Pl.'s Resp. to Defs.' Statement of Undisputed Material Facts at 33, 35.) However, Plaintiff disputes that these agreements were solely between Winn-Dixie and OMS, because it states that OMS "was acting on behalf of its affiliated and commonly owned and controlled sister company, OMF." (*Id.*)

Plaintiff contends that genuine issues of material fact exist as to whether Winn-Dixie was an indirect purchaser and whether OMS was owned or controlled by OMF. In opposition to Defendants' motion for partial summary judgment, Plaintiff submits the class action deposition testimony of Gary Schroeder (Pl.'s Ex. 1 [Schroeder Tr.]), and Kirk Reichert, who was the controller for OMF. (*See* Pl.'s Statement of Undisputed Mat. Facts in Opp. to Defs.' Mot. [Pl.'s SUMF] ¶ 4; Pl.'s Ex. 4 [Reichert Tr.].) In further support, Winn-Dixie presents the deposition testimony of representatives of several other EMMC members, as well as the EMMC Membership Agreement signed by **[*7]** Gary Schroeder, sales data from OMS, and analysis of its expert Dr. Keith Leffler. (*See* Pl.'s Ex. 5, 8, 11-14, 16-17.)

II. STANDARD OF REVIEW

Summary judgment is appropriate when admissible evidence fails to demonstrate a genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*, *56(c)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Material facts are those "that could affect the outcome" of the proceeding, and "a dispute about a material fact is 'genuine' if the evidence is sufficient to permit a reasonable jury to return a verdict for the non-moving party." *Lamont v. New Jersey, 637 F.3d 177, 181 (3d Cir. 2011)*. Evidentiary matter in support of the motion must establish the absence of a genuine dispute of material fact; if it does not, the motion will be denied, even if no opposing evidentiary matter is presented, because "a response is not essential to defeat a motion that does not satisfy the movant's initial burden." *Maldonado v. Ramirez, 757 F.2d 48, 50 (3d Cir. 1985)* (citing *Adickes v. S.H. Kress & Co., 398 U.S. 144, 160-61, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*). In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)*. A court may not, however, make credibility determinations or weigh the evidence in considering motions for summary judgment. *Anderson, 477 U.S. at 255*.

III. DISCUSSION

The question raised by **[*8]** Defendants' motion for partial summary judgment is whether Winn-Dixie can bring an action for antitrust damages for its purchases of mushrooms from non-party OMS. As a threshold matter, the Court will consider and deny Plaintiff's request to strike the Certification of Gary Schroeder. Defendants' motion relies entirely on the Schroeder Certification and its accompanying exhibits, so the Court must first determine whether it may consider this Certification before it can assess Defendants' motion. Then the Court will turn to the merits of Defendants' motion for partial summary judgment.

A. Plaintiff's Request to Strike the Schroeder Certification

Plaintiff makes two distinct arguments to exclude the Schroeder Certification offered in support of Defendants' motion. First, Plaintiff argues that the Certification does not meet the requirements of *28 U.S.C. § 1746* or *Rule 56(c)(4)*. Second, because OMS and OMF are in bankruptcy, Plaintiff argues that the Schroeder Certification violated the automatic stay of the bankruptcy court. The Court rejects both of these arguments.

1. Compliance with 28 U.S.C. § 1746 and Rule 56(c)(4)

An unsworn statement can support a motion for summary judgment to the same extent as a sworn affidavit as long as the statement **[*9]** is made under penalty of perjury. *United States ex rel. Doe v. Heart Sol., PC, 923 F.3d 308, 315 (3d Cir. 2019)*; *Fed. R. Civ. P. 56(c)(4)* cmt. on 2010 amdts. (citing *28 U.S.C. § 1746*).

The Schroeder Certification concludes with the statement:

> "The foregoing statements made by me are true and correct to the best of my knowledge, information and belief. I am aware that if any statement made by me is intentionally false, I am subject to punishment under the perjury and false statement laws of the Commonwealth of Pennsylvania or the United States."

(Schroeder Cert.) Plaintiff argues the Certification should be excluded because it does not substantially comply with *28 U.S.C. § 1746*, which requires that an unsworn certification is verified as true and correct under penalty of perjury. Plaintiff argues that Schroder's qualifiers that the statement is true and correct "to the best of [his] knowledge, information and belief[,]" and that Schroeder is subject to perjury only if any statement is "intentionally false," render the Certification non-compliant. (Pl.'s Resp. in Opp. to Defs.' Motion [Pl.'s Resp.] at 46-48.)

The Court finds that Schroeder's Certification substantially complies with the requirements of *28 U.S.C. § 1746*. A declarant is guilty of federal perjury when he "willfully subscribes as true any material matter which he does not **[*10]** believe to be true[.]" *18 U.S.C. § 1621(2)*. Schroeder's certification that his "intentionally false" statements are subject to punishment under perjury laws does not diminish the penalty of federal perjury, and therefore substantially complies with *28 U.S.C. § 1746*.

Schroeder's statement that the entire Certification is true and correct "to the best of [his] knowledge, information and belief[,]" also does not require its exclusion. "[W]hen affidavits based on knowledge and belief are submitted to support or oppose a motion for summary judgment, the district court has discretion to determine whether it can differentiate between knowledge and belief for each averment in the affidavit." *Ondo v. City of Cleveland, 795 F.3d 597, 605 (6th Cir. 2015)*. A party's inclusion of improper language in an affidavit's declaration of personal knowledge does not invalidate the entire contents of an affidavit. *Brown v. Nat'l Penn Ins. Servs. Grp., Inc., Civ. A. No. 13-1748, 2014 U.S. Dist. LEXIS 117036, 2014 WL 4160421, at *4 (E.D. Pa. Aug. 22, 2014)*, *aff'd*, *614 F. App'x 96 (3d Cir. 2015)*. "Rather, the Court must only disregard statements that are clearly not based upon personal knowledge." *Id.* (citing *Keating v. Bucks Cty. Water & Sewer Auth., Civ. A. No. 99-1584, 2000 U.S. Dist. LEXIS 18690, 2000 WL 1888770, at *4 (E.D. Pa. Dec. 29, 2000)*). "Statements in affidavits made only on belief or on information and belief may not be considered in support of or in opposition to summary judgment." *United States v. Rocky Mountain Holdings, Inc., 782 F. Supp. 2d 106, 114 (E.D. Pa. 2011)*; *see also* *Tziatzios v. United States, 164 F.R.D. 410, 411-*

12 (E.D. Pa. 1996) (statements in an affidavit about the conduct of other persons, made to the best of the affiant's "knowledge, **[*11]** information and belief," were insufficient to create a genuine dispute of fact).

Upon review of the Schroeder Certification, nearly all of its contents are based upon Schroeder's personal knowledge. Schroeder is the sole shareholder and President of OMS and OMF. (Schroeder Cert. ¶ 1.) The Court concludes that Schroeder's statements throughout the affidavit concerning OMS's and OMF's formation and business operations are based on his personal knowledge. Therefore, the Court will not exclude those statements from consideration. Schroeder is also the OMS signatory on the two supply agreements with Winn-Dixie, and therefore has personal knowledge of those agreements. (Exs. A-B to Schroeder Cert.) Thus, the Court will not exclude those exhibits from consideration.

However, Exhibit C is a chart that appears to summarize Winn-Dixie's mushroom purchase data, by mushroom type, between 2004 and 2010. (Ex. C to Schroeder Cert.) Schroeder does not state how Exhibit C was created or whose data supported the calculations. (Schroeder Cert. ¶ 7.) In fact, Defendants' brief implies that the chart may have been prepared by Plaintiff's expert witness. (*See* Defs.' Mot. for Partial Summary J. [Defs.' Mot.] **[*12]** at 7 of 39.) Because Schroeder's Exhibit C does not appear to be based upon his personal knowledge, the Court will not consider Exhibit C or the conclusions Schroeder draws from it.

Plaintiff further argues that the Schroeder Certification does not satisfy Rule 56(c)(4) because it lacks support from the record and is conclusory or irrelevant. (Pl.'s Resp. at 41-45.) Declarations in support of a motion for summary judgment must be "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Statements in an affidavit need not be supported from the record in order to be considered on a motion for summary judgment, so long as they otherwise meet the requirements of Rule 56(c)(4). Even if an affidavit is self-serving, it may still be part of the record if it sets forth specific facts based on personal knowledge. *See* Buie v. Quad/Graphics, Inc., 366 F.3d 496, 506 (7th Cir. 2004) (finding the district court abused its discretion by refusing to consider part of an affidavit simply because it was self-serving, since it set forth a relevant specific fact based on personal knowledge). However, an affidavit that is "'essentially conclusory' and lacking in specific facts" is **[*13]** inadequate to satisfy the movant's burden on a motion for summary judgment. Maldonado v. Ramirez, 757 F.2d 48, 51 (3d Cir. 1985) (quoting Drexel v. Union Prescription Centers, Inc., 582 F.2d 781, 789-90 (3d Cir. 1978)). The Court has already assessed the specific facts in the Schroeder Certification to ensure they are based upon his personal knowledge and would be admissible in evidence. Therefore, the Court will not exclude the entire Certification simply because not all statements therein are supported by extrinsic evidence or certain statements are conclusory or irrelevant.

Finally, although Plaintiff generally claims the Schroeder Certification is contradicted by his deposition, it does not point to any portions of Schroeder's deposition testimony that contradict provisions of the Certification. (Pl.'s Resp. at 41, 43.) Even if the Certification were contradicted by deposition testimony, this could raise an issue of credibility that would preclude summary judgment, but it would not require the Court to exclude the Certification. *See* 10B Wright & Miller, *Federal Practice & Procedure* § 2738 (4th ed.). For these reasons, the Court declines to strike the Schroeder Certification but will not consider Exhibit C to the Certification.

2. The Bankruptcy Automatic Stay

Winn-Dixie next argues that the Schroeder Certification **[*14]** should be excluded because OMF and OMS are in bankruptcy. OMS and OMF each filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on December 28, 2018. (Pl.'s Ex. 2 ¶ 1.) The petitions were consolidated, and the bankruptcy case is still ongoing. *See In re: Oakshire Mushroom Farm, Inc.*, No. 18-18446 (Bankr. E.D. Pa.). On March 17, 2021, the bankruptcy court granted Winn-Dixie's Motion to lift the automatic stay of this action against OMF. (Document No. 343-1.)

Winn-Dixie argues that this Court's consideration of the Schroeder Certification would violate the automatic stay imposed by the bankruptcy court. (Pl.'s Resp. at 39-41.) When an entity files for bankruptcy, an automatic stay applies to the "commencement or continuation" of all suits "against the debtor . . . ." 11 U.S.C. § 362(a)(1). Thus, when OMF filed for bankruptcy, Winn-Dixie's claims against Defendant OMF were stayed. But the automatic stay of claims *against* OMF does not have any impact on OMF's voluntary actions. Even before the stay was lifted as to Plaintiffs' claims against OMF, nothing about the automatic stay would have precluded this Court from considering evidence voluntarily produced by OMF's President in support **[*15]** of Defendants' motion for partial summary judgment. The automatic stay did not prevent this matter from proceeding against the other Defendants. *See In re Gronczewski, 444 B.R. 526, 530 (Bankr. E.D. Pa. 2011)*. Moreover, Defendants all face potential joint and several liability for damages premised on Winn-Dixie's purchases from OMS. *See In re Processed Egg Prods. Antitrust Litig., 392 F. Supp. 3d 498, 513 (E.D. Pa. 2019)*. It would unfairly prejudice Defendants not in bankruptcy for this Court to allow Plaintiffs to proceed in litigating their claims against Defendants, but prohibit Defendants from presenting any evidence from Gary Schroeder because of the automatic stay of Plaintiffs' claims against OMF.

Winn-Dixie's final argument for exclusion of the Schroeder Certification is based on its inability to collect evidence from OMF because of the bankruptcy automatic stay. (Pl.'s Resp. at 48-50.) First, the Court notes that Plaintiff has not offered an affidavit or declaration concerning its inability to take discovery from Defendant OMF or non-party OMS, pursuant to *Fed. R. Civ. P. 56(d)*. Even absent this procedural defect, the Court would not exclude the Schroeder Certification on these grounds, for two reasons.

First, Plaintiff argues that it was deprived of discovery relating to OMS, which was previously produced in the class action, because of **[*16]** the automatic stay. (Pl.'s Resp. at 48-49.) Plaintiff bases this argument on the class action deposition of Gary Schroeder, who testified that OMF produced documents in the class action pertaining to OMS. (*Id.*) From this testimony, Plaintiff concludes that Defendants withheld from it documents pertaining to OMS that were previously produced in the class action. The conclusion Plaintiff draws from Schroeder's testimony is not supported by the existing record. During discovery in this action, Plaintiff moved to compel Defendants to produce all documents that had been previously produced in the class action. The Court denied Plaintiff's motion to compel because Defendants represented that they had produced every document previously produced in the class action. (Document No. 262 at 2 n.3.) However, the Court denied this motion without prejudice to renew "[s]hould Winn-Dixie find additional evidence that Defendants' document production is incomplete[.]" (*Id.*) Plaintiff did not renew that motion. Months later, Plaintiff filed a motion to reopen discovery in this action, arguing—as it does here—that the class action deposition testimony of Gary Schroeder indicates Defendants did not produce **[*17]** materials in this action that were produced in the class action, which pertain to OMS. (Document No. 344-1 at 6 n.3.) In opposition to that motion, Defendants reiterated that they did not "refuse or withhold any materials" because of the bankruptcy stay. (Document No. 345 at 5.) In light of this representation, the class action deposition testimony of Gary Schroeder is not sufficient to convince the Court that Defendants withheld from discovery any documents previously produced in the class action.

Second, Plaintiff states that it was unfairly ambushed by new information in Schroeder's Certification that Defendants Country Fresh and South Mill supplied mushrooms to OMS. (Pl.'s 49-50.) This argument is belied by Plaintiff's own exhibits, which indicate that OMS used Country Fresh and South Mill as suppliers to Winn-Dixie. (Pl.'s Ex. 5; *see* Schroeder Tr. 50:11-24.) In fact, in its briefing on discovery disputes, Plaintiff has previously informed the Court that OMS procured mushrooms from these entities. (Document No. 256 at 14 ("Schroeder testified that Oakshire Mushroom Sales, LLC purchased mushrooms from Defendants Country Fresh and South Mill, EMMC members.").) Although the automatic **[*18]** stay may have prevented Plaintiff from collecting discovery directly from OMF, Plaintiff could have propounded discovery requests to Country Fresh or South Mill concerning their supply of mushrooms to OMS, if it believed such discovery was necessary. Plaintiff also could have propounded third party discovery to OMS or sought to lift the automatic stay sooner to pursue discovery from OMF. (*See* Document No. 346.)

In sum, Plaintiff has not shown that the bankruptcy proceedings of OMF and OMS should prevent the Court from considering Gary Schroeder's Certification in support of Defendants' motion. Therefore, the Court will proceed to consider the merits of Defendants' motion, excluding Exhibit C of the Certification.

B. Defendants' Motion for Partial Summary Judgment

Defendants argue that Winn-Dixie cannot pursue damages on the basis of its purchases from non-party OMS because antitrust damages claims can only be sustained by parties who directly purchase from members of the conspiracy. Defendants further argue that OMS is not owned or controlled by OMF, so the exception to the direct purchaser rule for entities that are owned or controlled by members of the conspiracy does not apply. Upon **[*19]** review of the record, the Court concludes that there is a genuine dispute of fact as to whether OMS is owned or controlled by OMF, and therefore, the motion will be denied.

The Court will consider first Plaintiff's argument that the direct purchaser rule does not apply to the facts of this case. Then, the Court will turn to the question of whether OMS is owned or controlled by OMF. Third, the Court will address the alleged pleading deficiencies in the First Amended Complaint. Finally, the Court will consider Defendants' arguments concerning the impact on damages of mushrooms OMS purchased from Defendants other than OMF.

1. The Illinois Brick *Bar to Antitrust Damages for Indirect Purchasers*

Defendants argue that Winn-Dixie's suit for damages for mushroom sales from OMS is barred by the direct purchaser rule set forth in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Meanwhile, Plaintiff contends that the *Illinois Brick* framework does not apply because OMS sold mushrooms at prices fixed by the EMMC. The Court agrees with Defendants that *Illinois Brick* controls the analysis of Winn-Dixie's potential damages for purchases from OMS.

Section 4 of the Clayton Act provides that, "[a]ny person who shall be injured in his business or property by reason **[*20]** of anything forbidden in the antitrust laws may sue therefor...and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *15 U.S.C. § 15(a)*. In *Illinois Brick*, the Court concluded that an injured person under *Section 4 of the Clayton Act* did not encompass an indirect purchaser who had incurred damages passed-on by the direct purchaser from a participant in the conspiracy. *431 U.S. at 728-29*. The *Illinois Brick* opinion relied on two main considerations.

First, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, the Court held that an antitrust defendant could not employ a pass-on theory as a defense to damages, meaning that direct purchasers could recover all damages incurred from an antitrust violation regardless of whether they passed on those damages to their customers. As a result, in *Illinois Brick*, the Court concluded that allowing indirect purchasers to sue for damages would essentially permit *offensive* pass-on theories of liability, even though pass-on was not a permissible defense, which could lead to inconsistent results and double recovery against antitrust violators. *431 U.S. at 730*. The Court expressed concern that allowing an indirect purchaser to sue for damages "would create a serious risk of multiple liability" **[*21]** for antitrust violators in suits from both direct and indirect purchasers. *Id.*

Second, the Court described that requiring courts to "trace the complex economic adjustments to a change in the cost of a particular factor of production"—as would be required to determine the extent of an indirect-purchaser plaintiff's damages stemming from overcharge to the direct purchaser—"would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings . . . ." *Id. at 732*. As a result, the Court in *Illinois Brick* reaffirmed the judgment of *Hanover Shoe* that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Id. at 735*. In its analysis, the Court cautioned against litigation where "the overcharge would have to be apportioned among the relevant wholesalers, retailers, and other middlemen . . . ." *Id. at 740*.

The Supreme Court has twice reaffirmed *Illinois Brick*'s bar to actions for damages by indirect purchasers. In *Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*, the Court held that the bar to damages recovery by indirect **[*22]** purchasers applied even if direct purchasers were required by law or regulation to pass on all overcharges to downstream purchasers. The Court reasoned that even if a direct purchaser passed on 100% of the overcharge to an indirect purchaser, the direct purchaser may still have suffered antitrust damages in situations where it could have raised its prices absent the overcharge, or where there was a delay between the increase in defendants' price and the increase in the direct purchasers' sales price. Id. at 209-11. As a result, the damages from any overcharge would still have to be apportioned between direct and indirect purchasers—the calculation *Illinois Brick* was designed to preclude. *See* id. at 210-11. Thus, even if overcharges are passed on in their entirety, an indirect purchaser cannot sustain a claim for damages, unless a specific exception to *Illinois Brick* applies. *Id.* The Court in *Utilicorp* went on to conclude that "even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." Id. at 217. In Apple Inc. v. Pepper, 139 S. Ct. 1514, 203 L. Ed. 2d 802 (2019), the Supreme Court again reaffirmed that *Illinois Brick* outlined a **[*23]** bright-line rule barring an indirect purchaser's recovery, even if the antitrust violator did not set the price of the product for the direct purchaser. The Court reiterated that, "the bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* 'apply with equal force' in every individual case." Id. at 1524 (quoting UtiliCorp, 497 U.S. at 216). The combined effect of the major indirect-purchaser cases is a single bright-line rule: "if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A." Id. at 1521.

a. Illinois Brick's *Application in Vertical Conspiracies*

Despite this bright-line rule, the *Illinois Brick* doctrine will not always bar a plaintiff's recovery from multiple levels of a production chain when the plaintiff alleges a vertical conspiracy. *See* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 346h (5th ed. 2020). For example, if a consumer plaintiff alleges that it has purchased from a retailer who has conspired with the manufacturer to fix the plaintiff's purchase price, the consumer plaintiff can seek damages from the manufacturer because there is no allegation of pass-on **[*24]** damages. *See* Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1211-12 (9th Cir. 1984). This scenario has been referred to as the "co-conspirator exception" to *Illinois Brick*, although some courts have noted that, "the 'co-conspirator exception is not really an exception at all,' but rather describes a situation in which *Illinois Brick* is simply not applicable." In re Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1157 (9th Cir. 2019), *cert. denied sub nom.* Nat'l Football League v. Ninth Inning, Inc., 141 S. Ct. 56, 208 L. Ed. 2d 291 (2020) (quoting In re ATM Fee Antitrust Litig., 686 F.3d 741, 750 (9th Cir. 2012)). In such a scenario, even though the product has been sold through an intermediary, the plaintiff is a direct purchaser from an alleged member of the conspiracy. *Id.* ("[W]hen co-conspirators have jointly committed the antitrust violation, a plaintiff who is the immediate purchaser from any of the conspirators is directly injured by the violation.")

However, in order to invoke the co-conspirator exception and successfully sue an upstream seller or manufacturer for an overcharge, a plaintiff in the Third Circuit must name as a defendant the intermediary co-conspirator from which it purchased the product. McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 855 (3d Cir. 1996); Link v. Mercedes—Benz, 788 F.2d 918, 931-33 (3d Cir. 1986). The Third Circuit has "rejected attempts to invoke a co-conspirator exception to *Illinois Brick*'s bar on indirect purchaser standing when plaintiffs have not named the co-conspirators immediately upstream as defendants." Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 424 F.3d 363, 370 (3d Cir. 2005) ("*Hess I*") (citing McCarthy, 80 F.3d at 854; Link, 788 F.2d at 933). If the retailer **[*25]** from which a plaintiff purchased the product is not named as a defendant, it will not be bound by the Court's judgment, and therefore, could potentially seek double recovery from the manufacturer. *See* Link, 788 F.2d at 932. This is precisely the type of scenario the *Illinois Brick* holding was designed to avoid. Even if these concerns of double recovery were not practically possible, the absence of *Illinois Brick* policy concerns in a particular case does not remove it as a bar to indirect purchaser recovery. Hess I, 424 F.3d at 371 (citing UtiliCorp, 497 U.S. at 216). Thus, to revive the shorthand described in *Apple v. Pepper*, the bright-line rule for a vertical price-fixing conspiracy in the Third Circuit is: if manufacturer A sells to and conspires with retailer B, and retailer B sells to consumer C, consumer C may not sue A *unless it also sues B*.

Plaintiff argues that the *Illinois Brick* doctrine should not bar Winn-Dixie's recovery in this case because Defendants engaged in a conspiracy to fix the "retail" prices that Winn-Dixie paid for mushrooms. (Pl.'s Resp. 4-10, 19-28, 30-32.) Essentially, Winn-Dixie argues that it should be treated as a direct purchaser because OMS was a co-

conspirator with OMF in a vertical conspiracy that fixed the prices Winn-Dixie **[*26]** paid to OMS. The glaring problem with this argument is that OMS is not a defendant in this action.

Winn-Dixie argues that an intermediary distributor need not be joined as a co-conspirator in a conspiracy to fix the "retail" price, relying on *Lowell v. Am. Cyanamid Co., 177 F.3d 1228, 1230 (11th Cir. 1999)*. (Pl.'s Resp. 31.) In *Lowell*, the plaintiff farmers' failure to join the intermediary dealers from which they purchased a price-fixed product did not bar their recovery. *Id. at 1231*. Thus, the Eleventh Circuit seemed to approve a co-conspirator exception to *Illinois Brick* when the direct sellers were not joined as defendants. But a closer reading of *Lowell* does not support its application to the facts here. *Lowell* specifically relied on what it deemed to be an exception to *Illinois Brick* for a "a single vertical conspiracy where the plaintiff has purchased directly from a conspiring party in the chain of distribution." *Id. at 1232*. The court's conclusion was premised on the fact that there was "no allegation of both a vertical conspiracy as well as a horizontal conspiracy one step removed from the plaintiffs." *Id.* The *Lowell* court specifically differentiated the narrowly confined facts of that case—which alleged a single vertical conspiracy with no allegations of pass-on—from **[*27]** the facts of *In re Beef Indus. Antitrust Litig., 600 F.2d 1148 (5th Cir. 1979)*, in which the plaintiff ranchers alleged a horizonal conspiracy among retail food chains and a vertically integrated conspiracy with the meat packer and slaughterhouse intermediaries. *177 F.3d at 1231-32*. The *Lowell* court explained that "[n]ot every vertical conspiracy allegation will get around the *Illinois Brick* doctrine. An alleged vertical conspiracy on top of a horizontal conspiracy . . . does not...'save' the overall conspiracy claims. Instead, the *Illinois Brick* doctrine might apply even more strongly in a case like *In re Beef*." *177 F.3d at 1232*. Thus, in allegations of a horizontal and vertical conspiracy, where the intermediary reseller is not joined as a defendant, the risks that *Illinois Brick* contemplated of multiple liability and damages-apportionment complexity would still be present.

In this case, Plaintiffs have alleged a horizontal conspiracy among EMMC members. Now facing Defendants' motion for partial summary judgment, Winn-Dixie argues that OMS followed EMMC minimum pricing policies, and in essence, was a vertically integrated co-conspirator that sold to Winn-Dixie at prices fixed by the conspiracy. But because OMS is not a defendant, the policy concerns *Illinois Brick* identified of **[*28]** double recovery from members of the EMMC, and pass-on damages apportionment among OMS and Winn-Dixie, could still arise. Plaintiff argues that the concerns of double recovery and apportionment of damages do not apply in this case because OMS never sued Defendants and any new claims would now be time-barred. (Pl.'s Resp. at 32.) Even if Plaintiff were correct, the Supreme Court has cautioned against assessing whether the policy rationales of *Illinois Brick* apply in a particular case because "allowing an exception, even in rather meritorious circumstances, would undermine the rule." *UtiliCorp, 497 U.S. at 216*. Regardless of whether OMS followed EMMC minimum pricing in its sales to Winn-Dixie, or whether there is any risk that OMS may still sue Defendants, the *Illinois Brick* doctrine bars an indirect purchaser from suing an upstream entity for damages, unless the intermediary is also joined as a defendant or another exception applies. Winn-Dixie's argument that *Illinois Brick* does not apply fails because OMS is not a named defendant in this action.

b. Determining the Seller, Direct Purchaser, and Indirect Purchaser

Winn-Dixie also argues that it is a direct purchaser, and therefore *Illinois Brick* does not apply, **[*29]** because Defendants Country Fresh and South Mill were the "true sellers" to Winn-Dixie. (Pl.'s Resp. 29; Pl.'s SUMF ¶¶ 18-26, 58-63.) Plaintiff argues that because OMS was purely a sales entity that did not package or ship the mushrooms it sold to Winn-Dixie, "it is reasonable to infer that OMS did not take possession or title to the Dole mushrooms sold to Winn-Dixie, and that Country Fresh and South Mill, both EMMC members, were the true sellers of Dole mushrooms to Winn-Dixie." (Pl.'s SUMF ¶ 63.)

Winn-Dixie's argument is similar to an argument considered and rejected in *Hess I, 424 F.3d 363, 372-73 (3d Cir. 2005)*. In that case, the plaintiffs, who purchased a price-fixed product through dealer intermediaries, argued they were direct purchasers from the manufacturer for certain transactions where the dealers "do not take physical possession" of the product. *Id. at 373*. The Third Circuit rejected this argument, reasoning that the shipping method "does not affect the economic substance of the transaction." *Id.*

Here, Schroeder testified that OMS was a sales entity that was distinct from the packaging operation, and OMS used other growers besides OMF, including Country Fresh and South Mill, to supply, package, and label its sales of Dole mushrooms. **[*30]** (*See* Schroeder Tr. 50:11-14; 51:4-52:4, 95:21-96:10.) OMS's data for sales to Winn-Dixie also describes the "Ship Method" as "Southmill", "Country Fresh", or "Quincy". (Pl.'s Ex. 5.) However, Defendants presented sales agreements between Winn-Dixie and OMS, and Winn-Dixie does not dispute the validity of these agreements. (Exs. A-B to Schroeder Cert.) Nor does Winn-Dixie put forth any evidence that it negotiated directly with South Mill or Country Fresh on the prices of mushrooms or directly paid those entities. Although Country Fresh and South Mill may have packaged and shipped OMS mushrooms sold to Winn-Dixie, this does not affect the economic substance of the transaction between OMS and Winn-Dixie. Plaintiff's argument fails to create a genuine issue of material fact that Winn-Dixie purchased mushrooms directly from Defendants Country Fresh or South Mill, rather than from non-party OMS.

The Court concludes that Winn-Dixie is an indirect purchaser in a distribution chain impacted by a horizontal conspiracy, which is exactly the circumstance in which *Illinois Brick* and its progeny apply. Therefore, Winn-Dixie cannot recover damages from Defendants based on purchases from OMS—an alleged **[*31]** co-conspirator that is not joined as a defendant—unless an exception to the *Illinois Brick* doctrine applies to those purchases. The Court will next consider the exception to *Illinois Brick* that may govern Winn-Dixie's purchases from OMS.

2. The Ownership or Control Exception to Illinois Brick

Illinois Brick set forth a potential limited exception to the direct purchaser rule for situations "where the direct purchaser is owned or controlled by its customer." *431 U.S. at 736 n.16*. The Court described that in such a situation "market forces have been superseded" such that the general reasoning to prevent indirect purchasers from recovering might no longer apply. *Id.* Although *Illinois Brick* described this exception in the context of a direct purchaser that was owned or controlled by the customer, courts have since applied the exception where the direct purchaser is owned or controlled by the antitrust conspirator. *See* Areeda & Hovenkamp, *supra*, ¶ 346f.

The Third Circuit has allowed a plaintiff to sue for damages based on its purchases from a conspiring defendant's wholly-owned subsidiary. *In re Sugar Indus. Antitrust Litig., 579 F.2d 13 (3d Cir. 1978)*. *In re Sugar* alleged a conspiracy among major sugar refiners to fix the prices of refined sugar. *Id. at 15*. The plaintiff was a candy wholesaler that had purchased **[*32]** candy from a subsidiary of a defendant. *Id.* After considering the facts of the case, the court concluded that "at least for this purpose and in this context, the subsidiary should be treated as the alter ego of the parent." *Id. at 18-19*. The following year, in *Mid-West Paper Products Co. v. Continental Group. Inc.*, the Third Circuit again faced the question of whether a plaintiff could pursue antitrust damages based on purchases from a defendant's subsidiary. *596 F.2d 573, 588-89 (3d Cir. 1979)*. The Third Circuit remanded to the district court to determine whether *Illinois Brick* should prevent plaintiff's recovery. *Id. at 589*. The *Mid-West Paper* court assessed that in certain circumstances courts could regard a parent and its' subsidiary as one entity, "when the parent dominates and controls the subsidiary to such an extent that the subsidiary is deemed to be an agent of the parent." *Id.* In finding remand necessary, the court stated that "[i]f [plaintiff] can establish facts that...as a consequence of [defendant's] domination the subsidiary's prices were determined in accordance with the general price-fixing conspiracy, [plaintiff] would be entitled to sue defendants for damages resulting from its purchases from [the subsidiary]." *Id.* A **[*33]** few years later, in dicta, the Third Circuit summarized the standard set forth in *Mid-West Paper* as requiring that a "violator must dominate [the] subsidiary's prices in accordance with the general price fixing conspiracy" in order for the indirect purchaser to be able to sue for damages when it purchased from a subsidiary or division of a co-conspirator. *Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 967 n.20 (3d Cir. 1983)*.

The Third Circuit most recently described the contours of the ownership or control exception in *Hess I, 424 F.3d at 371-72 (3d Cir. 2005)*. The *Hess I* opinion stated that courts which have expanded the ownership or control exception beyond a direct subsidiary have limited the exception to "relationships involving such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale." *Id. at 372* (quoting *Jewish Hosp. Ass'n of Louisville, Ky. v. Stewart Mech. Enters., 628*

F.2d 971, 975 (6th Cir. 1980)). "Modes of control that might qualify for the control exception include 'interlocking directorates, minority stock ownership, loan agreements that subject the wholesalers to the manufacturers' operating control, [or] trust agreements.'" *Id.* (quoting In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 605 (7th Cir. 1997) (alteration in original)). Plaintiffs in *Hess I* were dental laboratories that alleged an exclusive-dealing and price-fixing conspiracy between **[*34]** Dentsply, which marketed artificial teeth, and its dealer intermediaries, which sold the artificial teeth to plaintiffs. *Id. at 366-67*. The Third Circuit held the ownership or control exception did not allow plaintiffs to sue Dentsply for damages because Dentsply did not "own any interest in" the dealers and "no functional unity" existed between Dentsply and the dealers, so the *Illinois Brick* policy concerns of double recovery and damages apportionment would apply. *Id. at 372*. Thus, while the Third Circuit did not apply the control exception to *Illinois Brick* in *Hess I*, the opinion recognized the continuing viability of the exception. *See* *In re: Domestic Drywall Antitrust Litig., 322 F.R.D. 188, 196-97 (E.D. Pa. 2017)*.

In light of this precedent, the question for the Court is whether there is any genuine dispute as to whether non-party OMS should be treated as the alter ego of Defendant OMF. The Court must assess whether OMF has functional unity with OMS or exercises control over OMS as a result of interlocking directorates or other agreements. The Court must also consider whether, as a consequence of OMF's domination or control, OMS's prices were determined in accordance with EMMC minimum pricing policy.

In their respective arguments regarding the ownership or control exception in this **[*35]** case, the parties each rely on earlier decisions in the related class action litigation. Judge O'Neill ruled on the application of the ownership or control exemption to *Illinois Brick* in two instances. In one instance, Judge O'Neill ruled that plaintiff Diversified Foods was an indirect purchaser and could not recover damages because distributor South Mill of New Orleans, from which it had purchased mushrooms, was not owned or controlled by Defendants Kaolin Mushroom Farms, Inc. or Defendant South Mill Mushroom Sales, Inc. ("South Mill/Kaolin"). *In re Mushroom Direct Purchaser Antitrust Litig., 319 F.R.D. 158, 181-84 (E.D. Pa. 2016)*. John and Michael Pia were the 100% owners of Defendants South Mill/Kaolin, but they were only 50% owners of the South Mill Distribution entities; the remaining 50% of the distribution entities were owned by Stuart Thomas. *See* *id. at 183-84*; *In re Mushroom Direct Purchaser Antitrust Litig., 54 F. Supp. 3d 382, 388 n.6 (E.D. Pa. 2014)*. In finding that the Defendants South Mill/Kaolin did not own or control the direct purchaser South Mill of New Orleans, the court reasoned,

> "[w]hile some overlap existed in ownership between the affiliated distributors and the member growers, they were not under common control in the same sense as is a corporation and its wholly-owned subsidiary, a corporation and its divisions or as are *two corporations owned in* ***[*36]*** *identical proportions by the same set of investors*."

319 F.R.D. at 183 (quoting *In re Mushroom, 621 F.Supp.2d 274, 290 (E.D. Pa. 2009)* (emphasis added)). The court further reasoned that the lack of unity of interest between the entities was demonstrated by the fact that there had been a lawsuit between South Mill/Kaolin and a South Mill distribution center concerning mushroom pricing. *Id. at 184*; *see* *54 F. Supp. 3d at 388-89*. The court concluded this history of litigation implicated the potential for double recovery that *Illinois Brick* had attempted to avoid, so Diversified Foods could not proceed with its claims for damages as class representative. *319 F.R.D. at 184*.

Separately, Judge O'Neill found that there were genuine issues of material fact as to whether M.D. Basciani owned or controlled a distribution entity to which it sold mushrooms. *In re Mushroom Direct Purchaser Antitrust Litig., Civ. A. No. 06-620, 2016 U.S. Dist. LEXIS 177839, 2016 WL 8459462, at *5 (E.D. Pa. Dec. 13, 2016)*. There, M.D. Basciani moved for summary judgment arguing that plaintiffs were indirect purchasers because M.D. Basciani sold all of its mushrooms to a distributor, which took possession of and title to the mushrooms, and which was not an EMMC member or defendant. *2016 U.S. Dist. LEXIS 177839, [WL] at *2*. M.D. Basciani argued that it was a separate corporate entity from this distributor, and that the two entities had separate financial statements, bank accounts, boards of directors, shareholder meetings, **[*37]** and payrolls. *Id.* However, the two entities had identical owners, who each owned the same percentage of shares in M.D. Basciani and the distributor. *Id.* The court denied the motion for summary judgment, and found it notable that "M.D. Basciani and [the distributor] were owned and operated and controlled by the same individuals and that he and the other co-owners made decisions for both...."

2016 U.S. Dist. LEXIS 177839, [WL] at *5. Judge O'Neill concluded that there were material questions of fact as to whether "sufficient functional unity" existed between the two entities to warrant application of the control exception to *Illinois Brick* and permit plaintiffs' claims against M.D. Basciani. *Id.*

The situation here regarding OMF and OMS is much more akin to that of M.D. Basciani in the related class case than to South Mill/Kaolin. Here, the parties do not dispute that Gary Schroeder is the sole shareholder and President of both OMS and OMF. (Schroeder Cert. ¶ 1; Schroeder Tr. 95:3-10, 96:11-15.) Indeed, Schroeder himself certifies that OMS and OMF "shared some common employees and used a common ordering system." (Schroeder Cert. ¶ 10.) OMF had already been growing, packaging, and selling mushrooms for 17 years when Schroeder **[*38]** formed OMS "for the purpose of obtaining a license from the Dole Company—which it did in 2003—to market and sell all types of mushrooms...under the DOLE brand name...." (Schroeder Cert. ¶¶ 3-4.) OMS "kept separate books and records from OMF" and had separate financial reporting. (*Id.* ¶ 10; *accord* Schroeder Tr. 96:16-19, 98:21-99:8.)

In 2001, OMF joined the EMMC, and Schroeder was elected Treasurer of the EMMC. (*Id.* ¶ 3.) Schroeder avers that OMS did not offer or attempt to join the EMMC, and he did not agree that OMS would follow "any of the rules[,] regulations or pricing policies adopted by the EMMC." (*Id.* ¶ 5.) Schroeder states that any mushrooms that OMS purchased from OMF and "re-sold" to Winn-Dixie were at "prices that included the packaging and delivery costs...." (*Id.* ¶ 8.) Schroeder further states the sales prices between OMS and Winn-Dixie "were negotiated between Winn Dixie's Procurement Officers and OMS[,]" and "were not affected or influenced by any rule, regulation or program adopted by the EMMC." (*Id.* ¶ 7.) As a result, Defendants argue OMS is not owned or controlled by OMF.

Winn-Dixie argues that there is sufficient evidence to raise a genuine dispute of material fact **[*39]** as to whether OMF owned or controlled OMS. Plaintiff first points to the bankruptcy filings of OMF and OMS, which designate the two entities as "affiliates," pursuant to the Bankruptcy Code. (Pl.'s SUMF ¶¶ 2-3; Pl.'s Ex. 2 ¶ 14.) OMF and OMS's affiliation in bankruptcy does not indicate any functional unity or control beyond what is already evident from the entities' common ownership by Gary Schroeder. *See 11 U.S.C. § 101(2)(B)* (an "affiliate" is a "corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned or controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns...20 percent or more of the outstanding voting securities of the debtor...").

Next, in support of its argument that genuine issues of material fact exist as to the control of OMS by OMF, Plaintiff submits the deposition of Kirk Reichert, who was the controller for OMF and testified in the related class action as a corporate designee of OMF. (Pl.'s SUMF ¶ 4; Pl.'s Ex. 4 [Reichert Tr.] 9:5-9.) Reichert did not mention the existence of "Oakshire Mushroom Sales" throughout his deposition. While Reichert testified on behalf of OMF, he also testified about sales **[*40]** data from OMS. (*See* Pl.'s SUMF ¶¶ 15-17; Pl.'s Ex 5; Reichert Tr. 17:25-18:17.) Reichert testified that Schroeder usually completed the negotiations on behalf of "Oakshire" (*see* Reichert Tr. 25:23-26:13), and that Schroeder completed all negotiations of rebates and pricing, without specifying whether this testimony applied to OMF or OMS. (*Id.* at 54:13-23, 65:9-15.) He testified to the electronic operating system and operations of a customer service employee, again without differentiating between OMF and OMS. (*See id.* at 21:10-23; 26:7-27:9; Pl.'s SUMF ¶¶ 10-11, 13.) Reichert further testified that in 2003, "we got the Dole license." (Reichert Tr. 65:19-23.) Plaintiff argues that this testimony, as well as an article on the website of OMF, indicate it was OMF, not OMS, which began selling mushrooms under the Dole license. (Pl.'s SUMF ¶¶ 5, 27-30.) Whether it was OMS or OMF that acquired the Dole license is irrelevant to the Court's inquiry of OMF's domination or control over OMS. However, Reichert's failure to distinguish between the two entities throughout his testimony signals to the Court a potential functional unity of operation and management between OMF and OMS.

Plaintiff next **[*41]** argues that OMF required OMS to follow EMMC minimum pricing. (Pl.'s SUMF ¶¶ 32-36.) In support of this argument, Plaintiff presents the EMMC Membership Agreement signed by Schroeder on behalf of OMF, which required EMMC members "not to sell or otherwise dispose of mushrooms except as provided under the terms of this Agreement" and "to sell mushrooms to all customers only on the terms authorized by the Cooperative." (Pl.'s Ex. 8 ¶¶ 6-7.) Plaintiff points to the testimony John Pia, President of South Mill Mushroom Sales, stating that the EMMC minimum prices applied to sales to "[f]resh market consumers[.]" (Pl.'s SUMF ¶ 49; Pl.'s Ex. 11 [Pia Tr.] 8:16-18, 251:11-20.) Schroeder similarly testified that one of the prices set by EMMC minimum pricing was for sales to retail customers. (*See* Pl.'s SUMF ¶ 46; Schroeder Tr. 118:4-25.) Plaintiff also presents the testimony of representatives of several defendants stating that they believed EMMC minimum pricing applied to sales from EMMC members' packaging and shipping operations to retail or wholesale consumers, rather than sales from members' growing operations to their packaging and shipping operations. (*See* Pl.'s SUMF ¶¶ 47-48, Pl.'s Ex. 13 **[*42]** (Johnson Tr. 191:19-192:17, 195:3-14; Reitnauer Tr. 98:5-11, 98:24-99:10; Ferranto Tr. 33:9-21; Cutone Tr. 82:4-22; Cardile Tr. 145:6-12, 146:10-21; D'Amico Tr. 171:17-172:3).) Plaintiff also cites to Judge O'Neill's finding that "the price fixing in which the EMMC admits it participated was applied to integrated and affiliated distributors' sales and not at the growers level." *In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 285 n.11 (E.D. Pa. 2009)*. Finally, Plaintiff asserts that the prices OMS actually charged Winn-Dixie in its sales contracts were higher than the EMMC minimum prices. (*See* Pl.'s SUMF ¶¶ 51-52; Pl.'s Ex. 16, Leffler Rebuttal Report at 8 n.23.) Defendants do not dispute this assertion.

The Court concludes that there is a genuine dispute of material fact whether OMF controlled OMS in order to satisfy the exception to *Illinois Brick*. OMF and OMS are 100% commonly owned and controlled by Gary Schroeder. OMS shared common employees, a common ordering system, and functional operations with OMF. Schroeder was also solely responsible for negotiating OMF's and OMS's sales prices. As EMMC Treasurer and President of EMMC member OMF, it is a reasonable inference that Schroeder was aware of the EMMC minimum prices. While Schroeder avers that the EMMC **[*43]** minimum pricing did not affect OMS's sale prices to Winn-Dixie, Defendants present no evidence or explanation of how OMS's sales prices were determined or negotiated, for either its sales to Winn-Dixie or to other customers. Moreover, certain other EMMC members seem to have applied the minimum pricing policies to their retail sales operations, even if those were separate entities than their growing enterprises. On this record, and drawing all inferences in the light most favorable to Winn-Dixie, the Court concludes that a reasonable juror could find that OMF exercised sufficient control over OMS to satisfy the exception to *Illinois Brick*. As a result, the Court cannot find, as a matter of law, that the *Illinois Brick* doctrine prevents Winn-Dixie from suing for damages for its purchases of mushrooms from OMS.

3. Winn-Dixie's Pleading Deficiency Regarding Purchases from OMS

Defendants further argue that Plaintiff cannot sustain a claim for damages premised on the ownership or control exception to *Illinois Brick* because it did not plead this exception in its First Amended Complaint. (Defs.' Mot. at 8-9.) Defendants rely on *Hess I*, in which the Third Circuit found that the plaintiffs could **[*44]** not claim they were direct purchasers from Dentsply to avoid the *Illinois Brick* doctrine because their complaint had specifically defined the plaintiff class as dental laboratories "who purchased such products *through Dentsply Dealers*." *424 F.3d at 372*.

Here, Plaintiffs pleaded that during the "Conspiracy Period" Winn-Dixie "purchased Agaricus mushrooms directly from one or more Defendants." (First Am. Comp. ¶ 18.) Plaintiffs defined the "Conspiracy Period" as January 1, 2001 through 2008. (*Id.* ¶ 3.) Winn-Dixie did not plead that it purchased mushrooms from OMS or that OMS was owned or controlled by OMF. As a result, Defendants posit that "Winn-Dixie's 'ownership or control' argument comes too late." (Defs.' Mot. at 9.)

The Federal Rules do not require a plaintiff to set out a legal theory at the pleadings stage and "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby, Miss., 574 U.S. 10, 11, 135 S. Ct. 346, 190 L. Ed. 2d 309 (2014)*. When a party has a valid claim, it should be able to recover provided that the change in theory will not prejudice the other party in maintaining a defense upon the merits. 5 Wright & Miller, *Federal Practice & Procedure* § 1219 (3d ed.); *see also Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 142, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*, *overruled on other* ***[*45]*** *grounds by Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (remanding case for trial despite objections that antitrust plaintiffs' "particular theories of conspiracy" were not pleaded with specificity because "[t]he gist of petitioners' cause of action [was] clear from the outset, and respondents will in no way be prejudiced if petitioners are permitted to rely on these alternative theories of conspiracy.").

Defendants have not argued any prejudice in being able to prepare a defense to the ownership and control exception to *Illinois Brick* premised on Winn-Dixie's purchases from OMS. To the contrary, they have asserted that Gary Schroeder can attest to the relationship between OMF and OMS and has access to contracts and sales data concerning Winn-Dixie's purchases from OMS. (*See* Schroeder Cert.) Moreover, Defendants assert that the parties explicitly discussed Winn-Dixie's indirect purchases from OMS before the close of discovery, and Plaintiff referenced the ownership or control exception in its filings concerning discovery disputes. (Defs.' Mot. at 11-12 (citing Document No. 256 at 8-14).) Thus, Defendants are not surprised or prejudiced by Plaintiff's assertion of the ownership and control exception to *Illinois Brick*. The Court **[*46]** concludes that Winn-Dixie's failure to plead that it purchased from OMS, and that OMS was owned or controlled by OMF, should not prohibit Winn-Dixie from asserting this theory of recovery in opposition to summary judgment or at trial.

4. Mushrooms OMS Purchased from Conspirators Besides OMF

Defendants next argue that even if there is a dispute of material fact concerning whether OMS is owned or controlled by OMF, *Illinois Brick* still prohibits Winn-Dixie from recovering damages stemming from any mushrooms that originated from any member of the conspiracy besides OMF. (Defs.' Mot. at 12.) Defendants argue that 75% of OMS's sales to Winn-Dixie were mushrooms that OMS purchased from Country Fresh or South Mill, citing to Exhibit C to the Schroeder Certification. (*Id.*) As described in Section III.A.1 *supra*, the Court will not consider Exhibit C in support of Defendants' motion. But the Court will consider Defendants' argument in the abstract, since it is evident that at least some share of Winn-Dixie's purchases from OMS were originally acquired from Country Fresh or South Mill. (Pl.'s Ex. 5; *see* Schroeder Tr. 50:11-24.)

Defendants argue the ownership or control exception to *Illinois Brick* ***[*47]*** cannot apply to products purchased from a company owned or controlled by a conspirator that originated from members of the conspiracy other than its parent company. Defendants cite no case law in support of this assertion, and the Court has found no controlling authority from the Third Circuit on this question. *See In re Sugar Indus. Antitrust Litig., 579 F.2d at 20 (3d Cir. 1978)* (denying petition for rehearing and expressly declining to address this issue because it was not raised in the lower court or briefed on appeal); *In re Fine Paper Antitrust Litig., 98 F.R.D. 48, 117 n.61 (E.D. Pa. 1983)*, *aff'd in part, rev'd in part*, *751 F.2d 562 (3d Cir. 1984)* (noting that the Third Circuit did not rule on this question in *In re Sugar*).

In opposition, Plaintiffs rely on *Royal Printing Co. v. Kimberly Clark Corp., 621 F.2d 323 (9th Cir. 1980)*. In *Royal Printing*, the Ninth Circuit approved of an indirect purchaser's antitrust standing in the circumstances alleged here—where a wholly owned or controlled entity sold plaintiff goods acquired from its parent's co-conspirator rather than the parent itself. *621 F.2d at 326*. The court considered the purpose behind the *Illinois Brick* doctrine, specifically the possibility of double recovery, stating, "[t]here is little reason for the price-fixer to fear a direct purchaser's suit when the direct purchaser is a subsidiary or division of a co-conspirator." *Id.* "The co-conspirator parent will forbid **[*48]** its subsidiary or division to bring a lawsuit that would only reveal the parent's own participation in the conspiracy." *Id.*

The *Royal Printing* court did note that extending the *Illinois Brick* exception to goods originating from co-conspirators, rather than the direct purchaser's parent company, created a slightly increased risk of multiple liability. *Id. at 326 n.6* ("Of course, if the plaintiff purchased a defendant's goods through the defendant's own wholesaling subsidiary, there would be even less likelihood that the direct-purchaser subsidiary would ever also sue the defendant and create a potential multiple liability."). For example, the court hypothesized that "[t]he parent might be under government pressure or discover that the conspiracy is not sufficiently profitable; and if a subsidiary has outside shareholders, a derivative suit might be a possibility. In such an event, multiple liability might lurk." *Id. at 326*. But the *Royal Printing* opinion also noted that even if a subsidiary did sue a parent's co-conspirators, it might be prevented from recovering if the subsidiary had true and complete involvement and participation in the antitrust activity. *Id. at 326 n.5* (citing *Perma Life Mufflers, 392 U.S. at 146-47, 149, 154 (1968)* (White, J. concurrence) (Marshall, J. concurrence) **[*49]** (Harlan, J. concurrence), *overruled on other grounds by* *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*). Thus, a subsidiary's true and complete involvement and participation in the conspiracy lowers the risk of multiple liability.

Notwithstanding "some small chance that such a subsidiary or division might wish to sue its parent's co-conspirators[,]" the Ninth Circuit ultimately concluded,

> "as a practical matter the chance of a direct-purchaser suit is so small, the correspondingly small risk of multiple recovery does not disturb us. This is especially so when our only alternative is to effectively immunize the transactions here from private antitrust liability, thus thwarting a vital part of the antitrust enforcement scheme and the expressed purpose of *Illinois Brick*."

Id. at 326 (footnotes omitted). Thus, in allowing recovery for purchases from a defendant's subsidiary for goods created by any co-conspirator, the Ninth Circuit balanced the dual concerns of *Illinois Brick* to avoid multiple recovery and to encourage private antitrust enforcement.

Although it did not address this particular question, the Third Circuit similarly considered the dual risks of multiple recovery and encouraging private antitrust enforcement in its decision to apply **[*50]** the ownership or control exception in *In re Sugar, 579 F.2d 13, 18-19 (3d Cir. 1978)*. The plaintiff had purchased from a wholly owned subsidiary of a defendant, and in this context, the court concluded that the subsidiary should be treated as the alter ego of the parent. *Id. at 18-19*. "To adopt any other view would invite evasion by the simple expedient of inserting a subsidiary between the violator and the first noncontrolled purchaser." *Id. at 19* (footnote omitted). The *In re Sugar* court reasoned that, "[a]lthough the subsidiary does have a separate legal existence, it is owned by the parent company, and would not ordinarily sue it." *Id. at 18*. Thus, in condoning the existence of an exception to *Illinois Brick*, the Third Circuit considered whether there would be a low risk of multiple recovery by the direct purchaser and expressed a desire to prevent complete evasion of private antitrust liability. Two years after the Third Circuit's decision in *In re Sugar*, the Ninth Circuit considered these same factors in *Royal Printing* and concluded that the same logic should extend to products sold by a co-conspirator's subsidiary. *621 F.2d at 326 (9th Cir. 1980)*.[2]

The reasoning in *In re Sugar* leads the Court to anticipate that that the Third **[*51]** Circuit would agree with the Ninth Circuit's holding in *Royal Printing* that the ownership and control exception to *Illinois Brick* applies equally to goods originating from any member of the conspiracy. In general, a direct purchaser that is owned or controlled by a member of the conspiracy is unlikely to sue its parent company or other members of the conspiracy. When a direct purchaser acquires price-fixed products from a co-conspirator that is not its parent company, there may be a minimally increased risk of multiple liability in certain circumstances. But the Court concludes this risk is generally outweighed by the risk of the antitrust violators' complete evasion of private enforcement through insertion of a corporate entity that is owned or controlled by a conspirator into the distribution chain.

The Court's anticipation that the Third Circuit would condone this conclusion is further bolstered by a footnote in a recent opinion addressing a different antitrust liability question. In *In re Processed Egg Prod. Antitrust Litig.*, the Third Circuit held that the plaintiffs could seek overcharge damages for all egg products purchased from a conspirator, even where those egg products included **[*52]** some amount of eggs from a third-party non-conspirator. *881 F.3d 262, 274-76 (3d Cir. 2018)*. The question was not governed by *Illinois Brick* because the plaintiffs were direct purchasers from conspirators, so the holding is of limited relevance here. But, in a footnote, the opinion stated,

> "certain Defendants obtained shell eggs from other conspirator-Defendants. These eggs are within the scope of what this Opinion refers to as 'internal' eggs, as they were produced within the conspiracy. For purposes of the issues before us, it does not matter whether a Defendant's 'internal' eggs came from a flock owned by that same Defendant or instead from a flock that belonged to a fellow conspirator-Defendant."

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[2] In dicta, the Third Circuit has compared these decisions, stating, "[t]he *Royal Printing* decision parallels the exception to *Illinois Brick* that we recognized in ***In re Sugar Indus. Antitrust Litig., 579 F.2d 13 (3d Cir.1979)***." *Merican, 713 F.2d 958, 967 n. 20 (3d Cir. 1983)*. The Court in *Merican* noted one key difference between the Ninth Circuit's interpretation in *Royal Printing* and the Third Circuit's interpretation of the ownership or control exception: in the Third Circuit, for the exception to apply, the antitrust conspirator "must dominate the subsidiary's prices in accordance with the general price fixing conspiracy." *Id.* (citing *Mid-West Paper Prods., 596 F.2d 573, 589 (3d Cir. 1979)*). The *Merican* opinion noted no other disagreement between the circuits' interpretation of the exception.

Id. at 266 n.4. Thus, the court treated equally any eggs originating from any member of the conspiracy, regardless of which defendant ultimately sold the eggs outside of the conspiracy. Applying the same reasoning here would require the Court to treat equally any mushrooms that were grown by any Defendant, regardless of which Defendant—or which entity controlled by a Defendant—ultimately sold the mushrooms outside the conspiracy. This is precisely how the Court will proceed.

The Court declines to hold that Winn-Dixie is barred from seeking **[*53]** damages for any mushrooms OMS purchased from Country Fresh, South Mill, or any other Defendant. The Court will treat these mushrooms equivalently to those mushrooms OMS purchased from OMF. Of course, the Court has not issued any opinion as to whether an exception to *Illinois Brick* would allow Winn-Dixie to seek damages from Defendants for its mushroom purchases from OMS. The Court has merely determined that there is a genuine dispute of material fact on this question that cannot be resolved at summary judgment.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion for partial summary judgment is denied. An Order consistent with this Memorandum will be docketed separately.

ORDER

AND NOW, this **12th** day of **May, 2021**, after consideration of Defendants' Motion for Partial Summary Judgment Against Plaintiff Winn-Dixie, and the responses and replies thereto, and for the reasons outlined in this Court's Memorandum dated May 12, 2021, it is **ORDERED** that Defendants' Motion for Partial Summary Judgment (Document No. 286) is **DENIED**.

BY THE COURT:

/s/ Berle M. Schiller

Berle M. Schiller, J.

In re Auto. Parts Antitrust Litig.

United States Court of Appeals for the Sixth Circuit

March 11, 2021, Argued; May 14, 2021, Decided; May 14, 2021, Filed

File Name: 21a0108p.06

No. 20-1599

Reporter
997 F.3d 677 *; 2021 U.S. App. LEXIS 14372 **; 2021 FED App. 0108P (6th Cir.)

IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION and IN RE: ANTI-VIBRATIONAL RUBBER PARTS CASES, End-Payor Actions.DIRECT PURCHASER PLAINTIFFS, Interested Parties-Appellees, v. YAMASHITA RUBBER COMPANY, LTD.; YUSA CORPORATION; DTR INDUSTRIES, INC.; BRIDGESTONE CORPORATION; BRIDGESTONE APM COMPANY; TOYO TIRE & RUBBER COMPANY, LTD.; TOYO TIRE NORTH AMERICA OE SALES LLC; TOYO AUTOMOTIVE PARTS (USA), INC., SUMITOMO RIKO COMPANY LIMITED, fna Tokai Rubber Industries, Ltd., Defendants-Appellants.

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of Michigan at Detroit. Nos. 2:12-md-02311; 2:13-cv-00803--Marianne O. Battani, District Judge.

In re Auto. Parts Antitrust Litig., 2018 U.S. Dist. LEXIS 242164, 2018 WL 11260510 (E.D. Mich., Nov. 7, 2018)

Core Terms

purchasers, settlement agreement, lawsuit, indirect, anti-vibration, rubber, antitrust, direct-purchaser, end-payor, manufacturers, settlement, district court, ownership-or-control, violator, indirectly, entities, anti trust law, unambiguous

LexisNexis® Headnotes

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

HN1[] **Purchasers, Indirect Purchasers**

In Illinois Brick Co., the Supreme Court recognized an exception to the direct-purchaser rule, holding that an indirect purchaser might have standing to sue if it purchased from an intermediary that was owned or controlled by the ultimate seller.

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

Torts > ... > Settlements > Settlement Agreements > Enforcement

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

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

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

The court reviews a district court's denial of a motion to enforce a settlement agreement for an abuse of discretion. A district court abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact. Where the issue involves the interpretation of a settlement agreement, review is de novo. But if contractual language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact subject to review for clear error.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Civil Procedure > ... > Settlement Agreements > Enforcement > Breach of Contract Actions

HN3[] **Types of Contracts, Settlement Agreements**

A settlement agreement is a contract governed by principles of state contract law.

Contracts Law > Contract Interpretation > Intent

HN4[] **Contract Interpretation, Intent**

Under Michigan law, the primary goal of contract interpretation is to honor the intent of the parties. To achieve that goal, the court must read the contract as a whole. If the contractual language is clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and popular sense. The court is governed by what the parties said and did, and not merely by their unexpressed subjective intent.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

HN5[] **Offers, Definite Terms**

A. contract is not ambiguous merely because a term is not defined in the contract.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN6[] **Types of Contracts, Settlement Agreements**

To the extent "indirectly" or "directly purchased" are used in the settlement agreements as legal phrases or terms of art, Michigan law instructs the court to further consider case law explanations that those familiar with such terms of art are held to understand.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

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

HN7[] **Remedies, Damages**

The Supreme Court has consistently stated that, for purposes of federal ***antitrust law***, direct purchasers are those who buy immediately from the alleged antitrust violators, and indirect purchasers are those who are two or more steps removed from the violator in a distribution chain.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN8[] **Remedies, Damages**

llinois Brick recognized the general rule that a plaintiff has no standing under federal ***antitrust law*** to sue an alleged antitrust violator if the plaintiff did not directly purchase the overcharged product from the alleged violator. But it hinted that that standing rule might not apply if plaintiffs bought from a direct purchaser that was "owned or controlled" by the alleged antitrust violator. That hint has since turned into an exception allowing an indirect purchaser to bring a federal antitrust suit when, for example, an alleged antitrust violator owns or controls its direct purchaser. In practice, the ownership-or-control exception permits courts to treat indirect purchasers as direct purchasers for standing purposes so that antitrust violators cannot simply integrate vertically to escape federal antitrust liability.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

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

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

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

HN9[] **Standing, Clayton Act**

The ownership-or-control exception mentioned in Illinois Brick is ultimately a pragmatic carveout to a federal antitrust standing rule, not a redefinition of indirect purchaser.

Contracts Law > Contract Interpretation > Intent

HN10[] **Contract Interpretation, Intent**

Under Michigan law, courts are prohibited from considering extrinsic evidence to determine the parties' intent when the contract language is clear and unambiguous.

Contracts Law > Contract Interpretation > Intent

HN11[] **Contract Interpretation, Intent**

Where the language in the contracts is clear and unambiguous, the court looks only within the four corners of the relevant contracts to accomplish its task.

Counsel: ARGUED: Zachary D. Tripp, WEIL, GOTSHAL & MANGES LLP, Washington, D.C., for Appellants.

David H. Fink, FINK BRESSACK, Bloomfield Hills, Michigan, for Appellees.

ON BRIEF: Zachary D. Tripp, WEIL, GOTSHAL & MANGES LLP, Washington, D.C., Adam C. Hemlock, David Yolkut, WEIL, GOTSHAL & MANGES LLP, New York, New York, Frederick R. Juckniess, JUCKNIESS LAW FIRM PLC, Ann Arbor, Michigan, Matthew J. Turchyn, HERTZ SCHRAM PC, Bloomfield Hills, Michigan, Robert N. Hochman, SIDLEY AUSTIN LLP, Chicago, Illinois, Joanne G. Swanson, KERR, RUSSELL AND WEBER, PLC, Detroit, Michigan, J. Clayton Everett, Jr., MORGAN, LEWIS & BOCKIUS LLP, Washington, D.C., Larry J. Saylor, MILLER, CANFIELD, PADDOCK & STONE P.L.C., Detroit, Michigan, for Appellants.

David H. Fink, Nathan J. Fink, FINK BRESSACK, Bloomfield Hills, Michigan, for Appellees.

Judges: Before: BATCHELDER, GRIFFIN, and BUSH, Circuit Judges.

Opinion by: JOHN K. BUSH

Opinion

[*679] JOHN K. BUSH, Circuit Judge. Under federal ***antitrust law***, a private plaintiff generally must be a "direct purchaser" to have suffered injury **[**2]** and thus have standing to sue a manufacturer or supplier. *HN1*[] In *Illinois Brick Co. v. Illinois*, however, the Supreme Court recognized an exception to the direct-purchaser rule, holding that an "indirect purchaser" might have standing to sue if it purchased from an intermediary that was "owned or controlled" by the ultimate seller. *431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. The present dispute raises the question whether *Illinois Brick* has any effect on the interpretation of certain antitrust class-action settlement agreements under Michigan law.

Specifically, we consider *Illinois Brick* to address whether Plaintiffs, who purchased automotive anti-vibration rubber parts, are barred from maintaining a purported direct-purchaser class-action lawsuit against the manufacturers and sellers of those parts. Defendants argue that Plaintiffs settled all their claims as part of a class composed of certain "persons and entities" that "indirectly purchased" anti-vibration rubber parts. Plaintiffs argue that, in accordance with *Illinois Brick*, they are not part of the settlement class because they purchased "directly" from subsidiaries of a manufacturer. As explained below, regardless of whether *Illinois Brick* applies to Plaintiffs' underlying **[**3]** claims, Plaintiffs fit within the class definition because they "indirectly purchased" parts under the plain meaning of the settlement agreements. Their suit is therefore barred by those agreements. We reverse the district court's contrary holding.

I.

This appeal is part of the litigation that arose from the manufacture and sale of automotive anti-vibration rubber parts. Those parts are used, as their name suggests, to absorb and reduce vibration transmission in various sections of a vehicle. In 2013, a putative class of anti-vibration rubber part purchasers, referred to as end-payor purchasers, sued several manufacturers and suppliers, alleging that they conspired to fix prices of anti-vibration **[*680]** rubber parts.[1] The end payors brought claims under the *Clayton Act, 15 U.S.C. § 26*, for violations of the *Sherman Act, 15 U.S.C. § 1 et seq.* They also sued under certain state antitrust laws.

The end-payor litigation settled in 2016 and 2017, after the district court certified a nationwide settlement class comprising persons and entities who indirectly purchased anti-vibration rubber parts that were manufactured or sold by the defendant manufacturers and suppliers. Notably, the settlement class excludes persons or entities who purchased parts directly or **[**4]** for resale. In total, the defendants agreed to pay $80.4 million to the settlement class. In exchange for that sum, the class members "completely released, acquitted, and forever discharged . . . any and all claims" against the defendants arising out of or relating to the conduct alleged in the complaint. The agreements bind all settlement class members except those who timely opted out. Finally, the agreements contain a list of exclusions from the releases, including for all direct purchasers and specific indirect purchasers.

Before the district court entered final judgments approving the settlement agreements in the end-payor lawsuit, Jerry Anderson, Laura LaRue, and Christopher Lee filed a separate putative class action against the same manufacturers and suppliers defending the end-payor litigation, in the same court, in front of the same judge.[2] As Plaintiffs in that new lawsuit, they seek money damages under the Clayton Act on behalf of a putative class of all "direct purchasers" of anti-vibration rubber parts.

Specifically, Plaintiffs allege that they purchased parts "from an entity of which one of the Defendants is the ultimate parent." **[**5]** Of note, the entity that Plaintiffs allegedly purchased parts from is not a defendant in their direct-purchaser lawsuit or the end-payor lawsuit. They purchased anti-vibration rubber parts from a Firestone repair shop (Bridgestone Retail Operations, dba Firestone Complete Auto Care), which is owned by Bridgestone Americas, a subsidiary of one of the defendants in both lawsuits, Bridgestone Corporation. The trial record also reflects that Plaintiffs purchased from a couple of other retail shops, "Tires Plus" and "Wheel Works," which too are allegedly "part of the Bridgestone . . . family." Like the end-payor class, Plaintiffs claim that Defendants conspired to raise prices for anti-vibration rubber parts and passed down the increased costs to their putative class of direct purchasers.

Soon after Plaintiffs filed the direct-purchaser lawsuit, the district court entered final judgments approving the settlement agreements in the end-payor lawsuit. In doing so, the court enjoined all settlement class members from "commencing, prosecuting, or continuing . . . any and all claims" arising out of or relating to the released claims.

About a year later, after Plaintiffs filed their first discovery **[**6]** request in the direct-purchaser lawsuit, Defendants filed a motion to enforce the judgments from the **[*681]** end-payor lawsuit against Plaintiffs. They asked the district court to enjoin Plaintiffs from litigating their claims in the direct-purchaser lawsuit because the settlement agreements in the end-payor lawsuits prohibited Plaintiffs, as indirect purchasers, from maintaining their federal antitrust claims against Defendants. The district court denied the motion because, in its view, Plaintiffs were properly considered direct purchasers under the ownership-or-control exception to the standing rule of *Illinois Brick*. It also reasoned that Defendants' litigation tactics and other post-settlement actions tipped the scales of justice in Plaintiffs' favor. Defendants appeal.

II.

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[1] Those manufacturers and suppliers include Bridgestone Corporation, Bridgestone APM Company, Yamashita Rubber Co., YUSA Corporation, Tokai Rubber Industries, DTR Industries, Toyo Tire & Rubber Co., Toyo Tire North American OE Sales, and Toyo Automotive Parts (USA) and "unnamed co-conspirators."

[2] Judge Marianne O. Battani of the Eastern District of Michigan oversaw the *In re: Automotive Parts Antitrust Litigation* MDL for about eight years. In June of 2020, she removed herself from the MDL for health reasons. Judge Sean F. Cox, of the same district, is now presiding over the MDL.

HN2[] We review a district court's denial of a motion to enforce a settlement agreement for an abuse of discretion. *Therma-Scan, Inc. v. Thermoscan, Inc., 217 F.3d 414, 419 (6th Cir. 2000)*. "A district court abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." *United States v. Fowler, 819 F.3d 298, 303 (6th Cir. 2016)* (quoting *United States v. Bridgewater, 606 F.3d 258, 260 (6th Cir. 2010)*). Where, as here, the issue involves the interpretation of a settlement agreement, our review is de novo. *Golden v. Kelsey-Hayes Co., 73 F.3d 648, 653 (6th Cir. 1996)*. But if contractual **[**7]** language is "unclear or susceptible to multiple meanings, interpretation becomes a question of fact" subject to review for clear error. *Solo v. United Parcel Serv. Co., 819 F.3d 788, 794 (6th Cir. 2016)* (quoting *Port Huron Educ. Assn. v. Port Huron Area Sch. Dist., 452 Mich. 309, 550 N.W.2d 228, 237 (Mich. 1996)*).

III.

A. The Settlement Agreements

The only issue on appeal is whether the settlement agreements bar Plaintiffs from maintaining their direct-purchaser lawsuit. *HN3*[] A settlement agreement is a contract governed by principles of state contract law, here Michigan law. *See* *Converge, Inc. v. Topy Am., Inc., 316 F. App'x 401, 404-05 (6th Cir. 2009)*; *Kloian v. Domino's Pizza L.L.C., 273 Mich. App. 449, 452, 733 N.W.2d 766 (2006)*. So this case simply requires us to apply that law to interpret the parties' contracts.

HN4[] Under Michigan law, "[t]he primary goal of contract interpretation is to honor the intent of the parties." *Old Kent Bank v. Sobczak, 243 Mich. App. 57, 63, 620 N.W.2d 663 (2000)*. To achieve that goal, we must read the contract as a whole. *Id.* If the contractual language is "clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and popular sense." *Michigan Mut. Ins. Co. v. Dowell, 204 Mich. App. 81, 87, 514 N.W.2d 185 (1994)*. We "are governed by what the parties said and did, and not merely by their unexpressed subjective intent." *Fletcher v. Bd. of Educ. of Sch. Dist. Fractional No. 5, 323 Mich. 343, 348, 35 N.W.2d 177 (1948)*.

Read in light of those rules, the settlement agreements clearly and unambiguously bar Plaintiffs from maintaining their direct-purchaser lawsuit. The district court's contrary legal determination was incorrect and thus an abuse of discretion.

First, we consider the relevant **[**8]** contractual language.[3] The agreements release all **[*682]** the past and future claims of the settlement class. The settlement class includes:

> All persons and entities that, from March 1, 1996 through the Execution Date, purchased or leased a new Vehicle in the United States not for resale, which included one or more Anti-Vibration Rubber Part(s) as a component part, or indirectly purchased one or more Anti-Vibration Rubber Part(s) as a replacement part, which were manufactured or sold by a Defendant, any current or former subsidiary of a Defendant, or any co-conspirator of a Defendant.

That definition excludes those persons and entities that purchased anti-vibration rubber parts "directly or for resale." If Plaintiffs are indirect purchasers who did not timely elect to be excluded from the settlement class, the settlement agreements bar their direct-purchaser lawsuit.[4] But, if they are direct purchasers, the settlement agreements cannot stand in their way.

The settlement agreements do not define "indirectly purchased" or "directly purchased," or any variation of those phrases. Those omissions, however, do not make the agreements ambiguous. *See* *McGrath v. Allstate Ins. Co., 290 Mich. App. 434, 439, 802 N.W.2d 619 (2010)* (*HN5*[] "A[] . . . contract is not ambiguous merely because **[**9]** a term is not defined in the contract."). We can look to the plain and ordinary meaning of those terms and phrases as described in dictionary definitions. *Id.* "Direct" means "[s]traightforward, uninterrupted, immediate"; "[e]ffected or

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[3] Because each manufacturer settled with the class separately, there are several settlement agreements. The relevant language is identical in all the agreements, so our analysis applies to all Defendants.

[4] Plaintiffs concede that they did not timely opt out of the settlement class, and they do not contend that Defendants provided them insufficient notice of the settlement agreement, or of their ability to opt out of the class.

existing without intermediation or intervening agency; immediate." *Direct*, Oxford English Dictionary (2d ed. 1989); *see also Direct*, Webster's Third New International Dictionary (1986) ("immediate"; "stemming immediately from a source"; without an "intervening agency, instrumentality, [] influence . . . or intervening step"; "without use of a broker or other middleman."). And "indirect" is just the opposite; it means "[n]ot direct." *Indirect*, Oxford English Dictionary (2d ed. 1989).

Plaintiffs alleged that they purchased anti-vibration rubber parts from Bridgestone Retail Operations, LLC, (dba Firestone) and the other retailers noted, which purchased the parts from Bridgestone Americas, Inc., which in turn purchased them from the Bridgestone Corporation--one of the defendants and alleged antitrust violators in both the end-payor and direct-purchaser lawsuits. Plaintiffs' purchasing arrangement was not "[s]traightforward, uninterrupted," or "immediate." **[**10]** And it certainly was not "without intermediation," an "intervening step" or a "middleman." By definition then, it was not direct. It was indirect.

HN6[] To the extent "indirectly" or "directly purchased" are used in the settlement agreements as "legal phrase[s] or term[s] of art," Michigan law instructs us to further consider "case law explanation[s] that those familiar with such terms of art are held to understand." *Henderson v. State Farm Fire and Cas. Co., 460 Mich. 348, 357 n.9, 596 N.W.2d 190 (1999)*. Examination of the relevant antitrust case-law explanations of the terms "indirectly" and "directly purchased" (or "indirect" and "direct purchaser") confirms the plain meaning of the agreements. ***HN7***[] The Supreme Court has "consistently stated" that, for purposes of federal ***antitrust law***, direct purchasers are those who buy "immediately from the alleged antitrust violators," and indirect purchasers are those "who are two or **[*683]** more steps removed from the violator in a distribution chain[.]" *Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520, 203 L. Ed. 2d 802 (2019)* (quoting *Kansas v. UtiliCorp United Inc., 497 U.S. 199, 207, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*). Here, Plaintiffs concede that they did not purchase "immediately" from Defendant Bridgestone Corporation, or any of the other Defendants. They acknowledge that their purchases were "two or more steps removed" from the alleged violator. *Id.* Plaintiffs are thus indirect purchasers. Accordingly, **[**11]** they fall within the settlement class defined above and are barred by the settlement agreements from maintaining their federal antitrust claims as the named Plaintiffs in the direct-purchaser lawsuit.

B. *ILLINOIS BRICK* & THE OWNERSHIP-OR-CONTROL EXCEPTION

To circumvent the plain meaning, Plaintiffs argue that, as a matter of law, we should treat them as direct purchasers under the ownership-or-control exception to the antitrust-standing rule of *Illinois Brick Co. v. Illinois*. We find their theory unpersuasive.

HN8[] *Illinois Brick* recognized the general rule that a plaintiff has no standing under federal ***antitrust law*** to sue an alleged antitrust violator if the plaintiff did not directly purchase the overcharged product from the alleged violator. *413 U.S. at 729-30*. But it hinted that that standing rule might not apply if plaintiffs bought from a direct purchaser that was "owned or controlled" by the alleged antitrust violator. *Id. at 736 n.16*. That hint has since turned into an exception allowing an indirect purchaser to bring a federal antitrust suit when, for example, an alleged antitrust violator owns or controls its direct purchaser. *See Jewish Hosp. Ass'n of Louisville, Ky., Inc. v. Stewart Mech. Enters., Inc., 628 F.2d 971, 975 (6th Cir. 1980)*; *see also, e.g., Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 424 F.3d 363, 371 (3d Cir. 2005)*. In practice, the ownership-or-control exception permits courts **[**12]** to treat indirect purchasers as direct purchasers for standing purposes so that antitrust violators cannot simply integrate vertically to escape federal antitrust liability.

As highlighted above, Plaintiffs allege that at least some of Defendants are vertically integrated such that they own their direct purchasers. Accordingly, the argument goes, Plaintiffs are the only purchasers that Defendants do not own, and so, under the "ownership" prong of the ownership-or-control exception, they can proceed against Defendants as its direct purchasers. Defendants assert that Plaintiffs' argument is irrelevant to our interpretation of the settlement agreement.

We agree with Defendants. Whether Plaintiffs can maintain their direct-purchaser lawsuit under the ownership-or-control exception of *Illinois Brick* is a question of antitrust standing. *See Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 613-14 (6th Cir. 2004)*. It is not a question that bears on our interpretation of the settlement agreements. That

Plaintiffs might be considered to have standing under *Illinois Brick* does not alter the reality that they indirectly purchased anti-vibration rubber parts from Defendant Bridgestone Corporation.[5] *See, e.g., Jewish Hosp, 628 F.2d at 975*; **[*684]** *Howard, 424 F.3d at 371*. ***HN9***[] The ownership-or-control exception mentioned in *Illinois* ***[**13]*** *Brick* is ultimately a pragmatic carveout to a federal antitrust standing rule, not a redefinition of indirect purchaser.

By nevertheless claiming that the exception applies to them, Plaintiffs concede that they are in fact indirect purchasers. How so? Well, because the ownership-or-control exception applies *only* to indirect purchasers. *See Jewish Hosp., 628 F.2d at 975*. If Plaintiffs had directly purchased anti-vibration rubber parts from Defendants, they would have no reason to rely on the exception; the settlement agreements would expressly permit their new lawsuit.

What's more, the settlement agreements include eight express exclusions from the class-wide releases, none of which references this ownership-or-control exception. The exclusions allow only certain indirect purchasers to bring federal antitrust claims against Defendants. *See Bridgestone Settlement Agreement*, R. 265-2 at PageID 9859-60 (permitting claims asserted by "automobile dealerships" and "equipment dealerships," that are "indirect purchasers of Anti-Vibration Rubber Parts," or claims asserted by "any state, state agency, or instrumentality or political sub-division of a state"). The exclusions also permit **[**14]** any "claims for damages under the state or local laws of any jurisdiction other than an Indirect Purchaser State."[6] *Id.* at PageID 9860. That means that persons or entities who indirectly purchased anti-vibration rubber parts can sue Defendants under state antitrust laws in states, like Michigan, that do not follow the special standing rule of *Illinois Brick. See Mich. Comp. Laws Ann. § 445.778*. Thus, it seems that the settlement agreements explicitly mention how Plaintiffs might sue the manufacturers in the future--namely, under certain state antitrust laws. The failure of the agreements to provide in their exclusions a means by which Plaintiffs, as indirect purchasers, might sue under federal ***antitrust law*** (*e.g.*, through the ownership-or-control exception) strongly suggests that Plaintiffs cannot maintain their federal claims.

C. "OTHER FACTORS"

Two final matters bear mentioning before we conclude. First, the district court mentioned in its order that a number of "other factors" tipped the scale in Plaintiffs' favor. Those factors included its observations that (1) Defendants' counsel did not file a notice in the direct-purchaser lawsuit that it had settled Plaintiffs' claims **[**15]** in the end-payor settlement agreements, (2) Defendants' counsel also did not notify Plaintiffs of its motion to enforce judgment, and finally, (3) Plaintiffs' claims would not be duplicative of the end-payor claims because the end payors sought injunctive relief against Defendants whereas Plaintiffs now seek money damages.

None of those factors has anything to do with the language in the settlement agreements. ***HN10***[] Under Michigan law, courts are prohibited from considering extrinsic evidence to determine the parties' intent when the contract language is clear **[*685]** and unambiguous. *See Kyocera Corp v Hemlock Semiconductor, LLC, 313 Mich. App. 437, 446, 886 N.W.2d 445 (2015)*. The district court did not purport to find ambiguity in the agreements. We do not find ambiguity either. Therefore, the district court's consideration of post-contracting, external evidence of the parties' intent was an abuse of discretion.

Second, the manufacturers raise a number of policy considerations in their briefing on appeal. We decide this case without reference to those considerations. This is a contract case that requires us to interpret a set of terms. ***HN11***[] Where, as here, the language in the contracts is clear and unambiguous, we look only within the four corners of the relevant contracts to accomplish **[**16]** our task. *See, e.g., Old Kent Bank, 243 Mich. App. at 63*.

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[5] In resolving this appeal, we do not decide whether Plaintiffs are appropriately considered direct purchasers for purposes of antitrust standing. Just a year ago, after the district court denied Defendants' motion to dismiss the direct-purchaser lawsuit, we held, on review of a petition to appeal under *28 U.S.C. § 1292(b)*, that the facts were not sufficiently "fleshed out" to decide whether Plaintiffs had antitrust standing under the ownership-or-control exception. *In re: Auto parts Antitrust Litig, et al.*, Dkt. No. 19-106, Doc. No. 13 at 2. No additional discovery has been conducted in the interim to alter that holding.

[6] After *Illinois Brick* was decided, several states passed statutes rejecting the logic of the special standing rule in *Illinois Brick*. Those states that amended their antitrust laws to specifically allow indirect purchasers to bring suit are often called "Repealer States"; the states that did not amend their laws after *Illinois Brick* are referred to as "Indirect Purchaser States."

IV.

Having evaluated the terms of the settlement agreements, we hold that they unambiguously bar Plaintiffs from maintaining their alleged direct-purchaser lawsuit. The district court abused its discretion in holding otherwise. We therefore reverse the district court and remand for further proceedings consistent with this opinion.

In re Ranbaxy Generic Drug Application Antitrust Litig.

United States District Court for the District of Massachusetts

May 14, 2021, Decided; May 14, 2021, Filed

MDL No. 19-md-02878-NMG

Reporter

338 F.R.D. 294 *; 2021 U.S. Dist. LEXIS 93198 **; 109 Fed. R. Serv. 3d (Callaghan) 964

In re: Ranbaxy Generic Drug Application Antitrust Litigation, This Document Relates To: All Actions

Prior History: *In re Ranbaxy Generic Drug Application Antitrust Litig., 355 F. Supp. 3d 1382, 2019 U.S. Dist. LEXIS 24048, 2019 WL 625968 (J.P.M.L., Feb. 11, 2019)*

Core Terms

generic, class member, antitrust, drugs, manufacturer, purchaser, brand, Defendants', class period, anticompetitive, prices, predominate, uninjured, state law, variation, entities, plans, proposed class, commonality, methodology, overcharge, damages, certification, consumer, effects, class certification, adequacy, cease, class action, ascertainable

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN1[] **Class Actions, Certification of Classes**

Under Fed. R. Civ. P. 23, a court may certify a class only if it finds that the proposed class satisfies all the requirements of Fed. R. Civ. P. 23(a) and that classwide adjudication is appropriate for one of the reasons set forth in Fed. R. Civ. P. 23(b).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN2[] **Prerequisites for Class Action, Adequacy of Representation**

Fed. R. Civ. P. 23(a) requires that a class meet the following four criteria:1) the class is so numerous that joinder of all members is impracticable (numerosity), 2) there are questions of law or fact common to the class (commonality), 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality) and 4) the representative parties will fairly and adequately protect the interests of the class (adequacy). Fed. R. Civ. P. 23(a)(1)-(4).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN3[] **Prerequisites for Class Action, Adequacy of Representation**

A district court must conduct a rigorous analysis under Fed. R. Civ. P. 23 before certifying a class. The Court may look behind the pleadings, predict how specific issues will become relevant to facts in dispute and conduct a merits inquiry only to the extent that the merits overlap with the Rule 23 criteria. Courts should also be mindful that the prerequisites of commonality, typicality and adequacy tend to merge in their analysis.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Evidence > Burdens of Proof > Preponderance of Evidence

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN4[] **Prerequisites for Class Action, Commonality**

Fed. R. Civ. P. 23(b)(3) requires that common questions of law or fact predominate over those affecting individual class members and that a class action be the superior method for fair and efficient adjudication. Fed. R. Civ. P. 23(b)(3). Implicit in Rule 23 is the additional requirement that plaintiffs demonstrate by a preponderance of the evidence that the class is currently and readily ascertainable based on objective criteria.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN5[] **Prerequisites for Class Action, Numerosity**

Fed. R. Civ. P. 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable. Generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Fed. R. Civ. P. 23(a) has been met. Nonetheless, there is no requirement of a minimum number of plaintiffs and numerosity requirement is satisfied where class members are geographically dispersed and judicial economy favors proceeding as a class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN6[] **Prerequisites for Class Action, Commonality**

To satisfy commonality, there must be questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). The commonality requirement is a low hurdle, and even a single common question can satisfy this element.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN7[] **Prerequisites for Class Action, Typicality**

The typicality requirement is satisfied when the claims or defenses of the representative parties are typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). Typicality does not require that all putative class members share identical claims. Rather, typicality is met when the representative's claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and are based on the same legal theory. In antitrust cases such as the instant action, the typicality requirement is particularly likely to be satisfied where all claims arise out of the same alleged antitrust violations.

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

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

HN8[] **Standing, Requirements**

Competitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs in an antitrust action, it does not follow that consumers outside of that market necessarily lack standing. Rather, standing depends on whether the injury suffered flows from that which makes defendants' acts unlawful.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN9[] **Class Actions, Certification of Classes**

In the context of a motion for class certification, the purpose of the typicality requirement is to ensure that the named representative's claims have the same essential characteristics as the claims of the class at large.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

HN10[] **Prerequisites for Class Action, Adequacy of Representation**

In the context of a motion for class certification, the element of adequacy is satisfied if 1) there is no conflict between the interest of the named plaintiffs and the class members and 2) counsel chosen by the named plaintiffs are qualified and able to litigate the claims vigorously.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN11[] **Prerequisites for Class Action, Commonality**

In addition to the Fed. R. Civ. P. 23(a) requirements, a proposed class must establish that questions of law or fact common to class members predominate over any questions affecting only individual members. Fed. R. Civ. P. 23(b)(3) To satisfy the predominance requirement, the proposed class must show that the fact of antitrust impact can be established through common proof and that any resulting damages would likewise be established by sufficiently common proof. They need not prove that each element of their claims is susceptible to classwide proof.

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

HN12[] **Standing, Requirements**

That kind of common evidencehas generally been found sufficient to establish antitrust injury on a classwide basis, except when a large number of putative class members are uninjured.

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

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

HN13[] **Purchasers, Indirect Purchasers**

It is common practice to use averages to determine whether class members suffered a common antitrust injury in direct purchaser actions. Any potential variation among class members in the actual prices paid for each drug is more relevant to assessing the extent of the injury suffered than to determining the existence of an injury at all.

Antitrust & Trade Law > Sherman Act > Claims

HN14[] **Sherman Act, Claims**

An antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset and that a single overcharge is sufficient to constitute such an injury. Paying an overcharge caused by the alleged anticompetitive conduct on a single purchase suffices to show — as a legal and factual matter — impact or fact of damage.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN15[] Prerequisites for Class Action, Maintainability

Prior to certification, Fed. R. Civ. P. 23(b)(3) requires a showing that the class action would be superior to other available methods for fairly and efficiently adjudicating the controversy. That Rule provides a nonexhaustive list of factors for courts to consider when determining whether the superiority requirement has been met: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN16[] Class Actions, Certification of Classes

To establish that common issues predominate, the proposed class must show that the fact of antitrust impact can be established through common proof and that any resulting damages would likewise be established by sufficiently common proof.

Torts > Products Liability > Theories of Liability > Strict Liability

HN17[] Theories of Liability, Strict Liability

Antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset. For that reason, offsets such as consumer contributions and manufacturer rebates are more relevant to the extent of damages than to the incurrence of injury.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN18[] Class Actions, Certification of Classes

To certify the proposed classes under Fed. R. Civ. P. 23(b)(3), variations in state law must not swamp any common issues and defeat predominance. The necessity of applying the laws of multiple states does not automatically defeat class certification if the variation among those laws is not particularly material or significant.

Civil Procedure > ... > Jury Trials > Verdicts > Special Verdicts

HN19[] Verdicts, Special Verdicts

In the context of complex litigations, any minor differences in the relevant state laws can be accommodated through the use of special jury instructions and verdict forms. Differences in state law can be readily accommodated on a special verdict form or through other mechanisms routinely employed in complex litigations.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Preponderance of Evidence

HN20[] Class Actions, Certification of Classes

To satisfy the ascertainability requirement, the proposed class must show, by a preponderance of the evidence, that the class is currently and readily ascertainable based on objective criteria. At the certification stage, it is unnecessary to identify every class member but the class must be sufficiently ascertainable to permit a court to decide and declare who will receive notice, who will share in any recovery, and who will be bound by the judgment.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN21[] Class Actions, Certification of Classes

There is no requirement that a class be identified or even that the methodology for doing so be in place by the time of certification.

Counsel: [1]** For Ranbaxy Generic Drug Application Antitrust Litigation, In Re: Gregory T. Arnold, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

For United Food and Commercial Workers Health and Welfare Fund of Northern Pennsylvania, on behalf of itself and all others similary situated, Consolidated Plaintiff : Gerald Lawrence, RENEE A. NOLAN, LEAD ATTORNEYS, Lowey Dannenberg, P.C., West Conshohocken, PA; William J Olson, LEAD ATTORNEY, PRO HAC VICE, Lowey Dannenberg, P.C., West Conshohocken, PA; Eric L Young, Paul V Shehadi, PRO HAC VICE, McEldrew Young, Attorneys-at-Law, Philadelphia, PA; Gregory T. Arnold, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Consolidated Plaintiff, Louisiana Health Services and Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana, on behalf of itself and all others similary situated, LEAD ATTORNEY, PRO HAC VICE; David Scott Scalia, LEAD ATTORNEY, PRO HAC VICE, The Dugan Law Firm, New Orleans, MA; James R. Dugan, II, LEAD ATTORNEY, PRO HAC VICE, The Dugan Law Firm, New Orleans, LA; Terrianne Benedetto, PRO HAC VICE, THE DUGAN LAW FIRM, APLC, Philadelphia, PA.

For Meijer, Inc., Meijer Distribution, Inc., Plaintiffs: Alfred Luke Smith, LEAD ATTORNEY, PRO HAC **[**2]** VICE, Radice Law Firm, PC, Philadelphia, PA; Eamon P. Kelly, LEAD ATTORNEY, PRO HAC VICE, Sperling & Slater PC, Chicago, IL; Justin N. Boley, Kenneth A. Wexler, Tyler J. Story, LEAD ATTORNEYS, PRO HAC VICE, WEXLER WALLACE LLP, Chicago, IL; Royce Zeisler, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, New York, NY; Sharon K. Robertson, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Fourteenth Floor, New York, NY; Steve D. Shadowen, LEAD ATTORNEY, Hilliard & Shadowen LLP, Austin, TX; David P. Germaine, John P. Bjork, Joseph M. Vanek, Sperling & Slater, P.C., Chicago, IL; Donna M. Evans, Ethan J. Barlieb, Gregory T. Arnold, Cohen Milstein Sellers & Toll PLLC, New York, NY; John D. Radice, Radice Law Firm, PC, Long Beach, NJ; Joseph H. Meltzer, Kessler Topaz Meltzer & Check, LLP, Radnor, PA; Kristie A. LaSalle, Matthew Weiner, Richard M. Brunell, TERENCE S. ZIEGLER, Thomas M. Sobol, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

For Cesar Castillo, Inc., Plaintiff: Linda P. Nussbaum, LEAD ATTORNEY, Nussbaum Law Group, P.C., New York, NY; Gregory T. Arnold, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

Prinston Pharmaceutical Inc., Plaintiff, Pro se. **[**3]**

For Sun Pharmaceutical Industries Limited, Ranbaxy, Inc., Defendants: Alexandra I. Russell, LEAD ATTORNEY, PRO HAC VICE, Kirkland & Ellis, LLP, Washington, DC; Devora Allon, LEAD ATTORNEY, PRO HAC VICE, Kirkland & Ellis LLP, Citigroup Center, New York, NY; Kevin M Neylan, Jr., PRO HAC VICE, Jay P. Lefkowitz, LEAD ATTORNEY, Kyla Jackson, ROBERT ALLEN, Kirkland & Ellis LLP, New York, NY; Kara E. Cheever, LEAD ATTORNEY, PRO HAC VICE, Kirkland & Ellis, LLP, New York, NY; Benjamin M. Greene, McCarter & English, LLP, Boston, MA; Dena Harriet Medford, Kirkland & Ellis LLP, Boston, MA; Paul E. White, Arent Fox LLP, Prudential Tower, Boston, MA.

For Prinston Pharmaceutical Inc., Respondent: Scott A Cunning, II, LEAD ATTORNEY, PRO HAC VICE, Parker Poe Adams & Bernstein, LLP, Washington, DC.

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

Opinion by: Nathaniel M. Gorton

Opinion

[*297] MEMORANDUM & ORDER

This case involves five actions which were centralized in this Court and then divided into two putative class actions against Ranbaxy Inc. and Sun Pharmaceutical Industries Limited (collectively, "Ranbaxy" or "defendants").

Direct purchaser plaintiffs ("DPPs"), such as wholesalers, purchase generic drugs directly from the drug **[**4]** manufacturer. End-payor plaintiffs ("EPPs") are third-party payors ("TPPs") such as health plans and insurance companies that indirectly purchase (and/or provide reimbursement for generic drugs at the end of the distribution chain) from retailers and other financial intermediaries such as pharmaceutical benefit managers ("PBMs"). The DPPs and EPPs ("plaintiffs") bring claims against Ranbaxy for violations of the **[*298]** *Racketeer Influenced and Corrupt Organizations Act ("RICO")*, federal and state ***antitrust law*** and state consumer protection law.

Pending before the Court are the motions of the DPPs and EPPs for class certification under *Federal Rules of Civil Procedure 23(a)* and *(b)(3)*. For the reasons that follow, those motions will be allowed.

I. Background

A. Factual Background

Both the Court and the parties are well acquainted with the facts, which are described in detail in the Report and Recommendation of United States Magistrate Judge M. Page Kelley on Ranbaxy's motion to dismiss the complaint of plaintiffs in the original action in this Court prior to centralization. See *Meijer, Inc. v. Ranbaxy, Inc., No.1:15-cv-11828-NMG, 2016 U.S. Dist. LEXIS 120998 (D. Mass. Sept. 7, 2016)*. For purpose of completeness, however, the Court provides the following abbreviated summary of the background relevant to the pending motions.

In the early 2000s, Ranbaxy filed a number of applications with the United States **[**5]** Food and Drug Administration ("FDA") seeking approval to manufacture and market generic versions of various pharmaceuticals. Under the *Hatch-Waxman Act, Pub. L. No. 98-417, 98 Stat. 1585 (1984)*, the first generic drug manufacturer to submit a substantially complete Abbreviated New Drug Application ("ANDA") is entitled to a 180-day period of exclusivity during which no other manufacturer is permitted to market a generic version of the subject drug. The FDA may revoke the exclusivity period if the generic manufacturer fails to obtain tentative approval from the FDA, which requires the manufacturer to demonstrate that its facilities comply with current good manufacturing practices.

In 2004 and 2005, Ranbaxy submitted the first substantially complete ANDAs for three brand drugs at issue here: Diovan, Nexium and Valcyte.[1] It subsequently obtained tentative approval from the FDA for its ANDAs for each of those drugs in 2007 and 2008. Despite its early success, Ranbaxy failed to secure final approval for its generic version of Diovan until June, 2014 and did not bring that generic to market until July, 2014. Before defendant could secure final approval for its generic Nexium and Valcyte ANDAs, the FDA revoked its tentative approval for both drugs **[**6]** in 2014 and Ranbaxy's generic versions were never brought to market.

Plaintiffs allege that Ranbaxy violated RICO, federal and state antitrust laws and state consumer protection laws by submitting multiple ANDAs with missing, incorrect or fraudulent information, thereby wrongfully acquiring exclusivity periods and delaying the market entry of generic Diovan, Nexium and Valcyte. Plaintiffs assert that but for defendants' allegedly anti-competitive conduct, generic versions of those three drugs would have entered the market and been available at lower prices much sooner. As a result, plaintiffs contend they paid artificially inflated prices for generic versions of Diovan, Nexium and Valcyte during the Class Periods.

B. The Proposed Classes

The DPPs seek certification of the following three classes:

(1) All persons or entities in the United States and its territories who purchased Diovan and/or AB-rated generic versions of Diovan directly from any of the Defendants or any brand or generic manufacturer at any time during the period September 21, 2012, through and until the anticompetitive effects of the Defendants' conduct cease (the "Diovan Class Period");

(2) All persons or entities in the **[**7]** United States and its territories who purchased Valcyte and/or AB-rated generic versions of Valcyte directly from any of the Defendants or any brand or generic manufacturer, but excluding those purchasers who only purchased branded Valcyte, at any time during the period August 1, 2014, through and until the anticompetitive effects **[*299]** of the Defendants' conduct cease (the "Valcyte Class Period"); and

(3) All persons or entities in the United States and its territories who purchased Nexium and/or AB-rated generic versions of Nexium directly from any of the Defendants or any brand or generic manufacturer at any time during the period May 27, 2014, through and until the anticompetitive effects of the Defendants' conduct cease (the "Nexium Class Period").

Excluded from each of the direct purchaser classes are the defendants and their officers, directors, management, employees, subsidiaries, or affiliates, and all governmental entities.

The EPPs seek to certify the following three nationwide RICO classes:

(1) All persons or entities in the United States and its territories that indirectly purchased, paid, and/or provided reimbursement for some or all of the purchase price of Diovan and/or AB-rated **[**8]** generic versions of Diovan from any of the Defendants or any brand or generic manufacturer at any time during the class period September 28, 2012, through and until the anticompetitive effects of the Defendants' conduct cease (the "Diovan Class Period");

(2) All persons or entities in the United States and its territories that indirectly purchased, paid, and/or provided reimbursement for some or all of the purchase price of AB-rated generic versions of Nexium from any of the Defendants or any brand or generic manufacturer, other than for resale, at any time during the class period May 27, 2014, through and until the anticompetitive effects of the Defendants' conduct cease (the "Nexium Class Period"); and

(3) All persons or entities in the United States and its territories that indirectly purchased, paid, and/or provided reimbursement for some or all of the purchase price of Valcyte and/or AB-rated generic versions of Valcyte from any of the Defendants or any brand or generic manufacturer, other than for resale, at any time during the

[1] Diovan is an antihypertensive drug used to treat high blood pressure and heart failure, among other things. Valcyte is an antiviral medication. Nexium is a proton-pump inhibitor used to treat gastroesophageal reflux disease.

class period August 1, 2014, through and until the anticompetitive effects of the Defendants' conduct cease (the "Valcyte Class Period").

The EPPs also seek **[**9]** certification of the following three state law classes:

(1) All persons or entities in the Indirect Purchaser States that indirectly purchased, paid, and/or provided reimbursement for some or all of the purchase price of Diovan and/or AB-rated generic versions of Diovan from any of the Defendants or any brand or generic manufacturer, other than for resale, at any time during the class period September 28, 2012, through and until the anticompetitive effects of the Defendants' conduct cease (the "Diovan Class Period");

(2) All persons or entities in the Indirect Purchaser States that indirectly purchased, paid, and/or provided reimbursement for some or all of the purchase price of AB-rated generic versions of Nexium from any of the Defendants or any brand or generic manufacturer, other than for resale, at any time during the class period May 27, 2014, through and until the anticompetitive effects of the Defendants' conduct cease (the "Nexium Class Period"); and

(3) All persons or entities in the Indirect Purchaser States that indirectly purchased, paid, and/or provided reimbursement for some or all of the purchase price of Valcyte and/or AB-rated generic versions of Valcyte from any of **[**10]** the Defendants or any brand or generic manufacturer, other than for resale, at any time during the class period August 1, 2014, through and until the anticompetitive effects of the Defendants' conduct cease (the "Valcyte Class Period").

Excluded from all six of the EPPs' proposed classes are:

(a) natural person consumers; (b) Defendants, their officers, directors, management, employees, subsidiaries, and affiliates; (c) all federal and state governmental entities except for cities, towns, municipalities, or counties with self-funded prescription drug plans; (d) all persons or entities who purchased Diovan, Nexium, Valcyte, or their AB-rated generic versions for purposes of resale from any of the Defendants **[*300]** or any brand or generic manufacturer; (e) fully insured health plans (i.e., health plans that purchased insurance covering 100% of their reimbursement obligation to members); and (f) pharmacy benefit managers.

C. Relevant Procedural History

The five actions comprising this multidistrict litigation were centralized in this Court in February, 2019. In April, 2019, the Court consolidated for pretrial purposes all direct purchaser actions and all end-payor actions that were centralized in **[**11]** this District and assigned to this Court, thereby creating two putative class actions. Amended complaints were filed by the DPPs and EPPs later that month. The EPPs further amended their complaint in February, 2020 and March, 2021. The DPPs also amended their complaint in March, 2021.

In November, 2020, the DPPs and EPPs each moved for class certification. Defendants have filed oppositions to class certification to which each group of plaintiffs filed replies. This Court heard oral argument on the motions in April, 2021.

II. Legal Standard

HN1[] Under *Federal Rule of Civil Procedure 23*, a court may certify a class only if it finds that the proposed class satisfies all the requirements of *Rule 23(a)* and that classwide adjudication is appropriate for one of the reasons set forth in *Rule 23(b)*. See *Smilo v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003)*.

HN2[] *Rule 23(a)* requires that a class meet the following four criteria:

1) the class is so numerous that joinder of all members is impracticable (numerosity),
2) there are questions of law or fact common to the class (commonality),

3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality) and
4) the representative parties will fairly and adequately protect the interests of the class (adequacy).

Fed. R. Civ. P. 23(a)(1)-(4).

HN3[] A district court **[**12]** must conduct a "rigorous analysis" under *Rule 23* before certifying the class. Smilo, 323 F.3d at 38. The Court may look behind the pleadings, predict how specific issues will become relevant to facts in dispute and conduct a merits inquiry only to the extent that the merits overlap with the *Rule 23* criteria. *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 20 (1st Cir. 2008)*. Courts should also be mindful that the prerequisites of commonality, typicality and adequacy "tend to merge" in their analysis. *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 n.5, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*.

Plaintiffs seek to certify all classes under ***HN4***[] *Rule 23(b)(3)* which requires that common questions of law or fact "predominate" over those affecting individual class members and that a class action be the "superior" method for fair and efficient adjudication. *Fed. R. Civ. P. 23(b)(3)*. Implicit in *Rule 23* is the additional requirement that plaintiffs demonstrate by a preponderance of the evidence that the class is "currently and readily ascertainable based on objective criteria." *In re Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015)* ("Nexium III") (internal citation omitted).

III. DPPs' Motion for Class Certification

A. *Rule 23(a)* Requirements

Of the four *Rule 23(a)* requirements, defendants explicitly challenge only the DPPs' showing of adequacy of representation under *Rule 23(a)(4)*. Given that the analysis of commonality, typicality and adequacy of representation tend to merge, this Court assumes that defendants' reliance **[**13]** on typicality relates to the elements of commonality and adequacy as well. Although defendants do not expressly contest the numerosity requirement of *Rule 23(a)(1)*, they refer to the size of the proposed classes in the context of the superiority requirement of *Rule 23(b)(3)*. Accordingly, the Court will briefly address each of the *Rule 23(a)* requirements.

1. Numerosity

HN5[] *Rule 23(a)(1)* requires that the class be "so numerous that joinder of all members is impracticable." The DPPs have shown that the proposed Diovan class contains 62 members, **[*301]** the proposed Nexium class contains at least 51 members and the proposed Valcyte class contains 39 members. At a minimum, the proposed Diovan and Nexium classes are sufficiently numerous. See *Garcia-Rubiera v. Calderon, 570 F.3d 443, 460 (1st Cir. 2009)* ("[G]enerally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of *Rule 23(a)* has been met." (internal citation omitted)).

At oral argument, defendants highlighted that the DPPs' expert admits that five of the 39 Valcyte class members suffered no injury. Nonetheless, there is no requirement of a minimum number of plaintiffs and courts in similar cases have found the numerosity requirement to be satisfied where, as here, class members are geographically dispersed and judicial **[**14]** economy favors proceeding as a class action. See, e.g., *In re K-Dur Antitrust Litig., No. 01-1652, 2008 U.S. Dist. LEXIS 118396, at *19 n.4 (D.N.J. Apr. 14, 2008)* ("[E]ven if the proposed Class consisted of only 38 members, that fact, alone, would not defeat numerosity, particularly where the members appear to be dispersed geographically and the interests of judicial economy would be served by resolving the common issues raised in this case in a single action, rather than 38 individual ones.").

The Court finds that the DPPs have established numerosity.

2. Commonality

HN6[] To satisfy commonality, there must be questions of law or fact common to the class. *Fed. R. Civ. P. 23(a)(2)*. The commonality requirement is a "low hurdle," *Swack v. Credit Suisse First Boston, 230 F.R.D. 250, 258 (D. Mass. 2005)*, and even a single common question can satisfy this element. See *Dukes, 564 U.S. at 359*.

The DPPs contend that commonality is satisfied as to both the antitrust and RICO claims. They note that all class members allege injury from the same misconduct, namely the purported anti-competitive scheme to delay the entry of cheaper generic drugs into the market. They also assert that their RICO claims depend on common issues such as whether the evidence will prove a RICO conspiracy, enterprise and pattern of racketeering activity.

This Court finds that, because the DPPs have shown that their claims focus on defendants' conduct, **[**15]** commonality has been sufficiently pled.

3. Typicality

HN7[] The typicality requirement is satisfied when the claims or defenses of the representative parties are typical of the claims or defenses of the class. *Fed. R. Civ. P. 23(a)(3)*. Typicality does not require that all putative class members share "identical claims." *Garcia v. E.J. Amusements of N.H., Inc., 98 F. Supp. 3d 277, 289 (D. Mass. 2015)* (citation omitted). Rather, typicality is met when the representative's claims

> arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members, and . . . are based on the same legal theory.

Garcia-Rubiera v. Calderon, 570 F.3d 443, 460 (1st Cir. 2009) (citation omitted). In antitrust cases such as the instant action, the typicality requirement is "particularly likely" to be satisfied where all claims arise out of the same alleged antitrust violations. *In re Zetia Ezetimihe Antitrust Litig., No. 2:18-md-2836, 2020 U.S. Dist. LEXIS 112331, at *57-58 (E.D. Va. June 18, 2020)* (internal citations omitted).

Defendants contend that Meijer is an atypical class representative because it is subject to unique defenses unavailable to other class members. Specifically, they assert that the DPPs purport to show monopolization by Ranbaxy only in the market for generic drugs. For that reason, defendants assert that the DPPs lack standing to assert claims related to the purchase of brand drugs. Meijer, as a purchaser of brand drugs as well as generics, **[**16]** would therefore benefit from a broader definition of the antitrust market. Ranbaxy submits that such a preference creates a conflict between Meijer and generic-only purchasers over the appropriate market definition because a narrower definition of the antitrust market would allow generic-only purchasers to prove monopolization more easily.

[*302] Defendants' contention is unpersuasive. Although it is true that *HN8*[] "[c]ompetitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs" in an antitrust action, *Breiding v. Eversource Energy, 344 F. Supp. 3d 433, 452 (D. Mass. 2018)* (quoting *Serpa Corp. v. McWane, Inc., 199 F.3d 6, 10-11 (1st Cir. 1999)*), it does not follow that consumers outside of that market necessarily lack standing. Rather, standing depends on whether the injury suffered "flows from that which makes defendants' acts unlawful." *Serpa Corp., 199 F.3d at 10* (internal citation omitted). Here, the DPPs allege that all class members have suffered overcharge injuries flowing from Ranbaxy's anti-competitive conduct.

In any event, the Court need not conclusively resolve that dispute because brand-only purchasers are, in fact, consumers in the generic market allegedly restrained by Ranbaxy's anti-competitive conduct given that the delay of generics prevented brand-only purchasers from switching to **[**17]** purchasing cheaper generics.

Furthermore, *HN9*[] the purpose of the typicality requirement is

> to ensure that the named representative's claims have the same essential characteristics as the claims of the class at large.

In re Neurontin Mktg., Sales Practices & Prods. Liab. Litig., 257 F.R.D. 315, 321 (D. Mass. 2009) (internal citation omitted).

Here, Meijer's claim arises from the same course of conduct and is based on the same legal theories that give rise to the claims of all other members of the proposed DPP classes. All class members, including Meijer, allege that they suffered an overcharge injury because Ranbaxy improperly delayed entry of generic drugs in violation of the Sherman Act and RICO. The Court finds that to be sufficient to satisfy the typicality requirement. See Zetia, 2020 U.S. Dist. LEXIS 112331, at *60-61 (concluding that the claims of the named plaintiff are typical of the class because he "alleges the same injury as the rest of the class" and "share[s] the same interest in producing proof in relation to the existence, scope, duration, and effect of [the] alleged conspiracy.").

4. Adequacy

HN10[] The element of adequacy is satisfied if 1) there is no conflict between the interest of the named plaintiffs and the class members and 2) counsel chosen by the named plaintiffs are qualified and able to litigate the claims vigorously. **[**18]** S. States Police Benevolent Ass'n v. First Choice Armor & Equip., Inc., 241 F.R.D. 85 (D. Mass. 2007) (citing Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985)).

Notwithstanding defendants' arguments to the contrary, the Court has already determined that there is no conflict between Meijer as the named plaintiff and the rest of the proposed class members. As to the second criterion, defendants do not dispute that the DPPs' counsel is qualified and able to litigate the claims vigorously under Rule 23(a)(4) and the DPPs have shown that their counsel has extensive experience litigating similar antitrust class actions.

Accordingly, the adequacy element is satisfied.

B. Rule 23(b)(3) Predominance

HN11[] In addition to the Rule 23(a) requirements, the DPPs must establish that

> questions of law or fact common to class members predominate over any questions affecting only individual members.

Fed. R. Civ. P. 23(b)(3). To satisfy the predominance requirement, the DPPs must show that

> the fact of antitrust impact can[] be established through common proof and that any resulting damages would likewise be established by sufficiently common proof.

Nexium III, 777 F.3d at 18 (internal quotation marks omitted). They need not prove that each element of their claims is susceptible to classwide proof. See Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 469, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013).

Defendants assert that the DPPs cannot show that common issues predominate because **[*303]** individualized inquiries will be required to determine whether **[**19]** each class member suffered an antitrust injury. The model used by the DPPs' expert, Dr. Meredith Rosenthal, compares the monthly average prices of the at-issue drugs with the hypothetical average prices for those same drugs in a world without the alleged anti-competitive conduct ("but-for world"). According to Ranbaxy, that model fails to account for price variability among class members in the real world, thereby obscuring uninjured class members.

The Court is satisfied that the DPPs have met their burden under Rule 23(b)(3) to demonstrate that antitrust impact is capable of proof by common evidence. Dr. Rosenthal relies on pharmaceutical economic literature, contemporaneously-created business forecasts from brand and generic manufacturers of each relevant drug and transactions-level sales data for each at-issue drug to conclude that all or virtually all of the members of each proposed class have suffered an overcharge injury. **HN12**[] That kind of common evidence has generally been found sufficient to establish [antitrust] injury on a classwide basis, except when a large number of putative class members are uninjured.

*In re Intuniv Antitrust Litig., No. 1:16-cv-12653, 2019 U.S. Dist. LEXIS 162792, at *29 (D. Mass. Sept. 24, 2019)* (collecting cases); see also *In re Loestrin 24 FE Antitrust Litig., No. 13-2472, 2019 U.S. Dist. LEXIS 118308, at *47-48 (D.R.I. July 2, 2019)* (concluding that plaintiffs established classwide injury **[**20]** through "a combination of transactional data and manufacturers' forecasts to predict prices in the but-for world"). As discussed in further detail below, this is not a case in which a large number of DPP class members are uninjured.

Defendants' attack on the use of averages by Dr. Rosenthal is misguided. First,***HN13***[] it is

common practice to use averages to determine whether class members suffered a common antitrust injury

in direct purchaser actions. *In re Zetia (Ezetimibe) Antitrust Litig., 481 F. Supp. 3d 571, 578 (E.D. Va. 2020)*. Any potential variation among class members in the actual prices paid for each drug is more relevant to assessing the extent of the injury suffered than to determining the existence of an injury at all. See *In re Nexium (Esomeprazole) Antitrust Litig., 296 F.R.D. 47, 57-58 (D. Mass. 2013)* ("Nexium II") ("The Defendants' focus on the variations in purchase price among the putative class members directly challenges the Direct Purchasers' damages model, but it does not weaken their assertion of common impact.").

Second, Dr. Rosenthal's methodology does not obscure a significant number of uninjured class members. Defendants submit that each DPP pays a unique price based upon factors such as individualized negotiations with manufacturers, chargebacks and other credits for which Dr. Rosenthal fails to account. They ignore, however, **[**21]** that ***HN14***[] an antitrust injury

occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset

and that a single overcharge is sufficient to constitute such an injury. *Nexium III, 777 F.3d at 27* ("Paying an overcharge caused by the alleged anticompetitive conduct on a single purchase suffices to show — as a legal and factual matter — impact or fact of damage.").

By using monthly average prices, Dr. Rosenthal's model necessarily incorporates the variation across class members in the actual and but-for prices of each drug to come to a reasonable conclusion that class members suffered a common injury. See *Loestrin 24, 2019 U.S. Dist. LEXIS 118308, at *46* (approving of a methodology which incorporates the "variation across Class members in the actual prices they paid and in the prices they would have paid, providing averages that correctly summarize the combined effects of all of these Class members in a single classwide overcharge measure."). Through this "well accepted" methodology, id., Dr. Rosenthal demonstrates that the average but-for prices were always or almost always below the average prices actually paid, thus proving a common injury. **[*304]** Even if the proposed DPP classes include a de minimis number of uninjured members, that fact **[**22]** alone is not fatal to class certification at this early stage. See *Loestrin 24, 2019 U.S. Dist. LEXIS 118308, at *48* ("The prospect that a handful of identifiable class members may be uninjured is not a barrier to class certification."); *Nexium III, 777 F.3d at 25* ("Numerous courts have certified plaintiff classes even though the plaintiffs have not been able to use common evidence to show harm to all class members."). The DPPs have persuasively shown through Dr. Rosenthal's analysis that the number of potentially uninjured class members is in single digits and that they can be identified and excluded at a later stage in a manageable fashion. Consequently, this is not a case in which certification of the classes would be inappropriate because

any class member may be uninjured, and . . . apparently thousands who in fact suffered no injury.

In re Asacol Antitrust Litig., 907 F.3d 42, 53 (1st Cir. 2018).

In sum, the DPPs have sufficiently shown that classwide injury and damages can be demonstrated through evidence common to the class and that common issues predominate over individualized inquiries.

C. *Rule 23(b)(3)* Superiority

HN15[] Prior to certification, *Rule 23(b)(3)* requires a showing that the class action would be superior to other available methods for fairly and efficiently adjudicating the controversy.

That Rule provides a "nonexhaustive list of factors" **[**23]** for courts to consider when determining whether the superiority requirement has been met:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Amchem Prods. v. Windsor, 521 U.S. 591, 615-16, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (quoting *Fed. R. Civ. P. 23(b)(3)*).

Defendants contend that representative litigation is not superior because 1) the proposed DPP classes are small in number, 2) the alleged damages are large and concentrated in only three DPPs and 3) there are fundamental intra-class conflicts.

Two of those three arguments have already been addressed. First, the Court has determined that the purported conflict between generic-only and brand-only purchasers poses no substantial threat to class cohesion. Second, the Court has concluded that each of the three proposed classes is sufficiently numerous that joinder would be impracticable and judicial economy favors proceeding as a class action. Consequently, neither **[**24]** the alleged intra-class conflict nor the purported small size of the classes poses an obstacle to certification.

As to defendant's contention regarding the concentration of damages among a small number of the DPPs, that fact does not defeat certification. Where several class members are "large, well-capitalized companies with multi-million dollar claims," class resolution is still superior if

> the majority of the proposed class members have negative value claims (i.e., the expenses, including expert fees, exceed their possible recovery).

*Am. Sales Co., LLC v. Pfizer, Inc., No. 2:14cv361, 2017 U.S. Dist. LEXIS 137222, at *31 (E.D. Va. July 28, 2017)*. Here, the DPPs have shown, using data provided by Ranbaxy's expert, that many members of the proposed classes would likely have negative value claims if forced to litigate in separate actions. Even if some class members do have economic incentives to litigate their claims individually, counsel for the DPPs noted at oral argument that some members would still be dissuaded from doing so out of fear of retaliation by their suppliers.

Finally, class resolution is particularly appropriate here given that "in the complex **[*305]** context of delayed generic entry the benefits of *Rule 23* have been widely recognized." *Id. at 53*. Indeed, representative litigation of the DPPs' claims is **[**25]** fair and efficient because it will "avoid duplicative, expensive, and potentially inconsistent adjudication of the common claims." Id.

IV. EPPs' Motion for Class Certification

As to the EPPs, Defendants do not oppose certification of their classes under the *Rule 23(a)* requirements. Nevertheless, the Court concludes that the requirements of numerosity, commonality, typicality and adequacy of representation are met here.

The proposed classes are sufficiently numerous such that joinder would be impracticable considering that each class is comprised of thousands of TPPs who paid for prescriptions of the subject drugs during the class hearings. Commonality is satisfied because the EPPs allege injury from the same allegedly unlawful conduct of defendants. The EPPs have shown that the claims and defenses of the class representatives are typical of those of the class because all EPP claims arise from the same anti-competitive scheme. Finally, the EPPs have satisfied the representation requirement by explaining that the interests of the class representatives are aligned with those of the other class members.

Ranbaxy does, however, oppose certification of the EPPs' proposed classes for failure to satisfy **[**26]** the predominance and ascertainability requirements of *Rule 23(b)(3)*. The Court will address those issues seriatim.

A. *Rule 23(b)(3)* Predominance

HN16[] To establish that common issues predominate, the EPPs must show that

> the fact of antitrust impact can[] be established through common proof and that any resulting damages would likewise be established by sufficiently common proof.

Nexium III, 777 F.3d at 18 (internal quotation marks omitted).

Ranbaxy contends that the EPPs fail to satisfy the predominance requirement for two reasons. First, defendants submit that the use of aggregate pricing to establish classwide antitrust injury fails to account for substantial price variability and thus conceals the existence of uninjured class members. Second, Ranbaxy maintains that significant variation in the state law governing the EPPs' claims causes individual questions of law to predominate over common ones.

1. Common Injury Provable by Common Evidence

Ranbaxy challenges the methodology used by the EPPs' expert, Dr. Rena Conti, for relying on "average prices, average copayments, and average rebates to measure injury." According to defendants, because individual payments made by TPPs for the subject drugs vary widely due to factors such as cost-sharing and **[**27]** rebates, Dr. Conti's methodology obscures class members who did not overpay and were therefore uninjured.

That argument is virtually identical to the one asserted against the proposed DPP classes and will be rejected for similar reasons. First, Dr. Conti's "yardstick" methodology and her use of averages are widely accepted methods of proving antitrust injury and damages on a classwide basis. See, e.g., *In re Loestrin 24 Fe Antitrust Litig., 410 F. Supp. 3d 352, 389-90 (D.R.I. 2019)* (observing that the "yardstick" method is generally accepted and has been endorsed by the First Circuit Court of Appeals); *In re Nexium Antitrust Litig., 297 F.R.D. 168, 183 (D. Mass. 2013)* ("Nexium I") ("Dr. Rosenthal's aggregate damages analysis demonstrates both common antitrust impact and damages to the class. Further, the End-Payors at this stage of litigation need not prove individualized proof of injury.").

Furthermore, ***HN17***[] antitrust injury

> occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset.

Nexium III, 777 F.3d at 27. For that reason, offsets such as consumer contributions and manufacturer rebates are more relevant to the extent of damages than to the incurrence of injury. Dr. Conti's analysis also indicates that defendants greatly exaggerate the variation **[*306]** in pricing of the at-issue drugs. For example, graphs in her rebuttal report **[**28]** demonstrate that approximately 99% of the prices paid for those drugs fall within a very narrow range.

Defendants also overstate the extent to which three discrete groups of EPP class members are likely to be uninjured.

First, defendants assert that the EPPs ignore the existence of "brand loyal" TPPs which would not have purchased generics under any circumstances and would have suffered no injury from a delayed generic entry. Ranbaxy faults Dr. Conti for assuming that plans that only purchased brand drugs prior to generic entry and made no purchase after generic entry would have switched to generic in the event of future purchases. Yet such an assumption is reasonable given that the evidence proffered by Dr. Conti shows that brand loyalty is doubtful among TPPs and that meaningful generic competition would likely cause all TPPs to purchase generics. See *Loestrin 24, 410 F. Supp. 3d at 404 n.46* ("That a TPP did not purchase generic Loestrin 24 once it became available is of no moment when we have evidence that, with sustained and robust generic competition, each TPP likely would have made at least one such purchase.")

Defendants also contend that TPPs which manage Medicare D plans are unlikely to be injured because other parties **[**29]** such as the federal government and consumers cover a high percentage of the costs for the at-issue drugs. Similarly, Ranbaxy submits that there are still more uninjured TPPs because they paid a higher price for generics than the brand drugs for which they received higher copayments and rebates. Both arguments can be easily rebutted because, as noted several times before, antitrust injury occurs at the moment of the overcharge regardless of later rebates or other offsets. That some TPPs may have ultimately paid more for generics is relevant to the amount of damages incurred but not for determining antitrust impact.

An overcharge injury occurs as long as the price for one of the subject drugs is higher for a purchaser in the actual world than it would have been in the but-for world. The EPPs have demonstrated by virtue of Dr. Conti's careful and thorough analysis that all or virtually all class members suffered an overcharge injury which is provable by common evidence.

2. Variation in State Law

HN18[] To certify the proposed classes under *Rule 23(b)(3)*, "variations in state law [must not] swamp any common issues and defeat predominance." *Nexium I, 297 F.R.D. at 175* (internal citation omitted). The necessity of applying the laws of multiple **[**30]** states does not automatically defeat class certification if the variation among those laws is not particularly material or significant. See *In re Solodyn Antitrust Litig., No. 14-md-02503, 2017 U.S. Dist. LEXIS 170676, at *67-68 (D. Mass. Oct. 16, 2017)* (collecting cases).

Defendants submit that the EPPs cannot demonstrate that the common issues predominate in light of the "significant variation[]" in the 21 state antitrust laws and the 11 consumer protection laws under which the EPPs bring suit. The EPPs respond that any variation is neither material nor significant and that their state law claims should be allowed to proceed.

The variety of state laws applicable to the EPPs' claims does not overwhelm predominance. The EPPs have provided charts compiling the state laws applicable to their antitrust and consumer protection claims and have identified the substantial similarities among those laws and between the state and federal antitrust provisions. Ranbaxy purports to highlight material distinctions between the applicable state laws but the EPPs have shown that much of its argument is based upon misinterpretations of state law. Ranbaxy does not contest that the core elements of the EPPs' claims are virtually identical under all applicable state laws. ***HN19***[] Any minor differences in the relevant state **[**31]** laws can be accommodated through the use of special jury instructions and verdict forms, as suggested by the EPPs. See *In re Lidoderm Antitrust Litig., No. 14-md-02521, 2017 U.S. Dist. LEXIS 24097, at *111 (N.D. Ca. Fed. 21, 2017)* ("[D]ifferences [in state law] can be readily **[*307]** accommodated on a special verdict form or through other mechanisms routinely employed in complex litigations like this one.").

Notably, it is common for courts in the First Circuit and elsewhere to certify end-payor classes in similar antitrust actions even when it is necessary to apply the laws of multiple states. See, e.g., *Solodyn, 2017 U.S. Dist. LEXIS 170676, at *68* (collecting cases); *Lidoderm, 2017 U.S. Dist. LEXIS 24097, at *111* (same). A different result is unwarranted here where the variation in the applicable state laws, to the extent it exists, does not appear to be material or significant.

B. Ascertainability

HN20[] To satisfy the ascertainability requirement, the EPPs

> must show, by a preponderance of the evidence, that the class is currently and readily ascertainable based on objective criteria.

Nexium III, 777 F.3d at 19 (quoting Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013)). At the certification stage, it is unnecessary to identify every class member but the class must be

> sufficiently ascertainable to permit a court to decide and declare who will receive notice, who will share in any recovery, and who will be bound by the judgment.

Schonton v. MPA Granada Highlands LLC, No. 16-cv-12151, 2019 U.S. Dist. LEXIS 56502, at *8 (D. Mass. Apr. 2, 2019) (internal quotation marks omitted).

The EPPs **[**32]** submit that their proposed procedure will easily ascertain class members through the use of detailed pharmaceutical transaction data from the largest PBMs to identify purchases of the three at-issue drugs and their generic equivalents in the applicable states during the relevant class periods. They declare that uninjured EPPs can also be excised from the classes using the same objective criteria. Ranbaxy rejoins that the EPPs' plan is not administratively feasible for either task.

1. Identifying Eligible Class Members with PBM Data

Defendants first contend that using drug transactions data from the seven largest PBMs would exclude an impermissibly large number of eligible class members.

They underscore data provided by Ms. Craft which demonstrate that the seven largest PBMs processed between 89% and 96% of all retail prescriptions from 2015 to 2018. According to Ranbaxy, that data indicates that as much as 11% of all retail prescriptions will be excluded from the classes. Defendants fail to point out, however, that the 11% figure applies only to the year 2015. The percentage of retail prescriptions processed outside of the seven largest PBMs drops to 8% in 2016 and 4% in both 2017 and **[**33]** 2018.

Ranbaxy further asserts that because some insurers operate their own independent PBMs, the data from the seven largest PBMs would not account for the transactions of such insurers. Yet they fail to identify any such insurers and the analysis provided by plaintiffs' expert demonstrates that the data from the largest PBMs will likely capture all but a negligible number of eligible class members. In any event, additional PBMs could be subpoenaed to achieve greater data coverage if necessary. As discussed in further detail below, the Court is satisfied that such a procedure would be relatively straightforward and inexpensive.

In addition to its challenges to the contents of the PBM data, Ranbaxy contends that the collection of such data is not feasible because there is no evidence regarding whether 1) such data contains sufficient information to identify class members, 2) the data can be easily understood and organized and 3) the PBMs retain such data long enough.

To the contrary, plaintiffs' expert has established that the requisite data exists and has proffered a detailed approach for using it to identify class members. Courts in similar cases have confirmed that the identification **[**34]** of class members is administratively feasible because

> **[*308]** in the pharmaceutical industry, data is collected and maintained at every level of the transaction.

Solodyn, 2017 U.S. Dist. LEXIS 170676, at *51. With respect to the availability of older but still relevant data, Ms. Craft has explained and other courts have recognized that

> economic incentives for PBMs, pharmacies, and other relevant actors are aligned with retaining [prescription drug transaction] data in some form for as long as possible.

Loestrin 24, 410 F. Supp. 3d at 400.

For those reasons, the Court is satisfied that the use of retail prescription transactions information from (at least) the seven largest PBMs is an administratively feasible process by which virtually all eligible class members can be identified.

2. Applying Class Exclusions with PBM Data

Defendants also contend that class identity data cannot be used effectively to apply class exclusions. They maintain that the EPPs have not demonstrated how certain excluded parties, namely governmental entities and fully-insured plans, can be separated from eligible class members such as self-funded health plans.

Ranbaxy overstates the difficulty of determining class exclusions based upon the proposed PBM data sets. It relies heavily on the theory that there **[**35]** is no single way to search datasets for non-class members such as Third-Party Administrators ("TPAs") and Administrative Services Only entities ("ASOs") which facilitate payments on behalf of their self-funded plan clients. Although plaintiffs' expert concedes that the labels "TPA" and "ASO" may not be present in the data, she proffers a detailed explanation of how multiple data fields including the "client/carrier" and "account" fields can be used jointly to identify efficiently such non-class members. To the extent that Ranbaxy complains that Ms. Craft has not tested her proposed methodology, that argument has already been raised and rejected elsewhere. See *In re Namenda Indirect Purchaser Antitrust Litig., No. 1:15-cv-6549, 2021 U.S. Dist. LEXIS 26566, 2021 WL 509988, at *12 (S.D.N.Y. Feb. 11, 2021)* (holding***HN21***[] there is no requirement that a class be identified or even that the methodology for doing so be in place by the time of certification).

As to governmental entities, the EPPs have proffered an administratively feasible method of identifying and excluding those plans "through PBMs, government websites and personnel offices, actuarial consulting databases, and data publishers." Other courts have been satisfied by similar methods of identifying governmental plans in order to exclude them from end-payor classes. See, e.g., **[**36]** *Namenda, 2021 U.S. Dist. LEXIS 26566, 2021 WL 509988, at *12-13* ("Craft notes that PBMs processing the insurance claims would know the identity of any government entities . . . that they service. . . . Information about state/federal insurance plans is also publicly available, and so whoever is analyzing the raw PBM data could use this information to apply the exclusion."); *In re Zetia Ezetimibe Antitrust Litig., No. 2:18-md-2836, 2020 U.S. Dist. LEXIS 183601, at *38 (E.D. Va. Aug. 13, 2020)* ("Craft persuasively testified that PBMs 'absolutely know' which of its clients are federal or state entities and thus would be able to point them out to EPPs.").

Because Ms. Craft has proposed using PBM data in which government plans have been highlighted and using additional third-party data as a backstop, the Court sees no reason to deviate from prior approvals of such approaches to exclude governmental entities.

3. Economic Feasibility of EPPs' Methodology

Finally, Ranbaxy submits that the EPPs have not shown that the proposed methodology for ascertaining class members can be implemented without excessive cost.

Defendants' cost-based objection is without merit. Plaintiffs' expert clearly explains in her rebuttal report that PBMs regularly provide data in response to subpoenas at no cost to the parties and that some PBMs have a "standard litigation package" of claims data to **[**37]** be produced in cases such as this one. Defendants provide no contradictory evidence. Accordingly, there is no indication **[*309]** that the EPPs' proposed methodology would be "prohibitively expensive and thus infeasible." *In re Niaspan Antitrust Litig., 464 F. Supp. 3d 678, 707 (E.D. Pa. 2020)*.

ORDER

For the foregoing reasons, the motions of the Direct Purchaser Plaintiffs and the End-Payor Plaintiffs for class certification (Docket Nos. 286 and 287) are **ALLOWED**.

So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated May 14, 2021

Acad. of Allergy & Asthma in Primary Care v. Quest Diagnostics, Inc.

United States Court of Appeals for the Fifth Circuit

May 18, 2021, Filed

No. 20-50179

Reporter

998 F.3d 190 *; 2021 U.S. App. LEXIS 14807 **; 2021 U.S.P.Q.2D (BNA) 550; 109 Fed. R. Serv. 3d (Callaghan) 774

ACADEMY OF ALLERGY & ASTHMA IN PRIMARY CARE; UNITED BIOLOGICS, L.L.C., DOING BUSINESS AS UNITED ALLERGY SERVICES, Plaintiffs—Appellants, versus QUEST DIAGNOSTICS, INCORPORATED, Defendant—Appellee.

Prior History: [1]** Appeal from the United States District Court for the Western District of Texas. USDC No. 5:17-CV-1295.

Acad. of Allergy & Asthma in Primary Care v. Quest Diagnostics Inc., 2019 U.S. Dist. LEXIS 29479 (W.D. Tex., Feb. 22, 2019)

Core Terms

district court, statute of limitations, allegations, overt act, conspiracy, co-conspirator, civil conspiracy, tortious interference, misappropriation, allergy, misappropriation of trade secrets, undiscoverable, leave to amend, customers, diligence, providers, parties, restart, testing, limitations period, motion to dismiss, discovery rule, policy change, trade secret, involvement, antitrust, reasonable diligence, antitrust claim, Aftershocks, time-barred

LexisNexis® Headnotes

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

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

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

This court reviews de novo a district court's grant of a Fed. R. Civ. P. 12(b)(6) motion to dismiss. The court construes all allegations in favor of the plaintiff.

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

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > Time Limitations

HN2[] Motions to Dismiss, Failure to State Claim

Dismissal for failure to state a claim based on the statute of limitations defense should be granted only when the plaintiff's potential rejoinder to the affirmative defense was foreclosed by the allegations in the complaint.

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

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

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

HN3[] Conspiracy to Monopolize, Elements

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. 15 U.S.C.S. § 1. Texas law also prohibits restraints on trade. Tex. Bus. & Com. Code Ann. § 15.05(a) (Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful.). Section 2 of the Sherman Act prohibits persons from monopolizing, attempting to monopolize, or combining or conspiring to monopolize any part of the trade or commerce among the several States. 15 U.S.C.S. § 2.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Business Torts > Unfair Business Practices > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

HN4[] Sherman Act, Defenses

Both federal and Texas law have four-year statutes of limitations for antitrust claims. 15 U.S.C.S. § 15(b); Tex. Bus. & Com. Code Ann. § 15.25. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.

Governments > Legislation > Statute of Limitations > Time Limitations

HN5[] Statute of Limitations, Time Limitations

In Rx.com, the court reiterated the Supreme Court's rule that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and the statute of limitations runs from the commission of the act.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Sherman Act > Defenses

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

HN6[] **Remedies, Damages**

"Aftershocks" are lingering effects of earlier overt acts in an antitrust conspiracy. They are not events that restart the statute of limitations because a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action.

Governments > Legislation > Statute of Limitations > Time Limitations

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Confidentiality

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Trade Secrets Law > ... > Remedies > Damages > Costs & Attorney Fees

HN7[] **Statute of Limitations, Time Limitations**

Under Texas law, a person must bring suit for misappropriation of trade secrets not later than three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. Tex. Civ. Prac. & Rem. Code Ann. § 16.010(a).

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

HN8[] **Statute of Limitations, Time Limitations**

The discovery rule defers accrual until the plaintiff knew, or exercising reasonable diligence, should have known of the wrongful act causing injury.

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

HN9[] **Tolling, Discovery Rule**

The discovery rule does not apply simply because a claimant does not know the specific cause of the injury, the party responsible for it, the full extent of it, or the chances of avoiding it.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

HN10[] **Statute of Limitations, Time Limitations**

The discovery rule is a limited exception to statutes of limitation and will only be applied when the nature of the plaintiff's injury is both inherently undiscoverable and objectively verifiable. Texas courts have set the inherently undiscoverable bar high, to the extent that the discovery rule will apply only where it is nearly impossible for the plaintiff to be aware of his injury at the time he is injured.

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

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Evidence > Burdens of Proof > Allocation

Governments > Legislation > Statute of Limitations > Time Limitations

HN11[] **Motions to Dismiss, Failure to State Claim**

In considering the applicability of the discovery rule at the motion to dismiss stage, the court's inquiry is whether, accepting all well-pleaded facts as true, plaintiffs' alleged injury, by its nature, is unlikely to be discovered within the prescribed limitations period despite due diligence. Defendants bear the burden of proof on the statute of limitations defense. With respect to the statute of limitations defense, dismissal at the Fed. R. Civ. P. 12(b)(6) stage is proper only where it is evident from the complaint that the action is barred and the complaint fails to raise some basis for tolling.

Governments > Courts > Authority to Adjudicate

HN12[] **Courts, Authority to Adjudicate**

Reasonable diligence requires parties to make general inquiries to knowledgeable parties.

Evidence > Privileges > Trade Secrets > Elements

Trade Secrets Law > Protected Information > Business Information

Trade Secrets Law > Protected Information > Know-How

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Common Law

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Existence & Ownership

HN13[] **Trade Secrets, Elements**

A trade secret is any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Concerted Action > Civil Conspiracy > Defenses

HN14[] **Statute of Limitations, Time Limitations**

Civil conspiracy claims are generally subject to a two-year statute of limitations.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

HN15[] **Statute of Limitations, Time Limitations**

The discovery rule analysis turns on whether an injury is inherently undiscoverable, not on whether particular actions or causes are undiscoverable.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Defenses

Governments > Legislation > Statute of Limitations > Tolling

Torts > ... > Statute of Limitations > Tolling > Equitable Estoppel

HN16[] **Tolling of Statute of Limitations, Fraudulent Concealment**

Fraudulent concealment tolls the statute of limitations only until the fraud is discovered or could have been discovered with reasonable diligence.

Governments > Legislation > Statute of Limitations > Time Limitations

HN17[] **Statute of Limitations, Time Limitations**

Tortious interference claims are subject to a two-year statute of limitations under Texas law.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

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

HN18[] **Judges, Discretionary Powers**

Fed. R. Civ. P. 15(a)(2) constrains the district court's discretion in deciding whether to allow parties leave to amend. Rule 15 favors granting leave to amend, but denying leave is justified when the movant unduly delays or acts with bad faith or dilatory motive.

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

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

HN19[] **Standards of Review, Abuse of Discretion**

When parties delay seeking leave to amend for several months after a motion to dismiss is filed, the court has held that district courts do not abuse their discretion in denying the request for leave.

Counsel: For Academy of Allergy & Asthma in Primary Care, United Biologics, L.L.C., doing business as United Allergy Services, Plaintiffs - Appellants, Ronald Casey Low, Benjamin L. Bernell, Esq., Dillon James Ferguson, Pillsbury Winthrop Shaw Pittman, L.L.P., Austin, TX.

For Quest Diagnostics, Incorporated, Defendant - Appellee: Mark H. Hamer, Baker & McKenzie, L.L.P., Washington, DC; Nicholas O'Brian Kennedy, Baker & McKenzie, L.L.P., Dallas, TX.

Judges: Before STEWART, HIGGINSON, and WILSON, Circuit Judges.

Opinion by: CARL E. STEWART

Opinion

[*194] CARL E. STEWART, *Circuit Judge*:

Plaintiffs-Appellants Academy of Allergy & Asthma in Primary Care ("AAAPC") and United Allergy Services ("UAS") sued Quest Diagnostics ("Quest") for conspiring to force them out of the market of providing allergy and asthma testing. The district court dismissed Plaintiffs' claims under *Rule 12(b)(6)*. We AFFIRM in part and REVERSE and REMAND in part.

I. FACTUAL AND PROCEDURAL HISTORY

A. Factual Background

In 2009, UAS began providing allergy testing and treatment services in Texas. UAS's services allowed primary care physicians to treat allergies, disrupting the standard **[**2]** practice that required doctors to refer patients to allergists for treatment. Quest is one of the leading laboratories that receive patient referrals. Phadia is an allergy test producer and a defendant in Plaintiffs' 2014 suit.[1]

According to Plaintiffs' complaint, Quest and Phadia began discussing ways to curtail competition posed by UAS in 2011. The two businesses created a "talking points letter" to be distributed by their employees to discourage doctors from working with UAS. The letter fabricated warnings about patient safety, medical and legal liability, and the risks of fraudulent billing associated with UAS's testing products.

[*195] Unaware that Quest and Phadia were working to push UAS out of the market, UAS began negotiating with Quest to provide alternative methods of allergy testing. Phadia instructed Quest not to work with UAS, and Quest passed along confidential information about UAS to Phadia. Notably, Quest shared UAS's customer list with Phadia in 2012. Phadia then targeted those customers and tried to convince them to cease their relationships with UAS. Quest and Phadia also used a misleading opinion from the Office of the Inspector General of Health and Human

[1] Plaintiffs' 2014 suit will be discussed *infra* Section B.1.

Services **[**3]** ("OIG") that cautioned against businesses like UAS.[2] Through 2014, Quest and Phadia trained their employees to tell physicians and providers about the opinion and to spread misinformation about UAS.

From 2014 to 2016, Quest and Phadia continued to disparage UAS and to conspire to remove it from the market. In September 2014, Phadia and Quest used a Superior Health Plan policy change (that was announced in June 2014 and enacted in August 2014) to convince primary care physicians to stop working with UAS.

As a result of Quest and Phadia's actions, competition declined and the two entities now account for more than 70% of the local market share in allergy testing and immunotherapy.

B. Procedural History

1. The 2014 Lawsuit

In January 2014, UAS began tracking which customers were targeted with disinformation about its testing products. Unaware that Phadia or Quest were involved in spreading the disinformation, UAS filed both state and federal antitrust claims against several physicians. *Acad. of Allergy & Asthma in Primary Care v. Am. Acad. of Allergy, No. SA-14-CV-35-OLG, 2014 U.S. Dist. LEXIS 201028, 2014 WL 12497080, at *2 (W.D. Tex. Sep. 8, 2014)*. As the lawsuit progressed through discovery, Plaintiffs learned of Phadia's role and amended their complaint to add Phadia as a defendant in 2015.

Plaintiffs soon sought discovery from Phadia, and they began **[**4]** to suspect that Quest might have knowledge of Phadia's conduct. Plaintiffs subpoenaed Quest's corporate representative and requested document production in December 2015. Quest responded in January 2016 with several objections. Quest provided a representative in May 2016, and only then did Plaintiffs learn of Quest's involvement.

The physicians and Phadia settled Plaintiffs' 2014 suit. The remaining defendants (Allergy Asthma Network/Mothers of Asthmatics, Inc. ("AANMA") and Tonya Winders, Phadia's former market development leader and new CEO of AANMA) went to trial, and a jury found them not liable.

2. The Current Suit

The deadline for Plaintiffs to add Quest to their 2014 suit occurred before Quest responded to Plaintiffs' subpoenas. Once Plaintiffs learned of Quest's involvement, they filed this suit against Quest on December 28, 2017.

Quest moved to dismiss on March 9, 2018. The district court granted Quest's **[*196]** motion on February 22, 2019. The district court dismissed Plaintiffs' antitrust claims as time-barred, concluding that Plaintiffs had not alleged that Quest committed overt acts within the four-year statute of limitations. The court dismissed Plaintiffs' state law tortious interference **[**5]** and civil conspiracy claims as time-barred by Texas's two-year statute of limitations. The court also dismissed Plaintiffs' misappropriation of trade secrets claim as time-barred because it was not filed within three years of when Plaintiffs discovered or could have discovered the misappropriation through ordinary diligence.

Plaintiffs requested leave to amend, and the district court denied their request. Plaintiffs then submitted a *Rule 59(e)* motion, and the district court denied it because it failed to raise new arguments. This appeal followed.

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[2] James Wallen, an associate and alleged co-conspirator of Phadia and Quest, put together a company called Universal Allergy Labs, LLC, not to be confused with Plaintiffs' United Allergy Labs (the predecessor to UAS). The Office of the Inspector General Opinion referred to UAL and expressed serious concerns about businesses providing allergy tests being run by a single person with no healthcare experience. Plaintiffs argue that Wallen intentionally "sandbagged" the review process to get an unfavorable decision so that it could be used to falsely equate Wallen's company with Plaintiffs.

II. Standard Of Review

HN1[] This court reviews de novo a district court's grant of a *Rule 12(b)(6)* motion to dismiss. *Gregson v. Zurich Am. Ins. Co., 322 F.3d 883, 885 (5th Cir. 2003)*. We construe all allegations in favor of the plaintiff. *Id.*

HN2[] "[D]ismissal for failure to state a claim based on the statute of limitations defense should be granted only when the plaintiff's potential rejoinder to the affirmative defense was foreclosed by the allegations in the complaint." *Jaso v. The Coca Cola Co., 435 F. App'x 346, 352 (5th Cir. 2011)* (internal quotation marks omitted).

III. Discussion

Plaintiffs appeal the district court's dismissal of the following seven claims against Quest: (1) *Sherman Act § 1*, (2) *Sherman Act § 2*, (3) Texas antitrust, (4) Texas misappropriation of trade secrets, (5) Texas tortious interference with contracts, (6) **[**6]** Texas tortious interference with existing and prospective business, and (7) Texas civil conspiracy.

A. Dismissal of Plaintiffs' Federal and State Antitrust Claims

Plaintiffs alleged that Quest violated *§§ 1* & *2 of the Sherman Act* and Texas ***antitrust law***. The district court dismissed these claims under *Rule 12(b)(6)*, concluding that they were time-barred. We disagree.

HN3[] *Section 1 of the Sherman Act* prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. Texas law also prohibits restraints on trade. *See Tex. Bus. & Com. Code § 15.05(a)* ("Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful."). *Section 2 of the Sherman Act* prohibits persons from "monopoliz[ing], attempt[ing] to monopolize, or combin[ing] or conspir[ing] . . . to monopolize any part of the trade or commerce among the several States . . . ." *15 U.S.C. § 2*.

HN4[] Both federal and Texas law have four-year statutes of limitations for antitrust claims. *See 15 U.S.C. § 15(b)*; *Tex. Bus. & Com. Code § 15.25*. "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*.

Under the general rule, Plaintiffs had four years to bring their claims against Quest from the date of Quest's latest overt act. **[**7]** The district court determined that the last overt act was Quest's August 2013 meeting with Phadia about UAS's insurance reimbursement. Plaintiffs filed suit on December 28, 2017. Because Plaintiffs' claims were not brought by August 2017, **[*197]** the district court dismissed them as time barred.

In concluding that Quest's latest overt act occurred in August 2013, the district court disregarded several of Plaintiffs' allegations that described later overt acts. The district court determined that these allegations were insufficient because they lacked specificity, described mere "aftershocks" of earlier overt acts, or only described Phadia's actions as a potential co-conspirator (and not Quest's actions). We agree that many of the allegations lacked specificity or described aftershocks of earlier acts, but we disagree as to the allegations of Phadia's role as a potential co-conspirator.

1. Lack of Specificity in Allegations of Later Acts

Plaintiffs point to their allegations that Quest continued to injure their businesses in 2014 and 2015. They argue that those allegations sufficiently describe later overt acts and that the statute of limitations should reset based on those overt acts. We disagree. **[**8]**

Plaintiffs alleged before the district court that "Phadia and Quest continued to approach individual providers and payors in 2014 and 2015 regarding the negative impact UAS was having on their ImmunoCAP sales. Quest and Phadia continued to work with other co-conspirators to minimize the competitive threat." The district court discounted this allegation from Plaintiffs as insufficiently specific to restart the statute of limitations. The district court cited *Poster Exchange Incorporated v. National Screen Service Corporation, 517 F.2d 117 (5th Cir. 1975)*. In *Poster Exchange Inc.*, we remanded an antitrust case to determine whether there was a specific act or word of refusal contributing to the antitrust conspiracy during the limitations period. *Id. at 128-29*.

Later, we decided *Rx.com v. Medco Health Solutions, Inc., 322 F. App'x 394 (5th Cir. 2009)*. In *Rx.com*, we did not allow the plaintiffs to toll the statute of limitations by merely alleging that the defendants continued their earlier violations of ***antitrust law***. *Id. at 397*. ***HN5***[] We reiterated the Supreme Court's rule that "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . the statute of limitations runs from the commission of the act." *Id.* (quoting *Zenith Radio Corp., 401 U.S. at 338*).

Plaintiffs' allegations about Phadia and Quest's continued meetings with providers **[**9]** and payors mirror the allegations we rejected in *Rx.com.* These allegations do not restart the statute of limitations because they did not describe a specific act or word contributing to the conspiracy. *See Poster Exch. Inc., 517 F.2d at 128-29*.

2. Allegations of "Aftershocks" of Earlier Events

Plaintiffs next argue that the district court erred by concluding that a policy change that took effect in June 2014 was not an overt act that would reset the statute of limitations. Plaintiffs alleged that a June 2014 policy change that discouraged providers from working with UAS was a timely overt act. The district court disagreed, concluding that the overt act associated with the policy change occurred in August 2013. We agree with the district court.

HN6[] "Aftershocks" are lingering effects of earlier overt acts in an antitrust conspiracy. They are not events that restart the statute of limitations because "a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely **[*198]** the abatable but unabated inertial consequences of some pre-limitations action." *Poster Exch. Inc., 517 F.2d at 128*.

Here, the district court determined that the overt act occurred in August 2013 when Quest and Phadia lobbied for the **[**10]** policy change. It follows that the policy's implementation was an aftershock of Quest and Phadia's earlier lobbying rather than an independent action. Phadia and Quest did not continue to act after they lobbied for the new policy, so the policy's implementation was merely a delayed result of their earlier actions. This allegation does not suffice to restart the clock for Plaintiffs' claims.

Accordingly, the district court properly concluded that Plaintiffs' allegation regarding the June 2014 policy change does not suffice to restart the statute of limitations.

3. Allegations of Phadia's Involvement

Next, Plaintiffs argue that the district court erred by concluding that their allegations as to Phadia's conduct could not restart the statute of limitations. We agree.

The district court disregarded Plaintiffs' allegations of Phadia's post-2013 overt acts because they were "actions taken wholly by Phadia." Plaintiffs alleged that in May 2014, Phadia's Dallas district manager emailed Quest's directors about their collaboration to discourage providers from working with UAS. The manager indicated that he had recently met with Timothy McDaniel (another Quest employee), and the manager sent out **[**11]** a list of several providers that they should further target.

Plaintiffs argue that Phadia's manager's meeting with McDaniel was an overt act by a co-conspirator that occurred within four years of Plaintiffs' suit. They rely on *United States v. Therm-All, Inc., 373 F.3d 625 (5th Cir. 2004)*. In

Therm-All, Inc., various corporations and their presidents were indicted for conspiring to fix prices. *Id. at 628*. Though five companies were involved in the price fixing, only two of them were parties to the underlying dispute in *Therm-All, Inc.* *Id. at 629-32*. The defendants argued that the government's claims against them were barred because the government failed to introduce evidence that the illegal actions occurred within the statute of limitations. *Id. at 631*. However, testimony of non-party co-conspirators was introduced as evidence that the conspiracy continued into the limitations period. *See id. at 636* ("Rhodes (of Mizell Co.) testified that the conspiracy continued through June 1995. The testimony is direct evidence that the participants were involved in conspiratorial acts . . . .").

Here, the district court ruled that Phadia's actions were insufficient to restart the statute of limitations, even if its actions were in furtherance of the conspiracy. The district court's view is inconsistent **[**12]** with our precedent in *Therm-All, Inc.*

Moreover, Quest's argument that Phadia cannot be a co-conspirator here because it was a defendant in the 2014 lawsuit is incorrect. Phadia settled in the 2014 suit, but no court ever determined its liability as a co-conspirator. Collateral estoppel would bar Plaintiffs from arguing that Phadia is a co-conspirator only if Phadia's liability was "actually litigated in the prior action" and was determined as "a necessary part of the judgment in that action." *See* *Petro-Hunt, L.L.C. v. United States, 365 F.3d 385, 397 (5th Cir. 2004)*.

Phadia cites *Discon Inc. v. Nynex Corp.*, where a district court held that a plaintiff was collaterally estopped from asserting a conspiracy claim against a second co-conspirator after a jury determined that the first co-conspirator was not liable. *86 F. Supp. 2d 154, 167 (W.D.N.Y. 2000)*. The **[*199]** alleged conspiracy involved only two co-conspirators. *Id.* An acquittal of one co-conspirator meant that there was no conspiracy as between the two of them, and the district court concluded that the second suit was barred. *Id.*

Here, the conspiracy involved many actors, including allergists, Tonya Winders, AANMA, Phadia, and now Quest. The jury determined that Winders and AANMA were not liable, but it did not determine Phadia's liability. Collateral **[**13]** estoppel does not bar Plaintiffs from asserting that Phadia is a co-conspirator. Plaintiffs may use the allegations of co-conspirators (and the timing of those actions) in future suits. *See* *Therm-All, Inc., 373 F.3d at 636*.

At this stage of litigation, Plaintiffs have sufficiently alleged that Phadia and Quest were involved in the alleged conspiracy and that the allegation regarding Phadia's May 2014 email reset the statute of limitations. We therefore disagree with the district court and reverse its dismissal of Plaintiffs' state and federal antitrust claims.

B. Dismissal of Plaintiffs' Tort Claims

The district court also dismissed Plaintiffs' claims for misappropriation of trade secrets, civil conspiracy, and tortious interference. We reverse the dismissal of Plaintiffs' misappropriation of trade secrets claim. We affirm the dismissal of the civil conspiracy and tortious interference claims.

1. Misappropriation of Trade Secrets Claim

Plaintiffs filed a misappropriation of trade secrets claim against Quest, arguing that Quest misappropriated UAS's client list. UAS shared its client list with Quest when the two were discussing doing business together, and Quest sent the list to Phadia in February 2012 (more than five **[**14]** years before Plaintiffs filed suit against Quest). ***HN7***[] Under Texas law, "[a] person must bring suit for misappropriation of trade secrets not later than three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered." *Tex. Civ. Prac. & Rem. Code Ann. § 16.010(a)*.

The district court dismissed Plaintiffs' trade secrets claim because "UAS and AAAPC fail[ed] to explain why they could not have discovered the misappropriation through ordinary diligence in the months following February 2012."

Plaintiffs argue that they did not know that Quest shared their customer list with Phadia in 2012. They only knew that Quest declined to move forward with Plaintiffs' deal to provide allergy testing. They learned of Quest's involvement in May 2016 when Quest produced discovery during the 2014 lawsuit. Because they did not discover Quest's involvement until May 2016, Plaintiffs argue that the statute of limitations should be tolled until that time.

HN8[] The discovery rule "defers accrual . . . until the plaintiff knew, or exercising reasonable diligence, should have known of the wrongful act causing injury." *N. Tex. Opportunity Fund v. Hammerman & Gainer Int'l., Inc., 107 F. Supp. 3d 620, 635-36 (N.D. Tex. 2015)* (quoting *Jackson v. W. Telemarketing Corp. Outbound, 245 F.3d 518, 523-24 (5th Cir. 2001)*). The fact that Plaintiffs did not actually know of Quest's involvement until **[**15]** 2016 will not preserve their claim unless they also could not have discovered their misappropriation injury using ordinary diligence. ***HN9***[] The discovery rule does not apply "simply because a claimant does not know 'the specific cause of the injury,' 'the party responsible for it,' 'the full extent of it,' or 'the chances of avoiding it.'" *USPPS, Ltd.* ***[*200]*** *v. Avery Dennison Corp., 326 F. App'x 842, 847 (5th Cir. 2009)* (quoting *PPG Indus. Inc. v. JMB/Hous. Ctrs. Partners Ltd., 146 S.W.3d 79, 93-94 (Tex. 2004)*).

HN10[] The discovery rule is a limited exception to statutes of limitation and will only be applied "when the nature of the plaintiff's injury is both inherently undiscoverable and objectively verifiable." *Wagner & Brown, Ltd. v. Horwood, 58 S.W.3d 732, 734 (Tex. 2001)*. "Texas courts have set the inherently undiscoverable bar high, to the extent that the discovery rule will apply only where it is nearly impossible for the plaintiff to be aware of his injury at the time he is injured." *Sisoian v. Int'l Bus. Machs. Corp., No. A-14-CA-565-SS, 2014 U.S. Dist. LEXIS 114693, 2014 WL 4161577, at *4 (W.D. Tex. Aug. 18, 2014)* (quoting *Priester v. JP Morgan Chase Bank, N.A., 708 F.3d 667, 675 (5th Cir. 2013)*).

HN11[] In considering the applicability of the discovery rule at the motion to dismiss stage, our inquiry is whether, accepting all well-pleaded facts as true, Plaintiffs' alleged injury, "by its nature, is unlikely to be discovered within the prescribed limitations period despite due diligence." *Beavers v. Metro. Life Ins. Co., 566 F.3d 436, 440 (5th Cir. 2009)* (quoting *Wagner, 58 S.W.3d at 734-35*). Defendants bear the burden of proof on the statute of limitations defense. *Jaso, 435 F.App'x at 351*. "With respect to the statute of limitations **[**16]** defense, dismissal at the 12(b)(6) stage is proper only 'where it is evident from the [complaint] that the action is barred and the [complaint] fail[s] to raise some basis for tolling.'" *Id.* (quoting *Jones v. Alcoa Inc., 339 F.3d 359, 366 (5th Cir. 2003)* (alterations in original)).

The district court rejected Plaintiffs' allegations and suggested that Plaintiffs could have learned that Quest misappropriated their client list. ***HN12***[] Reasonable diligence requires parties to make general inquiries to knowledgeable parties. *See Target Strike, Inc. v. Marston & Marston Inc., 524 F. App'x 939, 945 (5th Cir. 2013)*. On appeal, Plaintiffs assert that even if they learned which customers stopped working with UAS, they would not have learned that Quest shared their customer list with Phadia.

We agree that even if Plaintiffs had exercised due diligence by inquiring with their customers, it is unlikely that they would have learned that Quest shared UAS's proprietary billing information and business records. Plaintiffs' trade secret injury was unlikely to be discovered given the nature of Plaintiffs' trade secret[3] —a client list. While the misappropriation of other proprietary information like computer codes[4] or product designs[5] may be readily discoverable once the information appears in the marketplace, Plaintiffs could not have discovered **[**17]** their misappropriation injury as easily.

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[3] ***HN13***[] "A trade secret is any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it." *Computer Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W.2d 453, 455 (Tex. 1996)*.

[4] *See Altai, Inc., 918 S.W.2d at 457*.

[5] *See Seatrax, Inc. v. Sonbeck Int'l, Inc., 200 F.3d 358, 365-66 (5th Cir. 2000)*.

We therefore find it unlikely that they could have discovered the distinct injury to their trade secret caused by Quest. We conclude that Plaintiffs' trade secret injury, by its nature, was unlikely to have been discovered within the limitations period even if Plaintiffs had exercised due diligence. *See* Beavers, 566 F.3d at 440.

[*201] Plaintiffs have sufficiently pled they could not have discovered their misappropriation injury using reasonable diligence. Moreover, nothing in the complaint forecloses Plaintiffs' potential rejoinder to the statute of limitations defense. *See* Jaso, 435 F. App'x at 351. We thus disagree with the district court's dismissal of Plaintiffs' misappropriation of trade secrets claim and reverse.

2. Civil Conspiracy Claim

The district court dismissed Plaintiffs' civil conspiracy claim as time-barred. Plaintiffs argue that their civil conspiracy claim is also subject to the discovery rule and therefore timely. Here, we disagree.

Plaintiffs' conspiracy claim is based on Quest and Phadia's actions dissuading providers from using UAS's services. **HN14**[] Civil conspiracy claims are generally subject to a two-year statute of limitations. Navarro v. Grant Thornton, LLP, 316 S.W. 3d 715, 719 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Like their misappropriation of trade secrets **[**18]** argument, Plaintiffs argue that this information could not have been discovered within the initial statute of limitations. *See* Sisoian, 2014 U.S. Dist. LEXIS 114693, 2014 WL 416157, at *4.

We are unpersuaded by Plaintiffs' argument that they could not discover the injuries caused by Quest and Phadia's alleged civil conspiracy. Unlike their trade secrets injury, the only injuries Plaintiffs alleged here relate to their businesses and ability to compete in the marketplace. We fail to see how those injuries are inherently undiscoverable, particularly since these injuries were litigated in Plaintiffs' 2014 suit against Phadia.[6]

Our analysis is unaltered by the argument that Quest's role in the conspiracy might have been inherently undiscoverable during the limitations period. **HN15**[] The discovery rule analysis turns on whether an injury is inherently undiscoverable, not on whether particular actions or causes are undiscoverable. *See* Beavers, 566 F.3d at 440. Unlike Plaintiffs' misappropriation claim, there is no inherently undiscoverable injury that stems from the civil conspiracy.

Plaintiffs also argue that Quest's fraudulent concealment of its alleged wrongdoing may toll the statute of limitations. We disagree.

HN16[] Fraudulent concealment tolls the statute of limitations only until **[**19]** "the fraud is discovered or could have been discovered with reasonable diligence." Shell Oil Co. v. Ross, 356 S.W.3d 924, 927 (Tex. 2011) (quoting BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 67 (Tex. 2011)). As we previously discussed, Plaintiffs failed to plead that they used diligence in trying to discover Quest and Phadia's civil conspiracy. We thus affirm the district court's dismissal of Plaintiffs' civil conspiracy claim.

3. Tortious Interference Claims

The district court also dismissed Plaintiffs' tortious interference claim as time barred. Plaintiffs argue that this claim is subject to the discovery rule. We disagree.

HN17[] Tortious interference claims are subject to a two-year statute of limitations under Texas law. *See* First Nat'l Bank of Eagle Pass v. Levine, 721 S.W.2d 287, 289 (Tex. 1986). Plaintiffs allege that Quest and Phadia's work convincing UAS's customers **[*202]** to stop using UAS interfered with its existing and future business.

[6] Plaintiffs' misappropriation of trade secrets claim was not litigated in the 2014 suit, probably because Plaintiffs did not yet know of Quest's involvement or that Quest shared the customer list with Phadia.

Plaintiffs alleged injuries of lost revenue and lost business relationships. The lost revenue injury is not inherently undiscoverable as discussed above. While the loss of prospective business relationships might be the kind of injury that is inherently undiscoverable, Plaintiffs fail to adequately plead tortious interference with a prospective business relationship. Their complaint does not adequately allege that there was a reasonable **[**20]** probability that UAS and third parties would enter into future relationships. *See* *Apani Sw., Inc. v. Coca-Cola Enters., Inc., 300 F.3d 620, 634 (5th Cir. 2002)*. Though the complaint says that there was a reasonable probability that AAPC would have entered into additional relationships with third parties, the statement is conclusory. Plaintiffs did not plead adequate factual support for their claim, so we dismiss the claim under *Rule 12(b)(6)*.

Accordingly, we affirm the district court's dismissal of Plaintiffs' tortious interference claim.

C. Leave to Amend Complaint

After the district court dismissed their first complaint, Plaintiffs filed a motion for leave to amend their complaint. The district court denied Plaintiffs' request, and they now argue that the district court erred. We disagree.

HN18[] *Rule 15(a)(2)* constrains the district court's discretion in deciding whether to allow parties leave to amend. *See* *Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597-98 (5th Cir. 1981)*. *Rule 15* favors granting leave to amend, but denying leave is justified when the movant unduly delays or acts with bad faith or dilatory motive. *Rosenzweig v. Azurix Corp., 332 F.3d 854, 864 (5th Cir. 2003)*.

Here, Quest filed its *Rule 12(b)(6)* motion to dismiss on March 9, 2018. The district court granted Quest's motion on February 22, 2019. In the eleven months that Quest's motion was pending, Plaintiffs did not seek leave to amend their complaint. However, Plaintiffs **[**21]** did timely move for leave to file an amended complaint after the district court issued its order granting dismissal. Their motion did not attach an amended complaint but attached additional evidence instead.

The facts of this case resemble *Whitaker v. City of Houston, 963 F.2d 831 (5th Cir. 1992)*. ***HN19***[] When parties delay seeking leave to amend for several months after a motion to dismiss is filed, we have held that district courts do not abuse their discretion in denying the request for leave. *See* *id. at 837* (affirming district court's denial of *Rule 15(a)* request to amend for undue delay when the plaintiff did not seek leave to amend for eleven months while motion to dismiss was pending).

Plaintiffs rely on *Dussouy*, where we held that a court can abuse its discretion by denying a request for leave that occurs within a reasonable time after the entry of dismissal. *Dussouy, 660 F.2d at 599*. Though Plaintiffs' request was within thirty days of the district court's entry of dismissal, we cannot conclude that the court abused its discretion because Plaintiffs did not seek to amend during the eleven months that Quest's motion was pending or provide an amended complaint once they did move for leave to amend.

We thus affirm the district court's denial of Plaintiffs' request for leave to amend their **[**22]** complaint.

IV. Conclusion

For the aforementioned reasons, we AFFIRM in part and REVERSE and REMAND in part.

[Texas v. Google LLC]

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

May 20, 2021, Decided; May 20, 2021, Filed

CIVIL NO. 4:20-CV-957-SDJ

Reporter
2021 U.S. Dist. LEXIS 96586 *; 2021 WL 2043184

THE STATE OF TEXAS, ET AL. v. GOOGLE LLC

Prior History: *[In re Google Digital Adver. Antitrust Litig., 2021 U.S. Dist. LEXIS 98044, 2021 WL 2021990 (N.D. Cal., May 13, 2021)]*
[Rhodes v. Texas, 2020 U.S. Dist. LEXIS 169377 (N.D. Tex., Sept. 3, 2020)]

Core Terms

convenient, witnesses, weighed, venue, cases, documents, factors, private-interest, public-interest, attendance, courts, class action, advertisers, nonparty witness, inconvenience, transferring, antitrust, parties, discovery, source of proof, allegations, publishers, asserts, resides, closer, movant, ease of access, ease-of-access, competitors, electronic

Counsel: **[*1]** For The State Of Texas, Plaintiff: Jason Allen Zweig, LEAD ATTORNEY, Ashley C Keller, Brooke Clason Smith, Stephen Yelderman, Keller Lenkner LLC, Chicago, IL; W Mark Lanier, LEAD ATTORNEY, The Lanier Law Firm, Houston, TX; Alex J Brown, Zeke DeRose, III, The Lanier Law Firm, PC - Houston, Houston, TX; David Matthew Ashton, Attorney General's Office, Austin, TX; Kim Van Winkle, Office of The Attorney General of Texas - Austin, Austin, TX; Matthew Levinton, Office of The Attorney General of Texas, Austin, TX; Nicholas G. Grimmer, R Floyd Walker, Office of The Attorney General of Texas, Austin, TX; Shawn Cowles, Office of the Attorney General of Texas - 214, Austin, TX; Warren D Postman, Keller Lenkner LLC, Washington, DC.

For State of Arkansas, Plaintiff: Johnathan R Carter, LEAD ATTORNEY, Office of the Arkansas Attorney General, Little Rock, AR; Ashley C Keller, Keller Lenkner LLC, Chicago, IL.

For State of Idaho, Plaintiff: Brett DeLange, John K Olson, LEAD ATTORNEYS, Office of the Idaho Attorney General, Boise, ID; Ashley C Keller, Keller Lenkner LLC, Chicago, IL.

For State of Indiana, Plaintiff: Matthew Michaloski, Scott Barnhart, LEAD ATTORNEYS, Office of the Indiana Attorney General, **[*2]** Indianapolis, IN; Ashley C Keller, Keller Lenkner LLC, Chicago, IL.

For Commonwealth of Kentucky, Plaintiff: John Christian Lewis, LEAD ATTORNEY, Kentucky Office of the Attorney General, Frankfort, KY; Ashley C Keller, Keller Lenkner LLC, Chicago, IL; Philip R Heleringer, Office of the Kentucky Attorney General, Frankfort, KY.

For State of Mississippi, Plaintiff: Ashley C Keller, Keller Lenkner LLC, Chicago, IL; Hart Martin, Mississippi Attorney General's Office, Jackson, MS.

For State of Missouri, Plaintiff: Kimberley Biagioli, LEAD ATTORNEY, Missouri Attorney General's Office, Kansas City, MO; Ashley C Keller, Keller Lenkner LLC, Chicago, IL; Stephen M Hoeplinger, Missouri Attorney General's Office, Jefferson City, MO.

For State of North Dakota, Plaintiff: Elin S Alm, LEAD ATTORNEY, Office of the North Dakota Attorney General, Bismarck, ND; Parrell D Grossman, LEAD ATTORNEY, Office of the Attorney General of North Dakota, Bismarck, ND; Ashley C Keller, Keller Lenkner LLC, Chicago, IL.

For State of South Dakota, Plaintiff: Ashley C Keller, Keller Lenkner LLC, Chicago, IL; Yvette K Lafrentz, Office of Attorney General, Pierre, SD.

For State of Utah, Plaintiff: Ashley C Keller, Keller Lenkner **[*3]** LLC, Chicago, IL; Tara W Pincock, Utah Office of Attorney General, Salt Lake City, UT.

For State of Alaska, Plaintiff: Ashley C Keller, Keller Lenkner LLC, Chicago, IL; Jeffery G Pickett, Department of Law, Office of the Attorney General, Anchorage, AK.

For State of Florida, Plaintiff: Ashley C Keller, Keller Lenkner LLC, Chicago, IL; Lee Istrail, Office of the Attorney General of Florida, The Capitol, PL-01, Tallahassee, FL.

For State of Nevada, Plaintiff: Lucas J Tucker, LEAD ATTORNEY, State of Nevada, Office of the Attorney General, Las Vegas, NV; Marie W.L. Martin, Michelle C Newman, LEAD ATTORNEYS, State of Nevada, Office of the Attorney General, Carson City, NV; Ashley C Keller, Keller Lenkner LLC, Chicago, IL.

For Commonwealth of Puerto Rico, Plaintiff: Ashley C Keller, Keller Lenkner LLC, Chicago, IL.

For State of Montana, Plaintiff: Charles J Cooper, LEAD ATTORNEY, Brian W Barnes, David H Thompson, Harold S Reeves, Cooper & Kirk, PLLC, Washington, DC; Ashley C Keller, Keller Lenkner LLC, Chicago, IL; Chuck Munson, Montana Attorney General's Office, Helena, MT; Mark Mattioli, Montana Attorney General's, Helena, MT.

For Google, LLC, Defendant: R Paul Yetter, LEAD ATTORNEY, Bryce L **[*4]** Callahan, Yetter Coleman, LLP - Houston, Houston, TX; Daniel S Bitton, PRO HAC VICE, Axinn Veltrop & Harkrider, LLP - San Francisco, San Francisco, CA; Eric Mahr, Julie Elmer, Freshfields Bruckhaus Deringer US LLP, Washington, DC; John D. Harkrider, Axinn Veltrop & Harkrider, LLP - NY, New York, NY.

Judges: SEAN D. JORDAN, UNITED STATES DISTRICT JUDGE.

Opinion by: SEAN D. JORDAN

Opinion

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant Google LLC's Motion to Transfer Venue Pursuant to *28 U.S.C. § 1404(a)*, (Dkt. #28). For the following reasons, the Court concludes that the motion should be **DENIED**.

I. BACKGROUND

Plaintiffs—the States of Texas, Alaska, Arkansas, Florida, Idaho, Indiana, Mississippi, Missouri, Montana, Nevada, North Dakota, South Dakota, and Utah, and the Commonwealths of Kentucky and Puerto Rico, by and through their Attorneys General (collectively, "Plaintiff States")—have brought the instant action in the Eastern District of Texas against Defendant Google LLC ("Google").[1] Plaintiff States, invoking their statutory, equitable, or common-law powers, and pursuant to *Sections 4* and *16 of the Clayton Act, 15 U.S.C. §§ 15c*, *26*, brought this action in their

[1] The Court has jurisdiction over the instant action. Plaintiff States assert claims under *Sections 1* and *2 of the Sherman Act*, *15 U.S.C. §§ 1*, *2*, and *Sections 4* and *16 of the Clayton Act*, *15 U.S.C. §§ 15c*, *26*. *See also* *28 U.S.C. §§ 1331*, *1337*. Plaintiff States also assert various state-law claims arising out of the same nucleus of operative fact, over which this Court is empowered to exercise supplemental jurisdiction. *See* *28 U.S.C. § 1367(a)*.

respective sovereign capacities and as *parens patriae* on behalf of the citizens, general welfare, and economies **[*5]** of their respective states.

At its core, Plaintiff States' theory of the case is that Google has violated *Section 2 of the Sherman Act*, as well as applicable state antitrust laws, by unlawfully maintaining a monopoly, or attempting to acquire a monopoly, in markets associated with online display advertising. Specifically, Plaintiff States allege that Google engaged in anticompetitive conduct to force publishers and advertisers to use its online-display-advertising products or services. Plaintiff States further allege that Google violated *Section 1 of the Sherman Act* through an unlawful agreement with Facebook. Plaintiff States also contend that Google's representations to publishers, advertisers, and consumers violated state consumer-protection and deceptive-trade laws. Based on these allegations, Plaintiff States assert the following causes of action: actual and attempted monopolization and unlawful tying under *Section 2 of the Sherman Act, 15 U.S.C. § 2*; unlawful agreement under *Section 1 of the Sherman Act, 15 U.S.C. § 1*; and thirty additional state-law claims under Plaintiff States' respective antitrust and deceptive-trade-practices statutes.

Google denies all the substantive factual and legal allegations in Plaintiff States' Amended Complaint. Google asserts that it has not acted anticompetitively in the digital-advertising **[*6]** and e-commerce marketplace. Google specifically maintains that Plaintiff States' Amended Complaint is factually inaccurate, that the digital-advertising and e-commerce marketplace is highly competitive, and that Plaintiff States' legal theory turns on the incorrect premise that ***antitrust law*** requires companies to design their products so as to help their rivals become stronger competitors. Google further contends that Plaintiff States mischaracterize the terms and misunderstand the impact of a procompetitive agreement between Google and Facebook and that Google has not made false or deceptive statements to consumers concerning its products or services.

Google has filed a motion to transfer venue under *28 U.S.C. § 1404(a)*, arguing that this case should be transferred to the United States District Court for the Northern District of California. (Dkt. #28). Google does not dispute that venue is proper in the Eastern District of Texas under *15 U.S.C. § 22* and *28 U.S.C. § 1391*. Google contends that transfer is appropriate because the Northern District of California constitutes a clearly more convenient forum for this action. Plaintiff States counter that Google's transfer motion should be denied because Google has failed to show that the **[*7]** private-interest and public-interest factors comprising the *Section 1404(a)* test, taken together, warrant the transfer of this case to the Northern District of California.

II. Legal Standard

Section 1404(a) permits the transfer of civil actions for the convenience of the parties and witnesses and in the interest of justice to other districts or divisions where the plaintiffs could have properly brought the action. *28 U.S.C. § 1404(a)*. District courts have broad discretion in deciding whether to transfer a case under *Section 1404(a)*, *In re Volkswagen of Am., Inc., 545 F.3d 304, 311 (5th Cir. 2008)* (en banc), and *Section 1404(a)* motions are adjudicated on an "individualized, case-by-case consideration of convenience and fairness." *TravelPass Grp. v. Caesars Ent. Corp., No. 5:18-cv-153, 2019 U.S. Dist. LEXIS 142227, 2019 WL 3806056, at *11 (E.D. Tex. May 9, 2019)* (quoting *Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988)* and *Van Dusen v. Barrack, 376 U.S. 612, 622, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964)*), *report and recommendation adopted*, *2019 U.S. Dist. LEXIS 147213, 2019 WL 4071784 (E.D. Tex. Aug. 29, 2019)*.

The party seeking a transfer under *Section 1404(a)* must show good cause. *Volkswagen, 545 F.3d at 315* (quoting *Humble Oil & Refin. Co. v. Bell Marine Serv., Inc., 321 F.2d 53, 56 (5th Cir. 1963)*). In this context, showing good cause requires the moving party to "clearly demonstrate that a transfer is for the convenience of parties and witnesses [and] in the interest of justice." *Id.* (cleaned up) (quoting *28 U.S.C. § 1404(a)*). When the movant fails to demonstrate that the proposed transferee venue is "clearly more convenient" than the plaintiff's chosen venue, "the plaintiff's choice should be respected." *Id.* Conversely, when the movant demonstrates that the proposed transferee venue is clearly **[*8]** more convenient, the movant has shown good cause and the court should transfer the case. *Id.* The "clearly more convenient" standard is not equal to a clear-and-convincing-evidence standard, but it is nevertheless "materially more than a mere preponderance of convenience." *Quest NetTech Corp. v. Apple, Inc., No. 2:19-CV-00118, 2019 U.S. Dist. LEXIS 206019, 2019 WL 6344267, at *7 (E.D. Tex. Nov. 27, 2019)*.

To determine whether a *Section 1404(a)* movant has demonstrated that the proposed transferee venue is "clearly more convenient," the Fifth Circuit employs the four private-interest and four public-interest factors first enunciated in *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)*. *Volkswagen, 545 F.3d at 315*. The private-interest factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* (citation omitted). The public-interest factors are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law." *Id.* (alteration **[*9]** in original) (citation omitted).

Although these factors "are appropriate for most transfer cases, they are not necessarily exhaustive or exclusive," and no single factor is dispositive. *Id.* (citation omitted). Moreover, courts are not to merely tally the factors on each side. *In re Radmax, Ltd., 720 F.3d 285, 290 n.8 (5th Cir. 2013)*. Instead, courts "must make factual determinations to ascertain the degree of actual convenience, if any, and whether such rises to the level of 'clearly more convenient.'" *Quest NetTech, 2019 U.S. Dist. LEXIS 206019, 2019 WL 6344267, at *7* (citing *In re Radmax, 720 F.3d at 290* (holding that, where five factors were neutral, two weighed in favor of transfer, and one weighed "solidly" in favor of transfer, the movant had met its burden)); *see also* *In re Radmax, 720 F.3d at 290* (holding that courts abuse their discretion when they deny transfer solely because the plaintiff's choice of forum weighs in favor of denying transfer).

III. Discussion

A party seeking transfer under *28 U.S.C. § 1404(a)* must first meet the threshold requirement of establishing that the action could have been brought in the transferee district. Google, the only defendant in this case, has its headquarters and principal place of business in the Northern District of California. Accordingly, the Court finds that this case could have properly been filed in the Northern District of California **[*10]** under both *28 U.S.C. § 1391* and *15 U.S.C. § 22*. The threshold requirement having been met, the Court will analyze each of the private-interest and public-interest factors to determine if Google has demonstrated that the Northern District of California is a "clearly more convenient" forum for the instant action than the Eastern District of Texas.

A. Private-Interest Factor One: Ease of Access to Sources of Proof

Google asserts that there is greater ease of access to sources of proof in the Northern District of California than in the Eastern District of Texas. Specifically, Google argues that the Northern District of California is where the challenged conduct occurred, where Google has its headquarters, and where its executives and most of its employees work. Google maintains that none of its challenged conduct is alleged to have occurred in the Eastern District of Texas. Google further asserts that, because the complaint refers to a number of Google communications authored or possessed by employees that work in Northern California or New York, but not Texas, those communications and documents are more readily available in the Northern District of California.

Plaintiff States contest Google's assertion that the challenged **[*11]** conduct occurred in the Northern District of California, maintaining instead that Google's conduct occurred throughout the country. Plaintiff States further argue that Google has presented no evidence that any specific, relevant documents are actually located in the Northern District of California. Plaintiff States have also presented evidence that Google stores its electronic documents in thirteen data-storage centers across the country and that all but two of these centers are located closer to the Eastern District of Texas than to the Northern District of California. (Dkt. #46 at 10).

The Court agrees with Plaintiff States: Google has not demonstrated that the ease of access to sources of proof is relatively greater in the Northern District of California than in the Eastern District of Texas. In considering this factor, courts look to where "documents and physical evidence" are stored. *Seven Networks, LLC v. Google LLC, No. 2:17-CV-442, 2018 U.S. Dist. LEXIS 146375, 2018 WL 4026760, at *2 (E.D. Tex. Aug. 15, 2018)* (citing *Volkswagen, 545 F.3d at 316*).[2]

In *Seven Networks*, Google, seeking a convenience transfer to the Northern District of California, argued that much of the evidence was "located in or maintained by Google's Northern California offices." *Id.* (citation omitted). However, the court observed that "the **[*12]** vast majority of Google's electronic records are hosted in secure servers *managed from* its Northern California offices, not *stored in* its Northern California offices." *Id.* (quotations omitted). Consistent with the Fifth Circuit's admonition that technological improvements to the ease of access to electronic documents has not rendered the ease-of-access factor superfluous, the *Seven Networks* court held that the physical location of sources of proof must still be considered. *2018 U.S. Dist. LEXIS 146375, [WL] at *3* (citing, among others, *Volkswagen, 545 F.3d at 316*). The evidence showed that Google stored its electronic documents in facilities outside of Northern California—and that all but one of those facilities were closer to the Eastern District of Texas. The plaintiff further presented evidence of specific sources of proof that could be found in the Eastern District of Texas. For its part, Google presented no such specific evidence. *Id.* Rather, Google claimed only that some of the documentary evidence that might be relevant would likely be located in Northern California. *2018 U.S. Dist. LEXIS 146375, [WL] at *4*. The *Seven Networks* court reasoned that the fact that evidence "might" exist in a particular location, absent any identification of the specific documents, is insufficient. *Id.* ***[*13]*** Accordingly, the court held that the ease-of-access factor weighed against transfer. *2018 U.S. Dist. LEXIS 146375, [WL] at *7*.

Google's ease-of-access arguments here mirror those that it presented in *Seven Networks*. Google asserts that the ease-of-access factor favors transfer because Google's headquarters and the headquarters of several potentially relevant nonparties are located in the Northern District of California. But Google has failed to present any evidence of the specific documents or kinds of documents allegedly located in Northern California. By contrast, Plaintiff States have provided rebuttal evidence that Google's electronic documents are located in storage facilities outside of Northern California (most of which are closer to this district than to the Northern District of California) and that ten potential third-party witnesses possess relevant documents stored closer to this district. (Dkt. #46-7-11) (sealed exhibits).

Furthermore, Plaintiff States have confirmed, and Google does not dispute, that much of the relevant documentary evidence is contained in Austin, Texas, at the Office of the Attorney General of Texas as a result of the extensive investigation that precipitated this suit. Google maintains that **[*14]** the location of these relevant and voluminous materials is irrelevant because Austin is in the Western District of Texas rather than the Eastern District of Texas. Google misunderstands the burden of proof on this issue. Plaintiff States do not have to establish that the Eastern District of Texas is the most convenient venue in which this case could be litigated. Rather, Google, as the party seeking transfer, must establish that the Northern District of California is a clearly more convenient venue than the Eastern District of Texas. In regard to the ease of access to documents located in Austin, Texas, the Northern District of California is certainly not a more convenient forum than the Eastern District of Texas.

For all of these reasons, the ease-of-access factor weighs against transfer.

B. Private-Interest Factor Two: Availability of Compulsory Process to Secure Attendance of Unwilling Witnesses

Federal Rule of Civil Procedure 45 allows courts to subpoena a nonparty witness to ensure attendance at trial "within 100 miles of where the person resides, is employed, or regularly transacts business in person" or a party

[2] The *Seven Networks* court rejected Google's argument that witnesses constitute sources of evidence under this first factor, noting that the *Volkswagen* court emphasized and analyzed only documentary evidence under this factor. *Seven Networks, 2018 U.S. Dist. LEXIS 146375, 2018 WL 4026760, at *3* (citing *Volkswagen, 545 F.3d at 316*).

witness's attendance at trial "within the state where the person resides, is employed or regularly transacts **[*15]** business in person." *Fed. R. Civ. P. 45(c)(1)*. Courts are to consider the availability of this compulsory process to secure the attendance of witnesses—especially nonparty witnesses—in making convenience-transfer determinations. *Seven Networks, 2018 U.S. Dist. LEXIS 146375, 2018 WL 4026760, at *7* (citing *Volkswagen, 545 F.3d at 316*). Only witnesses potentially unwilling to attend trial are considered under this factor. Identifying a pool of likely unwilling witnesses has some probative value in determining convenience, although greater specificity as to the identity of those witnesses creates greater probative value. *2018 U.S. Dist. LEXIS 146375, [WL] at *8*.[3]

Google argues that it would be unable to subpoena witnesses from relevant third parties, such as competitors and former Google employees, many of whom reside or work in California. Plaintiff States counter that Google is merely speculating that these witnesses would be unwilling to attend. Moreover, Plaintiff States identify seventy-nine potential nonparty witnesses within 100 miles of this Court who could be subpoenaed for attendance at trial. (Dkt. #46-2). Thus, Plaintiff States argue, this factor should weigh against transfer "because transfer would merely redistribute the inconvenience of lacking the ability to subpoena non-party witnesses" from one party to the others. *Perritt v. Jenkins, No. 4:11-CV-23, 2011 U.S. Dist. LEXIS 89614, 2011 WL 3511468, at *5 (E.D. Tex. July 18, 2011)*.

The Court **[*16]** agrees that the presence of potential nonparty witnesses within both districts' respective ambits means that this factor does not weigh in favor of transfer. However, neither party has demonstrated beyond mere speculation the unwillingness of these potential witnesses to attend trial. Ultimately, therefore, this factor is neutral as to the requested venue transfer.

C. Private-Interest Factor Three: Cost of Attendance for Willing Witnesses

As the Fifth Circuit has held, it is obviously more convenient for witnesses to testify closer to home, and additional distance means additional travel, meal, and lodging costs, as well as additional time away from the witnesses' regular employment. *Volkswagen, 545 F.3d at 317*. "When the distance between an existing venue for trial of a matter and a proposed venue under *§ 1404(a)* is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled." *Id.* (citation omitted). Significantly, this factor relates primarily to the inconvenience placed on willing nonparty witnesses, not party witnesses. *See, e.g., Seven Networks, 2018 U.S. Dist. LEXIS 146375, 2018 WL 4026760, at *9* (collecting cases); *Frederick v. Advanced Fin. Sols., Inc., 558 F.Supp.2d 699, 704 (E.D. Tex. 2007)* ("The availability and convenience of party-witnesses is generally insignificant because **[*17]** a transfer based on this factor would only shift the inconvenience from movant to nonmovant.").

In *Seven Networks*, the court found that the inconvenience to Google's party witnesses if the case was not transferred would generally be the same as the inconvenience to the plaintiff's party witnesses if the case was transferred, and thus concluded that the two concerns canceled each other out. *Seven Networks, 2018 U.S. Dist. LEXIS 146375, 2018 WL 4026760, at *12*. However, Google also specifically identified a willing potential nonparty witness, and the inconvenience to that witness weighed "heavily in the analysis," causing the Court to ultimately determine that this factor weighed "slightly in favor of transfer." *Id.*

Here, as in *Seven Networks*, the inconvenience to the party witnesses, which is given little weight, would only be shifted from Google to Plaintiff States by a transfer.[4] Further, Google has specifically named only one potential

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[3] The compulsory-process factor weighs heaviest against or for transfer when either the transferor or transferee has "absolute subpoena power," meaning that "all relevant and material non-party witnesses reside within the subpoena power of a particular court." *Volkswagen, 545 F.3d at 316*. Because neither this district nor the Northern District of California has absolute subpoena power, the magnitude of this factor is diminished.

[4] Google maintains that transfer would not shift the inconvenience to the Plaintiff States because the inconvenience of litigating this case in the Northern District of California is no greater than the inconvenience of doing so in the Eastern District of Texas for most of the Plaintiff States. However, as Google concedes, this district is a more convenient forum for the lead Plaintiff State—

nonparty witness who possibly resides in the Northern District of California and would therefore be inconvenienced by a trial in this district. (Dkt. #63-2 ¶5) (sealed exhibit). As to other potential nonparty witnesses, Google appears to presume that such witnesses reside in Northern California without pointing to any **[*18]** specific witnesses or entities. Plaintiff States, on the other hand, have specified thirteen potential nonparty witnesses, each of whom is located closer to this district and each of whom has expressed his or her willingness to travel to this district to testify at trial.[5] (Dkt. #46-7-16) (sealed exhibits). Thus, this factor weighs against transfer.

D. Private-Interest Factor Four: All Other Practical Problems

The fourth private-interest factor includes "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Volkswagen, 545 F.3d at 315*. This "all-other-practical-problems" factor is a "Catch-All Factor," *ExpressJet Airlines, Inc. v. RBC Cap. Mkts. Corp., No. H-09-992, 2009 U.S. Dist. LEXIS 64411, 2009 WL 2244468, at *9 (S.D. Tex. July 27, 2009)*, comprising all practical considerations "rationally based on judicial economy," *i.e.*, the efficient application of judicial resources, *Seven Networks, 2018 U.S. Dist. LEXIS 146375, 2018 WL 4026760, at *12*. For example, "the existence of duplicative suits involving the same or similar issues may create practical difficulties that will weigh heavily in favor or against transfer." *Seven Networks, 2018 U.S. Dist. LEXIS 146375, 2018 WL 4026760, at *12* (citation omitted).

Courts need not find the issues in the two sets of litigation to be identical in order for this factor to weigh in favor of transfer, but, typically, the issues must be at least "substantially" similar. *See, e.g., TravelPass, 2019 U.S. Dist. LEXIS 142227, 2019 WL 3806056, at *15-16* (concluding that, where the cases **[*19]** did not involve "precisely the same issues" and the court could not say that the other district court was "well-versed in *all* of the claims, parties, and issues before the Court presently," the factor was, at least, "neutral" (cleaned up)); *Princeton Digit. Image Corp. v. Facebook, Inc., No. 2:11-CV-400, 2012 U.S. Dist. LEXIS 119432, 2012 WL 3647182, at *5 (E.D. Tex. Aug. 23, 2012)* (transferring action where pending cases involved the same patent); *Fujitsu Ltd. v. Tellabs, Inc., 639 F.Supp.2d 761, 768 (E.D. Tex. 2009)* (transferring where the two actions involved "substantially similar issues" regarding patents relating to the "same technology," even though the cases might "not involve precisely the same issues"); *Westberry v. GusTech Commc'ns, LLC, No. 3:17-CV-3162, 2018 U.S. Dist. LEXIS 123753, 2018 WL 3548869, at *9 (N.D. Tex. July 24, 2018)* (involving "identical FLSA claims").

The decision in *TravelPass* is instructive here. In that case, the plaintiffs brought several antitrust and related claims in the Eastern District of Texas. *2019 U.S. Dist. LEXIS 142227, 2019 WL 3806056, at *1*. Defendants sought to transfer the case under *Section 1404(a)* to the Northern District of Illinois, primarily because a putative class action with similar allegations had been pending in that district for over a year. *2019 U.S. Dist. LEXIS 142227, [WL] at *2*. The two actions concerned the same core set of facts, the same antitrust statute, and nearly all the same defendants. *Id.* Nevertheless, the court concluded that the judicial-economy factor (subsumed under the all-other-practical-problems factor) was neutral. *2019 U.S. Dist. LEXIS 142227, [WL] at *16*. On one hand, the court recognized **[*20]** that "numerous courts have held that transfer for the purpose of consolidating concurrent, ongoing actions is proper where the concurrent actions are based on precisely the same issues." *2019 U.S. Dist. LEXIS 142227, [WL] at *15* (citations omitted). On the other hand, the court was not persuaded that the case and the pending out-of-district action involved "precisely the same issues." *Id.*

Moreover, the court rejected the defendant's argument that the judicial-economy factor was, by itself, "determinative" in the case. *2019 U.S. Dist. LEXIS 142227, [WL] at *14*. Specifically, the *TravelPass* court was concerned that no other factors weighed in favor of transfer, unlike in the other cases cited by the defendants in which the courts found transfer proper. *Id.* Having determined that the other three private-interest factors were neutral and that two of the public-interest factors were neutral, one weighed against transfer, and one weighed in

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Texas. Further, the Court notes that, by any measure, the majority of Plaintiff States are closer to the Eastern District of Texas than to the Northern District of California.

[5] Plaintiff States have also identified thirty-four additional nonparty witnesses located closer to this district, although statements regarding those witnesses' willingness to appear in this district have not been produced. (Dkt. #46-1 ¶ 3).

favor of transfer, 2019 U.S. Dist. LEXIS 142227, [WL] at *12-14, 16-18, the *TravelPass* court held that the defendants had "failed to carry their burden to show the Northern District of Illinois is a clearly more convenient venue," 2019 U.S. Dist. LEXIS 142227, [WL] at *18

Here, similar to *TravelPass*, Google points to several antitrust class actions pending in the Northern District of California "that, like this case, accuse **[*21]** Google of monopolistic conduct related to digital advertising and seek both damages and injunctive relief on behalf of publishers and advertisers." (Dkt. #61 at 2). In Google's view, given the similarity of the cases, the Northern District of California would be a "clearly more convenient" forum to resolve this case together with the California class cases.

Google correctly notes that the central allegations in the cases pending against it in the Northern District of California mirror the core allegations of the Plaintiff States here; that is, that Google has engaged in purportedly anticompetitive conduct in markets associated with online display advertising. However, the private class actions pending in the Northern District of California involve different claims, parties, defenses, and damages than this case. Further, the various proposed class plaintiffs in those cases will be required to meet the criteria of Federal Rule of Civil Procedure 23 before they can litigate their claims on a classwide basis. In this regard, the procedural posture of the proposed private class actions in the Northern District of California undermines Google's argument that judicial economy will necessarily be advanced by transferring this **[*22]** case. Those actions are likely to undergo class discovery followed by class-certification motion practice, none of which is relevant to the case pending before this Court. Consolidating this case with multiple putative class actions would therefore introduce a substantial risk of unnecessary delay associated with Rule 23 proceedings, which may be complex and heavily litigated, and which are unrelated to this litigation. *See* TravelPass, 2019 U.S. Dist. LEXIS 142227, 2019 WL 3806056, at *16 (concluding that transferring a non-class action to be consolidated with a putative class action would have a negative effect on judicial economy due to the nature of class certification).

Further, this case was filed following an eighteen-month investigation by the Plaintiff States, which involved the production of millions of documents and the participation of over sixty witnesses. Under the circumstances, the materials and information already disclosed in the underlying investigation will aid the discovery process in this case. The parties in the California cases, however, will likely have to collect materials and information that have already been gathered here through the Plaintiff States' pre-suit investigation.[6] The plaintiffs here are sovereign states that have **[*23]** filed suit as *parens patriae* on behalf of citizens allegedly harmed by Google's conduct in online-display-advertising markets; therefore, no class allegations are at issue and no Rule 23 proceedings are implicated in this case. Additionally, this case involves state-law claims that are not at issue in the private class actions pending in the Northern District of California, including consumer-protection and deceptive-trade-practices claims that are dissimilar to the putative class plaintiffs' claims. Such differing claims implicate differing evidence and legal issues.

In sum, the Court concludes that, rather than presenting precisely the same issues as this case, the private class actions pending in the Northern District of California—while premised on the same underlying theories concerning Google's alleged anticompetitive conduct—involve claims, parties, defenses, damages, and procedural frameworks that differ materially from those in this case. Given the important distinctions between this case and those pending in the Northern District of California, Google has failed to establish that transfer of this case would clearly preserve judicial **[*24]** economy. *See, e.g.*, TravelPass, 2019 U.S. Dist. LEXIS 142227, 2019 WL 3806056, at *15.[7]

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[6] For example, in their initial requests for discovery, the plaintiffs in *In re Google Digital Advertising Antitrust Litigation* indicated that they seek "100,000 pages of documents that Google reportedly produced to the Texas Attorney General." No. 5:20-cv-03556, Dkt. #37 at 2 (N.D. Cal. Oct. 16, 2020).

[7] The Court notes that the class-action lawsuits in the Northern District of California referenced by Google are themselves not all pending before the same judge. Most of the cases are pending before Judge Freeman and have been consolidated into two related actions. *See generally In re Google Digit. Advert. Antitrust Litig.*, No. 5:20-cv-03556-BLF, (N.D. Cal.); *In re Google Digit. Publisher Antitrust Litig.*, No. 5:20-cv-08984-BLF, (N.D. Cal.). However, Judge Freeman rejected the relation of one other suit on which Google relies, and it remains pending before Judge Gilliam. *See In re Google Digit. Advert. Antitrust Litig.*, No. 5:20-cv-

E. Public-Interest Factor One: Court Congestion

The first public-interest factor is the speed with which a case can come to trial and be resolved. *Deep Green Wireless LLC v. Ooma, Inc., 2:16-CV-0604, 2017 U.S. Dist. LEXIS 23509, 2017 WL 679643, at *6 (E.D. Tex. Feb. 21, 2017)* (citing *In re Genentech, Inc., 566 F.3d 1338, 1347 (Fed. Cir. 2009)*). Generally, this factor favors a district that can bring a case to trial faster. *Ho Keung Tse v. Blockbuster, LLC, No. 4:12-CV-328, 2013 U.S. Dist. LEXIS 33234, 2013 WL 949844, at *5 (E.D. Tex. Jan. 17, 2013)*, *report and recommendation adopted*, *No. 4:12cv328, 2013 U.S. Dist. LEXIS 32060, 2013 WL 942496 (E.D. Tex. Mar. 8, 2013)*. However, this factor is "the most speculative," and "case-disposition statistics may not always tell the whole story" because "[c]omplex cases . . . need more time for discovery and take longer to get to trial" no matter where they proceed. *Va. Innovation Sci., Inc. v. Amazon.com, Inc., 2019 U.S. Dist. LEXIS 117004, 2019 WL 3082314, at *32 (E.D. Tex. July 15, 2019)*.

According to the December 2020 Federal Court Management Statistics report, the median time from filing of a civil case to its disposition in the Eastern District of Texas is 8.9 months, and the median time from filing to trial is 17.5 months.[8] In the Northern District of California, those median times are 11.3 months and 37.6 months, respectively.[9]

Google argues that "transfer unquestionably achieves overall efficiency because it places this case **[*25]** in the same district as numerous other antitrust cases against Google that concern the same claims." (Dkt. #28 at 12). Plaintiff States respond that, because the median times are shorter in this district, this factor "weighs heavily against transfer." (Dkt. #46 at 17-18).

The Court concludes that this factor weighs against transfer. Google is correct that, in theory, consolidating cases regarding precisely the same facts and legal claims should create greater "overall efficiency." However, as noted in Section III.D., *supra*, the factual and legal issues in the instant case are not "precisely the same" as those presented in the private class action cases pending in the Northern District of California. Given the substantive and procedural distinctions between this case and the class cases in the Northern District of California, particularly the anticipated class discovery and motion practice associated with the private actions referenced by Google, it is likely that transferring this case to the Northern District of California would result in this litigation being delayed by class proceedings.

Further, as discussed above, the instant action is in a unique position because, as a *parens patriae* ***[*26]*** and government-enforcement action, Plaintiff States have already conducted a substantial pre-suit investigation, and thus the discovery required in this action will likely be significantly truncated compared to the discovery in the California actions. Therefore, based on both the shorter median disposition and trial times in this district and the likelihood of a shorter discovery period if this action is kept separate, the Court concludes that this factor weighs against transfer.

F. Public-Interest Factor Two: Deciding Local Interests at Home

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03556-BLF, Dkt. #108 (Mar. 2, 2021) (denying motion to relate *SPX Total Body Fitness LLC v. Google LLC*, No. 4:21-cv-00801-HSG (N.D. Cal.)).

Accordingly, it is not obvious that, were the Court to transfer this case, it would be assigned to any particular judge presiding over cases involving similar allegations against Google. *See* *TravelPass, 2019 U.S. Dist. LEXIS 142227, 2019 WL 3806056, at *16* (noting that the defendants could not meet their burden by simply assuming that the similar cases would be consolidated before a single judge if the case were transferred).

[8] UNITED STATES COURTS, *U.S. District Courts—Federal Court Management Statistics—Profiles—During the 12-Month Periods Ending December 30, 2015 Through 2020*, available at https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2020.pdf (last accessed May 20, 2021).

[9] *Id.*

"There is little doubt" that a district "has a local interest in the disposition of any case involving a resident corporate party." *Seven Networks, 2018 U.S. Dist. LEXIS 146375, 2018 WL 4026760, at *14*. Because Google's principal place of business is located there, the Northern District of California has an obvious interest in deciding this case.

But at least one of the Plaintiff States, Texas, has an equally strong interest in resolving this case in a district within the state. Further, Texas has brought this action on behalf of Texas advertisers, publishers, competitors, and consumers, many of whom are located in the Eastern District of Texas. By contrast, because California has not joined as a plaintiff in this **[*27]** action, Plaintiff States have not and could not bring their action on behalf of California advertisers, publishers, competitors, and consumers. Thus, because the Northern District of California has an interest in deciding a case involving Google, a California-based company, and because the Eastern District of Texas has an equal interest in deciding a case involving Texas advertisers, publishers, competitors, and consumers, this factor is neutral.

G. Public-Interest Factor Three: Familiarity of the Forum with the Governing Law of the Case

In addition to federal antitrust claims, each Plaintiff State asserts causes of action under its own law. "The need to apply a particular state's law may weigh in favor of or against transfer." *Calypso Wireless, Inc. v. T-Mobile USA, Inc., No. 2:08-CV-441, 2010 U.S. Dist. LEXIS 155260, 2010 WL 11469012, at *5 (E.D. Tex. Mar. 31, 2010)*.

The State of California is not a Plaintiff in this case, and this action contains no claims arising under California law. Google therefore concedes that the Northern District of California does not have greater familiarity than this Court with any law to be applied in this case. The State of Texas, however, asserts two causes of action arising under Texas law, with which this Court likely has a greater degree of familiarity than does the Northern District of **[*28]** California. Because the claims arising under Texas law amount to only two of thirty state-law claims asserted in an action that also involves significant federal claims, this factor weighs only slightly against transfer.

H. Public-Interest Factor Four: Avoidance of Unnecessary Problems of Conflict of Laws or in the Application of Foreign Law

The parties do not dispute that this factor is neutral. The Court agrees.

IV. Conclusion

In light of the foregoing, Google has failed to establish that any private-interest factor or public-interest factor weighs in favor of transfer, and several factors weigh against transfer. Thus, Google has failed to meet its burden to establish that the Northern District of California is a clearly more convenient venue for the instant litigation than the Eastern District of Texas. It is therefore **ORDERED** that Google's Motion to Transfer Venue Pursuant to *28 U.S.C. § 1404(a)*, (Dkt. #28), is **DENIED**.

So ORDERED and SIGNED this 20th day of May, 2021.

/s/ Sean D. Jordan

SEAN D. JORDAN

UNITED STATES DISTRICT JUDGE

Pac. Steel Grp. v. Commercial Metals Co.

United States District Court for the Northern District of California

May 21, 2021, Decided; May 21, 2021, Filed

Case No. 20-cv-07683-HSG

Reporter

2021 U.S. Dist. LEXIS 97113 *; 2021 WL 2037961

PACIFIC STEEL GROUP, Plaintiff, v. COMMERCIAL METALS COMPANY, et al., Defendants.

Subsequent History: Claim dismissed by *Pac. Steel Grp. v. Commer. Metals Co., 2022 U.S. Dist. LEXIS 75797 (N.D. Cal., Apr. 26, 2022)*

Core Terms

rebar, manufacturing, alleges, micro, steel, market power, market share, antitrust, relevant market, mini, competitors, geographic, anticompetitive, customers, fabrication, Sherman Act, output, sales, restraint of trade, judicial notice, foreclose, leave to amend, vertical, radius, build, built, costs, zone, motion to dismiss, rule of reason

LexisNexis® Headnotes

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

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

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

Fed. R. Civ. P. 8(a) requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief. Rule 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. To survive a Rule 12(b)(6) motion, a plaintiff need only plead enough facts to state a claim to relief that is plausible on its face. A claim is facially plausible when a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

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

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

In reviewing the plausibility of a complaint, courts accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party. Nevertheless, courts do not accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.

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

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

HN3[] **Motions to Dismiss, Failure to State Claim**

Even if the court concludes that a Fed. R. Civ. P. 12(b)(6) motion should be granted, the court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Public Records

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

HN4[] **Adjudicative Facts, Facts Generally Known**

Under Fed. R. Evid. 201, a court may take judicial notice of a fact not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Rule 201(b)(2). Accordingly, a court may take judicial notice of matters of public record, but cannot take judicial notice of disputed facts contained in such public records. The Ninth Circuit has clarified that if a court takes judicial notice of a document, it must specify what facts it judicially noticed from the document. Further, just because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth.

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

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

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

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

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

HN5[] **Relevant Market, Geographic Market Definition**

A threshold step in any antitrust case is to accurately define the relevant market, which refers to the area of effective competition. The plaintiff must allege both that a relevant market exists and that the defendant has power within that market. Such allegations need not be pled with specificity. Although the validity of the relevant market is typically a factual element rather than a legal one, an antitrust complaint may be dismissed under Fed. R. Civ. P.

12(b)(6) if the complaint's relevant market definition is facially unsustainable. The relevant market must include both a geographic market and a product market.

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

HN6[] Relevant Market, Geographic Market Definition

A properly defined geographic market extends to the area of effective competition in which buyers can turn for alternative sources of supply.

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

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

HN7[] Relevant Market, Product Market Definition

The question of what constitutes a relevant market is factual, and not usually appropriate to resolve at the motion to dismiss stage.

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

HN8[] Relevant Market, Product Market Definition

A properly defined product market must encompass the product at issue as well as all economic substitutes for the product. Whether a product can be substituted is determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.

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

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

HN9[] Scope, Monopolization Offenses

Market power is demonstrated by a party's ability to raise prices profitably by restricting output. Market power cannot be inferred solely from the existence of entry barriers and a dominant market share. The ability to control output and prices—the essence of market power—depends largely on the ability of existing firms to quickly increase their own output in response to a contraction by the defendant.

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

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

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

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

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

HN10[] Per Se Rule Tests, Manifestly Anticompetitive Effects

The United States Supreme Court has made clear that a market power analysis is required for antitrust claims based on vertical restraints. Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the court first defines the relevant market. The possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power.

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

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

HN11[] Attempts to Monopolize, Elements

The Ninth Circuit has explained that while market share is just the starting point for assessing market power, market share, at least above some level, could support a finding of market power in the absence of contrary evidence. Where such an inference is not implausible on its face, an allegation of a specific market share is sufficient, as a matter of pleading, to withstand a motion for dismissal.

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

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

HN12[] Scope, Monopolization Offenses

The Ninth Circuit has been reluctant to apply bright-line rules regarding market share in deciding whether a defendant has market power to restrict output or raise prices. The Ninth Circuit has advised courts to be wary of the numbers game of market percentage, and instead consider relevant market factors including market share, entry barriers and the capacity of existing competitors to expand output.

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

HN13[] Actual Monopolization, Monopoly Power

Market power can be plausibly alleged even with a low market share if other anticompetitive factors are adequately alleged.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN14[] Sherman Act, Claims

In order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a relevant market.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN15[] **Sherman Act, Claims**

Ninth Circuit precedent holds that to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a relevant market.

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

HN16[] **Per Se Rule & Rule of Reason, Sherman Act**

The United States Supreme Court has repeatedly emphasized that there is no duty to deal under the terms and conditions preferred by a competitor's rivals. Likewise, the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. This is because the antitrust laws, including the Sherman Act, were enacted for the protection of competition, not competitors.

Torts > ... > Types of Premises > Recreational Facilities > Sports Facilities

HN17[] **Recreational Facilities, Sports Facilities**

The limited exception to the general rule that there is no antitrust duty to deal comes under the United States Supreme Court's decision in Aspen Skiing. The Ninth Circuit has explained that the Aspen Skiing exception applies in limited circumstances where a company (1) unilaterally terminates a voluntary and profitable course of dealing; (2) the only conceivable rationale or purpose is to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition; and (3) the refusal to deal involves products that the defendant already sells in the existing market to other similarly situated customers.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN18[] **Sherman Act, Claims**

Section 1 of the Sherman Act prohibits every contract, combination, or conspiracy, in restraint of trade or commerce among the several States. 15 U.S.C.S. § 1. The United States Supreme Court has long held that, the phrase "restraint of trade" is best read to mean undue restraint. Therefore, to establish liability under § 1, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade.

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

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

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

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

HN19[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

A restraint of trade may be found unreasonable under either a per se rule or the rule of reason burden-shifting framework. A minority of restraints are found per se unreasonable because they always or almost always tend to restrict competition and decrease output. Restraints that are not unreasonable per se are judged under the rule of reason. The rule of reason requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition.

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

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

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

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

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

HN20[] **Scope, Monopolization Offenses**

Typically only horizontal restraints—restraints imposed by agreement between competitors'—qualify as unreasonable per se. A common example is price fixing. On the other hand, vertical restraints should nearly always be analyzed under the rule of reason. An exclusive-dealing arrangement does not constitute a per se violation of § 1 of the Sherman Act.

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

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

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

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

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

HN21[] Scope, Monopolization Offenses

A vertical restraint of trade is not per se illegal under § 1 of the Sherman Act unless it includes some agreement on price or price levels.

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

HN22[] Exclusive & Reciprocal Dealing, Exclusive Dealing

The main antitrust objection to exclusive dealing is its tendency to foreclose existing competitors or new entrants from competition in the covered portion of the relevant market during the term of the agreement.

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

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

HN23[] Exclusive & Reciprocal Dealing, Exclusive Dealing

Under the antitrust rule of reason, an exclusive dealing arrangement violates § 1 of the Sherman Act only if its effect is to foreclose competition in a substantial share of the line of commerce affected. The Ninth Circuit has indicated that in analyzing allegations of market foreclosure, courts are to consider alternative sources available to competitors. The foreclosure calculation includes the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN24[] Sherman Act, Claims

To establish liability under § 2 of the Sherman Act, a plaintiff must show: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN25[] **Sherman Act, Claims**

Antitrust injury means injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Essentially, a plaintiff must adequately allege that its loss flows from an anticompetitive aspect or effect of the defendants' behavior. If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal per se. A causal link between a plaintiff's injuries and a defendant's actions alone is not enough to sustain an antitrust claim.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

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

HN26[] **Sherman Act, Claims**

Injuries to a competitor that do not also harm competition are not grounds for antitrust claims. The antitrust laws, including the Sherman Act, were enacted for the protection of competition, not competitors and therefore the Sherman Act generally does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. Where the defendant's conduct harms the plaintiff without adversely affecting competition generally, there is no antitrust injury.

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

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

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

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

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

HN27[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Competition may be promoted rather than harmed by vertical agreements because they have potential to stimulate interbrand competition, the primary concern of ***antitrust law***. That said, vertical restraints certainly can injure competition when they foreclose competitors from entering or competing in a market.

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

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

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

HN28[] **Supplemental Jurisdiction, Pendent Claims**

A district court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction. 28 U.S.C.S. § 1367(c)(3). In the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims.

Counsel: **[*1]** For Pacific Steel Group, Plaintiff: Christopher C. Wheeler, Esq., LEAD ATTORNEY, PRO HAC VICE, Farella Braun & Martel LLP, San Francisco, CA; Daniel McCuaig, PRO HAC VICE, Benjamin Doyle Brown, Daniel A. Small, Cohen Milstein Sellers & Toll, PLLC, Washington, DC; Matthew W Ruan, Cohen Milstein Sellers & Toll, PLLC, New York, NY.

For Commercial Metals Company, Defendant: Bonnie Lau, LEAD ATTORNEY, Ian Kiely Bausback, Morrison & Foerster LLP, San Francisco, CA; David I. Gelfand, PRO HAC VICE, Alexis Lazda, CLEARY GOTTLIEB STEEN & HAMILTON LLP, Washington, DC; Mark Leddy, PRO HAC VICE, Clearly Gottlieb Steen & Hamilton LLP, Washington, DC.

For C M C Steel Fabricators, Inc., CMC Steel US, LLC, Defendants: Bonnie Lau, LEAD ATTORNEY, Ian Kiely Bausback, Morrison & Foerster LLP, San Francisco, CA; Alexis Lazda, David I. Gelfand, CLEARY GOTTLIEB STEEN & HAMILTON LLP, Washington, DC; Mark Leddy, Clearly Gottlieb Steen & Hamilton LLP, Washington, DC.

For Danieli Corporation, Defendant: Lisa Tenorio-Kutzkey, LEAD ATTORNEY, Elizabeth Cherise Callahan, Mandy Chan, DLA Piper LLP (US), San Francisco, CA; John J. Hamill, DLA Piper LLP (US), Chicago, IL; Michael Spencer Pullos, DLA PIper LLP US, Chicago, **[*2]** IL.

For Gerdau Reinforcing Steel, Defendant: Bonnie Lau, LEAD ATTORNEY, Morrison & Foerster LLP, San Francisco, CA.

For CMC Rebar West, Defendant: Bonnie Lau, LEAD ATTORNEY, Morrison & Foerster LLP, San Francisco, CA; Alexis Lazda, CLEARY GOTTLIEB STEEN & HAMILTON LLP, Washington, DC; David I. Gelfand, Cleary Gottlieb Steen & Hamilton LLP, Mark Leddy, Clearly Gottlieb Steen & Hamilton LLP; Ian Kiely Bausback, Morrison & Foerster LLP, San Francisco, CA.

Judges: HAYWOOD S. GILLIAM, JR., United States District Judge.

Opinion by: HAYWOOD S. GILLIAM, JR.

Opinion

ORDER GRANTING MOTIONS TO DISMISS

Re: Dkt. Nos. 39, 40, 41, 49

Pending before the Court are motions to dismiss filed by Defendants Commercial Metals Company and its subsidiaries and Defendant Danieli Corporation. Dkt. Nos. 39, 40. For the following reasons, the Court **GRANTS** the motions to dismiss with **LEAVE TO AMEND**.

I. BACKGROUND

A. Causes of Action

Plaintiff Pacific Steel Group ("PSG" or "Plaintiff") brings this action for injunctive relief, damages, and restitution against Defendants Commercial Metals Company ("CMC") and its subsidiaries, CMC Steel Fabricators, Inc. d/b/a CMC Rebar ("CMC Rebar"), CMC Steel US, LLC ("CMC Steel US"), and Gerdau Reinforcing Steel ("GRS") **[*3]** (collectively, "CMC" or the "CMC Defendants") and Defendant Danieli Corporation ("Danieli") for violations of *Sections 1* and *2 of the Sherman Act*, California antitrust and unfair competition statutes, and California common law. Dkt. No. 1 ("Compl.") at 1. PSG lists eight causes of action:

1. Conspiracy in restraint of trade against CMC and Danieli in violation of the *Sherman Act (15 U.S.C. § 1*) and the California Cartwright Act (*Cal. Bus. & Prof. Code § 16720*);

2. Monopolization against CMC in violation of the *Sherman Act (15 U.S.C. § 2*);

3. Attempted monopolization (in the alternative) against CMC in violation of the *Sherman Act (15 U.S.C. § 2*);

4. Conspiracy to monopolize against CMC and Danieli in violation of the *Sherman Act (15 U.S.C. §§ 1*, *2*) and the California Cartwright Act (*Cal. Bus. & Prof. Code § 16720*);

5. Below cost sales against CMC Rebar, CMC Steel US, and GRS in violation of the California Unfair Practices Act (*Cal. Bus. & Prof. Code § 17043*);

6. Loss leader sales against CMC Rebar, CMC Steel US, and GRS in violation of the California Unfair Practices Act (*Cal. Bus. & Prof. Code § 17044*);

7. Unlawful and unfair business practices against all defendants in violation of the California Unfair Competition Law (*Cal. Bus. & Prof. Code § 17200*);

8. Interference with prospective economic advantage against CMC in violation of California common law. Compl. ¶¶ 124-169.

B. Parties

PSG is a fabricator and installer of steel reinforcing bar ("rebar") based in San Diego. Compl. ¶ 17. CMC is a U.S.-based manufacturer and fabricator of rebar and is the parent company to CMC Rebar, CMC **[*4]** Steel, and CMC Steel US. *Id.* ¶ 18. According to the Complaint, CMC is the largest rebar manufacturer and fabricator in the United States. *Id.* CMC Rebar is a subsidiary of CMC and is in the fabrication and installation market ("Furnish-and-Install"). *Id.* ¶ 19. As of 2018, CMC Rebar owns the assets and liabilities of GRS. *Id.* CMC Steel US is a subsidiary of CMC and markets and manufactures rebar, among other things. *Id.* ¶ 20. GRS, like PSG and CMC Rebar, is in the Furnish-and-Install market. *Id.* ¶ 21. Danieli builds mills and plants for metal industries. *Id.* ¶ 22.

C. Factual Allegations

Entities in the Furnish-and-Install market, like PSG, buy rebar from rebar manufacturers, like CMC. *Id.* ¶ 3. PSG desires to vertically integrate by entering the rebar manufacturing market. *Id.* Rebar manufacturing is done in steel mills, of which there are three types: traditional integrated steel mills, mini mills (which came into prominence in the 1960s), and micro mills, the first of which was built in 2009 by CMC and Danieli. *Id.* ¶ 42-53. According to PSG, "building a traditional integrated mill requires enormous startup costs and historically was only economical to build when done on an enormous scale **[*5]** with millions of tons of annual capacity or more" whereas "mini mills require lower capital costs and provide higher returns on equity" by controlling costs and using advanced technology. *Id.* ¶ 43, 48-49. Micro mills are allegedly the future of rebar manufacturing because, unlike traditional or mini mills, they "output[] directly into rebar." *Id.* ¶ 52. "This enables a micro mill not only to be more efficient, it also requires a smaller physical footprint and lower capital expenditures." *Id.* According to PSG, these gains in efficiency and lower startup costs are the reason that "[s]ince building its first micro mill over ten years ago, CMC has not built any other type of mill." *Id.* ¶ 57.

PSG wants to build a micro mill. *Id.* ¶ 3. According to the Complaint, "[t]he only commercially viable way for PSG to enter the relevant rebar manufacturing market [is] to construct a micro mill, as opposed to a mini mill that requires a significantly greater capital investment and employs older, less efficient technology." *Id.* ¶ 5.

Danieli is the only company to have developed and sold a micro mill. *Id.* Danieli has sold or is in the process of selling five such micro mills using its proprietary ("MI.DA") **[*6]** technology; three of these deals have gone to CMC and two to CMC's largest national competitor, Nucor Corporation. *Id.* ¶ 7. CMC's first micro mill, which was located in Mesa, Arizona, was subject to an exclusivity provision covering a radius of 400 miles from Mesa. *Id.*

PSG met with Danieli in late 2019 to begin negotiations to build an environmentally friendly micro mill. *Id.* ¶ 85. Initially, the plan was to build the micro mill in Pittsburg, California, which is outside of the 400-mile exclusivity provision of CMC's first micro mill. *Id.* ¶ 89. At the same time, however, Danieli was allegedly negotiating with CMC for CMC's purchase of another MI.DA mill to be located in Mesa, Arizona. *Id.* PSG's Pittsburg site location fell through, and it decided instead to secure property within the greater Los Angeles basin. *Id.* ¶ 91. Ultimately, negotiations between PSG and Danieli were cut short when Danieli and CMC finalized their agreement for a third micro mill. *Id.* ¶ 95. The agreement includes an exclusivity provision which bars Danieli from selling one of their proprietary micro mills to any company other than CMC within a 500-mile radius of Rancho Cucamonga, California for 69 months. *Id.* ¶ **[*7]** 5. This radius covers approximately half of Utah, nearly all of Arizona, the majority of Nevada, and almost all of California (up to just south of Redding). *Id.* ¶ 97. Rancho Cucamonga is not the planned site of the new mill in Arizona, but instead is apparently the location of one of CMC's mini mills which is soon to be retired. *Id.* ¶ 98. PSG claims this new exclusivity agreement "effectively prevents construction of any rebar mill within the 500-mile radius for over five years because the most efficient means of manufacturing rebar is the MI.DA mill." *Id.* ¶ 8.

CMC's new mill will allegedly employ the "technology PSG had been led to believe it would be developing in conjunction with Danieli." *Id.* ¶ 95. PSG alleges that "CMC promoted the new mill as embracing the very alternative energy use concepts PSG had laid out to Danieli in their initial November 2019 meeting." *Id.* Additionally, PSG alleges that Danieli "inappropriately shared PSG's [Pittsburg, CA] site consideration with CMC." *Id.* ¶ 89. PSG alleges that CMC opted for a 500-mile exclusionary zone from Rancho Cucamonga, California—as opposed to Mesa, Arizona—in part because that zone includes Pittsburg, California. *Id.* ¶ 99; Dkt. **[*8]** No. 99 ("Opp.") at 8.

PSG also alleges that building a micro mill outside the reach of the 500-mile restriction is not commercially feasible due to the cost to transport rebar, especially to PSG's southern California facilities and customers. Compl. ¶ 101. According to PSG, a significant majority of rebar sales are to customers located within 500 miles of a mill. *Id.* ¶ 108.

Finally, PSG also alleges that Defendants in the Furnish-and-Install market (CMC Rebar, CMC Steel US, and GRS) have for years priced their services below cost and used loss leaders "in an effort to minimize PSG's growth, profitability, effectiveness, and efficiency." *Id.* ¶ 1. Allegedly, "[d]espite a California construction boom and rising demand for rebar Furnish-and-Install services, CMC Rebar and GRS have sustained heavy losses in their Furnish-and-Install businesses since at least 2017, due in large part to bidding below cost." *Id.* ¶ 63. PSG also claims that

"CMC Rebar has been accused [by former employees] of below-cost bidding in other geographic areas," like Texas, in efforts to undercut competitors and force them to "go broke." *Id.* ¶¶ 64-65.

II. LEGAL STANDARD

HN1[] Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain **[*9]** statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Rule 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)*. To survive a Rule 12(b)(6) motion, a plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

HN2[] In reviewing the plausibility of a complaint, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. Nevertheless, courts do not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Secs. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (quoting *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*).

HN3[] Yet even if the court concludes that a 12(b)(6) motion should be granted, the "court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could **[*10]** not possibly be cured by the allegation of other facts." *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)* (en banc) (quotation omitted).

In *Khoja v. Orexigen Therapeutics*, the Ninth Circuit clarified the judicial notice rule and incorporation by reference doctrine. *See* *899 F.3d 988 (9th Cir. 2018)*. **HN4**[] Under Federal Rule of Evidence 201, a court may take judicial notice of a fact "not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Accordingly, a court may take "judicial notice of matters of public record," but "cannot take judicial notice of disputed facts contained in such public records." *Khoja, 899 F.3d at 999* (citation and quotations omitted). The Ninth Circuit has clarified that if a court takes judicial notice of a document, it must specify what facts it judicially noticed from the document. *Id. at 999*. Further, "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Id.* As an example, the Ninth Circuit held that for a transcript of a conference call, the court may take judicial notice of the fact that there was a conference call on the specified date, but may not take judicial notice of a fact mentioned **[*11]** in the transcript, because the substance "is subject to varying interpretations, and there is a reasonable dispute as to what the [document] establishes." *Id. at 999-1000*.

III. DISCUSSION

A. Sherman Act Antitrust Plaintiffs Must Establish A Geographic Market, A Product Market, And Market Power

HN5[] "A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.'" *Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 992 (9th Cir. 2020)* (citing *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285, 201 L. Ed. 2d 678 (U.S. 2018)*). "[T]he plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market." *Newcal Indus., Inc. v. Ikon Off. Sol.,* 513 F.3d 1038, 1044 (9th Cir. 2008). Such allegations need not be pled with specificity. *Id.* Although the "validity of the 'relevant market' is typically a factual element rather than a legal one," an antitrust complaint may be dismissed under Rule 12(b)(6) "if the complaint's 'relevant market' definition is facially unsustainable." *Id.* "The relevant market must include both a geographic market and a product market." Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1120 (9th Cir. 2018). PSG alleges two relevant markets: a rebar manufacturing market centered near Los Angeles, which PSG seeks to enter, and Furnish-and-Install markets in the Los Angeles Basin and the San Francisco Bay Area, in which PSG currently competes.

i. Geographic Market

HN6[] A properly defined geographic **[*12]** market extends to the "area of effective competition" in which "buyers can turn for alternative sources of supply." *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)* (citation and internal quotation marks omitted). PSG alleges the relevant Furnish-and-Install market covers a 200-mile radius from the Los Angeles basin (PSG's Southern California fabrication facilities), and a 200-mile radius from the San Francisco Bay Area (PSG's Northern California fabrication facilities). Compl. ¶ 117. PSG alleges the relevant rebar manufacturing market covers a "500-mile radius from the high desert area near the greater Los Angeles basin." *Id.* ¶ 109.

With respect to the Furnish-and-Install market, PSG alleges that rebar is "costly to ship due to its weight and irregular shape[,]" and that "additional trips to the construction site are sometimes needed." *Id.* ¶ 115. Therefore, "[t]he large majority of sales of Furnish-and-Install services are provided at construction sites within 200 miles of the fabrication plant." *Id.* ¶ 116. As a result, the alleged Furnish-and-Install product market extends 200 miles from each of PSG's fabrication facilities. The Court finds that PSG has plausibly alleged this market.[1]

With respect to the rebar manufacturing market, **[*13]** PSG contends that "[r]ebar's weight makes it expensive to ship, especially relative to the cost of manufacturing rebar." Compl. ¶ 30. "There are substantial cost advantages to sourcing rebar locally to reduce shipping costs." *Id.* As a result, "[a] significant majority of rebar sales are to customers located within 500 miles of a mill, and most of those sales are to customers located less than 400 miles away." *Id.* ¶ 108. On this basis, PSG alleges that the relevant rebar market is defined by the outer limits of what is economical to ship.

CMC contends that PSG's allegations regarding the geographic market are conclusory and implausible. Dkt. No. 40 ("CMC Mot.") at 8. CMC argues that a geographic market must include all sellers to whom a purchaser can reasonably turn, including imports, and that because at least some rebar in California is supplied by imports, PSG's claimed geographic market is implausible. *Id.* (citing Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)). PSG acknowledges that foreign imports account for at least some (roughly 7%) of total rebar sourced in California. Compl. ¶ 33.[2]

HN7[] The question of what constitutes a relevant market is factual, and not usually appropriate to resolve at the motion to dismiss stage. **[*14]** Newcal Indus., 513 F.3d at 1045. Because PSG has plausibly alleged that transportation costs are a determinative factor in the geographic scope of the rebar market and that the majority of rebar sales are to customers located within 500 miles of a mill, its alleged geographic market is not "facially

[1] While CMC asserts that "[t]his geographic scope is not supported by any facts," CMC Mot. at 14, CMC fails to address the alleged facts about the Furnish-and-Install market's geographic scope, and fails to explain why these facts do not satisfy the pleading standard.

[2] CMC notes that the complaint does not allege the percentage of rebar bought from domestic suppliers located outside of PSG's geographic market and requests judicial notice of documents that purport to show PSG's purchase of rebar from Washington, Nevada, Oregon, and Texas. CMC Mot. at 3-4, 9. The Court **DENIES** CMC's request for judicial notice, Dkt. No. 41, because CMC asks the Court to resolve a factual dispute through "judicial notice of disputed facts contained in such . . . records." *See* Khoja, 899 F.3d at 999.

unsustainable." *Id.* Accordingly, the Court finds that PSG has plausibly alleged a geographic rebar manufacturing market.

ii. Product Market

HN8[] A properly defined product market "must encompass the product at issue as well as all economic substitutes for the product." *Id. at 1045* (citation omitted). Whether a product can be substituted is "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id.* (citing *Brown Shoe v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*). Concerning the rebar manufacturing market, PSG alleges that "[s]teel rebar is used to reinforce concrete slabs in construction projects. . . . It is virtually impossible to complete a commercial construction project without using rebar to reinforce concrete structures." Compl. ¶ 106. Alternatives, like stainless steel, are far more expensive and are not commercially viable. *Id.* Concerning the Furnish-and-Install market, PSG alleges that fabrication **[*15]** and installation "services are necessary for steel rebar to be used to reinforce concrete in a structure, and there are no substitutes for these services." *Id.* ¶ 114. These factual allegations are sufficient to plausibly allege a product market.

iii. CMC's Market Power

PSG's Sherman Act claims also require plausible allegations of market power. *See Newcal Indus., 513 F.3d at 1044 n. 3* ("The 'relevant market' and 'market power' requirements apply identically under the two different sections of the Act, meaning that the requirements apply identically to all six of [plaintiff's] claims.").[3] ***HN9***[] Market power is demonstrated by a party's "ability to raise prices profitably by restricting output." *Am. Express Co., 138 S. Ct. at 2288* (citation omitted). "Market power cannot be inferred solely from the existence of entry barriers and a dominant market share." *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1441 (9th Cir. 1995)*. "The ability to control output and prices—the essence of market power—depends largely on the ability of existing firms to quickly increase their own output in response to a contraction by the defendant." *Id.*

HN11[] The Ninth Circuit has explained that "[w]hile market share is just the starting point for assessing market power, . . . market share, at least above some level, could support a finding of market power in the **[*16]** absence of contrary evidence." *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co., 99 F.3d 937, 950-51 (9th Cir. 1996)* (quoting *Hunt—Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 925 (9th Cir.1980)*). "Where such an inference is not implausible on its face, an allegation of a specific market share is sufficient, as a matter of pleading, to withstand a motion for dismissal." *Id.* (emphasis removed).

With respect to the rebar market, PSG "believes that CMC has accounted for approximately 50% of the total rebar sold in the relevant market during the relevant time period." Compl. ¶ 111. CMC contends that this allegation is conclusory and below the threshold of 65% market share generally required by courts. CMC Mot. at 7. ***HN12***[] The Ninth Circuit, however, has been "reluctant to apply such bright-line rules regarding market share in deciding whether a defendant has market power to restrict output or raise prices." *Rebel Oil, 51 F.3d at 1438 n.10*. The Ninth Circuit has advised courts to be "wary of the numbers game of market percentage," and instead consider relevant market factors including "market share, entry barriers and the capacity of existing competitors to expand output." *Id.* Given that the complaint includes allegations of 50% market share and "[s]ubstantial barriers to entry . . . that make

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[3] PSG argues that because it has alleged direct evidence the Defendants excluded competition, it need not establish CMC's market power. Opp. at 12-13. ***HN10***[] But the Supreme Court has made clear that a market power analysis is required for antitrust claims based on vertical restraints. *Am. Express, 138 S. Ct. at 2285 n.7* ("Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market. . . . '[T]he possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power.'" (citations omitted)).

CMC's market power durable," Compl. ¶¶ 71, 111-112, the Court finds that PSG has **[*17]** plausibly alleged CMC's market power in the rebar manufacturing market.

With respect to the Furnish-and-Install market, "PSG estimates that CMC Rebar's market share in each of the relevant markets has ranged between 15% and 30% during the relevant time period." Compl. ¶ 119. But a market share of somewhere between 15% and 30% does not appear to be enough to establish market power. *See* *Distance Learning Co. v. Maynard, No. 19-cv-03801-KAW, 2020 U.S. Dist. LEXIS 99256, 2020 WL 2995529, at *7 (N.D. Cal. June 4, 2020)* (noting "the 'gray area of the law' between the 30% and 65% thresholds identified by the Ninth Circuit."). PSG disagrees and cites three cases in support of its argument that market power can exist below 30% of market share. Opp. at 14 (citing *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291, 1301 (9th Cir. 1982)*; *United States v. Visa U.S.A., Inc., 344 F.3d 229 (2nd Cir. 2003)*; *Toys "R" Us, Inc. v. F.T.C., 221 F.3d 928, 937 (7th Cir. 2000)*). But none of those cases stand for the proposition that a market share below 30%, *standing alone*, equates to market power. The court in *Twin City Sportservice* "found unreasonable restraint of trade had been evidenced not only by Sportservice's 24 percent share of the relevant market, but also from its continuing *pattern of conduct that produced that market share*," including predatory franchise agreements. *676 F.2d at 1301* (emphasis added). The court in *Visa U.S.A.* found defendants had market power because merchants "could not refuse to accept payment by Visa [47% market share] **[*18]** or MasterCard [26% market share], even if faced with significant price increases, because of customer preference." *344 F.3d at 239-40*. And the court in *Toys "R" Us* found that defendant had market power not because of its 20% market share but because of "direct evidence of anticompetitive effects." *221 F.3d at 937*. ***HN13***[] In short, market power can be plausibly alleged even with a low market share if other anticompetitive factors are adequately alleged.

Here, PSG's allegations regarding the Furnish-and-Install market are focused on state law unfair practices claims rather than Sherman Act violations. Compl. ¶¶ 148-157. PSG does allege that Defendants' anticompetitive behavior in the rebar manufacturing market will result in loss of access to a lower-cost supply of rebar for PSG's Furnish-and-Install business, *Id.* ¶¶ 128, 133-134, 140-141, 146-147, but these allegations are conclusory and stem from alleged anticompetitive behavior in the rebar manufacturing market rather than the Furnish-and-Install market. Taking PSG's allegations as a whole, the Court finds that PSG has not plausibly alleged that CMC's market share of 15-30% coupled with other behavior establishes market power in the Furnish-and-Install market. According, **[*19]** PSG's Sherman Act claims against CMC in the Furnish-and-Install market are **DISMISSED WITH LEAVE TO AMEND**.

iv. Danieli's Market Power

HN14[] As discussed above, "[i]n order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a 'relevant market.'" *Newcal Indus., 513 F.3d at 1044*. But PSG does not allege that Danieli has market power in either the rebar manufacturing market or the Furnish-and-Install market. *See* Compl. at 28-29, 31. Rather, Danieli builds and supplies steel mills. *Id.* ¶ 22.

Still, PSG contends that a supplier that has entered into an anticompetitive vertical agreement with a customer may be subject to antitrust liability for harm caused in the customer's downstream market, relying on *Beech Cinema, Inc. v. Twentieth Century Fox-Film Corp., 622 F.2d 1106 (2d Cir. 1980)*, and similar cases. Opp. at 31. The Court finds that *Beech Cinema* and the other cases cited by PSG are of limited persuasive value. In addition to being out of circuit authority that is decades old, the cases relied upon by PSG do not squarely analyze whether a supplier like Danieli can be held liable under the Sherman Act for anticompetitive behavior in a market in which it does not participate. ***HN15***[] In the absence of clear authority to the contrary, the Court will rely on **[*20]** Ninth Circuit precedent holding that "to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a 'relevant market.'" *Newcal Indus., 513 F.3d at 1044*. PSG is not pleading that the market for steel mills is being restrained. Rather, PSG is pleading that the rebar manufacturing and Furnish-and-Install markets are being restrained. But Danieli is not a participant in those markets and is not alleged to have market power within them.

Further, PSG's arguments come close to implying that Danieli has an antitrust duty to deal with PSG. As Danieli points out, PSG does not allege that it was barred from contracting with another builder of steel mills, or with Danieli to build a different type of steel mill, such as a mini mill, within the exclusivity zone. Dkt. No. 39 at 3-4. Rather, PSG alleges that it was barred from contracting with Danieli for one specific type of steel mill, i.e. a micro mill, that it preferred at a location of its choosing. ***HN16***[] "As the Supreme Court has repeatedly emphasized, there is 'no duty to deal under the terms and conditions preferred by [a competitor's] rivals[.]" *Qualcomm, 969 F.3d at 993* (citations omitted). Likewise, "the Sherman Act 'does not restrict the long recognized **[*21]** right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Id.* "This is because the antitrust laws, including the Sherman Act, were enacted for the protection of *competition*, not *competitors*." *Id.* (citations and quotation marks omitted). ***HN17***[] The limited exception to the "general rule that there is no antitrust duty to deal comes under the Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*." *Id.* The Ninth Circuit has explained that the *Aspen Skiing* exception applies in limited circumstances where a company (1) "unilateral[ly] terminat[es]. . .a voluntary and profitable course of dealing;" (2) "the only conceivable rationale or purpose is 'to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition;'" and (3) "the refusal to deal involves products that the defendant already sells in the existing market to other similarly situated customers." *Id.* (citations omitted). It may be that PSG is able to adequately allege facts supporting this exception, but it has not done so in the current complaint. Accordingly, the Court **DISMISSES WITH LEAVE TO AMEND** the **[*22]** claims against Danieli.

B. First Cause of Action: Conspiracy In Restraint Of Trade By CMC And Danieli In Violation Of The Sherman Act, Section 1

HN18[] *Section 1 of the Sherman Act* prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. The Supreme Court has long held that, "the phrase 'restraint of trade' is best read to mean 'undue restraint.'" *Am. Express Co., 138 S. Ct. at 2283*. Therefore, "[t]o establish liability under *§ 1*, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016)* (citation omitted). Because PSG's Sherman Act claims against CMC in the Furnish-and-Install Market and against Danieli are not adequately pled, as discussed above, the Court need only consider whether PSG has adequately alleged an unreasonable restraint of trade against CMC in the rebar manufacturing market.

i. Existence Of An Agreement

The parties do not dispute that a contract exists between CMC and Danieli, and PSG's factual allegations are sufficient to establish an agreement. Therefore, the first element of a *Sherman Act Section 1* claim is satisfied.

ii. An Unreasonable Restraint of Trade

HN19[] A restraint of trade may be found unreasonable under either a per se **[*23]** rule or the "rule of reason" burden-shifting framework. *Am. Express, 138 S. Ct. at 2283-2284*. A minority of restraints are found per se unreasonable because they "always or almost always tend to restrict competition and decrease output. . . . Restraints that are not unreasonable per se are judged under the 'rule of reason.'" *Id.* (citation omitted). "The rule of reason requires courts to conduct a fact-specific assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect' on competition." *Id.* (citation omitted).

HN20[] "Typically only 'horizontal' restraints—restraints 'imposed by agreement between competitors'—qualify as unreasonable *per se*." *Id. at 2284* (citation omitted). A common example is price fixing. On the other hand, vertical restraints should nearly always be analyzed under the rule of reason. *Id.*; *see also Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 996 (9th Cir. 2010)* ("[A]n exclusive-dealing arrangement does not constitute a per se violation of *section 1*."). PSG contends that CMC and Danieli's conduct is a per se violation of federal and California state antitrust laws. Compl. ¶ 127. But the parties do not dispute that the agreement at issue—establishing the micro-mill exclusivity zone—is vertical, and PSG has not pled that CMC and Danieli agreed to set prices. **[*24]** *See Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc., No. 12-cv-05847-WHO, 2014 U.S. Dist. LEXIS 16631, 2014 WL 524076, at *9 (N.D. Cal. Feb. 6, 2014)* ("***HN21***[] A vertical restraint of trade is not per se illegal under *§ 1 of the Sherman Act* unless it includes some agreement on price or price levels." (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*)). PSG has not provided any other reason why the Court should analyze the agreements at issue under the per se rule. As a result, the Court finds that the rule of reason applies.

In its motion to dismiss, CMC argues that PSG fails to adequately allege that entry into the rebar manufacturing market is foreclosed by the exclusivity zone, relying on caselaw that addresses "exclusive-dealing" arrangements. CMC Mot. at 9-10. 12-14. In response, PSG argues that it is not bringing an exclusive-dealing claim, such that market foreclosure is not at issue. Opp. at 21. Rather, PSG argues that the relevant question is whether the contract restriction constitutes "anticompetitive conduct." *Id.* The Court finds this argument curious. It is true that the CMC-Danieli exclusivity zone is not "an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor" and thus does not fit squarely within the traditional definition of an exclusive-dealing relationship. *See Allied Orthopedic 592 F.3d at 996*. But the "anticompetitive conduct" that PSG alleges **[*25]** is an exclusive relationship between a provider of an essential input into a market, i.e. steel mills, and a customer. *See* Compl. ¶ 110 ("CMC was able to exclude PSG by conspiring with the sole provider of the technology PSG needs to profitably enter the market."). And the harm alleged by PSG is foreclosure from the rebar manufacturing market. *Id.* ¶ 100 ("Exclusive access not only *forecloses* PSG's entry into the relevant rebar manufacturing market, but blocks entry by other potential competitors as well.") (emphasis added).

Given that the harm alleged by PSG is market foreclosure due to an exclusive relationship between a provider and its customer, the Court is not persuaded by PSG's argument that the authority on exclusive dealing and market foreclosure is irrelevant. On the contrary, the Court finds that the contractual relationship at issue between CMC and Danieli is analogous enough to a traditional exclusive-dealing relationship to make the precedent in that area helpful in analyzing PSG's allegations of anticompetitive conduct. *See Omega Env't, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997)* (***HN22***[] "The main antitrust objection to exclusive dealing is its tendency to 'foreclose' existing competitors or new entrants from competition in the covered **[*26]** portion of the relevant market during the term of the agreement.").

HN23[] "Under the antitrust rule of reason, an exclusive dealing arrangement violates Section 1 only if its effect is to 'foreclose competition in a substantial share of the line of commerce affected.'" *Allied Orthopedic, 592 F.3d at 996*. The Ninth Circuit has indicated that in analyzing allegations of market foreclosure, courts are to consider alternative sources available to competitors. *Omega Env't, 127 F.3d at 1162-63* (quoting with approval the proposition that the "foreclosure calculation 'includes the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations.'").[4]

PSG claim that it is foreclosed from the rebar manufacturing market by the exclusivity zone is undermined by PSG's own factual allegations. The premise of PSG's claim is that entry into the rebar manufacturing market *must* be via a micro mill built by Danieli. *See* Compl. ¶¶ 5, 113, 126. In support, PSG alleges that "all three of the new mills CMC has built (or is building) since 2009 are [micro] mills . . . as are both of the mills built recently by Nucor Corporation." **[*27]** Opp. at 4; Compl. ¶¶ 55-57, 98. But this, at best, suggests only that micro mills are preferable to mini mills, not that mini mills are obsolete, or that "[t]he *only* commercially viable way for PSG to enter the relevant rebar manufacturing market [is] to construct a micro mill." Compl. ¶ 5 (emphasis added).

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[4] While the Ninth Circuit's decision in *Omega Environmental* dealt with a claim under *Section 3 of the Clayton Act*, the Ninth Circuit has applied similar standards in Sherman Act cases and held that "a *greater* showing of anticompetitive effect is required to establish a Sherman Act violation than a section three Clayton Act violation in exclusive-dealing cases." *Twin City Sportservice, 676 F.2d at 1304 n.9* (emphasis added).

On the contrary, a necessary implication of PSG's allegations is that other competitors are operating successfully in the rebar manufacturing market without micro mills. For example, PSG alleges that CMC controls 50% of the Los Angeles-based rebar manufacturing market even though CMC is the only manufacturer in the region using a micro mill. *Id.* ¶ 111. Thus, accepting PSG's allegations as true, at least half of the market is being supplied by traditional or mini mills. CMC itself uses mini mills and has purchased them quite recently: while it may be true that all of the mills CMC has built recently are micro mills, CMC agreed to acquire four steel mills from Gerdau in 2018, none of which are micro mills. *Id.* ¶ 69. PSG concedes that mini mills are "capable of generating profits on rebar through cost control and advanced technology." *Id.* ¶ 49. Finally, PSG alleges that it is a superior **[*28]** competitor. *Id.* ¶ 62 ("PSG's innovative and efficient operations and its high performance standards yield superior performance and lower costs"). So, a reasonable inference is that PSG could, like those companies already in the rebar market, compete using a mini mill.

In short, PSG's claim elides the difference between "the most efficient means of entry or expansion—the MI.DA mill—" and the ability to enter the market at all. *Id.* ¶ 113. It may be true that micro mills are highly efficient and an improvement on mini mills. *Id.* ¶ 52-60. Micro mills can, for example, output directly to rebar rather than steel billets (which must later be crafted into rebar); mini mills cannot. *Id.* But neither PSG's allegations, nor reasonable inferences from them, plausibly allege that building a micro mill with Danieli is the *only* way to enter the rebar manufacturing market. Because PSG's restraint of trade claim is based on its complete exclusion from the rebar manufacturing market and because the facts alleged by PSG suggest that manufacturing using mini mills is a viable means of competing in the market, the Court finds that PSG has not adequately alleged an unreasonable restraint of trade.[5] Accordingly, **[*29]** PSG's conspiracy in restraint of trade claim is **DISMISSED WITH LEAVE TO AMEND**.

C. Second Through Fourth Causes of Action: Monopolizations Claims In Violation Of The Sherman Act, Section 2

HN24[] To establish liability under *Section 2 of the Sherman Act*, "a plaintiff must show: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury." *Qualcomm, 969 F.3d at 990* (quotation marks omitted).

"'***HN25***[] Antitrust injury' means 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)*. Essentially, PSG must adequately allege that its loss "flows from an *anticompetitive* aspect or effect of" Defendants' behavior. *Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir. 2011)*. "'If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal per se.'" *Id.* A causal link between a plaintiff's injuries and a defendant's actions alone is not enough to sustain an antitrust claim. *See Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 902 (9th Cir. 2008)*.

PSG alleges that competition in the rebar manufacturing market has been harmed in a number of ways: PSG claims that it would have been a "a lower-cost producer with the **[*30]** ability and incentive to price below the market and spur greater price competition" had it entered the rebar manufacturing market; that "additional production capacity and output and the resulting additional competition is excluded from the market"; and that "other potential entry into the relevant rebar manufacturing market is foreclosed." Compl. ¶ 126. But the only basis upon which PSG rests these claims is the allegation that "[t]he *only* commercially viable way for PSG to enter the relevant rebar manufacturing market [is] to construct a micro mill." *Id.* ¶ 5 (emphasis added). As discussed above, PSG's allegations, and reasonable inferences drawn from them, do not adequately foreclose the possibility that

[5] The Court notes that the exclusionary zone challenged by PSG centers on Rancho Cucamonga, California and not Mesa, Arizona, the site of the planned CMC micro mill. While certainly revealing with respect to CMC's motives, this fact does not obviate the need for PSG to plausibly allege all necessary elements of its Sherman Act claims. Additionally, even if CMC had opted to center the second exclusionary zone on Mesa, Arizona, that still would have foreclosed PSG from building a micro mill in the greater Los Angeles basin.

PSG or other competitors could enter the rebar market using mini mills rather than a micro mill built by Danieli, which is the only type of steel mill affected by the alleged anticompetitive conduct.

PSG also claims personal injuries, asserting that, since it is barred from the rebar manufacturing market, "it will lose sales of rebar and the profits thereon; and . . . [it] is losing access to a lower-cost supply of rebar for its rebar Furnish-and-Install business." Compl. ¶ 134. ***HN26***[] Setting **[*31]** aside the issue of whether PSG is in fact barred from the rebar manufacturing market, injuries to a competitor that do not also harm competition are not grounds for antitrust claims. *See* *Qualcomm, 969 F.3d at 993* (explaining that "the antitrust laws, including the Sherman Act, were enacted for the protection of *competition*, not *competitors*" and therefore the Sherman Act generally "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."); *Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1158 (9th Cir. 2003)* ("Where the defendant's conduct harms the plaintiff without adversely affecting competition generally, there is no antitrust injury.").

HN27[] To that end, competition may be promoted rather than harmed by vertical agreements, like the ones at issue here, because they have "potential to stimulate interbrand competition, 'the primary concern of ***antitrust law***.'" *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. And PSG, as a purchaser of rebar, may in fact be helped by this interbrand competition if it results in lower priced rebar available from CMC. *See* *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 329, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (finding that plaintiff did not suffer antitrust injury in part because the alleged conspiracy would have worked to its advantage). **[*32]** That said, vertical restraints certainly can injure competition when they "foreclose competitors from entering or competing in a market." *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1198-1200 (9th Cir. 2012)*. But, again, PSG has not adequately pled that it has been prevented from entering the rebar manufacturing market.

In short, because PSG's has not adequately pled causal antitrust injury, its monopolization claims are **DISMISSED WITH LEAVE TO AMEND**.

D. Fifth Through Eighth Causes of Action (State Law Claims)

HN28[] A district court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction. *Sanford v. MemberWorks, Inc., 625 F.3d 550, 561 (9th Cir. 2010)* (citing *28 U.S.C. § 1367(c)(3)*). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.* (citation and internal quotations omitted).

PSG alleges that the Court has subject matter jurisdiction over the federal claims and supplemental jurisdiction over the state claims. Compl. ¶ 11. Having dismissed all the federal claims, the Court, in its discretion, declines to assert supplemental jurisdiction **[*33]** over the remaining state law claims unless and until PSG can state a valid federal claim. Accordingly, PSG's state law claims are **DISMISSED** without prejudice. Plaintiff may reassert these claims (but no new state law claims) in any amended complaint.

IV. CONCLUSION

The Court **GRANTS** Defendants' motions to dismiss with **LEAVE TO AMEND**.[6] Dkt. Nos. 39, 40. Plaintiff may not add any new causes of action or defendants to an amended complaint, and any amended complaint must be filed within 21 days from the date of this Order.

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[6] The Court also **DENIES AS MOOT** Defendants' motion to stay discovery pending the Court's decision on Defendants' motion to dismiss. Dkt. No. 49.

IT IS SO ORDERED.

Dated: 5/21/2021

/s/ Haywood S. Gilliam, Jr.

HAYWOOD S. GILLIAM, JR.

United States District Judge

Cigna Corp. v. Celgene Corp.

United States District Court for the Eastern District of Pennsylvania

May 24, 2021, Decided; May 24, 2021, Filed

CIVIL ACTION NO. 21-90-KSM

Reporter
2021 U.S. Dist. LEXIS 97590 *; 2021 WL 2072210

CIGNA CORPORATION, Plaintiff, v. CELGENE CORPORATION, et al., Defendants.

Prior History: *United HealthCare Servs. v. Celgene Corp., 2020 U.S. Dist. LEXIS 226940, 2020 WL 7074626 (D. Minn., Dec. 3, 2020)*

Core Terms

venue, generic, motion to transfer, alleges, parties, weigh, antitrust claim, memorandum, factors, drugs, public interest factors, transferring, antitrust, cases, state law, Counts

Counsel: **[*1]** For CIGNA CORPORATION, Plaintiff: URIEL RABINOVITZ, LEAD ATTORNEY, LOWEY DANNENBERG, P.C., WHITE PLAINS, NY; PETER D. ST. PHILLIP, LOWEY DANNENBERG, P.C., TEL 914-997-0500, WHITE PLAINS, NY.

For CELGENE CORPORATION, BRISTOL-MYERS SQUIBB COMPANY, Defendants: ARTHUR J. ARGALL , III, LEAD ATTORNEY, WILLIAMS & CONNOLLY, WASHINGTON, DC; BENJAMIN M. GREENBLUM, COLETTE CONNOR, JOHN E. SCHMIDTLEIN, LEAD ATTORNEYS, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC; LATHROP B. NELSON, III, LEAD ATTORNEY, MONTGOMERY MCCRACKEN WALKER AND RHOADS, L.L.P., PHILADELPHIA, PA; ANDREA N. PHILLIPS, MONTGOMERY MCCRACKEN, PHILADELPHIA, PA.

Judges: KAREN SPENCER MARSTON, J.

Opinion by: KAREN SPENCER MARSTON

Opinion

MEMORANDUM

MARSTON, J.

Plaintiff Cigna Corporation filed this action against Defendants Celgene Corporation and its parent company Bristol-Meyers Squibb Corporation ("BMS") (collectively Defendants) alleging that Defendants violated federal and state antitrust laws by suppressing generic competition against Celgene's Thalomid and Revlimid drugs. (Doc. No. 1.) Presently before the Court is the parties' joint motion to transfer venue to the District of New Jersey pursuant to *28 U.S.C. § 1404(a)*. (Doc. No. 17.) Following a status conference with the Court, the **[*2]** parties filed a supplemental memorandum in support of their joint motion to transfer providing additional information related to BMS's presence in the Eastern District of Pennsylvania.[1] (Doc. No. 19.) For the reasons that are discussed below, the parties' joint motion will be granted.

I.

Cigna's complaint alleges six counts against Defendants: (I) violation of *Section 2 of the Sherman Act*; (II) a monopolization and monopolistic scheme under various state laws; (III) an attempted monopolization under state laws; (IV) unfair and deceptive trade practices under state laws; (V) unjust enrichment under state laws; and (VI) declaratory and injunctive relief under *Section 16* of the Clayton Act for Celgene's violations of *Section 2 of the Sherman Act*. (*Id.* at ¶¶ 448-89.) The facts of this action are complex, as evidenced by Cigna's 131-page complaint. As relevant to this Memorandum, the facts are as follows.[2]

Cigna is a Delaware corporation with a principal place of business in Bloomfield, Connecticut. (Doc. No. ¶ at ¶ 14.) Cigna is the parent company of or is otherwise affiliated with businesses that operate specialty pharmacies, health insurance plans, and prescription drug plans. (*Id.* at ¶¶ 15-16.) Celgene is a pharmaceutical company, incorporated in Delaware **[*3]** and with a principal place of business in Summit, New Jersey, that manufactures and markets Thalomid and Revlimid. (*See id.* at ¶ 19.) BMS is Celgene's parent company and is incorporated in Delaware, with a principal place of business in New York City, New York. (*Id.* at ¶ 20.) BMS has owned Celgene since January 2, 2019. (*Id.*) According to the parties' supplemental memorandum in support of their joint transfer motion, BMS also leases a storage facility in Falsington, Pennsylvania, which is located within the Eastern District of Pennsylvania. (Doc. No. 19 at ¶ 4.)

The prescription drug market is subject to a complex regulatory scheme designed to balance the intellectual property rights of pharmaceutical companies, patient health and safety, and the benefits of free-market competition. (*See id.* at ¶¶ 21-67.) Federal law requires companies that invent a new drug to obtain approval from the Food and Drug Administration ("FDA") before they may sell the drug.[3] (*Id.* at ¶ 28 (citing *21 U.S.C. § 355(b)*).)

At issue in this suit are the allegedly unlawful tactics that Defendants purportedly employed to protect two of Celgene's name-brand drugs, Thalomid and Revlimid, from generic competition. **[*4]** (*Id.* at ¶ 1.) Cigna alleges that Celgene manipulated its Risk Evaluation and Mitigation Strategy ("REMS") programs for these drugs, abused the patent process related to them, and filed baseless citizen petitions, all to prevent generic manufacturers from producing generic versions of the drugs. (*Id.*) Cigna also alleges that when these efforts failed, Celgene paid off generic manufacturers to delay bringing their generic versions of the drugs to market. (*Id.* at ¶ 2. *See generally id.* at ¶¶ 77-417.)

But for this alleged misconduct, Cigna claims that generic Thalomid would have been commercially available in early 2009, and generic Revlimid would have entered the market in or around 2010. (*Id.* at ¶¶ 419-420.) The result of Celgene's conduct, Cigna says, was the illegal maintenance of a monopoly over the sale of Thalomid and Revlimid, allowing Celgene to artificially inflate the prices of these drugs without fear of lost sales. (*Id.* at ¶ 430.) Additionally, Cigna asserts that it was personally injured by Celgene's alleged misconduct in that the misconduct forced Cigna to spend more money on Thalomid and Revlemid than it would have otherwise had to if those drugs were subject to generic **[*5]** competition. (*Id.* at ¶ 425.) Cigna and its subsidiaries have purchased both Thalomid and Revlemid from Celgene in this District. (*Id.* at ¶ 12.)

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[1] The parties also argued that if the Court were to find venue improper, transfer to the District of New Jersey would also be proper pursuant to *28 U.S.C. § 1406(a)*. (Doc No. 19 at 2-3.)

[2] Unless otherwise noted, these facts are all drawn from Cigna's complaint. At this stage of the litigation, we take the well-pleaded allegations in Cigna's complaint as true. *See* *Lewis v. Nat'l Bd. of Osteopathic Med. Exam'rs, Civil Action No. 20-4368, 2020 U.S. Dist. LEXIS 232062, 2020 WL 7260747, at *1 n.1 (E.D. Pa. Dec. 10, 2020)*.

[3] New drugs that are approved by the FDA become known as "brand-name drugs"; when these same drugs are manufactured and sold by other companies, they are known as "generic drugs." *See Generic Drug Facts*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/drugs/generic-drugs/generic-drug-facts (last accessed May 6, 2021).

This is one of several cases that has been filed in federal and state courts across the country by various plaintiffs alleging the same basic violations against Defendants. (*See* Doc. No. 17 at ¶¶ 2, 10.) In this case, as well as at least three other cases, Defendants have filed motions to transfer to the District of New Jersey, where similar cases are pending.[4]

II.

Although the parties have stipulated to a transfer of venue to the District of New Jersey, the Court must independently evaluate whether transfer is appropriate. *See* *White v. ABCO Eng'g Corp., 199 F.3d 140, 142 (1999)* ("We conclude that *§ 1404(a)* transfers may not be made simply by stipulation."). "In addressing a motion to transfer, 'all well-pleaded allegations in the complaint are generally taken as true unless contradicted by the defendant's affidavits, and the Court may examine facts outside the complaint to determine proper venue.'" *Lewis, 2020 U.S. Dist. LEXIS 232062, 2020 WL 7260747, at *1 n.1* (quoting *Holiday v. Bally's Park Place, Inc., CV No. 06-4588, 2007 U.S. Dist. LEXIS 66554, 2007 WL 2600877, at *1 (E.D. Pa. Sept. 10, 2007)*).

In federal court, venue transfers are governed by *28 U.S.C. §§ 1404(a)* and *1406(a)*. *Jumara v. State Farm Ins. Co., 55 F.3d 873, 878 (3d Cir. 1995)*. *Section 1404(a)* governs transfer when "both the original and the requested venue are proper." *Id.* Under *§ 1404(a)*, a district **[*6]** court may for the convenience of the parties and witnesses and if it is in the interest of justice "transfer any civil action to any other district or division where it may have been brought or to any district or division to which all parties have consented." *See* *28 U.S.C. § 1404(a)*. "*Section 1406(a)*, on the other hand, applies where the original venue is improper." *Jumara, 55 F.3d at 878*. Under *§ 1406(a)*, the court may either dismiss the action or, "if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." *28 U.S.C. § 1406(a)*.

Under this framework, we must first decide whether venue is proper in the Eastern District of Pennsylvania. Proper venue for Cigna's federal antitrust claims is determined according to the antitrust venue statute, which provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22.

The general venue statute contained in *28 U.S.C. § 1391*[5] applies to Cigna's state law claims, or in the alternative a court may **[*7]** exercise "pendent venue" over state law claims arising out of the same operative facts as Cigna's federal antitrust claims. *See, e.g.,* *Dockery v. Heretick, Civil Action No. 17-4114, 2019 U.S. Dist. LEXIS 81748, 2019 WL 2122988, at *14 (E.D. Pa. May 14, 2019)*; *McKinney v. Pinter, Civil Action No. 18-4185, 2019 U.S. Dist. LEXIS 30715, 2019 WL 952247, at *3-4 (E.D. Pa. Feb. 26, 2019)*.

III.

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[4] *See* *BCBSM, Inc. v. Celgene Corp., Case No. 20-cv-02071 (SRN/ECW), 2021 U.S. Dist. LEXIS 52785, 2021 WL 1087662, at *8 (D. Minn. Mar. 22, 2021)* (transferring a related matter to the District of New Jersey); *United Healthcare Servs., Inc. v. Celgene Corp., Civil No. 20-686(DSD/ECW), 2020 U.S. Dist. LEXIS 226940, 2020 WL 7074626, at *4 (D. Minn. Dec. 3, 2020)* (same); Minute Order, *Blue Cross & Blue Shield Ass'n v. Celgene Corp.*, No. 1:20-cv-01980-TSC (Apr. 16, 2021) (same); *see also* Docket, *Humana Inc. v. Celgene Corp.*, No. 2:19-cv-07532-ES-MAH (D.N.J.) (related case originally filed in the District of New Jersey).

[5] *Section 1391(b)* states:

> A civil action may be brought in (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

As for Cigna's federal antitrust claims, contained in Counts I and VI of the complaint, venue is proper under 15 U.S.C. § 22 in any district in which the Defendants reside, may be found, or transact business.

Defendant Celgene

Cigna alleges that it and its subsidiaries have purchased Thalomid and Revlemid from defendant Celgene in the Eastern District of Pennsylvania and that Celgene has its principle place of business in the District of New Jersey. (Doc. No. ¶ at ¶¶ 12, 19.) Therefore, **[*8]** because Celgene transacts business in this District and resides in the District of New Jersey, both Districts are proper venues for Cigna's federal antitrust claims against Celgene.

Because both the Eastern District of Pennsylvania and the District of New Jersey are proper venues for Cigna's federal antitrust claims, we must next consider the *Jumara* private and public factors to determine whether transfer to the District of New Jersey is appropriate. *See* *Jumara, 55 F.3d at 879* (outlining the public and private interest factors that must be considered before a case is transferred pursuant to *§ 1404(a)*); *Yelverton v. Lab. Corp. of Am. Holdings, CIVIL ACTION NO. 19-6045-KSM, 2020 U.S. Dist. LEXIS 81281, 2020 WL 2307353, at *3 (E.D. Pa. May 8, 2020)* ("[H]aving made the threshold determination under *§ 1404(a)* that venue is proper in both forums, the Court now considers the *Jumara* private and public interest factors to determine whether transfer to the District of Delaware under *§ 1404(a)* is appropriate in this case.").

In *Jumara*, the Third Circuit explained that the private interest factors are: (1) the "plaintiff's forum preference as manifested in the original choice," (2) the defendant's forum preference; (3) "whether the claim arose elsewhere;" (4) "the convenience of the parties as indicated by their relative physical and financial condition;" (5) "the convenience of witnesses **[*9]** - but only to the extent that the witnesses may actually be unavailable for trial in one of the fora;" and (6) "the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum." *55 F.3d at 879*. The public interest factors include: (1) "the enforceability of the judgment;" (2) "practical considerations that could make the trial easy, expeditious, or inexpensive;" (3) "the relative administrative difficulty in the two fora resulting from court congestion;" (4) "the local interest in deciding local controversies at home;" (5) "the public policies of the fora;" and (6) "the familiarity of the trial judge with the applicable state law in diversity cases." *Id.*

For the private interest factors, although Cigna originally filed this case in the Eastern District of Pennsylvania, Cigna has stipulated to the transfer to the District of New Jersey, rendering the first private interest factor essentially neutral. (Doc. No. 17 at ¶ 9). Celgene is headquartered in New Jersey and prefers to litigate this matter in the District of New Jersey. Given the close proximity of the two fora, the other private interest factors—including proximity of witnesses **[*10]** that may be needed for trial and the location of books and records—do not "render one forum significantly more convenient than the other." *Jumara, 55 F.3d at 882*. As for the public interest factors, there is no indication that a judgment against Celgene could be more easily enforced in this District as opposed to the District of New Jersey, so this factor does not weigh for or against transfer. *See* *Perrigo Co. v. AbbVie, Inc., Civil Action No. 20-2132, 2020 U.S. Dist. LEXIS 195977, 2020 WL 6200192, at *3 (E.D. Pa. Oct. 21, 2020)*. Given the proximity of the District of New Jersey and Eastern District of Pennsylvania, it is unlikely that trial will be substantially easier, more expeditious, or more inexpensive in one jurisdiction over the other.[6] And, given that Celgene is "at home" in the District of New Jersey, this factor weighs slightly in favor of transfer. As the claims allege nationwide violations of federal law there are no distinct public interests in resolving the claims in

[6] As one judge put it in evaluating a proposed transfer from the District of New Jersey to the Eastern District, "as the James A. Byrne Courthouse in Philadelphia is visible from the upper floors of the Mitchell H. Cohen Courthouse in Camden, the Court cannot conceive of any meaningful inconvenience or difficulty posed by continued litigation in New Jersey as opposed to the Eastern District of Pennsylvania." *United Ass'n of Plumbers & Pipefitters Loc. 322 of S. N.J. v. Mallinckrodt ARD, LLC, Civil No. 20-188 (RBK/KMW), 2020 U.S. Dist. LEXIS 148343, 2020 WL 5627149, at *8 (D.N.J. Aug. 18, 2020)*. As the related cases in the District of New Jersey are assigned to the Honorable Esther Salas (*see* Doc. No. 17 at ¶¶ 3-5), who is stationed in Newark, the situation in this case is not quite as dramatic as that in *Mallinckrodt*. Nonetheless, the spirit of the *Mallinckrodt* court's analysis applies equally here.

Pennsylvania, no clear difference in policy preferences for the two locales, and no disparities in the qualifications of the federal judges sitting in the two districts to pass on federal law. *See* Jumara, 55 F.3d at 882-83. Court congestion does weigh against transfer as the District of New Jersey currently faces a significantly heavier caseload than this Court,[7] however, the other **[*11]** public interest factors, combined with the fact that a number of related actions are pending in New Jersey, weigh heavily in favor of transfer here.

The Court finds that the private and public interest factors weigh in favor of transferring Counts I and VI against Celgene to the District of New Jersey—particularly given the parties' joint preference to litigate this matter there and the fact that there are already related actions pending there. *See* Orndorff v. Ford Motor Co., Civil Action No. 20-00247-KSM, 2020 U.S. Dist. LEXIS 56592, 2020 WL 1550760, at *1 (E.D. Pa. Mar. 31, 2020) (approving transfer in part because the parties had consented to it); Dawson v. Gen. Motors LLC, No. 3:19-cv-08680, 2020 U.S. Dist. LEXIS 33710, 2020 WL 953713, at *2 (D.N.J. Feb. 24, 2020) (same); Jermano v. Graco Child.'s Prods., Inc., Civil Action No. 12 5905, 2013 U.S. Dist. LEXIS 197512, 2013 WL 12156081, at *1 (E.D. Pa. Feb. 12, 2013) (same); Travelers Indem. Co. v. E.F. Corp., Civ. A. No. 95-5660, 1996 U.S. Dist. LEXIS 20683, 1997 WL 135819, at *8 (E.D. Pa. Mar. 17, 1997) ("Because of the related actions pending in New Jersey, the public interests weigh heavily in favor of transfer.") (collecting cases).

Defendant BMS

The Court notes that Cigna's complaint and the parties' joint motion to transfer has very little factual information for the Court to determine if venue is proper as to BMS in either the Eastern District of Pennsylvania or the District of New Jersey. Rather, Cigna and the Defendants assert that "[v]enue is proper in the District of New Jersey because Celgene is headquartered there and the Complaint alleges **[*12]** conduct there." (Doc. No. 17 at ¶ 8.)

Cigna's complaint alleges that BMS "wholly owns Defendant Celgene Corporation as its subsidiary," "is a biopharmaceutical drug company incorporated under the laws of Delaware with its principal executive offices located [in New York City]," and "is a publicly-traded corporation registered on the New York Stock Exchange under the symbol 'BMY.'" (Doc. No. 1 at ¶ 20.) Although the complaint's allegations largely refer to the actions of both Defendants Celgene and BMS collectively as "Celgene," the parties agreed during a status conference with the Court that, for the purposes of transfer, the complaint can be read as alleging violations of the laws by both Defendants.

The parties have filed a supplemental memorandum in support of their joint motion to transfer that asserts that "BMS presently leases a storage facility in Falsington, Pennsylvania"—a town located within the Eastern District. (Doc. No. 19 at ¶ 4.) The Court finds that the fact BMS has a storage facility in the Eastern District constitutes a sufficient presence to find venue proper pursuant to § 1404(a) for the federal antitrust claims.[8]

Additionally, the Court finds that venue **[*13]** is proper in the District of New Jersey as the Court takes judicial notice of the fact that BMS maintains at least five facilities in New Jersey, and these facilities house BMS's finance,

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[7] In the twelve-month period ending on September 30, 2020, there were 440 pending cases and 306 weighted filings per judge in the Eastern District, and 2,742 pending cases and 860 weighted filings per judge in the District of New Jersey. *See United States District Courts — National Judicial Caseload Profile*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2020.pdf (last accessed May 6, 2021).

[8] The Third Circuit has explained that, for the purposes of 15 U.S.C. § 22, a corporation may be "found" in any judicial district in which it has a "presence" and "continuous local activities." In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 293 n.6 (3d Cir. 2004) (quoting Caribe Trailer Sys., Inc. v. P.R. Mar. Shipping Auth., 475 F. Supp. 711, 716 (D.D.C. 1979)). Additionally, a corporation "transacts business" within a district for § 22 purposes if, "in the ordinary and usual sense" it engages "in any substantial business operations" there. United States v. Scophony Corp. of Am., 333 U.S. 795, 807, 68 S. Ct. 855, 92 L. Ed. 1091 (1948). The Court finds that, for the purposes of 15 U.S.C. § 22, a company that rents a warehouse within a judicial district may be "found" in and "transacts business" in that district. *See R.I. Fittings Co*.

legal, and accounting departments.[9] These activities are sufficient indicators that BMS may be found in and transacts business in the District of New Jersey.

Because venue is proper both in this District and in the District of New Jersey, *28 U.S.C. § 1404(a)* governs transfer, and the Court again considers whether the *Jumara* private and public interest factors militate in favor of transferring this matter to the District of New Jersey. The Court finds that they do. The analysis of these factors is largely identical to the analysis with respect to Cigna's claims against Celgene, with one exception. That exception is that BMS, unlike Celgene, is not "at home" in the District of New Jersey; it is at home in the District of Delaware and the Southern District of New York. However, given BMS's stated preference to litigate this matter in the District of New Jersey and its significant presence there, this is a distinction without a difference. Therefore, the Court finds, as it did with **[*14]** respect to Celgene, that the *Jumara* public and private interest factors weigh in favor of transferring Counts I and VI against BMS to the District of New Jersey.[10]

IV.

Cigna also brings state antitrust, unfair and deceptive trade practices, and unjust *Rhode Island Fittings Co. v. Grinnell Corp., 215 F. Supp. 198, 200-01 (D.R.I. 1963)* (considering the presence or absence of a warehouse in the district as a factor in the venue analysis under *§ 22*); *Wentling v. Popular Sci. Publ'g Co., 176 F. Supp. 652, 657 (M.D. Pa. 1959)* (same). enrichment claims against Celgene and BMS (Counts II, III, IV and V). "Although venue must generally be established for each cause of action, there is an exception known as 'pendent venue,' which applies 'where claims arise out of the same operative facts.'" *See* *Dockery, 2019 U.S. Dist. LEXIS 81748, 2019 WL 2122988, at *14* (quoting *Phila. Musical Soc'y, Loc. 77 v. Am. Fed'n of Musicians of the U.S. & Can., 812 F. Supp. 509, 517 n.3 (E.D. Pa. 1992)*). Because all the federal ***antitrust law*** claims against Celgene and BMS are properly venued in both this District and the District of New Jersey under *15 U.S.C. § 22*, and the remaining state law claims (state antitrust, unfair and deceptive trade practices, and unjust enrichment) all arise out of the same operative facts, the Court finds venue is proper in both districts as to these claims against both Defendants.[11] The Court finds its analysis of the public and private *Jumara* factors[12] for the federal antitrust claims is also applicable for the state claims and weighs in favor **[*15]** of transfer for these remaining claims against Celgene and BMS to the District of New Jersey.

V.

For these reasons, the Court finds that transfer to the District of New Jersey is appropriate under *§ 1404(a)*. Therefore, the Court grants the parties' joint motion to transfer venue (Doc. No. 17.)

An appropriate Order follows.

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[9] *See Worldwide Facilities*, BRISTOL MYERS SQUIBB, https://www.bms.com/about-us/our-company/worldwide-facilities.html (last accessed May 5, 2021).

[10] In the alternative, even if venue were not proper in the Eastern District, the Court finds that it would be in the interest of justice to transfer Counts I and VI to the District of New Jersey, where venue is proper, and thus would approve the transfer pursuant to *28 U.S.C. § 1406(a)*.

[11] During the status conference Defendants agreed for purposes of venue only that these state law claims arise out of the same operative facts.

[12] The Court notes that Cigna's claim for unjust enrichment alleges that Defendants have been unjustly enriched under the state laws of both Pennsylvania and New Jersey, and as such, this remains a neutral factor in the Court's analysis, as both the transferor and transferee jurisdictions have an interest in resolving local controversies arising under their laws at home. And, although Cigna alleges a violation of Pennsylvania state law, but not New Jersey law, as to its claim for unfair and deceptive trade practices, the Court finds that the familiarity with the law public interest factor is also neutral here as "[f]ederal district courts are regularly called upon to interpret the laws of jurisdictions outside of the states in which they sit." *Nathan, 2019 WL 3216613, at *7*.

ORDER

AND NOW, this 24th day of May, 2021, upon consideration of the parties' Joint Motion to Transfer Venue (Doc. No. 17) and Supplemental Memorandum in Support of Joint Motion to Transfer Venue (Doc. No. 19), and for the reasons discussed in the accompanying memorandum, it is **ORDERED** as follows:

1. The Joint Motion (Doc. No. 17) is **GRANTED**.

2. The Clerk of Court is directed to **TRANSFER** this lawsuit to the United States District Court for the District of New Jersey pursuant to *28 U.S.C. § 1404(a)*.

IT IS SO ORDERED.

/s/ Karen Spencer Marston

KAREN SPENCER MARSTON, J.

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Nfinitylink Communs., Inc. v. City of Monticello

United States District Court for the Eastern District of Kentucky, Southern Division

May 24, 2021, Decided; May 24, 2021, Filed

CIVIL ACTION NO. 6:20-208-KKC

Reporter

2021 U.S. Dist. LEXIS 98844 *; 2021 WL 2077797

NFINITYLINK COMMUNICATIONS, INC., Plaintiff, v. THE CITY OF MONTICELLO, KENTUCKY; THE CITY COUNCIL OF THE CITY OF MONTICELLO, KENTUCKY; and COMMUNITY TELECOM SERVICES, Defendants.

Core Terms

immunity, municipality, franchise, Cable, state policy, displacement, market participant, antitrust claim, city council, anticompetitive, articulated, foreseeable, conversion, requests, trespass, license, cable television, antitrust, cable franchise, supplemental jurisdiction, delegated, quotation, provider, argues, marks

LexisNexis® Headnotes

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

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

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

To survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim is plausible if the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. In determining whether a complaint states a claim for the relief sought, courts construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

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

HN2[] Sherman Act, Defenses

Under the Parker immunity doctrine , states and state officials are immune from liability for federal antitrust claims brought under the Sherman Act. As explained by the Supreme Court, Parker immunity does not automatically apply to the actions of municipalities and their agents because municipalities and other political subdivisions are not themselves sovereign. Thus, Parker immunity only applies to the actions of municipalities and their agents if they are acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. A sufficient state policy exists if the displacement of competition was a foreseeable result of the actions that the state policy authorizes. Displacement of competition is foreseeable when the anticompetitive effects are the inherent, logical, or ordinary result of the exercise of authority delegated by the state. But displacement of competition is not foreseeable if the state takes a merely neutral position regarding the allegedly anticompetitive actions. However, the clear articulation test does not require the state legislature to expressly state that it intends for the delegated actions to have anticompetitive effects. Instead, the municipalities or their agents must show that the state has delegated authority to them to act anticompetitively.

Energy & Utilities Law > Utility Companies

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Property

HN3[] Energy & Utilities Law, Utility Companies

Ky. Const. § 163 grants municipalities the authority and responsibility to control the entry of public utilities into the municipal marketplace by requiring such utilities to obtain a franchise before they can operate within a municipality. While not explicitly mentioned in the statute, the Kentucky Supreme Court has held that § 163 includes cable television systems. Relatedly, § 164 places limits on the length of the franchises that municipalities grant and gives municipalities the right to reject any or all bids when granting franchises. Ky. Const. § 164. In turn, Ky. Rev. Stat. Ann. § 96.010 sets forth the requirements that a municipality must fulfill in granting a franchise. Ky. Rev. Stat. Ann. § 96.010(1). A municipality does not have to fulfill these requirements if the city owns or desires to own and operate a municipal plant to render the required service. § 96.010(2).

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

Governments > Local Governments > Duties & Powers

Communications Law > ... > Rules & Regulations > Regulated Entities > Cable Systems

Business & Corporate Compliance > ... > Regulated Entities > Satellite Services > Direct Broadcast Satellites

HN4[] Federal Acts, Cable Television Consumer Protection & Competition Act

Displacement of competition is the inherent, logical, or ordinary result of a city's constitutional authority to reject bids by cable television providers for franchises and to control which cable television providers may obtain franchises to operate within the municipality. Displacement of competition is also the inherent, logical, or ordinary result of the city's statutory authority to operate its own plant to provide cable television. In this way, Kentucky has delegated authority to cities and their agents to act anticompetitively.

Constitutional Law > State Constitutional Operation

Governments > Local Governments > Property

HN5[] Constitutional Law, State Constitutional Operation

The guiding themes behind the enactment of Ky. Const. § 163 and § 164 were: 1) municipal control; and 2) municipal benefit via the sale of franchises.

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

Governments > Local Governments > Claims By & Against

Communications Law > Federal Acts > Telecommunications Act > Federal Preemption

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

HN6[] Noerr-Pennington Doctrine, Right to Petition Immunity

It cannot be concluded that a municipality should incur antitrust liability simply for contravening some unrelated federal statute, especially in the absence of any authority indicating otherwise. Indeed, violations of the federal Cable Act or Telecommunications Act should be pursued as just that—violations of independent federal statutes. Such violations should not also neutralize a municipality's immunity to federal ***antitrust law***.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN7[] Parker State Action Doctrine, Local Governments & Private Parties

The Supreme Court has merely acknowledged the possible existence of a market participant exception to Parker immunity in the municipality context. In North Carolina State Board, the Court held that a nonsovereign actor controlled by active market participants enjoys Parker immunity only if it satisfies two requirements: first that the challenged restraint be one clearly articulated and affirmatively expressed as state policy, and second that the policy be actively supervised by the State. Here, the Court did not adopt a market participant exception to Parker immunity but instead, concluded that, subject to these two requirements, Parker immunity still applies to actors controlled by market participants. As the Court itself confirmed in North Carolina State Board, the active supervision requirement does not apply to municipal actors.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN8[] **Scope, Exemptions**

The Sixth Circuit has explained that if a state acts as a commercial participant in a given market, action taken in a market capacity is not protected. Thus, with the possible market participant exception, any action that qualifies as state action is ipso facto exempt from the operation of the antitrust laws. In those circumstances, a state is a market participant when it acts in a proprietary capacity as a purchaser or seller with regard to the challenged action or its actions constitute direct state participation in the market.

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

HN9[] **Private Actions, Sherman Act**

Both Kentucky state courts and federal district courts in Kentucky have analyzed Kentucky state antitrust claims under the same framework as federal antitrust claims.

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

Evidence > Burdens of Proof > Allocation

HN10[] **Supplemental Jurisdiction, Same Case & Controversy**

Where subject matter jurisdiction is challenged pursuant to Fed. R. Civ. P. 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. A district court has supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. 28 U.S.C.S. § 1367(a). Claims form part of the same case or controversy when they derive from a common nucleus of operative facts.

Counsel: **[*1]** For NFINITYLINK Communications, Inc., Plaintiff: Daniel P. Reing, LEAD ATTORNEY, PRO HAC VICE, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., Boston, MA; William L. Montague, Jr., LEAD ATTORNEY, Montague Law PLLC, Lexington, KY.

For City of Monticello, Kentucky, City Council of the City of Monticello, Kentucky, Defendants: Robert E. Maclin, III, McBrayer PLLC - Lexington, Lexington, KY.

Judges: KAREN K. CALDWELL, UNITED STATES DISTRICT JUDGE.

Opinion by: KAREN K. CALDWELL

Opinion

OPINION AND ORDER

This matter is before the Court on the joint partial motion to dismiss filed by Defendants The City of Monticello, Kentucky ("The City"), The City Council of the City of Monticello ("The City Council"), and Community Telecom Services ("CTS") pursuant to *Federal Rules of Civil Procedure 12(b)(6)* for failure to state a claim and *12(b)(1)* for lack of subject-matter jurisdiction. (DE 10.) For the following reasons, the Court grants the motion.

I. Background

Plaintiff NFINITYLINK Communications, Inc. constructs communications networks to deliver cable, internet, and phone services to commercial and residential customers. (Compl. ¶¶ 1, 26.) Plaintiff also offers consulting services related to the operation and management of communications networks to other network owners. (**[*2]** *Id.* ¶ 1.) Plaintiff provided consulting services to CTS to assist with the operation of its cable system. (*Id.* ¶ 30.)

Similar to Plaintiff, CTS is a provider of cable, internet, and phone services. (*Id.* ¶ 4.) CTS offers these services to residents of the City, which has authorized CTS to construct the necessary systems in the City's rights of way. (*Id.*) The City and Wayne County, Kentucky jointly own CTS. (*Id.*) Currently, CTS is the sole cable operator serving the City. (*Id.* ¶ 28.)

A. Plaintiff's Cable Franchise and License Requests

On May 21, 2020, CTS's Board of Directors voted to hire a new co-manager who would be responsible for replacing the services that Plaintiff was providing to CTS. (*Id.* ¶ 35.) The next day, Plaintiff formally requested a cable television franchise through a letter to the City. (*Id.* ¶ 36.) The Board of Directors held a special meeting with Plaintiff on May 28, 2020, during which the Board voted to formally and immediately terminate the consulting relationship between Plaintiff and CTS. (*Id.* ¶¶ 37-40.) On July 27, 2020, Plaintiff sent a follow up letter to the City, giving additional details regarding its cable franchise request. (*Id.* ¶ 45.)

Plaintiff's franchise **[*3]** request was an agenda item for the City Council meeting on August 10, 2020. (*Id.* ¶ 47.) In considering Plaintiff's request, Greg Latham, the City Clerk and CTS's Chairman of the Board of Directors, gave a presentation to the City Council about the prior relationship between CTS and Plaintiff. (*Id.* ¶¶ 49-51.) Latham allegedly asked the City Council to reject Plaintiff's request, explaining that he did not want Plaintiff to compete with CTS. (*Id.* ¶ 52.) The City Council did not invite comment from Plaintiff before voting on Plaintiff's franchise request and ultimately voted to deny the request. (*Id.* ¶¶ 58- 66.) During the same City Council meeting, the City approved an agreement between the City and CTS to allow CTS to install wireless antennas on a City-owned water tower to provide wireless internet service. (*Id.* ¶ 48.)

After the City Council denied Plaintiff's franchise request, Plaintiff asked Latham about the requirements for obtaining a license to occupy the City's rights of way to provide non-cable services. (*Id.* ¶ 71.) Latham responded that the City would not issue Plaintiff such a license without a cable franchise. (*Id.* ¶ 72.)

Thereafter, Plaintiff sent another letter to the City **[*4]** that asked it to reconsider its denials of Plaintiff's requests for a cable franchise and a license to occupy the City's rights of way. (*Id.* ¶ 73.) The City did not respond to Plaintiff's letter. (*Id.* ¶ 74.) On September 10, 2020, Plaintiff requested that the City allow Plaintiff to be heard on its franchise request at the next City Council meeting, but the City denied the request. (*Id.* ¶¶ 75-76.) To date, Plaintiff claims that it never had the opportunity to address the City Council and that the City never provided a reason for denying Plaintiff's franchise request. (*Id.* ¶¶ 80-81.)

B. Plaintiff's Equipment

At the May 28, 2020 meeting where CTS terminated its consulting relationship with Plaintiff, Plaintiff asked CTS to return the equipment that Plaintiff had purchased and installed to operate CTS's cable system. (*Id.* ¶ 41.) CTS indicated that it would return the equipment the following week. (*Id.* ¶ 42.) According to Plaintiff, CTS has never returned the equipment. (*Id.* ¶ 44.)

C. Procedural History

On October 14, 2020, Plaintiff filed a complaint for declaratory and injunctive relief against Defendants, claiming violations of the Sherman Act and Kentucky state antitrust laws and alleging **[*5]** that Defendants are engaging in a conspiracy to maintain CTS's monopoly over the cable market. (*Id.* ¶¶ 119-168.) Plaintiff also claims that the City and the City Council violated the 1992 Cable Act ("Cable Act") and 1996 Telecommunications Act ("Telecommunications Act"). (*Id.* ¶¶ 87-118.) Plaintiff specifically requests a declaratory judgment finding that Defendants' actions violated these respective statutes and an injunction requiring the City to grant Plaintiff's request for a cable franchise. (*Id.* at p. 26- 27.) Additionally, Plaintiff asserts conversion and trespass to chattels claims against CTS. (*Id.* ¶¶ 169-176.)

Defendants filed a joint partial motion to dismiss on November 20, 2020. (DE 10.) Defendants seek to dismiss the federal and state antitrust claims against them, arguing that *Parker* immunity bars these claims. (*Id.* at 5-7.) CTS further argues that the Court lacks supplemental jurisdiction over the conversion and trespass claims against it. (*Id.* at 8-9.)

II. Analysis

A. Standard of Review

HN1[] To survive a 12(b)(6) motion to dismiss for failure to state a claim, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible **[*6]** on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). A claim is plausible if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In determining whether a complaint states a claim for the relief sought, courts "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Cagayat v. United Collection Bureau, Inc., 952 F.3d 749, 753 (6th Cir. 2020)* (citations and quotation marks omitted).

1. *Parker* Immunity

a. Application of *Parker* Immunity to Federal Antitrust Claims

HN2[] Under the *Parker* immunity doctrine[1], states and state officials are immune from liability for federal antitrust claims brought under the Sherman Act. *See* *Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. The Supreme Court most recently discussed *Parker* immunity in the municipality context in *Federal Trade Commission v. Phoebe Putney Health System, Inc., 568 U.S. 216, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013)*. As explained in *Phoebe Putney, Parker* immunity does not automatically apply to the actions of municipalities and their agents[2] "[b]ecause municipalities and other political subdivisions are not themselves sovereign." *568 U.S. at 225*. Thus, *Parker* immunity only applies to the actions of municipalities and their agents if they are acting "pursuant to a 'clearly articulated and affirmatively expressed' **[*7]** state policy to displace competition." *Id. at 226* (quoting *Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 52, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)*). A sufficient state policy exists if the displacement of competition was a "foreseeable result" of the actions that the state policy authorizes. *Id. at 226-27*. Displacement of competition is foreseeable when the anticompetitive effects are "the inherent, logical, or ordinary result of the exercise of authority delegated by the [state]." *Id. at 229*. But displacement of competition is not foreseeable if the state takes a merely neutral position regarding the allegedly anticompetitive actions. *Id. at 228*. However, the clear articulation test does not require the state legislature to "'expressly state'" that it "'intends for the delegated action[s] to have anticompetitive effects.'" *Id. at 226* (quoting *Town of Hallie v. City of Eau Claire,*

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[1] *Parker* immunity is also known as "state-action" immunity.

[2] Parties do not appear to dispute that the City Council and CTS are municipal agents for the purposes of *Parker* immunity. Therefore, the Court will analyze the applicability of *Parker* immunity to the actions of Defendants altogether.

471 U.S. 34, 43, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)). Instead, the municipalities or their agents must show that the state has delegated authority to them to act anticompetitively. Id. at 228.

To support their argument that *Parker* immunity shields their allegedly anticompetitive actions from liability for the federal antitrust claims brought against them, Defendants cite to the Sixth Circuit's decision in Consolidated Television Cable Service, Inc. v. City of Frankfort, 857 F.2d 354 (6th Cir. 1988). (DE 10 at 6.) Parties do not dispute the virtually indistinguishable factual similarities between *Consolidated* and the **[*8]** instant case. (*See* DE 10 at 6; DE 13 at 6.) In *Consolidated*, a private cable television provider brought federal antitrust claims against the City of Frankfort, the city's Electric and Water Plant Board, and a city-owned cable provider after the city denied the private provider's requests to utilize city-owned poles for cable services. 857 F.2d 354 at 355-56. The Sixth Circuit ultimately found that *Parker* immunity extended to the defendants' actions because Kentucky law contains "a 'clearly articulated and affirmatively expressed' state policy to allow municipal regulation of the provision of [cable television] service, and, foreseeably, to displace competition." Id. at 359-60.

However, parties dispute whether *Consolidated* remains good law. (DE 13 at 6-11.) Plaintiff maintains that it does not because (1) the Supreme Court's decision in *Phoebe Putney* overturned *Consolidated*; and (2) the Cable Act and the Telecommunications Act preempt any contrary state policy and thus, supersede *Consolidated*. (*Id.*) Defendants disagree. (DE 14 at 1-4.) Plaintiff further contends that, in any event, *Parker* immunity does not apply because Defendants were acting as "market participants" in denying Plaintiff's franchise and license requests. **[*9]** (DE 13 at 12-13.) The Court addresses these arguments in turn.

i. Impact of *Phoebe Putney* on *Consolidated*

Plaintiff argues that the Sixth Circuit's reasoning in *Consolidated* depended on the Eleventh Circuit's "loose application" of the clear articulation test that the Supreme Court later rejected in *Phoebe Putney*. (DE 13 at 9-11.) The Eleventh Circuit found that, under *Parker*, the displacement of competition was a "foreseeable result" of a state policy when the state legislature could have "reasonably anticipated" that anticompetitive conduct would occur as a result of the policy. Phoebe Putney, 568 U.S. at 223 (citing F.T.C. v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369, 1376 (11th Cir. 2011) (quotation marks omitted)). According to the Eleventh Circuit, the anticompetitive effect did *not* need to be "one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation." *Id.* (citation and quotation marks omitted). The Supreme Court ultimately reversed the Eleventh Circuit, instead finding that a state policy meets the clear articulation test if "the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the [state]." Id. at 229.

In contrast to Plaintiff's suggestion otherwise, the Sixth **[*10]** Circuit did not apply the Eleventh Circuit's version of the clear articulation test in *Consolidated*, nor did the Sixth Circuit even reference a similar standard. Consolidated, 857 F.2d at 359-61. *Phoebe Putney* merely affirmed and clarified, rather than overturned, existing precedent, finding that displacement of competition is foreseeable when it is the "inherent, logical, or ordinary result" of a state policy. Phoebe Putney, 568 U.S. at 229.

In finding that Kentucky law contains a "clearly articulated and affirmatively expressed" state policy that foreseeably displaces competition, the Sixth Circuit in *Consolidated* analyzed *Parker* immunity consistent with . Consolidated, 857 F.2d at 359-61. The applicable state policy is found in Sections 163 and 164 of the Kentucky Constitution and Kentucky Revised Statute ("KRS") § 96.010. Id at 360-61. Section 163 of the Kentucky Constitution provides:

> No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained[.]

Ky. Const. § 163. ***HN3***[] Put more simply, the provision "grants municipalities **[*11]** the authority and responsibility to control the entry of public utilities into the municipal marketplace by requiring such utilities to obtain a franchise before they can operate within a municipality." *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc., 562 F. Supp. 543, 546 (W.D. Ky. 1982)*. While not explicitly mentioned in the statute, the Kentucky Supreme Court has held that *Section 163* includes cable television systems. *Id.* (citing *City of Owensboro v. Top Vision Cable Co., 487 S.W.2d 283, 287 (Ky. 1972)*). Relatedly, *Section 164* places limits on the length of the franchises that municipalities grant and gives municipalities "the right to reject any or all bids" when granting franchises. *Ky. Const. § 164*. In turn, *KRS § 96.010* sets forth the requirements that a municipality must fulfill in granting a franchise. *See Ky. Rev. Stat. Ann. § 96.010(1)*. A municipality does not have to fulfill these requirements "if . . . the city owns or desires to own and operate a municipal plant to render the required service." *Id. § 96.010(2)*.

In *Consolidated*, the Sixth Circuit found that, as a result of the clearly articulated and affirmatively expressed state policy derived from these provisions, "[the] displacement of competition in the provision of [cable television] service . . . is a foreseeable result of granting the city power to franchise public utilities or own and operate a municipal plant." *Consolidated, 857 F.2d at 361*. Kentucky law is "not neutral" and "clearly **[*12]** contemplates" the anticompetitive conduct alleged. *Id. at 360*. This analysis aligns with that set forth (and further clarified) by the Supreme Court in *Phoebe Putney*.

Moreover, the state policy relied upon in *Consolidated* still sufficiently confers *Parker* immunity on Defendants, even after *Phoebe Putney*. ***HN4***[] Displacement of competition is the "inherent, logical, or ordinary result" of the City's constitutional authority to reject bids by cable television providers for franchises and to control which cable television providers may obtain franchises to operate within the municipality. *Phoebe Putney, 568 U.S. at 229*. Displacement of competition is also the "inherent, logical, or ordinary result" of the City's statutory authority to operate its own plant to provide cable television. *Id.* In this way, Kentucky has "delegated authority to [the City and its agents] to act . . . anticompetitively." *Id. at 228*.

Plaintiff additionally argues that the Kentucky Supreme Court recently characterized the state policy implicated in *Consolidated* "quite differently." (DE 13 at 10.) Plaintiff accordingly cites to *Kentucky CATV Ass'n v. City of Florence, 520 S.W.3d 355 (Ky. 2017)*. In that case, the Kentucky Supreme Court explained, "Evident within the [d]ebates concerning *Sections 163* and *164* is the framers' desire to protect the citizens **[*13]** of a municipality from a city council infiltrated by business interests and whose objective is to profit, at the expense of the public, through perpetual monopolies and backroom dealings." *Kentucky CATV, 520 S.W.3d at 360*. Thus, Plaintiff claims that the state policy is instead "intended to protect *against* anticompetitive monopolies and 'backroom dealings.'" (DE 13 at 10 (emphasis in original).) However, Plaintiff misconstrues this passage. The framers' concern seemingly originated from those perpetual monopolies created by *private corporations*, rather than those created by *municipalities*. ***HN5***[] As the court confirms in the same opinion, "[T]he guiding themes behind the enactment of *Sections 163* and *164* were: 1) municipal control; and 2) municipal benefit via the sale of franchises." *Kentucky CATV, S.W.3d 355 at 361*. This state policy of municipal control over the provision of public utilities is entirely in harmony with the state policy that the Sixth Circuit identified in *Consolidated*.

Therefore, in denying Plaintiff's franchise and license requests, Defendants were acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition under Kentucky law. Thus, *Parker* immunity applies to Defendants' actions, and Defendants are not **[*14]** liable for the federal antitrust claims brought against them.

ii. Impact of Subsequent Federal Law on *Consolidated*

At the outset, the Court notes that Plaintiff has not cited to a single case finding that the Cable Act or the Telecommunications Act overrides any grant of immunity under *Parker*. The Court recognizes that the Cable Act and the Telecommunications Act contain express preemption provisions. *See 47 U.S.C. § 253(d)* ("If . . . the [Federal Communications] Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates *subsection (a)* or *(b)* [of the immediate provision], the Commission shall preempt the enforcement of such statute, regulation, or legal requirement[.]") *(Telecommunications Act); 47 U.S.C. § 556(c)* ("[A]ny provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.") (Cable Act). ***HN6***[] However, the Court cannot conclude that "a municipality should incur antitrust liability simply for contravening some *unrelated* federal statute," especially in the absence of any **[*15]** authority indicating otherwise. *Classic Commc'ns, Inc. v. Rural Tel. Serv. Co., 956 F. Supp. 896, 904 (D. Kan. 1996)* (examining similar preemption argument) (emphasis added). Indeed, "[v]iolations of . . . the federal Cable Act or Telecommunications Act should be pursued as just that—violations of independent federal statutes. Such violations should not also neutralize a municipality's immunity to federal ***antitrust law***." *Id.* Therefore, the Court cannot conclude that the Cable Act and the Telecommunications Act supersede *Consolidated* and thus, will not deprive Defendants of their *Parker* immunity on that basis.

iii. Application of the Market Participant Exception to *Parker* Immunity

Finally, Plaintiff argues that *Parker* immunity does not apply to the actions of Defendants because they were acting as "market participants" when denying Plaintiff's franchise and license requests. (DE 13 at 12-13.) Defendants respond that such an exception does not apply in this case. (DE 14 at 5-7.)

HN7[] The Supreme Court has merely acknowledged the *possible* existence of a market participant exception to *Parker* immunity in the municipality context. *See Phoebe Putney, 568 U.S. at 226 n.4*; *City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 379, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)* ("We reiterate that, with the possible market participant exception, *any* action that qualifies as state action is *ipso facto* . . . exempt from **[*16]** the operation of the antitrust laws.") (emphasis in original) (citation and quotation marks omitted). To the extent that Plaintiff relies upon the Supreme Court's opinion in *North Carolina State Board of Dental Examiners v. Federal Trade Commission, 574 U.S. 494, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015)* to support its assertion that "the Supreme Court then formally adopted and applied the market-participant exception in 2015," Plaintiff's representation is misleading. (DE 13 at 12.) In *North Carolina State Board*, the Court held that

> "[a] nonsovereign actor controlled by active market participants . . . enjoys *Parker* immunity only if it satisfies two requirements: first that the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy, and second that the policy . . . be actively supervised by the State."

574 U.S. at 503-04 (citations and quotation marks omitted). Here, the Court did not adopt a market participant exception to *Parker* immunity but instead, concluded that, subject to these two requirements, *Parker* immunity *still* applies to actors controlled by market participants. *See id.* Further, *North Carolina State Board* involved antitrust claims brought against a state regulatory agency comprised of private actors, unlike the instant case, which involves claims brought against a municipality **[*17]** and its agents. *Id. at 499*. As the Court itself confirmed in *North Carolina State Board*, the "active supervision" requirement does not apply to municipal actors. *See id. at 507-08*.

The Sixth Circuit similarly recognized the possibility of a market participant exception in *VIBO Corporation, Inc. v. Conway, 669 F.3d 675 (6th Cir. 2012)*. In that case, the Sixth Circuit explained, "[I]f a state acts as a 'commercial participant in a given market,' action taken in a market capacity is not protected. ***HN8***[] Thus, 'with the possible market participant exception, *any* action that qualifies as state action is *ipso facto* exempt from the operation of the antitrust laws.'" *VIBO, 669 F.3d at 687* (quoting *Omni, 499 U.S. at 379*) (emphasis in original). In those circumstances, "[a] state is a market participant when it acts 'in a proprietary capacity as a purchaser or seller with regard to the challenged action' or its actions 'constitute[ ] direct state participation in the market.'" *Id.* (quoting *Huish Detergents, Inc. v. Warren Cnty., 214 F.3d 707, 714-15 (6th Cir. 2000)* (discussing the market participation exception in the context of the *Commerce Clause*)). Notably, however, the Sixth Circuit concluded that the market participant exception did not apply. *Id.* And the court examined the possible exception as applied to corporations, not to municipalities. *Id. at 686- 87*.

This Court is not aware of any federal District Court or Court of **[*18]** Appeals that has applied the market participant exception to nullify *Parker* immunity and reestablish antitrust liability against a municipality and its agents. *See, e.g., Freedom Holdings, Inc. v. Cuomo, 624 F.3d 38, 61 (2d Cir. 2010)* ("While the possibility of a market participant exception is left open in [*Omni*], the trial record does not support its application here."); *Hedgecock v. Blackwell Land Co., 52 F.3d 333, 1995 WL 161649 (Table), at *2 (9th Cir. 1995)* ("While a commercial participant exception to *Parker* might be appropriate in circumstances where an arm of the state enters a market in competition with private actors . . ., such is not the case here."); *AmeriCare MedServices, Inc. v. City of Anaheim, Case No. 8:16-cv-1596-JLS- AFMx, 2017 U.S. Dist. LEXIS 74031, 2017 WL 1836354, at *10 (C.D. Cal. Mar. 28, 2017)* ("Moreover, in the present case, the City Defendants' provision of emergency ambulance services does not implicate the exception."); *In re Recombinant DNA Tech. Pat. & Cont. Litig., 874 F. Supp. 904, 912 (S.D. Ind. 1994* ("Thus, even were we inclined to apply a market participant exception to *Parker* immunity, the facts of this particular case would not warrant its application."); *see also* *W. Star Hosp. Auth. Inc. v. City of Richmond, 986 F.3d 354, 360 (4th Cir. 2021)* ("The Supreme Court has never recognized such an exception; in fact, it has suggested only that it might possibly exist. . . . Nor have *any* of the Courts of Appeals ever concluded that this proposed exception frustrates the invocation of state action immunity[.]") (emphasis in original). Absent definitive guidance from the Supreme Court or the Sixth Circuit, this Court declines **[*19]** to apply the market participant exception to this case. Therefore, Defendants are immune from antitrust liability under *Parker*, and no other exception applies. The Court accordingly dismisses those claims.

b. Application of *Parker* Immunity to State Antitrust Claims

Plaintiff argues that *Parker* immunity does not apply to its *state* antitrust claims against Defendants because it is a doctrine based on federalism. (DE 13 at 13-14.) ***HN9***[] Both Kentucky state courts and federal district courts in Kentucky have analyzed Kentucky state antitrust claims under the same framework as federal antitrust claims. *See* *Conrad v. Bevin, No. 3:17-CV-00056-GFVT, 2018 U.S. Dist. LEXIS 27736, 2018 WL 988071, at *8 (E.D. Ky. Feb. 16, 2018)*. Accordingly, for the reasons given above, *Parker* immunity also applies to the state antitrust claims against Defendants, and those claims are also dismissed.

B. Supplemental Jurisdiction over Conversion and Trespass Claims

Parties do not dispute that this Court still retains subject-matter jurisdiction over the Cable Act and the Telecommunications Act claims in this matter because those claims present federal questions. (Compl ¶¶ 5-6; DE 10 at 8.) However, parties disagree about whether the Court has supplemental jurisdiction over the state conversion and trespass claims against CTS pursuant **[*20]** to *28 U.S.C. § 1367(a)*. (Compl. ¶ 7; DE 10 at 8-9.)

HN10[] "Where subject matter jurisdiction is challenged pursuant to *12(b)(1)*, the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Ashland Hosp. Corp. v. Int'l Brotherhood. of Elec. Workers Loc. 575, 807 F. Supp. 2d 633, 638 (E.D. Ky. 2011)*. A district court has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *28 U.S.C. § 1367(a)*. "Claims form part of the same case or controversy when they 'derive from a common nucleus of operative facts.'" *Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 209 (6th Cir. 2004)* (quoting *Ahearn v. Charter Twp. of Bloomfield, 100 F.3d 451, 454-55 (6th Cir. 1996)*).

The Court declines to exercise supplemental jurisdiction over Plaintiff's state conversion and trespass claims against CTS because those claims do not form part of the same case or controversy as the remaining federal claims. The federal and state claims do not derive from common underlying facts. The Cable Act and the Telecommunications Act claims arise out of the City's and the City Council's denials of Plaintiff's requests for a cable franchise and a license to occupy the City's rights of way. The conversion and trespass claims arise out of CTS's alleged failure to return Plaintiff's equipment following the dissolution of the pre-existing consulting relationship between **[*21]** Plaintiff and CTS. Therefore, the federal claims and state claims "require proof of different facts, will involve different witnesses, and apply different law." *Raymer v. W. and S. Life Ins. Co., Civil Action No. 5:13-cv-00042, 2013 U.S. Dist. LEXIS 129596, 2013 WL 4875029, at *3 (E.D. Ky. Sept. 11, 2013)*. Accordingly, the Court dismisses Plaintiff's state conversion and trespass claims against CTS. Because those are the sole remaining claims against CTS, the Court likewise dismisses CTS as a party to this action.

III. Conclusion

The Court hereby ORDERS as follows:

1. The joint partial motion to dismiss (DE 10) brought by Defendants The City of Monticello, Kentucky, The City Council of the City of Monticello, Kentucky, and Community Telecom Services is GRANTED;

2. Counts III (violation of *15 U.S.C. § 1*), IV (violation of *15 U.S.C. § 2*), V (violation of *Kentucky Revised Statute § 367.175(1)*), and VI (violation of *Kentucky Revised Statute § 367.175(2)*) are DISMISSED with prejudice;
3. Count VII (conversion and trespass to chattels) is DISMISSED without prejudice; and
4. Defendant Community Telecom Services is DISMISSED as a party to the action.

Dated May 24, 2021

/s/ Karen K. Caldwell

KAREN K. CALDWELL

UNITED STATES DISTRICT JUDGE

EASTERN DISTRICT OF KENTUCKY

O.M. v. Nat'l Women's Soccer League, LLC

United States District Court for the District of Oregon

May 24, 2021, Decided; May 24, 2021, Filed

Case No. 3:21-cv-00683-IM

Reporter

541 F. Supp. 3d 1171 *; 2021 U.S. Dist. LEXIS 97840 **; 2021 WL 2073475

O.M., by and through her parent and guardian, K.C. MOULTRIE, Plaintiff, v. NATIONAL WOMEN'S SOCCER LEAGUE, LLC, Defendant.

Subsequent History: Injunction granted at *O.M. v. Nat'l Women's Soccer League, LLC, 2021 U.S. Dist. LEXIS 113666, 2021 WL 2478439 (D. Or., June 17, 2021)*

Appeal dismissed by *O.M. v. Nat'l Women's Soccer League, LLC, 2021 U.S. App. LEXIS 25094 (9th Cir. Or., Aug. 20, 2021)*

Core Terms

teams, Age Rule, league, players, soccer, injunction, single entity, procompetitive, sports, collective bargaining agreement, preliminary injunction, exemption, argues, games, public interest, anticompetitive, non-statutory, irreparable, bargaining, antitrust, asserts, playing, career, temporary restraining order, separate entity, initial burden, soccer player, competitors, concerted, benefits

LexisNexis® Headnotes

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

HN1[] **Grounds for Injunctions, Balance of Hardships**

In deciding whether to grant a motion for a temporary restraining order, courts look to substantially the same factors that apply to a court's decision on whether to issue a preliminary injunction. A plaintiff seeking a preliminary injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. Like a preliminary injunction, a temporary restraining order is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[ ] Grounds for Injunctions, Balance of Hardships

A stronger showing of one element of the preliminary injunction test may offset a weaker showing of another. Thus, when the balance of hardships tips sharply in the plaintiff's favor, the plaintiff need demonstrate only serious questions going to the merits.

Civil Procedure > Remedies > Injunctions > Mandatory Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

HN3[ ] Injunctions, Mandatory Injunctions

The already high standard for granting a temporary restraining order (TRO) or preliminary injunction is further heightened when the type of injunction sought is a mandatory injunction. To obtain a mandatory injunction, a plaintiff must establish that the law and facts clearly favor her position, not simply that she is likely to succeed. In plain terms, mandatory injunctions should not issue in doubtful cases.

Antitrust & Trade Law > Sherman Act > Claims

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

HN4[ ] Sherman Act, Claims

Section 1 of the Sherman Act prohibits any contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. 15 U.S.C.S. § 1. Section 1 is intended to prohibit actions that unreasonably restrain competition.

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

Evidence > Burdens of Proof > Allocation

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

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

Evidence > Burdens of Proof > Burden Shifting

HN5[ ] Per Se Rule Tests, Manifestly Anticompetitive Effects

The rule of reason is the accepted standard for testing whether an alleged restraint on competition imposed by a sports league violates § 1 of the Sherman Act. To determine whether a restraint violates the rule of reason, courts apply a three-step, burden-shifting framework. The plaintiff bears the initial burden to show that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries this burden, it shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes that showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN6[] **Sherman Act, Claims**

With respect to § 1 of the Sherman Act, a plaintiff must establish three elements to meet its initial burden: (1) the existence of a contract, combination, or conspiracy among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstate or foreign commerce.

Antitrust & Trade Law > Sherman Act > Claims

HN7[] **Sherman Act, Claims**

Section 1 of the Sherman Act targets only concerted action between separate entities and does not apply to anticompetitive actions taken by a single entity acting unilaterally. The determination of whether targeted activity is concerted action between separate entities is a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate. The inquiry does not turn simply on whether the parties involved are legally distinct entities. Instead, the crucial question is whether the entities alleged to have conspired maintain an economic unity, and whether the entities were either actual or potential competitors.

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

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

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

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

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

HN8[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

In a Sherman Act case, the plaintiff can show that an agreement unreasonably restrains trade either directly or indirectly. Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market. Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition.

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

HN9[] Relevant Market, Product Market Definition

The labor market of athletes can constitute a relevant market for antitrust purposes.

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

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

HN10[] Per Se Rule Tests, Manifestly Anticompetitive Effects

The antitrust laws are concerned with competition. Accordingly, justifications offered under the rule of reason may be considered only to the extent that they tend to show that, on balance, the challenged restraint enhances competition. Procompetitive benefits are those that improve or broaden competitive choices and include increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice. Cost-cutting, promoting social values, ethical values, public policy, or public safety are not considered procompetitive benefits.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

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

HN11[] Scope, Exemptions

The Supreme Court has recognized that a proper accommodation between the congressional policy favoring collective bargaining under the National Labor Relations Act and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. The Supreme Court has never delineated the precise boundaries of the non-statutory labor exemption, and what guidance it has given as to its application has come mostly in cases in which agreements between an employer and a labor union were alleged to have injured or eliminated a competitor in the employer's business or product market. The Court has explained that the purpose behind the exemption is to effectuate the intent of Congress of preventing judicial use of ***antitrust law*** to resolve labor disputes.

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

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN12[] Private Actions, Sherman Act

In the context of professional sports leagues, courts have consistently held that rules created through or incorporated by collective bargaining agreements between leagues and their respective players unions are immune from scrutiny under § 1 of the Sherman Act.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

HN13[] **Grounds for Injunctions, Irreparable Harm**

To obtain a temporary restraining order, a plaintiff must demonstrate that irreparable injury is likely in the absence of an injunction.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN14[] **Grounds for Injunctions, Public Interest**

With respect to an injunction, the public interest inquiry primarily addresses impact on non-parties rather than parties.

Counsel: [1]** For Plaintiff: Eric R. Mills, Joshua M. Sasaki, Bruce L. Campbell, Max Louis Forer, Miller Nash LLP, Portland, OR; Dennis Stewart, Michelle J. Looby, Mickey L. Stevens, Gustafson Gluek pLLC, Minneapolis, MN; Leonard B. Simon, Law Offices of Leonard B. Simon P.C., San Diego, CA.

For Defendant: Christopher St. John Yates, Elizabeth Hays Yandell, Latham & Watkins LLP, San Francisco, CA; David H. Angeli, Michelle Holman Kerin, Peter D. Hawkes, Angeli Law Group LLC, Portland, OR; Anna M. Rathbun, Latham & Watkins LLP, Washington, DC; Lawrence E. Buterman, Latham & Watkins LLP, New York, NY.

Judges: Karin J. Immergut, United States District Judge.

Opinion by: Karin J. Immergut

Opinion

[*1176] OPINION AND ORDER

IMMERGUT, District Judge.

Before this Court is Plaintiff's Motion for a Temporary Restraining Order ("TRO") and Preliminary Injunction. ECF 2. Plaintiff, a 15-year-old soccer player, seeks an order from this Court enjoining Defendant National Women's Soccer League ("NWSL") from enforcing against her its rule that all players in the league must be at least 18 years old (the "Age Rule"). Plaintiff does not seek an order requiring the NWSL or any of its member teams to hire her. Further, Plaintiff does not seek an order that interferes **[**2]** with negotiations between the NWSL and the NWSL Players Association ("NWSL PA"). Plaintiff concedes that if the NWSL and the NWSL PA enter into a collective bargaining agreement ("CBA") that includes an age restriction, she could lose her ability to play for the NWSL until she is age-eligible and would not have grounds to challenge such a restriction. Through this TRO, Plaintiff solely seeks the opportunity to compete for a position on a professional soccer team free from the Age Rule's restrictions.

Plaintiff filed both her Complaint and TRO Motion on May 4, 2021. ECF 1; ECF 2. Plaintiff's Complaint challenges the NWSL Age Rule as a violation of the *Sherman Anti-Trust Act, 15 U.S.C. § 1*, and argues that "[t]he ten teams that make up the NWSL have agreed among themselves, and with the League, not to contract with soccer players under the age of 18, without regard to their talents or ability to compete in the League." ECF 1 at ¶ 40. Plaintiff further argues that NWSL is the only option for women to play professional soccer in the United States, and that the Age Rule serves no legitimate business justification or procompetitive purpose. *Id.* at ¶¶ 41, 44. Plaintiff points to the absence of any age restrictions for male soccer **[**3]** players to demonstrate that the public interest in open competition and equal treatment of women favors a TRO in this case. *Id.* at ¶ 45. Plaintiff asserts that keeping her out of the NWSL, which has already started its season of games, "will continually slow her development, delay her improvement, and more generally impede her career as a soccer player." *Id.* at ¶ 35.

On May 20, 2021, this Court held a hearing on Plaintiff's TRO Motion at which both sides had an opportunity to present additional evidence and argument.[1] ECF 46. After considering testimony at the hearing, as well as the pleadings, declarations, exhibits, and arguments of counsel, this Court finds that Plaintiff has presented facts and legal support sufficient to warrant a TRO enjoining the enforcement of the Age Rule against her until a preliminary injunction hearing is held. As explained further below, Plaintiff has shown that the ten teams that make up the NWSL have agreed to impose the NWSL's age restriction which excludes female competitors from the only available professional soccer opportunity in the United States because they are under 18, regardless of talent, maturity, strength, and ability. Defendants have not **[**4]** presented any compelling procompetitive reasons to **[*1177]** justify this anticompetitive policy, nor have they shown that eliminating the Age Rule will cause any non-speculative injury to the NWSL. Defendants have offered no legitimate procompetitive justification for treating young women who want an opportunity to play professional soccer differently than young men.

In contrast, Plaintiff has presented persuasive evidence that each day that passes with the Age Rule in place represents a missed opportunity for her potential professional soccer career. Accordingly, this Court finds that the merits clearly favor Plaintiff's position and that she will be irreparably harmed if this Court does not grant the TRO. Furthermore, the balance of equities and the public interest strongly favor affording girls in the United States the same opportunities as boys. Therefore, for the reasons that follow, Plaintiff's Motion for Temporary Restraining Order, ECF 2, is GRANTED.

STANDARDS

HN1[] In deciding whether to grant a motion for a temporary restraining order, courts look to substantially the same factors that apply to a court's decision on whether to issue a preliminary injunction. *See* *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., 240 F.3d 832, 839 n.7 (9th Cir. 2001)*. A plaintiff seeking a preliminary **[**5]** injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Winter v. NRDC, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*. Like a preliminary injunction, a temporary restraining order is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id. at 22*.

The Ninth Circuit applies a "sliding scale" approach in considering the factors outlined in *Winter*. ***HN2***[] A stronger showing of one element of the preliminary injunction test may offset a weaker showing of another. *All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-32 (9th Cir. 2011)*. Thus, "when the balance of hardships tips sharply in the plaintiff's favor, the plaintiff need demonstrate only 'serious questions going to the merits.'" *hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985, 992 (9th Cir. 2019)* (quoting *All. for the Wild Rockies, 632 F.3d at 1135*).

HN3[] Finally, the already high standard for granting a TRO or preliminary injunction is further heightened when the type of injunction sought is a "mandatory injunction." *Garcia v. Google, Inc., 786 F.3d 733, 740 (9th Cir. 2015)*. To obtain a mandatory injunction, a plaintiff must "establish that the law and facts *clearly favor* her position, not simply that she is likely to succeed." *Id.* (emphasis in original). "In **[**6]** plain terms, mandatory injunctions should not issue in 'doubtful cases.'" *Id.* (quoting *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust, 636 F.3d 1150, 1160 (9th Cir. 2011)*).

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[1] The Court adopted the parties' proposed briefing schedule leading up to the hearing. ECF 23. In its Response to Plaintiff's TRO Motion, Defendant argued that the *Norris LaGuardia Act*'s ("NLGA") anti-injunction provision, *29 U.S.C. § 101*, divested this Court of jurisdiction to issue an injunction in this case unless it conformed with the NLGA's enumerated special requirements. ECF 35 at 25-30. This Court ordered the parties to provide briefing addressing whether the NLGA's anti-injunction provision applied to this case. ECF 40. On May 19, 2021, this Court issued an Order finding that the NLGA's anti-injunction provision does not apply to this case. ECF 45.

DISCUSSION

A. Form of Injunction

Defendant argues that Plaintiff seeks a mandatory injunction and thus this Court must apply the heightened standard described above. ECF 35 at 24-25. Plaintiff asserts that her requested relief can be properly categorized as prohibitory. ECF 41 at 12. Because this Court finds that Plaintiff has met her burden under either standard, it assumes without finding that Plaintiff seeks a mandatory injunction.

[*1178] B. TRO Factors

1. The Law and the Facts Clearly Favor Plaintiff's Position

a. The Sherman Act

Plaintiff alleges Defendant's Age Rule violates *§ 1 of the Sherman Act, 15 U.S.C. § 1*. ECF 1 at ¶ 3. ***HN4***[] *Section 1 of the Sherman Act* prohibits any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. *Section 1* "is intended to prohibit actions that unreasonably restrain competition." *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1033 (9th Cir. 2005)* (citing *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*).

HN5[] The "rule of reason" is the accepted standard for testing whether an alleged restraint on competition imposed by a sports league violates *§ 1 of the Sherman Act*. *See* *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 202-03, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*; *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc., 883 F.3d 32, 41 (2d Cir. 2018)* ("Regulation of league sports is a textbook example of when the rule of reason applies."). To determine whether a restraint violates the rule of reason, courts apply **[**7]** a three-step, burden-shifting framework. *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018)*. The plaintiff bears the initial burden to show that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. *Id.* If the plaintiff carries this burden, it shifts to the defendant to show a procompetitive rationale for the restraint. *Id.* If the defendant makes that showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. *Id.*

HN6[] A plaintiff must establish three elements to meet its initial burden: "(1) the existence of a contract, combination, or conspiracy among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstate or foreign commerce." *Jack Russell Terrier, 407 F.3d at 1033*. Each element is discussed in turn.

Defendant argues that Plaintiff cannot demonstrate the existence of a contract, combination, or conspiracy among two or more separate entities because "the NWSL is a single entity that employs the players and assigns their rights to teams via its draft and player dispersal process." ECF 35 at 34. ***HN7***[] *Section 1 of the Sherman Act* targets only "concerted action" between separate entities and does not apply **[**8]** to anticompetitive actions taken by a single entity acting unilaterally. *Am. Needle, 560 U.S. at 190-91*. The determination of whether targeted activity is "concerted action" between separate entities is a "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Id. at 191*. The inquiry "does not turn simply on whether the parties involved are legally distinct entities." *Id.* ("[W]e have repeatedly found instances in which members of a legally single entity violated *§ 1* when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity."). Instead, "the crucial question is whether the entities alleged to have conspired maintain an 'economic unity,' and whether the entities were either actual or potential competitors." *Jack Russell Terrier, 407 F.3d at 1034*.

Courts have often rejected single entity defenses from sports leagues in *§ 1* cases. *See* *Am. Needle, 560 U.S. at 201*; *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 99, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*; **[*1179]** *L.A. Memorial Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1388-89 (9th Cir. 1984)* (collecting cases); *Sullivan v. Nat'l Football League, 34 F.3d 1091, 1099 (1st Cir. 1994)*; *McNeil v. Nat'l Football League, 790 F. Supp. 871, 878-80 (D. Minn. 1992)*. In *Fraser v. Major League Soccer, LLC, 284 F.3d 47, 56 (1st Cir. 2002)*, the district court found on summary judgment that Major League Soccer ("MLS") was a single entity because its owners were called "operator/investors" and the league had some aspects of a unified corporation and granted summary judgment for the MLS on that issue. *Id. at 59-61*. The First Circuit declined **[**9]** to affirm on the district court's finding that MLS was a single entity, calling it "doubtful." *Id. at 58*. In calling the single entity finding "doubtful," the court focused on the operator/investors' roles as individual team managers with "a diversity of entrepreneurial interests that go[] well beyond the ordinary [stockholder in a company]." *Id. at 57-58*.

Here, the information in the record suggests that, like many other professional sports leagues, the NWSL is not a single entity for the purposes of this *§ 1* analysis. Plaintiff asserts in an unchallenged declaration that each NWSL team has a separate owner who funds at least some aspects the team's operations. ECF 9 at ¶ 19. The teams compete directly against each other to build the best team, attract fans, and make money, including by selling sponsorships, advertising, and tickets. *Id.* Each team hires and pays its own staff and trains its own players. *Id.* The NWSL also has an "Allocation Money" mechanism that allows each team to spend its own funds to pay individual players on its roster significantly more money than would otherwise be permitted by the NWSL's salary cap, or to pay acquisition/transfer fees for players the team wishes to acquire from non-NWSL **[**10]** teams and leagues. *Id.* Based on this limited record, this Court finds that the member teams of the NWSL are competitors in the market for players such that they are not a single entity for the purposes of this *§ 1* challenge alleging an anticompetitive restriction of that market.

Defendant asserts that because the NWSL was a single entity at the time the Age Rule was adopted in 2013, Plaintiff cannot show any agreement between two or more competitors to constitute concerted action. ECF 35 at 34-35. However, the relevant question is not whether the NWSL was a single entity when the Age Rule was created but whether the Age Rule has now been agreed upon and enforced by separate entities in an anticompetitive manner. Defendant contends that this case is similar to *Relevent Sports, LLC v. United States Soccer Fedn., Inc., No. 19-cv-8359 (VEC), 2020 U.S. Dist. LEXIS 128260, 2020 WL 4194962 (S.D.N.Y. July 20, 2020)*. In *Relevant Sports*, a sporting event promoter brought a *§ 1* claim against United States Soccer Federation alleging that it had entered into an agreement with the Fédération Internationale de Football Association ("FIFA") and other regional confederations and national associations to refuse to sanction soccer games in the United States and to boycott professional leagues, clubs, and players that participate in unsanctioned games. *2020 U.S. Dist. LEXIS 128260, [WL] at *1*. **[**11]** The district court granted United States Soccer Federation's motion to dismiss the complaint because Plaintiff failed to plead facts demonstrating that it had entered into any such agreement with FIFA. *2020 U.S. Dist. LEXIS 128260, [WL] at *6-*7*.

In contrast to *Relevant Sports*, Plaintiff here has pointed to evidence in the record which demonstrates that the Age Rule has been incorporated into an agreement made between the NWSL and its member teams. ECF 41 at 19. Documents filed under seal appear to show that the Age Rule is contained in the 2021 NWSL Competition **[*1180]** Manual, and that member teams are required to sign Rules of Compliance Affidavits at the beginning of each season certifying their compliance with the rules in the Manual. At this stage of the proceedings, this Court concludes that Plaintiff has shown sufficient evidence of an agreement to enforce the Age Rule between the NWSL and its member teams to constitute concerted action.

In sum, Plaintiff has established that the NWSL and its member teams are not a single entity under *§ 1 of the Sherman Act* and that they formed an agreement to enforce the Age Rule. Thus, Plaintiff has satisfied the first step of its initial burden by showing "the existence of a contract, combination, or conspiracy **[**12]** among two or more separate entities." *See* *Jack Russell Terrier, 407 F.3d at 1033*.

HN8[] Next, Plaintiff must establish that the Age Rule "unreasonably restrains trade." *Id.* Plaintiff can show that an agreement unreasonably restrains trade either directly or indirectly. *Ohio, 138 S. Ct. at 2284*. "Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market." *Id.* (internal quotation marks, citations and alterations omitted). "Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition." *Id.*

To start, the NWSL has market power. ***HN9***[] The labor market of athletes can constitute a relevant market for antitrust purposes. *See O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1058 (9th Cir 2015)*. The NWSL is the only professional women's soccer league in the United States, and it accordingly has no real competition in the labor market for women professional soccer players. ECF 9 at ¶ 16; *Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1053-54 (C.D. Cal. 1971)* (finding that there were "no other leagues of professional basketball teams of comparable status" to the NBA and ABA—the then existing top-level professional U.S. basketball leagues), *injunction reinstated by, Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 91 S. Ct. 672, 28 L. Ed. 2d 206 (1971)*.

In *Denver Rockets*, Spencer Haywood successfully challenged **[**13]** the NBA's rule prohibiting a prospective player from negotiating with any NBA team until four years after his high school class graduation. *325 F. Supp. at 1066-67*. The district court in that case explained the harms stemming from rules like the "four years from high school" rule as follows:

> The harm resulting from a 'primary' boycott such as this is threefold. First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services is injured. Third, by pooling their economic power, the individual members of the NBA have, in effect, established their own private government.

Id. at 1061. The District Court granted a preliminary injunction, and later a partial summary judgment in Haywood's favor. *Id. at 1067*. On appeal, the Ninth Circuit briefly stayed the injunction, but never ruled on the merits because on emergency petition to the Supreme Court, Justice Douglas reinstated the trial court injunction, permitting Haywood to play immediately. *Haywood, 401 U.S. at 1206-07*. In his opinion, Justice Douglas expressed that "[t]his group boycott issue in professional sports is a significant one" and found that the balance of equities favored Haywood. *Id. at 1205-06*.

Two other **[**14]** cases followed in hockey and football, with the same result. *Linseman v.* ***[*1181]*** *World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977)*; *Boris v. United States Football League, No. Cv. 83-4980 LEW (Kx), 1984 U.S. Dist. LEXIS 19061, 1984 WL 894 (C.D. Cal. Feb. 28, 1984)*.

Here, the Age Rule unreasonably restrains competition in the same way that the "four years from high school" rule did in *Denver Rockets*. Plaintiff is injured by being excluded from the market, competition in the market is injured by the exclusion of otherwise qualified players, and the NWSL and its members have pooled their market power to "in effect, establish[] their own private government." *Denver Rockets, 325 F. Supp. at 1061*. Therefore, Plaintiff has satisfied the second step of its initial burden by showing the Age Rule "unreasonably restrains trade." *See Jack Russell Terrier, 407 F.3d at 1033*.

Finally, it is clear that the Age Rule "affects interstate commerce." *Id.* The NWSL has ten teams in ten states, and each team travels to each of those states regularly to play games. ECF 1 at ¶ 17. Many of those games are broadcast around the United States on TV, radio, and the internet pursuant to contracts entered into by the NWSL or its teams. Accordingly, this Court concludes that Plaintiff has made a sufficient showing of all three elements to satisfy its initial burden under the rule of reason.

Because Plaintiff has met her initial burden, it shifts to Defendant to show a procompetitive rationale **[**15]** for the Age Rule's restraint. *Ohio, 138 S. Ct. at 2284*. The antitrust laws are concerned with competition. ***HN10***[] Accordingly, "justifications offered under the rule of reason may be considered only to the extent that they tend to show that, on balance, the 'challenged restraint enhances competition.'" *Law v. NCAA, 134 F.3d 1010, 1021 (10th*

Cir. 1998) (quoting Bd. of Regents, 468 U.S. at 104). Procompetitive benefits are those that improve or broaden competitive choices and include increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice. Id. at 1023; *see also* In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1257 (9th Cir. 2020) (citing O'Bannon, 802 F.3d 1049, 1072 (9th Cir. 2015)); Bd. of Regents, 468 U.S. at 102 (expanding consumer choice is procompetitive). Cost-cutting, promoting social values, ethical values, public policy, or public safety are not considered procompetitive benefits. Law, 134 F.3d at 1022-23; FTC v. Superior Trial Ct. Laws. Assn., 493 U.S. 411, 423-24, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 462-64, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986); Bd. of Regents, 468 U.S. at 117; National Soc. of Professional Engineers v. United States, 435 U.S. 679, 695-96, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978).

In a footnote, Defendant asserts that the Age Rule has "numerous benefits, including concerns for minor athletes' development, protecting a league from a minor's ability to avoid employment contracts, the myriad concerns for minor athletes embedded in the Safe Sport Act, and the League's costs to implement the same if it employs minors and allows them to travel throughout the United States for games." ECF 35 at 36-37 n.15. Further, Defendant argues that the **[**16]** benefits are "demonstrated by the fact that nearly every professional sports league in the U.S. chooses to require players to be at least the age of majority, if not older." *Id.* Defendant does not attempt to explain how its proffered benefits improve or broaden competitive choices in any way. Indeed, the list appears to be more directed at reducing Defendant's overhead costs than benefitting competition. *See* Law, 134 **[*1182]** F.3d at 1022 ("[C]ost-cutting by itself is not a valid procompetitive justification."). In the absence of further evidence justifying the Age Rule as procompetitive, this Court concludes that Defendant has failed to meet its burden of demonstrating a procompetitive rationale for the Age Rule's restraint.

Given the information in the record at this time, this Court finds that Plaintiff has shown that the law and facts clearly favor her position that the NWSL's Age Rule violates § 1 of the Sherman Act.

i. The Non-statutory Labor Exemption

Defendant next argues that Plaintiff cannot show that the law and the facts clearly favor her position because the Age Rule falls under the non-statutory labor exemption to the antitrust laws. ECF 35 at 30-34. **HN11**[] The Supreme Court has recognized "that a proper accommodation between the **[**17]** congressional policy favoring collective bargaining under the [National Labor Relations Act] and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975) (citing Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965). "The Supreme Court has never delineated the precise boundaries of the [non-statutory labor] exemption, and what guidance it has given as to its application has come mostly in cases in which agreements between an employer and a labor union were alleged to have injured or eliminated a competitor in the employer's business or product market." Cal. ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1125 (9th Cir. 2011) (quoting Clarett v. Nat'l Football League, 369 F.3d 124, 131 (2d Cir. 2004) (internal quotation marks omitted). The Court has explained that the purpose behind the exemption is to effectuate the intent of Congress of preventing "judicial use of ***antitrust law*** to resolve labor disputes." Brown v. Pro Football, Inc., 518 U.S. 231, 236, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996).

HN12[] In the context of professional sports leagues, courts have consistently held that rules created through or incorporated by collective bargaining agreements between leagues and their respective players unions are immune from scrutiny under § 1 of the Sherman Act. *See* Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 963 (2d Cir. 1987); Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 474-75 (6th Cir. 2005); Clarett v. Nat'l Football League, 369 F.3d 124, 142-43 (2d Cir. 2004).

Defendant argues that by recognizing the NWSL PA as an exclusive bargaining agent and beginning **[**18]** the collective bargaining process, it has immunized the Age Rule from antitrust scrutiny, and that any injunction this

Court could grant would interfere with the bargaining process. ECF 35 at 30-34. This position is unsupported by precedent and the facts of this case.

First, Defendant has not identified any cases where the non-statutory labor exemption applied to a regulation created before the recognition of a union, and which had not been subsequently included or implicitly incorporated into a collective bargaining agreement. There is no existing collective bargaining agreement between the NWSL and the NWSL PA, nor has there ever been. Extending the non-statutory exemption as Defendant suggests would mean that employers could fully insulate themselves from antitrust scrutiny by simply recognizing a union and commencing the (often years-long) collective bargaining process.

[*1183] Second, despite Defendant's assertions to the contrary, nothing about the injunction Plaintiff seeks would interfere with the NWSL PA's ability to collectively bargain over the terms or conditions of employment with Defendant. The Age Rule Plaintiff challenges was created by Defendant years before the NWSL PA existed. **[**19]** It has not been incorporated into any collective bargaining agreement between Defendant and the NWSL PA because no collective bargaining agreement has yet been reached. As Plaintiff acknowledges in her Complaint, an injunction prohibiting Defendant from enforcing its current Age Rule against Plaintiff in no way prevents the NWSL PA and Defendant from including a new age rule into a collective bargaining agreement, at which point it could be lawfully enforced against Plaintiff. ECF 1 at 12. Thus, Plaintiff's requested relief does not interfere with the rights of the NWSL PA to negotiate rules governing the league with Defendant, including whether there should be an Age Rule. Rather, Plaintiff simply seeks an order preventing Defendant from enforcing a rule created outside of any collective bargaining agreement which bars her from seeking employment with the NWSL.

Defendant further argues that the non-statutory labor exemption applies to the Age Rule because it has signed a "Voluntary Recognition Agreement" with the NWSL PA in November 2018. ECF 35 at 33. However, the agreement provides that Defendant reserves the unilateral right to change and establish rules concerning the drafting **[**20]** and trading of players. The agreement also reflects that it is not the result of collective bargaining negotiations, which had not yet begun in November 2018. The mere existence of this agreement does not insulate the Age Rule from *§ 1* scrutiny. Thus, this Court finds that the non-statutory labor exemption does not apply to this case.

ii. Damages

Finally, Defendant argues that Plaintiff cannot show that the merits clearly favor her position because her claimed injury is "entirely speculative." ECF 35 at 37-38. This Court disagrees.

In both her Complaint and during her testimony at the May 20, 2021 hearing, Plaintiff proffered sufficient indicia that she would be a sought-after player in the NWSL were it not for the Age Rule barring her eligibility. Plaintiff has an ongoing arrangement with the Portland Thorns, a member team of the NWSL, where she is treated like a team member in all ways other than signing a player contract and playing in official games. ECF 1 at ¶ 8. Plaintiff practices with the team, plays in unofficial "scrimmages" and pre-season games against other professional teams, and has her own locker in the Thorns' locker room. *Id.* At the hearing, Plaintiff testified that both **[**21]** the Thorns' General Manager and one of its coaches have told her that they would sign her if she were eligible. Plaintiff's testimony was not contradicted by Defendant.

Defendant asserts that because Plaintiff already missed this season's draft, "there is no mechanism in the League's rules and procedures that would result in her playing this season." ECF 35 at 38. This argument appears to be undermined by the 2021 NWSL Competition Manual, which outlines mechanisms outside the draft for players to enter the league mid-season. Therefore, this Court rejects Defendant's position that Plaintiff's alleged damages are entirely speculative and undermine her ability to succeed on the merits of her claim.

Based the record available at this stage of the proceeding, this Court finds that Plaintiff has met her burden of establishing that the law and the facts clearly favor her position.

[*1184] 2. Irreparable Harm

HN13[] To obtain a TRO, Plaintiff must also "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter, 555 U.S. at 22*. This Court finds that Plaintiff has made this showing.

Through declarations from U.S. National Women's Team players and collegiate soccer coaches, as well as her own testimony, Plaintiff **[**22]** has shown that she has the requisite skills and is ready to play professional soccer, that the Age Rule is impeding her development as a soccer player in an irreversible manner, that the career of a professional soccer player is short, and that there are no substitutes to actual professional competition to help her realize her full potential. ECF 3; ECF 4; ECF 5; ECF 6; ECF 8.

Becky Sauerbrunn, a professional soccer player on the Portland Thorns, described Plaintiff's injury as follows:

> Keeping [Plaintiff] out of League play can slow her development, delay her improvement, and more generally impede her career. Playing against top professional competition, when the opponents play their hardest and when your failures have consequences, is how you learn to be at your best. Practice and scrimmages are very helpful, but nothing is a full substitute for real competition.

ECF 3 at ¶ 7.

Plaintiff expressed a similar sentiment during her live testimony, where she explained that every coach she has ever worked with has believed that real competition is where players improve their skills the most. Plaintiff's injury is irreparable because the opportunities she will miss due to the Age rule cannot **[**23]** be regained. As put by Ms. Sauerbrunn, "A soccer player's career is finite. If [Plaintiff] spends two-and-a-half years (or some lesser period) barred from the League, there is no way to recover that lost time and the valuable experience she could be gaining by competing against the best week-in and week-out." *Id.* at ¶ 9. Plaintiff's personal coach, Joseph Smith, agrees:

> In my opinion, holding O.M. back from professional game competition will block her from being stretched, challenged, and pushed onto the next level and will do an incredible amount of harm to her ability to compete at the top level. I am fearful she might actually go backwards from lack of opportunity.

ECF 5 at ¶ 13.

The harm inflicted by the Age Rule is particularly acute given that the Olympic Games will be held this summer, which will open up roster spots in the NWSL, thereby increasing the likelihood that Plaintiff will receive even more meaningful playing time if the Age Rule is lifted promptly. ECF 8 at ¶ 15.

Based on this record, Plaintiff has shown that she will suffer irreparable injury in the absence of an injunction. *See Denver Rockets, 325 F. Supp. at 1057* (finding that the plaintiff's exclusion from playing professional basketball would cause **[**24]** him "irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of highlevel [sic] competition, his public acceptance as a super star will diminish to the detriment of his career, his self-esteem and his pride will have been injured and a great injustice will be perpetrated on him").

3. The Balance of the Equities

The threat of irreparable injury to Plaintiff is not counterbalanced by any cognizable harm to Defendant from a temporary injunction. Defendant suggests that if minors are permitted to play in the NWSL, its expenses will skyrocket because **[*1185]** it will need to develop guidelines to account for the presence of minors, to comply with all aspects of the *Safe Sports Act*, add hotel rooms and shower facilities for minors, and develop contracts specifically tailored for minors. ECF 35 at 41. Defendant offers no estimate of these additional costs. Further, the record suggests that Plaintiff is already using the Thorns' locker room facilities and has traveled with the team to participate in preseason scrimmages.

Without further evidence of the hardships the injunction Plaintiff seeks **[**25]** would impose on the NWSL, this Court finds that the equities tip strongly in Plaintiff's favor.

4. The Public Interest

Finally, this Court finds that the public interest weighs in favor of granting the requested injunction. ***HN14***[] "The public interest inquiry primarily addresses impact on non-parties rather than parties." *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton, 752 F.3d 755, 766 (9th Cir. 2014)* (internal quotation marks and citation omitted).

Here, the public interest is served by issuing injunctive relief both because it preserves free and open competition and because it promotes gender equity. This Court notes that the NWSL's comparable men's league in the United States, MLS, has no age limit and employs players under 18. ECF 1 at ¶ 4. As of the date Plaintiff's Complaint was filed, more than half of MLS teams allegedly had one or more players on their roster under the age of 18. *Id.* In other words, the only thing currently standing between Plaintiff and her aspiration to be a professional soccer player in this country is her gender. Promoting gender equity in athletics is clearly in the public interest.

By satisfying all four of the elements outlined above, Plaintiff has met her burden of establishing that temporary injunctive relief is appropriate in this case. **[**26]** Accordingly, Plaintiff's Motion for Temporary Restraining Order, ECF 2, is GRANTED as follows:

TEMPORARY RESTRAINING ORDER

1. Defendant and its members, officers, agents, servants, employees, attorneys, teams, and all persons in active concert or participation with them are enjoined from enforcing the Age Rule against Plaintiff, unless and until such Age Rule is contained in a fully effective collective bargaining agreement that would apply to her, as permitted by law.
2. This Order shall expire in fourteen (14) days after entry, unless otherwise extended by stipulation of the parties or by further order of the Court.
3. The parties shall confer and propose to the Court a schedule for briefing and hearing on whether the Court should issue a preliminary injunction.

IT IS SO ORDERED.

DATED this 24th day of May 2021.

/s/ Karin J. Immergut

Karin J. Immergut

United States District Judge

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AlphaCard Sys. LLC v. Fery LLC

United States District Court for the District of New Jersey

May 31, 2021, Decided; May 31, 2021, Filed

Civil Action No. 19-20110 (MAS) (TJB)

Reporter

2021 U.S. Dist. LEXIS 102098 *; 2021 WL 2190901

ALPHACARD SYSTEMS LLC, et al., Plaintiffs, v. FERY LLC, et al., Defendants.

Notice: NOT FOR PUBLICATION

Prior History: *AlphaCard Sys. LLC v. Fery LLC, 2020 U.S. Dist. LEXIS 147059, 2020 WL 4736072 (D.N.J., Aug. 14, 2020)*

Core Terms

allegations, products, motion to dismiss, counterclaims, antitrust, tortious interference, prices, anti-competitive, Enterprise, sales, disparaging, antitrust claim, anti trust law, manufacturers, customers, entrants, asserts

LexisNexis® Headnotes

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

Evidence > Burdens of Proof > Allocation

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

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

A district court conducts a three-part analysis when considering a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). First, the court must take note of the elements a plaintiff must plead to state a claim. Second, the court must accept as true all of the plaintiff's well-pleaded factual allegations and construe the complaint in the light most favorable to the plaintiff. The court, however, may ignore legal conclusions or factually unsupported accusations that merely state the-defendant-unlawfully-harmed-me. Finally, the court must determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. A facially plausible claim allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. On a Fed. R. Civ. P. 12(b)(6) motion, the defendant bears the burden of showing that no claim has been presented.

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

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

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

HN2[] **Conspiracy to Monopolize, Elements**

Competition is at the heart of the antitrust laws. Antitrust laws are only aimed at curtailing anticompetitive conduct, or a competition-reducing aspect or effect of the defendant's behavior. Stated differently, the underlying principle of our antitrust laws is to protect competition, not competitors. The law therefore establishes antitrust injury as a common pleading requirement for antitrust plaintiffs. An antitrust injury is an injury of the type the antitrust laws were intended to prevent and that flow from that which makes defendants' acts unlawful. Under this requirement, a party must allege harm to competition, not just harm to its own business' to adequately plead antitrust injury. This standard, on a motion to dismiss, requires an antitrust plaintiff to allege facts capable of supporting a finding or inference that the purported anticompetitive conduct produced increased prices, reduced output, or otherwise affected the quantity or quality of the product.

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

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

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

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

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

Pleadings may not be amended by the briefs in opposition to a motion to dismiss.

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

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

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

HN4[] **Anticompetitive & Predatory Practices, Predatory Pricing**

In an antitrust action, a competitor cannot suffer antitrust injury from its rival's charging higher prices because competitors have only to gain from their rivals' higher pricing schemes.

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

HN5[] **Complaints, Requirements for Complaint**

It is well established that the court may ignore legal conclusions or factually unsupported accusations that merely state the-defendant-unlawfully-harmed-me.

Torts > ... > Contracts > Intentional Interference > Elements

HN6[] Intentional Interference, Elements

A claim of tortious interference with a contract requires a plaintiff to allege: (1) actual interference with a contract; (2) that the interference was inflicted intentionally by a defendant who is not a party to the contract; (3) that the interference was without justification; and (4) that the interference caused damage.

Torts > ... > Contracts > Intentional Interference > Elements

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

HN7[] Intentional Interference, Elements

A complaint based on tortious interference must allege facts that show some protectable right—a prospective economic or contractual relationship. Not only does the law protect a party's interest in a contract already made, but it also protects a party's interest in reasonable expectations of economic advantage.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN8[] Intentional Interference, Elements

In a tortious interference action, to determine malicious interference, the relevant inquiry is whether the conduct was sanctioned by the rules of the game, and where a plaintiffs loss of business is merely the incident of healthy competition, there is no compensable tort injury.

Counsel: **[*1]** For ALPHACARD SYSTEMS LLC, DISCOUNTID.COM LLC, ID CARD GROUP LLC, Plaintiffs: STEVEN F. GOOBY, ANSA ASSUNCAO, LLP, MATAWAN, NJ.

For FERY LLC, Defendant: HEATHER M. EICHENBAUM, LEAD ATTORNEY, SPECTOR GADON & ROSEN, PC, Philadelphia, PA.

Judges: MICHAEL A. SHIPP, UNITED STATES DISTRICT JUDGE.

Opinion by: MICHAEL A. SHIPP

Opinion

MEMORANDUM OPINION

SHIPP. District Judge

This matter comes before the Court upon Plaintiffs-Counter Defendants AlphaCard Systems LLC, DiscountID.com LLC, and ID Card Group, LLC's (collectively, "Plaintiffs") Motion to Dismiss Defendant-Counter Plaintiff Fery LLC's ("Fery") counterclaims. (ECF No. 39.) Fery opposed (ECF No. 41), and Plaintiffs replied (ECF No. 45). The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to *Local Civil Rule 78.1*. For the reasons set forth herein, Plaintiffs' Motion is granted in part and denied in part.

I. BACKGROUND[1]

Plaintiffs and Fery sell identification card products and related supplies ("ID Products") on Amazon Marketplace. AlphaCard Sys. LLC, 2020 U.S. Dist. LEXIS 147059, 2020 WL 4736072, at *1. Plaintiffs allege that Fery has placed fake, positive reviews for its own products on Amazon's Marketplace. *Id.* Based on those allegations, Plaintiffs filed a two-count action against Fery in November **[*2]** 2019 asserting claims for (1) false advertising under the Lanham Act, 15 U.S.C. § 1125(a) and (2) tortious interference with prospective business advantage under New Jersey law. *Id.* In an earlier opinion, the Court denied Fery's motion to dismiss both counts. 2020 U.S. Dist. LEXIS 147059, [WL] at *5.

Thereafter, in September 2020, Fery filed an Answer and Counterclaims against Plaintiffs. (Answer & Countercls., ECF No. 33.) In those pleadings, Fery alleges that Plaintiffs and their nonparty corporate affiliates—the Barcodes Enterprise[2]—are seeking to monopolize the "ID Products market." (Countercls. ¶¶ 16, 25.) Fery asserts, on information and belief, that the Barcodes Enterprise "controls in excess of seventy (70%)" of the "'market for direct online sales of ID printers and related security control equipment and supplies to commercial and government customers i[n] the geographic market of the United States[.]" (*Id.* ¶ 17.) Fery alleges that, despite acting as a single enterprise, Plaintiffs "us[e] their own free-standing websites that they deceptively present to customers as numerous unrelated businesses[.]" (*Id.* ¶¶ 15, 20.) Fery also alleges that Plaintiffs "have historically charged prices above competitive levels for their products.'" (*Id.* ***[*3]*** ¶ 18.)

According to Fery, Plaintiffs and the Barcodes Enterprise are seeking to "curtail all sales of ID products on Amazon Marketplace" to maintain monopoly power. (*Id.* ¶¶ 24, 30.) In that regard, Fery appears to allege that Plaintiffs are seeking to limit competition in general and competition with Fery in particular. As to competition in general, Fery asserts that Plaintiffs are "covertly urging Amazon customers'"—in breach of their contract with Amazon—"'to divert their purchases from the Amazon Marketplace to the various Barcodes Enterprise's websites on Google." (*Id.*) As to Fery in particular, Fery asserts that Plaintiffs made "disparaging allegations to manufacturers that Fery's sales on the Amazon Marketplace were illegal[]" and brought the "present frivolous allegations against Fery in this Court." (*Id.* ¶¶ 26, 28.) With respect to the disparagement allegations, "Fery alleges, on information and belief, that at least one manufacturer, refused to make sales to Fery, after having previously done so, because the Barcodes Enterprise induced it to refrain from such dealing." (*Id.* ¶ 27.)

Based on these allegations, Fery asserts four counterclaims against Plaintiffs: three antitrust **[*4]** claims under Section 2 of the Sherman Act for attempted monopolization, monopolization, and conspiracy to monopolize; and one claim for tortious interference with existing business relations. (*Id.* ¶¶ 31-67.) On October 16, 2020, Plaintiffs moved to dismiss the counterclaims for failure to state a claim.

II. LEGAL STANDARD

HN1[] A district court conducts a three-part analysis when considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). Malleus v. George, 641 F.3d 560, 563 (3d Cir. 2011). "First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim.'" *Id.* (alteration in original) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). Second, the court must accept as true all of the plaintiffs well-pleaded factual allegations and construe the complaint in the light most favorable to the plaintiff. Fowlerv.

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[1] The parties are familiar with the factual and procedural history of this matter and therefore the Court recites only those facts necessary to resolve the instant motion. *See* AlphaCard Sys. LLC v. Fery LLC, No. 19-20110, 2020 U.S. Dist. LEXIS 147059, 2020 WL 4736072 (D.N.J. Aug. 14, 2020).

[2] Referring to them collectively as the Barcodes Enterprise, Fery indicates that Plaintiffs and four other nonparty entities are subsidiaries of nonparty Barcodes, which in turn is controlled by nonparty Odyssey Investment Partners, LLC. (Countercls. ¶¶ 1-9, 15.)

UPMC Shadyside, 578 F.3d 203,210 (3d Cir. 2009) (citing Iqbal, 556 U.S. at 678). The court, however, may ignore legal conclusions or factually unsupported accusations that merely state "the-defendant-unlawfully-harmed-me." Iqbal, 556 U.S. at 678 (citing Bell Atl Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Finally, the court must determine whether "the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief."' Fowler, 578 F.3d at 211 (quoting Iqbal, 556 U.S. at 679). A facially plausible claim "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 210 **[*5]** (quoting Iqbal, 556 U.S. at 678). On a 12(b)(6) motion, the "defendant bears the burden of showing that no claim has been presented." Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005) (citation omitted).

III. DISCUSSION

A. Antitrust Claims

Plaintiffs raise multiple challenges to Fery's antitrust claims, but the Court need only address one of those arguments at this time: whether Fery adequately pled antitrust injury. Specifically, Plaintiffs argue that Fery's antitrust claims should be dismissed because Fery failed to allege an injury that impacted the overall competitive market. (Pls.' Moving Br. 7-10, ECF No. 39-1.) The Court agrees.

HN2[] "Competition is at the heart of the antitrust laws[.]" Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc., 886 F.3d 332,338 (3d Cir. 2018). "Antitrust laws are only aimed at curtailing anticompetitive conduct, 'or a competition-reducing aspect or effect of the defendant's behavior.'" Pfizer Inc. v. Johnson & Johnson, 333 F. Supp. 3d 494, 501 (E.D. Pa. 2018) (quoting Phila. Taxi Ass'n, 886 F.3d at 338). Stated differently, "the underlying principle of our antitrust laws is to protect competition, not competitors." *Id.* (citing Phila Taxi Ass n, 886 F.3d at 338).

"The law therefore establishes antitrust injury as a common pleading requirement for antitrust plaintiffs." *Id.* (citing in part Brunswick Corp. v. Peublo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)). An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flow from that which makes defendants' acts unlawful." Brunswick, 429 U.S. at 489. "Under this requirement, [a party] "must allege harm to competition, not just harm to its own business' to **[*6]** adequately plead antitrust injury." Pfizer, 333 F. Supp. 3d at 502 (citations omitted). "This standard, on a motion to dismiss, requires an antitrust plaintiff to allege facts capable of supporting a finding or inference that the purported anticompetitive conduct produced increased prices, reduced output, or otherwise affected the quantity or quality of the product." *Id.* (citations omitted).

Here, Fery fails to adequately plead antitrust injury because it only alleges injury to itself, not to competition in the relevant market. According to the counterclaims, Fery was injured by Plaintiffs' alleged anti-competitive conduct because Fery lost at least one supplier due to Plaintiffs' "disparaging allegations" and because Fery has been forced to defend against Plaintiffs' "baseless litigation." (Countercls. ¶¶ 26-29.) The counterclaims fail, however, to address how Plaintiffs' alleged anti-competitive conduct negatively impacted the overall competitive market by, for example, increasing prices, reducing output, or otherwise affecting the quantity or quality of the products offered for sale to the market. Pfizer, 333. F. Supp. 3d at 502. Indeed, in each of its three antitrust claims, Fery only asserts that "*Fery has sustained the type of injury* that **[*7]** the antitrust laws were intended to prevent and that which flows from the anticompetitive and exclusionary characteristics that makes [Plaintiffs] and the Barcodes Enterprise's conduct unlawful." (Countercls. ¶¶ 37, 48, 56 (emphasis added).) In short, Fery's counterclaims fail to adequately allege that Plaintiffs' alleged conduct had an anti-competitive impact in the "ID Products market."

Fery's opposition brief highlights its failure to properly plead injury to the overall competitive market. There, Fery recounts some of Plaintiffs' alleged anti-competitive conduct but nevertheless fails to adequately address how that conduct had a wider impact on the competitive market. (*See* Fery Opp'n Br. 8-9, ECF No. 41.) Moreover, for the first time—without citation to its counterclaims—Fery vaguely alleges that Plaintiffs' "conduct allegedly affected prices generally[.]" (*Id.* at 8.) ***HN3***[] It is axiomatic, however, that pleadings "may not be amended by the briefs in opposition to a motion to dismiss." *Pa. ex rel. Zimmermanv. PepsiCo, Inc., 836 F.2d 173, 181 (3d Cir. 1988)* (citation omitted). Nor can Fery's assertion that *Plaintiffs* "have historically charged prices above competitive levels for their products" support an inference that such a pricing scheme damaged competition. **[*8]** (*See* Countercls. ¶ 18.) ***HN4***[] "[A] competitor cannot suffer antitrust injury from its rival's charging higher prices" because "competitors have only to gain from their rivals' higher pricing schemes." *The Treasurer, Inc. v. Phila. Nat 7 Bank, 682 F. Supp. 269, 272 n.2 (D.N.J. 1988)* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*).

Moreover, Fery's conclusory assertion that Plaintiffs have "exclud[ed] market entrants" is insufficient to state an antitrust injury. (Fery Opp'n Br. 8 (citing Countercls. ¶ 30).) ***HN5***[] It is well established that the Court may ignore legal conclusions or factually unsupported accusations that merely state "the-defendant-unlawfully-harmed-me." *Iqbal, 556 U.S. at 678*. In its pleadings, Fery provides no factual allegations to support its claim that Plaintiffs excluded market entrants.[3] In fact, Fery's own description of the Amazon Marketplace suggests that no market entrants have been excluded from the purported relevant market. (*See, e.g.*, Countercls. ¶ 23 ("Selling through the Amazon Marketplace is a uniquely efficient distribution channel for new entrants into any market, including the ID products market, and is the best means for market entrants who do not have established, free-standing websites able to compete with the Barcodes Enterprise in the sale of those products.").)

On these facts, the Court finds **[*9]** that Fery failed to adequately plead an antitrust injury and, accordingly, grants Plaintiffs' Motion to Dismiss Fery's antitrust claims—counterclaims one through three. *See* *Phila, Taxi Ass 'n, 886 F.3d at 344* (affirming motion to dismiss where appellants "'fail[ed] to aver an antitrust injury, such as a negative impact on consumers or to competition in general, let alone any link between this impact and the harms [a]ppellants have suffered.").

B. Tortious Interference with Existing Business Relations

Plaintiffs also seek to dismiss Fery's tortious inference claim. ***HN6***[] A claim of tortious interference with a contract requires a plaintiff to allege: "(1) actual interference with a contract; (2) that the interference was inflicted intentionally by a defendant who is not a party to the contract; (3) that the interference was without justification; and (4) that the interference caused damage." *Tipton v. U-Go, Inc., No. A-1543-12T3, 2014 N.J. Super. Unpub. LEXIS 2117, 2014 WL 4231363, at *5 (N.J. Super. Ct. App. Div. Aug. 28, 2014)*.

First, Plaintiffs argue that Fery has failed to allege it had a protected interest with which Plaintiffs tortiously interfered. (Pls.' Moving Br. 26-27.) ***HN7***[] "A complaint based on tortious interference must allege facts that show some protectable right—a prospective economic or contractual relationship." *Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 563 A.2d 31, 37 (N.J. 1989)*; *see also* *Lamorte Burns & Co., Inc. v. Walters, 167 N.J. 285, 770 A.2d 1158, 1170 (N.J. 2001)* ("Not only does the law **[*10]** protect a party's interest in a contract already made, but it also protects a party's interest in reasonable expectations of economic advantage.'"). Here, the Court finds that Fery has sufficiently pled facts that would, if true, establish tortious interference with an existing contractual relationship. Fery alleges that Plaintiffs made "disparaging allegations to manufacturers that Fery's sales on the Amazon Marketplace were illegal[.]" (Countercls. ¶ 26.) According to the counterclaims, "at least one manufacturer[] refused to make sales to Fery, after having previously done so, because the Barcodes Enterprise induced it to refrain from such dealing." (*Id.* ¶ 27.) The Court finds that these pleadings sufficiently demonstrate allegations of interference with Fery's existing contractual relations. *See* *Nostrame v. Santiago, 213 N.J. 109, 61 A.3d 893, 902 (N.J. 2013)* (holding "[t]here can be no doubt that inducing another to end a contractual relationship

[3] Similarly, Fery's conclusory allegation regarding the diversion of customers from Amazon to Plaintiffs' own websites is also insufficient to state an antitrust injury. (Countercls. ¶ 24.) And although the Court only addresses antitrust injury, the Court notes that Fery fails to adequately explain or provide any support—even in its opposition brief—for its proposition that those actions constitute actionable anti-competitive conduct. (*See* Fery Opp'n Br. 12-20.)

through acts that amount to fraud or defamation would be wrongful" and that "deceit and misrepresentation can constitute wrongful means").

Second, Plaintiffs argue that Fery fails to adequately plead malice. (Pls.' Moving Br. 27.) According to Plaintiffs, Fery "cannot show that Plaintiffs' alleged **[*11]** comment was without justification or excuse." *[Id*. at 28.) ***HN8***[] To determine malicious interference, "the relevant inquiry is whether the conduct was sanctioned by the "rules of the game,' [and] where a plaintiffs loss of business is merely the incident of healthy competition, there is no compensable tort injury." *Lamorte Burns & Co., 770 A.2d at 1170*. As noted above, Fery alleges that Plaintiffs made "disparaging allegations to manufacturers" about the legality of Fery's sales on the Amazon Marketplace and that, as a result, Fery lost at least one supplier. (Countercls. ¶¶ 26-27.) Accepting those allegations as true, the Court cannot find that such conduct was sanctioned by the rules of the game. Moreover, Plaintiffs' reliance on third-party analyses at the pleading stage is misplaced; whether Fery placed fake, positive reviews for its own products remains a question of fact. The Court, therefore, finds that Fery sufficiently alleged malice.

Finally, Plaintiffs argue that Fery fails to properly plead that it suffered any economic damage. (Pls.' Moving Br. at 28-29.) The Court disagrees. Fery alleges that Plaintiffs "harmed Fery both by reducing the number and variety of products it could offer its customers and by disparaging **[*12]** customers from dealing with Fery," and as "a result of those actions, Fery has been caused great economic harm," (Countercls. ¶¶ 64-65.) Moreover, the Court finds it prudent to "await the development of [the] record" before dismissing a tortious interference claim for failing to allege damages. *Printing Mart, 563 A.2d at 47*. The Court, accordingly, denies Plaintiffs' Motion to Dismiss Fery's tortious interference claim.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion to Dismiss is granted in part and denied in part. The Court will enter an Order consistent with this Memorandum Opinion.

/s/ Michael A. Shipp

MICHAEL A. SHIPP

UNITED STATES DISTRICT JUDGE

ORDER

This matter comes before the Court upon Plaintiffs-Counter Defendants AlphaCard Systems LLC, DiscountID.com LLC, and ID Card Group, LLC's (collectively, "Plaintiffs") Motion to Dismiss Defendant-Counter Plaintiff Fery LLC's ("Fery") counterclaims. (ECF No. 39.) Fery opposed (ECF No. 41), and Plaintiffs replied (ECF No. 45). The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to *Local Civil Rule 78.1*. For the reasons set forth in the accompanying Memorandum Opinion, and for good cause shown,

IT IS on this 31st **[*13]** day of May 2021, **ORDERED** that:

1. Plaintiffs' Motion to Dismiss (ECF No. 39) is **GRANTED** in part and **DENIED** in part.
2. Counterclaims One through Three are dismissed without prejudice.
3. Fery may file amended counterclaims by **June 15,2021**.

/s/ Michael A. Shipp

MICHAEL A. SHIPP

UNITED STATES DISTRICT JUDGE

In re Broiler Chicken Antitrust Litig.

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

June 1, 2021, Decided; June 1, 2021, Filed

No. 16 C 8637

Reporter

2021 U.S. Dist. LEXIS 102550 *; 2021 WL 2207142

IN RE BROILER CHICKEN ANTITRUST LITIGATION

Prior History: *In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 2017 U.S. Dist. LEXIS 191754, 2017 WL 5574376 (N.D. Ill., Nov. 20, 2017)*

Core Terms

communications, conspiracy, allegations, chicken, producers, entities

LexisNexis® Headnotes

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN1[] **Civil Conspiracy, Elements**

It is at least plausible (if not likely) that a person who facilitates a conspiracy knows about the conspiracy and engages in the facilitation knowing of its consequences.

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

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

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

Fed. R. Civ. P. 12(b)(6) does not permit Plaintiffs to chase ghosts. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

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

HN3[] **Conspiracy to Monopolize, Elements**

Encouraging lower production by itself is simply not enough to plausibly establish liability. There is a trade-off between price and volume. If firms want to raise prices, they have to produce less, sell less, and thereby say no to customers. It should not be a mark of conspiracy to say what is true, already known by the audience, and articulated by countless third-party analysts, academicians, and jurists alike.

Evidence > Inferences & Presumptions > Inferences

HN4[] Inferences & Presumptions, Inferences

Sparce allegations can sometimes be sufficient to state a claim in the right circumstances and when they permit the necessary inferences.

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

HN5[] Complaints, Requirements for Complaint

The force of the allegations controls the analysis, not the title of the potential defendant.

Counsel: [*1] For Maura R. Grossman, Special Master: Maura R. Grossman, PRO HAC VICE, Maura Grossman Law, Buffalo, NY.

For Maplevale Farms, Inc., individually and on behalf of all others similarly situated, Plaintiff: Brian D. Clark, LEAD ATTORNEY, Lockridge Grindal Nauen P.l.l.p., Minneapolis, MN; Daniel Warshaw, LEAD ATTORNEY, PRO HAC VICE, Pearson, Simon & Warshaw < LLP, Sherman Oaks, CA; Devon Paul Allard, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, P.C., Rochester, MI; Elizabeth R. Odette, LEAD ATTORNEY, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Gabrielle Sliwka, LEAD ATTORNEY, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Guido Saveri, LEAD ATTORNEY, Saveri & Saveri, San Francisco, CA; Jacob Michael Saufley, LEAD ATTORNEY, Lockridge Grindal Nauen P.l.l.p., Minneapolis, MN; Joseph C Kohn, LEAD ATTORNEY, PRO HAC VICE, Kohn, Swift & Graf, P.C., Philadelphia, PA; Naveed Abaie, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Robert John McLaughlin, LEAD ATTORNEY, Hart McLaughlin & Eldridge, LLC, Chicago, IL; Stephen M Owen, LEAD ATTORNEY, PRO HAC VICE, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Steven Alan Hart, LEAD ATTORNEY, Hart McLaughlin **[*2]** & Eldridge, LLC, Chicago, IL; Veronica W Glaze, LEAD ATTORNEY, PRO HAC VICE, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA; W. Joseph Bruckner, LEAD ATTORNEY, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; William Ernest Hoese, LEAD ATTORNEY, PRO HAC VICE, Kohn, Swift & Graf, Philadelphia, PA; Adam J Pessin, PRO HAC VICE, Fine, Kaplan and Black, RPC, Philadelphia, PA; Benjamin Michael Shrader, Hart McLaughlin & Eldridge, LLC, Chicago, IL; Blake Stubbs, Hart McLaughlin & Eldridge, LLC, Chicago, IL; Bobby Pouya, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Breanna LE Van Engelen, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Brian H Eldridge, Hart McLaughlin & Eldridge, LLC, Chicago, IL; Bruce L Simon, PRO HAC VICE, Pearson Simon & Warshaw LLP, San Francisco, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Clifford Harris Pearson, PRO HAC VICE, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA; Eric Jeffrey Mont, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Garrett D Blanchfield , Jr., PRO HAC VICE, Reinhardt Wendorf & Blanchfield, Suite W; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Jeffrey J. Corrigan, **[*3]** PRO HAC VICE, SPECTOR ROSEMAN & KODROFF, P.C., Philadelphia, PA; John Shannon Marrese, Hart McLaughlin & Eldridge, LLC, Chicago, IL; Jonathan M Jagher, Freed Kanner London & Millen, Conshohocken, PA; AKyle Pozan, Hart McLaughlin & Eldridge, LLC, Chicago, IL; Linda P. Nussbaum, PRO HAC VICE, Nussbaum Law Group, P.C., New York, NY; Mark Reinhardt, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Mark A Wendorf, PRO HAC VICE, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Matthew Pearson, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Michael H. Pearson, PRO HAC VICE, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA; Neil J Swartzberg, PRO HAC

VICE, Pearson Simon & Warshaw, LLP, San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; RACHEL ELLEN KOPP, PRO HAC VICE, SPECTOR ROSEMAN & KODROFF, P.C., PHILADELPHIA, PA; Richard Alexander Saveri, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Roberta D. Liebenberg, PRO HAC VICE, Fine, Kaplan and Black, R.P.C., Philadelphia, PA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC **[*4]** VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Sharon S Almonrode, The Miller Law Firm, P.C., Rochester, MI; Simeon Andrew Morbey, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Stephen J. Teti, PRO HAC VICE, Block & Leviton LLP, Boston, MA.

For Daniel M. Percy, Gloria J. Lathen, Jonas Dimas, Frank Coe, Lester Patterson, Dorothy Monahan, Pamela Tierney, Linda Cheslow, Natalie Wilbur, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Daniel J. Kurowski, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Chicago, IL; Jeannie Y Evans, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Chicago, IL; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For John Gross and Company, Inc., Plaintiff: Naveed Abaie, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steven Alan Hart, LEAD **[*5]** ATTORNEY, Hart McLaughlin & Eldridge, LLC, Chicago, IL; Alexander Dewitt Kullar, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Allan Howard Steyer, PRO HAC VICE, Steyer, Lowenthal, Boodrookas Alvarez & Smith LLP, San Francisco, CA; Bobby Pouya, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Clifford Harris Pearson, PRO HAC VICE, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA; D. Scott Macrae, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Devon Paul Allard, PRO HAC VICE, The Miller Law Firm, P.C., Rochester, MI; Douglas A Millen, Freed Kanner London & Millen, LLC, Bannockburn, IL; Eric Jeffrey Mont, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Jill M. Manning, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Franisco, CA; Kevin B Love, PRO HAC VICE, Criden & Love, P.A., South Miami, FL; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Matthew Pearson, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, **[*6]** CA; Michael Jerry Freed, Freed Kanner London & Millen, LLC, Bannockburn, IL; Michael E. Moskovitz, Freed Kanner London &Millen LLC, Bannockburn, IL; Neil J Swartzberg, PRO HAC VICE, Pearson Simon & Warshaw, LLP, San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Rick A. Decker, PRO HAC VICE, The Miller Law Firm, P.C., Rochester, MI; Robert J. Wozniak, Freed Kanner London & Millen, LLC, Bannockburn, IL; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Simeon Andrew Morbey, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Stephen M Owen, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Steven A Kanner, Freed Kanner London & Millen, LLC, Bannockburn, IL; Veronica W Glaze, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA.

For Fargo Stopping Center LLC, Plaintiff: Adam J. Trott, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Adam John Zapala, LEAD ATTORNEY, Cotchett, Pitre & Mccarthy, Burlingame, CA; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Daniel E Gustafson, LEAD ATTORNEY, Gustafson Gluek PLLC, Minneapolis, **[*7]** MN; Daniel C Hedlund, LEAD ATTORNEY, Gustafson Gluek PLLC, Minneapolis, MN; Joyce Chang, LEAD ATTORNEY, PRO HAC VICE, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Mark Francis Ram, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Tamarah P Prevost, LEAD ATTORNEY, Cotchett Pitre and McCarthy, LLP, Burlingame, CA; Brian Douglas Penny , Penny, PRO HAC VICE, Goldman Scarlato & Penny, Conshohocken, PA; Brittany N. Resch, Gustafson Gluek PLLC, Minneapolis, MN; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Dianne M Nast, NastLaw LLC, Philadelphia, PA; Joseph M. Alioto , Jr., Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Joshua J. Rissman, Gustafson Gluek PLLC, Minneapolis, MN; Kenneth A. Wexler, Wexler Wallace LLP, Chicago, IL; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Melinda J. Morales, Wexler Wallace LLP, Chicago, IL; Michelle J. Looby, Gustafson Gluek PLLC, Minneapolis, MN; Michelle Perkovic, Wexler Wallace Llp, Chicago, IL; Richard Michael Hagstrom, Hellmuth &

Johnson, PLLC, Edina, MN; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens **[*8]** Berman Sobol Shapiro LLP, Berkeley, CA.

For Sargent's, Plaintiff: Adam J. Trott, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Adam John Zapala, LEAD ATTORNEY, Cotchett, Pitre & Mccarthy, Burlingame, CA; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Daniel E Gustafson, LEAD ATTORNEY, Gustafson Gluek PLLC, Minneapolis, MN; Daniel C Hedlund, LEAD ATTORNEY, Gustafson Gluek PLLC, Minneapolis, MN; Joyce Chang, LEAD ATTORNEY, PRO HAC VICE, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Mark Francis Ram, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Tamarah P Prevost, LEAD ATTORNEY, Cotchett Pitre and McCarthy, LLP, Burlingame, CA; Brittany N. Resch, Gustafson Gluek PLLC, Minneapolis, MN; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Dianne M Nast, NastLaw LLC, Philadelphia, PA; Joseph M. Alioto , Jr., Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Joshua J. Rissman, Gustafson Gluek PLLC, Minneapolis, MN; Kenneth A. Wexler, Wexler Wallace LLP, Chicago, IL; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Michelle J. Looby, Gustafson Gluek PLLC, Minneapolis, **[*9]** MN; Richard Michael Hagstrom, Hellmuth & Johnson, PLLC, Edina, MN; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Dorothy Monohan, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Bodega Brew Pub, Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Timothy D Battin, LEAD ATTORNEY, PRO HAC VICE, Straus & Boies, LLP, Fairfax, VA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Christopher Le, PRO HAC VICE, Straus & Boies, LLP, Fairfax, VA; Daniel Zemans, Law Offices of Daniel Zemans, LLC, Chicago, IL; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Nathan Cihlar, PRO HAC VICE, Straus & Boies, LLP, Fairfax, **[*10]** VA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Christopher G Glover, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Carl V. Malmstrom, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred T Isquith, Wolf Haldenstein Adler Freeman & Herz Llp, New York, NY; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Christopher Vallaro, Abraham Drucker, Ilana Harwayne-Gidansky, Sabrina Majernik, Christopher Nelson, Amy Veaner, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Carl V. Malmstrom, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Fred T Isquith, **[*11]** Wolf Haldenstein Adler Freeman & Herz Llp, New York, NY; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Barters International LLC, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Lisa M. Sriken, LEAD ATTORNEY, PRO HAC VICE, Bernstein Liebhard LLP, New York, NY; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For William E. Stack, Margo Stack, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio **[*12]** Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Terry Rose Saunders, The Saunders Law Firm, Chicago, IL.

For Cedar Farms Co., Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Thomas Cusack Cronin, Cronin & Co., Ltd., Chicago, IL; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For Ferraro Foods, Inc., Ferraro Foods of North Carolina, LLC, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO **[*13]** HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Jessica Noel Servais, PRO HAC VICE, Heins Mills & Olson, P.l.c., Minneapolis, MN; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Vincent J Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For Joe Christiana Food Distributors, Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Goldich A. Marc, Axler Goldich Llc, Philadelphia, PA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Noah Axler, Axler Goldich Llc, Philidelphia, PA; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana **[*14]** Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Steven Alan Hart, Hart McLaughlin & Eldridge, LLC, Chicago, IL.

For Sullott Corporation, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Kevin S Landau, PRO HAC VICE, Taus Cebulash & Landau LLP, New York, NY; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Cheryl Brenchley, Matthew Hayward, Wayne Deshotel, Carmen Ocasio, Vern Gardner, Jonathan Glover, Plaintiffs: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol **[*15]** Shapiro LLP, Berkeley, CA.

For Tracy Newman, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Ray Wieters, Jason Liebich, Debra Piette, Steve Mizera, Joshua Madsen, Michael Perry, Kirk Evans, Catherine Senkle, Andrew Evans, James Flasch, Plaintiffs: **[*16]** Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Daniel J. Kurowski, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Chicago, IL; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Marilyn Stangeland, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, **[*17]** CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Vern Peter Gardner, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew Dickinson Heaphy, PRO HAC VICE, **[*18]** Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For David Weidner, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, **[*19]** Berkeley, CA.

For Alison Pauk, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Jennifer Wallace, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol **[*20]** Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; J Gerard Stranch , IV, PRO HAC VICE, Branstetter, Stranch & Jennings, PLLC, Nashville, TN; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Christopher Gilbert, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Christopher J. Cormier, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew **[*21]** Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Leslie Weidner, Plaintiff: Alison Deich, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC, DC; Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Greenwood Village, CO; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Benjamin D. Brown, PRO HAC VICE, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., DC; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Daniel H. Silverman, Cohen Milstein Sellers & Toll, PLLC, Chicago, IL; Kit A. Pierson, Cohen Milstein Sellers & Toll Pllc, Washington, DC; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, **[*22]** Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Alpine Special Treatment Center, Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Robert J Gralewski , Jr., PRO HAC VICE, Kirby McInerney LLP, San Diego, CA; Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Indirect Purchaser Plaintiffs, Plaintiff: Adam John Zapala, LEAD ATTORNEY, Cotchett, Pitre & Mccarthy, Burlingame, CA.

For Piggly Wiggly Alabama Distributing Co., Inc., Plaintiff: Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Matthew Powers McCahill, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Matthew P. Mccahill, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer Llp, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Solomon B Cera, **[*23]** LEAD ATTORNEY, Cera LLP, San Francisco, CA; Charles Andrew Dirksen, PRO HAC VICE, Cera LLP, Boston, MA; Richard Lyle Coffman, The Coffman Law Firm, Beaumont, TX.

For Affiliated Foods, Inc.'s Plaintiffs, Plaintiff: Charles Andrew Dirksen, LEAD ATTORNEY, Cera LLP, Boston, MA; Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Rick A. Decker, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, P.C., Rochester, MI; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Solomon B Cera, LEAD ATTORNEY, Cera LLP, San Francisco, CA.

Plaintiffs in 1:16-cv-08637, Plaintiff, Pro se.

For Alex Lee, Inc., Big Y Foods, Inc., Woodman's Food Market, Inc., Plaintiffs: Charles Andrew Dirksen, LEAD ATTORNEY, Cera LLP, Boston, MA; Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL;

Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Matthew Powers McCahill, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Solomon **[*24]** B Cera, LEAD ATTORNEY, Cera LLP, San Francisco, CA; Evan Patrick Boyle, Williams Montgomery & John, Chicago, IL.

For Merchants Distributors, LLC, Associated Grocers of New England, Inc., Fareway Stores, Inc., Plaintiffs: Charles Andrew Dirksen, LEAD ATTORNEY, Cera LLP, Boston, MA; Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Matthew Powers McCahill, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Solomon B Cera, LEAD ATTORNEY, Cera LLP, San Francisco, CA.

For Sysco Corporation, Plaintiff: Erica Michelle Spevack, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC; Jonathan M. Shaw, PRO HAC VICE, Boies, Schiller & Flexner Llp, Washington, DC.

For US Foods, Inc., Plaintiff: Scott Gant, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC; Daryl M. Schumacher, Kopecky Schumacher Rosenburg PC, Chicago, IL; Erica Michelle Spevack, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC; Jonathan M. Shaw, PRO HAC VICE, Boies, Schiller & Flexner Llp, Washington, **[*25]** DC; Kyle N Smith, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC.

For Piggly Wiggly Alabama Distributing Co., Inc., Plaintiff: Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY.

For End-User Consumer Plaintiffs, Plaintiff: Breanna LE Van Engelen, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Jason A. Zweig, Hagens Berman Sobol Shapiro Llp, Chicago, IL; Rio Shaye Pierce, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA.

For Action Meat Distributors, Inc., W. Lee Flowers & Co., Inc., Howard Samuels as Trustee in Bankruptcy for Central Grocers, Inc., et al., Plaintiffs: Eric Richard Lifvendahl, Lowis & Gellen LLP, Chicago, IL.

For Jetro Holdings. LLC, Plaintiff: Mark A. Singer, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Albany, NY; Philip J. Iovieno, LEAD ATTORNEY, Boies Schiller Flexner, Albany, NY; Anne M. Nardacci, Boies Schiller Flexner, Albany, NY; Nicholas A Gravante , Jr, Boies, Schiller and Flexner LLP, New York, NY; Ryan Thomas McAllister, PRO HAC VICE, Boies **[*26]** Schiller Flexner LLP, Albany, NY; Terence H. Campbell, Cotsirilos, Tighe, Streicker, Poulos, & Campbell, Ltd., Chicago, IL.

For The Kroger Co., Plaintiff: Brandon S Floch, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Douglas H Patton, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Samuel J. Randall, Kenny Nachwalter, P.a., Miami, FL; William J Blechman, Kenny Nachwalter, P.A., Miami, FL.

For Hy-Vee, Inc., Albertsons Companies, Inc., Plaintiffs: Brandon S Floch, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Douglas H Patton, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Samuel J. Randall, Kenny Nachwalter, P.a., Miami, FL; William J Blechman, Kenny, Nachwalter, Seymour, Arnold, Miami, FL.

For Associated Grocers of the South, Inc., Plaintiff: David P Germaine, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL; John Paul Bjork, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL; Joseph Michael Vanek, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL; Martin Amaro, Sperling & Slater, P.C., Chicago, IL; Ryan Thomas Holt, Sherrard Roe Voigt & Harbison, Plc, Nashville, TN.

For Meijer, Inc., Meijer Distribution, Inc., OSI Restaurant Partners, LLC, Publix Super Markets, Inc., Supervalu **[*27]** Inc., Wakefern Food Corporation, Plaintiffs: David P Germaine, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL; Joseph Michael Vanek, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL; Martin Amaro, Sperling & Slater, P.C., Chicago, IL.

For Ahold Delhaize USA, Inc., Plaintiff: Ryan Patrick Phair, LEAD ATTORNEY, Hunton Andrews Kurth, Washington, DC; Carter C. Simpson, PRO HAC VICE, Hunton Andrews Kurth LLP, Washington, DC; Craig Young

Lee, Hunton Andrews Kurth, LLP, Washington, DC; Emily K Bolles, PRO HAC VICE, Hunton Andrews Kurth LLP, Washington, DC; John S Martin, PRO HAC VICE, Hunton Andrews Kurth, Richmond, VA; Julie B. Porter, Salvatore Prescott & Porter PLLC, Evanston, IL.

For BJ's Wholesale Club Inc., Maximum Quality Foods, Inc., Darden Restaurants, Inc., Sherwood Food Distributors, LLC, Plaintiffs: Philip J. Iovieno, LEAD ATTORNEY, Boies Schiller Flexner, Albany, NY; Anne M. Nardacci, Boies Schiller Flexner, Albany, NY; Mark A. Singer, Boies Schiller Flexner LLP, Albany, NY; Nicholas A Gravante , Jr, Boies, Schiller and Flexner LLP, New York, NY; Ryan Thomas McAllister, PRO HAC VICE, Boies Schiller Flexner LLP, Albany, NY; Terence H. Campbell, Cotsirilos, Tighe, Streicker, **[*28]** Poulos, & Campbell, Ltd., Chicago, IL.

For Associated Wholesale Grocers, Inc., on behalf of itself and as assignee of Affiliated Foods Midwest Cooperative, Inc.'s claims, Plaintiff: Amy D. Fitts, LEAD ATTORNEY, Polsinelli PC, Kansas City, MO; Daniel D. Owen, LEAD ATTORNEY, PRO HAC VICE, Polsinelli, Kansas City, MO; Guillermo Gabriel Zorogastua, LEAD ATTORNEY, PRO HAC VICE, Kansas City, MO; Rodney L. Lewis, Polsinelli PC, Chicago, IL.

For United Supermarkets, LLC, Krispy Krunchy Foods, LLC, Cheney Bros., Inc., Plaintiffs: Amanda R Jesteadt, LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL; David Bedford Esau, LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL; Sarah Cortvriend, LEAD ATTORNEY, Carlton Fields Jorden Burt, P.a., West Palm Beach, FL; Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL; Martin Vincent Sinclair, Sperling & Slater, PC, Chicago, IL.

For Commercial and Institutional Indirect Purchaser Plaintiffs, Plaintiff: James David Harper, LEAD ATTORNEY, PRO HAC VICE, Harper Little, PLLC, Oxford, MS; Scott Patton Tift, LEAD ATTORNEY, PRO HAC VICE, Barrett Johnston Martin & Garrison, LLC, Nashville, TN; Gabrielle Sliwka, PRO HAC VICE, Gustafson Gluek **[*29]** PLLC, Minneapolis, MN; Kara Anne Elgersma, Wexler Wallace LLP, Chicago, IL; Michelle Perkovic, Wexler Wallace Llp, Chicago, IL.

Plaintiffs in 1:16-cv-08637, Plaintiff, Pro se.

For Quirch Foods, LLC, f/k/a Quirch Foods Co., Christopher Clay Olson, Plaintiff: Andrew Szot, Miller Law LLC, Chicago, IL; Marvin Alan Miller, Miller Law LLC, Chicago, IL; Matthew E Van Tine, Miller Law LLC, Chicago, IL.

For Hooters of America, LLC, Plaintiff: Amanda R Jesteadt, LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL; Sarah Cortvriend, LEAD ATTORNEY, Carlton Fields Jorden Burt, P.a., West Palm Beach, FL.

For Hooters of America, LLC, Checkers Drive-In Restaurants, Inc., Plaintiffs: Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL.

For Brookshire Grocery Company, Plaintiff: For Schnuck Markets, Inc., Plaintiff: Evan Patrick Boyle, Williams Montgomery & John, Chicago, IL.

For Direct Purchaser Plaintiffs, Plaintiff: Allan Howard Steyer, PRO HAC VICE, Steyer, Lowenthal, Boodrookas Alvarez & Smith LLP, San Francisco, CA; D. Scott Macrae, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Jill M. Manning, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & **[*30]** Smith LLP, San Franisco, CA.

For Unified Grocers, Inc., Associated Grocers of Florida, Inc., Plaintiffs: Martin Amaro, Sperling & Slater, P.C., Chicago, IL; David P Germaine, Sperling & Slater, P.C., Chicago, IL.

For Giant Eagle, Inc., Plaintiff: Bernard D Marcus, PRO HAC VICE, Marcus & Shapira, L.L.P., Pittsburgh, PA; Erin Gibson Allen, PRO HAC VICE, Marcus & Shapira LLP, Pittsburgh, PA; Moira E. Cain-Mannix, PRO HAC VICE, Marcus & Shapira LLP, Pittsburgh, PA.

For Bi-Lo Holdings, LLC, Plaintiff: Philip J. Iovieno, Boies Schiller Flexner, Albany, NY; Theodore Beloyeannis Bell, Ahern & Associates P.C., Chicago, IL.

For Walmart, Inc., Plaintiff: Neal S Manne, LEAD ATTORNEY, Susman Godfrey, LLP, Houston, TX; Shawn J. Rabin, LEAD ATTORNEY, Susman Godfrey L.L.P., New York, NY.

For Conagra Brands, Inc., Pinnacle Foods, Inc., Kraft Heinz Foods Company, Nestle USA, Inc., Nestle Purina Petcare Company, Plaintiffs: David C. Eddy, LEAD ATTORNEY, ***Antitrust Law*** Group, LLC, Columbia, SC; Dennis John Lynch, ***Antitrust Law*** Group, Llc, Columbia, SC; Rachael Cecelia Brennan Blackburn, A & G Law LLC, Chicago, IL; Robert M. Andalman, A & G Law LLC, Chicago, IL.

For Services Group of America, Inc., Plaintiff: **[*31]** Dominic Emil Draye, PRO HAC VICE, Greenberg Traurig, LLP, Phoenix, AZ; Erik Weber, Greenberg Traurig, LLP, Austin, TX; Gregory J. Casas, PRO HAC VICE, Greenberg Traurig, LLP, Austin, TX; John F. Gibbons, Greenberg Traurig, LLP., Chicago, IL; Thomas E. Dutton, Greenberg Traurig, LLP, Chicago, IL.

For WalMart, Inc., WAL-MART STORES EAST, LP, Wal-Mart Stores Arkansas, LLC, Wal-Mart Stores Texas, LLC, Wal-Mart Louisiana, LLC, Sam's West, Inc., Sam's East, Inc., Plaintiffs: Neal S Manne, Susman Godfrey, LLP, Houston, TX; Shawn J. Rabin, Susman Godfrey L.L.P., New York, NY.

For Restaurants of America, Inc., LTP Management Group, Inc., Gibson, Greco & Wood, Ltd., Hooters Management Corporation, Anaheim Wings, LLC d/b/a Hooters of Anaheim, Gaslamp Wings, LLC previously d/b/a Hooters of San Diego, Plaintiffs: Lauren Giudice, Carlton Fields, Orlando, FL.

For Mission Valley Wings, LLC d/b/a Hooters of Mission Valley, Oceanside Wings, LLC previously d/b/a Hooters of Oceanside, Costa Mesa Wings, LLC d/b/a Hooters of Costa Mesa, Rancho Bernardo Wings, LLC d/b/a Hooters of San Marcos, Ontario Wings, LLC d/b/a Hooters of Ontario, Hollywood Wings, LLC d/b/a Hooters of Hollywood, South Gate Wings, LLC **[*32]** d/b/a Hooters of South Gate, Wings Over Long Beach, LLC d/b/a Hooters of Long Beach, Bonita Plaza Wings, LLC d/b/a Hooters of Plaza Bonita, Downtown Wings, LLC previously d/b/a Hooters of Downtown LA, Plaintiffs: Amanda R Jesteadt, LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL; David Bedford Esau, LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL; Sarah Cortvriend, LEAD ATTORNEY, Carlton Fields Jorden Burt, P.a., West Palm Beach, FL; Lauren Giudice, Carlton Fields, Orlando, FL; Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL.

For Commonwealth of Puerto Rico, Plaintiff: Elena N Liveris, Law Offices of Michael M. Mulder, Evanston, IL; Michael M. Mulder, Law Offices of Michael M. Mulder, Evanston, IL.

For PJ Food Service, Inc., Plaintiff: Philip J. Iovieno, LEAD ATTORNEY, Boies Schiller Flexner, Albany, NY; Scott R. Wilson, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, New York, NY; Anne M. Nardacci, Boies Schiller Flexner, Albany, NY; Mark A. Singer, Boies Schiller Flexner LLP, Albany, NY; Nicholas A Gravante , Jr, Boies, Schiller and Flexner LLP, New York, NY; Ryan Thomas McAllister, Boies Schiller Flexner LLP, Albany, NY.

For Koch Foods, **[*33]** Inc., JCG Foods of Alabama, LLC, JCG Foods of Georgia, LLC, Koch Meats Co., Inc., Defendants: Stephen Novack, LEAD ATTORNEY, Novack and Macey LLP, Chicago, IL; Brian E. Cohen, Novack and Macey LLP, Chicago, IL; Christopher S. Moore, Novack and Macey, LLP, Chicago, IL; Elizabeth Carlson Wolicki, Novack and Macey, LLP, Chicago, IL; Julie Ann Johnston-Ahlen, Novack and Macey, LLP, Chicago, IL; Marie Velinda Lim, Novack and Macey LLP, Chicago, IL; Stephen J. Siegel, Novack and Macey LLP, Chicago, IL.

For Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Breeders, Inc., Tyson Poultry, Inc., Defendants: John M. Tanski, LEAD ATTORNEY, Axinn, Veltrop & Harkrider LLP-HTFD, Hartford, CT; Nicholas Gaglio, LEAD ATTORNEY, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, New York, NY; Rachel J Adcox, LEAD ATTORNEY, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Washington, DC; Daniel K. Oakes, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Washington, DC; Jarod G. Taylor, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Hartford, CT; Jordan Matthew Tank, Lipe Lyons Murphy Nahrstadt & Pontikis, Chicago, IL; Kenina J Lee, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Washington, DC; Michael J O'Mara, PRO HAC VICE, **[*34]** Axinn, Veltrop & Harkrider LLP, Washington, DC.

For Pilgrim's Pride Corporation, Defendant: Brian Liegel, Weil Gotshal & Manges Llp, Miami, FL; Carrie C. Mahan, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington, DC; Cecile L. Farmer, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington, DC; Christopher J. Abbott, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington, DC; Clayton E. Bailey, PRO HAC VICE, Bailey Brauer PLLC, Dallas, TX; Eric A. Rivas, PRO HAC VICE, Weil, Gotshal & Manges LLP, Redwood Shores, CA; Jessica L. Falk, PRO HAC VICE, Weil, Gotshal &

Manges LLP, New York, NY; Jonathan S. Goldsmith, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington, DC; Kevin J Arquit, Kasowitz Benson Torres LLP, New York, NY; Lorell Guerrero, PRO HAC VICE, Weil Gotshal & Manges, Miami, FL; Michael Lee McCluggage, Eimer Stahl LLP, Chicago, IL; Rachel A. Farnsworth, PRO HAC VICE, Weil, Gotshal & Manges LLP, Princeton, NJ; Robert A Dahnke, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington DC, DC.

For Perdue Farms, Inc., Defendant: Andrew Thomas Hernacki, LEAD ATTORNEY, PRO HAC VICE, Venable LLP, Washington, DC; Deborah Leah Bessner, LEAD ATTORNEY, PRO HAC VICE, Venable LLP, New York, NY; James **[*35]** Douglas Baldridge, LEAD ATTORNEY, Venable LLP, Washington, DC; Robert Paul Davis, LEAD ATTORNEY, PRO HAC VICE, Venable LLP, Washington, DC, DC; Zakariya Koorosh Varshovi, LEAD ATTORNEY, PRO HAC VICE, Venable LLP, Washington, DC; Benjamin P. Argyle, PRO HAC VICE, Venable LLP, New York, NY; Danielle R Foley, PRO HAC VICE, Venable LLP, Washington, DC; Kirstin Beth Ives, Falkenberg Ives LLP, Chicago, IL; Leonard L. Gordon, PRO HAC VICE, Venable LLP, New York, NY; Lisa Jose Fales, PRO HAC VICE, Venable LLP, Washington, DC; Mary M Gardner, PRO HAC VICE, Venable LLP, Washington, DC.

For Sanderson Farms, Inc., Sanderson Farms, Inc. (Foods Division), Sanderson Farms, Inc. (Production Division), Sanderson Farms, Inc. (Processing Division), Defendants: Christa Cynthia Cottrell, LEAD ATTORNEY, Kirkland & Ellis LLP, Chicago, IL; Daniel E. Laytin, LEAD ATTORNEY, Kirkland & Ellis LLP, Chicago, IL; Stacy L Pepper, LEAD ATTORNEY, Kirkland & Ellis LLP, Chicago, IL; Jessica Jean Giulitto, Kirkland And Ellis Llp, Chicago, IL; Joseph Benjamin Tyson , III, Kirkland & Ellis Llp, Chicago, IL; Martin L. Roth, Kirkland & Ellis LLP, Chicago, IL.

For Wayne Farms, LLC, Defendant: Peter Duffy Doyle, LEAD ATTORNEY, **[*36]** Proskaver Rose, New York, NY; Christopher E Ondeck, PRO HAC VICE, Proskauer Rose LLP, Washington, DC; Marc Eric Rosenthal, Proskauer Rose LLP, Chicago, IL; Rucha A Desai, PRO HAC VICE, Proskauer Rose LLP, Boston, MA; Stephen R Chuk, PRO HAC VICE, Proskauer Rose LLP, Washington, DC.

For Mountainaire Farms, Inc., Mountainaire Farms, LLC, Mountainaire Farms of Delaware, Inc., Defendants: John W. Treece, LEAD ATTORNEY, Chicago, IL; Adam Lee Hopkins, PRO HAC VICE, Rose Law Firm, Fayetteville, AR; Amanda K. Wofford, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Bourgon Burnelle Reynolds, PRO HAC VICE, Rose Law Firm, P.A., Little Rock, AR.

For Peco Foods, Inc., Defendant: Boris Bershteyn, LEAD ATTORNEY, PRO HAC VICE, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY; Patrick Joseph Fitzgerald, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Chicago, IL; Gail E. Lee, Skadden, Arps, Slate, Meagher & Flom, Chicago, IL; Lara A Flath, Skadden Arps Slate Meagher & Flom, LLP CH, Chicago, IL.

For Foster Farms, LLC, Defendant: Carmine R. Zarlenga, LEAD ATTORNEY, Mayer Brown LLP, Washington, DC; Stephen M. Medlock, LEAD ATTORNEY, PRO HAC VICE, Mayer Brown LLP, Washington, DC; Oral Pottinger, **[*37]** PRO HAC VICE, Mayer Brown LLP, Washington, DC; William Stallings, PRO HAC VICE, Mayer Brown LLP, Washington, DC.

For House of Raeford Farms, Inc., Defendant: Gregory Gene Wrobel, LEAD ATTORNEY, Vedder Price P.C., Chicago, IL; Henry W. Jones , Junio, PRO HAC VICE, Jordan Price, Raleigh, NC.

For Simmons Foods, Inc., Defendant: Lynn Hagman Murray, LEAD ATTORNEY, Shook, Hardy & Bacon LLP, Chicago, IL; Peter Francis O'Neill, LEAD ATTORNEY, Shook, Hardy & Bacon Llp, Chicago, IL; John R Elrod, Conner & Winters, LLP, Fayetteville, AK; Laurie A. Novion, Shook, Hardy & Bacon, Kansas City, MO; Vicki D Bronson, PRO HAC VICE, Conner & Winters, Fayetteville, AR.

For Fieldale Farms Corporation, Defendant: Alex Brown, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Anthony Thomas Greene, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Brendan J. Healey, Baron Jarris Healey, Chicago, IL; Brian Parker Miller, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; James Butler Cash , Jr., PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Max Paul Marks, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Roger Brent Hatcher , Jr., PRO HAC VICE, Smith, Gilliam, Williams & Miles, P.A., Gainesville, GA; valarie cecile williams, **[*38]** PRO HAC VICE, Alston & Bird LLP, Atlanta, GA.

For George's Inc., George's Farms, Inc., Defendants: William L. Greene, LEAD ATTORNEY, PRO HAC VICE, Stinson LLP, Minneapolis, MN; Gary V Weeks, PRO HAC VICE, The Law Group of Northwest Arkansas LLP, Fayetteville, AR; Jaclyn Niccole Warr, Stinson LLP, St. Louis, MO; John Conroy Martin, Sugar Felsenthal Grais and Helsinger LLP, Chicago, IL; K.C. Dupps Tucker, PRO HAC VICE, The Law Group of Northwest Arkansas LLP, Fayetteville, AR; Kevin Parker Kitchen, PRO HAC VICE, Stinson LLP, Minneapolis, MN; Kristy Elizabeth Boehler, PRO HAC VICE, The Law Group of Northwest Arkansas LLP, Fayetteville, AR; Peter Joseph Schwingler, PRO HAC VICE, Stinson LLP, Minneapolis, MN; Zachary H Hemenway, PRO HAC VICE, Stinson Leonard Street, Kansas City, MO.

For O.K. Foods, Inc., O.K. Farms, Inc., O.K. Industries, Inc., Defendants: Anna Forman, LEAD ATTORNEY, PRO HAC VICE, Kutak Rock LLP, Omaha, NE; John P. Passarelli, LEAD ATTORNEY, PRO HAC VICE, Kutak Rock LLP, Omaha, NE; Robin Stewart, LEAD ATTORNEY, PRO HAC VICE; J.R. Carroll, PRO HAC VICE, Kutak Rock, LLP, Fayetteville, AR; James M. Sulentic, PRO HAC VICE, Kuak Rock LLP, Omaha, NE; Jeffrey Michael Fletcher, PRO **[*39]** HAC VICE, Kutak Rock, LLP, Fayetteville, AR; Kimberly Michelle Hare, Kutak Rock Llp, Chicago, IL; Stephen Michael Dacus, PRO HAC VICE, Kutak Rock LLP, Fayetteville, AR.

For Mar-Jac Poultry, Inc., Mar-Jac Poultry MS, LLC, Mar-Jac Poultry AL, LLC, Mar-Jac AL/MS, Inc., Mar-Jac Holdings, LLC, Defendants: Edward C. Konieczny, LEAD ATTORNEY, Edward C. Konieczny LLC, Atlanta, GA; David C Newman, PRO HAC VICE, Smith, Gambrell & Russell, Atlanta, GA; James L. Thompson, Lynch Thompson, LLP, Chicago, IL; Pennington Philip John, PRO HAC VICE, Smith, Gambrell & Russell, LLP, Washington, DC; Wm. Parker Sanders, PRO HAC VICE, Smith Gambrell & Russell LLP, Atlanta, GA.

For Harrison Poultry, Inc., Defendant: Kaitlin Ann Carreno, LEAD ATTORNEY, PRO HAC VICE, Eversheds Sutherland, Atlanta, GA; Patricia Anne Gorham, LEAD ATTORNEY, PRO HAC VICE, Eversheds Sutherland (US) LLP, Atlanta, GA; Clay H. Phillips, SmithAmundsen LLC (Chgo), Chicago, IL; James Robert McGibbon, PRO HAC VICE, Eversheds Sutherland (US) LLP, Atlanta, GA; Peter M. Szeremeta, PRO HAC VICE, Eversheds Sutherland (US) LLP, Atlanta, GA; Ronald David Balfour, Smithamundsen Llc, Chicago, IL.

For Agri Stats, Inc., Defendant: Jacob D Koering, Miller, **[*40]** Canfield, Paddock and Stone, P.L.C., Chicago, IL; Jeffrey Mark Drake, Miller, Canfield, Paddock and Stone, Chicago, IL; Jennifer A. Fleury, PRO HAC VICE, Hogan Lovells US LLP, Houston, TX; Justin Wade Bernick, PRO HAC VICE, Hogan Lovells US LLP, Washington, DC; Liam Edward Phibbs, PRO HAC VICE, Hogan Lovells US LLP, Washington, DC; William L Monts , III, Hogan Lovells US LLP, Washington, DC.

For Norman W. Fries, Inc., d/b/a Claxton Poultry Farms, Inc., Defendant: James Franklin Herbison, LEAD ATTORNEY, Winston & Strawn LLP, Chicago, IL; Charles C. Murphy , Jr., PRO HAC VICE, Vaughan & Murphy, Atlanta, GA; Michael P Mayer, Winston & Strawn LLP, Chicago, IL.

For Mar-Jac Poultry, LLC, Defendant: Edward C. Konieczny, LEAD ATTORNEY, Edward C. Konieczny LLC, Atlanta, GA; David C Newman, PRO HAC VICE, Smith, Gambrell & Russell, Atlanta, GA; Pennington Philip John, PRO HAC VICE, Smith, Gambrell & Russell, LLP, Washington, DC; Wm. Parker Sanders, PRO HAC VICE, Smith Gambrell & Russell LLP, Atlanta, GA.

For Perdue Foods LLC, Defendant: Deborah Leah Bessner, LEAD ATTORNEY, PRO HAC VICE, Venable LLP, New York, NY; James Douglas Baldridge, LEAD ATTORNEY, Venable LLP, Washington, DC; Benjamin P. Argyle, **[*41]** PRO HAC VICE, Venable LLP, New York, NY; Kirstin Beth Ives, Falkenberg Ives LLP, Chicago, IL; Mary M Gardner, PRO HAC VICE, Venable LLP, Washington, DC; Zakariya Koorosh Varshovi, PRO HAC VICE, Venable LLP, Washington, DC.

For Foster Poultry Farms, Defendant: Carmine R. Zarlenga, Mayer Brown LLP, Washington, DC.

For Simmons Prepared Foods, Inc., Defendant: Lynn Hagman Murray, Shook, Hardy & Bacon LLP, Chicago, IL; Peter Francis O'Neill, Shook, Hardy & Bacon Llp, Chicago, IL; Vicki D Bronson, PRO HAC VICE, Conner & Winters, Fayetteville, AR.

For Amick Farms, LLC, Defendant: Steven Howard Gistenson, LEAD ATTORNEY, Dykema Gossett PLLc, Chicago, IL; Cody D. Rockey, Dykema Gossett PLLC, Ann Arbor, MI; Dante Andreas Stella, Dykema Gossett Pllc, Detroit, MI; Howard Bruce Iwrey, Dykema Gossett Pllc, Bloomfield Hills, MI.

For Case Foods, Inc., Case Farms, LLC, Case Farms Processing, Inc., Defendants: Joseph D Carney, LEAD ATTORNEY, PRO HAC VICE, Joseph D. Carney & Associates, LLC, Avon, OH; Daniel Martin Feeney, Miller Shakman Levine & Feldman LLP, Chicago, IL; Deborah A Klar, PRO HAC VICE, D. Klar Law, Bel Air, CA; Thomas M. Staunton, Miller, Shakman Levine & Feldman LLP, Chicago, IL.

For Mar-Jac **[*42]** Holdings, Inc., Defendant: Edward C. Konieczny, LEAD ATTORNEY, Edward C. Konieczny LLC, Atlanta, GA; James L. Thompson, Lynch Thompson, LLP, Chicago, IL.

For R.W. Zant Co., Respondent: Joshua Erik Bidzinski, LEAD ATTORNEY, Swanson, Martin & Bell, Llp, Chicago, IL; Shera D. Wiegler, LEAD ATTORNEY, Swanson, Martin & Bell, LLP, Chicago, IL.

For Gerber's Poultry, Inc., Movant: Charles B. Leuin, Benesch, Friedlander, Coplan & Aronoff LLP, Chicago, IL.

For Shamrock Foods Company, United Food Service, Inc., Movants: Ilana Drescher, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Jerry R Goldsmith, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Joshua Goldberg, Carpenter Lipps & Leland LLP, Chicago, IL; Lori P Lustrin, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Robert W Turken, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Scott N Wagner, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Steven Christopher Moeller, Carpenter Lipps & Leland LLP, Chicago, IL.

For Porky Products, Inc., Movant: Ariel Welker Schepers, Barack Ferrazzano Kirschbaum & Nagelberg LLP, Chicago, IL; Edward Francis Malone, Barack Ferrazzano Kirschbaum **[*43]** & Nagelberg LLP, Chicago, IL; JORDAN DEREK WEINREICH, PRO HAC VICE, Sherman Wells Sylvester & Stamelman LLP, Florham Park, NJ.

For Quirch Foods, LLC, f/k/a Quirch Foods Co., Movant: Carlos Juan Canino, LEAD ATTORNEY, PRO HAC VICE, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL; Abigail Grieco Corbett, PRO HAC VICE, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL; Jay Brian Shapiro, PRO HAC VICE, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL; Samuel Olds Patmore, PRO HAC VICE, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL.

For United States of America, Intervenor: Michael Thomas Koenig, LEAD ATTORNEY, U.S. Department of Justice, Washington, DC; Carolyn M Sweeney, United States Department of Justice, Antitrust Division, Washington, DC; Heather Diefenbach Call, U.S. Department of Justice, Washington, DC; Paul John Torzilli, United States Department of Justice, Antitrust Division, Washington, DC.

Judges: Honorable Thomas M. Durkin, United States District Judge.

Opinion by: Thomas M. Durkin

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiffs[1] allege that Rabobank[2] conspired with defendant companies in the poultry industry to limit the supply **[*44]** of chicken meat in violation of the *Sherman Act § 1*. Rabobank has moved to dismiss for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. R. 4369. That motion is granted.

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[1] According to the Direct Action Plaintiffs' consolidated complaint, the following plaintiffs have sued Rabobank: Sysco Corporation; US Foods, Inc.; EMA Foods Co., LLC; L. Hart, Inc.; R&D Marketing, LLC; Timber Lake Foods, Inc.; Campbell Soup Company, and related entities; Target Corporation; McLane Company, Inc. and related entities; Kinexo, Inc.; John Soules Foods, Inc. and John Soules Acquisitions LLC; and Red Bird Farms Distribution Company. *See* R. 4243 at 3-52. The three classes and more than 100 other Direct Action Plaintiffs have not.

Several years ago, the Court held that the class plaintiffs plausibly alleged a conspiracy in the poultry production industry to limit supply in order to increase the price of chicken. *See* R. 541 (*In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772 (N.D. Ill. 2017)*). Shortly thereafter, the Court held that the class plaintiffs had also plausibly alleged that industry analyst, Agri Stats, acted as a co-conspirator by being a conduit of information and communication among chicken producers. *See* R. 1943 (*In re Broiler Chicken Antitrust Litig., 2019 U.S. Dist. LEXIS 32560, 2019 WL 1003111 (N.D. Ill. Feb. 28, 2019)*). Plaintiffs allege that Rabobank played a similar role.

In denying the motion to dismiss the claims against Agri Stats, the Court found that ***HN1***[] "[i]t is at least plausible (if not likely) that a person who facilitates a conspiracy knows about the conspiracy and engages in the facilitation knowing of its consequences." *2019 U.S. Dist. LEXIS 32560, [WL] at *2*. Plaintiffs would argue that this finding applies equally to Rabobank.

It is not surprising, and Rabobank does not dispute that it had frequent communications across the industry. It is apparently the largest or one of the largest lenders to chicken producers. Indeed, Plaintiffs have discovered **[*45]** emails in which a Rabobank director states that he has relayed communications between defendants Perdue and Pilgrim's Pride. *See* R. 4372-5; R. 4372-6; R. 4372-7. These emails raise the specter of Rabobank serving as a communications conduit akin to Agri Stats.

HN2[] *Rule 12(b)(6)*, however, does not permit Plaintiffs to chase ghosts. The mere possibility that the subject matter of Rabobank's communications was the alleged conspiracy to reduce supply is insufficient to state a claim. See *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ("The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief."). The emails are entirely ambiguous as to the subject matter of the communications they reference. Without knowing this information, Plaintiffs are asking the Court to infer that Rabobank knew about and communicated with Defendants about the alleged conspiracy from the unsurprising and unsuspicious fact that Rabobank communicated with Defendants. There are too many inferences in that chain of **[*46]** reasoning for it to retain plausibility.

Plaintiffs' allegations against Agri Stats were much more concrete. Plaintiffs alleged that Agri Stats "reports are so detailed that the ostensible anonymity of the information is breached, and Defendants were able to use the reports to communicate their Broiler production intentions, thereby conspiring to fix Broiler prices." *In re Broiler Chicken*, 2019 U.S. Dist. LEXIS 32560, 2019 WL 1003111, at *1. And since Agri Stats produced the reports, the Court found it plausible that Agri Stats knew the reports were being used to facilitate conspiracy. There is no similar factual basis regarding Rabobank's communications with Defendants from which the Court can infer that those communications concerned the alleged supply reduction conspiracy.

The rest of the allegations are even less compelling. Plaintiffs emphasize that Rabobank campaigned for the industry to reduce production in order to increase prices. *See* R. 4243 at 189-92 (¶¶ 576-86). You don't need to be John Maynard Keynes to recognize this truism, and simply repeating it without a plausible claim of helping the producers to coordinate production decreases does not an antitrust violation make. ***HN3***[] Encouraging lower production by itself is simply not enough to plausibly **[*47]** establish liability. *See* *Kleen Prods. LLC v. Int'l Paper, 276 F. Supp. 3d 811, 841 (N.D. Ill. 2017)* ("[T]here is a trade-off between price and volume. If firms want to raise prices, they have to produce less, sell less, and thereby say 'no' to customers. It should not be a mark of conspiracy to say what is true, already known by the audience, and articulated by countless third-party analysts, academicians, and jurists alike.").

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[2] By "Rabobank," Plaintiffs mean: Utrecht-America Holdings, Inc., a Delaware corporation headquartered in New York, NY, which is the American subsidiary of the Dutch cooperative banks Cooperative Rabobank U.A. and Rabobank International Holding, B.V., and the subsidiaries Rabo AgriFinance LLC, a Delaware limited liability company headquartered in Saint Louis, MO; Rabobank USA Financial Corporation, a Delaware corporation headquartered in New York, NY; and Utrecht-America Finance Co., a Delaware company headquartered in New York, NY. *See* R. 4243 at 121-22 (¶ 240).

Plaintiffs also make much of the fact that Rabobank communicated with Agri Stats about the need for production cuts. *See* R. 4243 at 189-90 (¶¶ 577-80). But again, these communications merely establish that Rabobank had a significant interest in the industry. None of these communications show that Rabobank was involved in coordinating production cuts among the producers.

Plaintiffs allegations are all the more insufficient when viewed in the context of the complaint as a whole. Plaintiffs dedicate only 13 of 1,514 paragraphs to Rabobank's conduct. The 425-page complaint provides great detail about the supply of chicken during the relevant time period and the activities of the defendant chicken producers and Agri Stats. The most compelling allegations against Rabobank are based on three emails, which, as discussed, are ambiguous at best. **[*48]** Such***HN4***[] sparce allegations can sometimes be sufficient to state a claim in the right circumstances and when they permit the necessary inferences. But it is simply not plausible that Rabobank participated in an extensive conspiracy and left so little evidence of its participation.

Therefore, Rabobank's motion is granted, and Rabobank is dismissed without prejudice. If Plaintiffs discover facts plausibly implicating Rabobank in the conspiracy, Plaintiffs may amend their complaint. In anticipation of that possibility, the Court addresses several of Rabobank's arguments.

First, the Court rejects Rabobank's argument that "service providers" should not face antitrust liability for colluding with their clients. *See* R. 4372 at 14 (quoting *Gulf States Reorganization Grp., Inc. v. Nucor Corp., 822 F. Supp. 2d 1201, 1219 n.18 (N.D. Ala. 2011)*). If allegations plausibly demonstrate that a banker, lender, accountant, lawyer, or other service provider facilitated an unlawful conspiracy among their clients, the Court does not perceive any precedential danger in holding that person accountable for their conduct. ***HN5***[] The force of the allegations controls the analysis, not the title of the potential defendant.

Next, Rabobank argues that Plaintiffs sued the wrong entities and should have sued an entity called **[*49]** Coöperatieve Rabobank, U.A., New York Branch. *See* R. 4372 at 3 n.1; *id.* at 12. In support of this argument, Rabobank cites a Seventh Circuit holding that a "complaint based on a theory of collective responsibility must be dismissed." R. 4372 at 12 (quoting *Bank of Am., N.A. v. Knight, 725 F.3d 815, 818 (7th Cir. 2013)*). But the claims are plausibly understood as alleging agency among the Rabobank entities, not merely collective liability. Similarly, to the extent Rabobank is correct that Plaintiffs failed to sue the correct entity, that argument would not necessarily undermine the plausibly of the allegations against the other related entities.

Lastly, the Court notes Rabobank's argument that Plaintiffs must have "nothing to say" because they "used just two-thirds of the pages this Court allows for response briefs." *See* R. 4536 at 2. This argument runs contrary to the opinions of great thinkers and writers throughout history who believed that brevity and silence have greater persuasive power, including Blaise Pascal's apology, "I would have written a shorter letter, but I did not have the time." More presently relevant to the parties, the Court suggests that condemnation of a concise brief is not generally a winning argument to make to a Court **[*50]** with many hundreds of pages of motions and briefs to read each week, many in this case alone.

Nevertheless, Rabobank's motion to dismiss [4369] is granted. The claims against Rabobank are dismissed without prejudice.

ENTERED:

/s/ Thomas M. Durkin

Honorable Thomas M. Durkin

United States District Judge

Dated: June 1, 2021

End of Document

Spectrum Scis., LLC v. Celestron Acquisition, LLC

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

June 2, 2021, Decided; June 2, 2021, Filed

Case No. 5:20-cv-03642-EJD

Reporter

2021 U.S. Dist. LEXIS 103832 *; 2021 WL 2224347

SPECTRUM SCIENTIFICS, LLC, et al., Plaintiffs, v. CELESTRON ACQUISITION, LLC, et al., Defendants.

Prior History: *Spectrum Scis., LLC v. Celestron Acquisition, LLC, 2020 U.S. Dist. LEXIS 166748, 2020 WL 5500424 (N.D. Cal., Sept. 11, 2020)*

Core Terms

allegations, conspiracy, telescope, Manufacturing, acquisition, competitor, antitrust, co-conspirators, statute of limitations, motion to dismiss, motion to strike, participated, monopolization, distributors, Entities, horizontal, prices, Plaintiffs', concealment, fraudulent concealment, affirmative act, misconduct, acquire, email, alleged conspiracy, class period, overt act, constitutes, affiliates, violations

LexisNexis® Headnotes

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

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

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

Fed. R. Civ. P. 8(a)(2) requires a complaint to include a short and plain statement of the claim showing that the pleader is entitled to relief. A complaint that fails to meet this standard may be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Rule 8(a) requires a plaintiff to plead enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. While a plaintiff must allege more than a sheer possibility that a defendant has acted unlawfully, the plausibility standard is not akin to a probability requirement.

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

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

For purposes of ruling on a Fed. R. Civ. P. 12(b)(6) motion, the court generally accepts factual allegations in the complaint as true and construes the pleadings in the light most favorable to the nonmoving party. The court need not, however, assume the truth of legal conclusions merely because they are cast in the form of factual allegations.

Mere conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss. The court may also look beyond the plaintiff's complaint to matters of public record without converting the Rule 12(b)(6) motion into a motion for summary judgment.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > Defenses

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

HN3[] **Sherman Act, Defenses**

Ordinarily, a cause of action in antitrust accrues each time a plaintiff is injured by an act of the defendant and the statute of limitations runs from the commission of the act. An antitrust cause of action generally accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. A plaintiff is not required actually discover its antitrust claims before the statute of limitations begins to run.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

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

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

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

HN4[] **Sherman Act, Defenses**

In the context of a continuing conspiracy to violate the antitrust laws, each time a plaintiff is injured by an act of the defendant a cause of action accrues to him to recover the damages caused by that act. As to those damages, the statute of limitations runs from the commission of the act. To restart the statute of limitations, there must be a new overt act that: (1) is new and independent and not merely a reaffirmation of a previous act, and (2) inflicts new and accumulating injury on the plaintiff. The Supreme Court and federal appellate courts have recognized that each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act.

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

Governments > Legislation > Statute of Limitations > Time Limitations

HN5[] **Conspiracy to Monopolize, Elements**

In the context of a continuing conspiracy to violate antitrust laws, each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Begins to Run > Continuing Violations

HN6[] **Statute of Limitations, Time Limitations**

The continuing conspiracy doctrine does not entitle plaintiffs to recover for all past injuries; rather, each new price-fixed sale triggers a new limitations period for Plaintiffs to recover the damages caused by that act. The commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.); (It does not therefore necessarily follow that each new injury constitutes Sherman-Act-compensable harm that—when timely litigated—provides an avenue of redress for past, non-timely-pursued harms.

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > Tolling

HN7[] **Statute of Limitations, Pleadings & Proof**

The burden of alleging facts which would give rise to tolling falls upon a plaintiff. However, because resolving tolling disputes is a fact-intensive process, statute of limitations defenses may not be raised by motion to dismiss unless they include no disputed issues of fact.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Torts > ... > Statute of Limitations > Tolling > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN8[] **Tolling of Statute of Limitations, Fraudulent Concealment**

To toll the statute of limitations under a theory of fraudulent concealment, a plaintiff must do more than show that it was ignorant of its cause of action. A plaintiff asserting fraudulent concealment must allege that: (1) the defendant took affirmative acts to mislead the plaintiff; (2) the plaintiff did not have actual or constructive knowledge of the facts giving rise to its claim; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to its claim. Allegations of fraudulent concealment must be pled with particularity; conclusory statements are insufficient.

Business & Corporate Law > ... > Causes of Action & Remedies > Breach of Fiduciary Duty > Statute of Limitations

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN9[] **Breach of Fiduciary Duty, Statute of Limitations**

Although the affirmative acts necessary to show fraudulent concealment can be integral to the underlying conspiracy itself passive concealment is not enough. Passive concealment of information is not enough to toll the statute of limitations, unless the defendant had a fiduciary duty to disclose information to the plaintiff. An affirmative act of denial, however, is enough if the circumstances make the plaintiff's reliance on the denial reasonable. The line between active and passive concealment is very fine indeed.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

HN10[] **Sherman Act, Defenses**

Mere failure to own up to illegal conduct in response to an inquiry about whether the defendant engaged in illegal antitrust activity is not sufficient for fraudulent concealment, and to find otherwise would effectively nullify the statute of limitations in these cases.

Antitrust & Trade Law > Sherman Act > Defenses

HN11[] **Sherman Act, Defenses**

Courts have been hesitant to dismiss an otherwise fraudulently concealed antitrust claim for failure to sufficiently allege due diligence, because questions of inquiry notice are necessarily bound up with the facts of the case.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN12[] **Sherman Act, Claims**

Courts in the district do not require plaintiffs in complex, multinational, antitrust cases to plead detailed, defendant-by-defendant allegations; instead they require plaintiffs to make allegations that plausibly suggest that each Defendant participated in the alleged conspiracy. An antitrust complaint must allege that each individual defendant joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it. This is because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN13[] **Sherman Act, Claims**

Sherman Act § 1provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. 15 U.S.C.S. § 1. A plaintiff asserting a claim under § 1 must plead: (1) a contract, combination or conspiracy among two or more persons or distinct business entities (2) which is intended to restrain or harm trade; (3) which actually injures competition, and (4) harm to the plaintiff from the anticompetitive conduct. But because § 1 does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express.

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

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

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

Antitrust & Trade Law > Sherman Act > Claims

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

HN14[] **Actual Monopolization, Claims**

Sherman Act § 2 prohibits monopolization or attempted monopolization of trade or commerce. 15 U.S.C.S. § 2. A plaintiff asserting an attempt claim must plead: (1) a specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving monopoly power, and (4) causal antitrust injury. A monopoly claim has two elements, aside from antitrust injury: (1) the defendant possessed monopoly power in the relevant market and (2) the defendant willfully acquired or maintained that power.

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

HN15[] **Anticompetitive & Predatory Practices, Predatory Pricing**

A plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

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

HN16[] **Clayton Act, Claims**

The Clayton Act § 7 prohibits a corporation from acquiring the stock or assets of another corporation in any line of commerce in which the effect may be substantially to lessen competition, or to tend to create a monopoly. 15

U.S.C.S. § 18. When examining a § 7 claim, a court must be mindful that every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects.

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

Torts > Business Torts > Unfair Business Practices > Elements

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

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

The Unfair Competition Law (UCL) broadly prohibits any unlawful, unfair or fraudulent business act or practice. By proscribing any unlawful business practice, the UCL borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. Thus, the unlawful prong of the statute prohibits anything that can properly be called a business practice and that at the same time is forbidden by law.

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

HN18[] **Amendment of Pleadings, Leave of Court**

Requests for leave to amend should be granted with extreme liberality. Under Fed. R. Civ. P. 15(a)(2), he court should freely give leave when justice so requires.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Immaterial Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Irrelevant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Scandalous Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Redundant Matters

HN19[] **Motions to Strike, Immaterial Matters**

A court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter pursuant to Fed. R. Civ. P. 12(f). Fed. R. Civ. P. 12(f). Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question. Redundant allegations are those that are needlessly repetitive or wholly foreign to the issues involved in the action. Scandalous matters are allegations that unnecessarily reflect on the moral character of an individual or state anything in repulsive language that detracts from the dignity of the court.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Immaterial Matters

HN20[] **Motions to Strike, Immaterial Matters**

The function of a Fed. R. Civ. P. 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial. In determining whether to grant a motion to strike, a district court views the pleadings in a light most favorable to the non-moving party, and resolves any doubt as to the relevance of the challenged allegations in the plaintiff's favor.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN21[] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

Allegations supplying background or historical material or other matter of an evidentiary nature will not be stricken unless unduly prejudicial to defendant.

Counsel: **[*1]** For Spectrum Scientifics, LLC, Radio City, Inc., Plaintiffs: Jonas Noah Hagey, LEAD ATTORNEY, Athul Karinja Acharya, Ronald James Fisher, Matthew Brooks Borden, BraunHagey & Borden LLP, San Francisco, CA; Gunnar Karl Martz, BraunHagey & Borden LLP, San Francisco, CA.

For Sigurd Murphy, Keith Uehara, Plaintiffs: Adam J. Zapala, LEAD ATTORNEY, Cotchett Pitre & McCarthy LLP, Burlingame, CA.

For Celestron Acquisition, LLC, SW Technology Corporation, Corey Lee, Joseph Lupica, Dave Anderson, Defendants: Christopher Lynn Frost, LEAD ATTORNEY, Eisner, APC, Beverly Hills, CA; Amber Henry, Eisner Jaffe, Beverly Hills, CA; Amy Rose Cole, Eisner, LLP, United Sta, Beverly Hills, CA; Ashlee Nicole Lin, Eisner LLP, Beverly Hills, CA.

Judges: EDWARD J. DAVILA, United States District Judge.

Opinion by: EDWARD J. DAVILA

Opinion

ORDER GRANTING IN PART AND DENYING DEFENDANTS' MOTIONS TO DISMISS; GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO STRIKE

Re: Dkt. Nos. 63, 64, 96, 97

Plaintiffs Spectrum Scientifics, LLC and Radio City, Inc. ("Plaintiffs") brought this putative class action on behalf of themselves and a proposed class of direct purchasers ("DPPs") against Defendants (1) Synta Technology Corp. ("Synta Tech"), (2) Suzhou **[*2]** Synta Optical Technology Co., Ltd. ("Suzhou Synta"), (3) Nantong Schmidt Opto-Electrical Technology Co. Ltd. ("Nantong Schmidt"), (4) Synta Canada International Enterprises Ltd. ("Synta Canada"), (5) Pacific Telescope Corp. ("Pacific Telescope"), (6) Olivon Manufacturing Group Ltd. ("Olivon Manufacturing"), (7) SW Technology Corp. ("SW"), (8) Celestron Acquisition, LLC ("Celestron"), (9) Olivon USA LLC ("Olivon USA"), (10) Dar Tson "David" Shen, (11) Joseph Lupica, (12) David Anderson, (13) Corey Lee; (14) Jean Shen, (15) Sylvia Shen, (16) Jack Chen, (17) Laurence Huen, and (18) Ningbo Sunny Electronic Co. Ltd., ("Ningbo Sunny") (collectively, "Defendants") alleging antitrust violations arising out of a conspiracy to unlawfully monopolize and fix prices in the telescope market.

On October 19, 2020, Plaintiffs filed their Second Amended Complaint ("SAC"). Dkt. No. 54. On November 16, 2020, Defendants Celestron, SW, Mr. Anderson, Mr. Lupica, and Mr. Lee filed (1) a Motion to Strike Allegations in the SAC ("Motion to Strike"), and (2) a Motion to Dismiss the SAC pursuant to *Federal Rule of Civil Procedure 12(b)(6)* ("First Motion to Dismiss"). Dkt. Nos. 63, 64. The remainder of Defendants later joined in the Motion to Strike, **[*3]** with the exception of Ningbo Sunny, which has not appeared in this action. Dkt. No. 98.

On January 20, 2021, Defendants Mr. Shen, Ms. Sylvia Shen, Mr. Chen, Mr. Huen, Suzhou Synta, Nantong Schmidt, Synta Tech, Olivon Manufacturing, Olivon USA, and Pacific Telescope filed a Motion to Dismiss the SAC ("Second Motion to Dismiss"), raising substantially the same arguments as the First Motion to Dismiss. Dkt. No. 96. On the same day, Defendants Jean Shen and Synta Canada filed a separate Motion to Dismiss the SAC for lack of personal jurisdiction and for failure to state a claim pursuant to *Rule 12(b)(2)* and *(6)* ("Synta Canada Motion"). Dkt. No. 97. Following jurisdictional discovery, Ms. Shen and Synta Canada withdrew their motion as to personal jurisdiction. Dkt. Nos. 140, 143. The remainder of the Synta Canada Motion raises substantially the same arguments as the First and Second Motions to Dismiss. The Court, therefore, considers all three motions to dismiss together.

The Court took all three motions under submission for decision without oral argument pursuant to *Civil Local Rule 7-1(b)*. For the reasons stated below, the Court GRANTS IN PART and DENIES IN PART the Motions to Dismiss and GRANTS IN PART AND DENIES IN PART the **[*4]** Motion to Strike.

I. BACKGROUND

The SAC generally alleges that Synta Technology and its affiliates (collectively, "Synta" or "the Synta Entities")[1] participate in a long-running conspiracy with Ningbo Sunny and its affiliates ("the Ningbo Sunny Entities") to "to fix prices, divide the market, retaliate against competitors, mislead U.S. authorities, illegally acquire assets and dominate the U.S. market so that they could rip off American purchasers." SAC ¶ 2. The Synta Entities are "a group of related entities, holding companies, and shell corporations controlled by an individual named David Shen, and his henchmen," including his family members. *Id.* ¶ 13.

Both the Synta Entities and the Ningbo Sunny Entities are vertically integrated corporate families, that manufacture telescopes in China and distribute, market, and sell those telescopes around the world, including in the U.S. through U.S. subsidiaries. *See id.* ¶ 66. Plaintiffs allege that these two corporate families conspired to improperly dominate two relevant markets: (1) the consumer telescope and telescope accessory manufacturing for import into the United States ("the Manufacturing Market"); and (2) the market for consumer telescope **[*5]** distribution in the United States ("the Distribution Market"). *Id.* ¶¶ 55-59. Plaintiffs allege that Synta and Ningbo Sunny presently manufacture over 80% of all consumer telescopes imported into the United States. *Id.* ¶ 3.

In 2005, Synta acquired Celestron through a wholly owned subsidiary holding company, SW. *Id.* ¶¶ 23-24. From 2001 until 2005, Mr. Shen was not only the owner and Chairman of Synta but was also the Vice Chairman of and stakeholder in Ningbo Sunny. *Id.* ¶¶ 15-16. Mr. Shen transferred that interest and resigned from his position in 2005 in order to avoid any conflict of interest created by Synta's acquisition of Celestron, Ningbo Sunny's horizontal competitor. *Id.*

Before they were acquired by Synta, Celestron and Meade Instruments Corp. ("Meade") were the leading U.S. telescope manufacturers and distributors. In 1991, and again in 2002, Celestron attempted to merge with Meade. Both times, the FTC took action to block proposed combinations on antitrust grounds. *Id.* ¶ 74.

When Meade was offered for sale in 2013, a smaller manufacturer of telescopes, Jinghua Optical Co. Ltd. ("Jinghua"), made a bid to purchase it. *Id.* ¶¶ 73, 75. Knowing that Jinghau's purchase of Meade would **[*6]** have allowed Jinghua to more substantially compete in the market, Ningbo Sunny and Synta conspired to prevent the acquisition. *Id.* ¶ 77, Ex. 2. Because Synta owned Celestron, a direct competitor of Meade, Synta could not purchase Meade directly. Instead, Ningbo Sunny's CEO Peter Ni, and Synta's CEO Mr. Chen agreed that Ningbo Sunny would purchase Meade with financial and other assistance from Synta. *Id.* ¶¶ 77-78.

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[1] The SAC regularly refers to "Synta," defined as "a conglomerate of entities owned and controlled by Dar-Tson 'David' Shen and his close family members that include Synta Technology Corporation, Suzhou Synta, and a shadowy network of other factories and distributors." SAC ¶ 2 n.1. Defendants challenge the use of "Synta" and, as discussed further below, argue that such allegations do not adequately distinguish among corporate affiliates. In summarizing the allegations of the SAC and without prejudging the arguments, the Court refers to Synta where no affiliate is specified.

After the acquisition, Celestron loaned considerable sums to horizontal competitor Ningbo Sunny. *Id.* ¶ 88. In exchange for these capital contributions, Celestron was granted an ownership interest in Meade, another horizontal competitor, which was memorialized in Celestron's "shadow books." *Id.* ¶ 89. David Shen and Peter Ni agreed that Defendant and then-Celestron CEO Joe Lupica would quit his role at Celestron on June 18, 2013 and become CEO of Meade after the deal closed. *Id.* ¶ 83. This transfer took place as planned, and other Celestron executives also joined Meade. *Id.* ¶ 84.

The Synta Entities and Ningbo Sunny Entities effectively divided the telescope market by agreeing that Synta would manufacture and supply higher-end telescopes, that Ningbo Sunny would manufacture and **[*7]** supply lower-end telescopes, and that they would not compete. *Id.* ¶ 96; *see also id.* Ex. 9 (email from Synta's CEO Mr. Shen informing Ningbo Sunny's CEO Mr. Ni and Celestron's CEO David Anderson that "[t]he best way in the future is to divide the products and sell them into different markets to reduce conflicts"). Ningbo Sunny also provided Celestron with Meade's trade secrets and pricing information, allowed Celestron engineers to tour Meade's factory, and continued to coordinate business activities with Mr. Shen and his trusted counselor and Celestron Executive Committee member Laurence Huen. *Id.* ¶¶ 87, 100-101. By dividing the market and sharing information in this way, Ningbo Sunny and Synta together controlled between 90% of the manufacturing market in 2018. *Id.* ¶¶ 118.

On November 1, 2016, independent telescope distributer Optronic Technologies Co. ("Orion") filed suit in this District against its competitors Ningbo Sunny, Meade, and affiliate Sunny Optics, Inc. (the "*Orion* Action"). *See Optronic Techs. Inc. v. Ningbo Sunny et al.*, No. 5:16-cv-06370-EJD (N.D. Cal.). The *Orion* Action involved largely the same causes of action and factual allegations as described in the SAC. Orion was also represented by counsel for Plaintiffs in this case. After a six-week **[*8]** trial in the *Orion* Action, a jury found Ningbo Sunny liable for violations of the *Sherman Act* and *Clayton Act*. *Optronic Techs. Inc. v. Ningbo Sunny et al., No. 5:16-cv-06370-EJD, Dkt. No. 501, 2019 U.S. Dist. LEXIS 224707 (N.D. Cal. Nov. 26, 2019)*. While the *Orion* Action is relevant to the extent it affects the analysis of Plaintiffs' knowledge of the underlying factual allegations, none of the moving Defendants were parties to the *Orion* Action and the holdings of that case are not binding on this one.

Following the *Orion* trial, Plaintiffs filed the present action. Plaintiffs seek to represent a class consisting of all similarly situated retailers and distributors who purchased telescopes manufactured or sold by Defendants during the time period beginning from Synta's acquisition of Celestron in 2005 through such time as class notice is given. On October 19, 2020, Plaintiffs filed the SAC, raising four causes of action: (1) price fixing, credit term fixing, market allocation, product allocation, and other unlawful collusion between competitors in violation of *§ 1 of the Sherman Act (15 U.S.C. § 1)*; (2) monopolization, attempted monopolization, and conspiracy to monopolize in violation of *§ 2 of the Sherman Act (15 U.S.C. § 2)* and *§ 7 of the Clayton Act (15 U.S.C. § 18)*; (3) unfair competition in violation of *California Business & Professions Code §§ 17200 et seq.*; and (4) price fixing, credit term fixing, market allocation, product allocation, other unlawful collusion between competitors, monopolization, **[*9]** attempted monopolization, and conspiracy to monopolize in violation of the Cartwright Act, *California Business & Professions Code §§ 16700 et seq.* Plaintiffs seek, among other things, their actual damages, treble damages, and injunctive relief.

As noted above, Defendants filed two separate motions to dismiss, which raise many of the same arguments and which the Court considers together. Several indirect purchaser plaintiffs ("IPPs") also filed complaints in this District against largely the same defendants ("the IPP Action"), which were later consolidated and related to this case. *Hightower v. Celestron Acquisiton, LLC et al.*, No. 5:20-cv-03639-EJD (N.D. Cal.). The Defendants filed similar motions to dismiss and a motion to strike in the IPP Action, which this Court addressed in a separate order ("the IPP Order"). *Hightower, No. 5:20-cv-03639-EJD, Dkt. No. 177, 2021 U.S. Dist. LEXIS 103832 (N.D. Cal. June 2, 2021)*. Because many of the arguments Defendants raised are the same in both cases, the Court references and relies on its analysis in the IPP Order throughout this order.

II. LEGAL STANDARD

HN1[] *Rule 8(a)(2) of the Federal Rules of Civil Procedure* requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint that fails to meet this standard may be dismissed pursuant to *Rule 12(b)(6)*. *Rule 8(a)* requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility **[*10]** when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. While a plaintiff must allege "more than a sheer possibility that a defendant has acted unlawfully," the plausibility standard "is not akin to a probability requirement." *Id.*

HN2[] For purposes of ruling on a *Rule 12(b)(6)* motion, the Court generally "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. The Court need not, however, "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th Cir. 2011)* (per curiam). Mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson, 355 F.3d 1179, 1183 (9th Cir. 2004)*. The Court may also "look beyond the plaintiff's complaint to matters of public record" without converting the *Rule 12(b)(6)* motion into a motion for summary judgment. *Shaw v. Hahn, 56 F.3d 1128, 1129 n. 1 (9th Cir.1995)*.

III. MOTION TO DISMISS

Defendants seek to dismiss the SAC on three grounds (1) all of Plaintiffs' claims are barred under the applicable statutes of limitations; (2) Plaintiffs fail to raise sufficient allegations as to specific named defendants; and (3) **[*11]** Plaintiffs fail to sufficiently allege claims under the Sherman Act, the Clayton Act, or the relevant state laws.

A. Statutes of Limitations

Plaintiffs have alleged violations of the *Sherman Act §§ 1* and *2*, *Clayton Act § 7*, the Cartwright Act, and *California Business & Professions Code §§ 16700*, *17200*—all of which are subject to a four-year statute of limitations. *Garrison v. Oracle Corp., 159 F. Supp. 3d 1044, 1062-85 (N.D. Cal. 2016)* (analyzing limitations period of these same claims). ***HN3***[] "Ordinarily, '[a] cause of action in antitrust accrues each time a plaintiff is injured by an act of the defendant and the statute of limitations runs from the commission of the act.'" *Intel Corp. v. Fortress Inv. Grp. LLC, No. 19-CV-07651-EMC, 2020 U.S. Dist. LEXIS 158831, 2020 WL 6390499, at *19 (N.D. Cal. July 15, 2020)* (quoting *Oliver v. SD-3C LLC, 751 F.3d 1081, 1086 (9th Cir. 2014)*; *see also* *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1050 (8th Cir. 2000)* ("An antitrust cause of action generally accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.") (internal quotation marks omitted). A plaintiff is not required actually discover its antitrust claims before the statute of limitations begins to run. *Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012)*.

Defendants argue that Plaintiffs' claims are time-barred because Plaintiffs do not allege any wrongful acts within four years of when this action was first filed on June 1, 2020. Defendants further argue that Plaintiffs fail to plead facts to support fraudulent concealment or any other defense to the statute of limitations bar.

1. Continuing conspiracy

Plaintiffs **[*12]** first argue that their claims are timely because they allege a continuing violation of antitrust laws, such that allegations of ongoing sales of price-fixed products are sufficient to restart the statute of limitations period. ***HN4***[] "[I]n the context of a continuing conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by an act of the defendant[ ] a cause of action accrues to him to recover the damages caused by that act." *Oliver, 751 F.3d at 1086* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*) (internal quotation marks omitted). "[A]s to those damages, the statute of limitations runs from the commission of the act." *Id.* (internal quotation marks omitted). To restart the statute of limitations, there must be a new overt act that: (1) is "new and independent . . . [and] not merely a reaffirmation of a previous act," and (2) "inflict[s] new and accumulating injury on the plaintiff." *Id.* (citing *Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 238 (9th Cir. 1987)*). "[T]he Supreme Court and federal appellate courts have recognized that each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act." *Id.*

Plaintiffs argue that they have sufficiently alleged a continuing conspiracy, **[*13]** pointing to their allegation that "Defendants entered into a *continuing* combination or conspiracy to unreasonably restrain trade and commerce." SAC ¶ 142 (emphasis added); *see also id.* ¶ 120 ("Through their domination of the supply chain and unlawful agreements, Defendants have effectively prevented new market entrants at the distribution level, and forced many distributors to go out of business, thereby continuing to inhibit and restrict competition."); *id.* ¶ 144 ("Plaintiffs were and continue to be injured in fact by the conspiracies of Defendants."). The Court agrees that at the pleading stage, these allegations are sufficient to show that continuing violations are plausible.

Defendants argue that the Court should not interpret *Oliver* to mean that "each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act." Dkt. No. 91, Reply in Supp. of Mot. to Dismiss DPP Second Amended Compl. ("First Reply"). at 9. But that is precisely what the Ninth Circuit held. *Oliver, 751 F.3d at 1086* ("***HN5***[] [E]ach time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury **[*14]** to the purchaser and the statute of limitations runs from the date of the act."); *see also* *In re Cal. Bail Bond Antitrust Litig., No. 19-CV-00717-JST, 2020 U.S. Dist. LEXIS 92836, 2020 WL 3041316, at *19 (N.D. Cal. Apr. 13, 2020)* (relying on *Oliver* in holding that "each sale of a bail bond that was artificially inflated as a result of the alleged conspiracy thus constitutes an overt act restarting the statute of limitations").

Defendants cite to *In re Packaged Seafood Products Antitrust Litigation, 242 F. Supp. 3d 1033 (S.D. Cal. 2017)* in support of their argument. There, the court acknowledged *Oliver*'s holding that in a continuing conspiracy "each price-fixed sale constitutes an 'overt act' that starts the statute of limitations anew," but also noted that other Circuits require more, such as another meeting in furtherance of the conspiracy. *Id. at 1098* (citing *Penn. Dental Ass'n v. Med. Serv. Ass'n of Penn., 815 F.2d 270, 277 (3d Cir. 1987)*). In light of the split of authority, the court simply held that the continuing conspiracy did not save *all* of plaintiffs' claims from application of the statute of limitations.

HN6[] The Court agrees with the court in *In re Packaged Seafood* that the continuing conspiracy doctrine does not entitle Plaintiffs to recover for all past injuries; rather, each new price-fixed sale triggers a new limitations period for Plaintiffs to recover "the damages caused by that act." *Zenith Radio Corp., 401 U.S. at 338-39*; *see also* *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* ("[T]he commission of a separate new overt act generally does not permit the plaintiff to **[*15]** recover for the injury caused by old overt acts outside the limitations period."); *In re Packaged Seafood, 242 F. Supp. 3d at 1098* ("It does not therefore necessarily follow that each new injury constitutes Sherman-Act-compensable harm that—when timely litigated—provides an avenue of redress for past, non-timely-pursued harms."). However, the Court departs from the *In re Packaged Seafood* analysis in finding that under *Oliver*, Plaintiffs may recover damages for alleged price-fixed sales throughout the last four years.

2. Fraudulent concealment

Other than the allegations discussed above regarding a continuing conspiracy, the SAC does not raise any allegations of specific unlawful acts in the four years prior to filing. Thus, to the extent Plaintiffs seek to recover damages for conduct that occurred before June 1, 2016, Plaintiffs must establish that the applicable statutes of limitations were tolled. *Hinton v. Pac. Enterprises, 5 F.3d 391, 395 (9th Cir. 1993)* ("***HN7***[] The burden of alleging facts which would give rise to tolling falls upon the plaintiff."). However, "because resolving tolling disputes is a fact-intensive process, statute of limitations defenses 'may not be raised by motion to dismiss' unless they include 'no disputed issues of fact.'" *In re Cal. Bail Bond, 2020 U.S. Dist. LEXIS 92836, 2020 WL 3041316, at *17* (citing *Scott v. Kuhlmann, 746 F.2d 1377, 1378 (9th Cir. 1984)*). Plaintiffs argue that they have sufficiently **[*16]** alleged that Defendants fraudulently concealed their conspiracy and thus their claims are timely.

HN8[] To toll the statute of limitations under a theory of fraudulent concealment, a plaintiff "must do more than show that it was ignorant of its cause of action. *In re Cathode Ray Tube (CRT) Antitrust Litig. ("In re Cathode Ray Tube II"), No. C-07-5944 JST, 2016 U.S. Dist. LEXIS 186204, 2016 WL 8669891, at *4 (N.D. Cal. Aug. 22, 2016)*. A plaintiff asserting fraudulent concealment must allege that: (1) the defendant took affirmative acts to mislead the plaintiff; (2) the plaintiff did not have actual or constructive knowledge of the facts giving rise to its claim; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to its claim. *In re Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175, 1194 (N.D. Cal. 2015)* (quoting *Hexcel Corp., 681 F.3d at 1060*). Allegations of fraudulent concealment must be pled with particularity; conclusory statements are insufficient. *Conmar Corp. v. Mitsui & Co. (U.S.A.), 858 F.2d 499, 502 (9th Cir. 1988)*; *Reveal Chat Holdco, LLC v. Facebook, Inc., 471 F. Supp. 3d 981, 992 (N.D. Cal. 2020)* (citing *Ryan v. Microsoft Corp., 147 F. Supp. 3d 868, 885 (N.D. Cal. 2015)*).

a. Affirmative acts

With respect to the first element, Plaintiffs argue that they sufficiently allege several affirmative acts that Defendants took to mislead Plaintiffs, including:

- "The conspirators falsely told the FTC that Celestron, Synta, and David Shen were uninvolved in Ningbo Sunny's anticompetitive and illegal acquisition of Meade. In fact, Ningbo Sunny's counsel Sheppard Mullin was directed to take instructions from Synta and Celestron personnel, including Defendant **[*17]** Lupica, Defendant Anderson, Defendant Huen, and David Shen. These Celestron and Synta personnel orchestrated the illegal Meade deal behind the scenes." SAC ¶ 132; *see also id.* ¶¶ 91-93 (Ningbo Sunny's counsel stating in an email to the FTC that "except for the limited advice to Peter Ni regarding how to acquire a U.S. company . . . David Shen has no role in the proposed acquisition of Meade."); *id.*, Ex. 4, 8.

- "As part of their unlawful arrangement, Defendant Celestron took equity in its horizontal competitor Meade — which is memorialized in shadow books kept by Defendants' coconspirators." *Id.* ¶ 89, Ex. 7.

- "After the Meade acquisition closed, Synta and Celestron directed millions of dollars to Ningbo Sunny to finance its consolidation and control over Meade. Defendant Anderson (who was President of Celestron at the time) wrote his co-conspirators emails explaining that this arrangement could not be disclosed to Celestron's banking partners." *Id.* ¶¶ 135.

- "The co-conspirators also intentionally and fraudulently concealed their conspiracy from the public by filing disclosures with the SEC relating to the Meade transaction that failed to disclose Chairman Shen, Synta, and Celestron's **[*18]** involvement and role in the Meade acquisition." *Id.* ¶ 136.

Defendants argue that these allegations amount to nothing more than "passive concealment." HN9[] Although the affirmative acts necessary to show fraudulent concealment "can be integral to the underlying conspiracy itself . . . passive concealment is not enough." *In re Cathode Ray Tube II, 2016 U.S. Dist. LEXIS 186204, 2016 WL 8669891, at *4*. "Passive concealment of information is not enough to toll the statute of limitations, unless the defendant had a fiduciary duty to disclose information to the plaintiff." *Reveal Chat, 471 F. Supp. 3d at 992-93* (citing *Conmar Corp., 858 F.2d at 505*)). "An affirmative act of denial, however, is enough if the circumstances make the plaintiff's reliance on the denial reasonable." *Id.* "[T]he line between active and passive concealment is very fine indeed." *In re Cathode Ray Tube II, 2016 U.S. Dist. LEXIS 186204, 2016 WL 8669891, at *4*.

By these standards, Defendants' failure to disclose details of the Meade transaction in public SEC filings is merely passive concealment, not an affirmative act. *See* *Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1416 (9th Cir. 1987)* ("[A]ppellees passively concealed the reports by not disclosing them to the investors. In such situations, the federal tolling doctrine does not apply."); *Reveal Chat, 471 F. Supp. 3d at 992-93* ("HN10[] [T]he mere failure to own up to illegal conduct in response to an inquiry about whether the defendant engaged in illegal antitrust activity is not sufficient for fraudulent **[*19]** concealment, and to find otherwise would effectively nullify the statute of limitations in these cases.") (internal quotation marks omitted).

Ningbo Sunny's affirmative misrepresentation to the FTC regarding Mr. Shen's involvement, however, implies more than mere passive concealment. It is plausible that this affirmative misrepresentation to the FTC was calculated to avoid government scrutiny of the transaction and thereby to hide the alleged antitrust violations from the public. The Court finds that this allegation constitutes an affirmative act to mislead Plaintiffs. Similarly, the fact that Celestron took equity in its competitor Meade, but only maintained records of that transaction in "shadow books," and the fact that Celestron allegedly structured its payments to Ningbo Sunny to avoid raising red flags with its bank or auditors constitute affirmatively misleading conduct "above and beyond" the alleged conspiracy itself. *In re Animation Workers, 87 F. Supp. 3d at 1215* (citing *Guerrero v. Gates, 442 F.3d 697, 706-07 (9th Cir. 2006)*).

The Court also notes that none of the alleged affirmative acts date back to the beginning of the proposed class period in January 2005; rather, they all revolve around the alleged conspiracy to acquire Meade in 2013. Thus, the Court finds that Plaintiffs **[*20]** have only sufficiently alleged affirmative acts to support the first element of fraudulent concealment as to the alleged misconduct that occurred in 2013 or later.

b. Actual or constructive knowledge

Plaintiffs allege that they "had neither actual nor constructive knowledge of the pertinent facts constituting their claims for relief" and could not have discovered those facts until "September 2019, when some evidence revealing Defendants' secret conspiracy was first made public in the summary [judgment] briefing in the Orion Litigation." SAC ¶ 130. Defendants argue that it is implausible that Plaintiffs lacked knowledge of the conspiracy until 2019, because Plaintiffs' peer distributor, Orion, was aware of the conspiracy at least as of 2015. Defendants question "what circumstances would permit Orion, but prevent similarly situated Plaintiffs, from becoming aware of the basis for the claims asserted in the SAC until 2019[.]" First Reply at 8.

The specific facts giving rise to Orion's complaint are not alleged in the SAC and are not before the Court. Although it is possible that Orion uncovered the conspiracy from observing public facts also available to Plaintiffs in this case, that is **[*21]** an inference the Court is unwilling to make at the pleading stage. It is equally possible—and, indeed, Plaintiffs argue—that Orion had unique experiences and interactions with Defendants that provided insight into the alleged conspiracy. It is not clear from the face of the SAC that Plaintiffs had constructive knowledge of the conspiracy, and at this stage, the Court must make all inferences in favor of Plaintiffs. Thus, the Court finds that Plaintiffs have sufficiently alleged that they did not actually or constructively know about the alleged conspiracy before September 2019.

c. Diligence

Defendants argue that Plaintiffs failed to plead specific "acts of diligence." First Mot. to Dismiss at 11. Plaintiffs contend that diligent inquiry is only required "where facts exist that would excite the inquiry of a reasonable person." *Reveal Chat, 471 F. Supp. 3d at 994*. The Court agrees with Plaintiffs. *Conmar Corp., 858 F.2d at 504*.

Defendants argue there are facts alleged in the SAC that should have "excited the inquiry" of Plaintiffs First Reply at 9 ("Surely, Plaintiffs recognized that the same companies had manufactured and distributed the telescopes they purchased for an uninterrupted 10 year period."). The Court does not find this argument persuasive. **[*22]** The fact that two companies dominated a particular industry uninterrupted for ten years does not, without more, suggest any misconduct and would not lead a reasonable person to suspect an antitrust conspiracy in the market.

HN11[] In the absence of any allegations on the face of the SAC that would raise the suspicions of a reasonable consumer, the Court finds that Plaintiffs were not required to plead specific acts of diligence. *See* *In re Animation Workers, 123 F. Supp. 3d at 1205* (noting "courts have 'been hesitant to dismiss an otherwise fraudulently concealed antitrust claim for failure to sufficiently allege due diligence,' because questions of inquiry notice are 'necessarily bound up with the facts of the case.'").

Accordingly, the Court finds that Plaintiffs have plausibly alleged that Defendants' fraudulent concealment of their misconduct tolled the statutes of limitations as to claims arising out of conduct in 2013 or later.

B. Individualized Allegations

HN12[] "Courts in this district do not require plaintiffs in complex, multinational, antitrust cases to plead detailed, defendant-by-defendant allegations; instead they require plaintiffs 'to make allegations that plausibly suggest that each Defendant participated in the alleged conspiracy.'" **[*23]** *In re Cathode Ray Tube (CRT) Antitrust Litig. ("In re Cathode Ray Tube I"), 738 F. Supp. 2d 1011, 1019 (N.D. Cal. 2010)*. An antitrust complaint "must allege that each individual defendant joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it." *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008)*. This is "because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it." *In re Cal. Title Ins. Antitrust Litig., No. C 08-01341 JSW, 2009 U.S. Dist. LEXIS 43323, 2009 WL 1458025, at *7-8 (N.D. Cal. May 21, 2009)*.

Defendants argue that Plaintiffs fail to state any valid claims against the majority of Synta affiliates and certain individual defendants because they do not allege any misconduct or participation in the conspiracy specific to each defendant. In the First Motion to Dismiss, Defendants challenge the allegations against SW and individual defendants Messrs. Anderson, Lupica, and Lee.

With respect to the individual defendants, Messrs. Anderson, Lupica, and Lee, Defendants argue that they cannot be held liable for antitrust violations "just because they served as CEO at the time." First Mot. to Dismiss at 15 (citing *F.T.C. v. Swish Mktg.*, No. C 09-03814 RS, 2010 U.S. Dist. LEXIS 15016, 2010 WL 653486, at *5-6 (N.D. Cal. Feb. 22, 2010)). Defendants argue that Plaintiffs must instead plead that the individuals actively participated in "inherently wrongful conduct." *Id.* (citing *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., 467 F. Supp. 841, 853 (N.D. Cal. 1979)*, *aff'd sub nom. Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981)*). Defendants contend that the SAC contains no such **[*24]** allegations of inherently wrongful conduct by the individual defendants, such that they could be held liable for the corporations' antitrust violations.

Plaintiffs argue that "the SAC's claims against Defendants Lee, Lupica, and Anderson are not based upon the bare fact that they were all Celestron's CEO, but rather their actual acts in furtherance of the anticompetitive conspiracy." Dkt. No. 86, Opp'n to First Mot. to Dismiss ("First Opp'n"), at 18. For example, the SAC alleges that "[a]s part of their pricing coordination efforts, Celestron's current CEO, Defendant Corey Lee, worked with co-conspirators Synta and Ningbo Sunny to steal competitors' trade secret sales and pricing information." SAC ¶ 99; *see also id.*, Ex. 12 (email exchange showing Mr. Lee requesting confidential information regarding competitor Orion's order statistics from Ningbo Sunny).

The SAC also alleges that Messrs. Lupica and Anderson were highly involved in orchestrating Ningbo Sunny's acquisition of Meade. *See, e.g., id.* ¶ 78 (Ningbo Sunny's Peter Ni sent an email to Mr. Anderson requesting that Celestron and Synta continue to provide financial support for the Meade transaction); *id.* ¶ 82 ("Defendants Lupica **[*25]** and Anderson worked with Sheppard Mullin to help structure and negotiate the [Meade] transaction and to keep Chairmen Shen and Ni informed about its progress."). After the acquisition, Mr. Lupica became Meade's CEO. *Id.* ¶¶ 83-84. In an email to Ningbo Sunny and Synta representatives, Mr. Lupica wrote: "if we take advantage of the strong relationships among Sunny, Synta, Celestron and Meade (under Peter's ownership) we can quickly turn the company around and the four companies can dominate the telescope industry." *Id.*, Ex. 17. Similarly, in an email to Ningbo Sunny's Mr. Ni and Mr. Anderson, Mr. Shen explained that "[t]he best way in the future is to divide the products and sell them into different markets to reduce conflicts." *Id.* ¶ 97, Ex. 10.

Thus, the SAC suggests that Mr. Anderson was directly involved in negotiating Celestron's role in Ningbo Sunny's 2013 acquisition of Meade; that he was aware of and approved of Celestron's payments to Ningbo Sunny; and that he was aware of Mr. Ni's desire to "divide the products." Like Mr. Anderson, Mr. Lupica was involved in advising Ningbo Sunny's legal team on the acquisition of Meade, and he is alleged to have become Meade's CEO following **[*26]** Ningbo Sunny's acquisition of Meade. He appears on a number of communications in which conduct of the conspiracy is discussed. The Court further finds that the allegations against Mr. Lee, while less extensive, plausibly allege that he participated in the conspiracy. Taking these allegations as true, the Court finds that they plausibly allege that Messrs. Anderson, Lupica, and Lee played a role in the alleged conspiracy such that they may be held liable for its consequences.

With respect to SW, the SAC alleges that SW is a wholly owned subsidiary of David Shen's company Synta Tech, that Mr. Shen and his family created SW to acquire Celestron in 2005, that they operate it as a holding company, and that Mr. Shen's sister Sylvia Shen is SW's CEO, CFO, and Secretary. SAC ¶¶ 24-25. The SAC further alleges that all "Synta-related holding companies and shell corporations," including SW, "are operated and run for the common benefit of one another and Chairman Shen and have aided, encouraged, and cooperated with Defendants and their coconspirators to fix the prices of telescopes, and dominate and allocate the markets for telescope manufacturing and distribution." *Id.* ¶ 37. It further alleges **[*27]** that these Synta affiliates "are designed to hide assets, obscure ownership, and divert assets and shift capital away from the People's Republic of China on behalf of their co-conspirators who are based in China." *Id.*

The Court finds that these allegations are not sufficient to raise a plausible inference that SW participated in the alleged conspiracy. The fact that SW was created for the purpose of acquiring Celestron in 2005 does not raise any inference of wrongdoing given that, as explained further below, the SAC does not allege any particular misconduct with respect to that acquisition. It is common for companies to create special purpose entities or holding companies for the purpose of acquiring a target, and without more, there is nothing nefarious about the use of such a holding company to acquire Celestron. The allegations that SW has "aided, encouraged, and cooperated with Defendants and their coconspirators to fix the prices of telescopes" merely offers a legal conclusion, which the Court need not accept as true. *Fayer, 649 F.3d at 1064*; *Adams, 355 F.3d at 1183*.

In the IPP Order, the Court analyzed a different and detailed set of allegations regarding how the Synta "corporate family" operated as a single enterprise. *See* ***[*28]*** *Hightower*, No. 5:20-cv-03639-EJD, Dkt. No. 113 ¶¶ 88-89 (N.D. Cal. Nov. 6, 2020). The Court found those allegations sufficient based on precedent from this District involving nearly identical allegations. *See, e.g., Jones v. Micron Tech. Inc., 400 F. Supp. 3d 897, 923 (N.D. Cal. 2019)*; *In re Cathode Ray Tube I, 738 F. Supp. 2d at 1019-22*; *In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1184-85 (N.D. Cal. 2009)*. No such allegations are present in the SAC here. *In re Cal. Title Ins.*, 2009 U.S. Dist. LEXIS 43323, 2009 WL 1458025, at *8 (finding insufficient allegations that "each of the Parent Corporations 'wholly owns and controls its affiliates and subsidiaries,' that each does business in California 'through' those subsidiaries, and that each of the subsidiaries 'engaged in the conduct challenged here with the approval' of the Parent Corporations"). Thus, the Court finds that Plaintiffs have failed to adequately allege claims against SW.

In the Second Motion to Dismiss, Defendants challenge the allegations against Sylvia Shen, Jack Chen, Pacific Telescope, Nantong Schmidt, Olivon Manufacturing, Olivon USA, and Suzhou Synta. The SAC raises the following allegations as to each of these parties:

- Sylvia Shen is David Shen's sister, is a conduit through whom he "exercises control over several Synta-related entities," is a member of Celestron's executive committee, and personally "participated in, planned, and carried out the conspiracy" (SAC ¶ 17);

- Jack Chen is Sylvia Shen's husband, a member of Celestron's executive committee, **[*29]** and personally "participated in, planned, and carried out the conspiracy" (*id.* ¶ 18);

- Pacific Telescope is controlled by Sylvia Shen and it "participated in Defendants' conspiracy by distributing Synta telescopes" (*id.* ¶ 29);

- Nantong Schmidt "is owned and/or controlled by David Shen" and participated in the conspiracy by "manufactur[ing] telescopes that were sold into this District during the Class Period, including to Defendant Celestron" at artificial, supracompetitive prices (*id.* ¶ 21);

- Olivon Manufacturing is controlled by Jean Shen and "participated in Defendants' conspiracy by falsely representing to telescope distributors that Synta's horizontal competitor and co-conspirator Ningbo Sunny Electronic Co., Ltd. is one of Defendant Jean Shen's 'family's companies,' thereby unlawfully coordinating price fixing and market division among horizontal competitors" (*id.* ¶¶ 27, 30);

- Olivon USA is controlled by Jean Shen and "participated in Defendants' conspiracy by falsely representing to telescope distributors that Synta's horizontal competitor and co-conspirator Ningbo Sunny Electronic Co., Ltd. is one of Defendant Jean Shen's 'family's companies,' thereby unlawfully coordinating **[*30]** price fixing and market division among horizontal competitors" (*id.* ¶¶ 28, 30);

- Suzhou Synta "is owned and/or controlled by David Shen and his family" and participated in the conspiracy by "manufactur[ing] telescopes that were sold into this District during the Class Period" at Defendants' artificial, supracompetitive prices (*id.* ¶ 20).

There are several other allegations throughout the SAC that are not raised in the briefing regarding Sylvia Shen, including that she sent or received several emails in which Ningbo Sunny representatives discussed "how to avoid conflict with Celestron products" (*id.* ¶ 106, Ex. 15) and in which Mr. Anderson discusses Celestron providing financial support to Ningbo Sunny during the Meade transaction (*id.*, Ex. 2), among others. The Court finds these allegations sufficient to state claims against Ms. Shen.

As to all other defendants listed above, the Court finds the allegations insufficient for the same reasons as stated above with respect to SW. Allegations merely stating that each defendant "participated in" the conspiracy are conclusory, and Plaintiffs have provided no additional factual allegations from which one could deduce that each defendant joined **[*31]** the conspiracy and played a certain role in it.

In the Synta Canada Motion, Jean Shen and Synta Canada challenge the allegations against them. With respect to Synta Canada, the SAC alleges that it is a 20% owner of Suzhou Synta and that David Shen and his family members own or control Synta Canada. SAC ¶ 26. The SAC further alleges that all "Synta-related holding companies and shell corporations," including Synta Canada, "are operated and run for the common benefit of one another and Chairman Shen and have aided, encouraged, and cooperated with Defendants and their coconspirators to fix the prices of telescopes, and dominate and allocate the markets for telescope manufacturing and distribution." *Id.* ¶ 37. It further alleges that these Synta affiliates "are designed to hide assets, obscure ownership, and divert assets and shift capital away from the People's Republic of China on behalf of their co-conspirators who are based in China." *Id.* These are substantially the same allegations as those against SW, and for the same reasons the Court finds that Plaintiffs have not stated a claim against SW, it likewise finds that Plaintiffs have not stated a claim against Synta Canada.

With respect **[*32]** to Jean Shen, Plaintiffs allege that she is David Shen's sister, that she is a conduit through whom he "exercises control over" Olivon Manufacturing and Olivon USA, and that she personally actively "participated in, planned, and carried out the conspiracy" by "representing to telescope distributors that Synta's horizontal competitor and co-conspirator Ningbo Sunny . . . was one of 'my family's companies.'" SAC ¶ 19. The most that can be inferred from these sparse allegations is that Ms. Shen was aware of the connection between Synta and Ningbo Sunny. However, these allegations say nothing about any action that Ms. Shen may have taken to join the conspiracy, and it is not clear what role—if any—she played in it. Accordingly, the Court finds that Plaintiffs have failed to state a claim against Ms. Shen. *In re Cathode Ray Tube I, 738 F. Supp. 2d at 1019*; *In re TFT-LCD, 586 F. Supp. 2d at 1117*.

Thus, the Motions to Dismiss are GRANTED as to SW, Jack Chen, Pacific Telescope, Nantong Schmidt, Olivon Manufacturing, Olivon USA, Suzhou Synta, Jean Shen, and Synta Canada.

C. Sherman Act § 1 Claim

HN13[] Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared **[*33]** to be illegal." 15 U.S.C. § 1. A plaintiff asserting a claim under § 1 must plead: (1) a contract, combination or conspiracy among two or more persons or distinct business entities (2) which is intended to restrain or harm trade; (3) which actually injures competition, and (4) harm to the plaintiff from the anticompetitive conduct. *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1129 (9th Cir. 2015)* (quoting *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)*). But "[b]ecause § 1 . . . does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express." *Twombly, 550 U.S. at 553*.

Defendants argue first that Plaintiffs fail to allege which Defendants reached what agreements. The Court disagrees. The SAC raises numerous allegations that plausibly suggest a tacit or express agreement to restrain trade. *See, e.g.*, SAC ¶ 96 (alleging that "[a]fter the acquisition, Synta, Celestron, Ningbo Sunny, and Meade colluded not to compete with one another. . . . For example, an email between the principals of Synta and Ningbo Sunny shows Chairman Shen asking Ningbo Sunny's Chairman Peter Ni to work out what he calls a 'tacit understanding' with Defendant Anderson **[*34]** (Celestron's then-CEO) about not competing against Celestron for sales to Costco"); *id.* ¶ 97 (alleging that Synta's Mr. Shen informed Ningbo Sunny's Mr. Ni and Celestron's David Anderson, "[t]he best way in the future is to divide the products and sell them into different markets to reduce conflicts"); *id.* ¶ 107 (alleging that Ningbo Sunny's Mr. Chiu also explained to Synta's Ms. Sylvia Shen that Ningbo Sunny "will take prompt action to avoid conflict in the astronomical market," including "abandoning the small OEM customers so as to protect big customers."). The Court finds these allegations, along with others in the SAC, to sufficiently state a claim under § 1. ("Restraints that are per se unlawful include horizontal agreements among competitors to fix prices or to divide markets." *United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1037 (N.D. Cal. 2013)* (quoting *Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*) (internal quotation marks omitted).

Defendants next argue that there "there is no pre-2013 conduct forming the basis for this cause of action." First Mot. to Dismiss at 18. Plaintiffs seek to bring this case on behalf of "all similarly situated retailers and distributors who purchased a telescope manufactured or sold by Defendants from Synta's acquisition of Celestron in 2005 through such time **[*35]** as class notice is given." SAC ¶ 122. The only pre-2013 conduct alleged in the SAC, however, is Synta's acquisition of Celestron in 2005. Just as in the complaint in the IPP Action, the SAC alleges no specific misconduct in connection with that transaction, nor does the SAC allege any particular misconduct occurring between 2005 and the Meade acquisition in 2013. Thus, the Court agrees with Defendants that Plaintiffs fail to sufficiently allege any violation of § 1 before the Meade acquisition in 2013.

Defendants' motions are GRANTED as to Plaintiffs' Sherman Act § 1 claim, to the extent it is based on pre-2013 conduct. The Court otherwise DENIES Defendants' motions as to the Sherman Act § 1 claim.

D. Sherman Act § 2 Claim

HN14[] Section 2 of the Sherman Act prohibits monopolization or attempted monopolization of trade or commerce. 15 U.S.C. § 2. A plaintiff asserting an attempt claim must plead: (1) a specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving "monopoly power," and (4) causal antitrust injury" *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)*; *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., No. 5:16-CV-06370-EJD, 2017 U.S. Dist. LEXIS 160238, 2017 WL 4310767, at *3 (N.D. Cal. Sept. 28, 2017)*. A monopoly claim has two elements, aside from antitrust injury: (1) the defendant possessed monopoly power in the relevant market and (2) the defendant **[*36]** willfully acquired or maintained that power. *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997)*.

As with the *§ 1* claim, Defendants argue that Plaintiffs fail to raise any allegations of misconduct before the Meade acquisition in 2013. To the extent Plaintiffs seek to base their *§ 2* claim on Synta's acquisition of Celestron, Defendants argue that Plaintiffs failed to allege any monopolization or threat of monopolization arising out of that merger. In fact, Plaintiffs specifically allege that it was Ningbo Sunny's acquisition of Meade that ultimately gave the co-conspirators effective monopoly power over the market. SAC ¶ 41 (alleging that Ningbo Sunny "orchestrat[ed] the acquisition of Meade using the Synta Defendants' support and assistance to coordinate its pricing, sales, and manufacturing practices with Synta and Celestron to effectively monopolize the U.S. market."). Plaintiffs do not refute this point. The Court finds that Plaintiffs have failed to state a *§ 2* claim for any conduct arising before 2013.

Defendants next contend that "the SAC fails to allege that Defendants either have a monopoly in the market . . . or the 'dangerous probability' of Defendants achieving such a monopoly." First Mot. to Dismiss at 20. Defendants argue that "the **[*37]** SAC simply alleges that Ningbo Sunny and Defendants, in the aggregate, control the distribution market without specifying Defendants' alleged share of the market." *Id.* This argument ignores several allegations in the SAC specifically describing Defendants' share of the relevant market as a result of the conspiracy. *See, e.g.*, SAC ¶ 55 ("The Synta/Celestron Defendants and coconspirators and the Ningbo Sunny/Meade Co-Conspirators together control over 80 percent of that market."); *id.* ¶ 3 ("Synta and Ningbo Sunny together manufacture over 80% of all consumer telescopes imported into the U.S. Instead of competing, Synta and Ningbo Sunny agree on what prices to charge and which products their companies will produce. They have used their unlawful cooperation and dominance over telescope supply to enable their subsidiaries to take over the U.S. distribution market. As a result of this unlawful conspiracy, Celestron controls at least 70% of all U.S. consumer telescope sales, including sales to small distributors like Plaintiffs and their fellow class members, who are forced to pay supracompetitive prices."); *id.* ¶ 118 ("Ningbo Sunny and Synta have together controlled over 65% of the Manufacturing **[*38]** Market since 2012. In 2018, they controlled over 90%.").

Finally, Defendants argue that "[a] mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme." First Mot. to Dismiss at 21 (quoting *Rebel Oil, 51 F.3d at 1439*) (internal quotation marks omitted). ***HN15***[] Instead, a plaintiff "must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price." *Rebel Oil, 51 F.3d at 1439*. Plaintiffs point to several allegations in the SAC alleging barriers to entry as a result of the conspiracy. For example, they allege that "telescope manufacturing has high capital investment costs, and the two key manufacturers (Synta and Ningbo Sunny) are vertically integrated with the largest distributors." SAC ¶ 66. Additionally, "[g]iven the size of the market, there are not enough independent distributors to make building an independent manufacturing facility profitable." *Id.* The SAC also alleges that Defendants acquired key intellectual property rights through their acquisition of Meade, which prevented smaller distributors from seriously competing. *Id.* ¶ 67. The Court finds **[*39]** these allegations sufficient to show a dangerous probability of Defendants achieving monopoly power.

Thus, the Court finds that Plaintiffs have adequately stated a *§ 2* claim for the period starting in 2013.

E. Clayton Act § 7 Claim

HN16[] "The *Clayton Act § 7* prohibits a corporation from acquiring the stock or assets of another corporation 'in any line of commerce' in which the effect 'may be substantially to lessen competition, or to tend to create a monopoly.'" *15 U.S.C. § 18*. When examining a *§ 7* claim, a court must be mindful that "[e]very merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. "But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects." *Id.*

Plaintiffs bring a claim under *§ 7* arising out of Ningbo Sunny's acquisition of Meade, alleging that Defendants helped to facilitate that transaction. As an initial matter, for the same reasons stated above, the Court finds that Plaintiffs have failed to allege any conduct giving rise to a *§ 7* claim before the Meade transaction in 2013.

Defendants argue that "Plaintiffs do not substantively allege a **[*40]** violation of *Section 7* anywhere in the SAC," noting that "the only reference to this statute appears in the heading for the Second Cause of Action." First Mot. to Dismiss at 18. Defendants ignore the SAC's express allegation that "Defendant Celestron took equity in its horizontal competitor Meade — which is memorialized in shadow books kept by Defendants' coconspirators." SAC ¶ 89. Accepting this allegation as true, the SAC plausibly alleges that the Meade merger produced anticompetitive effects in violation of *§ 7* of the Clayton Act.

Thus, the Court GRANTS Defendants' motions as to Plaintiffs' *§ 7 Clayton Act* claim to the extent that claim is based on conduct occurring prior to 2013, but DENIES the motions to dismiss the claim in all other respects.

F. State Law Claims

Finally, Defendants argue that Plaintiffs fail to sufficiently allege a Cartwright Act claim or an unfair competition ("UCL") claim because they do not articulate the specific conduct underlying these claims. Plaintiffs contend that "because the SAC states valid Sherman Act claims, it also states valid Cartwright Act claims." First Opp'n at 25; *Cty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)* ("The analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright **[*41]** Act . . . was modeled after the Sherman Act."). Similarly, Plaintiffs argue that the UCL claims "rise and fall" with Plaintiffs' federal claims. *Id.* The Court agrees.

HN17[] "The UCL broadly prohibits 'any unlawful, unfair or fraudulent business act or practice.'" *Alvarez v. Chevron Corp., 656 F.3d 925, 933 (9th Cir. 2011)* (quoting *Cal. Bus. & Prof. Code § 17200*). "By proscribing any unlawful business practice, [the UCL] borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (citation and internal quotation marks omitted). Thus, the "unlawful" prong of the statute prohibits "anything that can properly be called a business practice and that at the same time is forbidden by law." *Id.*

Because the Court finds that Plaintiffs have stated valid Sherman Act and Clayton Act claims, as described above, the Court similarly finds that Plaintiffs state valid state law claims.

G. Leave to Amend

In their opposition brief, Plaintiffs request leave to amend any pleading deficiencies. ***HN18***[] "Requests for leave to amend should be granted with 'extreme liberality.'" *Brown v. Stored Value Cards, Inc., 953 F.3d 567, 574 (9th Cir. 2020)*; *see also* *Fed. R. Civ. P. 15(a)(2)* ("The court should freely give leave when justice so requires."). Because it may be possible for Plaintiffs to allege additional conduct before 2013 **[*42]** which might support antitrust claims for the class period alleged, the Court finds that amendment would not be futile. Similarly, because it may be possible for Plaintiffs to add allegations regarding the participation of the Synta affiliates, the Court finds that further amendment as to those defendants would not be futile either.

The Court, therefore, grants Plaintiffs leave to amend to allege facts, if any, to support the alleged class period between 2005 and 2012, and to support a finding of liability as to the defendants dismissed herein.

IV. MOTION TO STRIKE

HN19[] A court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" pursuant to *Federal Rule of Civil Procedure 12(f)*. *Fed. R. Civ. P. 12(f)*. "'Impertinent' matter consists of statements that do not pertain, and are not necessary, to the issues in question." *Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)*, *rev'd on other grounds*, *510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)*. "'Redundant' allegations are those that are needlessly repetitive or wholly foreign to the issues involved in the action." *Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002)*. "Scandalous matters are allegations that unnecessarily reflect on the moral character of an individual or state anything in repulsive language that detracts from the dignity of the court." *Consumer Sols. REO, LLC v. Hillery, 658 F. Supp. 2d 1002, 1020 (N.D. Cal. 2009)* (internal quotations **[*43]** and citations omitted).

"[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983)*. ***HN20***[] In determining whether to grant a motion to strike, a district court views the pleadings in a light most favorable to the non-moving party, and "resolves any doubt as to the relevance of the challenged allegations" in the plaintiff's favor. *Cal. Dep't of Toxic Substances Control, 217 F. Supp. 2d at 1033*.

Defendants move to strike (1) allegations asserting the class period from 2005 to 2012, and (2) allegations concerning the jury verdict in the *Orion* Action.

A. Class Allegations

Defendants argue that the Court should strike Plaintiffs' allegations asserting a class period beginning in 2005 because Plaintiffs fail to allege any actionable conduct prior to 2013. Given the Court's holdings above, the Court agrees that there is no actionable conduct alleged to have occurred before 2013. The Court has, however, granted Plaintiffs leave to amend their complaint to cure some of the deficiencies discussed herein.

For the same reasons articulated in the more in-depth analysis in the IPP Order regarding the motion to strike in that case, the Court DENIES **[*44]** AS MOOT the Motion to Strike, without prejudice to renewal should Plaintiffs fail to cure the pleading deficiencies as to the period between 2005 and 2012.

B. *Orion* Action Allegations

Defendants also seek to strike allegations relating to the *Orion* Action and its verdict. They argue that because that action is not binding on Defendants, the allegations are therefore impertinent and prejudicial. Specifically, Defendants seek to strike the following allegations:

- Paragraph 122: class period beginning in 2005;
- From Paragraph 2: "A jury has already found that Celestron and its parent company in China, Synta,[] conspired with their competitor [Ningbo Sunny] to fix prices, divide the market, retaliate against competitors, mislead U.S. authorities, illegally acquire assets an dominate the U.S. market so that they could rip off American purchasers.";
- From Paragraph 5: "where a jury awarded over $52,000 in damages against Defendants' co-conspirators.";
- All of Paragraph 90: "On November 26, 2019, a jury found that this acquisition, which was orchestrated and aided and abetted by Defendants, their co-conspirators and their agents, violated the antitrust laws."

The Court finds that certain of **[*45]** these allegations provide background and context to the action, while others are indeed impertinent and overly prejudicial. *See In re Facebook PPC Advert. Litig., 709 F. Supp. 2d 762, 773 (N.D. Cal. 2010)* (***HN21***[] "Allegations 'supplying background or historical material or other matter of an evidentiary nature will not be stricken unless unduly prejudicial to defendant.'") (quoting *LeDuc v. Kentucky Cent. Life Ins. Co., 814 F. Supp. 820, 830 (N.D. Cal. 1992)*). Specifically, the Court finds that Paragraph 2 improperly implies that Celestron and Defendants in this case have already been held liable for the same events alleged here, which is not true. While Plaintiffs argue that some of the holdings in the *Orion* Action may be admissible in this action against Ningbo Sunny, which was a defendant in the *Orion* Action, the allegation at issue is not specific to Ningbo Sunny. While the factual background of the *Orion* Action is pertinent to this case, allegations suggesting specific findings of liability against Defendants are not. The remainder of the *Orion* related allegations listed above simply provide background and context for the claims and the SAC as a whole.

Thus, the Court GRANTS IN PART Defendants' Motion to Strike. The cited portion of Paragraph 2 is hereby STRICKEN.

V. CONCLUSION

For the reasons stated above, the Court GRANTS IN PART the **[*46]** First and Second Motions to Dismiss Plaintiffs' Sherman Act, Clayton Act, and state law claims to the extent those claims are based on conduct arising before 2013. The remainder of Defendants' Motions to Dismiss are DENIED.

In light of the Court's findings on Defendants' Motions to Dismiss, the Court DENIES AS MOOT Defendants' Motion to Strike allegations regarding the alleged class period. The Court GRANTS IN PART and DENIES IN PART Defendants' Motion to Strike allegations regarding the *Orion* Action.

Plaintiffs may file an amended complaint, if any, by no later than **14 days** from the date of this order.

IT IS SO ORDERED.

Dated: June 2, 2021

/s/ Edward J. Davila

EDWARD J. DAVILA

United States District Judge

Facebook, Inc. v. BrandTotal Ltd.

United States District Court for the Northern District of California

June 3, 2021, Decided; June 9, 2021, Filed

Case No. 20-cv-07182-JCS

Reporter
2021 U.S. Dist. LEXIS 108137 *; 2021 WL 2354751

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

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

Core Terms

counterclaim, users, advertising, allegations, contracts, collected, customers, panelists, third party, products, motion to dismiss, investors, fraudulent, prong, terms, term of service, competitor, intentional interference, media, contractual relationship, declaratory judgment, disruption, parties, asserting, deceived, unfair, leave to amend, networks, preliminary injunction, interfering

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

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

For Facebook, Inc. a Delaware corporation, Counter-defendant: Sonal N. Mehta, LEAD ATTORNEY, Wilmer Cutler Pickering Hale and Dorr LLP, Palo Alto, CA; Ann Marie Mortimer, Hunton Andrews Kurth LLP, Los Angeles, CA.

Judges: JOSEPH C. SPERO, Chief Magistrate Judge.

Opinion by: JOSEPH C. SPERO

Opinion

ORDER REGARDING MOTION TO DISMISS AMENDED COUNTERCLAIMS

Re: Dkt. No. **[*2]** 132

I. INTRODUCTION

Plaintiff Facebook, Inc. brought this action asserting that Defendants BrandTotal Ltd. and Unimania, Inc. (collectively, "BrandTotal") improperly collected data from Facebook's social networks. BrandTotal, which is in the business of analyzing advertising data collected from social media websites, asserts counterclaims based on Facebook's efforts to block its collection of data. The Court previously denied BrandTotal's motion for a temporary restraining order ("TRO") and granted Facebook's motion to dismiss BrandTotal's counterclaims, with leave to amend. BrandTotal has now amended its counterclaims and moved for a preliminary injunction, and Facebook moves once again to dismiss. The Court held a hearing on May 28, 2021, at which the parties reached an agreement that rendered BrandTotal's motion for a preliminary injunction moot. For the reasons discussed below, Facebook's motion to dismiss is GRANTED in part and DENIED in part.[1]

II. BACKGROUND

The following summary of the facts, allegations, and procedural history of this case is intended for the convenience of the reader to provide context for the analysis below, and should not be construed as resolving any disputed **[*3]** issue of fact. Specific allegations of the amended counterclaims at issue are addressed in the Court's analysis. Because this order addresses a motion to dismiss under *Rule 12(b)(6)*, which turns on the sufficiency of BrandTotal's allegations, its analysis does not address the evidentiary record submitted in support of the motion for a preliminary injunction or the earlier motion for a TRO, although some of that evidence is included in this background section for context.

BrandTotal is an advertising consulting company that helps its corporate customers analyze their own advertising and their competitors' advertising on social media and other websites, by enlisting individual consumers—in BrandTotal's terminology, "panelists"—to agree to share the advertisements they view on those websites. In order to prepare valuable analysis for its corporate customers, BrandTotal relies heavily on data collected from Facebook, as opposed to other social media websites, due to Facebook's size. BrandTotal's most popular consumer product is UpVoice, an application or browser extension that offers panelists cash rewards to share their demographic information and the advertisements they see and interact with on social **[*4]** media. The particular form of UpVoice central to this case is an extension for the Google Chrome browser, offered for download from Google's web store. BrandTotal has also offered other applications and browser extensions that operate similarly in their collection of data, but provide different (non-cash) benefits to users, like a streamlined interface for browsing social media networks. BrandTotal began offering some of those programs multiple years ago. BrandTotal offers its consumer-facing products under the name of its subsidiary Unimania, in what was intended as an effort to obscure the source of its analytical data from potential competitors.

The UpVoice product available before this case commenced—which the parties refer to here as UpVoice Legacy for clarity—automatically collected multiple categories of information when users who had installed it browsed Facebook, including demographic data about the user, information about advertisements the user encountered on Facebook, and information that Facebook had generated about that user's preferences. Some such data was collected by the product automatically querying Facebook for information that would not otherwise have been transmitted **[*5]** to the user in the course of their browsing (although the user could have accessed that information if they chose to). According to BrandTotal, it disclosed all of this data collection to its users and obtained their consent, and did not collect personal data pertaining to any other Facebook users. All personal data was deidentified from a user's name and aggregated for the purpose of analyzing the demographic groups to whom particular advertisements were presented. One flaw in BrandTotal's consent system was that UpVoice Legacy could collect potentially collect personal data from unsuspecting users who logged into Facebook on a shared computer where someone else had installed UpVoice Legacy, although there is no evidence that either party considered that issue before this litigation commenced.

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

BrandTotal uses UpVoice and similar products to obtain data about advertising on Facebook that is not available from other sources. Facebook maintains a public "Ad Library" of all advertisements currently running on its platform, but with the exception of ads related to politics and social issues—a category of ads that tends not to be of particular interest to BrandTotal's corporate clients—that **[*6]** library does not provide information about ads that are no longer running, the demographic groups to whom the ads were presented, the number of people who saw an ad, or how users have engaged with an ad. Facebook also offers certain approved application programming interfaces ("APIs") to access data from its network, but none that provide the sort of information that BrandTotal collects through UpVoice and its other products.

By automatically collecting data from users about the ads they see on Facebook and other social networks, BrandTotal is able to provide analytical services to its corporate clients about their own and their competitors' advertising efforts. Facebook provides a more limited set of similar information to at least some advertisers on its platform in at least some circumstances, including metrics for "share of voice"—the portion of advertising within a particular category that a particular advertiser accounts for.

In 2018, a third party (Adguard) published a report indicating that BrandTotal used unsecure means to transmit personal data. BrandTotal thereafter changed its encryption method to a more secure standard. Facebook began investigating some BrandTotal products **[*7]** in the spring of 2019 but closed its investigation after determining that Google had removed those products from its store. BrandTotal disputes that those products were removed.

Among other potentially relevant provisions, Facebook's terms of service prohibit "collect[ing] data from our Products using automated means (without [Facebook's] prior permission)." In March of 2019, BrandTotal received legal advice from its Israeli counsel concluding that to the extent its products passively collected data served to users during their browsing, that did not implicate Facebook's terms of service, based in part on a dubiously narrow interpretation of the word "Products" in those terms to exclude advertisements—an interpretation that, at least thus far, BrandTotal has not pursued here. BrandTotal's attorneys determined that with respect to "active" collection through "calls" initiated by BrandTotal's products, BrandTotal was in a "grey area" because on one had the data collected might not implicate the terms of service if it was not part of Facebook's "Products," but on the other hand that method of collection could be considered as misuse of Facebook's APIs to access data for which BrandTotal **[*8]** lacked permission. BrandTotal did not change its practices in response to that opinion.

In the spring of 2020, Facebook began investigating UpVoice Legacy. On September 21, 2020, Facebook employee Jeremy Brewer sent an email to Google employee Benjamin Ackerman identifying "some Chrome extensions we believe are improperly scraping user PII[2] (e.g. gender, relationship status, ad interests, etc.) without proper disclosure"—including UpVoice Legacy—and requesting that Ackerman coordinate with Facebook security researcher Sanchit Karve, who had conducted the investigation, to "see if there is a way to collaborate and better protect user privacy." 1st. Am. Counterclaims ("FACC," dkt. 120) Ex. I. Karve replied to note that Google had removed certain other extensions that behaved similarly, produced by another developer. *Id.* Ackerman did not immediately respond.

In the days immediately following that exchange, a handful of internal Facebook emails involving other Facebook employees reflect that Facebook had received inquiries from advertisers who were either using BrandTotal's product or curious about its capabilities. One Facebook employee suggested that Facebook might consider partnering with **[*9]** BrandTotal. FACC Ex. G. An employee who had received a request from Facebook's marketing team regarding BrandTotal's capabilities contacted Karve on September 24, 2020, who informed her that Facebook was "enforcing on them this week." FACC Ex. H. The next day, Karve followed up with Ackerman at Google, who responded three days after that on September 29, 2020 to say that Google would investigate the browser extensions Facebook identified (including UpVoice Legacy), and that based on a preliminary review of BrandTotal's privacy policy, "it does look like they are collecting a bunch of information for advertising purposes which is a no no." FACC Ex. I.

[2] "PII" refers to "personally identifiable information."

On September 30, 2020, Facebook disabled BrandTotal's accounts on its social networks. On October 1, 2020, it filed a civil action against BrandTotal in state court. Later that day, Google removed UpVoice Legacy from its store, which disabled most installed copies of the browser extension, although around ten to fifteen percent of installations continued to collect data (with that number slowly declining over time) until relatively recently, when changes that Facebook made caused them to cease sending data. BrandTotal listed another version **[*10]** of UpVoice on Google store on October 12, 2020, which it contends was a mistake arising from efforts to prepare a new version to go live only if it prevailed in obtaining a TRO.

On October 14, 2020, Facebook dismissed its state court action and filed the present action in this Court, adding a federal claim under the *Computer Fraud and Abuse Act ("CFAA")*. BrandTotal filed counterclaims and moved for a TRO, which the Court denied because, although BrandTotal had shown serious issues going to the merits of its counterclaims, the public interest did not favor requiring Facebook, through expedited judicial proceedings, to allow a third party to scrape data from its network without BrandTotal having made any effort before deploying UpVoice Legacy to coordinate with Facebook and confirm that its program would respect user privacy. Order re Mot. for TRO (dkt. 63).[3] The Court later granted Facebook's motion to dismiss BrandTotal's counterclaims because, among other reasons, an order by the Federal Trade Commission ("FTC") requiring Facebook to block access to any "Covered Third Party" that did not certify compliance with Facebook's terms of use appeared to apply to BrandTotal, but granted leave to amend as to most of the counterclaims. **[*11]** Order re Mot. to Dismiss Counterclaims ("1st MTD Order," dkt. 108).[4]

BrandTotal initially filed a motion for a preliminary injunction one day before the hearing on the first motion to dismiss, but withdrew that motion after that hearing and later filed its renewed motion for a preliminary injunction after amending its counterclaims. The Court denied that motion as moot based on the parties' agreement at the May 28, 2021 hearing. *See* dkt. 150. Facebook has moved once again to dismiss BrandTotal's counterclaims.

Just before filing its preliminary injunction motion, BrandTotal released a new version of UpVoice, which the parties refer to here as UpVoice 2021. BrandTotal shared the source code for that program with Facebook two weeks before releasing it. UpVoice 2021 does not collect users' demographic data from Facebook, instead relying on users to enter that information in a form when they sign up for the program. The browser extension collects only identifying information for advertisements presented to the user while they are browsing, and does so passively by scanning the HTML code that Facebook serves to the user, without the UpVoice 2021 browser extension actively requesting any further **[*12]** information from Facebook. UpVoice 2021 also prompts users to confirm whether they wish to continue sharing that data when a new user logs into a social media account. Once the identifying information for an advertisement—a unique ID number, as well as the name of the page that sponsored the ad—is transmitted to BrandTotal, BrandTotal's servers (not the browser extension installed by a panelist) use that information to access the ad on a webpage visible to the general public that does not require logging in with a Facebook username and password, and gather further data about the ad from there.

BrandTotal now asserts the following counterclaims: (1) declaratory judgment that BrandTotal has not violated and will not violate the CFAA, FACC ¶¶ 93-101; (2) declaratory judgment that BrandTotal has not violated and will not violate *section 502 of the California Penal Code*, *id.* ¶¶ 102-10; (3) declaratory judgment that BrandTotal has not interfered and will not interfere with Facebook's contractual relations, *id.* ¶¶ 111-18; (4) intentional interference with contract, *id.* ¶¶ 119-60; (5) intentional interference with prospective economic advantage, *id.* ¶¶ 161-69; (6) violation of California's Unfair Competition Law (the "UCL"), *id.* **[*13]** ¶¶ 170-97.

III. ANALYSIS

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

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

A. Legal Standard

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

In ruling on a motion to dismiss under *Rule 12(b)(6)*, the court takes "all allegations of material fact as true and construe[s] them in the light most favorable to the non-moving party." *Parks Sch. of Bus. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. A pleading must "contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citing *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)*). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 555*). "[C]ourts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" **[*14]** *Twombly, 550 U.S. at 555* (quoting *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 557*). Rather, the claim must be "'plausible on its face,'" meaning that the claimant must plead sufficient factual allegations to "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly, 550 U.S. at 570*).

With the exception of narrow doctrines of judicial notice, a court may not consider extrinsic evidence in resolving a motion under *Rule 12(b)(6)* without converting it to a motion for summary judgment, which the Court has not done here. *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)*. Accordingly, even though an evidentiary record has been submitted in this case for the purposes of BrandTotal's previous motion for a TRO and motion for a preliminary injunction, the Court disregards that evidence for the purpose of Facebook's motion to dismiss, and focuses instead on the allegations of BrandTotal's amended counterclaims.

B. Declaratory Judgment Counterclaims

The Court previously dismissed BrandTotal's counterclaim seeking declaratory judgment that it did not breach Facebook's terms of service, and denied leave to amend to assert a declaratory judgment counterclaim seeking **[*15]** to establish that those terms of service were unenforceable, holding that such a counterclaim would be redundant to Facebook's affirmative claims. 1st MTD Order at 11-12. BrandTotal now seeks declaratory judgment that its UpVoice 2021 product does not violate the CFAA or *section 502 of the California Penal Code*, and does not interfere with Facebook's contractual relations. FACC ¶¶ 93-118.

District courts have broad discretion whether to hear a counterclaim for declaratory judgment, and "[n]umerous courts have used that discretion to dismiss [such] counterclaims . . . where they are either the 'mirror image' of claims in the complaint or redundant of affirmative defenses." *Stickrath v. Globalstar, Inc., No. C07-1941 TEH, 2008 U.S. Dist. LEXIS 95127, 2008 WL 2050990, at *3 (N.D. Cal. May 13, 2008)*. BrandTotal argued that these new claims were not redundant because Facebook's original complaint did not address the new and distinct UpVoice 2021 product, "[a]ny litigation over UpVoice needs to extend to UpVoice 2021[,] and BrandTotal properly included counterclaims to ensure that it does." Defs.' Opp'n (dkt. 138 at 2; *see also id.* at 22-23.

After briefing on the present motion to dismiss BrandTotal's counterclaims closed, the parties stipulated to Facebook filing an amended complaint, which includes BrandTotal's release of UpVoice 2021. 1st Am.

Compl. **[*16]** (dkt. 148) ¶ 78. The amended complaint asserts claims including interference with contractual relations and violation of the CFAA and *section 502*, and seeks injunctive relief to bar those purportedly ongoing alleged violations. The case therefore now includes the issues BrandTotal wishes to adjudicate, without need for its mirror-image declaratory judgment counterclaims. As a matter of discretion, the Court GRANTS Facebook's motion to dismiss BrandTotal's declaratory judgment counterclaims, without leave to amend at this time, but without prejudice to BrandTotal later moving for leave based on changed circumstances—for example, if Facebook withdraws any of its affirmative claims or limits them to prior versions of UpVoice while BrandTotal believes it still has an interest in proving that UpVoice 2021 does not violate the laws at issue.[5]

C. Interference with Contract

"'The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual **[*17]** relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.'" *hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985, 995-96 (9th Cir. 2019)* (quoting *Pac. Gas & Elec. Co. v. Bear Stearns & Co. ("PG&E"), 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (1990)*). While the typical case involves actual breach, the element of "disruption" of a contract can also be satisfied "where the plaintiff's performance has been prevented or rendered more expensive or burdensome." *Id. at 996 n.8* (citation and internal quotation marks omitted); *see also* *PG&E, 50 Cal. 3d at 1129* ("[W]hile the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations is distinct and requires only proof of interference.").

"Under California law, a legitimate business purpose can indeed justify interference with contract, but not just any such purpose suffices." *hiQ, 938 F.3d at 997*. "'Whether an intentional interference by a third party is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances including the nature of the actor's conduct and the relationship between the parties.'" *Id.* (quoting *Herron v. State Farm Mut. Ins. Co., 56 Cal. 2d 202, 206, 14 Cal. Rptr. 294, 363 P.2d 310 (1961)*). Courts must determine whether the defendant's interest outweighs societal interests in stability of contracts **[*18]** (the defendant's mere pursuit of economic advantage generally does not), "whether the means of interference involve no more than recognized trade practices," "whether the conduct is within the realm of fair competition," and—most importantly—"whether the business interest is pretextual or asserted in good faith." *Id.* (citations and internal quotation marks omitted).

The Court previously dismissed this claim based on the defense of a legitimate business purpose, which was satisfied as to the allegations of the original counterclaims both by Facebook's interest in enforcing its own terms of use, and by Facebook's obligation to comply with the FTC's order. 1st MTD Order at 14-15. The Court also noted that BrandTotal may not have satisfied the affirmative elements of its claim:

> Whether BrandTotal has included sufficient allegations of each of those elements is a close call, and Facebook might be correct that BrandTotal's counterclaim requires further specificity as to, for example, the nature of its contracts with customers, the extent to which it could perform those contracts relying only on non-Facebook

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[5] In briefing its motion for a preliminary injunction, BrandTotal argues that a likelihood of success on its declaratory judgment counterclaims could support injunctive relief, which would suggest that these counterclaims have practical value separate from Facebook's affirmative claims. The Court disagrees. A determination that UpVoice 2021 does not violate the particular laws at issue in these counterclaims would not in itself require Facebook to allow the use of UpVoice 2021 on its social networks. BrandTotal cites *hiQ*'s reference to the plaintiff in that case having asserted declaratory judgment claims (including claims to declare that it did not violate the CFAA and ***section 502***), *see* *938 F.3d at 992*, but the Ninth Circuit's analysis focused on the plaintiff's interference with contract claim, *id. at 995-99*, and addressed the CFAA only in the context of the defendant's argument that it preempted the interference claim, *id. at 999-1004*, not to consider the merits of the plaintiff's claim for declaratory judgment.

> data sources, and what BrandTotal believes Facebook knew or intended when it deactivated **[*19]** BrandTotal's accounts and asked Google to remove BrandTotal's products from Google's store.

Id. at 12.

1. Legitimate Business Purpose Defense

The FTC order is an appropriate starting point for the Court's analysis here, because Facebook's obligations under that order provided the clearest basis for dismissal of BrandTotal's tortious interference counterclaims as originally pleaded. That order requires Facebook to deny access to any "Covered Third Party" that failed to certify its compliance with Facebook's terms of use, and BrandTotal did not dispute for the purpose of the previous motion to dismiss that it was a "Covered Third Party." *See* 1st MTD Order at 15 (summarizing the FTC order).[6] Since BrandTotal did not obtain Facebook's permission to use automated means to collect data, as required by Facebook's terms of use, BrandTotal could not and did not certify compliance with those terms. The Court therefore held that, based on BrandTotal's original allegations, Facebook was required to deny BrandTotal access.

BrandTotal advances a number of arguments that are not particularly persuasive, including that the order was intended only to target third parties' collecting users' personal data **[*20]** without those users' consent, that the FTC only required Facebook to enforce violations in a manner proportionate to their severity (as opposed to necessarily blocking all access), and that construing the FTC order to apply in these circumstances would place it in conflict with the Ninth Circuit's decision in *hiQ. See* Defs.' Opp'n at 2, 4-5, 13-15.

Requiring third parties to obtain permission from Facebook before engaging in automated data collection is consistent with the FTC's intent to protect users from unauthorized data collection, because without at least some form of vetting, a third party that purports to obtain consent might maliciously collect more data than users authorize, or even if a third party acts in good faith to obtain consent, its product might have unforeseen uses or vulnerabilities that would cause it to exceed that consent—as with the previous version of UpVoice potentially capturing data from users of shared computers who had not themselves consented to its use.

While BrandTotal is correct that one provision of the FTC order requires Facebook to enforce violations of its terms "based solely on the severity, nature, and impact of the violation; the Covered Third **[*21]** Party's malicious conduct or history of violations; and applicable law," FTC Order § VII(E)(1)(d),[7] a separate and more specific provision requires, "if the Covered Third Party fails to complete the annual self-certification, denying or terminating access to all Covered Information unless the Covered Third Party cures such failure within a reasonable time, not to exceed thirty (30) days," *id.* § VII(E)(1)(b). There is no dispute that BrandTotal has not self-certified compliance with Facebook's terms of use—which require Facebook's permission for any automated data collection—as would be required for a Covered Third Party.

As for *hiQ*, that case concerned blocking a competitor's access to "otherwise public data." *hiQ, 938 F.3d at 998*. The opinion in *hiQ* repeatedly distinguished a scenario where information was not available to the general public, noting, for example, that the defendant could "satisfy its 'free rider' concern by eliminating the public access option" and restricting the data at issue to certain users of its platform. *Id. at 995*. Here, there is no dispute that while some of the information BrandTotal gathered was "otherwise public," not all of it was—particularly with respect to the original version of **[*22]** UpVoice, which captured user demographic data. Principles of *hiQ* might nonetheless

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[6] In a footnote of its brief opposing a preliminary injunction, Facebook implies that BrandTotal conceded that it is a "Covered Third Party," relying on a statement by BrandTotal's counsel at the hearing on its motion for a TRO. *See* Pl.'s Opp'n (dkt. 134) at 21 n.12. The full statement, in response to the Court's question of whether BrandTotal was a "Covered Third Party," was as follows: "I would think that we would be, Your Honor, yes. But I would want to study that specific question more, because it wasn't raised." Oct. 20, 2020 Hr'g Tr. (dkt. 57) at 8:24-9:1. In light of counsel's specifically-stated intent to further investigate the issue, his statement was not a concession.

[7] The FTC order is included in the record in a number of places, including as Exhibit C to BrandTotal's amended counterclaims.

inform the outcome here, but there is no clear conflict that would render the FTC's order unenforceable, at least with respect to password-protected portions of Facebook's network.

BrandTotal's strongest argument—at least for opposing the present motion to dismiss—that the FTC order does not justify Facebook's conduct is that, as alleged for the first time in BrandTotal's amended counterclaim, BrandTotal is not a "Covered Third Party" as that term is used in the FTC order, because BrandTotal collects data "only as part of a User-initiated transfer of information as part of a data portability protocol or standard." FACC ¶ 157. The FTC order defines a "Covered Third Party" as one that collects certain information *outside* of such a user-initiated transfer and protocol. FTC Order at 3, ¶ E. Accordingly, if BrandTotal only collects data in that manner, it is not a Covered Third Party, not required to complete to annual self-certification, and not subject to mandatory blocking by Facebook for its failure to certify compliance with Facebook's terms of use.

Facebook argues that BrandTotal does not fall within **[*23]** that carve-out from the definition of a Covered Third Party because it does not in fact use a "'protocol or standard' for transferring a user's *own* data." Pl.'s Mot. (dkt. 132) at 10 (emphasis added). Both parties rely on vague language from ISO, an international standards organization, with BrandTotal attaching to its counterclaims a screenshot of an ISO webpage defining "data portability" as "ability to easily transfer data from one system to another without being required to re-enter data," FACC Ex. B, and Facebook requesting judicial notice of an earlier portion of the same ISO webpage stating in an "introduction" section that the "goal of portability is to enable cloud service customers (CSCs) to move their data or applications between non-cloud and one or more cloud services and between cloud services."[8] Facebook also requests judicial notice of its own press release announcing its own tool allowing a user to transfer their photos from Facebook to Google Photos, asserting that feature is more in line with the type of data portability protocol contemplated by the FTC order. Pl.'s Mot. at 10.

The parties' reliance on extrinsic evidence—even if some of it is subject to judicial **[*24]** notice—drives home that this is not a matter suitable for resolution on the pleadings. While the original 2012 version of the FTC order was issued unilaterally, the operative version issued on April 27, 2020 reflects a stipulation between the FTC and Facebook in a judicial enforcement proceeding, and thus resembles a consent decree. *See* FACC Ex. C at 1. Interpreting ambiguous language in such a document may require extrinsic evidence:

> Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree. [Footnote.] Such reliance does not in any way depart from the 'four corners' rule of [*United States v. Armour & Co., 402 U.S. 673, 91 S. Ct. 1752, 29 L. Ed. 2d 256 (1971)*].
> [Footnote:] Assuming that a consent decree is to be interpreted as a contract, it would seem to follow that evidence of events surrounding its negotiation and tending to explain ambiguous terms would be admissible in evidence

United States v. ITT Cont'l Baking Co., 420 U.S. 223, 238, 95 S. Ct. 926, 43 L. Ed. 2d 148 & n.11 (1975) (considering an FTC consent order).

BrandTotal has alleged **[*25]** that it "receives information only as part of a User-initiated transfer of information as part of a data portability protocol or standard." FACC ¶ 157. It alleges that users chose to share with BrandTotal data that either they had previously provided to Facebook or was presented to them on Facebook. The Court takes those allegations as true. Requiring more detailed allegations as to the precise workings of BrandTotal's product or the facts underlying its interpretation of this term in the FTC order would go beyond the requirements of *Rule 8(a)* and *Iqbal*, and definitely resolving the ambiguous language of the order will likely at least some degree of extrinsic

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[8] ISO/IEC 19941:2017(en), Information technology—Cloud computing—Interoperability and portability, https://www.iso.org/obp/ui/#iso:std:iso-iec:19941:ed-1:v1:en (accessed May 24, 2021); *see* Pl.'s Mot. at 10.

evidence. Facebook is aware of BrandTotal's theory, and based on BrandTotal's allegations, that theory is sufficiently plausible to proceed.

Facebook's defense that enforcement of its own contract was a legitimate business purpose is also inappropriate for resolution on the pleadings. Adjudicating affirmative defenses on a motion to dismiss is the exception rather than the rule. "[P]laintiffs ordinarily need not plead on the subject of an anticipated affirmative defense"; such defenses are relevant on a motion under *Rule 12(b)(6)* only when they are **[*26]** "obvious on the face of a complaint" or from facts subject to judicial notice. *Rivera v. Peri & Sons Farms, Inc., 735 F.3d 892, 902 (9th Cir. 2013)* (citations and internal quotation marks omitted); *see also, e.g., Special Situations Fund III QP, L.P. v. Marrone Bio Innovations, Inc., 243 F. Supp. 3d 1109, 1122 (E.D. Cal. 2017)*. A defendant's enforcement of its own contract is not an absolute defense to interference—even then, the "determinative question" is whether the party acted in good faith. *Richardson v. La Rancherita, 98 Cal. App. 3d 73, 81, 159 Cal. Rptr. 285 (1979)*; *see also Webber v. Inland Empire Invs., 74 Cal. App. 4th 884, 902, 88 Cal. Rptr. 2d 594 (1999)*. Even if Facebook can show based on BrandTotal's allegations and facts subject to judicial notice that it had a right to enforce its terms of service, it is not "obvious on the face of" BrandTotal's counterclaims that such enforcement was done in good faith. *See Rivera, 735 F.3d at 902*. And unlike the original counterclaim, which the Court dismissed because "BrandTotal ha[d] not alleged any particular motive by Facebook," 1st MTD Order at 14, BrandTotal now alleges that 'Facebook's fraudulent and misleading statements to Google were known by Facebook to be false, and its actions were malicious," FACC ¶ 149, which BrandTotal supports with additional factual allegations that Facebook's investigations of BrandTotal would have revealed that BrandTotal's terms of service disclosed to panelists the data it collected, *id.* ¶¶ 190-91.

At the hearing, Facebook relied on arguments raised more **[*27]** clearly in its opposition to a preliminary injunction than its briefing on the motion to dismiss, including that its statement to Google was accurate because of potential issues around the margin of disclosing BrandTotal's data collection activities: that BrandTotal described Facebook as a "participating site" on its website; that BrandTotal did not obtain consent from advertisers, and might have obtained names or location data for individuals who sponsored advertisements; and the potential issue with users of shared computers. Pl.'s Opp'n (dkt. 134) at 19. None of those theories are necessarily what a reader of the phrase "improperly scraping user PII (e.g. gender, relationship status, ad interests, etc.), without proper disclosure," FACC Ex. I, would naturally take it to mean, and nothing on the face of BrandTotal's counterclaims suggests such issues in fact motivated Facebook's employee Jeremy Brewer to assert lack of proper disclosure to Google. That incongruity, coupled with Facebook following up with Google to press for a resolution days later after receiving inquiries about BrandTotal's capabilities from advertising customers, raises at least a specter of bad faith sufficient **[*28]** to render BrandTotal's allegation plausible.

Facebook cites *Savage v. Pacific Gas & Electric Co., 21 Cal. App. 4th 434, 26 Cal. Rptr. 2d 305 (1993)*, for the proposition that an "unfounded opinion" may be protected speech for the purpose of an interference claim, based on the "social value in allowing business contacts of enterprises dealing with the public to comment freely on matters affecting their own or the public interest." *21 Cal. App. 4th at 450*; *see* Pl.'s Opp'n at 19. It is possible that Brewer's characterization of BrandTotal was merely an "unfounded opinion," offered in good faith, which would not defeat Facebook's legitimate business purpose of enforcing its terms of use. It is also possible that it was made in bad faith, with knowledge of falsity (or at least omission) or reckless disregard as to its truth, for the purpose of inducing Google to remove UpVoice Legacy. BrandTotal has alleged the latter, and its allegation is sufficiently plausible to proceed.[9]

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[9] BrandTotal also relies heavily, and mistakenly, on a 2019 report by Facebook's researcher Sanchit Karve characterizing a separate BrandTotal mobile app, Social One—which BrandTotal contends functioned in a materially identical manner to UpVoice Legacy—as "harmless." FACC ¶¶ 59, 63, 155 & Ex. E. In context, Karve clearly distinguishes between the code included in the "app itself," which he concluded did not "contain any spyware/code within it," and a script that he determined the app "inject[ed]," which he concluded appeared to suggest scraping of "profile info and ads," necessitating further analysis "to see what they're stealing exactly" and perhaps "legal action against these guys." *Id.* Ex. E. Taken as a whole, the report cannot reasonably be interpreted as indicating that Karve believed Social One was "harmless." But regardless of the merits of the "harmless" characterization, BrandTotal has included sufficient allegations of bad faith with respect to Facebook's assertion that it lacked sufficient disclosures, as discussed above.

The Court therefore declines to dismiss BrandTotal's interference claims based on Facebook's asserted defense of a legitimate business interested.

2. Contracts at Issue

The first element of a claim for interference with contract is the existence of a valid contract between the plaintiff and a third party. *hiQ, 938 F.3d at 995*. BrandTotal identifies **[*29]** four classes of contracts at issue: contracts between BrandTotal and its corporate customers, FACC ¶ 120, contracts between BrandTotal and its individual "Panelists," *id.* ¶ 129, contracts between BrandTotal and its investors, *id.* ¶ 138, and a contract between BrandTotal and Google, *id.* ¶ 143. This order addresses the remaining elements of the claim—the defendant's knowledge of the contract, the defendant's intentional act to disrupt, actual disruption, and damage, *hiQ, 938 F.3d at 995-96*—for each class of contract separately.

a. Contracts with Customers

Other than the affirmative defenses discussed above, Facebook moves to dismiss BrandTotal's claim for interference with customer contracts primarily on the basis that Facebook was not aware of any specific contracts between BrandTotal and its customers. Pl.'s Mot. at 12; Pl.'s Reply (dkt. 142) at 7.

"'To be subject to liability [for inducing a breach of contract], the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract.'" *Jenni Rivera Enters., LLC v. Latin World Ent. Holdings, Inc., 36 Cal. App. 5th 766, 783, 249 Cal. Rptr. 3d 122 (2019)* (quoting *Little v. Amber Hotel Co., 202 Cal. App. 4th 280, 302, 136 Cal. Rptr. 3d 97 (2011)*) (alteration in original). But under California law, "the defendant need not know exactly who is a party to the contract, so long **[*30]** as he knows he is interfering with a contractual relationship." *Altera Corp. v. Clear Logic, Inc., 424 F.3d 1079, 1092 (9th Cir. 2005)*. Courts have found this element satisfied where a hair product company informed pharmacies selling "diverted" products that it had a "salon-only" distribution policy and all authorized buyers were bound by contract not to distribute them to non-salon resellers, even though the pharmacies did not know the specific other parties to those contracts, *Sebastian Int'l, Inc. v. Russolillo, 162 F. Supp. 2d 1198, 1203-04 (C.D. Cal. 2001)*, and where the operator of a nursing facility overstayed its lease with knowledge that the facility had been leased to a new operator, but did not know the identity of that new lessee, *Ramona Manor Convalescent Hosp. v. Care Enters., 177 Cal. App. 3d 1120, 1132, 225 Cal. Rptr. 120 (1986)*.

Here, BrandTotal alleges that Facebook knew of its relationships with customers based on BrandTotal's advertisements, BrandTotal's statement on its website that "'[m]any of the most recognizable consumer brands'" used its product, specific customers' communications with Facebook, and through Facebook's investigation of various BrandTotal products over the course of multiple years. FACC ¶¶ 121-22, 125 & Exs. D—H. Facebook argues that such potential sources of information fall short of showing actual knowledge of any contract, particularly when the first internal Facebook email referencing a particular **[*31]** customer actually using BrandTotal was dated September 22, 2020, one day after Facebook reported UpVoice to Google as potentially scraping user information on September 21, 2020.[10] Pl.'s Mot. at 12; Pl.'s Reply at 7. But BrandTotal is not required to prove its case in its complaint. BrandTotal has alleged that Facebook knew of its contracts to sell the data it gathered from Facebook, FACC ¶ 121, and the alleged potential sources of such knowledge render that allegation plausible. On a motion to dismiss under *Rule 12(b)(6)*, that is enough.

Facebook also somewhat indirectly attacks BrandTotal's showing of actual disruption, asserting that the internal email concerned "a BrandTotal client contract that BrandTotal does *not* allege was disrupted." Pl.'s Mot. at 12. But

[10] The Court notes that although Facebook employees sent their first two emails to Google one day before the internal email discussing a customer who used BrandTotal, Google did not immediately respond, and Facebook employee Sanchit Karve followed up several days later "to ask if [Google] had a chance to look into our request." FACC Ex. I. BrandTotal is also correct that the September 22 email refers to Facebook having "learned"—in the past tense—that the customer used BrandTotal, which leaves a possibility that Facebook obtained that knowledge before reporting UpVoice to Google.

BrandTotal alleges that its "entire business is premised on access to content on social media, the vast majority of which comes from Facebook," and that "by acting to have UpVoice removed from the Chrome Store, Facebook removed BrandTotal's ability to collect data from any site via UpVoice, not just from Facebook." FACC ¶ 127. BrandTotal also alleges that it "has lost current and prospective customers and has had to give credits of monthly **[*32]** membership fees to customers," *id.* ¶ 88, and that Facebook has made BrandTotal's "collection of this advertising information more costly" by forcing BrandTotal to redesign UpVoice before resubmitting it to the Google Chrome Store, *id.* ¶ 92. Those allegations do not carve out any particular customer contracts from the disruption BrandTotal has alleged. Facebook does not pursue this argument in its reply, and the Court declines to dismiss BrandTotal's counterclaim on this basis.

Facebook's motion to dismiss is therefore DENIED as to BrandTotal's counterclaim for intentional interference with customer contracts.

b. Contracts with Panelists

Facebook argues that BrandTotal's counterclaim for interference with its contracts with individual users or "panelists" must be dismissed because BrandTotal has not alleged that those users had any obligation to share their data with BrandTotal. Pl.'s Mot. at 12. BrandTotal describes its contracts with its panelists as follows:

129. BrandTotal had valid contracts with each of its Panelists.

> 130. When applying to be a Panelist, each individual must acknowledge and agree to the UpVoice Terms of Service. In consideration of a Panelist sharing their information **[*33]** with BrandTotal, BrandTotal provides the Panelist with monetary compensation. Similarly, users of Defendants' other extensions were compensated for the data they chose to share through use of the extension that improved the user's social media experience. If Panelists are unable to share their data with BrandTotal, Panelists cannot perform their duties under the UpVoice Terms of Service.

FACC ¶¶ 129-30.

Facebook may be correct that BrandTotal has not plausibly alleged an *obligation* by panelists to share data with BrandTotal. Despite its characterization of panelists' sharing data as their "duties" under the UpVoice terms of service, the overall relationship BrandTotal describes tends to resemble a unilateral contract, in which the offeree has no obligation to perform, but the offeror is bound to reciprocate if the offeree in fact performs. *See Sateriale v. R.J. Reynolds Tobacco Co., 697 F.3d 777, 785 (9th Cir. 2012)* ("In contrast to a bilateral contract, a unilateral contract involves the exchange of a promise for a performance. The offer is accepted by rendering a performance rather than providing a promise. Typical illustrations are found in offers of rewards or prizes." (cleaned up)). Here, it seems likely that BrandTotal agreed to provide rewards to panelists **[*34]** *if* they shared their data, and less likely that panelists committed to providing any particular amount of data such that they could be held responsible for breach of contract if they ceased using UpVoice. With only a cursory description of BrandTotal's terms of service included in its counterclaim, and no clear allegation that panelists were *obligated* to use UpVoice, it is difficult to say.

The distinction is not the knockout blow that Facebook suggests, but also not entirely insignificant (as BrandTotal appears to assume). While not addressed by either party here, the California Supreme Court has recently held that a claim for interference with an at-will contract requires showing wrongfulness beyond mere interference, based on its resemblance to a claim for interference with prospective relations—in particular, the lack of any "legal basis in either case to expect the continuity of the relationship or to make decisions in reliance on the relationship." *Ixchel Pharma, LLC v. Biogen, Inc., 9 Cal. 5th 1130, 1147, 266 Cal. Rptr. 3d 665, 470 P.3d 571 (2020)*. The same considerations would seem to apply to a contract that did not require panelists to use UpVoice in the future. If panelists had no obligation to provide data, BrandTotal would need to allege and prove wrongfulness.

But in any **[*35]** event, BrandTotal has sufficiently alleged that the same conduct by Facebook was unlawful for interfering with its *customer* contracts, where Facebook has not disputed that BrandTotal had a sufficiently binding obligation. The alleged conduct is therefore tortious for intentionally interfering with customer contracts. If the conduct is a tort with respect to customer contracts, it is "wrongful" for a reason independent of its effect on panelist contracts. BrandTotal has alleged that Facebook's interference with panelist contracts was wrongful at least on that basis, and perhaps also based on its plausible allegations of bad faith discussed above in the context of Facebook's legitimate business interest defense.[11]

Facebook's motion is therefore DENIED as to BrandTotal's counterclaim for intentional interference with panelist contracts.

c. Contracts with Investors

BrandTotal's only allegations regarding its contracts with investors are that it "had valid contracts with multiple investors," that Facebook was aware of the identities of certain specific investors, and that BrandTotal had raised several million dollars in investment. FACC ¶¶ 138-40. Facebook contends that BrandTotal has not "identifie[d] **[*36]** any contract that has been breached or any duty the performance of which has been rendered more burdensome." Pl.'s Mot. at 12. Facebook is correct. Unlike with customers, where there is at least some basis for an inference that BrandTotal was contractually obligated to deliver analytics services that Facebook's conduct rendered impossible or more burdensome, a typical investor relationship would involve investors providing funding in return for an ownership stake in BrandTotal, not a specific obligation on BrandTotal to provide any particular service. BrandTotal's only response is to cite its allegations of harm, which in turn cite a declaration discussing BrandTotal's difficulties attracting *new* investment. Defs.' Opp'n at 16; FACC ¶¶ 84-92 & Ex. L, ¶¶ 8-10.

BrandTotal cites no authority for the proposition that harm to a company constitutes interference with its existing investor contracts merely on the basis that it reduces investors' expected returns. Such a rule would elide basic distinctions of the corporate form, and would threaten to bring virtually any vigorous competition within the scope of an intentional interference claim. *Cf.* Ixchel, 9 Cal. 5th at 1148 (considering the risk of "chilling legitimate **[*37]** business competition" and "expos[ing] routine and legitimate business competition to litigation" in setting the contours of intentional interference with at-will contracts).

Facebook's motion is GRANTED as to BrandTotal's counterclaim for intentional interference with investor contracts. BrandTotal has not identified any way it could further amend its counterclaims to allege interference with any existing contract with investors beyond mere diminished returns. The Court nevertheless grants leave to amend if BrandTotal believes it can cure the defects identified above.

d. Contract with Google

BrandTotal alleges that it "had a valid contract with Google under which BrandTotal was able to provide developer services and promote its product on the Chrome web store," which Facebook disrupted by "fraudulently" reporting that BrandTotal was scraping users' personal information "without proper disclosure." FACC ¶¶ 143-50.

Facebook, requesting judicial notice of the developer agreement on Google's website, argues that "Google took its enforcement action pursuant to, not in violation of, the Google Chrome Web Store Developer Agreement," which "provides that Google may, at any time, remove extensions **[*38]** that violate a third party's terms of service." Pl.'s Mot. at 12. Facebook also contends that the removal of UpVoice Legacy did not prevent BrandTotal from listing other products in the Google Chrome store, including later versions of UpVoice. *Id.* at 13. BrandTotal responds that the developer agreement was tied to particular products (citing its introductory paragraph stating that the "Web Store is a publicly available site on which Developers can publish Products"), and that the allegation that Google removed UpVoice Legacy based on Facebook's misrepresentation of BrandTotal's data gathering and disclosures must be taken as true on a motion under Rule 12(b)(6). Defs.' Opp'n at 16-17. Facebook reiterates in its reply that Google reserved the right to suspend or remove products from its store, and argues that, "absent a contractual right or obligation that has been disrupted, BrandTotal can state no claim for relief." Pl.'s Reply at 8.

While BrandTotal's characterization of the developer agreement as pertaining to a specific product is somewhat questionable, and Facebook is correct that the agreement did not grant BrandTotal a *right* to continue offering

[11] Since the parties have not briefed this issue of independent wrongfulness in detail, this order is without prejudice to arguments that either party might present on that issue at summary judgment.

UpVoice Legacy or impose any *obligation* on **[*39]** Google to continue hosting it, the availability of UpVoice Legacy in Google's store was nevertheless one benefit of BrandTotal and Google's contractual relationship that BrandTotal had enjoyed until the time of Facebook's alleged interference. *See* *PG&E, 50 Cal. 3d at 1127* ("[I]t is the contractual relationship, not any term of the contract, which is protected against outside interference."). Google's contractual right to remove UpVoice Legacy from its store resembles in some ways the right of a party to terminate an at-will contract—which the California Supreme Court has held may support a claim for intentional interference when it is provoked a defendant's wrongful act. *See* *Ixchel, 9 Cal. 5th at 1148*.

For the purpose of Facebook's present motion, the Court takes as true BrandTotal's allegation that Facebook misrepresented BrandTotal's practices by asserting that UpVoice Legacy collected personal information without proper disclosures, and that this misrepresentation caused Google to remove UpVoice Legacy from its store. Those issues may warrant further exploration on a factual record—for one thing, there is some reason to believe that Google removed UpVoice Legacy based on its own determination that the product violated Google's policy **[*40]** against sharing data for advertising purposes, rather than any improper disclosure or violation of Facebook's terms of use. *See* FACC Ex. I (email from a Google employee to Facebook employees stating that, based on "quickly looking through [BrandTotal's] privacy policy[,] it does look like they are collecting a bunch of information for advertising purposes which is a no no"). But BrandTotal has met its relatively low burden to proceed beyond the pleadings on this claim.

D. Interference with Prospective Economic Relations

A claim for intentional interference with prospective economic relations is similar to intentional interference with contract. "A plaintiff asserting this tort must show that the defendant knowingly interfered with an 'economic relationship between the plaintiff and some third party, [which carries] the probability of future economic benefit to the plaintiff.'" *Ixchel, 9 Cal. 5th at 1141* (quoting *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*) (alteration in original). "Although this need not be a contractual relationship, an existing relationship is required." *Roth v. Rhodes, 25 Cal. App. 4th 530, 546, 30 Cal. Rptr. 2d 706 (1994)* (citing *Buckaloo v. Johnson, 14 Cal. 3d 815, 829, 122 Cal. Rptr. 745, 537 P.2d 865 (1975)*, *abrogated on other grounds by* *Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (1995)*). As with a claim based on an at-will contract, discussed above, the plaintiff "must plead as an element of the claim that the defendant's **[*41]** conduct was 'wrongful by some legal measure other than the fact of interference itself.'" *Id. at 1142* (quoting *Della Penna, 11 Cal. 4th at 393*).

BrandTotal alleges, and attaches to its counterclaim a declaration stating, that certain potential investors and customers walked away from negotiations (and some current customers froze their accounts) after Facebook's alleged interference. FACC ¶ 168 & Ex. L, ¶¶ 9, 17-22. The customers who froze their accounts are presumably encompassed within BrandTotal's interference with contract claim. As for potential new customers and investors, BrandTotal has not alleged any existing relationship at the time of interference, as required to proceed on this claim. *See* *Roth, 25 Cal. App. 4th at 546*. At least one district court has held that where "negotiations and discussions . . . never crystalized into something more . . . no specific, identifiable economic relationship was disrupted" sufficient to support an interference claim. *Medina v. Microsoft Corp., No. C 14-0143 RS, 2014 U.S. Dist. LEXIS 71271, 2014 WL 2194825, at *4 (N.D. Cal. May 23, 2014)*. BrandTotal is correct that a case cited by Facebook holding a relationship sufficient where parties had "had put pen to paper" and executed a term sheet[12] does not necessarily set the minimum standard for interference with prospective relations, but BrandTotal cites no authority allowing a claim **[*42]** to proceed based merely on the sort of negotiations it has alleged.

Even if BrandTotal alleged a sufficient prospective relationship, it has not plausibly alleged that Facebook knew of such a relationship. BrandTotal relies on an internal Facebook email noting "several advertiser partners asking

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[12] *Loop AI Labs Inc v. Gatti, No. 15-cv-00798-HSG, 2015 U.S. Dist. LEXIS 117330, 2015 WL 5158639, at *5 (N.D. Cal. Sept. 2, 2015)*.

[Facebook's] sales team for their [point of view] on [BrandTotal's] capabilities." FACC ¶ 164 & Ex. H. Curiosity about BrandTotal's capabilities does not plausibly suggest any existing relationship between those advertisers and BrandTotal.

A claim for interference with prospective economic relations can lie where parties have entered a contract that is unenforceable. *See Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Vill. Square Venture Partners, 52 Cal. App. 4th 867, 879, 60 Cal. Rptr. 2d 830 (1997)*. In an abundance of caution, Court therefore allows this claim to proceed in the alternative to BrandTotal's interference with contract claim as to its relationship with *existing* customers, *existing* panelists, and Google. As for merely *prospective* customers and investors,[13] however, this claim is DISMISSED, with leave to amend if BrandTotal can cure the defects identified above.

E. UCL Claim

California's UCL broadly prohibits unlawful, unfair, and fraudulent business acts. *Korea Supply, 29 Cal. 4th at 1143*. "Unlawful acts are anything that can properly be called **[*43]** a business practice and that at the same time is forbidden by law . . . be it civil, criminal, federal, state, or municipal, statutory, regulatory, or court-made, where court-made law is, for example a violation of a prior court order." *Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1151 (9th Cir. 2008)* (ellipsis in original) (citations and internal quotation marks omitted). "Unfair acts among competitors means 'conduct that threatens an incipient violation of an ***antitrust law***, or violates the spirit or policy of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.'" *Id. at 1152* (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*). "Finally, fraudulent acts are ones where members of the public are likely to be deceived." *Id.*

1. "Unlawful" Prong

BrandTotal's counterclaim under the "unlawful" prong is based on its theories of tortious interference, and the parties agree that it rises or falls with those counterclaims. Because the Court denies Facebook's motion to dismiss at least some aspects of those counterclaims as discussed above, Facebook's motion to dismiss BrandTotal's counterclaim under the unlawful prong of the UCL is also DENIED.

2. "Unfair" Prong

As the Court noted in its previous order, an "unfair" claim **[*44]** by a competitor under the UCL generally must implicate the antitrust laws.[14] 1st MTD Order at 16 (citing *Sybersound, 517 F.3d at 1152*). "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Courts have dismissed competitors' claims under this prong of the statute where plaintiffs fail to identify "any 'unusual' aspect of the alleged conduct that would make that

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[13] BrandTotal has not asserted interference with prospective economic advantage as to potential prospective panelists. *See* FACC ¶¶ 161-69. If it had, the Court would similarly dismiss that aspect of the claim for failure to allege existing relationships or Facebook's knowledge of such a relationships.

[14] There may be other circumstances were wrongful conduct can support an "unfair" UCL claim, *see, e.g., Doe v. CVS Pharmacy, Inc., 982 F.3d 1204, 1214-15 (9th Cir. 2020)*, *cert. petition docketed*, No. 20-1374 (U.S. Mar. 26, 2021), but those theories are limited to claims by consumers rather than competitors, *see Morgan v. AT&T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1254, 99 Cal. Rptr. 3d 768 (2009)*, and BrandTotal has not asserted them here, *see* Defs.' Opp'n at 19-21.

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

BrandTotal contends that it has remedied its previous failure to show injury to competition, as opposed to mere injury to itself, by adding allegations to "detail how Facebook is harming all **[*45]** competition that involves collection of data from its site," having "structured its policies and actions in such a way as to monopolize data about commercial advertising on its site and prevent competition for third-party advertising information." Defs.' Opp'n at 19. Facebook argues that BrandTotal has not sufficiently alleged either monopoly power in a relevant product market or an exception to the usual rule that unilateral refusal to deal with a competitor is not an antitrust violation, both of which would be necessary for it to proceed on its claim. Pl.'s Mot. at 18.

BrandTotal has not alleged unusual circumstances that would allow something other than an antitrust violation to support an "unfair" prong claim here. Its theory of what makes Facebook's conduct unfair is relatively straightforward: Facebook is extremely large and powerful, it controls a product that BrandTotal would like to access, it has denied BrandTotal that access both by refusing to permit it and by pressuring another company (Google) to alter its dealings with BrandTotal, and it also denies other potential competitors access, all to further Facebook's own competitive advantage and "maintain a monopoly over the **[*46]** Third-Party Advertising Information on Facebook." *See* FACC ¶¶ 173-83. The antitrust laws are equipped to deal with such a theory, and to determine whether it should be considered monopolization (or otherwise anticompetitive) or merely vigorous competition by a powerful market participant.

As a starting point to state such a claim, BrandTotal must identify a product market:

> Plaintiffs must plead a relevant market to state an antitrust claim under the Sherman Act, unless they assert a per se claim. While plaintiffs need not plead a relevant market with specificity, there are some legal principles that govern the definition of an antitrust "relevant market," and a complaint may be dismissed under *Rule 12(b)(6)* if the complaint's 'relevant market' definition is facially unsustainable.
>
> The relevant market must include both a geographic market and a product market. The latter . . . must encompass the product at issue as well as all economic substitutes for the product. Economic substitutes have a reasonable interchangeability of use or sufficient cross-elasticity of demand with the relevant product. Including economic substitutes ensures that the relevant product market encompasses the group or groups of **[*47]** sellers or producers who have actual or potential ability to deprive each other of significant levels of business.

Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1120-21 (9th Cir. 2018) (cleaned up). "[O]ne method of determining whether a proposed market is viable is assessing 'whether a monopolist in the proposed market could profitably impose a small but significant and nontransitory price increase." *Id. at 1122-23* (quoting *Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1002 (9th Cir. 2018)*). A complaint that "merely restate[s] a test for market definition without any factual elaboration" is not sufficient. *Id. at 1122*.

BrandTotal's amended counterclaim is inconsistent as to a relevant market. It asserts that the "market comprises at least Facebook's site, which has more users than the size of by far most countries in the world." FACC ¶ 173. Certain other allegations similarly reference a "market for Third Party Advertising Information on Facebook." *Id.* ¶ 125; *see also id.* ¶¶ 15, 179, 182. But a market definition of "at least" one product is no definition at all, and BrandTotal has not explained why data regarding advertising on other social media networks—or perhaps other media entirely—is not an economic substitute for information about Facebook ads. Some of BrandTotal's other allegations tend to suggest a larger market, including that BrandTotal **[*48]** offers "competitive analyses of advertising efforts on social media sites like Facebook, Instagram, Twitter, YouTube, LinkedIn, Amazon and others," *id.* ¶ 44, and that Facebook has used its terms of service "to maintain monopoly power of data on its platform and in the social networking platform market," *id.* ¶ 15.[15]

"[M]any courts have rejected antitrust claims reliant on proposed advertising markets limited to a single form of advertising," *Hicks, 897 F.3d at 1123*, and "[s]ingle-brand markets are, at a minimum, extremely rare," *Apple, Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008)*. While it is still conceivable that BrandTotal might be able to allege such a market here, some broader market in which Facebook holds power, or perhaps multiple potential markets in the alternative, it has not clearly done so, and certainly has not supported any such a market definition with sufficient factual allegations to render them plausible.

The general rule that a market participant may permissibly refuse to deal with its rivals is also an impediment to BrandTotal's claim. *See, e.g., Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407-08, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. BrandTotal argues that this is not a refusal-to-deal case because "Facebook is not merely a competitor, but also the operator of a social media site that reaches more than 2 billion users," because **[*49]** it has "interfere[d] with" rather than merely refused to aid BrandTotal's efforts to collect advertising data, and because "Facebook is not structuring deals to favor certain distributors; it is monopolizing data surrounding commercial advertisements that it displays to millions of users and taking steps to block anyone that would access that data." Defs.' Opp'n at 19-20. Ultimately, though, so long as Facebook generally has a right to set rules for accessing the password-protected portions of its website—a principle not reasonably in dispute—its refusal to authorize the access BrandTotal seeks is a refusal to deal with a potential competitor.

BrandTotal also argues that even if this is a refusal-to-deal case, the right to refuse to deal is not absolute, as recognized by the Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. Defs.' Opp'n at 20. BrandTotal contends that its counterclaim need not track the precise elements of that case because the Court "did not set forth express prerequisites." *Id.* This Court is bound by recent Ninth Circuit precedent to the contrary, which provides that "[t]he one, limited exception to this general rule that there is no antitrust duty to deal comes under the Supreme Court's decision **[*50]** in *Aspen Skiing*," and that the three key features of that case—(1) unilateral termination of a voluntary and profitable course of dealing; (2) that could only be intended to sacrifice short-term benefits for long-term monopolist profits; (3) involving products already sold to other similarly situated customers—are "required elements for the *Aspen Skiing* exception." *Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 994-95 (9th Cir. 2020)*.

BrandTotal's counterclaim under the "unfair" prong of the UCL is therefore DISMISSED. Although it is not obvious how BrandTotal would further amend to avoid the refusal-to-deal doctrine, the Court grants it leave to attempt to do so if it believes it can.

3. "Fraudulent" Prong

The Court previously dismissed a counterclaim under the "fraudulent" prong with prejudice, because BrandTotal could not plausibly allege that references in Facebook's terms of use to users owning their data or controlling their privacy settings were fraudulent when the purportedly conflicting truth—that Facebook barred automated data collection—was also contained in the terms of use. 1st MTD Order at 17-18. BrandTotal's new version of this counterclaim is distinct: it contends that Facebook's request that Google investigate or remove UpVoice Legacy **[*51]** from Google's store was fraudulent in asserting that BrandTotal lacked proper disclosures as to the personal data it collected, and rather than deceiving individual Facebook users, Facebook deceived Google. FACC ¶¶ 189-90. Facebook contends that the previous dismissal with prejudice is reason enough to dismiss this counterclaim again. Perhaps BrandTotal should have sought leave before reasserting a new version of this

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[15] BrandTotal's opposition brief further muddles its theory of a relevant market, asserting that, "[t]hough BrandTotal contends that the Facebook network is not itself a market, given the dominance of Facebook in the social media sphere, as alleged in the Amended Counterclaims, [FACC] ¶ 182, Facebook's monopolization of data on the Facebook network is crippling to any company engaged in social media commercial advertising." Defs.' Opp'n at 21.

counterclaim previously dismissed with prejudice, but given the significant factual differences between the new counterclaim and the old, as well as *Rule 15*'s general policy favoring amendment, the Court likely would not deny leave to attempt to assert this new and distinct counterclaim based solely on the previous dismissal.

That said, the new counterclaim fails on its merits. Facebook is correct that BrandTotal cannot state a claim under the fraudulent prong of the UCL without showing a likelihood that *members of the public* would be deceived:

> The "fraud" contemplated by *section 17200*'s third prong bears little resemblance to common law fraud or deception. The test is whether the public is likely to be deceived." Stated otherwise, "Fraudulent," as used in the statute, does not refer to the **[*52]** common law tort of fraud but only requires a showing members of the public are likely to be deceived.

S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 888, 85 Cal. Rptr. 2d 301 (1999) (cleaned up);[16] *see also, e.g., Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1169 (9th Cir. 2012)* ("A business practice is fraudulent under the UCL if members of the public are likely to be deceived."); *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1121 (C.D. Cal. 2001)* ("Though many courts have described the scope of business activities prohibited by *§ 17200* in sweeping terms, there is no case authority that 'fraudulent' business acts are separately actionable by business competitors absent a showing that the public, rather than merely the plaintiff, is likely to be deceived."). BrandTotal cites no authority recognizing a UCL "fraudulent" claim under comparable circumstances of a third-party corporation allegedly being deceived by a one-time communication directed to that corporation. *See* Defs.' Opp'n at 22.

Because BrandTotal has not alleged any statement likely to deceive the public, and its current theory could not be amended to do so, its new counterclaim under the "fraudulent" prong of the UCL is DISMISSED with prejudice.

IV. CONCLUSION

For the reasons discussed above, Facebook's motion to dismiss is GRANTED as to: (1) BrandTotal's declaratory judgment counterclaims, which are dismissed without **[*53]** leave to amend but without prejudice to seeking such leave if changed circumstances warrant; (2) BrandTotal's interference with contract counterclaim to the extent it is based on contracts with investors, which is dismissed with leave to amend; (3) BrandTotal's interference with prospective economic advantage counterclaim as to potential (but not existing) customers and investors, which is dismissed with leave to amend; (4) BrandTotal's counterclaim under the "unfair" prong of the UCL, which is dismissed with leave to amend; and (5) BrandTotal's counterclaim under the "fraudulent" prong of the UCL, which is dismissed with prejudice.

Facebook's motion is DENIED as to: (1) BrandTotal's interference with contract counterclaim to the extent it is based on contracts with existing customers, existing panelists, and Google; (2) BrandTotal's interference with advantage counterclaim as an alternative theory with respect to those same entities; and (3) BrandTotal's counterclaim under the "unlawful" prong of the UCL. Those counterclaims may proceed.

If BrandTotal believes it can cure the defects identified above as to the claims dismissed with leave to further amend, it may file a second amended **[*54]** counterclaim no later than June 25, 2021.

IT IS SO ORDERED.

Dated: June 3, 2021

/s/ Joseph C. Spero

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[16] Facebook's reply brief slightly misquotes *South Bay Chevrolet*, omitting the phrase referencing "the common law tort of fraud" without ellipsis or other indication. *See* Pl.'s Reply at 14.

JOSEPH C. SPERO

Chief Magistrate Judge

In re Opana ER Antitrust Litig.

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

June 4, 2021, Decided; June 4, 2021, Filed

MDL No. 2580; Case No 14 C 10150

Reporter
2021 U.S. Dist. LEXIS 105342 *; 2021 WL 3627733

In Re: OPANA ER ANTITRUST LITIGATION. This Document Relates to All Cases

Prior History: *In re Opana Er Antritrust Litig., 162 F. Supp. 3d 704, 2016 U.S. Dist. LEXIS 16700, Trade Reg. Rep. (CCH) P 79505 (N.D. Ill., Feb. 10, 2016)*

Core Terms

patents, generic, settlement, Defendants', damages, FDA, License, motion to exclude, launch, reformulated, license agreement, antitrust, parties, summary judgment, pharmaceutical, procompetitive, anticompetitive, oxymorphone, reliability, prices, generic drug, market power, calculating, methodology, scientific, profits, consumers, unreasonable restraint, disclosures, lawsuit

Counsel: **[*1]** For Opana ER Antitrust Litigation, In Re: Lewis Scott Joanen, The Dugan Law Firm, Aplc, New Orleans, LA; James R. Dugan, ii, The Dugan Law Firm, Aplc, New Orleans, LA.

For Rochester Drug Co-Operative, Inc., Plaintiff: Zachary David Caplan, PRO HAC VICE, Andrew C. Curley, David F. Sorensen, Berger & Montague, P.c., Philadelphia, PA; Archana Tamoshunas, PRO HAC VICE, Garwin Gerstein & Fisher LLp, New York, NY; Joseph T. Lukens, Faruqi & Faruqi, Jenkintown, PA; Peter R. Kohn, Faruqi & Faruqi, LLP, Jenkintown, PA.

For Value Drug Company, on behalf of itself and all others similarly situated, Plaintiff: Bruce E. Gerstein, PRO HAC VICE, Garwin, Bronzaft, Gerstein & Fisher, New York, NY; David C. Raphael, Erin R Leger, Susan C Segura, PRO HAC VICE, Smith Segura & Raphael, LLP, Alexandria, LA; Jonathan M Gerstein, Joseph Opper, PRO HAC VICE, Garwin Gerstein & Fisher Llp, New York, NY; Jordan M. Cramer, Law Offices of Jordan M. Cramer, PC, Skokie, IL; Miranda Y Jones, Russell A Chorush, PRO HAC VICE, Heim, Payne & Chorush, Llp, Houston, TX.

For Kim Mahaffay, Plaintiff: Joseph R. Saveri, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, San Francisco, CA; Joshua P. Davis, Matthew S. Weiler, Ryan **[*2]** J. Mcewan, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; Lynne Marie Brennan, Ralph B. Kalfayan, PRO HAC VICE, Krause, Kalfayan, Benink & Slavens, Llp, San Diego, CA.

For Fraternal Order of Police, Miami Lodge 20 Insurance Trust Fund, Plaintiff: Jayne Goldstein, Pomerantz Grossman Hufford Dahlstrom & Gross LLP, Weston, FL; Michael Jerry Freed, Freed Kanner London & Millen, LLC, Bannockburn, IL.

For Massachusetts Bricklayers & Masons Health and Welfare Fund, Plaintiff: Gregory Asciolla, LEAD ATTORNEY, Labaton Sucharow LLP-NY, New York, NY; Jay L Himes, PRO HAC VICE, Matthew J Perez, LEAD ATTORNEY, Labaton Sucharow Llp, New York, NY.

For Plumbers & Pipefitters Local 178 Health & Welfare Trust Fund, Plaintiff: Donald Lewis Sawyer, Michael Jerry Freed, Robert J. Wozniak, Steven A Kanner, LEAD ATTORNEYS, Freed Kanner London & Millen LLC, Bannockburn, IL.

For Wisconsin Masons' Health Care Fund, Louisiana Health Service and Indemnity Company, International Union of Operating Engineers, Local 138 Welfare Fund, Mary Davenport, Plaintiffs: Michael Jerry Freed, Freed Kanner London & Millen, LLC, Bannockburn, IL.

For Pennsylvania Employees Benefit Trust Fund, Plaintiff: Jeffrey L. **[*3]** Kodroff, Spector, Roseman & Kodroff, P.C., Philadelphia, PA; John Angelo Macoretta, Spector Roseman Kodroff & Willis, P.c., Philadelphia, PA; Michael Jerry Freed, Freed Kanner London & Millen, LLC, Bannockburn, IL.

Meijer, Inc., Plaintiff, Pro se.

For Walgreen Co, The Kroger Co., Safeway Inc., HEB Grocery Company L.P., Albertsons LLC, Albertsons LLC, Plaintiffs: Anna T Neill, Lauren C Ravkind, PRO HAC VICE, Kenny Nachwalter P.A., Miami, FL; David Lesht, Law Offices of Eugene M. Cummings, P.C., Chicago, IL; Scott E Perwin, PRO HAC VICE, Kenny, Nachwalter, Seymour, Arnold, Critchlow & Spector, P.A., Miami, FL.

For Rite Aid Corporation, Plaintiff: Eric L. Bloom, LEAD ATTORNEY, PRO HAC VICE, Hangley Aronchick Segal Pudlin Schiller, Harrisburg, PA; Barry L Refsin, PRO HAC VICE, Hangley Aronchick Segal Pudlin & Schiller, Philadelphia, PA; David Lesht, Law Offices of Eugene M. Cummings, P.C., Chicago, IL; Rebuck L. Monica, PRO HAC VICE, Hangley Aronchick Segal Pudlin & Schiller, Harrisburg, PA.

For Rite Aid Hdqtrs. Corp., Plaintiff: Barry L Refsin, PRO HAC VICE, Hangley Aronchick Segal Pudlin & Schiller, Philadelphia, PA; David Lesht, Law Offices of Eugene M. Cummings, P.C., Chicago, IL; Rebuck **[*4]** L. Monica, PRO HAC VICE, Hangley Aronchick Segal Pudlin & Schiller, Harrisburg, PA.

Direct Purchaser Plaintiffs, Plaintiff, Pro se.

For End-Payor Plaintiffs, Plaintiff: Jennings F. Durand, PRO HAC VICE, Dechert Llp, Philadelphia, PA.

(Direct Purchaser and End-Payor), Plaintiff, Pro se.

For Impax Laboratories, Inc., Defendant: Danielle R Foley, Lisa Jose Fales, PRO HAC VICE, James Douglas Baldridge, Venable Llp, Washington, DC; Joanna Rubin Travalini, Kevin Fitzgerald Wolff, Lawrence R. Desideri, Maureen L Rurka, Winston & Strawn Llp, Chicago, IL.

For Endo Health Solutions Inc., Endo Pharmaceuticals Inc., Defendants: Christine C Levin, Dechert LLP (Philadelphia), Philadelphia, PA; George Gabriel Gordon, Dechert Llp, Cira Centre, Philadelphia, PA; Jennings F. Durand, PRO HAC VICE, Dechert Llp, Philadelphia, PA; Nathan E Hoffman, Quinn Colleen Shean, Dechert LLP, Chicago, IL.

For Penwest Pharmaceuticals Co., Defendant: Christine C Levin, Dechert LLP (Philadelphia), Philadelphia, PA; George Gabriel Gordon, Dechert Llp, Cira Centre, Philadelphia, PA; Jennings F. Durand, PRO HAC VICE, Carolyn M. Hazard, Dechert Llp, Philadelphia, PA; Nathan E Hoffman, Quinn Colleen Shean, Dechert LLP, Chicago, **[*5]** IL.

Judges: Harry D. Leinenweber, United States District Judge.

Opinion by: Harry D. Leinenweber

Opinion

MEMORANDUM OPINION AND ORDER

This is a case involving patents for prescription opioids and alleged violations ***antitrust law*** through intellectual property licenses and lawsuit settlements. Broadly speaking, three groups of plaintiffs bring this case: the "End Payor" Plaintiffs, who consist of health insurance companies and trust funds, the "Direct Purchaser" Plaintiffs, who consist of drug distribution companies, and the "Retailer" Plaintiffs, who sell medicines to the general populace. (Pl.'s Resp. to Def.'s Stmt. of Facts on Damages/Causation ("PSOF-DC") ¶¶ 1-3, Pl's Stmt. of Facts on Damages/Causation, Ex. 1, Dkt. No. 618-1.) Defendants are patent holders Endo Pharmaceuticals, Endo Health

Solutions, Inc., and its acquired subsidiary Penwest Pharmaceuticals Co., (together, "Endo") as well as the patent licensee Impax Pharmaceuticals. (*Id.* ¶¶ 4-5.) Defendants argue that they are entitled to summary judgment because Plaintiffs have failed to show there was an antitrust injury or that damages resulted from the putative injury. (Dkt. No. 539.) In the alternative, Defendants filed a second summary judgment motion **[*6]** to argue that they are, at a minimum, entitled to summary judgment on various patent issues. (Dkt. No. 532.) Integral to both summary judgment arguments and in anticipation of trial, the parties have also filed twenty-one *Daubert* motions. (Dkt. Nos. 510, 513, 516, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 537, 541, 545, 546, 550, 552, 556.) For the reasons set forth below, the Court first resolves the *Daubert* motions and then denies Defendants' motions for summary judgment in part.

I. BACKGROUND

Oxymorphone has been available as a prescription opioid in the U.S. market since the 1960s. ("Regulatory History of Opana ER" at 5, Mem. on Causation/Damages, Ex. 4, Dkt. No 558-19.) Starting in the early 2000s, Endo Pharmaceutical Holdings developed, patented, and sold an oxymorphone medication that allowed patients to take a single large dose of medication and relieve pain over a longer duration, in other words an "extended release" oxymorphone, referred to throughout this opinion as "Opana ER" or "oxymorphone ER." (*Id.* at 6-7.) Opana ER was officially approved by the U.S. Food & Drug Administration in 2006. (*Id.*)

Oxymorphone ER was originally protected with one patent which expired **[*7]** on February 29, 2008. *See* U.S. FOOD & DRUG ADMIN., APPROVED DRUG PRODS. WITH THERAPEUTIC EQUIV. EVALS. 6-333 (41st ed. 2021) https://www.fda.gov/media/71474/download. To manage patented drugs and their approved substitutions, the FDA issues a yearly publication called the *Approved Drug Products with Therapeutic Equivalence Evaluations*, usually referred to as the "Orange Book." *Id.* at iv. As is pertinent to this litigation, the Orange Book identifies drug products approved by the FDA under the Federal Food, Drug and Cosmetic Act as well as patent and exclusivity information related to approved drug products. *Id.* at iv—vi.

In June 2007, Impax filed an Abbreviated New Drug Application ("ANDA") with the FDA. (Pretrial Stipulation ¶ 15, Mem. on Causation/Damages, Ex. 5, Dkt. No. 558-24.) The abbreviated application process was created by the Hatch-Waxman Act of 1984, enacted to encourage the entry of generic drugs into the U.S. market. KEVIN J. HICKEY, CONG. RSCH. SERV., R45666, DRUG PRICING AND INTELL. PROP. L. 20 (2019) *https://crsreports.congress.gov/product/pdf/R/R45666*. The Hatch-Waxman Act allows generic drug entrants to file a shorter application, relying on data and results from the original applicant, and gives temporary secondary exclusivity **[*8]** on the market to the first generic drug producer to file. *Id.* at 25. Specifically, the first successful applicant has exclusive right to sell the generic drug, apart from the patent holder, for up to 180 days after going on the market. *Id.* Once the FDA approves the abbreviated application, the generic drug producer is required to notify the original patent holders of their intention to produce a generic drug. The patent holders must challenge this action in court to prevent production and sale. (PSOF-DC ¶ 15.)

In the October 2007 Orange Book, Endo asserted for the first time U.S. Patent No. 7,276,250 ("the '250 patent"), and recently acquired U.S. Patent Nos. 5,662,933 ("the '933 patent") and 5,958,456 ("the '456 patent"), in connection with Opana ER. (Pretrial Stipulation ¶¶ 4,5,11,12.) These additional patents pertained to the controlled release mechanism of drug dosages, and the latest of these added patents expired in September 2013. (Pl.'s Resp. to Def.'s Stmt. of Facts on Patent Issues ("PSOF-PI") ¶ 6, Opp'n, Ex. 2, Dkt. No. 615-2.) In response to Endo's new patent claims, Impax amended its ANDA to certify that these new patents were "invalid, unenforceable, or will not be infringed upon by the manufacture, use or sale of Impax's generic Original Opana ER product." (*Id.* ¶ 9.) On November 15, 2007, **[*9]** Endo subsequently filed a suit for patent infringement based on the acquired '933 and '456 patents (the "underlying litigation patents"). (Joint Stipulation ¶ 18.)

Throughout the course of the 2007 patent litigation, Endo and Impax discussed resolving the case through settlement. Ultimately, Endo rejected each of Impax's proposals, including a July 2011 proposal. (Def.'s Resp. to Pl's Stmt. Of Facts on Damages/Causation ("DSOF-DC") ¶ 19, Dkt. No. 693. ("Impax's proposed July 2011 entry date 'was shut down very quickly.'") (citing Snowden Dep. 147:7-148:9, DSOF-DC, Ex. 66, Dkt. No. 676-10).)

Meanwhile, Endo sued and subsequently settled its lawsuit with Actavis, Inc., another ANDA first filer, albeit on the less popular dosage strengths of Opana ER. (DSOF-DC ¶ 24.) The settlement between Actavis, Inc. and Endo resulted in a July 15, 2011, start date for Actavis' generic Opana ER sales. (*Id.*)

Approximately one month before trial, Impax received tentative approval from the FDA to produce its dosages of generic Opana ER. (PSOF-PI ¶14.) At that time, Endo reinitiated settlement talks with Impax, and the parties eventually settled five days into the patent trial on June 8, 2010. (DSOF-DC ¶ 1.) The parties **[*10]** signed two documents on that date. (*Id.*)

The parties first signed the official settlement between Endo and Impax on the patent infringement litigation, entitled the 2010 Settlement and License Agreement ("2010 SLA"). (2010 SLA at 22-24, Mem. on Patent Issues, Ex. 17, Dkt. No. 535-19.) The 2010 SLA contained five notable provisions. First, Impax agreed to delay the sales of generic Opana ER until, at the latest, January 1, 2013. (*Id.* at 2-3.) Second, Endo agreed to grant Impax a broad license to sell generic Opana ER against both current and future patents, referred to as the "Broad License" provision. (*Id.* at 10-12.) Third, Endo agreed it would not launch its own competing generic version of Opana ER for at least six months after Impax's generic launch, meaning that Impax would be the only generic on the market during the secondary exclusivity period granted through the Hatch-Waxman Act. (*Id.* at 11.) This is referred to as the "No Authorized Generic" provision. The fourth and fifth important provisions constitute related compensation formulas based on the future 2013 market for generic Opana ER. (*Id.* at 13.) Essentially, if the market for generic Opana ER was still strong when Impax **[*11]** launched, then Impax would pay Endo a portion of its revenue. (*Id.*) This is the "Impax Royalty" provision. Conversely, if the market was weak, as might happen if Endo cannibalized the market with an upgraded Opana ER product in the intervening years, Endo would have to pay Impax. (*Id.*) This is referred to as the "Endo Credit" provision. The central dispute of this litigation is whether these provisions of the 2010 SLA violated ***antitrust law*** as an unreasonable restraint on trade.

The second agreement signed that day was a document forming a joint venture between Endo and Impax to develop a Parkinson's disease treatment. (DSOF-DC ¶ 5.) Endo was provided with future "profit-sharing rights," and Impax was provided with an upfront payment of ten million dollars. (*Id.* ¶ 2.) At summary judgment, the parties dispute whether the ten-million-dollar payment is an unrelated negotiation term or a sham venture created to provide an upfront payment to Impax. (*Id.*)

Approximately one month after the 2010 Settlement and License Agreement was signed, Endo submitted a New Drug Application with the FDA for a reformulated version of Opana ER. The "reformulated Opana ER" was crush-resistant and designed to **[*12]** curb the well-documented crushing and snorting abuse of opioid drugs. (PSOF-PI ¶4.) This information was made public when the reformulated Opana ER was approved by the FDA in December 2011. Reformulated Opana ER went on the market in March 2012. (*Id.*) During the next year, Endo filed multiple citizen petitions with the FDA asking the FDA to find the original Opana ER unsafe. (PSOF ¶ 55.) Had Endo been successful, the FDA would have revoked its approval of the generic versions of Opana ER. (*Id.*) The FDA declined to do so.

As a result, Impax launched its generic original Opana ER per the terms of the 2010 SLA between the parties in January 2013. (PSOF-DC ¶ 34.) Because the market for the original Opana ER had been drastically reduced through the launch of the reformulated Opana ER, Endo paid Impax the "Endo Credit," which was approximately $102 million. (DSOF-DC ¶ 4.)

Endo also worked to acquire additional patents to protect Opana ER from infringement. In late 2012, Endo acquired U.S. Patent No. 8,309,122 (the '122 patent) and 8,329,216 (the '216 patent). (PSOF-PI ¶ 34.)

Endo then aggressively enforced the '122 and '216 patents against the many generic drug producers who had filed either original or reformulated Opana ER ANDAs with the FDA. (PSOF-PI ¶ 35.) One of these **[*13]** lawsuits ended with a settlement agreement where Endo became the exclusive licensee of U.S. Patent No. 8,871,779 (the '779 patent) (with the '122 and '216 patents, the "later acquired patents"). (*Id.* ¶¶ 34, 37 n.11.) As the last of the extended release oxymorphone patents, the '779 patent does not expire until 2029. (*Id.* ¶ 34.) Once Endo became licensee of the '779 patent, Endo also sued generic drug producers for infringement on this patent as well. (*Id.* ¶ 44.)

In sum, Endo sued eleven additional generic drug producers over original and reformulated Opana ER infringement on the later acquired patents. (*Id.* ¶ 35.) Following two separate district circuit court decisions and one federal circuit affirmation, all other generic Opana ER producers other than Impax were enjoined from selling generic Opana ER based on the later acquired patents. (PSOF ¶¶ 41-43, 49-51.)

Even though Impax had the Broad License, Endo also sued Impax in a separate contention regarding the later acquired patents. Compl. ¶ 1, Endo Pharmaceuticals Inc. v. Impax Laboratories, Inc., No. 16-CV-2526 (D.N.J. May 4, 2016). In its complaint, Endo alleged that the 2010 SLA's Broad License included a requirement by Impax to enter good faith negotiations to provide Endo with a percentage of the profits. *Id.* The parties settled their dispute with an agreement for Impax to pay Endo three million **[*14]** dollars immediately and 50% of the profits thereafter. (2017 Settlement Agreement at 3, 15, App'x of Exs., Ex. 75, Dkt. No. 620-20.) In return, Endo authorized Impax to be the exclusive producer of generic Opana ER. (*Id.*)

In June 2017, the FDA requested that Endo withdraw reformulated Opana ER "based on its concern that the benefits of the drug may no longer outweigh its risks due to the public health consequences of abuse." *Notice, 85 FED. REG. 247 (Dec. 23, 2020)*. As a result, Impax's generic Opana ER is the only extended release oxymorphone product currently on the market.

This multidistrict litigation began with the December 12, 2014, transfer order from the United States Judicial Panel on Multidistrict Litigation (Dkt. No. 1.) Upon Defendants' motion to dismiss, on February 10, 2015, the Court dismissed all state consumer protection and unjust enrichment claims and allowed the antitrust claims to proceed. (Dkt. No. 151.) On March 2, 2016, the End Payor Plaintiffs filed a Second Consolidated Amended Class Action Compliant. (Dkt. No. 164.) On August 11, 2016, the Court dismissed some, but not all, of the state unjust enrichment and consumer protection claims. (Dkt. No. 210.)

The parties then entered extensive, multi-year **[*15]** discovery. At the close of discovery, the parties filed 25 motions. Defendants filed two motions for summary judgment and eleven *Daubert* motions. The Direct Purchaser Plaintiffs and End Payor Plaintiffs each filed motions for class certification and ten *Daubert* motions. The Court resolves the *Daubert* motions and the summary judgment motions in this opinion and order.

II. STANDARD

Summary judgment is proper "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and where no genuine issue remains for trial." *Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1166 (7th Cir. 1978)* (quoting *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1961)*). There is a genuine issue of material fact when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *See Harney v. Speedway SuperAmerica, LLC, 526 F.3d 1099, 1104 (7th Cir. 2008)* (citation omitted). The Court construes all facts and reasonable inferences in favor of the plaintiffs. *Id.* For the nonmoving party to prevail, it must show a genuine dispute of facts that might affect the outcome at trial; "[i]rrelevant or unnecessary facts do not deter summary judgment, even when in dispute." *Id.* (citation omitted).

"Any assessment of the admissibility of expert witness testimony begins with *Federal Rule of Evidence 702* and the Supreme Court's opinion in *Daubert* ***[*16]*** , as together they govern the admissibility of expert witness testimony." *Krik v. Exxon Mobil Corp., 870 F.3d 669, 673 (7th Cir. 2017)*; *see also Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. Under *Rule 702*:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702. "In *Daubert*, the Supreme Court interpreted *Rule 702* to require 'the district court to act as an evidentiary gatekeeper, ensuring that an expert's testimony rests on a reliable foundation and is relevant to the task at hand.'" *Gopalratnam v. Hewlett-Packard Co., 877 F.3d 771, 778 (7th Cir. 2017)* (quoting *Krik, 870 F.3d at 674*).

To screen proposed expert testimony, a district court must answer three questions: "whether the witness is qualified; whether the expert's methodology is scientifically reliable; and whether the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id. at 779* (citations omitted). To evaluate the reliability of an **[*17]** expert's scientific methodology, *Daubert* offers the following factors for case-by-case consideration: whether the methodology can be tested, whether it has been subject to peer review, what the known or potential rate of error is and whether there are standards controlling the technique's operation, and whether there is general acceptance of the technique in the relevant scientific community. *Daubert, 509 U.S. at 594*. This list is neither exhaustive nor mandatory. *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*.

The Court's "'gatekeeping' obligation . . . applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho, 526 U.S. at 141*. The court must adjust the *Daubert* factors "to fit the facts of the particular case at issue, with the goal of testing the reliability of the expert opinion" because "the reliability of different kinds of expertise may be shown in different ways." *United States v. Brumley, 217 F.3d 905, 911-12 (7th Cir. 2000)*. Where an expert's testimony is based on extensive experience, the court determines the extent and type of experience and may limit both the questioning and the testimony to reflect only those areas in which the expert has extensive experience and training. *Id. at 911*. Nevertheless, "[t]alking off the cuff — deploying neither **[*18]** data nor analysis — is not an acceptable methodology." *Lang v. Kohl's Food Stores, Inc., 217 F.3d 919, 924 (7th Cir. 2000)*. Ultimately, the court's gatekeeper role does not replace the role of the trier of fact, and the "jury must still be allowed to play its essential role as the arbiter of the weight and credibility of expert testimony." *Stollings v. Ryobi Techs., Inc., 725 F.3d 753, 765 (7th Cir. 2013)*.

III. DISCUSSION

The Court notes at the outset that few experts were challenged on the basis of insufficient credentials or that the experts do not qualify as experts in their fields. As a result, the Court focuses on the second and third prongs, the methodology of the expert and the expert opinion's relevance for the trier of fact, unless specifically noted otherwise in the subsequent challenges to the proffered experts.

A. Defendants' *Daubert* Motions

1. Defendants move to exclude the testimony of John R. Tupman, Jr. (Dkt. No. 510)

Defendants first move to exclude fully the opinion of John R. Tupman Jr. Plaintiffs have retained Mr. Tupman, a former pharmaceutical executive from Eli Lilly and Co., to give the opinion that "no reasonable pharmaceutical company in Endo's position" would have entered the side agreement regarding Parkinson's Disease, which was executed by Endo and Impax on the same day as the Opana ER Settlement **[*19]** agreement. (Tupman Rep. ¶¶ 1-3, Mem., Ex. 2, Dkt. No. 512-3.) In support of his opinion, Mr. Tupman identifies the lack of due diligence and contract terms that favor Impax from a risk-sharing perspective. Plaintiffs hope to use Mr. Tupman's testimony to argue that the Parkinson's Disease joint venture was a sham, and that the payment should be considered a reverse payment and part of the settlement between Impax and Endo's Opana ER patent lawsuit. As held in *F.T.C. v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*, a reverse payment can indicate that a patent infringement lawsuit settlement was an unlawful restraint on trade.

Defendants argue the Mr. Tupman's expert opinion is deficient in two ways. The first argument is that, under *Actavis*, the trier of fact must determine whether the agreement represents a "fair value for services" rendered. *Id.*

at 156. Because Mr. Tupman's opinion relates to the reasonableness of Endo's actions, it does not assist the trier of fact to determine whether the ten million dollars paid was a fair value for the promised development of the Parkinson's Disease research. Second, Defendants argue that there is no methodology employed by Mr. Tupman when making the determination that Endo was being atypical and unreasonable. **[*20]**

In response, Plaintiffs argue that Defendants, not Plaintiffs, have a burden to show the procompetitive rationale for the restraint. Under the rule of reason test, Plaintiffs have the burden to show that the agreements between the parties was an unreasonable restraint of trade, which Mr. Tupman provides through his testimony. In response to the second argument, Plaintiffs argue that Mr. Tupman's expertise is one of experience, not scientific analysis.

The Court finds neither of Defendants' arguments persuasive. Plaintiffs have the burden to show that the putative reasons set forth in the joint agreement between Endo and Impax are less plausible than Plaintiffs' alternative theory of a sham contract and secret settlement. By opining that Endo acted in an unusual and financially detrimental manner, Mr. Tupman's evidence makes Plaintiffs' theory more plausible and thus relevant to the litigation. The Court's review of Mr. Tupman's testimony shows that Mr. Tupman first articulates a standard process for engaging in pharmaceutical partnerships and then analyzes how Endo deviated from this process. As a result, Mr. Tupman's methodology is reliable under *Daubert. See* *Walker v. Soo Line R. Co., 208 F.3d 581, 591 (7th Cir. 2000)* ("*Rule 702* specifically contemplates **[*21]** the admission of testimony by experts whose knowledge is based on experience.") "Whether a payment was large and unjustified . . . requires viewing the payment in the context of the facts of the case, which may include business considerations that are less tangible or quantifiable." *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. CV 14-MD-02503, 2018 U.S. Dist. LEXIS 18979, 2018 WL 734655, at *4 (D. Mass. Feb. 6, 2018)*. Here, Defendants' objections go to the weight of the evidence and not its admissibility, and the motion is denied. (Dkt. No. 510.)

2. Defendants move to exclude the testimony of Janet K. DeLeon (Dkt. No. 513)

Plaintiffs have retained Janet K. DeLeon, a pharmaceutical consultant, to provide an expert opinion on what the FDA would have done, absent the litigation, specifically (1) when it would have granted approval for Impax's generic Opana ER; (2) when it would have granted approval Actavis' generic Opana ER; (3) whether it would have allowed Endo to claim its reformulated version was an improvement over the original; and (4) other regulatory hurdles, if any, had Endo decided to launch an authorized generic. (DeLeon Rep. ¶ 3, Mem., Ex. 4, Dkt. No. 515-5.)

Defendants move to exclude partially this testimony on three grounds. First, Defendants argued that Ms. DeLeon does not have experience with the FDA on **[*22]** opioid products and lacks the expertise to evaluate the impact reformulated Opana ER had on opioid abuse. Second, Defendants argue that Ms. DeLeon does not employ any methodology, but simply repeats facts already in evidence. Finally, Defendants argue that Ms. DeLeon's opinion regarding Endo's promotion of reformulated Opana ER is a legal conclusion and not a proper subject matter of expert opinion.

Without reaching the question of Ms. DeLeon's expertise in the regulatory pharmaceutical industry, the Court agrees that Ms. DeLeon does not employ expert analysis in her proffered opinion. Instead, DeLeon's report highlights information that is already available through documents and fact witnesses. First, as pointed out by Plaintiffs in their opposition brief, there is already substantial evidence in the record that the FDA declined to allow Endo to claim that the reformulated Opana ER was superior. (Opp'n to Mot. to Exclude DeLeon at 7, Dkt. No. 602.) Further, as stated in Ms. DeLeon's summary of the facts, the FDA had already tentatively approved generic Opana ER and would provide final approval after the required 30-month stay. (DeLeon Rep. ¶¶ 56-64.) Similarly, the FDA's approval of **[*23]** generic Opana ER necessarily means that Endo was free to produce a generic version as well. These facts are already in evidence, so it is unclear why Ms. DeLeon would provide any additional assistance to the jury.

Plaintiffs argue that courts routinely permit expert testimony to assist the jury in understanding complex regulatory issues, citing *Antrim Pharm. LLC v. Bio-Pharm, Inc., 950 F.3d 423, 430-31 (7th Cir. 2020)*. In *Antrim*, the Seventh Circuit held that the district court did not abuse its discretion in allowing the testimony of an FDA regulatory expert that testified about whether or not the FDA would infer ownership when receiving an ANDA application. *Id.* The Seventh Circuit, however, upheld the district court's decision because the jury needed to "determine a fact at issue" about this topic, noting that the fact witness "incorrectly stated there is 'no difference' between ownership of an ANDA and ownership of an underlying product." *Id. at 431*. Here, however, both parties agree as to the underlying facts, and Plaintiffs have not brought any questionable testimony before the Court that might lead to confusion on the facts in question.

Plaintiffs' other cases are similarly inapposite. Plaintiffs' cited cases admitted expert testimony regarding general regulatory **[*24]** processes that would assist the jury. *See, e.g., Jones v. Novartis Pharms. Corp., 235 F.Supp. 3d 1244, 1255-56 (N.D. Ala. 2017)* ("The court finds that Dr. Parisian is qualified, based on her experience at the FDA as a Medical Officer, to offer testimony about regulatory requirements for the testing, marketing, and development of prescription drugs."); *In re Yasmin & YAZ (Drospirenone) Mktg., Sales Practices & Prod. Liab. Litig., No. 3:09-MD-02100-DRH, 2011 U.S. Dist. LEXIS 145593, 2011 WL 6302287, at *13 (S.D. Ill. Dec. 16, 2011)* ("Here, the Court finds that Dr. Kessler's testimony is permissible because of the complex nature of the process and procedures and the jury needs assistance understanding it."). Ms. DeLeon has not submitted expert testimony about how the FDA ANDA approval process works generally. Instead, Ms. DeLeon's application of the FDA regulatory system to this case simply recited facts already present in the record. For this reason, the Court grants Defendants' motion to exclude Ms. DeLeon's testimony. (Dkt. No. 513.)

3. Defendants move to exclude the testimony of Luis A. Molina (Dkt. No. 516)

Luis A. Molina is an MBA-credited pharmaceutical consultant with more than twenty years of experience at a large pharmaceutical company. (Molina Rep. ¶¶ 5-6, Mem., Ex. 12, Dkt. No. 518-13.) Mr. Molina provides four opinions in his report: (1) absent the settlement agreement between Endo and Impax, Endo would have been ready and able **[*25]** to launch an authorized generic; (2) absent the agreement, a rational pharmaceutical company in Endo's position would have launched an AG version contemporaneously with Impax's launch; (3) Endo's actions were consistent with planning to launch an authorized generic; and (4) absent the agreement, a rational company in Endo's position would have continued its production of branded Opana ER and the authorized generic Opana ER, even with the launch of the reformulated version. (*Id.* ¶ 43.)

Defendants object to all of Mr. Molina's testimony, and the Court concurs. Mr. Molina's report does not engage in any analysis or method, but instead reiterates the facts of the case and then offers his opinion based entirely on his industry experience. (*See, e.g., id.* ¶ 68 ("All of [the recited facts are] consistent with and confirms my opinions that absent the no-AG promise Endo made to Impax, Endo was ready, and, in similar circumstances a rational pharmaceutical company would have been willing and financially incentivized to launch an AG version of Opana ER contemporaneously with an Impax generic launch."))

While experience can qualify a person to be an expert witness, the district court cannot simply **[*26]** take the witnesses' word at face value. *See Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1319 (9th Cir. 1995)* ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). "If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *FED. R. EVID. 702* advisory committee note to the 2000 amendment; *see also Lang, 217 F.3d at 924* ("Many times we have emphasized that experts' work is admissible only to the extent it is reasoned, uses the methods of the discipline, and is founded on data."). Mr. Molina's expert report is devoid of method or analysis. For this reason, the Court grants the Defendants' motion to suppress Mr. Molina's testimony. (Dkt. No. 516.)

4. Defendants move to exclude certain opinions of Dr. Jeffery J. Leitzinger (Dkt. No. 529.)

Dr. Jeffery J. Leitzinger holds a PhD and is an economist at a national research and consulting firm. (Leitzinger Rep. ¶ 1, Mem., Ex. 2, Dkt. No. 531-3.) Defendants dispute three opinions provided by Dr. Leitzinger: (1) his 'Lerner index' analysis, from which **[*27]** he concludes there is proof of Endo's market power; (2) his analysis on the cross-price elasticity between Opana ER and other long-acting opioids which additionally purports to show Endo's market power; and (3) a damages model based on sales which were unlawful based on the subsequently-acquired patents in this case. (*Id.* ¶¶ 51-53, 79-85, 87-116.) The Court reviews each in turn.

First, Defendants object to Dr. Leitzinger's employment of an economic method of calculating excess profit called the 'Lerner index.' A first principle of economics is that, in a perfectly competitive market, firms will be making almost no economic profit because each firm sells their goods at the cost it takes to make the additional unit. The additional-unit cost is referred to as marginal cost. The Lerner index is employed by economists to calculate the economic profits beyond marginal cost. In theory, a firm that attempts to set its prices above marginal cost would be subject to plummeting demand as consumers switched to competing substitutes. As a result, any excess economic profits that a firm makes on a per-unit basis demonstrates imperfect competition, i.e., constitutes evidence that the firm has enough **[*28]** power in the relevant market to set its prices above the competitive level without consequence.

A firm's Lerner index is calculated using two inputs. Economists take the retail price of the good or service sold, subtract out the marginal cost that it took to provide the good or service, and then divide the resulting number by the price sold. This is notated as (Price — Marginal Cost/Price) or P-MC/P = X. In practice, this number, noted as either a decimal or a percentage, will vary based on the type of product sold. For example, a product with low marginal cost, such as a software download to an end-user, could have a number closer to 1 (or closer to 100%). A company that provided extremely costly goods or services, such as a made-to-measure suit, would be expected to have a much lower ratio, or a number closer to 0 (or closer to 0%). Generally, a Lerner index score closer to 1 indicates strong market power. Dr. Leitzinger opines that Endo's Lerner index, estimated between 60.7 and 74.3 percent, is direct evidence of Endo's monopoly power. (*Id.* ¶¶ 51-53.) Defendants object, arguing the Lerner index is not a reliable method of calculating monopoly power in many industries with high initial **[*29]** costs, including the pharmaceutical industry.

In support of his assertion, Dr. Leitzinger cites to the textbook *Modern Industrial Organization* by Carlton and Perloff, as well as the Department of Justice Merger Guidelines. While the DOJ Guidelines are developed in a different context, the manual uses the same basic principles of economics outlined above. In the event of a proposed merger, the DOJ "employ[s] the hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets." Horizontal Merger Guidelines § 4.1.1, (U.S. Dep't of Justice & Fed. Trade Comm'n 2010). The DOJ evaluates whether products sold by the merging firms are (1) in the same market and (2) could, in the event of the merger, support a small but significant and non-transitory increase in price of at least 5% ("SSNIP"). *Id.* That small increase would have no effect on the cost it took to produce the good; it would be essentially profit, and thus show up as an .05 increase in a Learner index calculation.

Dr. Leitzinger admits in his report using the Merger Guidelines to suggest an absolute Lerner index score of .05 (or 5%) as a standard **[*30]** for monopoly power would be "prone to false indications of monopoly power." (*Id.* ¶52.) Unlike in a potential merger, Plaintiffs do not have a putative "before patent" oxymorphone ER market with which to compare their current economic profits, and thus Dr. Leitzinger's calculations cannot show increases. However, in principle, if a 5% increase in economic profit suggests market power, then a 60-70% calculation of absolute economic profit is an accurate indicator of general market power.

In their opposition, Defendants argue that many goods, including pharmaceutical drugs, have high fixed costs which do not show up on the Learner index because the equation only accounts for the marginal costs. Defendants' argument highlights the purpose of government-provided patents. A patent creates a monopoly to protect the company's investments in research in development as an inducement to undertake those larger fixed costs. It does not fully explain, however, why there would be excess economic profits absent the patent.

Defendants also rely on *United States v. Eastman Kodak Co., 63 F.3d 95 (2d Cir. 1995)*, in support of their petition to exclude Dr. Leitzinger's calculations. In *Kodak*, the United States appealed a district court order granting a motion to terminate **[*31]** two antitrust consent decrees from 1921 and 1954. *Id. at 97*. Integral to the decision was the district court finding that the market for film was worldwide and thus encompassed both foreign and domestic film manufacturers. *Id. at 102*.

On appeal, the Government argued that the scope of the market should be domestic, citing the *Cellophane* case fallacy. *Id. at 103*. In the *Cellophane* case, the Supreme Court found that while the manufacturer "du Pont produced almost 75% of the cellophane sold in the United States," this "constituted less than 20% of all 'flexible packaging material' sales" and thus did not exercise market power. *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 379, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. Later academic literature criticized this decision because it failed to account for the fact that a monopolist "always faces a highly elastic demand; its products are so overpriced that even inferior substitutes begin to look good to consumers." *Kodak, 63 F.3d at 103* (citing William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 960-61 (1981)). In *Kodak*, the district court rejected the Government's *Cellophane* fallacy argument and found that, unlike the inferior wrapping products that were compared to cellophane, "foreign film is an excellent substitute for Kodak film." *63 F.3d at 103*.

The government appealed, arguing that **[*32]** because "the sales price of Kodak film is twice the short-run marginal cost," or .50 on the Lerner index, Kodak was earning monopoly profits and thus had significant market power. *Id. at 108-09*. The Second Circuit was unpersuaded, particularly because it had already affirmed the district court's determination on the scope of the market. *Id. at 109*. Noting the evidence in the record that "fixed costs in the film industry are huge," the Second Circuit affirmed the district court's termination of the antitrust decrees. *Id. at 109-10*.

Unlike *Kodak*, however, the Court has not made any determinations in this litigation regarding the scope of the market. Indeed, the Government in *Kodak* was clearly allowed to present the Lerner index as evidence of profit and thus evidence of market power throughout the district court proceedings. The Court finds that the Lerner index is a well-established method implemented in the field of economics to find evidence of market power, although not conclusive in and of itself. *See* *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *12* ("Plaintiffs' evidence of high margins is insufficient direct evidence as a matter of law to demonstrate market power."); *c.f.* *Dial Corp. v. News Corp., 165 F.Supp. 3d 25, 41-42 (S.D.N.Y. 2016)* (permitting an expert to use a Lerner index analysis to determine the margin variable in **[*33]** his critical loss analysis). For this reason, the Court denies Defendants' motion to exclude Dr. Leitzinger's Lerner index analysis.

Next, Defendants move to exclude Dr. Leitzinger's analysis regarding cross-price elasticity. To determine the relationship between wholesale drug prices and sales volume, Dr. Leitzinger provides an econometrics regression model. (Leitzinger Rep. ¶ 81.) Defendants argue that the model has the wrong inputs and thus reviews the wrong market — i.e., the model charts retailers' wholesale prices instead of the price paid by the patient, and as a result it cannot include rebates and coupons in the analysis. As a result, Dr. Leitzinger's model essentially assumes that coupons and rebates have no effect on price.

The lack of rebate and coupons in the analysis is a questionable assumption given the extent to which pharmacy companies participate and compete via these programs. The Court's review of the econometrics analysis, however, finds that, regardless of inputs, the analysis was not performed with a degree of rigor or reliability such that it would be "generally accepted within the specific scientific field" of economics. *Lapsley v. Xtek, Inc., 689 F.3d 802, 810 (7th Cir. 2012)*. Specifically, Dr. Leitzinger's model **[*34]** does not include a graph to show the variability in retail prices, and Dr. Leitzinger does not include a standard error rate or sample size of his data. This lack of information would make it impossible for another economist to replicate his analysis or determine whether the dummy variables he included smooths his data or are impermissibly selective.

Further, Dr. Leitzinger's evidence against the null hypothesis, noted in the model as the "p-value," is not particularly helpful. Here, the p-values in Dr. Leitzinger's table are higher than 0.05 and thus do not meet the standard for statistical significance. (*Id.* ¶ 82.) Because there is no significance, Dr. Leitzinger cannot rule out that retailer prices have low cross-price elasticity. (*Id.*) When a product has low-price elasticity as compared to another product, it indicates that the price of either one could increase significantly without the typical corresponding switch to the lower priced alternative product. As a result, it is proof that the products should be considered to be in separate antitrust markets.

Given so many unknowns in his data, however, it appears equally plausible that if Dr. Leitzinger changed his null hypothesis, **[*35]** he could not rule out its opposite, i.e., that prices have a high cross-price elasticity. "In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*." *Daubert, 509 U.S. at 590 n.9*. Because this analysis lacks scientific validity and is equally likely to confuse the jury as to assist them, the Court grants Defendants' motion to exclude this testimony.

Defendants' final objection to Dr. Leitzinger's testimony is a legal one. Dr. Leitzinger's damages model includes the assumption that, had Endo and Impax not entered into the 2010 Settlement and License Agreement, then Impax would have been selling generic Opana ER on the market earlier. In Dr. Leitzinger's model, however, the entry of Impax's generic Opana ER pushes downward not only the price of Endo's branded Opana ER, but also Actavis' generic Opana ER, which was on the market with its limited settlement agreement from 2011 to 2012, and then sold from 2012 to 2016 'at risk' while the litigation was pending in federal court. Plaintiffs have included the difference between Actavis' generic actual price and the projected downward price of Actavis' generic Opana ER in their calculations for damages. Plaintiffs theorize **[*36]** that an antitrust injury affects the entire market, and thus even the marginal price differences in companies not currently involved this lawsuit constitutes part of their injury. Defendants point out, however, that a federal judge, later affirmed by the federal circuit, found that Actavis' generic was infringing on the later acquired patents. The district court then enjoined Actavis from selling its generic Opana ER until the later acquired patents' expirations. Defendants argue that by calculating damages that include Actavis' generic Opana ER, Dr. Leitzinger's model incorporates 'illegal' conduct as part of its damages model and ask that the model be excluded, citing *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class, 868 F.3d 132, 165 (3d Cir. 2017)* ("It is not enough for the Appellants to show that Anchen wanted to launch its drug; they must also show that the launch would have been legal.")

Plaintiffs argue that Actavis' generic Opana ER was not illegal from 2012 to 2016 because it is not illegal to sell a generic drug 'at-risk' while the patent litigation is pending. *Anesta AG v. Mylan Pharms., Inc., No. CV 08-889-SLR, 2014 U.S. Dist. LEXIS 112495, 2014 WL 3976456, at *2 (D. Del. Aug. 14, 2014)* ("I agree with defendants that, although their launch was at risk, it was not illegal when it took place and, absent a directive from the Federal Circuit to recall their generic products, defendants **[*37]** had no legal obligation to do so."). Plaintiffs also submitted a recalculated damages model without Actavis' generic Opana ER price differences after 2012.

Although Plaintiffs are correct that Actavis was not acting in a criminal manner by using the Hatch-Waxman Act to launch at-risk, the fact indisputably remains that the later acquired patents' validity is now settled. As a result, the patents were also valid while Actavis was selling its product 'at-risk.' The Court will not permit Plaintiffs to benefit from generic entrants who infringed on Endo's patents for the purpose of damages. However, Dr. Leitzinger also submitted a revised model without Actavis' projected price differences which the Court finds to be an acceptable alternative. To the extent that Dr. Leitzinger's revised model cures this deficiency, then, the Court denies Defendants' motion.

For the foregoing reasons, the Court grants in part and denies in part Defendants' motion to exclude certain portions of Dr. Leitzinger's testimony. (Dkt. No. 529.)

5. Defendants move to exclude partially the opinions of James R. Bruno (Dkt. No. 537)

James R. Bruno is the Managing Director of a pharmaceutical consulting company whose work **[*38]** includes assisting emerging companies develop and commercialize active pharmaceutical ingredients and finished drug products. (Bruno Rep. ¶ 5, Mot. to Exclude, Ex. 7, Dkt. No. 542-8.) Defendants move to exclude the entirety of Mr. Bruno's opinion and testimony, citing to two objections: first, that Mr. Bruno does not engage in expert analysis, but instead reads and summarizes the documents already in the record; second, that Mr. Bruno improperly speculates on Impax's state of mind.

The Court finds neither of these criticisms is persuasive. Upon review of Mr. Bruno's testimony, the closest that Mr. Bruno comes to reiterating a factual summary is his detailing of the progress Impax made prior to the 2010 Settlement Agreement. This information, however, is crucial to Mr. Bruno's expert opinion as to whether an earlier commercial start date was feasible for Impax's commercial entry of generic Opana ER. Mr. Bruno's experience with the policies and procedures required for a mass production of a laboratory drug are clearly articulated and compared with Impax's progress in his testimony.

Defendants also object to Mr. Bruno statements indicating that Impax would have launched 'at-risk,' claiming **[*39]** that Mr. Bruno is thus ascribing intent to Impax's actions. As stated in his testimony, Mr. Bruno only opines that Impax would be capable of launching at a certain time period, and that it was up to the jury to determine when Impax would have launched in a but-for world without the 2010 Settlement Agreement. (Bruno Rep. ¶ 26.) The Court holds that capacity and capability are within the purview of acceptable expert testimony and are not related to Impax's state of mind. Defendants' motion to exclude the testimony of Mr. Bruno is denied. (Dkt. No. 537.)

6. Defendants move to exclude certain opinions of Glen P. Belvis. (Dkt. No. 541.)

Glen P. Belvis is an intellectual property attorney who worked for over 20 years at a nationally recognized intellectually property firm. (Belvis Rep. ¶ 4, Mem., Ex. 1, Dkt. No. 542-2.) He currently serves as intellectual property counsel for multiple companies while maintaining his own law practice. (*Id.*) Among other topics, Mr. Belvis offers testimony regarding the technical aspects of the patents in dispute and their likelihood of success on the merits. Defendants object to one sentence of Mr. Belvis' report. As part of his analysis, Mr. Belvis reports **[*40]** that Impax had a "greater than 85% overall chance of ultimately prevailing at trial and through appeal." (*Id.* ¶ 431.) Defendants do not challenge Mr. Belvis' qualitative opinion that Impax "very likely" would have won the litigation. (*Id.* ¶ 104-05.) Instead, Defendants contend that the "85% chance" determination falsely denotes a level of mathematical precision does not present in Mr. Belvis' opinion and incorrectly relied upon by a later-discussed expert, Dr. McGuire, in his stock market analysis model.

Calculating a percentage chance of a but-for reality, such as Mr. Belvis' hypothetical jury verdict, requires uncertain estimates about human decisions and interactions. The Court is skeptical that Defendants' desired veneer of mathematical certainty on such an inherently dubious enterprise would be more helpful to the jury than what Dr. Belvis' estimate already provides. As Dr. McGuire cannot enter "very likely" into his mathematical model, it is reasonable for Mr. Belvis to draw upon his expertise to provide an estimate in mathematical terms. To the extent that Defendants wish to argue that "very likely" should be a different percentage, they will have the opportunity to do so on **[*41]** cross-examination before the jury.

Defendants also present a second argument, claiming that Mr. Belvis is wrong on the merits. The disagreements on the accuracy of Mr. Belvis' expert opinion goes to the weight of the evidence. For these reasons, Defendants' motion to exclude Mr. Belvis' testimony is denied. (Dkt. 541.)

7. Defendants move to exclude certain opinions of Dr. Meredith Rosenthal (Dkt. No. 545)

Dr. Meredith Rosenthal is a Health Economics and Policy Professor at Harvard University. (Rosenthal Rep. ¶ 1, Mem., Ex. 1, Dkt. No. 560-2.) Dr. Rosenthal opines that generic prices would have been lower without the 2010 Settlement and License Agreement and calculates Plaintiffs' damages based on those lower prices. Defendants object to Dr. Rosenthal's damages model on two grounds. First, Dr. Rosenthal includes sales of Actavis in her damages model, even after Endo's later acquired patents. Next, approximately 37% of Dr. Rosenthal's damages are attributed to "Medicare Part D" patients, who are not part of the proposed class.

The Court grants the motion. Plaintiffs argue that they are entitled to assume that Actavis would have begun selling at-risk in the hypothetical world, like Actavis' **[*42]** actual actions. Like the analysis above, however, the question at issue is not about the assumptions that Plaintiffs are permitted to incorporate into their models. Now that two district courts and the federal circuit have determined the later acquired patents are valid, there cannot be damages that

Plaintiffs "should" have received from Actavis being in the market past the acquisition of the '216 and '122 patents. This fact prohibits any recovery after the patents' issuances, and any model incorporating this for the purpose of calculating damages is stricken. For this reason, the Court grants the Defendants' motion to exclude Dr. Rosenthal's flawed damages model. (Dkt. No. 545.)

8. Defendants move to exclude the opinions of Dr. Stephen R. Byrn (Dkt. No. 546)

Dr. Stephen R. Byrn is a Professor of Medical Chemistry at Purdue University. (Byrn Rep. ¶ 3, Mem., Ex. 3, Dkt. 549-4.) He offers the opinion that the underlying patents Endo asserted and then settled in the 2010 Settlement and License Agreement are invalid. (*Id.* ¶¶ 12-16.) Defendants argue that Dr. Byrn's testimony is irrelevant and thus will not assist a trier of fact to understand the evidence or determine a fact in issue. Defendants argue that **[*43]** Dr. Byrn does not limit himself to the admissible and entered evidence present at the time of the 2010 litigation, and thus he will be unable to assist the upcoming jury in determining whether or not a 2010 jury would have found the patents infringed upon, and thus whether Impax or Endo would have prevailed in the underlying litigation. Plaintiffs disagree vehemently, stating that Dr. Byrn reached his conclusions based on the evidence Impax advanced in its materials filed in the 2010 patent litigation. In response, Plaintiffs reviewed each allegation made by Defendants and then pointed to where it was used in the underlying litigation.

Defendants also object to Dr. Byrn's responses to Drs. Lowman and Fassihi's expert opinions, claiming that they contain novel arguments. Plaintiffs counter that it is Defendants' experts who advance the novel arguments, and Plaintiffs are thus required to counter these arguments with their own expert.

Upon review of the disputed evidence, Court finds that Defendants have failed "to identify a particular reference or piece of information that was verifiably outside the scope" of the prior record Dr. Byrn "*relied upon* to form his opinion on validity and **[*44]** enforceability." *United Food & Com. Workers Loc. 1776 & Participating Emps. Health & Welfare Fund v. Teikoku Pharma USA, 296 F.Supp. 3d 1142, 1186 (N.D. Cal. 2017)*. Ultimately, however, both of Defendants' arguments misunderstand the purpose of this antitrust litigation. The purpose of the jury is to find whether the actual patents in the underlying litigation were invalid, and thus the 2010 SLA an unreasonable restraint on trade, and not whether the patents would have been found valid in the but-for world where the 2010 litigation continued without settlement. Under Defendants' framework of slavish devotion to the recreation of the 2010 litigation, the Court would not be able to correct clear errors in the prior litigation, and be forced to allow the appellate court to review as would have after the 2010 litigation, or, to Defendants' detriment, Defendants could not benefit from the knowledge that the 2012 lawsuit against Actavis would be successful on the merits. Defendants cannot insist on benefiting from later knowledge when it is convenient to Defendants and otherwise argue the Court and Plaintiffs are handicapped from bringing fresh analysis to the case. For these reasons, the Court denies the motion. (Dkt. No. 546.)

9. Defendants move to exclude the opinions of Patricia Zettler and Martin Lessem (Dkt. No. 550)

Plaintiffs **[*45]** have retained Patricia Zettler and Martin Lessem, both attorneys, to opine on any additional regulatory impediments, if any, Impax would have faced after receiving approval from the FDA. Defendants move to exclude these opinions on the basis that they are legal arguments, not expert opinions, and that Ms. Zettler and Mr. Lessem are advancing opinions as to Impax's intent and state of mind, both of which are prohibited under *Daubert*.

The Court's review of Ms. Zettler's expert report found that Ms. Zettler limited her opinions to (1) observations about the FDA's methods and processes regarding opioid launches generally, and (2) her professional opinion that the FDA's processes would not have impeded a generic Opana ER product launch. (Zettler Rep. ¶¶ 19-68, Mem., Ex. 8, Dkt. No. 554-9.) The Court did not review any initial report from Mr. Lessem, as no report was attached to any of the fillings associated with this motion, however, a review of Mr. Lessem's rebuttal report and testimony appear to be similarly unrelated to Defendants' concerns. Mr. Lessem's rebuttal report opposed Dr. Patel's opinion regarding a "reasonable company in Impax's situation" would have faced regulatory hurdles **[*46]** to an earlier generic Opana

ER launch. (Lessem Rebuttal Rep. ¶ 19, Mem., Ex. 12, Dkt. No. 554-11.) Mr. Lessem instead opines that there is no reason to think FDA's final approval letter would have been rescinded due to regulatory hurdles. (*Id.* ¶ 23.)

These opinions appear entirely unrelated to legal arguments or Impax's state of mind. In complex regulatory cases, opinions regarding government regulations are permitted "to testify on complex statutory or regulatory frameworks when that testimony assists the jury in understanding a party's actions within that broader framework." *Antrim Pharm. LLC, 950 F.3d at 430-31*. The Court finds that the testimony of Ms. Zettler and Mr. Lessem will be helpful to assist the trier of fact and denies Defendants' motion. (Dkt. No. 550.)

10. Defendants' motion to exclude partially the opinions of Dr. Keith Leffler (Dkt. No. 552.)

Dr. Keith Leffler is a Professor of Economics at the University of Washington, specializing in antitrust and industrial organization. He opines as to Endo's market share, the effect of Impax's generic Opana ER on the market, and presents a model for damages. (Leffler Rep. ¶ 11, Mem., Ex. 2, Dkt. No. 555-3.) Defendants allege Dr. Leffler's opinions on (1) an alternative **[*47]** settlement, (2) damages, and (3) Endo's market power are all endemically flawed and do not pass the 'reliability test' in the second prong of *Daubert*'s analysis. Defendants move to exclude all aspects of these topics from Dr. Leffler's testimony.

Like Dr. Leitzinger, Dr. Leffler also performs a Lerner index analysis using Endo's public SEC filings. Dr. Leffler similarly admits that no firm would "engage in a research and development project absent an anticipation of being able to sell at a price" that would create a 'high' Lerner index number, which would allow it to recoup its fixed costs, such as research and development costs. (June 2019 Leffler Dep. 182:25-183:9). As stated in Section III.A.4, this statement explains why drug manufacturers seek patent protections on newly developed drugs. Absent the patent, however, a company in a perfectly competitive market would nonetheless be forced to sell at lower-than-recoupable costs to compete with those manufacturers who did not shoulder the initial drug development outlays, as long as the company could charge enough on a per-item basis to cover the products' marginal cost. As a result, this admission does not fully explain Endo's high **[*48]** economic profits beyond marginal costs.

Dr. Leffler also acknowledges that "third party insurers, managed care entities, and pharmacies play a role in constraining price increases," but considers these considerations to be constraining the already-monopolized market of generic Opana ER, similar to the marginal price sensitivity of cellophane in the *Cellophane* case. (Leffler Rep. ¶ 50.) Despite these deposition concessions pointed out by Defendants, the Court reaches the same conclusion as it did with Dr. Leitzinger: a high Lerner index can be indicative of monopoly power. As such, it is permissible evidence to provide to the jury. Defendants' disagreement over the extent that insurance negotiations affect economic profits can be made before the jury. As such, Dr. Leffler is similarly permitted to present his expert opinion. The motion to exclude this opinion is denied.

Dr. Leffler also offers testimony regarding a hypothetical and more procompetitive agreement between Endo and Impax. Defendant first argues that Dr. Leffler impermissibly opines that an alternative agreement would have included the Broad License. Plaintiffs explain, however, that Dr. Leffler assumes the Broad License would **[*49]** have been included based on testimony by other fact witnesses. "The fact that an expert's testimony contains some vulnerable assumptions does not make the testimony irrelevant or inadmissible." *Stollings, 725 F.3d at 768*. The Court therefore declines to exclude Dr. Leffler's testimony on this basis.

Defendants also object to Dr. Leffler's hypothetical agreement between Endo and Impax because Dr. Leffler picked his entrance date based on a settlement offer letter from Impax. Defendants argue that Dr. Leffler's model works for numerous dates, and thus it is not rational to pick one date instead of a range of dates. The Court finds that Dr. Leffler is similarly assuming a date based on the factual record which does not cause his testimony to be suddenly inadmissible. As such, Defendants' objections go to the weight of the evidence to be submitted to the jury.

Finally, Defendants challenge Dr. Leffler's damages models. Dr. Leffler presents models on both a 'continued litigation' theory as well as a 'alternative settlement' theory. First, the Court notes that Defendants' objection to the 'alternative settlement' is identical to their objection to the hypothetical procompetitive agreement. In both cases, Defendants **[*50]** find fault with Dr. Leffler's inclusion of the Broad License. For the same reasons set forth above, Dr. Leffler's assumption that a Broad License would be included in the Plaintiffs' alternative settlement scenario is a permissible part of Dr. Leffler's damages model. The Court denies the Defendants' motion to exclude this model.

Second, Dr. Leffler's presents multiple 'continued litigation' damages models depending on various dates that Opana ER could have come onto the market. The complication to any continued litigation model, however, is that Endo acquired additional patents in 2012 which Endo immediately enforced against all generic producers. To avoid this complication, Dr. Leffler stops his damages model prior to the acquisition of the later acquired patents. Rather magnanimously, Plaintiffs state that they do not intend to seek damages after 2012.

Absent the 2010 SLA, Endo's acquisition of additional patents would have resulted in some change in the alleged oxymorphone ER market based on Endo's subsequent business decisions. On a general level, Endo could have decided (1) to sell a generic Opana ER either through its own production or a license agreement with another company, **[*51]** (2) to restart operations to sell branded Opana ER, or (3) to stop selling Opana ER entirely. Because some of these post-2012 continued litigation alternative histories would have decreased the competitiveness of the market or the price that Opana ER was sold to consumers, the 2010 SLA contained potentially procompetitive effects.

For this reason, Defendants argue that models that stop calculating damages after 2012 are inherently inaccurate as they do not consider the time periods where Plaintiffs received a procompetitive effect. Defendants argues that it is solely because of the 2010 SLA's Broad License that Plaintiffs can purchase any Opana ER product to this day. Defendants acknowledge that, in a continued litigation alternative history, Plaintiffs may have been able to purchase generic Opana ER earlier (either August 17, 2010 or July 14, 2011, as predicted Dr. Leffler's various models) but that ability would have stopped in 2012, and no Opana ER would have been available at that point forward.

The Court agrees in part. "[A]ny model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of **[*52]** the violation.'" *Comcast Corp. v. Behrend, 569 U.S. 27, 35, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (citing ABA Section of ***Antitrust Law***, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010)). Absent the 2010 SLA and particularly after the FDA's request for Endo to remove the reformulated Opana ER, it is possible that Endo may have decided to exit the extend release oxymorphone market entirely. However, this is not the only potential outcome: Endo may have made other, more financially lucrative decisions such as continuing in the market as either a branded or generic product. To succeed on the merits in a continued litigation scenario, Plaintiffs must put forth evidence to support the likely outcome of generic or branded Opana ER market without the 2010 SLA. What Plaintiffs cannot do, however, is avoid the post-2012 market in its entirety. For that reason, Dr. Leffler also cannot cut off his damages model as to only some of the effects of the settlement. For these reasons, the Court grants the motion to exclude the challenged 'continued litigation' models and denies the motion on all other grounds. (Dkt. No. 552.)

11. Defendants' motion to exclude partially the opinions of Dr. Thomas G. McGuire (Dkt. No. 556)

Dr. Thomas G. McGuire is Professor **[*53]** of Health Economics at Harvard University. (McGuire Rep. ¶ 5, Mem., Ex. B, Dkt. No. 559-3.) He has been retained by Plaintiffs to conduct an economic analysis of the 2010 SLA and the accompanying joint-venture agreement to determine whether the agreements are anticompetitive. (*Id.* ¶ 2.) Defendants challenge two portions of Dr. McGuire's testimony. First, Defendants challenge Dr. McGuire's assumption that the Broad License would be part of any alternative settlement. As determined in Section III.A.10 *supra*, the inclusion of an assumption based on the testimony of fact witnesses is admissible, and the Court similarly denies this part of the motion.

Second, Defendants challenge Dr. McGuire's testimony regarding his stock price analysis. As part of his opinion, Dr. McGuire makes the following assumption about the real-world financial markets:

> If the announcement of a pay-for-delay settlement was not anticipated by financial markets, new profits kept by the brand will be capitalized by traders in financial markets and reflected in the brand's stock price (i.e., the market will reward the brand for keeping its monopoly and associated profits beyond the expected expiration).

(*Id.* ¶ 151.) According **[*54]** to Defendants, Dr. McGuire's resulting opinion on Endo's stock prices is methodologically unsound. Defendants first object to Dr. McGuire relying on Mr. Belvis' opinion that Impax had a "greater than 85% likelihood of success" in the underlying patent litigation. (*Id.* ¶ 184.) "[A]s a general matter, there is nothing objectionable about an expert relying upon the work a colleague." *Gopalratnam, 877 F.3d at 789*. Dr. McGuire is permitted to assume that the jury will accept the testimony of another witness, and the Court will not prohibit the jury's access to Dr. McGuire's model on that basis.

Defendants also argue that the stock price increase following the announcement of the 2010 Settlement and License Agreement could have been due to any number of factors beyond the settlement announcement, and Dr. McGuire failed to properly consider the myriad of other reasons a stock price fluctuates in his analysis. Plaintiffs oppose the motion on the basis that Dr. McGuire's work has been published in prominent peer-reviewed economic journals. *See, e.g., Do "Reverse Payment" Settlements Constitute an Anticompetitive Pay-for-Delay*?, 22 Int'l J. Econ. Bus. 173 (2015). The Court finds no issue with Dr. McGuire's methodology, **[*55]** and any theories that Defendants have on confounding variables properly go to the weight of Mr. McGuire's testimony and should be argued before the jury. For these reasons, the Court denies the motion. (Dkt. No. 556.)

B. Plaintiffs' *Daubert* Motions

Plaintiffs filed ten motions to exclude various experts presented by Defendants. The Court reviews whether the witness is "qualified as an expert by knowledge, skill, experience, training, or education;" whether "the expert's reasoning or methodology underlying the testimony [is] scientifically reliable;" and whether "the testimony [assists] the trier of fact to understand the evidence or to determine a fact in issue." *Ervin v. Johnson & Johnson, Inc., 492 F.3d 901, 904 (7th Cir. 2007)* (citation omitted).

1. Plaintiffs' motion to exclude the opinions of Dr. Nina Patel (Dkt. No. 519)

Dr. Nina Patel is Vice President of a consulting group that specializes in advising pharmaceutical, biotech, and medical device companies. (Patel Rep. ¶ 1, Curley Aff., Ex. 67, Dkt. No. 534-71.) Dr. Patel opines that it "would not have been reasonable for a company in Impax's position to have launched or sold its generic Opana ER product without an FDA-approved risk management program in place." (*Id.* ¶ 14.)

The Hatch-Waxman Act "allows **[*56]** generic manufacturers to rely on FDA's prior approval of another drug with the same active ingredient — the reference listed drug (RLD) — to establish that the generic drug is safe and effective." KEVIN J. HICKEY, CONG. RSCH. SERV., R45666, DRUG PRICING AND INTELL. PROP. L. at 20. Dr. Patel acknowledges that Impax received a "final approval" letter regarding Impax's generic Opana ER from the FDA on this basis. (Patel Rep. ¶ 39.) While Dr. Patel appears to walk back her specific claim that additional approvals were required to launch a pharmaceutical drug in her deposition, Dr. Patel's testimony suggests that additional money, time, and research was required before Impax could launch generic Opana ER. (*See* Patel Dep. at 416:14-22, Curley Aff., Ex. 70, Dkt. No. 534-74. ("I have no opinion on [whether Impax had a statutory right to launch its generic Opana product after final approval].") While this may be true for initial drugs coming onto the market, it is without dispute that the FDA subsequently approved Impax's application based on Endo's research and safety analyses without the additional concern, cost or time highlighted by Dr. Patel.

An expert witness "ha[s] the responsibility **[*57]** to apply his [or her] analysis to the facts of the case." *Deimer v. Cincinnati Sub-Zero Prod., Inc., 58 F.3d 341, 345 (7th Cir. 1995)*. The Court finds that Dr. Patel's testimony did not do so here, and as such it would be unhelpful to jurors during trial. The Court grants the motion to exclude Dr. Patel's testimony. (Dkt. No. 519.)

2. Plaintiffs' motion to exclude partially the opinions of Mr. Jonathan Singer (Dkt. No. 520)

Mr. Jonathan Singer is a patent law attorney who has been hired by Defendants to rebut Plaintiffs' patent expert, Mr. Glen Belvis. Plaintiffs move to exclude portions of Mr. Singer's opinions and testimony, arguing that it fails *Daubert's* relevancy requirement and *Federal Rule of Evidence 702*'s reliability requirement.

The majority of Mr. Singer's report is a review of Endo's current and pending patents at the time of the 2010 Settlement and License Agreement. (Singer Rep. ¶¶ 118-261, Resp., Ex. 1, Dkt. No. 601-2.) Plaintiffs ask the Court to exclude the concluding paragraph of Mr. Singer's report where Mr. Singer states that, for the technical reasons described above, "one cannot simply assume that Endo would have entered into an alternative settlement agreement that provided (1) an earlier entry date for Impax; and (2) broad freedom to operate, including a broad **[*58]** license to all future patents covering Opana ER." (Singer Rep. ¶ 262.) Plaintiffs argue that this statement goes beyond the scope of Mr. Singer's expertise. Mr. Singer is a patent law attorney, not an economist, and Mr. Singer opined on the settlement and license agreement terms based off knowledge only provided by counsel instead of experts.

The Court declines to strike this portion of the opinion. While Plaintiffs attempt to frame this as an economic opinion, the discussion is in the context of Endo's bargaining position for settlement and licensing of its patents, a subject well within Mr. Singer's expertise.

Plaintiffs also move to exclude an earlier portion of Mr. Singer's report, where Mr. Singer notes that the "average cost of bringing a new drug to market in the United States was $1.32 billion in 2010," and that "new drugs can take at least ten years to reach profitability, if at all." (*Id.* ¶¶ 53-54.) Plaintiffs argue that this statement is not relevant to the case at hand and in no way relates to the costs of developing Opana ER or Opana ER's profitability profile. The Court agrees. The average cost of drug development is not relevant here and, if provided, could create an anchoring **[*59]** bias as to the cost Endo had in developing Opana ER. The Court grants the motion to exclude this portion of the testimony.

For the reasons stated above, the Court grants in part and denies in part the motion to exclude portions of Dr. Singer's testimony. (Dkt. No. 520.)

3. Plaintiffs' motion to exclude the opinions of E. Anthony Figg (Dkt. No. 521)

E. Anthony Figg is an intellectual property attorney and co-founder of his present patent law firm who was hired by Impax to assess whether it was reasonable for Impax to settle with Endo. (Figg Rep. ¶¶ 1-3, Curley Aff., Ex. 17, Dkt. No. 534-17.) Plaintiffs move to exclude two of Mr. Figg's opinions regarding the 2010 Settlement and License Agreement. First, Plaintiffs object to Mr. Figg's opinion that it was "reasonable" or "prudent" for Impax to settle. Second, Plaintiffs move to exclude Mr. Figg's opinion that the agreement "likely provided Impax the earliest opportunity to sell generic Opana ER to the benefit of consumers." (*Id.* ¶ 3.)

Plaintiffs argue that they do not challenge Impax's right to settle, or even Impax's right to settle reasonably. Generally, private parties may contract with each other in any way not prohibited by law. Here, **[*60]** however, Plaintiffs challenge the reverse payments between Endo and Impax as proof of Endo and Impax's collusive behavior. According to Mr. Figg's deposition testimony, however, he did not consider the reverse payments when making his determination about reasonableness. Mr. Figg also took pains to state that he does not "intend[] to comment on the rule of reason analysis in the antitrust sense" but rather offers an opinion on the "reasonable outcome of the patent litigation." (Figg Dep. 196:8-11, Curley Aff., Ex. 18, Dkt. No. 534-18.) Because the reasonableness of the patent litigation is not in dispute, the Court agrees with Plaintiffs that Mr. Figg's testimony is not relevant and thus unhelpful to the jury. The Court grants Plaintiffs' motion to exclude this portion of Mr. Figg's testimony.

The Court finds Mr. Figg's second opinion to be equally problematic. Mr. Figg's expert report does not describe or implement any scientific method for reaching his conclusions regarding what the "likely" earliest opportunity Impax had to sell generic Opana ER. "An expert scientific opinion must be grounded in the 'methods and procedures of science,' and must consist of more than simply 'subjective **[*61]** belief or unsupported speculation.'" *Cummins v.*

Lyle Indus., 93 F.3d 362, 368 (7th Cir. 1996) (quoting *Deimer, 58 F.3d at 344*). As Mr. Figg fails to offer a method for reaching his conclusion, the Court grants the Plaintiffs' motion to exclude Mr. Figg's opinion in this matter. (Dkt. No. 521.)

4. Plaintiffs' motion to exclude opinions of Dr. Anthony Lowman (Dkt. No. 522)

Dr. Anthony Lowman is a Professor of Chemical Engineering at Drexel University. (Lowman Rep. ¶¶ 1-2, Resp., Ex. 1, Dkt. No. 595-2.) He was hired by Defendants to provide an expert opinion on the patent infringement claim in Impax's ANDA that gave rise to the lawsuit between Endo and Impax. (*See id.* ¶¶ 11-13.) Plaintiffs move to exclude Dr. Lowman's testimony because Dr. Lowman allegedly applies the wrong standard in the patent infringement claims. Specifically, Plaintiffs claim that Dr. Lowman impermissibly interchanges the material description from "that which is effective to slow the hydration of the gelling agent without disrupting the hydrophilic matrix" with the "hydration rates of the tablets" generally. (Mot. at 1-2, Dkt. No. 522.) Defendants disagree and argue that Dr. Lowman only used the term "tablets" as a shorthand for measuring the gelling agent.

Plaintiffs' objection to Dr. Lowman's **[*62]** testimony appears to this Court to be a distinction without a difference, as the hydration of the tablet will necessarily be a hydration of the gelling agent that resides within the tablet. To the extent that Plaintiffs disagree, however, it is with the "soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis" and not with Dr. Lowman's credentials, methods, or relevance to this case. *Smith v. Ford Motor Co., 215 F.3d 713, 718 (7th Cir. 2000)*. As such, the disagreement must be left to the trier of fact. The Court denies Plaintiffs' motion to exclude Dr. Lowman's testimony. (Dkt. No. 522.)

5. Plaintiffs' motion to exclude the opinions of Dr. Reza Fassihi (Dkt. No. 524)

Dr. Reza Fassihi is a Professor in Biopharmaceutics and Industrial Pharmacy at Temple University. (Fassihi Rep. ¶ 2, Resp., Ex. 1, Dkt. No. 596-2.) Dr. Fassihi was initially hired by Endo in the underlying 2010 litigation and was rehired in the current litigation to provide similar testimony on the disputed patents. Plaintiffs move to exclude Dr. Fassihi's opinions, arguing she used the incorrect standard of law when determining whether the underlying patents were valid.

Dr. Fassihi's testimony centers **[*63]** around the "anticipation reference" defense to a patent infringement suit. A patent cannot be granted if the invention was "described in a printed publication in this or a foreign country . . . more than one year prior to the date of the application for patent in the United States." *35 U.S.C. § 102(b)(2002)*(amended 2011). An anticipatory reference discloses "each and every element of the claimed invention, whether it does so explicitly or inherently." *In re Gleave, 560 F.3d 1331, 1334 (Fed. Cir. 2009)* (citing *Eli Lilly & Co. v. Zenith Goldline Pharms., Inc., 471 F.3d 1369, 1375 (Fed. Cir. 2006)*). "Anticipation does not require the actual creation or reduction to practice of the prior art subject matter; anticipation requires only an enabling disclosure." *Schering Corp. v. Geneva Pharms., 339 F.3d 1373, 1380 (Fed. Cir. 2003)*.

According to Plaintiffs, Dr. Fassihi incorrectly discounts several disclosures that potentially qualify as "anticipatory disclosures" of the sustained release component of the underlying litigation patents. Dr. Fassihi's testimony states that there isn't enough data attached to these disclosures to prove the idea works correctly, and thus the disclosures fail to meet the standard for anticipatory disclosures under federal law. Plaintiffs argue that proof is not legally necessary, and Dr. Fassihi's incorrect espousal of law would mislead jurors if presented at trial.

In response, **[*64]** Defendants first argue that it would be unfair to limit Dr. Fassihi's testimony in any manner because Impax did not move to limit Dr. Fassihi's testimony prior to the 2010 Settlement and License Agreement. As pointed out by Plaintiffs, however, the 2010 trial was intended before a judge, as opposed to a jury, which necessarily changes Plaintiffs' trial strategy. Further, as previously stated, the Court is unconvinced by Defendants arguments that an exact replica of 2010 is required to meet Defendants' exacting sense of fairness. The Court's hands are not so tied such that it cannot correct mistakes of law that might have occurred had the original trial happened as scheduled; to preserve potentially incorrect proceedings in the name of "fairness" would compound only the original mistake instead of fixing it. The Court freely considers whether Dr. Fassihi's opinion incorrectly states the legal requirements for anticipatory disclosure.

Defendants' second argument is that Plaintiffs have presented only inherent anticipatory disclosures, as opposed to explicit ones. Defendants argue that, because there are only inherent disclosures, Plaintiffs have a somewhat higher standard, as articulated **[*65]** in *Continental Can Co. USA, Inc. v. Monsanto Co.*:

> Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing *may* result from a given set of circumstances is not sufficient. If, however, the disclosure is sufficient to show that the natural result flowing from the operation as taught would result in the performance of the questioned function, it seems to be well settled that the disclosure should be regarded as sufficient.

948 F.2d 1264, 1269 (Fed. Cir. 1991) (quoting *In re Oelrich, 666 F.2d 578, 581 (C.C.P.A. 1981)*). According to Defendants, the fact that the prior disclosures stated "sustained-release over any desired period and, in particular, over a twelve-hour period" (Mot. at 7, Dkt. No. 524.) does not show that "the disclosure of the required 'sustained release' as construed by the court (release out of a tablet over 12 hours does not equate to maintaining therapeutically beneficial levels of the active in a patient's bloodstream for 12 hours)." (Resp. at 16., Dkt. No. 596).

Even using Defendants' inherency standard, the natural and expected result of having a sustained-release drug over a twelve-hour period would be to have the drug be present in the patient's bloodstream over that same period. Defendants may **[*66]** argue on the factual record that the prior anticipatory patents did not, for some reason not mentioned in the briefing, intend for the drug to enter the bloodstream. The Court was not provided with any evidence to suggest that this patent intended something other than the natural result of a sustained drug release. For this reason, the Court holds that Defendants cannot use an expert testimony to require more than the "inherency" standard required by law. The Court grants Plaintiffs' request that Dr. Fassihi's testimony be excluded to the extent that it suggests additional proof as required by law. (Dkt. No. 524.)

6. Plaintiffs' motion to exclude the opinions of Dr. Christopher J. Gilligan (Dkt. No. 525)

Dr. Christopher J. Gilligan is Chief Physician at Brigham and Women's Hospital and Assistant Professor at Harvard Medical School. (Gilligan Rep. ¶ 2, Resp., Ex. 1, Dkt. No. 599-2.) Dr. Gilligan has been asked to offer his opinions on the interchangeability of long-lasting opioids and the benefits of the tamper resistant reformulated Opana ER. (*Id.* ¶ 1.) Plaintiffs object to Dr. Gilligan's characterizations about what clinicians generally believed, beyond his own experience, claiming **[*67]** it lacks reliable methodology or evidence. Plaintiffs also move to exclude opinions espoused by Dr. Gilligan that suggest that the reformulated Opana ER deterred abuse or was safer than original Opana ER in any capacity. Plaintiffs argue such an opinion is contrary to the facts in the case, as reformulated Opana ER was, in fact, more dangerous as determined by the FDA.

In response, Defendants argue that doctors are permitted to testify about uses beyond the recommendations of the FDA. Defendants also argue that Dr. Gilligan is a leader in his field, and thus qualified to testify generally about what physicians do or don't do, without an explicit methodology or scientifically measured component. The Court agrees. Plaintiffs objections go to the weight of the testimony and may be brought up at cross-examination. The motion is denied. (Dkt. No. 525.)

7. Plaintiffs' motion to exclude the opinions of Dr. Sumanth Addanki (Dkt. No. 526)

Dr. Sumanth Addanki is an economist and managing director of an economist research company. (Addanki Rep. ¶ 1, Attachment, Ex. 3, Dkt. No. 531-4.) Dr. Addanki primarily testifies regarding Endo's lack of market power, which Plaintiffs do not challenge on this **[*68]** motion. Plaintiffs do, however, move to exclude some of Dr. Addanki's ancillary opinions.

First, Plaintiffs argue to exclude Dr. Addanki's opinion that "economics provides no standard to evaluate the size of the reverse payments." (Mot. at 4, Dkt. No. 526.) The Court was unable to find where in Dr. Addanki's expert report he purported to make such a statement, and Plaintiffs unhelpfully did not cite to the record in their briefing. Defendants, perhaps similarly confused, do not address the point directly in their response. Since it is unclear to the Court whether Dr. Addanki holds this position in dispute, and, if so, the exact context for the statement, the Court denies the motion.

Plaintiffs' second contention also relates to another of Dr. Addanki's opinions on reverse payments. Under *F.T.C v. Actavis*, reverse payment settlements (i.e., payments from patent holder plaintiff to patent infringer defendant) are subject to the rule of reason test because the reverse payment could either be an innocuous "rough approximation of the litigation expenses saved through the settlement" or a problematic transfer of "'large sums' to induce 'others to stay out of its market.'" *570 U.S. at 156* (citing P. Areeda **[*69]** & H. Hovenkamp, ***Antitrust Law*** ¶ 2046, p. 351 (3d ed. 2012)). According to Dr. Addanki, it is impossible for Plaintiffs in this case to establish the size of the reverse payment associated with the 2010 Settlement and License Agreement. The terms of the 2010 SLA were conditioned on real-world events — specifically, the sale numbers of branded Opana ER prior to the launch date — so there was no exact payment calculated at the time of the agreement. (Addanki Rep. ¶¶ 112-127.) Without a specific number in the agreement, Dr. Addanki opines that the settlement agreement could not have contained a problematic reverse payment. Plaintiffs argue this standard is incorrect as a matter of law and ask the Court to find that the standard for a reverse transfer is met if the parties could estimate the worth of the contract at the time of the agreement, and that estimation was greater than the estimated attorneys' fees.

In support, Plaintiffs cite to language in *Actavis* and *Brown Shoe Co. v. United States. Actavis, 570 U.S. at 158* ("[A] court, by examining the size of the payment, may well be able to assess its likely anticompetitive effects along with its potential justifications without litigating the validity of the patent."); *Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* ("Congress used the words 'may be substantially **[*70]** to lessen competition,' to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities.")

Defendants object, claiming that "[i]t is necessary . . . to show" that an agreement produces "actual harm to competition," citing *Bunker Ramo Corp. v. United Bus. Forms, Inc., 713 F.2d 1272, 1283 (7th Cir. 1983)*. According to Defendants, Plaintiffs must prove actual harm as reviewed at the time the agreement. Because the payment amount was not known at the time of the agreement, and the estimated payment not "actual harm," Defendants are in effect arguing that any contract containing a contingency would escape review under the Sherman Act and other antitrust laws. Defendants go on to argue that it is only after Plaintiffs have shown actual harm that Defendants need to show a procompetitive reason for the agreement's terms.

The logic of this argument is flawed. Plaintiffs must prove both an actual antitrust injury and an unreasonable restraint on trade to succeed on an antitrust claim. *In re Humira (Adalimumab) Antitrust Litig., 465 F.Supp. 3d 811, 835 (N.D. Ill. 2020)*. To prove the injury, Plaintiffs may rely on the actual amount paid from Endo to Impax. To show the parties engaged in an unreasonable restraint on trade, **[*71]** Plaintiffs may present the parties' expected outcome at the time the contract was signed. Unexpected market forces are a part of all negotiations, and that alone cannot prohibit a contract from being in violation of antitrust laws. By separately requiring both components, an attempted unreasonable restraint of trade that did not result in an actual injury would properly fail to state a claim.

Importantly, the provision at issue here gave Endo full control over whether to continue to sell branded Opana ER or whether to take it off the market, which in turn controlled how much money would be provided to Impax under the contingent provisions. This control aligns with the traditional concerns of reverse payments. *See Actavis, 570 U.S. at 157* ([W]here a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice."). To the extent that Dr. Addanki's opinion relies on Defendants unsound articulation of law, the Court grants Plaintiffs' motion to exclude Dr. Addanki's opinion regarding the contract's uncertainty.

Plaintiffs next object to Dr. Addanki's opinions regarding the alternative settlements presented by Plaintiffs. According **[*72]** to Dr. Addanki, unless Plaintiffs show "the parties would have agreed on an alternative settlement [without a reverse payment,] the provisions giving rise to the payment cannot be deemed 'unjustified' as a matter of economics." (Addanki Rep. ¶ 129.) Similar to Dr. Figg, Section III.B.3 *supra*, Dr. Addanki proposes to testify as to whether it is economically reasonable to enter into this contract between two private actors. The Court notes that many contracts that are prohibited by ***antitrust law*** would be 'economically reasonable' to enter, e.g., a cartel agreement is usually wildly profitable, and it would be economically rational to enter such agreement. However, the question that will be before the jury in this matter is not whether the contract was economically reasonable or even advantageous for both parties. Instead, the jury will determine whether the 2010 SLA was an unreasonable restraint on trade. Presenting the jury with an unrelated reasonability standard is unhelpful and potentially misleading. For this reason, the Court grants the motion to exclude this section of Dr. Addanki's testimony.

In addition to the above concerns, Plaintiffs object to Dr. Addanki's opinions regarding **[*73]** the economic feasibility of an alternative settlement absent the FDA's approval of reformulated Opana ER and Dr. Addanki's characterization of the 2010 Settlement and License Agreement as procompetitive. In these cases, Plaintiffs' objections are disputes with factual evidence and conclusions based on those facts, and thus should be presented to the jury. The Court denies the motion to exclude these opinions. (Dkt. No. 526.)

8. Plaintiffs' motion to exclude the opinions of Dr. Jody L. Green (Dkt. No. 527)

Dr. Jody L. Green is currently the Chief Scientific Officer at Inflexxion, a health analytics company. (Green Rep. ¶ 9, Resp., Ex. 1, Dkt. 597-2.) Dr. Green testifies that the new reformulated Opana ER "was associated with a reduction in the overall rate of abuse for Opana ER." (*Id.* ¶ 14.) Plaintiff seeks to exclude Dr. Green's testimony in its entirety as it is (1) irrelevant, (2) rejected by the FDA, and (3) based on unreliable data.

Defendants object, claiming that it would be prejudicial to Endo if Plaintiffs could characterize the FDA's actions without an opportunity for Endo to rebut Plaintiffs' interpretations. The Court disagrees. The reformulation of Opana ER is only marginally **[*74]** relevant to the underlying patent litigation at the heart of this case. Whether or not the reformulation was successful is arguably even less relevant. Moreover, the facts surrounding the FDA's 2013 and 2017 decisions regarding the reformulated Opana ER are public and straightforward. *See Oxymorphone (marketed as Opana ER) Information*, U.S. Food & Drug Admin., (Feb. 6, 2018) *https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/oxymorphone-marketed-opana-er information*. Both parties may characterize the public statements through their attorneys at argument, but Defendants cannot produce an expert whose testimony directly contradicts the FDA and the facts of the case. The Court grants Plaintiffs' motion to exclude Dr. Green's testimony. (Dkt. No. 527.)

9. Plaintiffs' motion to exclude the opinions of Dr. Louis P. Berneman (Dkt. No. 528)

Dr. Louis P. Berneman holds a doctorate in Education and is currently managing director of a technology transfer consulting company. (Berneman Rep. ¶ 76, Curley Aff., Ex. 13, Dkt. No. 534-13.) Dr. Berneman assesses the commercial reasonableness of the Parkinson's Disease joint venture between Impax and Endo, entered into by **[*75]** the parties at the same time as the 2010 SLA. (*Id.* ¶ 11.) Plaintiffs challenge Dr. Berneman's 'fair value' analysis, arguing that Dr. Berneman does not employ any methodology when making this determination. Plaintiffs point to Dr. Berneman's testimony where he acknowledges that he did not use any of the industry standards, nor did he identify any comparable contracts, or do any "independent evaluation." (Berneman Dep. 173:11-12, Curley Decl., Ex. 16, Dkt. No. 534-16.) As a result, Plaintiffs move to exclude his testimony based on his lack of methodology.

Defendants object, stating that Dr. Berneman relies entirely on Endo's contemporaneous valuation for his opinion. Defendants further argue that it is necessary for Dr. Berneman to explain Endo's contemporaneous valuation despite those facts already being in the record for the jury to consider. The Court disagrees. Because Dr. Berneman does no valuation or other independent analysis, the Court grants Plaintiffs' motion to exclude Dr. Berneman's testimony. (Dkt. No. 528.)

10. Plaintiffs' motion to exclude experts that post-date the challenged reverse payment agreement. (Dkt. No. 523.)

Finally, Plaintiffs move to exclude certain portions **[*76]** of the opinions of Dr. Fassihi, Mr. Singer, Mr. Figg, and Dr. Addanki, each of whom has already been discussed in this opinion. All four experts opine in some way on the patents acquired by Endo after the 2010 Settlement License and Agreement. Plaintiffs argue that these patents are not relevant to any issue in the case, and thus these experts' opinions should be discarded. In support, Plaintiffs cite to *Valley Drug Co. v. Geneva Pharmacy, Inc., 344 F.3d 1294, 1306 (11th Cir.)*, *cert. denied 543 U.S. 939 (2004)* ("[T]he reasonableness of agreements under the antitrust laws are to be judged at the time the agreements are entered into.") Because these patents did not exist at the time of the agreement, Plaintiffs argue that any mention of them is inappropriate in the trial.

The Court denies the motion. (Dkt. No. 523.) When deciding as to whether there was an unreasonable restraint on trade, the jury takes into consideration "a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. As a result, the later acquired patents are relevant to the determination as to whether the overall effect of the agreement was an unreasonable restraint on trade and **[*77]** whether an actual antitrust injury resulted from the restraint on trade.

C. Motions for Summary Judgment

Having reviewed all *Daubert* motions, the Court turns to Defendants' two motions regarding summary judgment. The first motion contends that Plaintiffs have failed to show that the 2010 Settlement and License Agreement between Endo and Impax caused an injury, and that Plaintiffs cannot show damages from the 2010 SLA's restraint on trade because Plaintiffs would be financially worse off absent the agreement. The second motion argues that there should be summary judgment as to the underlying patent issues in this case. For the reasons below, the Court denies all parts except Defendants' motion on the state claims.

1. Motion for Summary Judgment on Causation and Damages

Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. To state a claim, Plaintiffs must plead "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in a relevant market; (3) and an accompanying injury." *In re Humira (Adalimumab) Antitrust Litig., 465 F.Supp. 3d at 835* (citation omitted). In this case, Plaintiffs, all of whom purchased Opana ER either wholesale or individually, **[*78]** argue that the 2010 Settlement and License Agreement between Endo Pharmaceuticals and Impax Laboratories, Inc. was an unreasonable restraint on trade in the extended release oxymorphone market which caused financial loss. Defendants argue that Plaintiffs have not proven an antitrust injury, however, the arguments employed by Defendants primarily hinge on whether the restraint is unreasonable. The Court reviews the best arguments presented by Defendants in both cases. Finally, the Court addresses Defendants argument that Plaintiffs have been unable to prove damages in this action.

a. Unreasonable Restraint on Trade

Under *Actavis*, courts reviewing reverse payment agreements apply the rule of reason test. *570 U.S. at 156*. The test directs courts to determine "whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343, 102 S. Ct. 2466,* 73 L. Ed. 2d 48 (1982). Judges consider the following factors: "(1) whether the alleged agreement involved the exercise of power in a relevant economic market, (2) whether this exercise had anti-competitive consequences, and (3) whether those detriments outweighed efficiencies or other economic benefits." *In re Nexium (Esomeprazole) Antitrust Litig., 968 F.Supp. 2d 367, 387 (D. Mass. 2013)* (citations omitted). The parties also engage **[*79]** in a "three-step, burden-shifting framework." *Ohio v. Am. Express Co., 138 S.Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018)*. The plaintiff "has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Id.* If successful, the defendant must show a procompetitive reason for the restraint. *Id.* If the defendant can make this showing, then the burden "shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.*

First, a reasonable juror could conclude that Opana ER constituted its own market, and thus an agreement regarding Opana ER was an exercise of market power. Patent ownership of a good or manufacturing process is not dispositive of market power. *See* *Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 45, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* ("Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee.") In this case, however, it is undisputed that Endo was selling Opana ER at a large profit. Dr. Leffler and Dr. Leitzinger estimate between 60% to 93% profit beyond marginal cost. (*See* Leitzinger Rep. ¶ 53 ("Endo's reported contribution margins for 2011 and 2012 were **[*80]** 74.3 percent and 60.7 percent, respectively."); Leffler Rep. ¶ 48 ("The evidence in this case shows that Endo achieved Lerner Indices as high as .93 from 2008 through 2011.") In contrast, the DOJ scrutinizes mergers with a 5% increase in price over marginal cost. Horizontal Merger Guidelines §§ 4, 4.1.1, 4.2, 4.2.1.

Taken alone, of course, there are other explanations for the high profit margin, including the research and other fixed costs associated with drug development. Here, Impax has presented enough supporting evidence that a reasonable juror could find Endo's actions regarding Opana ER on the underlying litigation patents to be evidence of shoring up supracompetitive pricing practices. For example, Endo imitated lawsuits and then settled with ANDA filers Actavis and Impax, both of whom allegedly infringed on the underlying litigation patents. Part of the reason the Court is faced with the question of whether the underlying patents are valid in this litigation is because Endo did not allow the jury to make a determination about the underlying patent lawsuits, preferring instead to settle that first round of patent disputes. In contrast, once Endo had the later acquired patents, **[*81]** Endo relied on their protections to twice reach trial and win.

Further, as repeatedly emphasized by the Defendants, Endo negotiated a settlement agreement with Impax that potentially negated the need for a reverse payment based on Endo's future conduct. For example, if Endo had continued to sell Opana ER at a similar volume up until Impax's launch, a small or non-existent reverse payment might have been instituted. Endo instead chose to transition the market over to the more profitable reformulated Opana ER and pay Impax $102 million. A reasonable juror could find this behavior evidence of protecting monopoly profits to the detriment of the consumer. For this reason, there is sufficient evidence such that a juror could find there to be evidence of market power.

Plaintiffs have the initial burden of proof to show this exercise of market power had a detrimental effect on competition. Assuming the underlying litigation patents to be invalid, the primary harm to the consumer in a Hatch-Waxman Act related lawsuit is the late start date of the generic entrant, which increases the amount of time that customers pay artificially inflated prices. In the 2010 Settlement and License Agreement, there **[*82]** was also a No Authorized Generic clause, where Endo agreed to forbear selling generic oxymorphone ER while Impax was the exclusive generic market entrant, again allowing higher prices to the detriment of the consumer.

These anticompetitive practices, however, are only anticompetitive to the extent the underling litigation patents are invalid. *Actavis* instructs that "it is normally not necessary to litigate patent validity to answer the antitrust question." *570 U.S. at 157*. Instead, "[a]n unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival." *Id.* The combination of a delayed release and a large payment to the generic drug producer, such as in this case, "suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market." *Id.*

Once Plaintiffs meet their initial burden, it is Defendants' burden to show the procompetitive benefits of the anticompetitive restraint. "An allegedly anticompetitive restraint survives a rule of reason analysis if it achieves legitimate, procompetitive justifications and is reasonably **[*83]** necessary to achieve those justifications." *In re Wellbutrin XL Antitrust Litig., 133 F.Supp. 3d 734, 760 (E.D. Pa. 2015)*, *aff'd sub nom.* *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class, 868 F.3d 132 (3d Cir. 2017)*.

According to Defendants, "the undisputed evidence demonstrates that the 2010 SLA benefitted [Plaintiffs]." (Mem. at 20, Dkt. No. 558.) Because of the Broad License provision, Impax was licensed to sell generic Opana ER even if Endo acquired additional patents. Defendants argue this procompetitive license outweighs any anticompetitive effects from the other provisions in the contract. Without the Broad License, Defendants would be entitled to either reintroduce branded Opana ER, which would be more expensive, or take oxymorphone ER entirely off the market until the expiration of the last acquired patent. Defendants state that Plaintiffs cannot prove that Defendants would have agreed to Impax starting production any earlier than January 2013. As a result, Defendants argue that Plaintiffs are worse-off without the 2010 SLA.

A reverse payment settlement has three components. First, the plaintiff agrees to stop pursuing the patent infringement case. Second, and theoretically in return, the defendant stops the production and sale of the generic version of the drug until a later time. In theory, if the parties feel the patent is **[*84]** likely to be found valid by the Court, the start date for the generic entrant would be closer to the patent's expiration, and in a weak patent case, earlier and closer to the FDA's ANDA approval date. The problem identified in *Actavis*, however, is the third element: a payment from the plaintiff, the allegedly injured party in need of relief, to the defendant. Under the rule of reason test, *Actavis* contemplated that the payment could be explained quite unobjectionably as saved litigation costs or the "compensation for other services that the generic [defendant] has promised to perform—such as distributing the patented item or helping to develop a market for that item [for the plaintiff]." *570 U.S. at 156*. If it cannot be explained, however, there is a risk that "a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement." *Id.*

In addition to the three elements outlined above, Endo and Impax also agreed to the Broad License provision. Defendants would like to use the Broad License as a counterbalance to the reverse payment, but the Broad License is a concession in the same direction as the reverse payment—from Endo to Impax. As a result, while the **[*85]** Broad License has potentially beneficial effects to consumers, it does not counterbalance the $102 million reverse payment from Endo to Impax. Instead, the Broad License concession serves only to highlight how much Endo valued Impax's delayed start, suggesting monopolistic effects instead of procompetitive ones.

Defendants also argue that the reverse payment was an unfortunate $102-million accident, as mathematically Defendants could have engineered the sales to be between the Impax Royalty provision (paid from Impax to Endo if sales remained strong) and the Endo Credit (from Endo to Impax if sales faltered) such that no money would have exchanged hands. While this is one interpretation of the facts, the Court finds it equally compelling to interpret these facts mean that Endo was making so much money by delaying the production of the generic drug and switching patients from original Opana ER to reformulated Opana ER that the $102 million cost was worth the benefit of cannibalizing Opana ER sales. And even if the jury discounts the later payment due to market uncertainty, the jury could consider either the ten million dollar payment purportedly made in furtherance of the Parkinson's **[*86]** Disease joint venture or the Broad License itself as items of value not fully explained under *Actavis*' reverse payment rubric.

Assuming that there are sufficient procompetitive justifications for the restraint, Plaintiffs may also present evidence that the procompetitive reason for the anticompetitive restraints — in this case, the January 2013 start date provision and the No Authorized Generic provision in the 2010 SLA — are "not reasonably necessary to achieve the stated objective." *In re Wellbutrin XL Antitrust Litig., 133 F. Supp. 3d at 753* (citation omitted). Here, there is additional evidence in the record that the Broad License was not a reasonably necessary part of the 2010 Settlement and License Agreement.

After Endo successfully defended Opana ER on the basis of its later acquired patents, Endo also filed a lawsuit regarding the Broad License between itself and Impax. According to Endo's filings, inherent in the Broad License provision was the understanding that Endo would receive royalties from Impax's use of any future patents. The parties eventually settled the suit without a determination on the merits, and Impax currently pays half its profits to Endo, likely raising the current price of generic Opana ER on the market. This is **[*87]** significant because it is unclear how the other provisions of the agreement were a necessary or even related to the Broad License, as Endo both settled a multitude of other lawsuits without this provision and later negotiated 50% of all proceeds from Broad License from Impax to this day. It is at least equally plausible that procompetitive conduct was sufficiently unrelated to the anticompetitive conduct at issue and therefore not necessary to induce the procompetitive conduct.

Ultimately, while it is "true that granting an exclusive licensing agreement is procompetitive relative to not granting it," the question here is "whether a large and unjustifiable reverse payment was made in order to avoid the risk of patent invalidation." *In re Aggrenox Antitrust Litig., 94 F.Supp. 3d 224, 245 (D. Conn. 2015)*. "If a settlement that grants an exclusive license violates the rule of *Actavis*, it is not saved by . . . the licensing arrangement being more competitive than a settlement agreement that lacked one." *Id.*

Because a jury could find that the anticompetitive portions were not necessary to receive the procompetitive benefit of Impax's licensing agreement, the Court declines to enter summary judgment for Defendants on this basis.

b. Anti-Trust Injury

To succeed on **[*88]** an antitrust claim, "a plaintiff must prove the existence of "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (citation omitted). This analysis is generally done in two parts: the type of injury and the but-for cause of the injury.

The alleged injury at issue here, "the improper use of a patent monopoly, is invalid under the antitrust laws." *Actavis, 570 U.S. at 148* (citation omitted). As a result, assuming the jury first finds the patent to be invalid, the reverse payment agreement constitutes an injury that the antitrust laws were meant to prevent.

Second, Plaintiffs must show that the injury is one "that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Endo and Impax entered into an agreement that delayed production and sale of generic Opana ER. As a result, there is a direct causal line between the agreement and the injury.

Defendants argue the later acquired patents are an independent barrier which breaks the causal chain. In support, Defendants cite to *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class, 868 F.3d at 152 (3d Cir. 2017)* (holding that it would be difficult to show an antitrust injury because "generic entry would have been blocked by the '708 patent owned **[*89]** by Andrx.") However, the Third Circuit's decision *In re Wellbutrin XL Antitrust Litigation* contemplates a patent present at the time of the alleged antitrust injury. Because Endo did not acquire its additional patents until years after the agreement was signed, the additional patents do not break the causal chain. The Court cannot grant summary judgment on this ground.

c. Damages

Defendants argue that, under either of Plaintiffs' theories, Plaintiffs have failed to prove that they are financially worse off from the 2010 Settlement and License Agreement. First, Defendants argue that Plaintiffs cannot prove that Endo would have signed an alternative agreement that still included the Broad License. As a result, in either the theories of alternative agreements or in Plaintiffs' theory of continued litigation, Plaintiffs would not have had access to generic Opana ER after 2016.

As discussed earlier in this opinion, the Court has permitted Plaintiffs' experts to pursue a theory of alternative settlement based on factual evidence in the record that Impax would not have agreed to a settlement without the

Broad License provision. Assuming the jury is convinced by this evidence, Plaintiffs theory **[*90]** of damages based on an "alternative settlement" survives summary judgment.

However, even under a continued litigation or alternative agreement without the Broad License provision, the Court finds that it is possible there would still be damages available to Plaintiffs. Because there is evidence in the record disputing that the procompetitive effect of the Broad License is reasonably necessary to the anticompetitive conduct, Defendants' theory of damages on summary judgment also fails. As previously discussed, both the reverse payment and the Broad License benefited Impax, making it unlikely that they were interdependent on each other.

Nevertheless, Defendants claim without evidence in the record that, absent the 2010 SLA, there would be no Opana ER on the market, generic or otherwise. While technically possible, the Court is skeptical that Defendants or any other rational economic actor would have sued eleven generic drug companies to cease and desist production of Opana ER and then forgo profits on seventeen years of patent-protected pain medication.

There are other reasons to think that, had the parties continued the underlying patent litigation, Defendants and Plaintiffs would have **[*91]** ended up in a similar financial situation. It is undisputed that Endo made a strategic decision to distance itself from the original Opana ER in order to promote the reformulated version, including a stop on its own production and petitions to the FDA to remove original Opana ER from the market prior to the entrance of Impax and other generic drug producers. Despite Endo's best efforts, generic Opana ER did enter the market for several years before Endo was able to secure the later acquired patents and enforce them against them against infringers. Unfortunately for Endo, the FDA also subsequently asked Endo to remove the reformulated Opana ER from the market, which meant that consumers had already purchased oxymorphone ER at generic prices and there was no oxymorphone ER alternative in the market sold by Endo.

Having, in effect, backed the wrong horse, Endo could have decided to stop selling any extended release oxymorphone pain medication as intimated by Defendants. Endo could have also attempted to reintroduce the branded Opana ER at its original price, although there could have been a risk of consumer pushback against that decision. A reasonable juror, however, could also find that **[*92]** Endo would have either produced an authorized generic version or entered a very similar license agreement with any number of generic drug companies after enforcing the later acquired patents, at which point the later acquired patents would have little to no effect on the damages claimed by Plaintiffs.

Because it is at least possible that Plaintiffs could prove damages under either theory, the Court denies summary judgment on this ground.

d. State Law Claims

Finally, Defendants move to narrow the scope of the unjust enrichment claims under Arizona, Massachusetts, and Mississippi law. According to Defendants, all three state laws contain a three-year statute of limitations for torts. The first End Payor Plaintiff complaint was filed on June 4, 2014. As a result, all recovery is limited to the three years prior to the filing date of the Complaint. Under one of End Payor Plaintiffs' theories, however, Impax would have launched its generic Opana ER as early as April 2011, which is approximately two months beyond the statute of limitations.

End Payor Plaintiffs concede that Mississippi law prevents relief beyond three years but argue that unjust enrichment claims in Massachusetts and Arizona **[*93]** are governed by alternative statutes which have longer statute of limitations. Antitrust claims have traditionally sounded in tort. *See, e.g., Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc., 902 F.3d 735, 743 (7th Cir. 2018)* (analyzing state unjust enrichment claims as a tort). A review of Arizona and Massachusetts tort law shows it is governed by the three-year statute of limitations. *See Costanzo v. Stewart, 9 Ariz. App. 430, 453 P.2d 526, 528 (Ariz. Ct. App. 1969)* (applying *Ariz. Rev. Stat. Ann. § 12-543(1)*); *Mass. Gen. Laws ch. 260, § 2A*. For this reason, the Court grants the motion to limit summary judgment to damages within three years of the first filed complaint as to the state law claims in Mississippi, Arizona, and Massachusetts.

2. Patent Issues

In the alternative to their first motion, Defendants have also filed a motion for partial summary judgment as to some of the patent issues within the litigation. First, Defendants note that Opana ER's later acquired patents have already been determined to be valid and upheld by the Federal Circuit. As a result, Defendants move to limit any recovery by Plaintiffs to the point of acquisition of the earliest valid patent, as opposed to point of injunction from the district court or the subsequent affirmation from the appellate court. Second, Defendants' motion to limit Plaintiffs from presenting any defense Impax had not prepared to provide at the beginning **[*94]** of the underlying patent litigation which ended shortly before trial with the 2010 Settlement and License Agreement.

a. Subsequently Acquired Patents

Endo received approval from the FDA on the '122 and '216 patents in late 2012 and prevailed in federal court against numerous generic drug manufacturers in defense of these patents. (PSOF-PI ¶¶ 35-36, 41-47.) As a result, Endo argues that the Court should grant summary judgment as to this material fact and prevent Plaintiffs from recouping potential damages after the issuance of these two patents.

Plaintiffs object on the theory that the later acquired patents are not a material fact. Because the patents did not exist at the time the 2010 Settlement and License Agreement was entered, Plaintiffs argue that it is irrelevant too for the Court to grant summary judgment as to this fact. Plaintiffs also note that they do not seek damages after November 2012, obliviating the need to consider the patents. A restraint on trade is "viewed at the time it was adopted." *Polk Bros. v. Forest City Enterprises, Inc., 776 F.2d 185, 189 (7th Cir. 1985)*. As a result, this fact is not material in determining whether was an antitrust injury. However, as discussed above, if successful, the fact is potentially salient to show the extent of Plaintiffs' **[*95]** damages. Defendants may argue that the Broad License's benefit to consumers over 2012 to present outweighs the prior injury, and Plaintiffs must convince the jury that the benefit of the Broad License either do not outweigh was sufficiently unrelated to the harm as to merit damages. As such, the Court denies the motion for summary judgment as to this marginal fact.

b. Underlying Patent Litigation Defenses

Defendants also argue that Plaintiffs are limited in their patent defenses to those that Impax would have prepared at trial and asks the Court to grant Endo summary judgment with respect to two of Endo's infringement claims. According to Defendants, this will "streamline any trial" and "pare away any patent defenses asserted by Plaintiffs that the trial court in the underlying litigation would have found deficient as a matter of law." (Mem. on Patent Issues at 10-11, Dkt. No 535.)

Both parties vigorously dispute the specifics as to what Impax would or would not have done in the original underlying litigation, however, the Court does not find this to be an appropriate matter to resolve on summary judgment. It is not usually necessary to litigate patent's validity to determine whether **[*96]** or not antitrust laws were violated. *Actavis, 570 U.S. at 157*. Defendants' focus on forcing summary judgment on patent issues is not helpful for the trier of fact. If Endo believed that the patent was strong at the time the contract was signed, Defendants can show that by providing a justification for the reverse payment. Otherwise, "the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself." *Id. at 158*.

Further, the jury must evaluate the contested restraint on the market, here the 2010 Settlement and License Agreement, at the time the restraint was adopted. The Court notes there was no summary judgment motion pending when the agreement was reached five days after the start of trial, and to resolve patent issues now would confuse rather than aid the jury.

While discussion of the underlying patent at issue is inevitable, the Court will not prematurely foreclose the jury's determination in this matter through summary judgment on the hypothetical patent defenses that might have been made at trial. As stated throughout this opinion, the purpose of this litigation is not to recreate **[*97]** the decision the 2010 jury would have made a determination about the validity of the patent, but rather whether Endo had, or likely had, a valid patent at the time of the 2010 Settlement and License Agreement. For these reasons, the Court denies the motion.

III. <u>CONCLUSION</u>

For the reasons stated herein, the Court rules as follows:

1. Defendants' *Daubert* motions to exclude Ms. DeLeon (Dkt. No. 513), Mr. Molina (Dkt. No. 516), and Dr. Rosenthal (Dkt. No. 545) are granted.

2. Defendants' *Daubert* motions to exclude Dr. Leitzinger (Dkt. No. 529) and Dr. Leffler (Dkt. No. 552) are granted in part and denied in part.

3. All of Defendants' other *Daubert* motions (Dkt. No. 510, Dkt. No. 537, Dkt. No. 541, Dkt. No. 546, Dkt. No. 550, Dkt. No. 556) are denied.

4. Plaintiffs' motions to exclude Dr. Patel (Dkt. No. 519), Mr. Figg (Dkt. No. 521), Dr. Fassihi (Dkt. No. 524), Dr. Green (Dkt. No. 527), and Dr. Berneman (Dkt. No. 528) are granted.

5. Defendants' *Daubert* motions to exclude Dr. Addanki (Dkt. No. 526) and Mr. Singer (Dkt. No. 520) are granted in part and denied in part.

6. All of Plaintiffs' other *Daubert* motions (Dkt. No. 522, Dkt. No. 525, Dkt. No. 523) are denied.

7. Defendants' motion for summary **[*98]** judgment as to the state claims is granted but denied as to all other claims in Defendants' summary judgment motions. (Dkt. No. 532, Dkt. No. 539).

IT IS SO ORDERED.

/s/ Harry D. Leinenweber

Harry D. Leinenweber, Judge

United States District Court

Dated: 6/4/2021

BHRS Group, LLC v. Brio Water Tech., Inc.

United States District Court for the Central District of California

June 7, 2021, Decided; June 7, 2021, Filed

Case No. 2:20-CV-07652-JWH-JCx

Reporter
553 F. Supp. 3d 793 *; 2021 U.S. Dist. LEXIS 251417 **; 2021 WL 6536662

BHRS GROUP, LLC, Plaintiff, v. BRIO WATER TECHNOLOGY, INC., f/k/a DOWN TOWN WHOLESALERS, INC., and DOES 1-10, inclusive, Defendants.

Prior History: *Bhrs Group v. Brio Water Tech., 2020 U.S. Dist. LEXIS 253575 (C.D. Cal., Dec. 14, 2020)*

Core Terms

allegations, rating, advertisement, false advertising, claim for relief, prong, unfair, star, motion to dismiss, leave to amend, products, unfair competition, manipulate, misleading, consumers, reviewers, fraudulent

Counsel: **[**1]** For BHRS GROUP, LLC, Plaintiff: Peter J. Farnese, Beshada Farnese LLP, Los Angeles, CA USA.

For Brio Water Technology, Inc., formerly known as | Down Town Wholesalers, Inc. | formerly known as | Down Town Wholesalers Inc |, Defendant: Elan Bloch, LEAD ATTORNEY, Christopher S Reeder, CSReeder PC, Los Angeles, CA USA.

Judges: John W. Holcomb, UNITED STATES DISTRICT JUDGE.

Opinion by: John W. Holcomb

Opinion

[*796] ORDER ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO *RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE* [ECF No. 27]

Before the Court is the motion[1] of Defendant Brio Water Technology, Inc. to dismiss the Amended Complaint[2] filed by Plaintiff BHRS Group, LLC, pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. After considering the papers filed in support and in opposition,[3] and the **[*797]** arguments of counsel at the hearing on February 19, 2021, the Court **GRANTS** the Motion, **without leave to amend**.

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[1] Def. Brio Water Technology, Inc.'s Mot. to Dismiss Pl.'s Amend. Compl. pursuant to *Fed. R. Civ. P. 12(b)(6)* (the "Motion") [ECF No. 27].

[2] First Amend. Compl. (the "Amended Complaint") [ECF No. 26].

[3] The Court considered the following papers: (1) the Amended Complaint; (2) the Motion (including its attachments); (3) Pl.'s Opp'n to the Motion (the "Opposition") [ECF No. 28]; and (4) Def.'s Reply in Supp. of the Motion (the "Reply") [ECF No. 29].

I. BACKGROUND

A. Procedural Background

BHRS filed its original complaint in this action on August 21, 2020. On September 23, 2020, Brio moved to dismiss the original complaint pursuant to *Rule 12(b)(6)*, which BHRS opposed. The Court granted Brio's motion to dismiss, with leave to amend, with respect to each of the four claims for relief asserted by BHRS.[4]

BHRS filed its Amended Complaint on January 8, 2021.[5] In that pleading, BHRS asserts the following three claims for relief against Brio: (1) Violation of the Lanham Act, 28 U.S.C. § 1125; (2) Violation of California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200, et seq.*; and (3) Breach of Contract—Third Party Beneficiary. Brio filed the instant Motion on January 22, 2021. The Motion is fully briefed.

B. The Amended Complaint

The Amended Complaint is premised upon the same theory and foundational factual allegations as the original complaint, which the Court examined in detail in its First Order.[6] To summarize, BHRS and Brio are competitors in the "water cooler and related hydration products marketplace" on Amazon.com.[7] This case concerns the "star rating" that is associated with a product on Amazon.com, which reflects the average consumer rating of a particular product based upon product reviews posted by other Amazon.com consumers. BHRS alleges—based in large part upon a report by a third-party investigator[8] — that Brio engaged in a fraudulent scheme to manipulate Amazon review ratings by enlisting individuals associated with Brio's management "to purchase products for the purpose of leaving a series of negative reviews **[**3]** of BHRS's products and post positive reviews of Brio's own brands of water cooler products on Amazon."[9] With that general background, the Court will focus on the additional allegations in the Amended Complaint.

The focus of the Amended Complaint, according to BHRS, is the alleged practice by Brio of enlisting reviewers in an effort to manipulate the Amazon star rating, "not the content of the statements of the reviews themselves."[10] The Amended Complaint includes additional allegations that:[11] (1) Amazon reviews that appear to be submitted by "verified" purchasers can sometimes be fabricated;[12] (2) consumers rely on the average star rating when making **[*798]** purchases;[13] and (3) Brio fabricated Amazon Vine reviews[14] which it then used on its website and the

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4 Order on Def.'s Mot. to Dismiss Pursuant to *R. 12(b)(6) of the Fed. R. Civ. P.* (the "First Order **[**2]** ") [ECF No. 22].

5 *See generally* Amended Complaint.

6 *See* First Order 3:1-4:8.

7 *See* Amended Complaint at ¶ 19.

8 *See generally* Report by Investigative Consultants, Inc. (the "IC Report") [ECF No. 26-1]. BHRS attached the IC Report to its Amended Complaint, whereas the original complaint included only references to the IC Report's findings.

9 Amended Complaint at ¶ 48; *see also id.* at ¶¶ 3, 40-47, 49-53, 74-79, & 87-93.

10 Opposition 2:6-11.

11 *See id.* at 2:12-17 (summarizing the additional allegations in the Amended Complaint).

12 *See* Amended Complaint ¶¶ 36-39.

13 *See id.* at ¶¶ 29-30.

website of Walmart without disclosing (in addition to the fabrication) that the reviewers received free products in exchange for their reviews.[15]

II. LEGAL STANDARD

A. Motion to Dismiss

A motion to dismiss under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* tests the legal sufficiency of the claims asserted in a complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. In ruling on a *Rule 12(b)(6)* motion, "[a]ll allegations of material fact are taken as true and construed in the light most **[**4]** favorable to the nonmoving party." *Am. Family Ass'n v. City & County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002)*. Although a complaint attacked by a *Rule 12(b)(6)* motion "does not need detailed factual allegations," a plaintiff must provide "more than labels and conclusions." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

To state a plausible claim for relief, the complaint "must contain sufficient allegations of underlying facts" to support its legal conclusions. *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*. "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . ." *Twombly, 550 U.S. at 555* (citations and footnote omitted). Accordingly, to survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," which means that a plaintiff must plead sufficient factual content to "allow[] the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (internal quotation marks omitted). A complaint must contain "well-pleaded facts" from which the Court can "infer more than the mere possibility of misconduct." *Id. at 679*.

The Federal Rules of Civil Procedure require a party alleging fraud to "state with particularity the circumstances constituting **[**5]** fraud." *Fed. R. Civ. P. 9(b)*. To plead fraud with particularity, the pleader must state the time, place, and specific content of the false representations. *See* *Odom v. Microsoft Corp., 486 F.3d 541, 553 (9th Cir. 2007)*. The allegations "must set forth more than neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about the statement, and why it is false." *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (internal quotation marks omitted). The heightened pleading standard under *Rule 9(b)* applies to claims that are "grounded in fraud" or that "sound in fraud." *Kearns v. Ford Motor Co., 567 F.3d 1120, 1122 (9th Cir. 2009)* (quoting *Vess, 317 F.3d at 1102*).

B. Leave to Amend

Pursuant to *Rule 15(a)*, a district court "should freely give leave when justice so requires." The purpose underlying **[*799]** the amendment policy is to "facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)*. Leave to amend should be granted unless the Court determines "that the pleading could not possibly be cured by the allegation of other facts." *Id.* (quoting *Doe v. United States, 8 F.3d 494, 497 (9th Cir. 1995)*).

III. DISCUSSION

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[14] According to BHRS, "[i]n order to facilitate reviews for products, Amazon provides sellers the opportunity to participate in its 'Vine' program. In exchange for a fee to Amazon, sellers can provide products to Amazon, who in turn, gives those products for free to customer reviewers to post reviews on Amazon." *Id.* at ¶ 54.

[15] *See id.* at ¶¶ 54-61.

Brio moves to dismiss each of BHRS's claims for relief pursuant to *Rule 12(b)(6)*. The Court, therefore, addresses the sufficiency of Brio's allegations with respect to each of BHRS's claims.

A. False Advertising in Violation of the Lanham Act

In its first claim for relief, BHRS avers that Brio engaged in **[**6]** false advertising in violation of § 43(a) of the *Lanham Act*, *15 U.S.C. § 1125(a)*.[16] Section 43(a) of the *Lanham Act* "authorizes suit against persons who make false and deceptive statements in a commercial advertisement about their own or the plaintiff's product." *Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 835 (9th Cir. 2002)*. A claim for false advertising under § 43(a) has five elements:

> (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused the false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.

Skydive Arizona, Inc. v. Quattrocchi, 673 F.3d 1105, 1110 (9th Cir. 2012) (citing *15 U.S.C. § 1125(a)(1)(B)*).

Because BHRS alleges that Brio placed "false," "fraudulent," and "misleading"[17] customer reviews on Amazon.com as part of the alleged "false advertising scheme,"[18] BHRS's false advertising claim sounds in fraud, and, therefore, is subject to the heightened pleading requirements of *Rule 9(b)*. *See* *Kearns, 567 F.3d at 1122*. Accordingly, BHRS must allege the "who, **[**7]** what, when, where, and how" of the alleged fraud. *Vess, 317 F.3d at 1106*.

In its First Order, the Court explained that BHRS failed to plead sufficient facts to establish the first element of its claim under § 43(a) of the *Lanham Act*—"a false statement of fact ***by the defendant*** in a ***commercial advertisement*** about its own or another's product," *Skydive Arizona, 673 F.3d at 1110* (emphasis added)—because BHRS did not allege that Brio itself made the statements at issue and because BHRS did not plead enough facts plausibly to connect the non-party reviewers to Brio, such as would support an inference that the third parties were acting on behalf of Brio.[19]

With those deficiencies in mind, in its Amended Complaint, BHRS attempts to shift the focus to the alleged broader scheme by Brio to manipulate the average star rating for the products. BHRS alleges that Brio's use of purportedly fake reviews results in a false and misleading star rating. **[*800]** BHRS's contention in this regard seems to be that the star rating is itself a "commercial advertisement" for the purpose of the *Lanham Act*.[20] However, these allegations still are not enough to state a plausible claim for false advertising under the *Lanham Act*, for the same reasons detailed in the Court's First Order.

BHRS's theory that **[**8]** the star rating itself constitutes a commercial advertisement ***by Brio*** is not persuasive. To constitute commercial advertising or promotion, a statement of fact must be:

> (1) commercial speech; (2) ***by the defendant*** who is in commercial competition with the plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services. While the representations need not be

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[16] *See* Amended Complaint ¶¶ 74-83.

[17] *See id.* at ¶¶ 75 & 76.

[18] *Id.* at ¶ 81.

[19] *See* First Order 9:20-11:7.

[20] *See* Amended Complaint ¶ 76; Opposition 7:21-9:8.

> made in a "classic advertising campaign," but may consist instead of more informal types of "promotion," the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Coastal Abstract Service, Inc. v. First American Title Insurance Co., 173 F.3d 725, 735 (9th Cir. 1999) (quotations omitted; emphasis added). In support of its theory that manipulated star ratings are actionable commercial advertising under the *Lanham Act*, BHRS cites *Grasshopper House, LLC v. Clean and Sober Media, LLC, 2018 U.S. Dist. LEXIS 228190, 2018 WL 6118440 (C.D. Cal. July 18, 2018)*, and *Interlink Prods. Int'l, Inc. v. F & W Trading LLC, 2016 U.S. Dist. LEXIS 44256, 2016 WL 1260713 (D.N.J. Mar. 31, 2016)*. Putting aside that this Court is not bound by the decisions of other district courts, *Grasshopper* and *Interlink* are each distinguishable from this case, particularly with respect to the first element of a claim under § 43(a) of the *Lanham Act*.

In each of those case cases, the plaintiff alleged that the ***defendant itself, or through its paid agents***, made false statements in commercial advertisements. *See* *Grasshopper, 2018 U.S. Dist. LEXIS 228190, 2018 WL 6118440, at *1-*2 & *5-*7* (allegations that defendants **[**9]** falsely attributed one-star rating of the plaintiff's facility to the plaintiff's own clients, without disclosing that the review publication was owned by one of the defendants, were sufficient to state a claim under the *Lanham Act*); *Interlink, 2016 U.S. Dist. LEXIS 44256, 2016 WL 1260713, at *2 & *9* (allegations that defendants engaged in "massive" and "continuous ratings manipulation" by sending "excessive quantities of free samples to professional reviewers" resulting in numerous fake or biased reviews were sufficient). In contrast, here, BHRS does not allege any facts plausibly to show that Brio ***itself*** posted or is responsible for the content of the allegedly misleading reviews. Nor does BHRS allege a "massive" scheme of ratings manipulation involving an "excessive" number of paid reviews. *Cf.* *Interlink, 2016 U.S. Dist. LEXIS 44256, 2016 WL 1260713, at *2 & *9*; *see also* *AlphaCard Sys. LLC v. Fery LLC, 2020 U.S. Dist. LEXIS 147059, 2020 WL 4736072, at *1 & *3 (D.N.J. Aug. 14, 2020)* (denying motion to dismiss false advertising claim where the plaintiff alleged that the defendant "placed hundreds of phony customer reviews on its products, which purport to state customers' honest opinions even though reviewers did not purchase or honestly evaluate the product"). As explained in the Court's First Order, BHRS does not allege facts plausibly to show that any of the individual reviewers were controlled or paid by Brio, or otherwise acting **[**10]** on behalf of Brio.[21] And BHRS has not alleged additional facts to support any inference in that regard. In **[*801]** the absence of such allegations, BHRS fails to state a claim for false advertising under § 43(a) of the *Lanham Act*.

To the extent that BHRS's false advertising claim is based upon the content of the allegedly misleading reviews cited in the Amended Complaint, the Court finds that the reviewers' statements are classic statements of opinion, and, therefore, the reviews are not actionable.[22] *Cf., e.g., Newcal Industries*, 513 F.3d at 1052-53 (affirming district court's finding that the defendant's statement that it would "deliver 'flexibility' in [its] 'cost-per-copy' contracts" was puffery); *JIVE Commerce, LLC v. Wine Racks Am., Inc., 2018 U.S. Dist. LEXIS 138967, 2018 WL 3873675, at *2-*3 (D. Utah Aug. 15, 2018)* (evaluating similar complaint allegations and finding that "the Court has no information that would suggest the reviews are actionable under the *Lanham Act*"). Like the original Complaint, each of the customer reviews cited in the Amended Complaint contains vague, generalized statements of opinion about the quality of, and the respective reviewers' experience with, the BHRS product—not statements of fact about the product.[23]

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[21] *See* First Order 10:13-11:7.

[22] Although BHRS attempts to shift the focus away from the content of the reviews at issue, *see* Opposition 7:21-25, the Amended Complaint includes screenshots of three negative reviews of BHRS's products, which reviews BHRS alleges were connected to Brio, *see* Amended Complaint ¶¶ 49-51. Notably, though, BHRS does not allege that these reviews are fake. To the contrary, BHRS explicitly acknowledges that these reviewers purchased products from BHRS. *Id.* at ¶ 50; *cf. id.* at ¶¶ 36-39. And, as explained above, BHRS does not allege sufficient facts to support a plausible inference that these reviewers are part of Brio's alleged false advertising scheme.

[23] *See* First Order 11:8-12:15.

Accordingly, the Court **GRANTS** Brio's Motion with respect to BHRS's first claim for relief. Furthermore, in view of the **[**11]** fact that BHRS was already granted leave to amend, and because the Court finds that the Amended Complaint does not cure the pleading deficiencies identified in the Court's First Order, granting leave to amend again would be futile. *See* *Lopez, 203 F.3d at 1127*.

B. Violation of California's Unfair Competition Law

The second claim for relief in the Amended Complaint is for unfair competition in violation of California's Unfair Competition Law ("UCL").[24] California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. BHRS alleges that Brio engaged in unfair competition by, "*inter alia*, making representations and omissions of material facts in causing and orchestrating fraudulent Amazon.com star ratings . . . ."[25]

Because BHRS alleges a "unified course of fraudulent conduct," BHRS is required to plead its claims under the unlawful and unfair prongs of the UCL[26] with particularity. *See* *Fed. R. Civ. P. 9(b)*; *Kearns, 567 F.3d at 1122, 1126-27* (if "the claim is said to be 'grounded in fraud' . . . the pleading of that claim as a whole must satisfy the particularity requirement of *Rule 9(b)*").

The Court addresses the sufficiency of BHRS's allegations under each of these prongs in turn.

[*802] 1. "Unfair" [12] Prong**

The "unfair" prong of the UCL prohibits a business practice that "violates established public policy or . . . is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." *McKell v. Wash. Mut., Inc., 142 Cal. App. 4th 1457, 1473, 49 Cal. Rptr. 3d 227 (2006)*. The California Supreme Court has held that "[w]hen a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

BHRS's claim under the "unfair" prong of the UCL fails for the reasons discussed in the preceding section. Although BHRS sufficiently alleges that BHRS and Brio are direct competitors, BHRS does not aver (or argue) that Brio's alleged misconduct threatens an incipient violation of an ***antitrust law*** or has effects comparable to a violation of an ***antitrust law***. The Amended Complaint does not state sufficient facts to show that the alleged false statements were made ***by*** Brio, or by individuals who received compensation **[**13]** (monetary or otherwise) in exchange for their reviews. Rather, BHRS merely alleges, in conclusory fashion, that Brio's conduct "is substantially injurious to BHRS, competitors, and the consuming public, offends public policy, and is immoral, unethical, oppressive, and unscrupulous . . . ."[27] Such allegations are mere "labels and conclusions," which, absent supporting evidentiary facts, are not sufficient to survive a motion under *Rule 12(b)(6)*. *Twombly, 550 U.S. at 555*.

Accordingly, the Court finds that BHRS has not alleged sufficient facts to state a plausible claim for relief under the UCL's unfair prong.

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[24] *Id.* at ¶¶ 84-98.

[25] *Id.* at ¶ 88.

[26] *See* Opposition 13:16-17 ("Plaintiff alleges claims for violations of the unlawful and unfair prongs of the statute.").

[27] *Id.* at ¶ 92. The Court explained in its First Order that this conclusory allegation, which BHRS left unchanged in the Amended Complaint, is not sufficient to plead a claim under the "unfair" prong of the UCL. *See* First Order 15:16-21.

2. "Unlawful" Prong

Under the UCL's "unlawful" prong, "[t]he UCL 'borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.'" *Wilson v. Hewlett—Packard Co., 668 F.3d 1136, 1140 (9th Cir. 2012)* (quoting *Cel-Tech, 20 Cal. 4th at 180*).

Here, BHRS alleges that Brio has violated the unlawful prong of the UCL through Brio's violation of the UCL itself and Brio's breach of Amazon's Seller Agreement (BHRS's third claim for relief).[28] However, as stated in the preceding section, the Court finds that BHRS has not alleged sufficient facts to state a plausible claim for relief under *§ 17200 of the California Business and Professions Code*. Furthermore, as explained below, BHRS is no longer pursuing its **[**14]** claim for breach of **[*803]** contract. Accordingly, BHRS cannot state a claim under the UCL's unlawful prong.

Based upon the foregoing, the Court **GRANTS** Brio's Motion to Dismiss BHRS's claim for violation of the UCL. For the reasons explained with respect to BHRS's claim for false advertising, the Court finds that granting leave to amend again would be futile. *See* *Lopez, 203 F.3d at 1127*.

C. Breach of Contract—Third Party Beneficiary

BHRS indicates in its Opposition that it has agreed to dismiss its breach of contract claim "without prejudice to Plaintiff's ability to raise any violations of the Amazon seller policies with Amazon as part of any informal process provided by Amazon in those agreements."[29]

Accordingly, the Court **GRANTS** Brio's Motion to Dismiss BHRS's claim for breach of contract, without prejudice to BHRS's right to pursue that claim in connection with any process provided by Amazon for resolving such claims.

IV. CONCLUSION

For the reasons set forth above, the Court hereby **ORDERS** as follows:

1. Brio's instant Motion to Dismiss is **GRANTED** in its entirety, **without leave to amend**.

2. The Court makes no findings or conclusions with respect to BHRS's right to raise its breach of contract claim through Amazon's **[**15]** dispute resolution process.

3. The Clerk is **DIRECTED** to close this case.

IT IS SO ORDERED.

Dated: June 7, 2021

/s/ John W. Holcomb

John W. Holcomb

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[28] The Amended Complaint also alleges that Brio's conduct violates "28 U.S.C. § 1125," *id.* at ¶ 89; however, BHRS likely meant to cite *15 U.S.C. § 1125* (*i.e.*, the *Lanham Act*), because title 28 of the United States Code does not contain a *§ 1125* (title 28 governs the judiciary and judicial procedure). Regardless, the Court already determined, in the preceding section, that the Amended Complaint fails adequately to allege a claim under the *Lanham Act*.

[29] Opposition 18:9-14.

UNITED STATES DISTRICT JUDGE

Comprehensive Sec. v. Metro. Gov't of Nashville & Davidson Cty.

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

June 9, 2021, Filed

No. 3:18-cv-00375

Reporter
2021 U.S. Dist. LEXIS 108055 *; 2021 WL 2355067

COMPREHENSIVE SECURITY, INC., et al., Plaintiffs, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Defendant.

Subsequent History: Affirmed by *Comprehensive Sec. v. Metro. Gov't of Nashville & Davidson County, 2022 U.S. App. LEXIS 6050 (6th Cir. Tenn., Mar. 7, 2022)*

Prior History: *Comprehensive Sec., Inc. v. Metro. Gov't of Nashville & Davidson Cty., 327 F. Supp. 3d 1094, 2018 U.S. Dist. LEXIS 139567, 2018 WL 3853201 (M.D. Tenn., Aug. 14, 2018)*

Core Terms

private security, monopoly power, off-duty, secondary, transition plan, special event, five-year, security service, labor pool, anti-competitive, destroy the competition, relevant market, market share, per hour, monopolization, hire, police officer, employees, training, compete, preponderance of evidence, anticompetitive conduct, antitrust, contracts, part-time, credibly

Counsel: **[*1]** For Comprehensive Security, Inc., Associated Protective Service, Inc., OnTrac Security, LLC, Plaintiffs: Bryant B. Kroll, W. Gary Blackburn, The Blackburn Firm, PLLC, Nashville, TN.

For Metropolitan Government of Nashville and Davidson County, Defendant: J. Brooks Fox, Metropolitan Legal Department, Nashville, TN.

Judges: WAVERLY D. CRENSHAW, JR., CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: WAVERLY D. CRENSHAW, JR.

Opinion

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This antitrust case concerns private security services in Davidson County, Tennessee. For years, private companies, including Plaintiffs, were the primary suppliers of private security services in Davidson County. Those private companies hired off-duty Metropolitan Nashville Police Department ("MNPD") officers to provide part-time security services. Beginning in 2013, MNPD started a five-year plan to transition the secondary employment of off-duty MNPD officers away from private companies. As MNPD implemented this transition, it also decided to enter the private security services market. In order to win business, MNPD lowered rates, changed administrative procedures, and eventually prohibited off-duty MNPD officers from working for private security companies. **[*2]**

MNPD won a number of contracts previously held by private security companies and became a significant player in the private security services market.

Plaintiffs allege a disruption caused by MNPD's aggressive, competitive, and successful entry into the private security services market. They argue that MNPD was successful through the use of anticompetitive conduct in violation of *Section 2 of the Sherman Act, 15 U.S.C. § 2* ("Section 2").[1] A bench trial was held on November 12 through 16, 2020, (Doc. Nos. 138-140), and the parties submitted post-trial briefs. (Doc. No. 137, 145, 146). The Court makes the following Findings of Fact and Conclusions of Law in accordance with *Rule 52(a) of the Federal Rules of Civil Procedure*.

FINDINGS OF FACT

The Private Security Services Market In Davidson County, Tennessee

1. Plaintiffs are three long-established private security companies operating in Davidson County, Tennessee. Comprehensive Security, Inc. ("Comprehensive") is headed by Loyd Poteete, a former MNPD officer. Associated Protected Services ("APS") is owned by Michael Woods, a former Millersville, Tennessee police officer. OnTrac Security is operated by Ralph Douglas Jones, a formed MNPD sergeant.

2. Plaintiffs offer traditional police and security services to the public, including site **[*3]** security, asset security, traffic control, crowd control, individual protection and other similar security services.

3. In order to deliver police and other security services, Plaintiffs hire off-duty police officers as part-time employees on an as-needed basis. (Doc. No. 138 at 16-26, 157-60). Those off-duty officers are either commissioned by the Tennessee Peace Officer Standards & Training Commission ("POST officers") or without a POST commission. (Id. at 17-19, 26, 159-63, 191). The distinction is significant because only POST officers can make arrests and direct traffic on public streets. (Id. at 16; Doc. No. 139 at 26; Doc. No. 140 at 66). Most of the off-duty officers typically work full-time for local and state governmental law enforcement agencies, such as MNPD, and receive employment benefits and annual training through that employment. As a result, private security companies benefit greatly from having access to trained off-duty officers who desire sporadic, additional part-time work pay without incurring the training cost or other costs associated with regular employees. (Doc. No. 139 at 116). Having this ready labor made it easier for private security companies, like Plaintiffs, **[*4]** to fulfill their contractual security obligations in Davidson County. (Doc. No. 138 at 171-72).

4. MNPD facilitated the success of private security companies through secondary employment policies and procedures. As far back as the 1990s, an MNPD officer who wanted to work part-time for a private security company could submit a secondary employment work request, known as a Form 150, and approval was "pretty much guaranteed." (Doc. No. 138 at 173; see also id. 51-52; Doc. No. 119-20). In 1997, MNPD created the Secondary Employment Unit ("SEU"), to help MNPD officers obtain approval of secondary employment requests. The SEU gave private security companies "very easy" access to a "great pool" of MNPD officers that were "on standby constantly." (Doc. No. 138 at 51-53, 172).

5. The cooperative relationship between MNPD and private security companies extended to Metro's Special Events Committee, which consisted of representatives from the Mayor's Office, Public Works, Metro Parks, MNPD, Metro Fire, and special event coordinators. The Committee's responsibilities included the planning, permitting, and approval of special events in Davidson County. (Id. at 37-38, 175; Doc. No. 139 at 57-58). **[*5]** The inclusion of Plaintiffs and other private security companies reflected the then market reality that private security companies did the "lion's share of [the private security] work," and were able to share their expertise on security, road closures, and traffic control. (Doc. No. 139 at 58-59).

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[1] Plaintiffs abandoned their *Section 2* predatory pricing claim. (Doc. No. 145 at 2, 32).

Chief Anderson's Five-Year Transition Plan for MNPD

6. In April 2013, then MNPD Chief Steve Anderson announced a five-year transition plan to change "the future of secondary employment of [MNPD] police officers" and to ensure the "safety" of citizens and visitors. (Ex. 68 at 2, 6). In an April 26, 2013 email to city officials, Chief Anderson explained that "practices relating to the off-duty employment of police officers that were in place 20 years ago would not be acceptable today." (Id. at 2). He explained that there was "little or no regulation or oversight as to how, or even where, officers used their police authority in off-duty employment," and that without "sufficient oversight, there is the real potential, and as we have seen in other cities, [for] the reality of inappropriate conduct, favoritism, misbehavior and/or corruption." (Id.) He was committed to "improving accountability and **[*6]** reducing liability to the city" by changing the availability and controls surrounding secondary employment of off-duty MNPD officers. (Id.)

7. Chief Anderson also determined that continued employment of MNPD officers by private security companies had "the potential to divide an [MNPD] officer's loyalties, create conflicts of interest and otherwise have a detrimental effect on the operation of the Metropolitan Government." (Id. at 3). So, he decided to restrict officers' secondary employment by requiring that all private security services work be approved by MNPD. (Id.) This would enable MNPD to "limit its liability and exercise sufficient control so as to minimize any detrimental impact [secondary employment] can create." (Id.) The change would also help MNPD become more "professional [and] coordinated," and "enhance public safety and service." (Id. at 6).

8. The transition plan for MNPD officers' secondary employment would occur over five years to avoid any "outcry" over sudden change to an existing system "[e]ngrained into the culture of Nashville." (Id.) It was important to Chief Anderson that special event planners would not hire MNPD officers directly unless the fees charged by **[*7]** MNPD were "reasonable and affordable." (Id. at 5). He explained that it was "imperative" that MNPD "give the Nashville community and event organizers an affordable way to have Metropolitan Nashville police officers staff their events." (Id. at 5-6).

9. MNPD Captain David Corman, the head of SEU from 2010 to 2019, was responsible for implement Chief Anderson's five-year transition plan. (Doc. No. 140 at 76).

10. Beginning in April 2013, Corman began the process. First, the focus of SEU changed to obtaining private security contracts for MNPD that could be directly staffed with MNPD officers. (Doc. No. 139 at 37). MNPD Sergeant Kim Forsyth testified that Corman was concerned that private security companies were using MNPD's officers to make their own money, and he became excited at the prospect of generating business for MNPD. (Id. at 37-38). Forsyth, a witness offered by Plaintiffs, was very critical and accusatory of Corman. She believed that Corman wanted to make as much money as possible for MNPD and operated SEU with the goal of eliminating the work available to private security companies so that eventually they would be forced out of business. At trial, she was nervous, unsure, fearful **[*8]** and contrived. She lacked any direct or indirect knowledge about MNPD's anti-competitive activities or motive. Instead, her testimony consisted of aggressive, prepackaged speeches that were often not responsive to questions. Overall, the Court found Forsyth not credible, and likely influenced by personal feelings about Corman.

11. Second, Corman implemented administrative changes to add "more structure" and "more oversight" to the Form 150 process for approving secondary requests. (Doc. No. 140; see also Doc. No. 138 at 51-57, 173-75). For example, MNPD required multiple escalating levels of approval - first by the captain or precinct commander, then by the head of SEU, and eventually by Chief Anderson. (Doc. No. 54-55, 173). MNPD also made a determination on each private security work opportunity to access whether it was "worthwhile." (Id. at 173-74). As a result, it became more difficult to get Form 150 approvals, and private security companies began to rely more on non-MNPD officers. (Id. at 78-80, 87-90).

12. Third, the five-year transition plan also changed the operation of the Special Events Committee. No longer were private security companies, like Plaintiffs, invited by Metro **[*9]** to attend meetings. Instead, they had to be invited by special event planners to discuss individual projects. (Id. at 69-70, 195-97; Doc. No. 140 at 140-41). The most

significant change occurred when MNPD began promoting itself to special event planners to provide private security services for their events. (Doc. No. 138 at 176, 196; Doc. No. 139 at 71-72). As Michael Woods of Plaintiff APS conceded, MNPD was merely "let[ting] [event organizers] know they had other options." (Doc. No. 138 at 198).

13. Between 2013 and 2018, Plaintiffs, and other private security companies, felt the impact of MNPD entrance into the private security market. In their case-in-chief, Plaintiffs painted an impressive picture through multiple private security companies who told stories of losing business to MNPD. According to them, MNPD used the Special Events Committee, control over the availability of off-duty MNPD offers through the Form 150 process, the parade permit process and the approval process for road closure to systemically take business that previously went to Plaintiffs and other private security companies. A few examples illustrate MNPD's takeover of the customer base for the private security **[*10]** market:

- For many years, Patrick McKellar and his company provided security for the annual Iroquois Steeplechase event, until he lost that work to MNPD.
- George H. Curry, Jr. provided security services for all events at the Ryman Auditorium and the Grand Ole Opry House until he lost that work to Ryman's in-house security force in 2018 because he could no longer employ MNPD officers.
- Doug Jones provided security services for TriStar Hospitals, which are part of the HCA family of companies. His contract approached 1 million dollars and was lost to MNPD in 2018.
- Also in 2018, Chaz Vetter, owner of Premier Protective Services, Inc., provided security services to the State Fairgrounds for at least six years until he lost that work to MNPD.
- Comprehensive, owned by Loyd Poteete, lost its customer, the Nashville Pride Festival to MNPD, which provided security services for free.
- APS, owned by Michael Woods, lost work for the Nashville Pride Festival and the Nashville Christmas Parade to MNPD.

Completion of the Five-Year Transition Plan

14. On March 2, 2018 - almost exactly five years after announcing the five-year transition plan - Chief Anderson issued a memorandum ending MNPD's approval **[*11]** of MNPD officers' requests to perform off-duty work for private security companies. (Ex. 6; Doc. No. 138 at 60-61; Doc. No. 139 at 14). This effectively ended Plaintiffs' ability to hire off-duty MNPD officers to staff their private security services contracts. Now, Plaintiffs had to use non-MNPD officers. (Doc. No. 138 at 90-94).

15. As a result, SEU now "operate[s] the same way" as a private security company and "provide[s] businesses or individuals an opportunity to hire [MNPD] police officers" for private security services. (Doc. No. 140 at 36, 113). SEU has been very successful. (Doc. No. 139 at 47, 49, 81-82). MNPD has obtained a number of significant contracts previously held by Plaintiffs and other private security companies. In some cases, MNPD even offered free or discounted private security services to the public. (Doc. No. 138 at 28-32; 178-80).

16. MNPD rates for private security services reflects its entrance into, and competition within, the private security market. From 2009 until 2013, Metro's range for hourly services ranged from $66.00 per hour to $116.00 per hour, much higher than the private security companies. Ex. 61 at 1. But in 2013, when MNPD began to implement **[*12]** Chief Anderson's five-year transition plan, MNPD lowered the range to $40.00 per hour to $75.00 per hour. (Id.) There was a small increase in 2017 to a range of $44.50 per hour to $79.50 per hour, encompassing completion of the five-year plan in 2018. (Id. at 2.) Finally, in 2020 to 2021, after MNPD had obtained many of Plaintiffs' and other private security companies' clients, the range had a modest increase to $46.50 per hour to $79.50 per hour. (Id.)

Expert Opinions

17. At trial, the Court qualified two witnesses as experts under *Federal Rule of Evidence 702*: Dr. Gilbert Mathis, Professor Emeritus of Economics at Murray State University, on behalf of Plaintiffs (Ex. 40), Dr. Charles L. Baum II, Professor of Economics at Middle Tennessee State University, a rebuttal expert on behalf of Defendant. (Ex. 60).

Having considered the testimony of both, the Court gives little weight to Dr. Mathis's opinions because the Court finds them to be flawed due to incomplete analysis.

18. Dr. Mathis opined that MNPD was anticompetitive when it reduced the available labor pool needed by Plaintiffs and other private security companies to compete in the private security services market. According to Dr. Mathis, MNPD increased market **[*13]** power and decreased competition when it restricted off-duty MNPD officers from working for Plaintiffs.

19. The Court concludes that Dr. Mathis's opinion is unreliable. (Doc. No. 139 at 136 47, 176-79). First, Dr. Mathis analyzed the wrong market. As credibly explained by Dr. Baum, Dr. Mathis failed to analyze the sell-side market for the supply of private security services that is the basis of Plaintiffs' claim. (Doc. No. 139 at 152). Indeed, contrary to Plaintiffs' own legal arguments, Dr. Mathis insisted that this case concerns buyers, not sellers. (Doc. No. 138 at 120 21). Dr. Mathis compounded this error by rejecting, contrary to the evidence at trial, that the "buyers" relevant to private security services are special event planners and organizers. Instead, Dr. Mathis devised a market in which the buyers are private security companies and the product is off-duty officers employed by law enforcement agencies. (Id. at 112, 121-22; Ex. 40 at 1-3). Because his "labor pool" market focus bears no resemblance to the private security service supply market at issue in this case, Dr. Baum concluded that Dr. Mathis failed to demonstrate that MNPD had market power. (Doc. No. 139 at 133, 137-38). **[*14]** The Court agrees that the labor pool market analysis offers little insight into MNPD's alleged anticompetitive behavior in the supply-side security service market.

20. Even if the labor pool market analysis were relevant, Dr. Mathis used untenable assumptions that undercut his conclusions. In particular, Dr. Mathis did not include all available off-duty officers such as non-POST officers, retired POST officers, Tennessee Highway Patrol officers, and officers in nearby counties. (Id. at 136-47, 190-91). His contrary assumptions are wholly unsupported by the evidence at trial. Rather, the evidence at trial establishes that private security companies routinely hire non-POST officers, retired POST officers, THP officers, and POST officers from law enforcement agencies in geographically distant counties, including as far as Alabama. (Doc. No. 138 at 17-22, 26, 58, 87, 90-91, 163, 191; Doc. No. 139 at 100; Doc. No. 140 at 144). Moreover, Dr. Mathis acknowledged making no attempt to ascertain how many MNPD officers are willing or able to work for private security companies. (Doc. No. 138 at 127 29). Indeed, Dr. Mathis conceded at trial that he did not consider much of the available information **[*15]** about private security companies' labor force; that it was reasonable to consider such data; and that correcting his assumptions with such data would alter his conclusions. (Id. at 114; 118-20; 125-30).

21. The HHI value calculated by Dr. Mathis is also unreliable. The HHI, typically used to evaluate a market in a merger case, has more limited utility in a *Section 2* case concerned with the market power of a single firm. Moreover, Dr. Mathis's method for calculating the HHI value likely overstated the results. Again, as Dr. Baum credibly explained, Dr. Mathis considered all of the POST officers in five counties as one "unit," instead of following standard principles and squaring the shares of the employers that supply POST officers in each county. (Doc. No. 139 at 176-83). "[L]umping all the firms in a county together and consider[ing] that to be one entity" makes the labor pool "seem way more concentrated than it really is." (Id.)

22. Finally, Dr. Mathis assumes that the "reasonable available" labor pool for private security companies includes MNPD, but he concedes that MNPD is not obligated to make its officers available to private security companies *at all*. (Doc. No. 138 at 136-37). In rebuttal, **[*16]** Dr. Baum stressed that Dr. Mathis failed to acknowledge that "there is no economic theory . . . that says it's somehow anticompetitive for a company to not allow its workers to work for another company." (Doc. No. 139 at 135-36). Dr. Mathis compounded this error by failing to ever consider the stated purposes for Chief Anderson's MNPD secondary employment transition plan. (Doc. No. 138 at 140). As a result, the labor pool market analysis entirely fails to take into account MNPD's alternate reasons for limiting the outside work of its officers, including "provid[ing] better security and control[ling] MNPD's public image." (Doc. No. 139 at 168, 187).

CONCLUSIONS OF LAW

***Antitrust Law* and the Sherman Act**

1. The antitrust laws protect "competition, not competitors." *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. To violate the Sherman Act, a firm must engage in anticompetitive conduct "designed to destroy competition, not just to eliminate a competitor." *Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 823 (6th Cir. 1982)*. Congress authorized Sherman Act scrutiny of a single firm only when the firm poses a danger of monopolization. This strict focus "reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. *Section 2* thus prohibits only monopolizing, attempting **[*17]** to monopolize, or conspiring with others to monopolize, commerce.[2] *15 U.S.C. § 2*; *Superior Prod. P'ship v. Gordon Auto Body Parts Co., 784 F.3d 311, 318 (6th Cir. 2015)*.

2. To prove monopolization, a plaintiff must prove that a firm: (1) "possess[ed] monopoly power in a relevant market"; (2) "willful[ly] acqui[red], maint[ained], or use[d] [ ] that power by anti-competitive or exclusionary means as opposed to 'growth or development resulting from a superior product, business acumen, or historic accident,'" *Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 782 (6th Cir. 2002)* (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595-96, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*); and (3) had a general intent to exclude others from the market. *Superior Prod. P'ship, 784 F.3d at 319* (quoting *Conwood, 290 F.3d at 782*).

3. To prove attempted monopolization, a plaintiff must prove that a firm: (1) "with a dangerous probability of success, engage[d] in anti-competitive practices the specific design of which [was] to build a monopoly or exclude or destroy competition"; and (2) had a "specific intent to destroy competition or build a monopoly."[3] *Conwood, 290 F.3d at 782* (quoting *Smith v. N. Mich. Hosps., Inc., 703 F.2d 942, 954 (6th Cir. 1983)*); *Superior Prod. P'ship, 784 F.3d at 319*; *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1431-32 (6th Cir. 1990)*. To satisfy the "dangerous probability of success" element, a firm must demonstrably "possess market strength that approaches monopoly power." *Langenderfer, 917 F.2d at 1431-32*; *Tarrant Serv. Agency, Inc. v. Am. Standard, Inc., 12 F.3d 609, 615 (6th Cir. 1993)*.

4. Consideration of every *Section 2* claim begins with two threshold issues: (1) the definition of "the relevant product and geographic markets" in which the plaintiffs compete with the defendant, and (2) whether the defendant, **[*18]** "in fact, possesses monopoly power." *Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917, 932 (6th Cir. 2005)* (quoting *Conwood, 290 F.3d at 782*); see also *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; *Hand v. Cent. Transp., Inc., 779 F.2d 8, 11 (6th Cir. 1985)*.

5. The proof at trial established, by a preponderance of the evidence, that Plaintiffs and other private security companies primarily used full-time MNPD officers and other law enforcement officers to supply the labor necessary to staff their for-profit companies providing security services to the public. They relied greatly upon MNPD. Their business model worked well because MNPD hired, trained, paid, and controlled their labor source with no direct costs to Plaintiffs. Then, in 2013, MNPD changed its administration of its employees. MNPD decided that more management and control was needed to maintain MNPD standards when its employees engaged in off-duty secondary employment. Recognizing that some MNPD officers wanted and needed part-time work for additional pay, MNPD entered the private security services market using its employees. Plaintiffs' claims that MNPD's

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[2] The Clayton Act provides the vehicle to sue for redress under *Section 2*. *Section 16* of the Clayton Act provides in part that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws[.]" *15 U.S.C. § 26*.

[3] Specific intent may be inferred from evidence of anticompetitive conduct, *Langenderfer, 917 F.2d at 1432*, and courts have found "[i]mproper exclusion . . . is always deliberately intended." *Spirit Airlines v. NW Airlines, Inc., 431 F.3d 917, 932 (6th Cir. 2005)*(citing *Aspen Skiing, 472 U.S. at 603*).

decision to compete with Plaintiffs is a violation of the antitrust laws is fundamentally flawed. Nothing in *Section 2 of the Sherman Act* requires MNPD to make its employees available to a for-profit company. Nothing in *Section 2 of the Sherman Act* requires MNPD to refrain from competing against Plaintiffs in the private **[*19]** security market. Nothing in *Section 2 of the Sherman Act* makes illegal MNPD decision to compete against Plaintiff. And, certainly nothing in *Section 2 of the Sherman Act* requires MNPD to help its competition once MNPD enters the market. For the reasons that follow, there is no violation of *Section 2 of the Sherman Act* in this case.

Market Definition

6. Plaintiffs must first accurately define the relevant market in which they compete with MNPD. *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 388 F.3d 955, 962 (6th Cir. 2004)*; see also *In re Se. Milk Antitrust Litig., 801 F. Supp. 2d 705, 724 (E.D. Tenn. 2011)*. The relevant market consists of two components: (1) product or service market, and (2) geographic market. *Brown Shoe, 370 U.S. at 324*; *Spirit Airlines, 431 F.3d at 932-33*; *In re Se. Milk, 801 F. Supp. 2d at 724*. Here, by a preponderance of the evidence, it is apparent that Plaintiffs, MNPD, and other private security companies compete primarily in the Nashville, Davidson County, Tennessee market in the private security market.

7. Plaintiffs contend that the appropriate service market is the supply of private security services "that require POST-commissioned officers." (Doc. No. 132 at 2; Doc. No. 145 at ¶ 206). However, Plaintiffs have not proven this narrow definition by a preponderance of the evidence. First, Plaintiffs have offered no antitrust analysis to support the definition. Dr. Mathis disagreed with the definition entirely and offered no relevant analysis of *any* supply market. And Plaintiffs presented no **[*20]** qualitative information to support the definition (e.g., data regarding the number and size of market participants; specific services supplied in the market; cross-elasticity; firms that have left the market; firms that could enter the market; barriers to entry, etc.) Indeed, Dr. Baum credibly opined that Plaintiffs did not even collect the appropriate data to analyze the supply market. (Doc. No. 139 at 139, 152).

Monopoly Power

8. The Court next considers the "critical factor" of whether MNPD has monopoly power in the relevant market. *Byars v. Bluff City News Co., 609 F.2d 843, 850 (6th Cir. 1979)* (citing *American Tobacco Co. v. United States, 328 U.S. 781, 813-14, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*). A single seller has monopoly power when it is able to raise prices or exclude competition when it desires to do so. *Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 464, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (quoting *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)*); see also *E.I. du Pont, 351 U.S. at 391*.

9. "The existence of [monopoly] power ordinarily is inferred from the seller's possession of a predominant share of the [relevant] market." *Spirit Airlines, 431 F.3d at 935* (quoting *Eastman Kodak, 504 U.S. at 464*). Although *Section 2* does not contain a specific percentage of market share that triggers an inference of monopoly power, courts have adopted a standard that is "very high." *In re Se. Milk, 801 F. Supp. 2d at 725* (citing *Smith Wholesale Co., Inc. v. Philip Morris USA, Inc., 219 F. App'x 398, 409 (6th Cir. 2007)*). In particular, the Sixth Circuit typically infers monopoly power "where the market share is *75-80% or greater*." *Byars, 609 F.2d at 850* (emphasis added). The Sixth Circuit has also endorsed Judge Learned **[*21]** Hand's "classic explanation" of market share sufficient to constitute monopoly power: "over ninety . . . percentage [market share] is enough to constitute a monopoly; it is *doubtful whether sixty or sixty-four percent would be enough*; and certainly thirty-three percent is not." *Spirit Airlines, 431 F.3d at 935* (emphasis added) (quoting *United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945)*).

10. The Sixth Circuit has also taken a demanding approach to whether a plaintiff has demonstrated market share "approach[ing] monopoly power" sufficient to satisfy the "dangerous probability of success" element of an attempted monopolization claim. *Langenderfer, 917 F.2d at 1431-32*; *Tarrant, 12 F.3d at 615*. Twice, the court has held that a

market share between 30 and 40 percent was insufficient evidence that a firm had even the capacity to monopolize. See *Richter, 691 F.2d at 826*; *Langenderfer, 917 F.2d at 1431*.

11. Plaintiffs have not established MNPD's market share. As discussed above, Dr. Mathis conducted a "buy-side" study of a "reasonable labor pool" that offers no insight into MNPD's share of the relevant sell-side market. Moreover, even if Dr. Mathis's labor pool analysis were relevant and reliable, it is insufficient to demonstrate monopoly power because MNPD's "share" is below the high threshold required under Section 2. *Byars, 609 F.2d at 850*. Indeed, Dr. Mathis implicitly acknowledged this shortfall **[*22]** by concluding that MNPD has only "considerable market power," not *monopoly* power. (See Ex. 40 at 3-4). Finally, Plaintiffs' anecdotal evidence at trial concerning MNPD's performance in the relevant market does not alone support a finding, of monopoly power. Accordingly, Plaintiffs have failed to prove, by a preponderance of the evidence, that MNPD possesses sufficient market share for the Court to infer the existence of monopoly power in the relevant market.

Anticompetitive Conduct

12. Even if Plaintiffs had met their burden regarding monopoly power in the relevant market, their *Section 2* claims still fail because Plaintiffs have not proven that MNPD engaged in anticompetitive conduct. There is insufficient proof that MNPD "willful[ly] acqui[red], maint[ained], or use[d] [monopoly] power by anti-competitive or exclusionary means as opposed to 'growth or development resulting from a superior product, business acumen, or historic accident,'" or "engage[d] in anti-competitive practices the specific design of which [was] to build a monopoly or exclude or destroy competition." *Conwood, 290 F.3d at 782* (quoting *Aspen Skiing, 472 U.S. at 595-96* and *Smith, 703 F.2d at 954*); see also *Superior Prod. P'ship, 784 F.3d at 319*. Neither have Plaintiffs proved that MNPD engaged in other anticompetitive behavior designed to **[*23]** destroy competition. See *Richter, 691 F.2d at 823* (explaining that anticompetitive conduct is "designed to destroy competition, not just to eliminate a competitor").

13. This Court does not find that Chief Anderson's five-year transition plan was intended to "destroy competition." His plan was largely inward-looking and concerned MNPD and MNPD officers. (See Ex. 68). Chief Anderson outlined specific and credible business reasons and police powers for the transition plan, including that MNPD sought better control over its own officers; better management of its reputation; limitation of complaints; improved training and risk management; and a better ability to provide for the public safety. Likewise, Plaintiffs offered insufficient evidence that changes to the Special Events Committee meetings were intended to "destroy competition." In short, Plaintiffs have not established, by a preponderance of the evidence, MNPD's pursuit of contracts for MNPD officers was anything other than vigorous competition upon completion of the transition plan. See *Richter, 691 F.2d at 823* (observing that an "attempt to succeed in business" is not punishable under the Sherman Act).

CONCLUSION

For these reasons, the Court concludes that Plaintiffs have not **[*24]** established a basis for relief under *Section 2 of the Sherman Act*. The Clerk shall enter judgment for the Defendant.

An appropriate order will enter.

/s/ Waverly D. Crenshaw, Jr.

WAVERLY D. CRENSHAW, JR.

CHIEF UNITED STATES DISTRICT JUDGE

Winn-Dixie Stores, Inc. v. Eastern Mushroom Mktg. Coop.

United States District Court for the Eastern District of Pennsylvania

June 9, 2021, Decided; June 9, 2021, Filed

CIVIL ACTION No. 15-6480

Reporter

2021 U.S. Dist. LEXIS 107778 *; 2021 WL 2352016

WINN-DIXIE STORES, INC., et al., Plaintiffs, v. EASTERN MUSHROOM MARKETING COOPERATIVE, et al., Defendants.

Subsequent History: Vacated by, in part *Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., 2021 U.S. Dist. LEXIS 256445, 2021 WL 7967551 (E.D. Pa., Nov. 15, 2021)*

Prior History: *Winn-Dixie Stores, Inc. v. Eastern Mushroom Mktg. Coop., 2019 U.S. Dist. LEXIS 3091, 2019 WL 130535 (E.D. Pa., Jan. 8, 2019)*

Core Terms

regression, variables, mushroom, prices, damages, conspiracy, reliability, purchases, Plaintiffs', methodology, unreliable, Defendants', non-compete, overcharge, rebuttal, brand, farm, opt-out, estimate, Rebut, cases, premium, benchmark, closures, expert testimony, sales, expert opinion, expert report, scientific, motion to exclude

Counsel: **[*1]** For WINN-DIXIE STORES, INC., BI-LO HOLDINGS, LLC, Plaintiffs: KRISHNA B. NARINE, LEAD ATTORNEY, LAULETTA BIRNBAUM, PHILADELPHIA, PA; PATRICK J. AHERN, LEAD ATTORNEY, AHERN & ASSOCIATES PC, CHICAGO, IL.

For EASTERN MUSHROOM MARKETING COOPERATIVE, INC., ROBERT A. FERANTO, JR., trading as, BELLA MUSHROOM FARMS, BROWNSTONE MUSHROOM FARMS, INC., TO-JO FRESH MUSHROOMS, INC., COUNTRY FRESH MUSHROOM CO., FOREST MUSHROOM INC., GINO GASPARI & SONS, INC., GASPARI BROS. INC., KAOLIN MUSHROOM FARMS, INC., SOUTH MILL MUSHROOM SALES, INC., MODERN MUSHROOM FARMS, INC., SHER-ROCKEE MUSHROOM FARM, C & C CARRIAGE MUSHROOM CO., OAKSHIRE MUSHROOM FARM, INC., PHILLIPS MUSHROOM FARMS, INC., LOUIS M. MARSON, JR., INC., MONTEREY MUSHROOMS, INC., JOHN PIA, MICHAEL PIA, Defendants: H. LADDIE MONTAGUE , JR., MARTIN I. TWERSKY, BERGER MONTAGUE PC, Philadelphia, PA; JENNIFER E. MACNAUGHTON, City of Philadelphia Law Department, Appeals Unit, PHILADELPHIA, PA; WILLIAM A. DESTEFANO, STEVENS & LEE, PHILADELPHIA, PA.

For CARDILE MUSHROOMS, INC., Defendant: GARY J. MCCARTHY, LEAD ATTORNEY, MCCARTHY WEIDLER PC, PHILADELPHIA, PA.

For GIORGI MUSHROOM COMPANY, GIORGIO FOODS, INC., Defendants: JACQUELINE P. RUBIN, LEAD ATTORNEY, **[*2]** PAUL WEISS RIFKIND WHARTON GARRISON LLP, NEW YORK, NY; JOSHUA SARNER, SARNER & ASSOCIATES, PHILADELPHIA, PA.

For MARIO CUTONE MUSHROOM CO., INC., Defendant: JOEL I. FISHBEIN, LEAD ATTORNEY, LITCHFIELD CAVO LLP, PHILADELPHIA, PA.

For M.D. BASCIANI & SONS, INC., Defendant: DONNA M. ALBANI, LEAD ATTORNEY, LAW OFFICES OF DONNA M. ALBANI, GLEN MILLS, PA; THOMAS K. SCHINDLER, SCHINDLER LAW GROUP LLC, KENNETH SQUARE, PA.

For MUSHROOM ALLIANCE, INC., Defendant: MATTHEW J. BORGER, LEAD ATTORNEY, KLEHR HARRISON HARVEY BRANZBURG L.L.P., PHILADELPHIA, PA.

For CREEKSIDE MUSHROOMS LTD., Defendant: BARBARA T. SICALIDES, LEAD ATTORNEY, BENJAMIN J. EICHEL, PEPPER HAMILTON LLP, PHILADELPHIA, PA.

For JM FARMS, INC., Defendant: JASON S. TAYLOR, LEAD ATTORNEY, CONNER & WINTERS LLP, TULSA, OK; FRANCESCO P. TRAPANI, Kreher & Trapani LLP, Philadelphia, PA.

Judges: Berle M. Schiller, UNITED STATES DISTRICT JUDGE.

Opinion by: Berle M. Schiller

Opinion

MEMORANDUM

Schiller, J.

June 9, 2021

Defendants[1] move to exclude the testimony of Plaintiffs Winn-Dixie and Bi-Lo's proposed expert Dr. Keith Leffler, Ph.D. Dr. Leffler is an Emeritus Associate Professor of Economics who analyzed the impact of the anticompetitive acts of the Eastern Mushroom Marketing **[*3]** Cooperative, Inc. (EMMC) and estimated Plaintiffs' damages. Meanwhile, Plaintiffs move to exclude the testimony of Defendants' proposed rebuttal expert, Dr. Jesse David, Ph.D. Dr. David is an economist and President of a consulting firm that provides economic and financial analysis for litigation and public policy matters. He analyzed the opinions of Plaintiffs' expert Dr. Leffler and provided opinions regarding Plaintiffs' alleged damages. For the reasons that follow, the Court will largely permit the testimony of both experts; however, the Court will limit the damages period proposed by Dr. Leffler to fit the facts of the case.

I. FACTUAL BACKGROUND

This case is one in a related series of actions dealing with alleged price fixing and collusion in the market for fresh Agaricus mushrooms. In February 2006, WM Rosenstein & Sons Co. filed a class action complaint in this district alleging that the EMMC and its members and affiliates colluded to inflate the price of mushrooms by agreeing on minimum prices and by decommissioning various mushroom farms in order to reduce mushroom supply. The Rosenstein complaint was later consolidated with six similar class cases, and those putative class **[*4]** plaintiffs filed a consolidated class action complaint on November 13, 2007. The Plaintiff here, Winn-Dixie, along with co-plaintiff Bi-Lo, opted out of that consolidated class action, and initiated this matter in 2015. Plaintiffs' First Amended

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[1] The motion was joined by Eastern Mushroom Marketing Cooperative, Inc. (EMMC); Robert A. Feranto, Jr., t/a Bella Mushroom Farms; Brownstone Mushroom Farms, Inc.; To-Jo Fresh Mushrooms, Inc.; Country Fresh Mushroom Co.; Gino Gaspari & Sons, Inc.; Kaolin Mushroom Farms, Inc.; South Mill Mushroom Sales, Inc.; Modern Mushroom Farms, Inc.; Sher-rockee Mushroom Farm, LLC; C&C Carriage Mushroom Co.; Oakshire Mushroom Farm, Inc.; Phillips Mushroom Farms, Inc.; Louis M. Marson, Jr., Inc.; Monterey Mushrooms, Inc.; John Pia; and Forrest Mushrooms (collectively, "Certain Defendants"), Giorgi Mushroom Co.; Giorgio Foods, Inc.; Franklin Farms, Inc.; M. Cutone Mushroom Co., Inc.; J-M Farms, Inc.; and United Mushroom Farms Cooperative, Inc. While the motion was pending, claims against Franklin Organic Mushrooms, Inc. (f/k/a Franklin Farms, Inc.) and J-M Farms, Inc. were dismissed with prejudice.

Complaint is similar in all meaningful respects to the class action complaint that preceded it. Two other plaintiffs that had historically opted out of the class action—Publix Super Markets, Inc. and Giant Eagle, Inc.—also filed complaints, which were consolidated with the class action.

A. Expert Reports in the Historic Opt-Out Cases

The historic opt-out plaintiffs, Publix and Giant Eagle, retained Dr. Leffler as an expert witness. In the historic opt-out cases, Dr. Leffler's expert report analyzed the impact of EMMC's anticompetitive acts and estimated the damages the historic opt-out plaintiffs incurred using multiple regression analysis. *In re Mushroom Direct Purchaser Antitrust Litig., Civ A. No. 06-0620, 2015 U.S. Dist. LEXIS 119446, 2015 WL 5775600, at *1 (E.D. Pa. Aug. 5, 2015)*. "Multiple regression analysis is the comparing of variables to determine the influence that one variable, the independent or explanatory variable, has on another variable, the dependent variable." *Id.* Dr. Leffler ran two separate regression models, one for each historic opt-out plaintiff, which attempted **[*5]** to isolate and quantify the impact on mushroom prices caused by the EMMC's policies. *Id.*

The EMMC defendants in the historic opt-out cases retained Dr. David as a rebuttal expert. Dr. David analyzed the expert opinion of Dr. Leffler and opined on the reliability of Dr. Leffler's regression model. *Id.* Defendants in the historic opt-out cases filed a motion to exclude Dr. Leffler's testimony, pursuant to *Federal Rule of Evidence 702*, and the historic opt-out plaintiffs filed a motion to exclude Dr. David's testimony, pursuant to *Rules 702* and *403*. Following *Daubert* hearings for each expert witness, Judge O'Neill issued opinions denying both motions and permitting the proposed testimony of Drs. Leffler and David. The historic opt-out plaintiffs settled their cases before trial.

B. Expert Reports in this Action

In this action, Winn-Dixie and Bi-Lo have also retained Dr. Leffler to analyze the EMMC's market power and the impact of EMMC's anticompetitive acts. Dr. Leffler's initial report, dated July 2, 2020, offers opinions on these topics and estimates Plaintiffs' overcharge damages for mushroom purchases from EMMC members and affiliates. (Pls.' Ex. 18, Expert Report of Keith Leffler, Ph.D. [Leffler Rpt.].) The EMMC Defendants **[*6]** have once again retained Dr. David as a rebuttal expert. Dr. David's expert report, dated July 23, 2020, analyzes the findings of Dr. Leffler's initial report and provides opinions regarding his assessment of damages. (Pls.' Ex. 2, Expert Report of Jessie David, Ph.D. [David Rpt.].) Dr. Leffler responds to Dr. David's opinions in a rebuttal report dated August 13, 2020. (Pls.' Ex. 8, Rebuttal Report of Keith Leffler, Ph.D. [Leffler Rebut. Rpt.].) Now before the Court are the parties' respective motions to exclude the proposed expert testimony of Drs. Leffler and David. In addition to Dr. David's expert report, Defendants' motion also presents a Declaration of Dr. David, dated August 31, 2020, in which he offers additional critiques of Dr. Leffler's opinions. (Defs.' Ex. B [David Decl.].) Plaintiffs' Response in Opposition presents a declaration of Dr. Leffler, dated October 2, 2020, which responds to arguments raised in Defendants' motion to exclude his testimony. (Pls.' Opp'n Ex. 1 [Leffler Decl.].)

Dr. Leffler's initial expert report opines that: (1) there is a relevant economic market for the sale of fresh Agaricus mushrooms in the eastern United States; (2) the EMMC controlled a **[*7]** sufficient percentage of those mushroom sales to have market power; (3) the anticompetitive actions of the EMMC caused the average prices of fresh Agaricus mushrooms sold to Winn-Dixie and Bi-Lo to be higher than competitive levels; and (4) as a result of the actions of the EMMC, Winn-Dixie and Bi-Lo suffered overcharge damages in the prices they paid for mushrooms. (Leffler Rpt. ¶ 4.) Dr. Leffler estimates the overcharge with an econometric analysis of mushroom prices paid by Winn-Dixie and Bi-Lo, controlling for supply and demand conditions. (*Id.* ¶ 53.) He performed this analysis by creating a model of fresh Agaricus mushroom prices using a standard multiple regression analysis with fixed-effects.[2] (*Id.* ¶¶ 54-55.)

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[2] "[F]ixed effects allows the econometrician to identify statistical relationships after accounting for the...effects unique to subgroups...in the dependent variable. This can be important as these effects could influence the estimated relationship between

Based on this regression analysis, Dr. Leffler's report offers opinions about the overcharge damages Winn-Dixie and Bi-Lo incurred in their mushroom purchases. (*Id.* at p. 32, Table 2.) Dr. Leffler's initial expert report splits Winn-Dixie's damages into three distinct conspiracy periods: (1) February 2001 - July 2005; (2) August 2005 - June 2007; and (3) July 2007 - December 2010. (*Id.*) His rebuttal report slightly revises **[*8]** these conspiracy periods. The rebuttal report divides Winn-Dixie's damages into four conspiracy periods by separating the damages incurred from July 2007 to December 2010 by mushroom provider; it defines the third conspiracy period as Winn-Dixie's purchases from Oakshire, July 2007 - December 2010, and the fourth conspiracy period as Winn-Dixie's purchases from Modern, July 2010 - December 2010. (Leffler Rebut. Rpt. ¶ 14, Table 1.) Dr. Leffler opines that Winn-Dixie incurred overcharges of: (1) 2.9% for the first conspiracy period; (2) 5.3% for the second conspiracy period; and (3) 12% for the third and fourth conspiracy periods. (*Id.*)

Dr. David's expert report offers a variety of critiques of Dr. Leffler's opinions. His opinions can be broadly summarized as criticisms that Dr. Leffler's regression model double counts certain transactions, fails to control for key industry factors, and inappropriately relies on sales from non-EMMC members and anticompetitive conduct after 2005. (David Rpt. ¶¶ 54-80.) Dr. Leffler accepts Dr. David's first criticism concerning double-counted transactions and offers a revised opinion of total overcharge damages after removing those duplicative transactions. **[*9]** (Leffler Rebut. Rpt. ¶ 14, Table 1.) The rebuttal report responds to Dr. David's remaining criticisms by defending Dr. Leffler's original opinions.

Before turning to the merits of the motions, the Court will briefly summarize its other relevant opinions in this action, as these opinions are relevant to whether the proposed expert testimony fits the case.

C. The Court's Previous Decisions in this Action

On July 15, 2020, the Court denied Plaintiffs' motion for leave to file a Second Amended Complaint. (Document Nos. 280, 281.) Plaintiffs' First Amended Complaint alleges:

> [s]tarting on or about January 1, 2001 and continuing until at least through 2008, the EMMC...engaged in an overarching scheme to unlawfully fix the price of fresh Agaricus mushrooms in the United States by agreeing to set floor (minimum) prices for mushrooms and by agreeing to collectively fund and effectuate the purchase or lease of mushrooms farms for the express purpose of reducing output, removing existing available production capacity from the market and artificially raising prices.

(FAC ¶ 3.) Six days before the close of fact discovery, Plaintiffs sought leave to amend the complaint to allege that the conspiracy period **[*10]** continued through December 31, 2010 and that "as part of this scheme, beginning no later than October of 2005, the EMMC added a 'non-compete' policy whereby members agreed not to compete against another member so as to take business away from a member or reduce a member's profit margin." (Document No. 266, Ex. 1 ¶¶ 1, 3, 10.) The Court denied leave to amend the Complaint because Plaintiffs' delay in seeking to extend the conspiracy period and assert this new theory of antitrust liability was both prejudicial and undue. The Court also denied Plaintiffs' motion for reconsideration on this issue, or in the alternative, for clarification that Winn-Dixie could move at trial to conform the pleadings to the evidence, finding that *Rule 15(b)* was inapplicable because no objection to evidence or trial had yet occurred and Defendants had not consented to trial on a non-compete theory of liability. (Document No. 297.)

On September 1, 2020, the Court granted partial summary judgment to Defendants for Bi-Lo's claims for damages. (Document Nos. 298, 299.) The Court found that Bi-Lo was an indirect purchaser from the alleged conspiracy, and therefore, was not an injured party eligible to recover damages pursuant **[*11]** to *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. On May 12, 2021, the Court denied summary judgment on Winn-Dixie's claims for damages, finding that there was a genuine dispute of material fact as to whether Winn-Dixie can recover damages for its mushroom purchases from non-party, Oakshire Mushrooms Sales, LLC (OMS). (Document Nos. 347, 348.) Defendants' liability and Winn-Dixie's damages are outstanding issues to be resolved at trial.

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the dependent variable and other independent variables." ABA Section of ***Antitrust Law***, *Econometrics: Legal, Practical, and Technical Issues* § 5.B.1.a (2d ed. 2014).

II. STANDARD OF REVIEW

Federal Rule of Evidence 702 provides that a qualified expert witness may offer opinion testimony if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. In essence, "Rule 702 embodies three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability, and fit." Elcock v. Kmart Corp., 233 F.3d 734, 741 (3d Cir. 2000).

"*Daubert* holds that admissibility under Rule 702 is governed by Rule 104(a), which requires the judge to conduct preliminary factfinding, to make 'a preliminary assessment of whether the reasoning or methodology **[*12]** underlying the testimony is scientifically valid,'...." In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 743 (3d Cir. 1994) ("*Paoli II*") (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)). The burden is on the proponent to establish admissibility by a preponderance of the evidence. Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 418 (3d Cir. 1999). However, "[t]his does not mean that plaintiffs have to prove their case twice—they do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are *correct*, they only have to demonstrate by a preponderance of evidence that their opinions are reliable." Paoli II, 35 F.3d at 744. A "merits standard of correctness," is "a higher bar than what Rule 702 demands." Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 83 (3d Cir. 2017).

A court's focus in determining admissibility of an expert's testimony is on "principles and methodology, not on the conclusions generated by the principles and methodology." In re TMI Litig., 193 F.3d 613, 665 (3d Cir. 1999), amended, 199 F.3d 158 (3d Cir. 2000). "The test of admissibility is not whether a particular scientific opinion has the best foundation, or even whether the opinion is supported by the best methodology or unassailable research. Rather, the test is whether the 'particular opinion is based on valid reasoning and reliable methodology.'" *Id.* (quoting Kannankeril v. Terminix Int'l Inc., 128 F.3d 802, 806 (3d Cir. 1997)). However, a court must be mindful that, "the reliability analysis [required by *Daubert*] applies to all aspects of an expert's testimony: the **[*13]** methodology, the facts underlying the expert's opinion, [and] the link between the facts and the conclusion." ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 291 (3d Cir. 2012) (quoting Heller v. Shaw Indus., Inc., 167 F.3d 146, 155 (3d Cir.1999)) (alterations in original).

In addition to reliability, district courts must also assess Rule 702's independent requirement of "fit"—that the expert's opinion will help the trier of fact to understand the evidence or to determine a fact in issue. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). "Thus, even if an expert's proposed testimony constitutes scientific knowledge, his or her testimony will be excluded if it is not scientific knowledge *for purposes of the case*." Paoli II, 35 F.3d at 743.

III. DISCUSSION

Plaintiffs and Defendants each seek to exclude the testimony of the other's proposed expert. Neither side has challenged the experts' qualifications. The Court will first consider Defendants' motion to exclude Dr. Leffler's expert testimony on the grounds that his opinions are unreliable and not relevant to the claims. The Court concludes that Dr. Leffler's methodology is reliable, but some of his opinions will be excluded because they do not fit the facts of the case. Then the Court will consider and deny Plaintiffs' motion to exclude Dr. David's rebuttal expert testimony on the grounds that his opinions are untested, based upon unreliable **[*14]** methodology and data, and their probative value is substantially outweighed by its prejudicial effect.

A. Defendants' Motion to Preclude Dr. Leffler's Proposed Expert Testimony

Defendants argue that Dr. Leffler's proposed testimony should be excluded for two reasons. First, Defendants argue that Dr. Leffler's multiple regression analysis is flawed in multiple ways, and therefore, his methodology is unreliable. Second, Defendants argue that Dr. Leffler's opinions do not fit the facts of the case because he relies on damages that resulted from a non-compete theory of anticompetitive conduct. The Court will consider each of these arguments in turn.

Further, Defendants argue that Dr. Leffler's damages estimate does not fit the facts of the case because he relies upon indirect purchases for which there are no recoverable damages. (Defs.' Mem. in Supp. of Mot. Pursuant to *Fed. R. of Evid. 702* [Defs.' Mot.] at 6-9.) After Dr. Leffler produced his initial report, the Court ruled that Bi-Lo was an indirect purchaser, which means it is not entitled to recover damages. Therefore, the Court agrees that Dr. Leffler's damages estimate pertaining to Bi-Lo must be excluded because it will not help the trier of fact determine **[*15]** any fact in dispute.[3] However, this Court has already ruled that there is a disputed question of fact as to whether Winn-Dixie may recover damages for its purchase of mushrooms from non-party OMS, based on application of the control exception to the direct purchaser rule. Thus, the Court will not exclude any of Dr. Leffler's damages opinions for Winn-Dixie merely because they are premised on Winn-Dixie's purchases from OMS.

1. Reliability of Dr. Leffler's Multiple Regression Analysis

Dr. Leffler estimated the overcharge damages in this case using a multiple regression analysis with fixed-effects. (Leffler Rpt. ¶ 55.) A multiple regression model measures the impact of two or more independent variables—such as demand, production costs, or conspiratorial conduct—on a dependent variable. Here, Dr. Leffler's dependent variable is the price of fresh Agaricus mushrooms. The seven independent variables in his regression model are: (1) wage rates for farm workers; (2) the price of alfalfa hay in Pennsylvania; (3) the cost of electricity to industrial customers in Pennsylvania; (4) the cost of fuel oil in Pennsylvania; (5) personal income per capita in the states where Plaintiffs bought mushrooms; **[*16]** (6) consumption of fresh vegetables as a share of all food consumption at home; and (7) the volume of purchases of a particular mushroom product at a particular time. (Leffler Rpt. ¶ 54.) The model also includes fixed-effects variables of a conspiracy period indicator and mushroom product indicator.[4] (*Id.*)

"There is no dispute that when used properly multiple regression analysis is one of the mainstream tools in economic study and it is an accepted method of determining damages in antitrust litigation." *In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 486 (W.D. Pa. 1999)*; *see* *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1238 (3d Cir. 1993)* ("the scientific method used by the economists, multiple regression analysis, is reliable."). Defendants do not generally dispute that a multiple regression analysis is a proper methodology to estimate antitrust injury and overcharge damages. Instead, Defendants argue the particulars of Dr. Leffler's multiple regression model are flawed. Specifically, Defendants argue that Dr. Leffler's multiple regression analysis suffers from: (1) omitted control variable bias; (2) ineffective control variables; (3) over-fitting; (4) a limited benchmark period; and (5) counterintuitive results. Defendants made several of these same arguments when they sought to exclude Dr. Leffler's testimony **[*17]** in the historic opt-out cases. For many of the same reasons Judge O'Neill explained in his well-reasoned opinion, the Court is not persuaded that Defendants' criticisms of Dr. Leffler's regression model warrant exclusion of his testimony as unreliable. *See* *In re Mushroom, 2015 U.S. Dist. LEXIS 119446, 2015 WL 5775600 (E.D. Pa. Aug. 5, 2015)*.

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[3] In light of the Court's opinion that Bi-Lo is ineligible for overcharge damages, Dr. Leffler "re-estimated the regression analysis using only Winn-Dixie data[,]" and excluding Bi-Lo purchases. (Leffler Decl. ¶ 5.) The result was an increase to Winn-Dixie's overcharges that, according to Dr. Leffler, was not statistically significant and did not meaningfully change Dr. Leffler's opinions. (*Id.*)

[4] "Fixed-effects models often use dummy variables to measure the effect of interest, where a dummy variable is a variable that takes the value of 1 for observations in the subgroup, time period, or event of interest, and 0 for all other observations." ABA Section of ***Antitrust Law***, *supra*, § 5.B.1.a.

a. Omitted Control Variable Bias

Defendants argue that Dr. Leffler's regression model fails to include three distinct control variables, and therefore, is an unreliable methodology. Defendants argue that Dr. Leffler's model fails to account for: (1) the closing of certain mushroom farms; (2) the Dole brand mushroom sales price premium; and (3) price discounts pursuant to sales contracts.

The Court is unpersuaded by Defendants' arguments that Dr. Leffler's failure to account for these variables renders his testimony inadmissible. "[T]he omission of variables from a regression analysis may render the analysis less probative than it otherwise might be[,]" but, absent some other infirmity, "an analysis which accounts for the major factors" likely to influence the result is admissible evidence. *Bazemore v. Friday, 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)*. "Normally, failure to include variables will affect the analysis' probativeness, not its admissibility." *Id.* Still, the court in *Bazemore* noted, **[*18]** "[t]here may, of course, be some regressions so incomplete as to be inadmissible as irrelevant[.]" *Id. at 400 n.10*. In the context of price-fixing cases, other district courts have recognized that "[m]erely pointing to economic conditions that may affect the dependent variable is not enough to call into question the reliability of an econometric model." *Resco Prods., Inc. v. Bosai Mins. Grp., Civ. A. No. 06-235, 2015 U.S. Dist. LEXIS 124930, 2015 WL 5521768, at *5 (W.D. Pa. Sept. 18, 2015)* (quoting *In re Linerboard Antitrust Litig., 497 F. Supp. 2d 666, 678 (E.D. Pa. 2007)*); *accord* *In re Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348, 1365 (N.D. Ga. 2000)*. Rather, a party challenging a regression model's admissibility for omission of variables, "must introduce evidence to support its contention that the failure to include those variables would change the outcome of the analysis." *In re Indus. Silicon Antitrust Litig., Civ. A. No. 95-1131, 1998 U.S. Dist. LEXIS 20464, 1998 WL 1031507, at *3 (W.D. Pa. Oct. 13, 1998)*; *accord* *Resco, 2015 U.S. Dist. LEXIS 124930, 2015 WL 5521768, at *5, 10 (W.D. Pa. Sept. 18, 2015)*.

i. Farm Closures

Defendants argue first that among the methodological problems with Dr. Leffler's regression model is its failure to account for farm closings over his ten-year damages period. (Defs.' Mot. at 11.) Dr. David's expert report discusses various mushroom farm closures that occurred between 2000 and 2009 and opines that Dr. Leffler does not account for how these farm closures may have affected pricing since there are no variables in the model to control for farm closures. (*See* David Rpt. ¶¶ 17-21, 78.) But because Dr. David did not create or test his own regression model that included **[*19]** a control variable for farm closures, Defendants have not shown that inclusion of this variable would have changed the results of the regression analysis.

Dr. Leffler responds that changes in supply resulting from farm closures are the result of price fluctuation through the application of supply and demand curves, meaning that farm closures are the result of price decreases. (Leffler Rebut. Rpt. ¶ 32.) As a result, Dr. Leffler argues that farm closures are already accounted for in the regression model because they are an "endogenous" variable (*id.* p. 16 n.56), meaning that they are "a factor...driven by 'economically driven changes in supply' that are accounted for in his model." *In re Mushroom, 2015 U.S. Dist. LEXIS 119446, 2015 WL 5775600, at *4 n.2* (quoting Civ. A. No. 06-620, Document No. 664 at 38). Judge O'Neill previously analyzed this same critique in the historic opt-out cases and concluded that, "Dr. Leffler adequately established for purposes of the reliability inquiry that a separate control variable for farm closings is not necessary where such closings are driven by price pressure rather than some independent intervening event such as a natural disaster." *2015 U.S. Dist. LEXIS 119446, [WL] at *4*. Similarly, here, the Court finds that Defendants' argument concerning an omitted variable **[*20]** for farm closures goes to the ultimate probativeness of Dr. Leffler's regression model but does not render it so incomplete as to be irrelevant.

ii. Dole Brand Premium

Defendants also argue that the sales price premium for Dole brand mushrooms was not adequately accounted for in the regression analysis. (Defs.' Mot. at 9-10.) The Dole brand issue is unique to Winn-Dixie's purchases from

OMS and, therefore, was not relevant to Dr. Leffler's opinions for the historic opt-out plaintiffs. From 1999 through 2003, Winn-Dixie's mushroom suppliers were EMMC members Monterey and Modern. (Leffler Rpt. ¶ 35.) In 2004, Winn-Dixie began purchasing mushrooms from OMS, which became Winn-Dixie's only mushroom supplier through 2010. (*Id.*) Winn-Dixie signed a two-year sales agreement with OMS in 2005 (Pls.' Opp'n Ex. 6), and a three-year sales agreement with OMS in 2007. (Pls.' Opp'n Ex. 7.) OMS had an exclusive license to sell mushrooms under the Dole brand, and it purchased mushrooms from suppliers, including EMMC members Country Fresh Mushroom Co., South Mill Mushroom Sales, Inc., and Oakshire Mushroom Farm, Inc., to re-sell under the Dole brand. (*See* David Rpt. ¶ 35.) Therefore, Dr. Leffler's first **[*21]** conspiracy period for Winn-Dixie's mushroom purchases, between February 2001 and July 2005, includes some Dole brand purchases from OMS and other non-Dole brand purchases from Monterey or Modern. Dr. Leffler's second and third conspiracy periods are exclusively for Winn-Dixie's purchases from OMS pursuant to the 2005 and 2007 sales agreements. (Leffler Rpt. ¶ 54 n.127.)

Dr. David opines that Winn-Dixie may have paid OMS as much as a nine percent premium for Dole mushrooms compared to the prices it had previously paid for mushrooms from Monterey or Modern. (David Rpt. ¶ 79.) Dr. David bases this conclusion on the fact that OMS pays Dole a royalty of three percent of net sales for the use of the Dole brand, (*id.* ¶ 35 n.99), and OMS had increased freight costs of approximately six percent compared to Monterey or Modern. (*Id.* ¶ 35 n.103.) As a result, Dr. David states that the Dole premium "could explain most or all" of Dr. Leffler's alleged overcharges. (*Id.* ¶ 79.) Defendants argue that because Winn-Dixie's purchases of Dole brand mushroom began in 2004, all of those purchases occurred during the conspiracy conduct period (2001-2010), as opposed to the benchmark period (1999-2000). (David **[*22]** Decl. ¶ 3 n.5.) Therefore, Defendants argue Dr. Leffler's model cannot distinguish between the premium paid for Dole products and overcharges resulting from the alleged conspiracy. (David Rpt. ¶ 79.)

In response, Dr. Leffler argues that he adequately accounted for the Dole brand mushroom purchases because he included a Dole indicator variable in his product definition "using a fixed-effects methodology." (Leffler Rebut. Rpt. ¶ 31.) Dr. Leffler's regression model includes a set of 0/1 indicator variables for each type of mushroom product. (Leffler Rpt. ¶ 54.) Dr. Leffler applied a Dole indicator variable to approximately 15 percent of Winn-Dixie's purchases from OMS, depending on whether the name of the purchase product indicated it was a "Dole" product. (Leffler Decl. ¶ 2.) Dr. Leffler argues that his analysis,

> bases any Dole premium on differences in prices between Dole branded purchases and Monterey and Modern purchases in Conspiracy period 1. The overcharges in Conspiracy Periods 2 and 3 are then measured by increases in the prices of Dole branded mushrooms, given any premium, that are not explained by the supply and demand control variables.

(*Id.* ¶ 3.)

However, the parties dispute **[*23]** what proportion of OMS's sales to Winn-Dixie were Dole brand mushrooms. Defendants argue that all mushrooms Winn-Dixie purchased from OMS were Dole brand. (David Decl. ¶ 5.) As a result, Dr. David asserts that no Dole indicator variable could separate the Dole premium from alleged overcharges because any Dole indicator variable, "would be indistinguishable from...Dr. Leffler's second and third damages periods." (*Id.*) Defendants reference the sales agreements between Winn-Dixie and OMS to argue that all mushroom sales pursuant to those agreements were Dole brand, but they do not cite any specific provisions of those agreements stating that all mushrooms sold under the agreements were Dole brand. (Defs.' Mot. at 9 n.4.) A cursory review of the sales agreements demonstrates that they describe the products sold pursuant to the agreement as "Oakshire Dole Mushrooms" (Pls.' Opp'n Ex. 6), or refer to OMS as "Dole Mushrooms" (Pls.' Opp'n Ex. 7), and both agreements bear the "Dole" brand logo. Even so, Dr. Leffler argues that these agreements present no conclusive evidence that all OMS sales were Dole brand mushrooms. (Leffler Decl. ¶ 2 n.3.) Nevertheless, Dr. Leffler recreated the regression **[*24]** analysis labelling all OMS sales to Winn-Dixie as "Dole", and the result was to increase the overcharge by less than one percent, which, according to Dr. Leffler, is not statistically significant. (*Id.* ¶ 4.)

The Court concludes that Dr. Leffler's reliance on the description of "Dole" in the product name to apply a Dole indicator variable to only a fraction of Winn-Dixie's purchases from OMS contains sufficient factual basis in the record. "A party confronted with an adverse expert witness who has sufficient, though perhaps not overwhelming, facts and assumptions as the basis for his opinion can highlight those weaknesses through effective cross-examination." [Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408, 414 (3d Cir. 2002)](). The contested issue of whether all of Winn-Dixie's purchases from OMS were Dole mushrooms should appropriately be resolved by the trier of fact, so the Court will not exclude Dr. Leffler's testimony on this basis. Dr. Leffler has also articulated how his regression model took the Dole premium into account, despite there being no Dole mushroom purchases during the benchmark period. (Leffler Decl. ¶ 3.) Defendants have not responded to this argument or offered any suggestion of how Dr. Leffler should have altered his regression **[*25]** analysis to take the Dole premium into account. Moreover, because Dr. David did not create or test his own regression model that included a control variable for the Dole premium, Defendants have not shown that inclusion of this variable would have changed the results of the regression analysis. The Court finds the alleged omission or ineffectiveness of the Dole premium variable goes to the regression model's probative value, not its admissibility, since it does not render the model so incomplete as to be irrelevant. Dr. Leffler's argument concerning the Dole premium will be subject to cross-examination at trial.

iii. Price Discounts

The final control variable Dr. David contends is missing from Dr. Leffler's regression model reflects contract price discounts. (David Rpt. ¶ 77.) Winn-Dixie's sales agreements with OMS set purchase prices, but the agreements also provided for a certain quantity of purchases at a discounted price. (*Id.* ¶ 39; Pls.' Opp'n Ex. 6-7.) Dr. David argues that Winn-Dixie purchased significant quantities of mushrooms at discounted rates but there is not a control variable for this feature of the transactions in Dr. Leffler's regression model. (David Rpt. ¶ 77.) Dr. **[*26]** Leffler responds that because he aggregates the data at a monthly level, his model adequately captures the variation that results from contract discounting. (Leffler. Rebut. Rpt. ¶ 20 n.29; *see* Leffler Rpt. ¶ 54.) As with farm closures and the Dole premium, the Court is not persuaded that the absence of a control variable for contract price discounts renders Dr. Leffler's methodology unreliable. Defendants may cross examine Dr. Leffler concerning this alleged deficiency at trial.

b. Ineffective Control Variables

Next, Defendants argue Dr. Leffler's methodology is unreliable because the coefficients on the conspiracy-period control variables indicate that the regression model is flawed. "Coefficients in multiple regression models indicate the degree of correlation between the dependent variable and each independent variable." ABA Section of ***Antitrust Law***, *supra*, Appendix and Glossary.C.3. Dr. David explains that, ordinarily, economic theory would predict that prices should be correlated with production cost—meaning that if costs increase, prices should increase, if all other factors are held constant. (David Rpt. ¶ 76.) Dr. David states that both of Dr. Leffler's variables for heating **[*27]** oil costs (contemporaneous and lagged) show a negative correlation with price, and only five of Dr. Leffler's eleven variables have coefficients that demonstrate statistically significant results, which Dr. David opines indicates that the regression model is not reliable. (*Id.*)

In response, Dr. Leffler contends that there are only seven total supply and demand variables, since contemporaneous and lagged values for the same variable are combined. (Leffler Rebut. Rpt. ¶ 29 n.50.) According to Dr. Leffler, five of the seven variables in his model affect Winn-Dixie's prices as predicted by economic theory; the exceptions with negative coefficients are the costs of hay and heating oil. (*Id.* ¶ 29.) Dr. Leffler explains that excluding either of these variables with a negative coefficient does not significantly change the outcome of the model, so it is unlikely that their inclusion renders the model unreliable. (*Id.* ¶¶ 29 n.52, 30 n.53.) He further states that an increase in the totality of his cost variables resulted in a statistically significant increase in prices, which validates the reliability of his model. (*Id.* ¶ 30; *see* Leffler Rpt. ¶ 55.)

Finally, Dr. Leffler explains that the cost **[*28]** variables of heating oil and electricity are highly correlated with one another, which can result in a phenomenon known as multicollinearity. (Leffler Rebut. Rpt. ¶ 30.) According to one treatise on regression models, "multicollinearity does not indicate a failure of the model. Instead, it reflects the fact that there is insufficient independent variation in the variables included in the data set." ABA Section of ***Antitrust***

Law, *supra*, § 6.C.2.b. Dr. David argues that Dr. Leffler "did not demonstrate...that multicollinearity was the cause of the non-sensical results...." (David Rpt. ¶ 76 n.153.)

Judge O'Neill assessed many of these same arguments in the historic opt-out cases. There, Judge O'Neill found that the cost control variables Dr. Leffler had chosen had "at least a logical relationship to mushroom prices[,]" and as a result, Dr. Leffler had shown that "his model is not equivalent to one that functionally has no cost control variables at all...." *In re Mushroom, 2015 U.S. Dist. LEXIS 119446, 2015 WL 5775600, at *5*. As a result, in the historic opt-out cases, Dr. Leffler's choice of cost control variables, including electricity, heating fuel, hay, and labor—which are many of the same control variables Dr. Leffler used in his regression model in **[*29]** this case (Leffler Rpt. ¶ 54)—did not present a reason to exclude his regression model. *In re Mushroom, 2015 U.S. Dist. LEXIS 119446, 2015 WL 5775600, at *5*. Judge O'Neill noted, "[w]hile there may be questions as to the probativeness of Dr. Leffler's damages models, they can be subjected to vigorous cross-examination at trial." *Id.* The Court agrees with this sound reasoning and will not exclude Dr. Leffler's model because of his choice of cost control variables or the resulting negative coefficients for the cost of heating oil or hay. For purposes of the *Daubert* analysis, Dr. Leffler has adequately shown that his conspiracy-period control variables create a reliable multiple regression model.

c. Over-fitting

Defendants next argue that Dr. Leffler's use of a multi-variable regression analysis is an inappropriate methodology because it suffers from over-fitting. Dr. David describes "over-fitting" as a violation of a cardinal rule in econometrics that "the number of independent observations should be substantially more than the number of independent variables for a regression analysis to be reliable." (David Rpt. ¶ 73 (citing Frank E. Harrell, *Regression Modeling Strategies* (2013).) Here, Dr. David argues that Dr. Leffler's regression model overfits because **[*30]** it incorporates far fewer price observations than it initially appears to include. The regression model "treats the average price for each product in a given month as the unit of observation, and further treats consecutive months as independent observations." (*Id.*) However, Dr. David argues that prices for Winn-Dixie's purchases did not vary monthly because they were negotiated according to contracts with OMS in 2004, 2005, and 2007. (*Id.*) For Winn-Dixie's purchases from other EMMC members Monterey and Modern, Dr. David similarly claims that these prices were negotiated for one-year periods. (*Id.* ¶¶ 34, 73; *see id.* ¶ 39.) Therefore, Defendants argue, Winn-Dixie's purchase prices on a consecutive monthly basis were not independent observations, "rather the data indicate that there were no more than approximately ten unique price observations for each product purchased by Winn-Dixie...." (*Id.*¶ 73.) Defendants argue Winn-Dixie's price data is too limited to generate valid results because Dr. Leffler's regression model uses fourteen independent variables,[5] which is not substantially fewer than the number of price observations.

Dr. Leffler disagrees with Defendants' factual premises and methodological **[*31]** argument. He states that Winn-Dixie purchased mushrooms at 79 unique prices for sliced products and 75 unique prices for whole mushrooms. (Leffler Rebut. Rpt. ¶ 19.) Moreover, Dr. Leffler explains that his use of the fixed-effects methodology with an indicator variable for each type of product means that the independent variable coefficients in his regression are based on estimates of price variation within each product. (*Id.* ¶ 20.)

Based on this explanation, the Court concludes that Dr. Leffler has provided good grounds for his use of average monthly prices, which should be tested in the adversarial process. While Dr. David criticizes that there are only "ten unique price observations *for each product*[,]" (David Rpt. ¶ 73 (emphasis added)), he fails to consider how many total products are included in the regression. Nor does he explain why Dr. Leffler's fixed-effects methodology does not resolve this concern of over-fitting. Moreover, the factual dispute between the experts of how many unique price observations are in the relevant data should be appropriately resolved by the factfinder. Thus, even if Defendants' over-fitting critique is a potential methodological flaw, such a flaw **[*32]** should go to the probativeness of Dr. Leffler's testimony but does not render the regression model unreliable. *See In re Urethane Antitrust Litig., 166 F.*

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[5] Dr. Leffler states that his model uses only seven variables, since when a contemporaneous and lagged value of the same variable are included, the sum of those coefficients are the expected sign for that variable. (Leffler Rebut. Rpt. ¶ 29 n.50.)

Supp. 3d 501, 505-06 (D.N.J. 2016). In sum, Defendants' arguments concerning over-fitting can be addressed on cross-examination.

d. Limited Benchmark Period

Defendants next argue that Dr. Leffler's regression model is unreliable because he has attempted to model a ten-year period of alleged conspiracy using only two years of pre-conspiracy data as a benchmark. (David Rpt. ¶ 74.) Dr. Leffler's regression model assesses data from January 1999 through December 2010. (Leffler Rpt. ¶ 51.) The data for January 1999 through January 2001 reflects a competitive benchmark period, whereas the data for February 2001 through December 2010 is assigned to one of the conspiracy periods. (*See id.* ¶ 54.) Dr. Leffler explains that his benchmark period was only two years because this was the only data available for his analysis, but even so, he found statistically significant overcharges despite these limitations in the data. (Leffler Rebut. Rpt. ¶ 21.) Dr. Leffler performed additional analysis to confirm that the relationship between cost variables and price did not change between the benchmark and conspiracy periods, and **[*33]** his demand variables did not show a statistically significant difference between the coefficients in the benchmark and conspiracy periods (with the exception of one conspiracy period for the fresh vegetable consumption variable). (*Id.* ¶ 22.) He argues these results prove the reliability of the two-year benchmark period in his model.

Dr. David states that practitioners generally recommend a benchmark period of similar length to the treatment period, and, as a result, Dr. Leffler's benchmark period is unreliable. (David Rpt. ¶ 74.) Dr. David explains that in situations with a disproportionately short benchmark period, "if market conditions change over time, the model may not be able to accurately predict the relationship between the independent and dependent variables, leading again to unreliable results." (*Id.*) However, Dr. David has not pointed to any specific market conditions that changed over the course of the conspiracy period which would render Dr. Leffler's model unreliable. In light of Dr. Leffler's empirical assessments described above, Defendants' speculative criticism is not sufficient to justify exclusion of Dr. Leffler's regression model as an unreliable methodology.

*e. Counterintuitive **[*34]** Results*

Finally, Defendants argue that "[t]he lack of reliability of Dr. Leffler's approach is evident from a straightforward examination of his results." (David Rpt. ¶ 75.) Specifically, Defendants point to Dr. Leffler's estimates that the percentage of overcharges increased in each consecutive conspiracy period, as follows: (1) 2.9% for February 2001-July 2005; (2) 5.3% for August 2005 - June 2007; and (3) 12% for July 2007 - December 2010. (*See* Leffler Rebut. Rpt. ¶ 14, Table 1.) Defendants argue that these overcharges are counterintuitive, since Dr. Leffler's "highest overcharges are found at the end of [the conspiracy] period...a time during which the EMMC's minimum pricing requirements had been eliminated and the EMMC's membership controlled less than half of the relevant market...." (David Rpt. ¶ 75; *see id.* ¶ 65.)

It bears remembering that a court's focus in determining admissibility of an expert's testimony is on "principles and methodology, not on the conclusions generated by the principles and methodology." In re TMI Litig., 193 F.3d at 665 (3d Cir. 1999). Indeed, Judge O'Neill considered and rejected this argument in the historic opt-out cases for precisely this reason, finding that "[this] argument is not consistent with **[*35]** the legal standard on *Daubert*...." In re Mushroom, 2015 U.S. Dist. LEXIS 119446, 2015 WL 5775600, at *7 (citing In re TMI Litig., 193 F.3d at 665). This Court agrees with Judge O'Neill that the counterintuitive trajectory of Dr. Leffler's overcharge estimates is not a sufficient reason to exclude the testimony as unreliable. Plaintiffs have established that Dr. Leffler's regression model, and its application to Winn-Dixie's purchase data, are based on good grounds and employ valid reasoning and reliable methodology. Therefore, the Court will not find Dr. Leffler's opinions inadmissible simply because Defendants deem his conclusions counterintuitive.[6]

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[6] Separately, Defendants also argue Dr. Leffler's model is unreliable because of his "failure to account for the substantially declining market share due to resignation of EMMC members...." (Defs.' Mot. at 10.) Specifically, Dr. David argues that because

2. Fit of Damages Premised on a Non-Compete Theory

In addition to reliability, district courts must also assess *Rule 702*'s independent requirement that the expert's opinion will help the trier of fact to understand the evidence or determine a fact in issue. *Fed. R. of Evid. 702(a)*; *see United States v. Bennett, 161 F.3d 171, 182 (3d Cir. 1998)* ("the trial judge has broad discretion to admit or exclude expert testimony, based upon whether it is helpful to the trial of fact."). This inquiry goes primarily to relevance and has been referred to as "fit" of the expert opinion. *Daubert, 509 U.S. at 591*. Here, Defendants argue Dr. Leffler's damages estimate does not fit the facts of the case because it is premised on an alleged non-compete **[*36]** agreement among EMMC members. (Defs.' Mot. at 10; Defs.' Reply in Supp. of Mot. Pursuant to *Fed. R. of Evid. 702* [Defs.' Reply] at 2-4.) The Court previously denied Plaintiffs' leave to amend the Complaint to assert a theory of liability premised on a non-compete agreement. (Document Nos. 280, 281, 297.) As a result, the Court agrees that any damages estimates premised on a non-compete agreement theory of liability, which was not pleaded, will not assist the trier of fact and, therefore, are not admissible. *Cf. In re Urethane, 166 F. Supp. 3d at 511 (D.N.J. 2016)* (declining to exclude damages for lack of fit because "the models here do not seek to measure damages stemming from an antirust impact that has been rejected or is otherwise no longer at issue."). However, the parties disagree as to what portions of Dr. Leffler's damages estimate, if any, are impacted by the Court's prior ruling denying leave to assert a non-compete theory of liability.

Dr. Leffler's initial report in this case described his opinions concerning the timeline of transition from the EMMC minimum pricing policy to a non-compete agreement.

> The EMMC's mandatory minimum pricing policies were in effect through August of 2005 when they were suspended by agreement of the members. Immediately **[*37]** after the suspension of the mandatory minimum pricing policy, the EMMC entered into a 'noncompete' period during which members agreed not to compete with another member's business.

(Leffler Rpt. ¶ 26 (footnote omitted).) Similarly, in the historic opt-out cases, Dr. Leffler opined that EMMC minimum pricing was suspended in 2005. At the *Daubert* hearing in the historic opt-out cases, Dr. Leffler testified that the *impact* of the "minimum pricing period" extended until June 2007, which was the end date of a sales contract one of the opt-out plaintiffs made in 2005, while EMMC minimum pricing was in effect. (Civ. A. 06-620, Document No. 664 at 57:9-58:3.) Dr. Leffler explained that the minimum pricing impact period was "longer than the period of the minimum pricing rules[,]" because of the two-year contract which began before EMMC's suspension of minimum pricing. (*Id.* at 58:4-11.) In that case, Dr. Leffler testified that the damages impact period beginning in July 2007 was "the non-compete impact period." (*Id.* at 58:18-59:4.) Judge O'Neill concluded that the possibility of this alleged non-compete agreement was a "sufficient rationale for [Dr. Leffler's] decision to include a conduct period **[*38]** after the official cessation of EMMC minimum pricing agreement." *In re Mushroom, 2015 U.S. Dist. LEXIS 119446, 2015 WL 5775600, at *7* (describing "the formal dissolution of the minimum pricing policy in [redacted text] 2005.").

Despite Dr. Leffler's statement in his initial report that EMMC minimum pricing was suspended in August 2005 and a non-compete period began immediately thereafter, Plaintiffs now argue that there is "a sufficient factual basis for the fact that the EMMC minimum pricing and policies were in effect from 2006 through 2009." (Pls.' Resp. in Opp'n to Defs.' Mot. to Exclude [Pls.' Resp.] at 15.) In opposition to the instant motion, Dr. Leffler states, "the facts...indicate continuing anticompetitive acts after July 2005. I understand Plaintiffs will offer evidence that the minimum price policy continued in effect after July 2005. I cited this evidence in my Rebuttal Report." (Leffler Decl. ¶ 7 (citing Leffler Rebut. Rpt. p. 8 n.23).) Plaintiffs rely on three pieces of evidence to support this new conclusion.

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there were significant resignations from the EMMC beginning in 2002, "there is no evidence of market power beginning at least as early as 2006." (David Rpt. ¶ 67; *see id.* ¶¶ 66, 68.) Defendants also argue that Dr. Leffler's third conspiracy period should be excluded because it reflects Winn-Dixie's purchases after OMF and Monterey had resigned from the EMMC. (*See id.* ¶¶ 58-62.) Both of these additional arguments only implicate Dr. Leffler's assessment of damages after 2005. In light of the Court's decision in Section III.A.2 *infra* to exclude damages premised on anticompetitive conduct after August 2005, the Court need not address these additional arguments concerning reliability.

First, Plaintiffs present the declaration of Michael Cardile stating that when Cardile Mushrooms, Inc. was a member of EMMC, during the period January 2001 through 2009, "there was never a time when either the minimum pricing or **[*39]** the non-compete was not in place." (Pls.' Ex. 17 [Cardile Decl.] ¶¶ 2, 4; *accord* Leffler Rebut. Rpt. p. 8 n.23.) Relying on this statement, Plaintiffs argue that because Defendants have taken the position that the EMMC never adopted any non-compete agreement, minimum pricing must have continued through 2009. (Pls.' Resp. at 10 (citing Pls.' Opp'n Ex. 3; Document No. 268 at n.1).) Second, Plaintiffs point to a document stating that in October 2005 the EMMC discussed "a transition from non-compete to price management." (Pls.' Opp'n Ex. 4 at 1; *accord* Leffler Rebut. Rpt. p. 8 n.23.) Finally, Plaintiffs cite an EMMC Policies document "[l]ast revised on December 6, 2005" stating that a new section entitled "Non-compete" was "to be voted December 13, 2005[.]" (Pls.' Opp'n Ex. 5 at 4.) The non-compete section states that "[t]he non-compete policy is intended to be used as a temporary tool to create stability among members during periods of transition. For example, as a bridge to the time when 80% coop market share is achieved and minimum pricing implemented." (*Id.*) This document further describes the terms of the non-compete policy and states that the "[n]on-compete will not be in effect **[*40]** when minimum pricing is in place except for brief periods of time...during a transition to new pricing. . . ." (*Id.*; *accord* Leffler Rebut. Rpt. p. 8 n.23.) Plaintiffs therefore contend that the EMMC minimum pricing policy must have resumed after December 13, 2005 and was in place through the end of 2009, or at least through the start of the third conspiracy period in 2007. (Pls.' Resp. at 16.) As a result, Plaintiffs argue that the full scope of Dr. Leffler's damages estimate is premised on EMMC minimum pricing, rather than an alleged non-compete agreement, and therefore is relevant to this case. At the very least, Plaintiffs argue, the end date of EMMC minimum pricing "involves a factual dispute not suitable for resolution by a *Daubert* motion, and instead, goes to the weight of his opinion and regression model and not their admissibility." (Pls.' Resp. at 17.)

The Court is not persuaded by Plaintiffs' forage for evidence in support of this new argument. "It is an abuse of discretion to admit expert testimony which is based on assumptions lacking any factual foundation in the record." *Stecyk, 295 F.3d at 414 (3d Cir. 2002)*; *see* *Elcock, 233 F.3d at 756 n.13 (3d Cir. 2000)* (describing the foundation requirement as "found in the interstitial gaps among the federal **[*41]** rules[,]" but also noting that an expert opinion lacking factual foundation "misleads the fact-finder and arguably does not comply with the 'fit' requirement" of *Rule 702*). Before the Court denied Plaintiffs leave to amend the Complaint to allege the existence of a non-compete agreement, Dr. Leffler stated in his initial report that EMMC minimum pricing was suspended in August 2005 and a non-compete period began immediately thereafter. (Leffler Rpt. ¶ 26.) Dr. Leffler also took this position in the historic opt-out cases. (*See* Civ. A. 06-620, Document Nos. 664, 703.) Dr. David's report concludes the same. (David Rpt. ¶ 29.) Plaintiffs' attempt to obfuscate this fact in rebuttal—only after the Court denied Plaintiff leave to assert a non-compete theory—is unconvincing. Moreover, Plaintiffs do not present any factual foundation that EMMC minimum pricing resumed after it was suspended in August 2005. Thus, the Court concludes that any expert opinions premised on the argument that the EMMC minimum pricing policy extended beyond August 2005 are inadmissible because this opinion lacks any factual foundation in the record.

Because the Court has denied leave to amend the Complaint to assert a non-compete **[*42]** theory of liability, and EMMC minimum pricing was suspended in August 2005, any damages resulting from alleged anticompetitive conduct after August 2005 do not fit the facts of the case. Plaintiffs' third conspiracy period covers the duration of the three-year sales contract between OMS and Winn-Dixie beginning June 28, 2007 and ending in 2010. The fourth conspiracy period covers only a few months in late 2010. Dr. Leffler's third and fourth conspiracy periods each begin years after the suspension of EMMC minimum pricing in August 2005, and Plaintiffs do not contend that any overcharges in those periods were caused by anticompetitive conduct before August 2005. Therefore, Dr. Leffler's opinions on damages during the third and fourth conspiracy periods will not assist the trier of fact to understand the evidence or resolve a disputed issue and are not admissible pursuant to *Rule 702*.

As for the second conspiracy period—August 2005 through June 2007—Plaintiffs argue that even if this period extends after EMMC minimum pricing ended, those damages are still the result of EMMC minimum pricing before August 2005. Winn-Dixie's mushroom purchases during the second conspiracy period were made pursuant **[*43]** to a two-year contract between Winn-Dixie and OMS that was entered into in June 2005, which was before the end of EMMC minimum pricing. (Pls.' Resp. at 9, 15, 19.) Plaintiffs present the June 2005 contract between Winn-Dixie and OMS, which set the price of mushroom sales throughout the second conspiracy period. (*See* Pls.' Opp'n Ex. 6.)

Dr. Leffler also states that the prices in this contract were above EMMC minimum prices. (Leffler Rebut. Rpt. p. 8 n.23.) The Court agrees that the 2005 contract between Winn-Dixie and OMS is a sufficient factual basis for Dr. Leffler to conclude that his damages estimate during the second conspiracy period is attributable to EMMC minimum pricing. Any damages estimate for mushroom sales during the second conspiracy period could be helpful to the trier of fact and will not be excluded.

In his declaration presented in opposition to Defendants' motion, Dr. Leffler re-estimates the Winn-Dixie overcharges until only June 2007, the end of the second conspiracy period. (Leffler Decl. ¶ 7 n.12; *see id.* ¶ 5 n.8.) The Court will allow Plaintiff to rely on the revised damages estimate set forth in Dr. Leffler's declaration as though it were a timely supplemental **[*44]** disclosure pursuant to *Rule 26(e)(2)*.

B. Plaintiffs' Motion to Exclude the Proposed Testimony of Dr. David

Plaintiffs move to exclude the testimony of Defendants' rebuttal expert Dr. David, pursuant to *Rule 702*, on the grounds that his opinions are untested and based upon unreliable methodology and data, and, pursuant to *Rule 403*, on the grounds that the probative value of his testimony is substantially outweighed by its prejudicial effect. Following a *Daubert* hearing in the historic opt-out cases, Judge O'Neill considered and rejected many of these same arguments in a well-reasoned opinion permitting the proposed testimony of Dr. David. For many of the same reasons previously articulated by Judge O'Neill, the Court will deny the motion to exclude Dr. David's testimony.

1. Reliability of Dr. David's Rebuttal Expert Opinions and Methodology

Rule 26(a)(2)(D)(ii) permits expert testimony "solely to contradict or rebut evidence on the same subject matter identified by another party[.]" "It is the proper role of rebuttal experts to critique plaintiffs' expert's methodologies and point out potential flaws in the plaintiff's experts' reports." *Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc., 829 F. Supp. 2d 802, 835 (D. Minn. 2011)*. Dr. David is a rebuttal expert witness retained to analyze the findings of Plaintiffs' expert Dr. **[*45]** Leffler and to offer opinions regarding Plaintiffs' damages. (David Rpt. ¶ 2.) In support of the expert report he authored for this case, Dr. David reviewed materials including Defendants' transactional data, excel files of sales data, documents produced in this matter, deposition transcripts, Dr. Leffler's report and supporting materials, and publicly available data concerning many of the variables in Dr. Leffler's analysis. (*See* David Rpt. App'x 1.) Dr. David offers specific criticisms of Dr. Leffler's regression model and the facts upon which it relies (*see id.* ¶¶ 58-80), which the Court described in Section III.A, *supra*. Plaintiff seeks to exclude Dr. David's testimony, pursuant to *Rule 702*, because it is based on untested theories, unreliable data, and an unaccepted methodology.

a. Testing of Regression Model Criticism

Plaintiffs' primary argument to exclude Dr. David's testimony is that he did not test his opinions or conclusions. (Pls.' Mot. to Exclude or Limit the Opinions of Defs.' Expert [Pls.' Mot.] at 5-23.) Specifically, Plaintiffs argue Dr. David did not test his criticisms of Dr. Leffler's regression model related to an omitted control variable for farm closings, the Dole brand **[*46]** premium, negative supply variable coefficients, or the benchmark period, and therefore, Dr. David's opinions on these topics are unreliable.

Plaintiffs argue that an expert's testing of a theory is the first *Daubert* reliability factor, but *Daubert* explicitly declined to "set out a definitive checklist or test" to ascertain reliability and emphasized that the *Rule 702* inquiry is "a flexible one." *509 U.S. at 593-94*; *see* *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. Nevertheless, Plaintiffs essentially argue that Dr. David fails to satisfy *Rule 702*'s requirements that expert witnesses apply reliable principles and methods and that the testimony be helpful to the fact-finder. Plaintiffs rely on *Advanced Telemedia, L.L.C. v. Charter Communications, Inc., Civ. A. No. 05-2662, 2008 U.S. Dist. LEXIS 110021, 2008 WL 6808442, *1 (N.D. Ga. July 17, 2008)*, in which the court excluded a proposed rebuttal expert who had identified flaws in the plaintiff's expert's method, without reviewing the underlying data, performing any testing, or testifying that a different method would yield different results. The *Advanced Telemedia* court concluded that the rebuttal expert's testimony did not meet the *Daubert* standard because it was "too speculative and unreliable and it will not assist the jury in determining the amount of damages...." *Id.*; *see also* *B-K Cypress Log Homes Inc. v. Auto-Owners Ins. Co., Civ. A. No. 09-211, 2012 U.S. Dist. LEXIS 73773, 2012 WL 1933766, *6 (N.D. Fla. May 25, 2012)* ("a pure rebuttal opinion that does not offer any alternative methodology or analysis...would **[*47]** not aid the jury in determining the amount of damages").

Despite this opinion, "[a] number of other district courts have held that rebuttal expert witnesses may criticize other experts' theories and calculations without offering alternatives." *Aviva Sports, 829 F. Supp. 2d at 834-35 (D. Minn. 2011)* (collecting cases). Indeed, "[i]f two contradictory expert opinions meet the requisite threshold of reliability," it is the function of the factfinder to assess the credibility of those contradictory experts, but "defendants' experts have a less demanding task, since they have no burden to produce models or methods of their own; they need only attack those of plaintiffs' experts." *In re Zyprexa Prods. Liab. Litig., 489 F. Supp. 2d 230, 285 (E.D.N.Y. 2007)* (Weinstein, J.). In order to demonstrate reliability to meet the requirements of *Rule 702*, a rebuttal expert, like any expert witness, need only show "good grounds" for the proposed testimony. *United States v. Velasquez, 64 F.3d 844, 851, 33 V.I. 265 (3d Cir. 1995)*; *see* *Paoli II, 35 F.3d at 744 (3d Cir. 1994)* ("an expert opinion [is] reliable under *Rule 702* if it is based on 'good grounds,' *i.e.*, if it is based on the methods and procedures of science"). In *Velasquez*, the Third Circuit found reversible error in a trial court's decision to exclude rebuttal expert testimony and noted that such testimony was "highly relevant" and would assist the jury "to properly weigh the testimony" of the **[*48]** initial expert. *Id. at 848, 852*. Judge O'Neill adopted this same perspective when admitting Dr. David's opinion in the historic opt-out cases. He concluded that "Dr. David's testimony will aid the fact finder in evaluating the proper weight to be afforded to Dr. Leffler's testimony as it is relevant to the question of whether Dr. Leffler's regression models...are flawed." (Civ. A. 06-620, Document No. 740 at 8.) The Court agrees with this sound reasoning.

Here, Dr. David's proposed testimony will assist the finder of fact in properly weighing Dr. Leffler's testimony. Dr. David did not need to perform his own damages computation or develop his own regression model to meet the standards of reliability as a rebuttal witness. Instead, he needed only to reliably apply reliable scientific methods in assessing and critiquing Dr. Leffler's regression model. Dr. David reviewed the underlying facts and data on which Dr. Leffler relied to reach his opinions. (*See* David Rpt. ¶¶ 35-39, 54-57, App'x 1.) In fact, Dr. Leffler agreed with Dr. David's criticisms concerning transactions that were double counted in the data and revised his report accordingly. (Leffler Rebut. Rpt. ¶ 13 n.18.) Moreover, Dr. David cites **[*49]** to econometric source materials for his opinions on principles such as over-fitting, negative coefficient correlation, and omitted control variable bias.[7] Dr. David's background also favors finding these opinions reliable, since an expert's "level of expertise may affect the reliability of the expert's opinion." *Elcock, 233 F.3d 734, 749 (3d Cir. 2000)* (quoting *Paoli II, 35 F.3d at 741*). Dr. David holds a Ph.D. in economics from Stanford University, and he has performed economic analysis for litigation and public policy matters for a total of approximately 24 years with the National Economics Research Associates, Inc., Criterion Economics, LLC, and Edgeworth Economics, LLC, where he is the current President. (David Rpt. ¶¶ 4-5, App'x 2.) Throughout his career, Dr. David has specialized in applied microeconomics and econometrics, and he has provided expert testimony on more than 60 occasions. (*Id.* ¶ 5.) Thus, the Court concludes that Dr. David's criticisms of Dr. Leffler's regression model are reliable.

Plaintiffs make two additional unavailing arguments to exclude Dr. David's opinions on supposedly omitted variables in Dr. Leffler's regression model. First, Plaintiffs **[*50]** argue that Dr. David's criticism concerning farm closures does not fit the facts of the case because overall mushroom production in Pennsylvania increased after the farm closures Dr. David identifies. (Pls.' Mot. at 9.) This argument regarding mushroom production does not make irrelevant or unreliable Dr. David's opinion that farm closures were a necessary control variable. The Court agrees with Judge O'Neill's prior ruling that Defendants sufficiently proved that Dr. David's opinions regarding farm closures

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[7] (*See* David Rpt. ¶ 73 n.150 (citing Frank E. Harrell, *Regression Modeling Strategies* (2013)); ¶ 75 n.152 (citing J. Johnston, *Econometric Models* (3d ed. 1984)); ¶ 76 n.153 (quoting Peter Kennedy, *A Guide to Econometrics* (5th ed. 2005)); ¶¶ 74 n.151, 78 (citing ABA Section of ***Antitrust Law***, *supra*, § 5.B.1.b.2).)

were based on good grounds, and thus are admissible. Next, Plaintiffs argue that Dr. David's opinion concerning the Dole brand premium should be excluded because he incorrectly asserts that all Winn-Dixie purchases from OMS were Dole brand mushrooms. (Pls.' Mot. at 22-23.) As explained in Section III.A.1.a.ii, *supra*, this is a disputed question of fact that should appropriately be resolved by the factfinder. Thus, the Court will not exclude Dr. David's opinions on these topics under *Rule 702*.

b. Unreliable Data for Declining Market Share

In addition to arguing that Dr. David failed to test his opinions, Plaintiffs also seek to exclude Dr. David's testimony regarding market share because **[*51]** it is based on unreliable data. (Pls.' Mot. at 26-28.) *Rule 702* requires expert testimony to be "based on sufficient facts or data." *Fed. R. Evid. 702(b)*; *see* *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 294 (3d Cir. 2012)* (reasonableness of an expert's reliance on facts or data to form an opinion is an appropriate inquiry under *Rule 702*). In addition, though Plaintiffs do not cite to *Rule 703*, it dictates that an expert's opinion may rely on hearsay facts or data if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject...." *Fed. R. Evid. 703*. This standard is equivalent to the reliability standard of *Rule 702*, meaning "there must be good grounds on which to find the data reliable." *Paoli II, 35 F.3d at 748 (3d Cir. 1994)*.

Dr. David opines that the market share of EMMC members was declining such that by 2006 the EMMC did not have sufficient market share to undertake monopolistic activity. (David Rpt. ¶ 67; *see* ¶¶ 66, 68.) Plaintiffs argue that this assessment of declining EMMC market share is based on unreliable data from two sources—EMMC dues assessment data and sales data that lacks a citation. (Pls.' Mot. at 26-27.) Plaintiffs argue that these data sources differ substantially from one another and are contradicted by deposition testimony and other documents from the EMMC, and **[*52]** therefore, Dr. David's opinions based on this data are unreliable. First, the Court notes that in light of its ruling to exclude Dr. Leffler's third conspiracy period, it is unlikely that Dr. David's opinion concerning declining market share remains relevant to the case. *See supra* n.6. But even if declining EMMC market share does remain relevant to Dr. David's opinions, Dr. David's data sources related to EMMC membership and Defendants' Agaricus mushroom sales were produced in this litigation or the related class action. (*See* David Rpt. App'x 1.) These sources therefore present reliable grounds for the basis of Dr. David's opinions. As for the discrepancies Plaintiffs point out in these data sources, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 83 (3d Cir. 2017)* (quoting *Daubert, 509 U.S. at 596*). Plaintiffs' arguments go to the weight of Dr. David's testimony on this issue, not its admissibility.

c. Price Trends Methodology

Plaintiffs also argue that Dr. David's opinions on mushroom price trends are based solely on "visual inspection" of a trend in a price graph, which is **[*53]** not a sound scientific principle, and therefore must be excluded. (Pls.' Mot. at 30-36.) Specifically, Plaintiffs argue that price trends cannot provide an economic explanation as to causation, since an economist must use an analysis that controls for supply and demand factors. (Pls.' Mot. at 32.) Plaintiffs state that Dr. David relies on his presentation of declining prices to argue that Dr. Leffler's model is flawed. (Pls.' Mot. at 31 (quoting David Rpt. ¶ 30).) This argument misstates Dr. David's opinion. Dr. David uses his analysis of price trends to criticize Dr. Leffler's claim that the pattern of rising average prices of fresh Agaricus mushrooms verified the impact of the EMMC minimum pricing policy. (David Rpt. ¶ 69 (citing Leffler Rpt. ¶ 50).) In fact, Dr. David's report makes an analogous critique to Plaintiffs' argument. Dr. David states that Dr. Leffler's assertion that a correlation existed between market-wide price increases and EMMC minimum pricing could not explain causation. (*Id.* ¶ 70.) Thus, both sides agree that a visual inspection of price trends is not a reliable scientific method to prove causation.

However, neither expert relies exclusively on visual inspections **[*54]** of price trends to offer opinions on causation or overcharge damages. In order to offer opinions on causation and damages, Dr. Leffler relies on testimony and documents regarding the EMMC's anticompetitive conduct and empirical analysis of damages using his multiple regression model. (*See* Leffler Rpt. ¶¶ 50-56.) Dr. David's critique of those opinions relies on an analysis of the econometric principles underlying the regression model. (*See* David Rpt. ¶¶ 73-80.) Therefore, Dr. David's opinions on overcharge damages are not premised on price trends, so the Court will not exclude his opinions as unreliable.

2. Rule 403

Finally, Plaintiffs seek to exclude Dr. David's testimony pursuant to *Federal Rule of Evidence 403*. Pursuant to *Rule 403*, the Court may exclude relevant evidence if its probative value is substantially outweighed by unfair prejudice or confusion of the issues. *Fed. R. Evid. 403*. Because expert evidence can be more misleading than other evidence, *Rule 403* gives a judge more power over experts than over lay witnesses. *Paoli II, 35 F.3d at 747* (citing *Daubert, 509 U.S. at 595*). Nevertheless, "exclusion under *Rule 403* should be rare[,]" and "in order for a district court to exclude scientific evidence, there must be something *particularly* confusing about the scientific evidence at issue—something other **[*55]** than the general complexity of scientific evidence." *Id. at 747, 747 n.16*. Plaintiffs argue that because Dr. David's opinions were never tested, and thus are speculative and unreliable, their inclusion at trial would mislead the jury and prejudice Plaintiffs. (Pls.' Mot. at 36.) The Court has already concluded that Dr. David's testimony is not unreliable, and Plaintiffs have not pointed to any aspect of Dr. David's testimony that is so particularly confusing or misleading as to substantially outweigh its probative value. At this pretrial stage, the Court will not exclude the proposed testimony pursuant to *Rule 403*.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Preclude Plaintiffs' Proposed Expert Testimony at Trial is granted in part and denied in part. Plaintiffs' Motion to Exclude or Limit the Opinions of Defendants' Expert is denied. An Order consistent with this Memorandum will be docketed separately.

ORDER

AND NOW, this **9th** day of **June**, **2021**, after consideration of Defendants' Motion to Preclude Plaintiffs' Proposed Expert Testimony at Trial, and the responses and replies thereto, and Plaintiffs' Motion to Exclude or Limit the Opinions of Defendants' Expert, and the responses and replies thereto, **[*56]** and for the reasons outlined in this Court's Memorandum dated June 9, 2021, it is **ORDERED** that:

1. Defendants' Motion to Preclude Plaintiffs' Proposed Expert Testimony at Trial (Document No. 300) is **GRANTED in part** and **DENIED in part**. Plaintiffs' expert Dr. Leffler is not permitted to offer opinion testimony of damages incurred during conspiracy periods three and four.

2. Plaintiffs' Motion to Exclude or Limit the Opinions of Defendants' Expert (Document No. 301) is **DENIED**.

BY THE COURT:

/s/ Berle M. Schiller

Berle M. Schiller, J.

End of Document

[1-800 Contacts, Inc. v. FTC](#)

United States Court of Appeals for the Second Circuit

March 5, 2020, Argued; June 11, 2021, Decided

Docket No. 18-3848

Reporter
1 F.4th 102 *; 2021 U.S. App. LEXIS 17508 **; 2021 U.S.P.Q.2D (BNA) 633

1-800 CONTACTS, INC., Petitioner, v. FEDERAL TRADE COMMISSION, Respondent.

Prior History: [1]** ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION. (DOCKET NO. 9372).

1-800 Contacts, Inc., petitions from a Final Order of the Federal Trade Commission (FTC) finding that agreements between Petitioner 1-800 Contacts, Inc. and various competitors to, among other things, refrain from bidding on "keyword" search terms for internet advertisements, violate *Section 5 of the FTC Act, 15 U.S.C. § 45*. We hold that although trademark settlement agreements are not immune from antitrust scrutiny, the FTC (1) improperly considered the agreements to be "inherently suspect" and (2) incorrectly concluded that the challenged agreements are a violation of the FTC Act under the "rule of reason.".

In re 1-800 Contacts, Inc., 2018 FTC LEXIS 183 (F.T.C., Nov. 7, 2018)
In re 1-800 Contacts, Inc., 2018 FTC LEXIS 184 (F.T.C., Nov. 7, 2018)

Disposition: PETITION FOR REVIEW GRANTED, FINAL ORDER VACATED AND REMANDED.

Core Terms

trademark, advertising, procompetitive, anticompetitive, antitrust, consumers, competitors, contact lens, effects, retailers, rule of reason, settlement agreement, parties, online, keywords, restrictions, prices, search engine, terms, bid, direct evidence, auctions, settlements, courts, Sherman Act, manufacturers, implicate, proffered, restrain, patent

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN1[] **Standards of Review, Substantial Evidence**

Factual findings of the Commission are binding if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Commission's legal conclusions are for the courts to resolve, although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as unfair.

Antitrust & Trade Law > Sherman Act > Defenses

HN2[] Sherman Act, Defenses

To be sure, in Actavis the Supreme Court detailed how certain commonplace forms of settlement agreements did not, by the nature of their existence alone, create antitrust liability. However, the Court went on to say that the possibility that agreements may not always bring about anticompetitive consequences does not justify dismissing the FTC's complaint. An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present.

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

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

HN3[] Per Se Rule Tests, Manifestly Anticompetitive Effects

The mere fact that an agreement implicates intellectual property rights does not immunize an agreement from antitrust attack. Intellectual property rights do not confer a privilege to violate the antitrust laws. As in any antitrust case, the court must determine whether the restraints in the agreements are reasonable in light of their actual effects on the market and their pro-competitive justifications.

Antitrust & Trade Law > Sherman Act > Claims

HN4[] Sherman Act, Claims

To prove a Sherman Act violation — and by extension, a violation of § 5 of the — the FTC must establish (1) a contract, combination, or conspiracy exists that (2) unreasonably restrains trade.

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

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

HN5[] Per Se Rule Tests, Manifestly Anticompetitive Effects

The court presumptively applies what is known as the rule of reason analysis to the Challenged Agreements to determine whether they restrain trade. Under that analysis an antitrust plaintiff must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful. As Justice Brandeis famously articulated: The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

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

HN6[] Per Se Rule Tests, Manifestly Anticompetitive Effects

A plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. After a prima facie case of anticompetitive conduct has been established, the burden shifts to the defendant to proffer procompetitive justifications for the agreement. Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means.

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

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

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

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

HN7[] Per Se Rule & Rule of Reason, Per Se Violations

In some cases, however, certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Such agreements are deemed per se illegal. This designation is saved for certain types of restraints, e.g., geographic division of markets or horizontal price fixing, that have been established over time to lack any redeeming virtue.

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

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

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

HN8[] Per Se Rule Tests, Manifestly Anticompetitive Effects

The Supreme Court, however, has rejected fixed categories of analysis when considering the anticompetitive nature of a restraint. Some restraints, therefore, fall between the type of conduct typically labeled per se anticompetitive and that which is analyzed under a full-blown rule of reason analysis. When the great likelihood of anticompetitive effects can easily be ascertained, courts apply an abbreviated rule of reason analysis sometimes known as the quick-look approach. The Commission calls the standard it applies in these situations the "inherently suspect" framework.

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

HN9[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Under the Commission's inherently suspect framework, neither direct evidence of harm nor proof of market power is needed to show the anticompetitive effect of the restraint because the likely tendency to suppress competition posed by the challenged conduct makes it inherently suspect. An elaborate market analysis is unnecessary, and once the government has identified a suspect agreement, the burden shifts directly to the defendant to show any procompetitive justifications it might have for the restraint. This approach is only permissible when an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets. Further, if an arrangement might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition,' more than a "quick look" is required.

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

HN10[] **Per Se Rule & Rule of Reason, Sherman Act**

But even if restraints on truthful advertising have a tendency to raise prices, the fact that a practice may have a tangential relationship to the price of the commodity in question does not mean that a court should dispense with a full rule-of-reason analysis.

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

Evidence > Inferences & Presumptions > Presumptions > Creation

HN11[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Trademarks are by their nature non-exclusionary. Agreements to protect trademarks, then, should not immediately be assumed to be anticompetitive — in fact, Clorox tells the court instead to presume they are procompetitive.

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

Public Contracts Law > Dispute Resolution > Bid Protests

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

Public Contracts Law > Bids & Formation > Competitive Proposals

HN12[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

An absolute ban on competitive bidding, or bid rigging, would be anticompetitive on its face and may justify an abbreviated rule of reason analysis.

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

Evidence > Burdens of Proof > Allocation

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

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

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

HN13[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Under the rule of reason, the Commission bears the burden of establishing a prima facie case of anticompetitive effect. Direct evidence of anticompetitive effects establishes a prima facie case of a *Sherman Act § 1* violation and obviates the need for a detailed market analysis or showing of market power.

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

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

HN14[] Attempts to Monopolize, Elements

Anticompetitive effects in a relevant market may be shown through direct evidence of output reductions, increased prices, or reduced quality in the relevant market. The Commission has also defined sufficient evidence of anticompetitive harm to include evidence of retarded innovation, or other manifestations of harm to consumer welfare. When an antitrust plaintiff advances an antitrust claim based on direct evidence in the form of increased prices, the question is whether it can show an actual anticompetitive change in prices after the restraint was implemented.

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

Evidence > Types of Evidence > Circumstantial Evidence

HN15[] Actual Monopolization, Anticompetitive & Predatory Practices

Empirical evidence is required under our caselaw to find direct evidence of an anticompetitive effect. But showing that a price for certain keywords dropped is not direct evidence of the effect on the market as a whole.

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

HN16[] Infringement Actions, Determinations

Trademarks are by their nature non-exclusionary, and agreements to protect trademark interests are common, and favored, under the law. As a result, it is difficult to show that an unfavorable trademark agreement creates antitrust concerns. This is true even though trademark agreements inherently prevent competitors from competing as effectively as they otherwise might.

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

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

HN17[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Where the petitioner has carried its burden of identifying a procompetitive justification, the government must show that a less restrictive alternative exists that achieves the same legitimate competitive benefits. That is, the restraint only survives a rule of reason analysis if it is reasonably necessary to achieve the legitimate objectives proffered by the defendant. Less restrictive alternatives are those that would be less prejudicial to competition as a whole.

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

HN18[] **Infringement Actions, Determinations**

In Clorox the court noted that it is usually unwise for courts to second-guess trademark agreements between competitors. In this context, what is "reasonably necessary," is likely to be determined by competitors during settlement negotiations, And, absent something that would negate the typically procompetitive nature of these agreements, the parties' determination of the scope of needed trademark protections is entitled to substantial weight.

Evidence > Weight & Sufficiency

HN19[] **Evidence, Weight & Sufficiency**

At the end of the day, the court's job is to weigh the competing evidence to determine if the effects of the challenged restraint tend to promote or destroy competition.

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

HN20[] **Standing, Requirements**

When the restraint at issue in an antitrust action implicates intellectual property (IP) rights, Actavis directs the court to consider the policy goals of the relevant IP law.

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

HN21[] **Infringement Actions, Determinations**

While trademark agreements limit competitors from competing as effectively as they otherwise might, the court owes significant deference to arm's length use agreements negotiated by parties to those agreements. Doing so may give rise to collateral harm in a relevant market. But forcing companies to be less aggressive in enforcing their trademarks is antithetical to the procompetitive goals of trademark policy.

Counsel: STEPHEN FISHBEIN, Shearman & Sterling LLP, New York, NY (Ryan A. Shores, Todd M. Stenerson, Brian C. Hauser, Shearman & Sterling LLP, Washington, D.C., on the brief) for Petitioner.

IMAD ABYAD, Federal Trade Commission (Gail F. Levine, Deputy Director, Geoffrey M. Green, Assistant Director, Joel Marcus, Deputy General Counsel, Barbara Blank, Daniel J. Matheson, Mariel Goetz, Attorneys, on the brief), for Alden F. Abbott, General Counsel, Federal Trade Commission, Washington, **[**2]** D.C., for Respondent.

Corbin K. Barthold and Cory L. Andrews, Washington Legal Foundation, Washington, D.C. for Amici Curiae Richard A. Epstein, Keith N. Hylton, Thomas A. Lambert, Geoffrey A. Manne, Hal Singer and Washington Legal Foundation in Support of Petitioner.

Theodore H. Davis Jr., Kilpatrick Townsend & Stockton LLP, Atlanta, GA and Sheldon H. Klein, President, American Intellectual Property Law Association, Arlington, VA, for Amicus Curiae American Intellectual Property Law Association in Support of Petitioner.

Bryan D. Gant, Seiji Niwa, White & Case LLP, New York, NY and Eileen M. Cole, White & Case LLP, Washington, D.C., for Amici Curiae United States Council for International Business in Support of Petitioner.

Mark A. Lemley, William H. Neukom Professor, Stanford Law School, Stanford, CA for Amici Curiae Intellectual Property, Internet Law and Antitrust Professors in Support of Respondent.

Judges: Before: LYNCH and MENASHI, Circuit Judges.[*].

Opinion

[*109] PER CURIAM:

Between 2004 and 2013, Petitioner 1-800 Contacts, Inc. ("1-800") entered into thirteen trademark settlement agreements and one sourcing and services agreement with competitors (the "Challenged Agreements"). As explained below, the Challenged **[**3]** Agreements contained provisions restricting specific terms on which the parties could "bid" when participating in auctions held by companies that operate search engines. By restricting bidding on terms in these auctions, the competitors agreed not to advertise their products when consumers used the search engines' platforms to search the specific terms at issue. In August 2016, the Federal Trade Commission ("FTC" or the "Commission") issued an administrative complaint against Petitioner, alleging that the Challenged Agreements and Petitioner's enforcement of the agreements unreasonably restrain truthful, non-misleading advertising as well as price competition in search advertising auctions in violation of *Section 5 of the FTC Act, 15 U.S.C. § 45*. The claim was tried before an Administrative Law Judge (ALJ), who in 2017 issued an Initial Decision and Order finding that the agreements violate *Section 5*. Petitioner then appealed to the full Commission, which affirmed the ALJ's conclusion in a three to one decision, with one Commissioner not participating. This timely petition for review followed the issuance of the Commission's Final Order.

Although we hold that trademark settlement agreements are not automatically immune from antitrust **[**4]** scrutiny, the Commission's analysis of the alleged restraints under the "inherently suspect" framework was improper. We further hold that the Commission incorrectly concluded that the agreements are an unfair method of competition under the FTC Act. We therefore GRANT the petition for review, VACATE the Final Order of the Commission, and REMAND the case to the Commission with orders to DISMISS the administrative complaint.

[*110] BACKGROUND

Contact lenses, prescription eyewear designed to improve the user's vision, can be sold only pursuant to a prescription. Such prescriptions specify both the characteristics of the lens, such as its strength, and the manufacturer brand. Thus, when consumers purchase contact lenses, they may not substitute one brand for another, but must purchase the brand listed on the prescription. Contact lenses are sold by four different types of retailers: independent eye care professionals; optical retail chains; mass merchants and club stores; and purely

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[*] Judge Peter W. Hall, originally a member of the panel, died on March 11, 2021. The two remaining members of the panel, who are in agreement, have determined the matter. See *28 U.S.C. § 46(d)*; 2d Cir. IOP E(b); *United States v. Desimone, 140 F.3d 457, 458-59 (2d Cir. 1998)*.

internet-based retailers, such as Petitioner. Internet-based retailers accounted for 17 percent of all contact lens sales in 2015, the year before these proceedings began. 1-800 accounts for a majority of all online **[**5]** sales of contact lenses. The price of contact lenses varies significantly based on retail channel; independent eye care professionals typically charge the most, followed by retail chains, mass merchants, and then online retailers. Petitioner, however, admits that it charges more than its rival online retailers. It prices its lenses somewhere below independent professionals and retail chains but above mass merchants and other club stores.

Petitioner and its competitors pay to advertise their sales of contact lenses on the internet. One way they do this is via "search advertising." When an online shopper uses a search engine such as Google or Bing, the search engine's program returns two types of results to the shopper: "sponsored" and "organic," both of which provide links to web pages. Sponsored results are ads; they appear because the owner of the featured web page has paid for its page to appear in that space. Sponsored links are typically designated by a label like "Ad" or "Sponsored," and by colored or shaded boxes around the link. Organic results, on the other hand, appear based exclusively on which results a search engine's algorithm deems to be most relevant to the shopper's **[**6]** search. Organic results are listed separately from the sponsored results.

Search engines determine which advertisements to display on a search results page based in part on the relevance or relation of the consumer's search to various words or phrases called "keywords." Advertisers bid on these keywords during auctions hosted by the search engines. The highest bidders' ads are typically displayed most prominently on a page, though search engines consider other factors when determining where to place an ad on a results page, such as an ad's quality and relevance to a consumer's search. Search engines generally do not limit the keywords available to advertisers at auction. As a result, competitors often bid on each other's brand names so that their ad runs when a consumer searches for a competitor. Brand name terms are often trademarked.

Via bidding on "negative keywords," an advertiser may also prevent its ad from being displayed when a consumer searches for a particular keyword. These negative keywords preclude ads from being displayed even when the search engine independently determined that the ad would be relevant to the consumer. The Commission suggests that this is useful when, **[**7]** for example, a retailer selling eyeglasses has bid on the advertising keyword "glasses" but wants to prevent its ad from appearing in response to the term "wine glasses."

Many online retailers of contact lenses devote the majority of their advertising budgets to search advertising. The Commission found that these ads are presented to consumers "at a time when [they are] more likely looking to buy." JA 279. Unlike its online retail competitors, Petitioner also **[*111]** uses other methods of advertising, including printed materials, radio, and television. Online search advertising, however, still represents a large portion of Petitioner's advertising budget. Because Petitioner charges more than other online retailers, when its competitors' ads appear in response to a search for 1-800's trademark terms, Petitioner's sales tend to decrease.

In 2002, Petitioner began filing complaints and sending cease-and-desist letters to its competitors alleging trademark infringement related to its competitors' online advertisements.[1] Between 2004 and 2013, Petitioner entered into thirteen settlement agreements to resolve most of these disputes. Each of these agreements includes language that prohibits the parties **[**8]** from using each other's trademarks, URLs, and variations of trademarks as search advertising keywords. The agreements also require the parties to employ negative keywords so that a search including one party's trademarks will not trigger a display of the other party's ads. The agreements do not prohibit parties from bidding on generic keywords such as "contacts" or "contact lenses."[2] Petitioner enforced the agreements when it perceived them to be breached.

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[1] Some of these trademark infringement allegations did not involve search advertising.

[2] Advertisers may designate how closely the keyword they bid on must match the consumer's search in order for their ads to be displayed. For example, Google, the leading search engine in the United States, offers different options for advertisers on its paid search platform. An advertiser may designate the keyword on which they have bid as "broad match," "phrase match," "exact match," or, as mentioned, "negative match." An ad tied to a keyword designated as "broad match" may appear when a consumer's search on Google contains the specific keyword, any plural forms or synonyms of the keyword, or phrases similar to the keyword. An advertiser selecting "phrase match" will have its ad appear when a search contains additional words along with

Apart from the settlement agreements, in 2013 Petitioner entered into a "sourcing and services agreement" with Luxottica, a company that sells and distributes contacts through its affiliates. JA 283. That agreement also contains reciprocal online search advertising restrictions prohibiting the use of trademark keywords and requiring both parties to employ negative keywords.

The FTC issued an administrative complaint against Petitioner in August 2016 alleging that the thirteen settlement agreements and the Luxottica agreement (the "Challenged Agreements"), along with subsequent actions to enforce them, unreasonably restrain truthful, non-misleading advertising as well as price competition in search advertising auctions, all of which **[**9]** constitute a violation of *Section 5 of the FTC Act, 15 U.S.C. § 45*.[3] The complaint alleges that the Challenged Agreements prevented Petitioner's competitors from disseminating ads that would have informed consumers that the same contact lenses were available at a cheaper price from other online retailers, thereby reducing competition and making it more difficult for consumers to compare online retail prices. The case was tried before an ALJ, who concluded that a violation had occurred.

[*112] As an initial matter, the ALJ rejected Petitioner's assertion that trademark settlement agreements are not subject to antitrust scrutiny in light of *FTC v. Actavis, 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. Applying the "rule of reason" and principles of *Section 1 of the Sherman Act, 15 U.S.C. § 1*, the ALJ determined that "[o]nline sales of contact lenses constitute a relevant product market." JA 120. He found that the agreements constituted a "contract, combination, or conspiracy" as required by the Sherman Act and held that the advertising restrictions in the agreements harmed consumers by reducing the availability of information, in turn making it costlier for consumers to find and compare contact lens prices. JA 184, 221-22.

Having found actual anticompetitive effects, as required under the rule of reason analysis, the ALJ rejected the **[**10]** procompetitive justifications for the agreements offered by Petitioner. He found that while trademark protection is procompetitive, it did not justify the advertising restrictions in the agreements and also that Petitioner failed to show that reduced litigation costs would benefit consumers. The ALJ issued an order that barred Petitioner from entering into an agreement with any marketer or seller of contact lenses to limit participation in search advertising auctions or to prohibit or limit search advertising.

1-800 appealed the ALJ's order to the Commission. In a split decision, a majority of the Commission agreed with the ALJ that the agreements violated *Section 5 of the FTC Act*. The majority, however, analyzed the settlement agreements differently from the ALJ. The majority classified the agreements as "inherently suspect" and alternatively found "direct evidence" of anticompetitive effects on consumers and search engines. The majority then analyzed the procompetitive justifications Petitioner offered for the agreements and rejected arguments that the benefits of protecting trademarks and reducing litigation costs outweighed any potential harm to consumers. Finally, the majority identified what it believed **[**11]** to be less anticompetitive alternatives to the advertising restrictions in the agreements. One Commissioner dissented, reasoning both that the majority should not have applied the "inherently suspect" framework and that it failed to give appropriate consideration to Petitioner's proffered procompetitive justifications. This timely appeal followed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal under *15 U.S.C. § 45(c)*. The majority opinion of the Commission "adopt[ed] the ALJ's findings of fact to the extent that they [were] not inconsistent" with its opinion. JA 285. ***HN1***[] Factual findings of the Commission are binding "if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *FTC v. Ind. Fed'n of Dentists (IFD), 476 U.S. 447, 454, 106 S.*

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the keyword. An "exact match" limits the ad's appearance to when the consumer searches the exact keyword. "Negative keywords" can also be designated by an advertiser for broad, phrase, or exact match. The Challenged Agreements do not specify whether the negative keywords must be employed using broad, phrase, or exact match.

[3] *Section 5 of the FTC Act* states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." *15 U.S.C. § 45(a)(1)*.

Ct. 2009, 90 L. Ed. 2d 445 (1986) (internal quotation marks and citation omitted). The Commission's legal conclusions are "for the courts to resolve, although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair.'" *Id.*

DISCUSSION

I. *Actavis* Considerations

Petitioner argues, as it did below, that trademark litigation settlements are generally immune from antitrust **[**12]** review. It contends that in *Actavis*, the Supreme **[*113]** Court "cabin[ed] its extension of antitrust scrutiny" to the "unusual" intellectual property settlements at issue there and did not intend to implicate "commonplace" settlements. Petitioner's Br. 43. Neither the ALJ nor any participating member of the Commission found this argument persuasive.[4] Nor do we.

In *Actavis*, the Supreme Court analyzed what are known as "reverse payment" patent settlements. *570 U.S. at 141*. In short, manufacturers of brand name drugs paid manufacturers of generic drugs to keep the generic manufacturers from litigating the validity of the brand name manufacturers' patents. *See id. at 145*. This effectively allowed the brand name manufacturers to maintain exclusive sales of certain drugs for longer than they would have if the applicable patent, through litigation, was found to be invalid. *Id. at 153-54*. In *Actavis*, the Court rejected the idea that the conduct at issue was immune from antitrust scrutiny just because it occurred within the context of a patent litigation settlement. *Id. at 146-48*. The Court explained that "it would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, **[**13]** rather than by measuring them against procompetitive antitrust policies as well." *Id. at 148*.

Petitioner argues that *Actavis* represents an exception to the general rule against subjecting intellectual property (IP) settlement agreements to antitrust scrutiny because patents, unlike trademarks, for example, are inherently exclusionary and because the reverse payment scheme at issue in *Actavis* was "unusual." Petitioner's Br. 43 (citing *Actavis, 570 U.S. at 147*). ***HN2***[] To be sure, in *Actavis* the Court detailed how certain commonplace forms of settlement agreements did not, by the nature of their existence alone, create antitrust *liability*. *570 U.S. at 151-52*. Contrary to Petitioner's claim, however, the Court went on to say that the possibility that agreements may not always bring about anticompetitive consequences "does not justify dismissing the FTC's complaint. An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present[.]" *Actavis, 570 U.S. at 156*.

As in *Actavis*, Petitioner's trademark, "if valid and infringed, might have permitted it to" preclude competitors from bidding on its trademarked terms in search advertising auctions or running advertisements on those terms. *Id. at 147*. We "take this fact as evidence that the agreement's **[**14]** anticompetitive effects fall within the scope of" the trademark protections. *Id.* (internal quotation marks omitted). ***HN3***[] But the mere fact that an agreement implicates intellectual property rights does not "immunize [an] agreement from antitrust attack." *Id.*; *see also In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1325 (Fed. Cir. 2000)* ("Intellectual property rights do not confer a privilege to violate the antitrust laws."); *United States v. Microsoft Corp., 253 F.3d 34, 63, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (same). We have not shied away from considering antitrust claims that implicate trademark rights in the past, *see, e.g., Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 55-56 (2d Cir. 1997)*, and we decline to do so now. As in any antitrust case, we must "determine whether the restraints in the agreement[s] are reasonable in light of their actual effects on the market **[*114]** and their pro-competitive justifications." *Id. at 56*.

[4] All four participating Commissioners agreed that *Actavis* does not immunize trademark settlement agreements from antitrust scrutiny. Commissioner Wilson did not participate in the appeal to the Commission.

II. Sherman Act Framework

Because "[t]he FTC Act's prohibition of unfair competition and deceptive acts or practices . . . overlaps the scope of *§ 1 of the Sherman Act* . . . aimed at prohibiting restraint of trade," *California Dental Ass'n v. FTC (Cal. Dental), 526 U.S. 756, 762 n. 3, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*, it was appropriate that the ALJ and the Commission consulted Sherman Act jurisprudence to determine whether the Challenged Agreements violated *Section 5 of the FTC Act*. *See* *Realcomp II, Ltd. v. FTC, 635 F.3d 815, 824 (6th Cir. 2011)*; *North Carolina Bd. of Dental Examiners v. FTC, 717 F.3d 359, 370-71 (4th Cir. 2013)* (recognizing a *Section 1* violation as a "species" of unfair competition prohibited under the FTC Act).

HN4[] To prove a Sherman Act violation — and by extension, a *Section 5* **[**15]** violation — the FTC must establish (1) a contract, combination, or conspiracy exists that (2) unreasonably restrains trade. *See* *Major League Baseball Props., Inc. v. Salvino, Inc. (MLB), 542 F.3d 290, 315-16 (2d Cir. 2008)*. In this case, the Challenged Agreements are undeniably contracts between Petitioner and its competitors. ***HN5***[] We "presumptively appl[y]" what is known as the "rule of reason" analysis to the Challenged Agreements to determine whether they restrain trade. *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. Under that analysis an antitrust plaintiff "must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Id.* As Justice Brandeis famously articulated:

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

Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918). ***HN6***[] A plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. *North Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc., 883 F.3d 32, 42 (2d Cir. 2018)*. After a prima facie case of anticompetitive conduct has been established, the burden shifts to the defendant to proffer procompetitive justifications for the agreement. *Id.* "Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means." *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 507 (2d Cir. 2004)*.

HN7[] In some cases, however, "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the **[**16]** precise harm they have **[*115]** caused or the business excuse for their use." *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. Such agreements are deemed *per se* illegal. *See* *MLB, 542 F.3d at 315*. This designation is saved for certain types of restraints, e.g., geographic division of markets or horizontal price fixing, that have been established over time to "lack . . . any redeeming virtue." *Id.*

HN8[] The Supreme Court, however, has rejected fixed categories of analysis when considering the anticompetitive nature of a restraint. *See* *Cal. Dental, 526 U.S. at 779*. Some restraints, therefore, fall between the type of conduct typically labeled *per se* anticompetitive and that which is analyzed under a "full-blown" rule of reason analysis. *MLB, 542 F.3d at 317*. When "the great likelihood of anticompetitive effects can easily be ascertained[,]" courts apply an abbreviated rule of reason analysis sometimes known as the "quick-look" approach.

Cal. Dental, 526 U.S. at 770. The Commission calls the standard it applies in these situations the "inherently suspect" framework.[5] JA 291.

HN9[] Under the Commission's "inherently suspect" framework, neither direct evidence of harm nor proof of market power is needed to show the anticompetitive effect of the restraint because the "likely tendency to suppress competition" posed by the challenged conduct makes it "inherently **[**17]** suspect." *In re Polygram Holding, 136 F.T.C. 310, 344-45 (2003)*, *aff'd*, *416 F.3d 29, 367 U.S. App. D.C. 367 (D.C. Cir. 2005)*. An "elaborate market analysis" is unnecessary, *Polygram, 416 F.3d at 35*, and once the government has identified a "suspect" agreement, the burden shifts directly to the defendant to show any procompetitive justifications it might have for the restraint. *See United States v. Apple, 791 F.3d 290, 330 (2d Cir. 2015)*.

This approach is only permissible when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental, 526 U.S. at 770*; *see also* *Dagher, 547 U.S. at 7 n.3* (rejecting a quick-look analysis because it applies only "to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability"); *Polygram, 416 F.3d at 37* (explaining that the inherently suspect framework is only applicable when "close family resemblance [exists] between the suspect practice and another practice that already stands convicted in the court of consumer welfare").

Further, "[i]f an arrangement 'might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition,' more than a 'quick look' is required." *MLB, 542 F.3d at 318* (quoting *Cal. Dental, 526 U.S. at 771*). In *California Dental*, the Supreme Court considered the California Dental Association's rule **[**18]** prohibiting price advertising, specifically discounted fees, and advertising relating to the quality of dental services. *526 U.S. at 761*. There, the Court rejected the use of an abbreviated rule of reason analysis, holding that the existence of a plausible procompetitive justification — in that case, the prohibition of deceptive advertising in an asymmetrical information marketplace — effectively foreclosed the ability of **[*116]** courts to utilize the quick look approach. *See id. at 771*.

Here, the Commission viewed the advertising restrictions in the Challenged Agreements as inherently suspect; it also found that the agreements were a form of "bid rigging" that harmed search engines — i.e., an independent basis upon which it could apply the inherently suspect analytical framework. Petitioner and *amici* argue that the application of the inherently suspect framework was improper and that the Challenged Agreements should only be considered under a rule of reason analysis. We agree with Petitioner that the Challenged Agreements cannot be classified as inherently suspect.

Citing expert reports and economic theory, the government argues that the Commission was correct to employ the inherently suspect framework because restrictions **[**19]** on advertising are likely to cause consumers to pay more for contact lenses. ***HN10***[] But even if restraints on truthful advertising have a tendency to raise prices, "[t]he fact that a practice may have a tangential relationship to the price of the commodity in question does not mean that a court should dispense with a full rule-of-reason analysis." *MLB, 542 F.3d at 317*.

Crucially, the restraints at issue here could plausibly be thought to have a net procompetitive effect because they are derived from trademark settlement agreements. In *Clorox*, applying the rule of reason, we considered whether a trademark settlement agreement illegally restrained trade under the Sherman Act and we explained that ***HN11***[] "[t]rademarks are by their nature non-exclusionary." *117 F.3d at 55-56*. Agreements to protect trademarks, then, should not immediately be assumed to be anticompetitive — in fact, *Clorox* tells us instead to presume they are *procompetitive. Id. at 60*. As the Challenged Agreements restrict the parties from running advertisements on Petitioner's trademarked terms, they directly implicate trademark policy.

[5] The "quick-look" and "inherently suspect" approaches are similar, and Petitioner does not take issue with the interchangeability of the two formulations of this abbreviated analysis.

The Commission acknowledged as much, finding Petitioner's proffered procompetitive justifications to be "cognizable and, at least, facially plausible[.]" **[**20]** JA 296. Rather than take that fact as an indication that it should not apply an abbreviated rule of reason analysis, as the Supreme Court instructed in *California Dental*, the Commission instead set out to show (i) that there was a theoretical basis for the alleged anticompetitive effect and that the restraints were likely, in this particular context, to harm competition and (ii) that Petitioner could have minimized the anticompetitive effects and accomplished its procompetitive justifications through less restrictive means. While this may be analytically acceptable in some situations, *see* *Cal. Dental, 526 U.S. at 779* (noting to require a "more extended examination" does not always translate to a call for "plenary market examination"), it was not appropriate here.

Courts do not have sufficient experience with this type of conduct to permit the abbreviated analysis of the Challenged Agreements undertaken by the Commission. *See* *Cal. Dental, 526 U.S. at 781* (explaining that the quick-look approach may be applicable if rule-of-reason analyses in case after case reach identical conclusions); *Polygram, 416 F.3d at 36-37* (accepting the Commission's definition of "inherently suspect" as describing restraints previously condemned by both "judicial experience and economic learning"). **[**21]** While both *California Dental* and *Polygram* consider advertising restraints, there are key differences between the restraints in those cases and the restraints **[*117]** here,[6] and our own precedent suggests that trademark agreements like those at issue here need to be examined using a fuller analysis. *See* *Clorox, 117 F.3d at 55-56, 59* (applying a rule of reason analysis and rejecting the alleged anticompetitive harm of a trademark agreement); *see also* *Actavis, 570 U.S. at 158-59* (rejecting the application of a quick-look analysis for intellectual property agreements). When, as here, not only are there cognizable procompetitive justifications but also the type of restraint has not been widely condemned in our "judicial experience," *see* *Polygram, 416 F.3d at 37*, more is required. *Cf.* *Bogan v. Hodgkins, 166 F.3d 509, 514 n.6 (2d Cir. 1999)* (noting pre-*California Dental* that "[u]nder quick look, once the defendant has shown a procompetitive justification for the conduct, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis" (internal quotation marks and citation omitted)). The Challenged Agreements, therefore, are not so obviously anticompetitive to consumers that someone with only a basic understanding of economics would immediately recognize them to be so.[7] *See* *Cal. Dental, 526 U.S. at 770*. **[**22]** We are bound, then, to apply the rule of reason.[8]

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[6] In *California Dental*, as an initial matter, the court rejected the use of an abbreviated rule of reason analysis for restraints on price and quality advertising. *526 U.S. at 781*. And in *Polygram*, the fact that the challenged conduct also restricted the parties from offering discounts on concert albums was key to the D.C. Circuit's affirmation of the inherently suspect analysis; the court thought that the agreement looked "suspiciously like a naked price fixing agreement between competitors[.]" *See* *Polygram, 416 F.3d at 37*.

[7] We do not discount the economic evidence cited by the Commission in coming to its conclusion, but the fact that it required the testimony of expert witnesses who provided empirical analyses in order to determine the net competitive effect of the Challenged Agreements underscores the point: these restraints are not obviously anticompetitive to someone with only a rudimentary understanding of economics. *See* *MLB, 542 F.3d at 340, n.10* (Sotomayor, *J.*, concurring).

[8] We also reject the Commission and *amici*'s arguments that the restrictions constitute illegal bid rigging as support for their use of the inherently suspect framework. ***HN12***[] An absolute ban on competitive bidding, or bid rigging, would be anticompetitive on its face and may justify an abbreviated rule of reason analysis. *Cal. Dental, 570 U.S. at 770* (citing *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692-93, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*); *see also* *United States v. Joyce, 895 F.3d 673, 679 (9th Cir. 2018)* (finding bid rigging to be *per se* illegal). It is not clear to us, however, that the restrictions constitute such a ban. The Challenged Agreements do not prevent the parties from participating in keyword auctions, only from bidding on trademarked terms. Whether restrictions on advertisers' use of particular terms leads to overall harm to the search engines is not obvious and therefore does not justify analyzing the agreements under the inherently suspect framework. Nor, as *amici* in support of the government argue, is it obvious that the restrictions constitute market division, another type of restraint that would justify an abbreviated analysis. *See* *Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (per curiam).

III. Application of the Rule of Reason

HN13[] Under the rule of reason, the Commission bears the burden of establishing a prima facie case of anticompetitive effect. Direct evidence of anticompetitive effects establishes a prima facie case of a *Sherman Act Section 1* violation and obviates the need for a detailed market analysis or showing of market power.[9] *See IFD,* ***[*118]*** *476 U.S. at 460*. The Commission contends that it satisfied its burden by adducing evidence of increased contact lens prices and a reduction in the quantity of advertisements.

A. Anticompetitive Effects

HN14[] Anticompetitive effects in a relevant market may be shown through direct evidence of output reductions, increased prices, or reduced quality in the relevant market. *Ohio v. Am Express Co. (Am. Express), 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018)*; *see also North Am. Soccer League, 883 F.3d at 42*. The Commission has also defined sufficient evidence of anticompetitive harm to include evidence of "retarded innovation, or other manifestations of harm to consumer welfare." *In re Realcomp II Ltd., No. 9320, 2009 FTC LEXIS 250, 2007 WL 6936319 (F.T.C. Oct. 30, 2009)*, *aff'd 635 F.3d 815*. We reject the Commission's argument that it has established direct evidence of anticompetitive effect in the form of increased prices. When an antitrust plaintiff advances an antitrust claim based on direct **[**23]** evidence in the form of increased prices, the question is whether it can show an actual anticompetitive change in prices after the restraint was implemented. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 236-37, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*; *MacDermid, 833 F.3d at 184*. The government could not make that showing because it did not conduct an empirical analysis of the Challenged Agreements' effect on the price of contact lenses in the online market for contacts. The evidence offered by the government is theoretical and anecdotal;[10] it is not "direct." Consequently, the Commission's conclusion that differences between 1-800 Contacts' prices and those of its competitors constitute direct evidence of the Challenged Agreements' anticompetitive effects is not supported by substantial evidence.[11]

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[9] Though the government argued to the ALJ that the parties to the Challenged Agreements collectively have market power in the relevant market and that the nature of the restraints makes it likely that the Challenged Agreements will have an anticompetitive effect, the ALJ chose not to determine the prima facie case under that theory, nor did the Commission on appeal.

[10] The government argues, inter alia, that (a) Petitioner admits that it charges more than their competitors in the relevant market; (b) economic theory strongly suggests that advertising restrictions tend to increase prices of any given product; and (c) Petitioner offered to meet or beat any price offered by other online retailers. Even accepting all this as true, it is not *direct* evidence that the Challenged Agreements caused the price of contact lenses in the relevant market to rise, as our precedent requires. *MacDermid, 833 F.3d at 184*.

[11] A slightly different issue plagues the government's argument that there is direct evidence of reduced revenues for search engines. To show this, the government did not show that Google or Microsoft, the companies who control the two most popular search engines, had lower revenues after the Challenged Agreements were put into place. Nor did the government introduce evidence that Petitioner spent less money on search advertising than it did before the Challenged Agreements came into effect. Instead, the government offered empirical evidence that the Challenged Agreements reduced the price paid by Petitioner for each click on one of its keywords. JA 1096-99. ***HN15***[] Empirical evidence is, as noted, required under our caselaw to find direct evidence of an anticompetitive effect. *K.M.B., 61 F.3d at 127*. But showing that a price for certain keywords dropped is not direct evidence of the effect on the *market as a whole. See Clorox, 117 F.3d at 56* (quoting *K.M.B., 61 F.3d at 127*). This snapshot shows only that Petitioner paid less for certain keyword advertisements, no more and no less.

While it is true that, when evaluating "whether horizontal restraints had an adverse effect on competition," we do not always "need to precisely define the relevant market to conclude that these agreements were anticompetitive," *Am. Express, 138 S.Ct. at 2285 n.7*, more was needed under our precedent if the Commission wished to show "direct" evidence in the market as a whole. *See Clorox, 117 F.3d at 56*. The "product" offered by search engines of which the Challenged Agreements allegedly restrain trade is, presumably, advertisers' use of keywords, but that is not clear from the record. For the same reason, we also

[*119] The government also argues that "disrupted information flow" is an anticompetitive effect and that a reduction in the quantity of advertisements is direct evidence of that effect. Respondent's Br. 63. While, to our knowledge, no Court of Appeals has held that a reduction of truthful information is necessarily a manifestation of anticompetitive harm, our sister circuits have occasionally considered advertising restraints in different contexts and have found the conduct in **[**24]** question to have anticompetitive effects. *See, e.g., California Dental Ass'n v. FTC (Cal. Dental II), 224 F.3d 942, 949 (9th Cir. 2000)* (considering professional advertising restraints in an asymmetrical information marketplace); *Polygram, 416 F.3d at 37* (holding that the FTC appropriately concluded an agreement to restrain price cutting and advertising violated the FTC Act); *Realcomp II, 635 F.3d at 831-32, 832 n.9* (denying petition for review when petitioner's policy limited access to internet marketing); *Blackburn v. Sweeney, 53 F.3d 825, 827-29 (7th Cir. 1995)* (identifying an agreement not to advertise in certain geographic areas as a *per se* illegal attempt to allocate markets). We need not decide whether the Commission's theory of harm is viable, however, because we conclude that Petitioner has shown a procompetitive justification and the Commission fails to carry its burden at the third step.

B. Procompetitive Justifications

Petitioner asserts that the Challenged Agreements are justified by two procompetitive effects: reduced litigation costs and protecting Petitioner's trademark rights. The Commission found that, while both of these justifications were "cognizable and facially plausible," Petitioner did not show that they "have a basis in fact," and therefore they were not "valid." JA 309. We disagree. The protection of Petitioner's trademark interests constitutes a valid procompetitive **[**25]** justification for the Challenged Agreements.

The Commission determined that, since "the [Challenged Agreements] restrict a type of competitive advertising that has never been found to violate the trademark laws, and the weight of authority overwhelmingly points to non-infringement[,]" trademark protection was not a valid procompetitive benefit that justified the Challenged Agreements. JA 313. This was incorrect. ***HN16***[] Trademarks are by their nature non-exclusionary, and agreements to protect trademark interests are "common, and favored, under the law." *Clorox, 117 F.3d at 55*. As a result, "it is difficult to show that an unfavorable trademark agreement creates antitrust concerns." *Id. at 57*. This is true even though trademark agreements inherently prevent competitors "from competing as effectively as [they] otherwise might[.]" *Id. at 59*.

In *Clorox*, we found that the plaintiff had failed to show adverse effects on the market as a whole because the restrictions at issue did not restrict competitors' ability to enter into the relevant market. *Id. at 59*. Although we held that the plaintiff in that case failed to present a prima facie case of anticompetitive harm, we also went on to detail how the procompetitive justifications of the agreement **[**26]** weighed against finding an antitrust violation. *Id. at 60*. We stated that "trademark agreements are favored in **[*120]** the law as a means by which parties agree to market products in a way that reduces the likelihood of consumer confusion and avoids time-consuming litigation." *Id.* And again, *Clorox* counsels that we should "presume" that trademark settlement agreements are procompetitive. *Id.*

The Commission, however, decided that the trademark claims that led to the Challenged Agreements were likely meritless. While it claimed not to be determining the validity of Petitioner's trademark claims, it did just that by weighing the potential validity of the trademark claims in order to show that Petitioner's procompetitive justification was invalid.[12] Even if the Commission's analysis of the underlying trademark claims were correct, trademark

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cannot say that the Commission's conclusion that the Challenged Agreements harmed search engines by reducing quality in the market was supported by substantial evidence.

[12] Though the Luxottica agreement was not the result of a trademark dispute, the agreement contains trademark protections similar to those in the other Challenged Agreements. And while the restrictions in the Luxottica Agreement may best be considered under the doctrine of ancillary restraints, *see MLB, 542 F.3d at 334* (Sotomayor, *J.*, concurring), the government does not attempt here to offer direct evidence differentiating the reductions in advertising stemming solely from that agreement.

agreements that "only marginally advance[] trademark policies" can be procompetitive.[13] *See id. at 57*. Under *Clorox*, "[e]fforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies." *Id. at 61*.

That does not mean that every trademark agreement has a legitimate procompetitive justification. If the "provisions relating **[**27]** to trademark protection are auxiliary to an underlying illegal agreement between competitors," or if there were other exceptional circumstances,[14] we would think twice before concluding the challenged conduct has a procompetitive justification. *See id. at 60*. As in *Clorox*, however, there is a lack of evidence here that the Challenged Agreements are the "product of anything other than hard-nosed trademark negotiations."[15] *Id.* Consequently, we find Petitioner met its burden at step two.

C. Less Restrictive Alternatives

HN17[] Because Petitioner has carried its burden of identifying a procompetitive justification, the government must show that a less restrictive alternative exists that achieves the same legitimate competitive **[*121]** benefits.[16] *Am. Express, 138 S. Ct. at 2284*; *North Am. Soccer League, 883 F.3d at 42*. That is, the restraint "only survives a rule of reason analysis if it is reasonably necessary to achieve the legitimate objectives proffered by the defendant." *United States v. Brown Univ., 5 F.3d 658, 678-79 (3d Cir. 1993)*. "Less restrictive alternatives are those that would be less prejudicial to competition as a whole." *North Am. Soccer League, 883 F.3d at 45* (internal quotation marks omitted). The Commission found that the government had shown a viable less restrictive alternative, namely that the parties to the Challenged Agreements could have **[**28]** agreed to require clear disclosure in each search advertisement of the identity of the rival seller rather than prohibit all advertising on trademarked terms. According to the government, therefore, the Challenged Agreements are overbroad.

HN18[] In *Clorox*, however, we noted that "it is usually unwise for courts to second-guess" trademark agreements between competitors. *117 F.3d at 60*. In this context, what is "reasonably necessary," *Brown Univ., 5 F.3d at 679*, is likely to be determined by competitors during settlement negotiations, *Clorox, 117 F.3d at 60*. And, as articulated above, absent something that would negate the typically procompetitive nature of these agreements, "the parties' determination of the scope of needed trademark protections is entitled to substantial weight." *Clorox, 117 F.3d at 60*.

In any event, because we hold that protecting trademarks is a valid procompetitive justification for the restrictions, we see no further need to differentiate the Luxottica Agreement from the other agreements.

[13] At the time the agreements were entered into, the law regarding the validity of Petitioner's trademark claims was unsettled, and it remains so in this Circuit. The fact that the law was unsettled at the time is one reason a party might enter into a settlement agreement.

[14] It has not been argued that exceptional circumstances exist in this case. We, therefore, need not decide what circumstances might qualify as exceptional, *von Hofe v. United States, 492 F.3d 175, 185 n.3 (2d Cir. 2007)*, such as, for example, agreements between parties with unequal bargaining power. *See Clorox, 117 F.3d at 60* ("There is no evidence that [a party to the challenged agreement] entered the agreement under duress.").

[15] Intent plays a role in this conclusion. *See Clorox, 117 F.3d at 60* (citing *Chicago Bd. of Trade, 246 U.S. at 238*). There is ample evidence that, if Petitioner's competitors had not been precluded by the Challenged Agreements from running ads on Petitioner's trademarks, they would have done so; the competitors' use of the terms is what spawned the agreements in the first place. This is unlike a typical market division case, where the two parties agree not to compete in the same geographic areas because it would benefit both of their bottom lines. *Cf. Palmer, 498 U.S. at 49-50* (holding an agreement between bar review course providers dividing market territories for the purpose of raising prices was *per se* illegal).

[16] The government argues that if we find that the Commission improperly weighed the procompetitive justification of Petitioner's trademark protections, we should remand to allow the Commission to reconsider in the first instance. The Commission, however, already determined that, assuming the procompetitive justifications were legitimate, they were not reasonably necessary to achieve the proffered procompetitive benefits. We need not remand to allow them to rearticulate the same point.

The government attempts to differentiate *Clorox* by arguing that the FTC is different than a private plaintiff, and when it brings an antitrust claim we should not give the settling parties as much latitude to negotiate a trademark agreement as a court would in a private antitrust suit. Even if we were to accept the Commission's argument that its presence in a case warrants less solicitude for trademark interests, the government still needs to show more than the mere possibility **[**29]** there could be crafted an alternative form of the trademark agreement. The alternative must be "substantially less restrictive." Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ¶ 1502 (3rd & 4th eds., 2019 Cum. Supp. 2010-2018). The alternative must also achieve the same legitimate competitive benefits outlined by the Petitioner. *North Am. Soccer League, 883 F.3d at 42*. And ***HN19***[] at the end of the day, our job is to "weigh[] the competing evidence to determine if the effects of the challenged restraint tend to promote or destroy competition." *Apple, 791 F.3d at 329* (internal quotation marks omitted).

The Commission majority thought that a disclosure requirement was enforceable because, *inter alia*, it has ordered similar requirements in the past. But the majority failed to consider the practical reasons for the parties entering into the Challenged Agreements. Under *Clorox*, this was insufficient. *117 F.3d at 60-61*. The Commission did not consider, for example, how the parties might enforce such a requirement moving forward or give any weight to how onerous such enforcement efforts would be for private parties. ***HN20***[] When the restraint at issue in an antitrust action **[*122]** implicates IP rights, *Actavis* directs us to **[**30]** consider the policy goals of the relevant IP law. *See 570 U.S. at 149*. Here, those considerations must include the practical implications of the government's proffered alternatives on the parties' ability to protect and enforce their trademarks.

HN21[] While trademark agreements limit competitors from competing as effectively as they otherwise might, we owe significant deference to arm's length use agreements negotiated by parties to those agreements. *Clorox, 117 F.3d at 59-60*. Doing so may give rise to collateral harm in a relevant market. But forcing companies to be less aggressive in enforcing their trademarks is antithetical to the procompetitive goals of trademark policy.[17] *See id. at 61*. And without considering the downstream effects of requiring less aggressive enforcement, the government has failed to show that the proffered alternatives achieve the same legitimate procompetitive benefits as those advanced by the Petitioner.

CONCLUSION

In this case, where the restrictions that arise are born of typical trademark settlement agreements, we cannot overlook the Challenged Agreements' procompetitive goal of promoting trademark policy. In light of the strong procompetitive justification of protecting Petitioner's trademarks, we conclude the **[**31]** Challenged Agreements "merely regulate[] and perhaps thereby promote[] competition." *Chicago Bd. of Trade, 246 U.S. at 238*. They do not constitute a violation of the Sherman Act, and therefore an asserted violation of the FTC Act fails of necessity.

The petition for review is GRANTED, the Final Order of the Federal Trade Commission is VACATED, and the case is REMANDED with instructions to DISMISS the administrative complaint.

End of Document

[17] We acknowledge a concern that the Challenged Agreements require the parties to employ negative keywords, which prevent ads of competitors from appearing in a consumer search for each other's trademarked terms — even absent purchase of a keyword (but rather due to a search engine's independent determination that an ad is relevant to the consumer). Even if we were inclined to consider whether this aspect of the settlement agreement goes beyond any legitimate claim of trademark infringement, and therefore imposes a restraint on competition not justified by the procompetitive value of enforcing trademark rights, the Commission has neither made separate findings with respect to the specific anticompetitive effects of this narrow aspect of the settlement agreements, nor urged that we should evaluate this issue separately. Accordingly, we have no reason to consider that issue.

In re Lantus Direct Purchaser Antitrust Litig.

United States District Court for the District of Massachusetts

June 11, 2021, Decided; June 11, 2021, Filed

CIVIL ACTION NO. 16-12652-JGD

Reporter

2021 U.S. Dist. LEXIS 256698 *; 2021 WL 8016913

In re LANTUS DIRECT PURCHASER ANTITRUST LITIGATION

Prior History: *In re Lantus Direct Purchaser Antitrust Litig., 284 F. Supp. 3d 91, 2018 U.S. Dist. LEXIS 4503 (D. Mass., Jan. 10, 2018)*

Core Terms

enterprise, entities, documents, parties, allegations, purposes, amend, coordinated, territories, subsidiary, wholly owned subsidiary, argues, revise, motion for leave, anticompetitive, purchases, futile, antitrust, discovery, disputes, parent company, anticompetitive conduct, propose an amendment, motion to dismiss, class action, encompass, untimely, unity

Counsel: **[*1]** For FWK Holdings LLC, on behalf of itself and all others similarly situated, Plaintiff: David P. Germaine, John P. Bjork, Sperling & Slater, P.C., Chicago, IL; Joseph M. Vanek, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL; Thomas M. Sobol, LEAD ATTORNEY, Bradley J. Vettraino, Jessica Rose MacAuley, Kristen A. Johnson, Kristie A. LaSalle, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Alberto Rodriguez, PRO HAC VICE, SPERLING & SLATER, P.C, Chicago, IL; Allison G. Margolies, PRO HAC VICE, Sperling & Slater, P.C., Chcago, IL; April D. Lambert, PRO HAC VICE, Radice Law Firm, P.C., Princeton, NJ; Clark Craddock, PRO HAC VICE, Radice Law Firm, Princeton, NJ; Greg Shinall, PRO HAC VICE, Sperling & Slater, P.C., Chicago, IL; John D. Radice, Kenneth Pickle, PRO HAC VICE, Radice Law Firm, PC, Princeton, NJ; Rochella T. Davis, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Trevor K. Scheetz, PRO HAC VICE, Sperling & Slater, P.C., Chicago, IL.

For Meijer, Inc., Meijer Distribution, Inc., Plaintiffs: Thomas M. Sobol, LEAD ATTORNEY, Bradley J. Vettraino, Kristen A. Johnson, Kristie A. LaSalle, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; John D. Radice, Radice Law Firm, **[*2]** PC, Princeton, NJ.

For Sanofi-Aventis U.S., LLC, Defendant: Julia E. McEvoy, Rosanna K. McCalips, LEAD ATTORNEYS, PRO HAC VICE, Jones Day, Washington, DC; Brian K. Grube, Michelle K. Fischer, Jones Day, Cleveland, OH; David Robert Fox, Elias Law Group, Washington, DC; Jonathan McCreary, Jones Day - Pittsburgh, Pittsburgh, PA; Katelyn O'Reilly, PRO HAC VICE, Walsh Pizzi OReilly Falanga LLP, Newark, NJ; Kathleen Wallace, Jones Day (Bos), Boston, MA; Kiersen Commons, Jones Day - Washington, Washington, DC; Liza M. Walsh, PRO HAC VICE, Walsh Pizzi OReilly Falanga LLP, Newark, NJ; Robert Nolan Stander, Theresa C. Martin, Jones Day, Washington, DC; Stephen D. Morrison, III, Jones Day - Minneapolis, Minneapolis, MN; William T. Walsh, Jr., PRO HAC VICE, Walsh Pizzi OReilly Falanga LLP, Newark, NJ.

For Sanofi-Aventis Puerto Rico, Inc., Defendant: Rosanna K. McCalips, LEAD ATTORNEY, Robert Nolan Stander, Theresa C. Martin, Jones Day, Washington, DC; Jonathan McCreary, Jones Day - Pittsburgh, Pittsburgh, PA; Kathleen Wallace, Jones Day (Bos), Boston, MA; Kiersen Commons, Jones Day - Washington, Washington, DC; Stephen D. Morrison, III, Jones Day - Minneapolis, Minneapolis, MN.

Judges: Judith Gail Dein, **[*3]** United States Magistrate Judge.

Opinion by: Judith Gail Dein

Opinion

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR LEAVE TO FILE A THIRD AMENDED CLASS ACTION COMPLAINT

DEIN, U.S.M.J.

I. INTRODUCTION

Plaintiff FWK Holdings, LLC ("FWK"), a direct purchaser of the insulin glargine products, Lantus and Lantus SoloSTAR (collectively, "Lantus"), has brought this putative class action against Sanofi-Aventis U.S. LLC ("Sanofi U.S."), the manufacturer of both products, claiming that Sanofi U.S. violated *Section 2* of the *Sherman Act*, *15 U.S.C. § 2*, by monopolizing and attempting to monopolize the market for insulin glargine in the United States, its territories and the District of Columbia. The matter is before the court on FWK's "Motion for Leave to File a Third Amended Class Action Complaint" (Docket No. 176), by which FWK is seeking permission to amend its complaint to add Meijer, Inc. and Meijer Distribution, Inc. (collectively, "Meijer") as named plaintiffs and proposed class representatives; add Sanofi-Aventis Puerto Rico ("Sanofi P.R.") as a defendant; revise the class definition to include all persons or entities in the United States or its territories who purchased Lantus directly from Sanofi U.S. "or from any entity which is **[*4]** part of the same economic enterprise with Sanofi, including Sanofi P.R." during the class period; and make a number of minor updates and revisions to the operative complaint. Sanofi U.S. and Sanofi P.R. (collectively, "Sanofi") oppose the motion "to the extent it seeks to add Sanofi PR as a party or amend the class definition[,]" and they object to naming the Meijer entities as plaintiffs and proposed class representatives "to the extent Meijer's allegations rest on purchases from Sanofi PR."[1] Because Sanofi does not oppose the remaining amendments, FWK's motion will be allowed with respect to those matters and this court's discussion will focus solely on the parties' dispute regarding the proposed addition of Sanofi P.R. and revision of the class definition.

FWK's request to add Sanofi P.R. as a defendant in this case, and its proposed expansion of the class definition to encompass Sanofi P.R. and "any entity which is part of the same economic enterprise with Sanofi," are premised upon the theory that Sanofi U.S. and Sanofi P.R. are part of a single economic enterprise under ***antitrust law***, and that Sanofi U.S.'s alleged anticompetitive conduct must be imputed to Sanofi P.R. and any **[*5]** other entity that is part of the single enterprise. Sanofi disputes these assertions and argues that FWK's motion should be denied as futile because the proposed amendments are insufficient to state a claim against Sanofi P.R. under a single economic enterprise theory, and because FWK's proposed expansion of the class definition would render the class unascertainable based on objective criteria. Sanofi further argues that the motion should be denied as untimely under Local Rule 15.1(a) because FWK failed to seek leave to amend its complaint as soon as its attorneys reasonably could have been expected to learn about Sanofi P.R.'s identity as a party.

After consideration of the parties' written submissions and their oral arguments, as well as a thorough review of the relevant case law, this court concludes that the question whether FWK may pursue a claim against Sanofi P.R. under a single economic enterprise theory should be resolved following further development of the factual record. This court also concludes that while it would have been far more appropriate for FWK to have filed its motion earlier, once it learned of Sanofi P.R.'s alleged sales of Lantus to members of the putative class, the plaintiff's **[*6]** decision to file its motion on the last day allowed under the operative Scheduling Order cannot, in fairness, be

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[1] Sanofi P.R., which is not a party to the litigation, has appeared solely for the purpose of opposing FWK's motion for leave to amend.

deemed untimely except to the extent FWK is seeking to expand the class definition to encompass sales by unidentified entities beyond Sanofi U.S. and Sanofi P.R. Therefore, and for the reasons described below, the plaintiff's motion for leave to file a Third Amended Class Action Complaint ("TAC") is ALLOWED IN PART and DENIED IN PART as follows:

1. The motion is allowed with respect to FWK's request to file a TAC (a) adding the Meijer entities as named plaintiffs and proposed class representatives; (b) adding allegations against Sanofi P.R.; (c) removing Cesar Castillo, Inc. from the complaint; (d) revising the class definition to include members who purchased Lantus from Sanofi U.S. or Sanofi P.R.; (e) including six minor revisions of factual allegations; (f) eliminating a stray paragraph erroneously included in earlier complaints; and (g) updating counsel appearing on behalf of the direct purchaser class plaintiffs.

2. The motion is denied with respect to FWK's request to revise the class definition to encompass unidentified entities from which class members may have purchased **[*7]** Lantus. Specifically, the class definition shall be limited to all persons or entities in the United States and its territories, or subsets thereof, that purchased Lantus (in cartridges or SoloSTAR) *directly from Sanofi U.S. or Sanofi P.R.* at any time between February 13, 2015 and December 31, 2016 or until the anticompetitive effects of Sanofi's conduct cease (the "class").

3. By **June 21, 2021**, the parties shall file a joint proposed schedule for the completion of discovery and, if appropriate, the filing of motions for summary judgment addressing the issue whether FWK can maintain claims against Sanofi P.R. based on the theory that Sanofi P.R. and Sanofi U.S. are part of a single economic enterprise. In the event the parties are unable to agree on a joint schedule, they shall file separate proposals.

II. DISCUSSION

A. Standard of Review of Motions to Amend

The decision whether to grant a motion for leave to amend falls within the trial court's discretion. *Sheehan v. City of Gloucester, 321 F.3d 21, 26 (1st Cir. 2003)*. Pursuant to *Rule 15(a) of the Federal Rules of Civil Procedure*, "[t]he court should freely give leave [to amend a complaint] when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. "This liberal amendment policy applies unless the plaintiff exhibited bad faith, undue delay, the amendment would work undue prejudice **[*8]** on the opposing party or be futile." *Ortiz v. Mara, 435 F. Supp. 3d 330, 332 (D. Mass. 2020)* (quoting *Weinberg v. Grand Circle Travel, LLC, 891 F. Supp. 2d 228, 236 (D. Mass. 2012)*). In the instant case, Sanofi argues that the proposed amendments relating to Sanofi P.R. are futile and untimely under this court's Local Rules.

B. Futility

The primary issue raised in connection with FWK's motion is whether the proposed amendments against Sanofi P.R. are futile because they fail to allege sufficient facts to show that Sanofi P.R. and Sanofi U.S. comprise a single economic enterprise for antitrust purposes. "In assessing futility, the district court must apply the standard which applies to motions to dismiss under *Fed. R. Civ. P. 12(b)(6)*." *Adorno v. Crowley Towing & Transp. Co., 443 F.3d 122, 126 (1st Cir. 2006)*. Pursuant to this standard, "the court must 'accept as true all well-pleaded facts set forth in the [proposed] complaint and draw all reasonable inferences therefrom in the pleader's favor.'" *Drachman v. Boston Sci. Corp., 258 F. Supp. 3d 207, 210 (D. Mass. 2017)* (alteration in original) (quoting *Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011)*) (additional quotations and citation omitted). The court will "not, however, credit 'bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like.'" *Aponte-Torres v. Univ. of P.R., 445 F.3d 50, 55 (1st Cir. 2006)* (quoting *Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996)*). "At bottom, a complaint will survive a motion to dismiss when it alleges 'enough facts to state a claim to relief that is plausible on its face.'" *Alston v. Spiegel, 988 F.3d 564, 571 (1st Cir. 2021)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.*

Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)). "A claim is plausible when the factual **[*9]** content adumbrated in the complaint permits a reasonable inference that the defendant is liable." Id.

Ordinarily, a court applying the standard established under *Rule 12(b)(6)* may "consider only the 'facts alleged in the complaint, and exhibits attached thereto.'" *Newman v. Lehman Bros. Holdings Inc., 901 F.3d 19, 25 (1st Cir. 2018)* (quoting *Freeman v. Town of Hudson, 714 F.3d 29, 35 (1st Cir. 2013)*). "However, there are some 'narrow exceptions' in which a court may, if it chooses, consider extrinsic documents, such as 'documents the authenticity of which are not disputed by the parties; ... official public records; ... documents central to the plaintiff's claim; [and] ... documents sufficiently referred to in the complaint[.]'" Id. (quoting *Freeman, 714 F.3d at 36*). In the instant case, the court has reviewed the documents cited by the plaintiff in its Reply memorandum and attached to the Declaration of Bradley J. Vettraino (Docket No. 195) because they include public records that have been filed with the Securities and Exchange Commission ("SEC") and because courts in some instances have looked at information beyond the complaint in evaluating whether the single economic enterprise theory applies. See *Gonzalez-Maldonado v. MMM Healthcare, Inc., 693 F.3d 244, 250 (1st Cir. 2012)* (relying on affidavit submitted in connection motion to dismiss to determine that related companies were part of a single corporate enterprise); **[*10]** *OrbusNeich Med. Co., Ltd., BVI v. Boston Sci. Corp., 694 F. Supp. 2d 106, 111 (D. Mass. 2010)* (considering Annual Report filed with the SEC on a motion to dismiss "as a matter of official public record"). Moreover, at this stage in the litigation, it would make little sense to deny the motion and force FWK to attempt to replead its proposed claim against Sanofi P.R. if the plaintiff possesses evidence that might ultimately support the claim on the merits.[2]

The Single Economic Enterprise Theory

The single economic enterprise theory under which FWK seeks to pursue claims against Sanofi P.R. arises out of the Supreme Court's decision in *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. In that case, the Supreme Court addressed the question whether a parent corporation and its wholly owned subsidiary are capable of conspiring with each other in violation of *§ 1* of the *Sherman Act*. *Copperweld Corp., 467 U.S. at 755, 104 S. Ct. at 2733-34*. The Court determined that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* of the *Sherman Act*" because they "have a complete unity of interest." *Id. at 771, 104 S. Ct. at 2741*. In particular, the Court emphasized that in the case of a parent and a wholly owned subsidiary,

> [t]heir objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but **[*11]** one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for *§ 1* scrutiny.

Id. at 771, 104 S. Ct. at 2741-42. Because it determined that they comprise a single economic enterprise, the Supreme Court held a parent company and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of *§ 1* of the *Sherman Act*." *Id. at 777, 104 S. Ct. at 2745*.

A majority of Circuit Courts of Appeal, including the First Circuit, "have held that *Copperweld*'s 'rationale and underlying policy apply with equal force to sister corporations that are wholly owned subsidiaries of the same parent,' and that such subsidiaries, along with their parent, constitute a single economic enterprise for antitrust purposes." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1233 (10th Cir. 2017)* ("*Lenox*") (footnote omitted) (quoting *Gonzalez-Maldonado, 693 F.3d at 249-50*). Accordingly, "*Copperweld* supports treating

[2] While this court expresses no opinion on whether FWK will be able to support its claim that Sanofi U.S. and Sanofi P.R. are part of a single economic enterprise, FWK has submitted evidence indicating that Sanofi P.R. could potentially face liability under such a theory. Under these circumstances, denying the motion for leave to amend and forcing FWK to replead its claim against Sanofi P.R. would be inefficient and effectively elevate form over substance.

the coordinated acts of sister subsidiaries wholly owned by the same parent as those of a single enterprise" for purposes of *§ 1* of the *Sherman Act*. *Id. at 1234* **[*12]** . Moreover, "every court to address the question has held that affiliated entities which must be treated as a single enterprise for purposes of *§ 1* also must be treated as a single enterprise for purposes of *§ 2*." *Id. at 1235* (footnote omitted). See also *Growers 1-7 v. Ocean Spray Cranberries, Inc., No. 12-12016-RWZ, 2014 U.S. Dist. LEXIS 61654, 2014 WL 1764533, at *7 (D. Mass. May 2, 2014)* (finding that parent company and its wholly owned subsidiary comprised a single economic entity for purposes of *§ 2* of the *Sherman Act* where they had "overlapping ownership, personnel, and economic interests"). Sanofi does not dispute, for purposes of the present motion, that the single economic enterprise theory could potentially apply in the context of this case. Instead, it argues that FWK's proposed allegations are insufficient to state a plausible claim for relief against Sanofi P.R. because they are devoid of facts showing that Sanofi U.S. and Sanofi P.R. function as a single economic enterprise or that they engaged in "coordinated activity" as required by *Copperweld*. (See Sanofi Opp. Mem. (Docket No. 188) at 9-13; Sanofi Surreply Mem. (Docket No. 202) at 1-2, 4-8).

"*Copperweld* 'held only that "the *coordinated* activity" of [related entities] must be viewed as that of a single enterprise.'" *Lenox, 847 F.3d at 1237* (alteration in original) (quoting *Mitchael v. Intracorp, Inc., 179 F.3d 847, 857 (10th Cir. 1999)* (quoting *Copperweld, 467 U.S. at 771, 104 S. Ct. at 2741*) (emphasis added)). Accordingly, courts have repeatedly emphasized that a corporation cannot "be held liable under *§ 2* for the anticompetitive conduct of one or more related entities, merely by virtue of its place in the same corporate family." Id. See also *Arandell Corp. v. Centerpoint Energy Servs., Inc., 900 F.3d 623, 633 (9th Cir. 2018)* (noting that *Copperweld* "does not supply a theory of unbounded vicarious liability for the *acts* of legally distinct entities."); *Chandler v. Phoenix Servs., No. 7:19-cv-00014-O, 2020 U.S. Dist. LEXIS 63779, 2020 WL 1848047, at *14 (N.D. Tex. Apr. 13, 2020)* (slip op.) ("It is well established that a parent cannot be held liable for the anticompetitive conduct of its subsidiary 'merely by virtue of its place in the same corporate family.'" (quoting *Lenox, 847 F.3d at 1237*)), appeal docketed, No. 20-1848 (Fed Cir. May 27, 2020); *Acuity Optical Labs, LLC v. Davis Vision, Inc., No. 14-cv-03231, 2016 U.S. Dist. LEXIS 112423, 2016 WL 4467883, at *9 (C.D. Ill. Aug. 23, 2016)* (explaining that because "commonly-owned companies have a unity of interest *only* when they are engaged in coordinated **[*13]** activity[,] ... courts have declined to extend the reasoning of *Copperweld* ... in the absence of specific evidence of coordinated activity."), and cases cited. In order to hold a related company liable under a single enterprise theory, the plaintiff "must put forth evidence that [the company] engaged in anticompetitive conduct." *Arandell Corp., 900 F.3d at 633* (footnote omitted). Accord *Lenox, 847 F.3d at 1237*; *Chandler, 2020 U.S. Dist. LEXIS 63779, 2020 WL 1848047, at *14*. Thus, a plaintiff seeking to show that legally distinct but related companies make up a single economic enterprise under ***antitrust law*** must establish that the companies' corporate relationship is such that they "have a complete unity of interest," *Copperweld, 467 U.S. at 771, 104 S. Ct. at 2741*, and "that each defendant independently participated in the enterprise's [anticompetitive] scheme[.]" *Lenox, 847 F.3d at 1237*.

Application to the Present Case

The new allegations pertaining to the addition of Sanofi P.R. as a defendant are set forth in four paragraphs of the proposed TAC as follows:

- In paragraph 16, FWK alleges that "[t]he defendant Sanofi-Aventis Puerto Rico Inc. ("Sanofi P.R.") is a corporation organized under the laws of Puerto Rico with its principal place of business located at City View Plz 2 4 FL Ste 4020, Guaynabo, Puerto Rico, 00968."

- In paragraph 195, FWK claims that "[a]fter approval by **[*14]** the FDA of NDA No. 21-081, in May 2001 Lantus was launched for sale in the United States and its territories. Lantus was prescribed and sold in the United States from May 2001 through the present. Lantus has been sold in the United States and its territories by Sanofi U.S. and Sanofi-Aventis Puerto Rico Inc. ("Sanofi P.R."), which constitute a single economic enterprise for antitrust purposes."
- Paragraph 460 provides that "[d]uring the relevant period, the plaintiffs and other purchasers bought substantial amounts of Lantus from Sanofi [] and from entities who are part of the same economic enterprise in the United States and its territories and possessions. One way in which activities were coordinated between Sanofi and other entities who are part of the same economic enterprise is through Sanofi's control of the price

set for Lantus by other Sanofi subsidiaries such as, for example, Sanofi-Aventis Puerto Rico, Inc. The plaintiffs' and the other purchasers' prices for these products were substantially greater than the prices that they would have paid absent the unlawful conduct alleged herein."

• Paragraph 487 would amend the class definition to include "[a]ll persons or entities in **[*15]** the United States and its territories, or subsets thereof, that purchased Lantus (in cartridges or SoloSTAR) directly from Sanofi, or from any entity which is part of the same economic enterprise . . . with Sanofi, including Sanofi P.R., at any time between February 13, 2015 and December 31, 2016 or until the anticompetitive effects of Sanofi's conduct cease (the 'class')."

FWK argues that these allegations merely clarify and formalize the fact that Sanofi U.S. and Sanofi P.R. are part of the same economic enterprise, and that "sales by Sanofi P.R. in the defined geographic market are implicated in the allegations of the complaint." (Pl. Mem. (Docket No. 177) at 9). In addition, FWK relies on documents, including public filings and evidence produced in discovery, to show that Sanofi U.S. and Sanofi P.R. are 100% owned and controlled by the same corporate entity, hold themselves out as a single economic enterprise, and operate as a single economic enterprise with respect to sales of Lantus in Puerto Rico. (Pl. Reply Mem. (Docket No. 194-1) at 3-8).

Sanofi argues that it is inappropriate to consider documents outside the complaint, and it disputes the plaintiff's characterization of the **[*16]** documents on which FWK relies. (See Sanofi Surreply at 1-5). In Sanofi's view, the relationship between Sanofi U.S. and Sanofi P.R. is one of "corporate cousins" and the documentation is insufficient to show that the entities function as a single economic enterprise, or that each entity participated in the alleged anticompetitive scheme. (Id. at 2; see also Sanofi Opp. Mem. at 10-13). This court finds, based on the differing interpretations of the evidence, that the question whether the plaintiffs may pursue claims against Sanofi P.R. under a single economic enterprise theory should be resolved following further development of the relevant facts.

While this court recognizes that the TAC contains conclusory allegations describing Sanofi U.S. and Sanofi P.R. as a "single economic enterprise for antitrust purposes[,]" relevant case law sets forth no specific requirements and provides little guidance for pleading such a claim. Moreover, the First Circuit has indicated that there are circumstances where consideration of evidence beyond the pleadings may be appropriate to establish the corporate relationship necessary to support a single economic enterprise theory. See *Gonzalez-Maldonado, 693 F.3d at 250* (relying on affidavit **[*17]** submitted by appellees in connection with their motion to dismiss to establish appellees' status as wholly owned subsidiaries of a parent company and conclude that they had "a total unity of economic interests" with the parent for purposes of ***antitrust law***). In the instant case, FWK relies on publicly filed documents to show that Sanofi U.S. and Sanofi P.R. are sufficiently related to establish a complete unity of interest as required under *Copperweld* and its progeny. (See Pl. Reply Mem. at 3-5). Sanofi vigorously disputes the plaintiff's reading of those documents, and argues that FWK has repeatedly misrepresented the corporate relationship between Sanofi U.S. and Sanofi P.R. (See Sanofi Surreply (Docket No. 202) at 3-4). Consequently, this court concludes that a determination regarding the Sanofi entities' corporate relationship would best be made at a later stage in the case, following further development of the factual record.

This court finds that the question whether Sanofi P.R. engaged in coordinated activity should also be resolved following development of the evidence. As described above, FWK's proposed amendments allege that Sanofi P.R. sold Lantus at inflated prices set by Sanofi U.S. **[*18]** Under the existing case law, it is unclear whether such facts are sufficient to support a claim that Sanofi P.R. participated in the anticompetitive scheme to monopolize the market for insulin glargine in the United States, its territories and the District of Columbia. Compare *Arandell Corp., 900 F.3d at 634-35* (ruling that evidence was sufficient to create a triable issue of liability against wholly owned subsidiary under a single economic enterprise theory where plaintiffs presented facts showing that subsidiary sold natural gas to consumers at artificially inflated prices set by parent company and disbursed profits to parent company, but subsidiary claimed to have acted innocently, without knowledge of parent company's price-fixing scheme) with *Chandler, 2020 U.S. Dist. LEXIS 63779, 2020 WL 1848047, at *15* (ruling that parent company could not be held liable for subsidiary's anticompetitive scheme as part of a single enterprise where parent was unaware of subsidiary's wrongful conduct and there was no evidence that parent shared the subsidiary's intent to monopolize the relevant market). The First Circuit has not addressed the question as to what level of involvement must be shown to hold an affiliated corporation liable as part of an enterprise's anticompetitive scheme, and **[*19]** it appears that no other circuit has provided a clear answer. See *Lenox, 847 F.3d at 1239* ("The question of what must be shown in order to hold a particular affiliated corporation liable as part of an inter-corporate scheme appears to be uncharted territory at the federal circuit level."); *Chandler, 2020 U.S. Dist. LEXIS 63779, 2020 WL 1848047, at *14* (explaining in a 2020 decision that question as to how involved a defendant must be in the enterprise's scheme to be held liable for coordinated activity of a single entity remains unresolved at the federal circuit level). Additionally, Sanofi takes issue with documents that FWK submitted in support of its assertion that Sanofi P.R. and Sanofi U.S. "coordinate — and operate as a single economic unit — with respect to the sale of Lantus in Puerto Rico." (See Pl. Reply Mem. at 6-8; Exhibits attached to the Declaration of Bradley J. Vettraino (Docket No. 195)). In particular, Sanofi disputes FWK's contention that the documents implicate Sanofi P.R. in the alleged anticompetitive conduct and notes that they represent no more than a handful of the documents produced by Sanofi U.S. in this action. (Sanofi Surreply at 4). Given the unsettled nature of the case law and the disputes raised by FWK's submission of evidence, this **[*20]** court finds that this issue should be resolved based on a more complete factual record, by way of summary judgment if appropriate.

Proposed Expansion of the Class

Sanofi argues that FWK's request to amend the class definition to include those who purchased Lantus "from any entity which is part of the same economic enterprise ... with Sanofi, including Sanofi P.R.[,]" should be denied as futile because it would render the class unascertainable based on objective criteria. (Sanofi Opp. Mem. at 14). It further urges this court to "reject this moving target, and FWK's unilateral attempt to extend the time by which it was required to conduct an investigation of the claims it seeks to vindicate, and to add additional parties to its complaint." (Id.). As described below, this court finds that FWK's effort to expand the class to encompass as yet unidentified parties is untimely, and that its motion to amend should be denied to the extent it seeks to expand the class definition to include purchases from entities other than Sanofi U.S. and Sanofi P.R. It is not necessary at this stage to determine whether the proposed amendment to the class definition should be denied on the grounds of futility **[*21]** as well.

C. Timeliness

Sanofi also contends that the plaintiff's motion for leave to file a TAC should be denied as untimely pursuant to Local Rule 15.1. Under that Rule, amendments adding parties must "be sought as soon as an attorney reasonably can be expected to have become aware of the identity of the proposed new party." L.R. 15.1(a). It is undisputed in this case that counsel for FWK knew by July 2020 at the latest that members of the putative class had purchased Lantus from Sanofi P.R. (See Declaration of Michelle K. Fischer (Docket No. 188-1) ¶¶ 11-12). Nevertheless, the plaintiff waited another six months, until January 21, 2021, to file its motion for leave to amend. During that time, FWK gave no indication to this court that it intended to add a defendant or had identified Sanofi P.R. as a potential party to the lawsuit. This court does not condone the plaintiff's tactics but will not deny the motion on this basis.

While FWK's delay in seeking to add Sanofi P.R. further complicates an already complex and protracted litigation, this court reluctantly concludes that the motion for leave to amend should not be denied under Local Rule 15.1. The operative Scheduling Order set January 21, 2021 as the deadline for the parties **[*22]** to amend the pleadings or add parties or claims except upon a showing of good cause.[3] (Docket No. 214 at 1). The plaintiff was entitled to rely on this Order. See *Viscito v. Nat'l Planning Corp., No. 3:18-30132-MGM, 2019 U.S. Dist. LEXIS 225137, 2019 WL 7578462, at *5 (D. Mass. July 5, 2019)* (slip op.) (declining to deny motion for leave to file amended complaint for failure to comply with Local Rule 15.1 where plaintiff met the deadline for filing motions for leave to amend the pleadings to add parties, claims or defenses set forth in the court's scheduling order). Additionally, "this is not a

[3] The January 21, 2021 deadline for amending the pleadings contains an exception for "any proposed amendments or additions based on information discovered through the review of the post-May 2016 discovery materials[.]" (Docket No. 214 at 1 n.1). That exception is not relevant to the plaintiff's present motion for leave to file a TAC.

case in which allowing Plaintiff leave to file the [TAC] would require re-opening discovery or postponing other scheduled events." Id. The Scheduling Order calls for the parties to serve supplemental discovery requests by July 28, 2021, serve final privilege logs by September 8, 2021, serve certain discovery motions by October 11, 2021 and complete all fact discovery by December 3, 2021. (Docket No. 214 at 1-2). Accordingly, fairness dictates that FWK's motion be allowed to the extent it seeks to add allegations relating to Sanofi P.R.

The plaintiff's proposal to amend the class definition to include purchases from unnamed entities "which [are] part of the same economic enterprise ... with Sanofi" warrants a different result. As Sanofi **[*23]** argues, allowing such an amendment would effectively "extend the time by which [FWK] was required to conduct an investigation of the claims it seeks to vindicate, and to add additional parties to its complaint." (Sanofi Opp. Mem. at 14). It would also cause unnecessary confusion over the scope of the class, increase the likelihood of disputes between the parties, and open the door to future delays. In short, it is simply too late in the litigation to allow the scope of the class to remain undefined. Therefore, FWK's motion will be denied to the extent it attempts to expand the class definition to include purchases from entities other than Sanofi U.S. and Sanofi P.R.

III. ORDER

For all the reasons detailed herein, FWK's "Motion for Leave to File a Third Amended Class Action Complaint" (Docket No. 176) is ALLOWED IN PART and DENIED IN PART as follows:

1. The motion is allowed with respect to FWK's request to file a TAC (a) adding the Meijer entities as named plaintiffs and proposed class representatives; (b) adding allegations against Sanofi P.R.; (c) removing Cesar Castillo, Inc. from the complaint; (d) revising the class definition to include members who purchased Lantus from Sanofi U.S. **[*24]** or Sanofi P.R.; (e) including six minor revisions of factual allegations; (f) eliminating a stray paragraph erroneously included in earlier complaints; and (g) updating counsel appearing on behalf of the direct purchaser class plaintiffs.

2. The motion is denied with respect to FWK's request to revise the class definition to encompass unidentified entities from which class members may have purchased Lantus. Specifically, the class definition shall be limited to all persons or entities in the United States and its territories, or subsets thereof, that purchased Lantus (in cartridges or SoloSTAR) *directly from Sanofi U.S. or Sanofi P.R.* at any time between February 13, 2015 and December 31, 2016 or until the anticompetitive effects of Sanofi's conduct cease (the "class").

3. By **June 21, 2021**, the parties shall file a joint proposed schedule for the completion of discovery and, if appropriate, the filing of motions for summary judgment addressing the issue whether FWK can maintain claims against Sanofi P.R. based on the theory that Sanofi P.R. and Sanofi U.S. are part of a single economic enterprise. In the event the parties are unable to agree on a joint schedule, they shall file separate **[*25]** proposals.

/s/ Judith Gail Dein

Judith Gail Dein

United States Magistrate Judge

In re Namenda Indirect Purchaser Antitrust Litig.

United States District Court for the Southern District of New York

June 11, 2021, Decided; June 11, 2021, Filed

No. 1:15-cv-6549 (CM) (RWL)

Reporter

2021 U.S. Dist. LEXIS 110081 *; 2021 WL 2403727

IN RE NAMENDA INDIRECT PURCHASER ANTITRUST LITIGATION

Prior History: *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC, 2016 U.S. Dist. LEXIS 128349 (S.D.N.Y., Sept. 13, 2016)*

Core Terms

generic, manufacturer, patent, Lexapro Amendment, settlement, summary judgment, lawsuit, summary judgment motion, settle, anticompetitive, saved, Defendants', memantine, benefits, switch, consumer-protection, parties, unjust-enrichment, purchasers, argues, opine, antitrust, consumers, reimbursement, courts, motion to exclude, cases, prevail, fair value, launch

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

HN1[] **Defenses, Experimental Use & Testing**

Under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C.S. § 301 et seq., a pharmaceutical company must file a New Drug Application (NDA) with the FDA any time it wishes to market a new brand-name drug. The NDA must provide the agency with scientific data showing that the drug is safe and effective. This generally requires conducting preclinical and clinical trials, and can take many years. 21 U.S.C.S. § 355. Although the process is costly and time consuming, once a patented drug is approved, it enjoys a period of exclusivity on the market (generally twenty years) — effectively, a government-sanctioned monopoly. A brand-name drug's developer can recoup its investment into the drug during this exclusivity period because the drug faces no competition from generics. However, once the exclusivity period ends and generic versions of the drug enter the market, it generally results in the brand-name drug losing more than 80% to 90% of its market share within six months — a process known in the industry as going off the "patent cliff".

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

HN2[] **Defenses, Experimental Use & Testing**

The Drug Price Competition and Patent Term Restoration Act (the Hatch-Waxman Act), Pub. L. No. 98-417, 98 Stat. 1585, permits generic manufacturers to file an Abbreviated New Drug Application (ANDA), which allows them to "piggy-back" on an already-approved branded drug's New Drug Application (NDA) information to show that the generic is safe and effective. The generic manufacturer can forgo any independent preclinical and clinic trials, but must certify that the generic has the same active ingredients as, and is bioequivalent to, the already-approved brand-name drug. 21 U.S.C.S. § 355(j). By allowing generic manufacturers to "piggy-back" on the studies of already-approved drugs, Hatch-Waxman reduced the development costs for lower-priced generics, speeding their introduction to the market.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Offers to Sell & Sales

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Making & Manufacturing Infringement

HN3[] **Defenses, Experimental Use & Testing**

But to succeed on an Abbreviated New Drug Application (ANDA), a generic manufacturer must submit a certification to the FDA describing the generic's implications on patents held by the branded manufacturer. The "Paragraph IV" route, so named after 21 U.S.C.S. § 355(j)(2)(A)(vii)(IV) permits certification where the generic manufacturer states that any relevant patent held by the brand-name manufacturer is invalid or will not be infringed by the manufacture, use, or sale of the generic. 21 U.S.C.S. § 355(j)(2)(A)(vii)(IV)). Submitting an ANDA under Paragraph IV exposes the applicant to patent litigation. A branded manufacturer has 45 days after the submission to initiate a patent-infringement action against the ANDA applicant. If the branded manufacturer files suit, the FDA must withhold approving the generic, usually for a 30-month period, while the parties litigate patent validity (or infringement) in court. 21 U.S.C.S. § 355(j)(5)(B)(iii).

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

HN4[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Like any lawsuit, the parties can decide to settle the patent-infringement litigation arising out of the Abbreviated New Drug Application (ANDA). However, in these instances, it is usually the brand-name manufacturer (the patent holder and plaintiff) that pays to settle the case against the generic manufacturer (the alleged infringer/patent challenger and defendant). Such settlements are therefore called reverse payments or reverse settlements. Because these payments tend to preclude, rather than encourage, market entry of generic competitors, there is reason for concern that settlements taking this form tend to have significant adverse effects on competition. A reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects. For this reason, the U.S. Supreme Court has held that reverse payments are not immune from antitrust scrutiny.

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

HN5[] **Entitlement as Matter of Law, Appropriateness**

Because only admissible evidence need be considered by the trial court in ruling on a motion for summary judgment. It is appropriate for district courts to decide questions regarding the admissibility of evidence on summary judgment. The resolution of evidentiary questions on summary judgment conserves the resources of the parties, the court, and the jury.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > ... > Testimony > Expert Witnesses > Qualifications

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

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

Under the Daubert standard and Fed. R. Evid. 702, the district court serves a gatekeeping function in determining whether an expert witness really qualifies as one.

Evidence > ... > Testimony > Expert Witnesses > Qualifications

Evidence > Relevance > Relevant Evidence

HN7[] **Expert Witnesses, Qualifications**

The Second Circuit has distilled Fed. R. Evid. 702's requirements into three broad criteria: (1) qualifications, (2) reliability, and (3) relevance and assistance to the trier of fact.

Evidence > Burdens of Proof > Allocation

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN8[] **Burdens of Proof, Allocation**

The party proffering the expert's opinions has the burden to establish the Fed. R. Evid. 702 admissibility requirements, with the district court acting as a gatekeeper to ensure that the expert's testimony both rests on a reliable foundation and is relevant to the task at hand. The court need not admit opinion evidence that is connected to the existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. In its evaluation, the district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN9[] **Judges, Discretionary Powers**

Ultimately, the Daubert standard is a flexible one, and will necessarily vary from case to case, District courts have broad discretion in the matter of the admission or exclusion of expert evidence. Even if an expert is qualified, the court must still consider whether the probative value of the testimony is substantially outweighed by a danger of unfair prejudice or likelihood of confusing or misleading the jury. Fed. R. Evid. 403.

Antitrust & Trade Law > Sherman Act > Defenses

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

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

HN10[] **Sherman Act, Defenses**

In the context of Actavis scrutiny, where the payor offers justifications for the payment aside from suppressing competition, there exists a question of fact as to whether the payment is unjustified. While parties may have reasons to prefer settlements that include reverse payments, the relevant antitrust question is: What are those reasons? If the basic reason is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the anti-trust laws are likely to forbid the arrangement. Put otherwise, if the reasons proffered by the parties are not persuasive to the trier of fact to justify the payment, then a large reverse payment likely means there has been an antitrust violation.

Patent Law > Nonobviousness > Elements & Tests > Prior Art

HN11[] **Elements & Tests, Prior Art**

A patent claim may be held invalid if it is anticipated or made obvious by prior art.

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

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

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

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

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

HN12[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate if the moving party can demonstrate that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In deciding a summary judgment motion, the court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in its favor. Whether any disputes of fact remain after the evidence is considered is a matter for the court. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.

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

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

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

HN13[] **Actual Monopolization, Claims**

To prove that there was unlawful monopoly maintenance, there must be evidence that a defendant (1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. To have a demonstrable restraint-of-trade claim, a plaintiff must prove (1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) unreasonably restraints trade.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Trademark Law > ... > Infringement Actions > Defenses > Genericness

HN14[] **Inequitable Conduct, Anticompetitive Conduct**

While a large payment may provide strong evidence that the patentee seeks to induce the generic challenger to abandon its claim, the U.S. Supreme Court has held that there are other considerations for evaluating whether a reverse payment was anticompetitive, such as whether the payment was a rough approximation of the litigation expenses saved through the settlement or reflected compensation for other services that the generic has promised to perform. Importantly, these considerations were not exhaustive; by using the phrase "such as," the Court made it clear that there were other things that could render a reverse settlement not anticompetitive. Because the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The only consideration that cannot factor into whether the reverse settlement was made are the expected profits from delayed competition.

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

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

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

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

HN15[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is inappropriate when there are dueling experts, both of whom have put forward opinions in contradiction with each other, and when those opinions are important to resolution of a material factual dispute.

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

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

HN16[] **Summary Judgment, Burdens of Proof**

To survive a summary judgment motion, An antitrust plaintiff must show that a defendant's anticompetitive act was a material and but-for cause of plaintiff's injury, although not necessarily the sole cause.

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

HN17[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

An alleged co-conspirator is not free from liability simply because it was not the most active participant in the scheme. It is sufficient that a defendant, regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have anticompetitive effects.

Antitrust & Trade Law > Regulated Practices > Private Actions > Purchasers

Governments > Legislation > Statutory Remedies & Rights

HN18[] **Private Actions, Purchasers**

Ala. Code § 8-19-10 et seq. only provides a private right of action to a consumer which it defines as any natural person who buys goods or services for personal, family, or household use. Ala. Code § 8-19-3(2).

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

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

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

Mich. Comp. Laws § 445.903, the Michigan Consumer Protection Act (MCPA), prohibits unfair, unconscionable, or deceptive methods in the conduct of trade or commerce. Michigan courts interpret this statute as providing relief only for consumers who purchased a product for personal use. Although the MCPA includes corporation under its definition of a person that can sue, Michigan courts hold that if an item is purchased primarily for business or commercial rather than personal purposes, the MCPA does not supply protection. The key question is whether the purchaser intends to use the product himself. Items purchased for commercial, rather than personal use, are outside the scope of the MCPA's protection.

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

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

HN20[] **Trade Practices & Unfair Competition, State Regulation**

Mich. Comp. Laws § 445.903, the Michigan Consumer Protection Act (MCPA), appears to only prohibit fraud or fraud-related acts in commerce. The statute includes a long list of what it defines as unfair, unconscionable, or deceptive methods. These include things like causing a probability of confusion or misunderstanding as to the source of goods; using deceptive representations; disparaging the goods, services, or reputation of another by false or misleading representation of fact; gross discrepancies between the oral representations of the seller and the written agreement, and etc. Mich. Comp. Laws §§ 445.903(1)(a)-(kk). None of the expressly prohibited acts pertains to any kind of antitrust violation. As a result, some courts have dismissed MCPA consumer-protection claims when brought in the antitrust context.

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

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

HN21[] **Trade Practices & Unfair Competition, State Regulation**

In the context of the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA), Illinois courts allow non-consumer plaintiffs to pursue relief if it can satisfy the consumer nexus text, which requires only that the complained-of conduct involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns.

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

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

HN22[] **State Regulation, Claims**

While a claimant would have to prove that there was an injury or detriment to consumers in order to satisfy all of the elements of a Florida Deceptive and Unfair Practices Act claim, the claimant does not have to be a consumer to bring the claim.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

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

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

HN23[] **Purchasers, Indirect Purchasers**

Massachusetts has two standing provisions for consumer-protection suits. Mass. Gen. Laws Ann. ch. 93A, § 11 provides a right of action to any person who engages in the conduct of any trade or commerce, while Mass. Gen. Laws Ann. ch. 93A, § 9 provides a right of action to any person other than a person entitled to bring action under section eleven. Mass. Gen. Laws Ann. ch. 93A, §§ 9, 11. This effectively splits the claims raised by "consumers" under § 9 and those raised by "businesses" under § 11. The key difference between §§ 9 and 11 is that the latter does not provide for indirect-purchaser standing. In any action brought under § 11, the court shall be guided in its interpretation of unfair methods of competition by the provisions of the Massachusetts Antitrust Act, which bars indirect-purchaser suits. Put simply, businesses cannot sue under § 11 for antitrust violations if they are indirect purchasers.

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

Torts > Business Torts > Unfair Business Practices > Remedies

HN24[] **Purchasers, Indirect Purchasers**

Mass. Gen. Laws Ann. ch. 93A does allow indirect purchaser claims, but only if the entity is not a business and is suing under Mass. Gen. Laws Ann. ch. 93A, § 9, not Mass. Gen. Laws Ann. ch. 93A, § 11.

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

Contracts Law > Remedies > Restitution

Torts > Business Torts > Unfair Business Practices > Remedies

HN25[] **False Advertising, State Regulation**

Prevailing plaintiffs are generally limited to injunctive relief and restitution under Cal. Bus. & Prof. Code § 17203.

Civil Procedure > Remedies > Damages > Monetary Damages

HN26[] **Damages, Monetary Damages**

Just because a certain type of monetary recovery is unavailable to a plaintiff does not mean that the substantive claim itself must be dismissed.

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

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

HN27[] **Trade Practices & Unfair Competition, State Regulation**

Nebraska's Consumer Protection Act (NCPA), Neb. Rev. Stat. §§50-1601 et seq., prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce but does not define "unfair" or "deceptive." Neb. Rev. Stat. § 59-1602. Liability exists under the NCPA if the plaintiff proves that the practice either (1) fell within some common-law, statutory, or other established concept of unfairness or (2) was immoral, unethical, oppressive, or unscrupulous.

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

HN28[] Deceptive & Unfair Trade Practices, State Regulation

Utah's consumer-protection statute, Utah Code Ann. § 13-11-5, requires that the defendant have engaged in an unconscionable act or practice.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN29[] Private Actions, State Regulation

Evaluating Utah's consumer-protection statute, Utah Code Ann. § 13-11-5, in the antitrust context, the court permits such claims to proceed, construing the statute liberally to conclude that an antitrust violation can be unconscionable.

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

HN30[] Deceptive & Unfair Trade Practices, State Regulation

A defendant cannot be liable for an unfair trade practice if it did not engage in any relevant trade in the United States.

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

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

HN31[] Trade Practices & Unfair Competition, State Regulation

Several states' consumer-protection statutes require that the actual unfair method of competition or deceptive act be associated with the commerce in question. The following include language specifically prohibiting unfair methods of competition in the conduct of any trade or commerce: Fla. Stat. § 501.204; Idaho Code § 48-603; 815 ILCS 505/2; Neb. Rev. Stat. Ann. § 59-1602; RSA § 358-A:2; N.M. Stat. Ann. § 57-12-3; Nev. Rev. Stat. Ann. § 598.0923(3); N.C. Gen. Stat. § 75-1.1(a); Utah Code Ann. § 13-11-5.

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

HN32[] Purchasers, Indirect Purchasers

Indirect-purchaser cannot bring unjust-enrichment claims in states that do not explicitly permit indirect-purchasers to bring suit, as permitting them to do so would constitute an impermissible end run around the Illinois Brick prohibition on indirect purchaser actions.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN33[] Equitable Relief, Quantum Meruit

The Florida Supreme Court has squarely held that to prevail on an unjust enrichment claim, the plaintiff must directly confer a benefit to the defendant. Courts following this holding have dismissed indirect-purchaser claims for lack of a "direct benefit" being conferred from an indirect-purchaser plaintiff to a defendant.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN34[] Equitable Relief, Quantum Meruit

Florida case law plainly precludes unjust-enrichment claims if the plaintiff only indirectly benefitted the defendant.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Personal Property > Choses in Action

HN35[] Types of Contracts, Quasi Contracts

Utah's Supreme Court has held that while unjust enrichment does not result if the defendant has received only an incidental benefit from the plaintiff's service this court has found that a large variety of items fall under the definition of benefit, including an interest in money, land, chattels, or choses in action; beneficial services conferred; satisfaction of a debt or duty owed by the defendant; or anything which adds to the defendant's security or advantage. Courts interpreting Utah law have construed benefit broadly and have declined to dismiss claims when there has arguably been an indirect benefit conferred by the plaintiff to the defendant.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Civil Procedure > Preliminary Considerations > Equity > Adequate Remedy at Law

HN36[] Types of Contracts, Quasi Contracts

Under New York law, an unjust-enrichment claim is an equitable claim that is unavailable where an adequate remedy at law exists. Courts in the Second Circuit have recognized that an unjust enrichment claim cannot survive where it simply duplicates, or replaces, a conventional contract or tort claim.

Civil Procedure > Special Proceedings > Class Actions > Class Action Fairness Act

HN37[] Class Actions, Class Action Fairness Act

The Class Action Fairness Act (CAFA) provides U.S. Const. art. III standing to class plaintiffs who represent out-of-state class members.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > Defenses

HN38[] Sherman Act, Defenses

For federal antitrust statutes, the statute of limitations restarts whenever there is an overcharge associated with the anticompetitive conduct. The U.S. Supreme Court has held that if there are a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again. Obviously, reimbursement cannot be obtained for periods that fall outside of the statute of limitations, but that does not mean that the claims as a whole are time barred.

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

Governments > Legislation > Statute of Limitations > Time Limitations

HN39[] Purchasers, Indirect Purchasers

Claims in indirect-purchaser actions are timely where there are allegations of overcharges within the class period that are within the statute of limitations.

Counsel: [*1] For Sergeants Benevolent Association Health & Welfare Fund, Individually and on behalf of itsself and all others similarly situated, Plaintiff: Andrew Szot, Matthew E Van Tine, Miller Law LLC, Chicago, IL; Ankur Kapoor, Hamsa Ananthi Mahendranathan, Lloyd Edward Constantine, Margaux Lynn Rosa Poueymirou, Constantine Cannon, LLP (NYC), New York, NY; Elizabeth S Metcalf, Peter George Safirstein, Safirstein Metcalf LLP, New York, NY; Ethan Edward Litwin, Constantine Cannon LLP, New York, NY; Kathleen Ellen Boychuck, Marvin Alan Miller, Miller Law, LLC, Chicago, IL; Lori Ann Fanning, PRO HAC VICE, Miller Law LLC, Chicago, IL.

For MSP Recovery Claims, Series LLC, MSPA Claims I, LLC, Consolidated Plaintiffs: Anna Higgins, Tracy Turner, LEAD ATTORNEYS, Pendley, Baudin & Coffin, New Orleans, LA; Christopher L. Coffin, LEAD ATTORNEY, Pendley, Baudin & Coffin, LLP, New Orleans, LA; Christopher M Placitella, LEAD ATTORNEY, Cohen, Placitelia & Roth, Red Bank, NJ.

For JM Smith Corporation, Movant: Dan Litvin, LEAD ATTORNEY, Bruce E. Gerstein, Garwin Gerstein & Fisher, L.L.P., New York, NY.

For Actavis, plc, Forest Laboratories, LLC, Defendants: Heather McDevitt, John Hail Chung, Kristen O'Shaughnessy, **[*2]** Martin Michael Toto, Michael Eugene Hamburger, LEAD ATTORNEYS, Daniel Grossbaum, Jack Pace, Matthew Robert Wisnieff, William Harold Bave, III, White & Case LLP (NY), New York, NY; Eric E Lancaster, White & Case LLP, Palo Alto, CA; Gina Marie Chiappetta, White & Case, New York, NY; James Francis Hurst, Kirkland & Ellis LLP, Chicago, IL; John Mark Gidley, White & Case LLP (DC), Washington, DC; Kevin Charles Adam, White & Case LLP, Boston, MA; Michael Sean Royall, Olivia Arden Adendorff, Kirkland & Ellis LLP, Dallas, TX; Peter J. Carney, White & Case LLP, New York, NY.

For Merz Pharmaceuticals GmbH & Co. KGaA, Defendant: Martin Michael Toto, White & Case LLP (NY), New York, NY.

For Amneal Pharmaceuticals, LLC, Upsher-Smith Laboratories, Inc., Defendants: Jay Philip Lefkowitz, LEAD ATTORNEY, Alexandra Corbett Strang, Devora Whitman Allon, Steven James Menashi, Kirkland & Ellis LLP (NYC), New York, NY; Kyla A. Jackson, PRO HAC VICE, Kirkland & Ellis LLP (NYC), New York, NY.

For Teva Pharmaceuticals USA, Inc., Barr Pharmaceuticals, Inc., Teva Pharmaceutical Industries Ltd, Defendants: Christopher T. Holding, PRO HAC VICE, Sarah K. Frederick, Goodwin Procter, LLP (Boston), Boston, MA.

For Cobalt **[*3]** Laboratories, Inc., Defendant: Christopher T. Holding, Sarah K. Frederick, LEAD ATTORNEYS, PRO HAC VICE, Goodwin Procter, LLP (Boston), Boston, MA; Jack Pace, White & Case LLP (NY), New York, NY; Peter J. Carney, White & Case LLP, New York, NY.

For Wockhardt Limited, Wockhardt USA LLC, Defendants: Damon William Suden, William Alfred Escobar, LEAD ATTORNEYS, Kelley Drye & Warren, LLP (NY), New York, NY; David Reap, Kelley Drye & Warren LLP, New York, NY.

For Sun India Pharmaceuticals Industries, Ltd., Defendant: Jay Philip Lefkowitz, LEAD ATTORNEY, Steven James Menashi, Kirkland & Ellis LLP (NYC), New York, NY.

For Dr. Reddy's Laboratories Ltd., Dr. Reddy's Laboratories, Inc., Defendants: Eric Cheung Hall, Jones Day - Washington, Washington, DC; Eric Peter Stephens, Jones Day (NYC), New York, NY; Jon Heintz, Jones Day, Washington, DC; Jonathan Bruce Berman, PRO HAC VICE, Jones Day (DC), Washington, DC.

For Sun Pharmaceutical Industries Ltd., Defendant: Jay Philip Lefkowitz, LEAD ATTORNEY, Alexandra Corbett Strang, Devora Whitman Allon, Steven James Menashi, Kirkland & Ellis LLP (NYC), New York, NY.

For Merz GmbH & Co. KGaA., Merz Pharmaceuticals GmbH, Merz Pharma GmbH & Co. KGaA, Defendants: **[*4]** Heather McDevitt, John Hail Chung, Kristen O'Shaughnessy, Martin Michael Toto, Michael Eugene Hamburger, LEAD ATTORNEYS, Matthew Robert Wisnieff, William Harold Bave, III, White & Case LLP (NY), New York, NY; Eric E Lancaster, White & Case LLP, Palo Alto, CA; Kevin Charles Adam, White & Case LLP, Boston, MA.

For Sun Pharmaceuticals Industries, Ltd., Defendant: Devora Whitman Allon, Kirkland & Ellis LLP (NYC), New York, NY; Kyla A. Jackson, PRO HAC VICE, Kirkland & Ellis LLP (NYC), New York, NY.

For Allergan plc, an Irish public limited company, Consolidated Defendant: Martin Michael Toto, LEAD ATTORNEY, Daniel Grossbaum, White & Case LLP (NY), New York, NY; Gina Marie Chiappetta, White & Case, New York, NY.

Judges: Colleen McMahon, United States District Judge.

Opinion by: Colleen McMahon

Opinion

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S AND DEFENDANTS' *DAUBERT* MOTIONS; AND GRANTING IN PART AND DENYING IN PART THE MOTIONS FOR SUMMARY JUDGMENT

McMahon, J:

Sergeants Benevolent Association Health & Welfare Fund commenced this antitrust lawsuit on behalf of itself and a class of similarly situated indirect purchasers of the brand and generic versions of Namenda — a drug used to treat Alzheimer's **[*5]** disease. Plaintiff accuses Defendants — Forest Laboratories and Merz Pharmaceuticals — of taking actions designed to limit generic competition for Namenda. Plaintiff originally advanced two theories of antitrust liability: (1) that Defendants' entered into several reverse-payment ("pay for delay") settlements with generic manufacturers of Namenda, which unlawfully delayed the market entry of generic competitors; and (2) Defendants' conduct in effectuating a "hard switch" for consumers between two versions of Namenda.

On February 11, 2021, this Court certified a class of indirect purchasers (or "end payors") of Namenda. However, the decision certified only the "pay for delay" theory for class treatment, and "den[ied] the motion insofar as it seeks to certify the same class (or any subclass) pursuant to the hard switch theory." *In re Namenda Indirect Purchaser Antitrust Litig., No. 15-cv-6549 (CM), 338 F.R.D. 527, 2021 U.S. Dist. LEXIS 26566, 2021 WL 509988 at *1 (S.D.N.Y. Feb. 11, 2021)*.

Presently before the Court are three motions for summary judgment: one filed by Defendant Forest (ECF 564); one filed by Defendant Merz (ECF 555); and one for partial summary judgment on Count I filed by SBA (ECF 568). Also before the Court are seven *Daubert* motions to exclude the opinions and proposed testimony of several experts.

The motions to exclude are granted **[*6]** in part and denied in part. As is generally the case, the principal reason given by each side for excluding the testimony of experts proffered by the other boils down to, "their expert doesn't agree with our expert, and since our expert is correct, theirs is not." Such motions waste the Court's time. There are, however, valid grounds for excluding certain portions of the testimony of several experts.

As for the summary judgment motions, they, too, are granted in part and denied in part. The motions are denied as to SBA's antitrust claims (Counts I and II). As to the consumer-protection claims (Count III), Forest's motion is granted for claims arising under the laws of Alabama, Massachusetts, and Michigan, but are denied for the remaining states; while Merz's motion is granted for all claims except the one arising under California law. Finally, Defendants' motions are granted as to the unjust-enrichment claims (Count IV) arising under the laws of Arkansas, Florida, and New York, but are denied without prejudice as to the rest of the states for further briefing (following trial) on whether the claims are duplicative under each state's unjust-enrichment jurisprudence.

I. BACKGROUND

This **[*7]** decision is the latest in a long line of opinions addressing actions that Forest took regarding its brand-name drug, Namenda. The underlying facts of the case are recounted at length in these other opinions. *See, e.g., New York v. Actavis, PLC ("Namenda I"), No. 14-cv-7473, 2014 U.S. Dist. LEXIS 172918, 2014 WL 7015198 (S.D.N.Y. Dec. 11, 2014)*, *aff'd sub nom. Schneiderman ex rel. New York v. Actavis, PLC ("Namenda II"), 787 F.3d 638 (2d Cir. 2015)*; *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC ("Namenda III"), No. 15-cv-7488, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690 (S.D.N.Y. Sept. 13, 2016)* (denying motion to dismiss federal claims brought by direct purchasers); *In re Namenda Direct Purchaser Antitrust Litig. ("Namenda V"), 331 F. Supp.3d 152 (S.D.N.Y. 2018)* (certifying class of direct purchasers); *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, plc (Namenda VI), No. 15-cv-6549, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233 (S.D.N.Y. Dec. 26, 2018)* (denying Defendants' motion to dismiss in this indirect-purchaser action); *In re Namenda Indirect Purchaser Antitrust Litig. ("Namenda VII")*, No. 15-cv-6549 (CM), 2021 WL 1000489 (S.D.N.Y. Jan. 12, 2021); *In re Namenda Indirect Purchaser Antitrust Litig. ("Namenda VIII"), No. 15-cv-6549 (CM), 338 F.R.D. 527, 2021 U.S. Dist. LEXIS 26566, 2021 WL 509988 (S.D.N.Y. Feb. 11, 2021)* (granting in part and denying in part motion for class certification).

The Court only summarizes the facts relevant to summary judgment.

A. The Product

Namenda IR (immediate release) and Namenda XR (extended release) (collectively "Namenda") are brand-name prescription drugs that contain the active ingredient memantine. Namenda is used to treat Alzheimer's disease, and has been commercially successful ever since Forest introduced Namenda IR to the U.S. market in 2003. Total annual sales of Namenda IR grew to approximately $1.5 billion by 2013, the same year that Forest launched Namenda XR. *Namenda II, 787 F.3d at 647*.

Although both versions of Namenda were patent protected, the patents had different expiration dates. Therein lies the dispute animating this lawsuit. SBA alleges that Defendants **[*8]** acted anticompetitively in attempting to protect Namenda's market advantage afforded by the patents, ultimately resulting in indirect purchasers paying higher prices for memantine than would otherwise have been the case but-for Defendants' conduct.

B. The Parties

Lead plaintiff Sergeants Benevolent Association Health & Welfare Fund ("SBA") is a fund that administers the prescription drug benefit plan for active and retired New York City Police Department sergeants and their dependents. It represents a class of indirect-purchaser plaintiffs ("IPPs"), which includes — subject to some exceptions — "All Third-Party Payors who indirectly purchased, and/or paid, and/or provided reimbursement for, some or all of the price for Namenda IR 5 or 10 mg tablets, their AB-rated generic equivalents, and/or Namenda XR capsules" between June 1, 2012, through December 31, 2017. (ECF 489).

Third-party payors are entities (besides the patient or the health care provider) that reimburse for health care expenses. They include insurance companies and self-insured health and welfare plans run by employers. They are indirect purchasers because they do not purchase drugs directly from the manufacturer (in contrast **[*9]** to direct purchasers like wholesalers). Instead, they pay reimbursement for the purchases made by the individual consumers that they insure.

Defendant Forest Laboratories is a limited-liability company incorporated in Delaware that manufactures and sells branded pharmaceutical products. Forest is a wholly owned subsidiary of Actavis PLC (now known as Allergan PLC).

Defendants Merz GmbH & Co. KGaA.; Merz Pharma GmbH & Co. KGaA; and Merz Pharmaceuticals GmbH (collectively "Merz") are headquartered in Germany and are engaged in the development, production, and distribution of pharmaceutical products. Merz is the original holder of the patent at the center of this dispute, U.S. Patent No. 5,061,703. Merz granted Forest an exclusive license to the '703 Patent in June 2000, which gave Forest the right to market a memantine drug in the United States. As part of the agreement, Forest was required to pay Merz 20% of its net revenues on sales of memantine products in the U.S. (ECF 607, Exh. 23 at 14).

C. The Hatch-Waxman Act and Generic Competition

HN1[] Under the *Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq.*, a pharmaceutical company must file a New Drug Application ("NDA") with the FDA any time it wishes to market a new brand-name drug. The NDA must provide the agency with scientific **[*10]** data showing that the drug is safe and effective. This generally requires conducting preclinical and clinical trials, and can take many years. *Namenda II, 787 F.3d at 643*; *21 U.S.C. § 355*. Although the process is costly and time consuming, once a patented drug is approved, it enjoys a period of exclusivity on the market (generally twenty years) — effectively, a government-sanctioned monopoly. A brand-name drug's developer can recoup its investment into the drug during this exclusivity period because the drug faces no competition from generics. However, once the exclusivity period ends and generic versions of the drug enter the market, it generally results in the brand-name drug losing more than 80% to 90% of its market share within six months — a process known in the industry as going off the "patent cliff." *Namenda II, 787 F.3d at 647*.

In 1984, Congress enacted the *Drug Price Competition and Patent Term Restoration Act (the "Hatch-Waxman Act"), Pub. L. No. 98-417, 98 Stat. 1585*. Hatch-Waxman attempted to serve a dual purpose: to lower drug prices by encouraging greater generic competition; and to incentivize innovation from branded drug manufacturers by providing for patent extensions beyond the standard 20-year patent term. *Namenda II, 787 F.3d at 644*.

HN2[] To increase generic competition, Hatch-Waxman permits generic manufacturers to file an Abbreviated New Drug Application ("ANDA"), which allows **[*11]** them to "piggy-back" on an already-approved branded drug's NDA information to show that the generic is safe and effective. *Ibid.* The generic manufacturer can forgo any independent preclinical and clinic trials, but must certify that the generic has the same active ingredients as, and is "bioequivalent" to, the already-approved brand-name drug. *21 U.S.C. § 355(j)*. By allowing generic manufacturers to "piggy-back" on the studies of already-approved drugs, Hatch-Waxman reduced the development costs for lower-priced generics, speeding their introduction to the market. *Namenda II, 787 F.3d at 644*.

HN3[] But to succeed on an ANDA, a generic manufacturer must submit a certification to the FDA describing the generic's implications on patents held by the branded manufacturer. The relevant certification here is the "Paragraph IV" route, so named after *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*. In a Paragraph IV certification, the generic manufacturer states that any relevant patent held by the brand-name manufacturer "is invalid or will not be infringed by the manufacture, use, or sale" of the generic. *FTC v. Actavis, Inc., 570 U.S. 136, 143, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)* (quoting *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*). Submitting an ANDA under Paragraph IV exposes the applicant to patent litigation. A branded manufacturer has 45 days after the submission to initiate a patent-infringement **[*12]** action against the ANDA applicant. If the branded manufacturer files suit, the FDA "must withhold approving the generic, usually for a 30-month period, while the parties litigate patent validity (or infringement) in court." *Ibid.*; *see also* *21 U.S.C. § 355(j)(5)(B)(iii)*.

Hatch-Waxman provides incentives for generic manufacturers who incur the risk of patent litigation. Generic manufacturers that first file a Paragraph IV certification (as many "first" certifications can be submitted on the same day) receive a 180-day exclusive marketing period for that generic. Generic manufacturers that are not "first filers" cannot market their versions of the drug during this period. "If the first-to-file generic manufacturer can overcome any patent obstacle and bring the generic to market, this 180-day period of exclusivity can prove valuable, possibly 'worth several hundred million dollars.'" *Actavis, 570 U.S. at 144* (citation omitted).

HN4[] Like any lawsuit, the parties can decide to settle the patent-infringement litigation arising out of the ANDA. However, in these instances, it is usually the brand-name manufacturer (the patent holder and plaintiff) that pays to settle the case against the generic manufacturer (the alleged infringer/patent challenger **[*13]** and defendant). Such settlements are therefore called "reverse payments" or "reverse settlements." Because these payments tend to preclude, rather than encourage, market entry of generic competitors, "there is reason for concern that settlements taking this form tend to have significant adverse effects on competition." *Id. at 148*. "[A] reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects." *Id. at 158*. For this reason, the Supreme Court has held that reverse payments are not immune from antitrust scrutiny.

Defendants' reverse settlements to generic manufacturers form the IPP class' remaining theory of liability — that the Defendants "paid to delay" generic competition.

D. The Generic Settlements

After Merz provided Forest with an exclusive license to the '703 Patent in June 2000, Forest developed Namenda IR and began marketing it in the U.S. following FDA approval in 2003. *Namenda II, 787 F.3d at 647*. Namenda IR's exclusivity period based on the '703 Patent was originally set to expire on April 11, 2010, but after securing several extensions, the final expiration date of the patent was October 11, 2015. *Namenda IV, 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *6*.

Starting in late 2007 — before Forest obtained the extensions — fourteen generic manufacturers **[*14]** "first filed" ANDAs in preparation to enter the market. These generic manufacturers provided Forest with Paragraph IV certifications, notifying Forest of their view that the '703 Patent was either invalid or was not infringed by their versions of a memantine product. (Second Amended Complaint, ECF 326 at ¶ 72). In early 2008, Forest and Merz commenced litigation against these generic manufacturers, triggering the automatic 30-month stay under Hatch-Waxman, during which the validity of the '703 Patent was to be litigated. (*Id.* at ¶ 74). The lawsuits were filed in the District of Delaware, and the consolidated cases were assigned to Judge Sleet and then-Magistrate Judge Stark (now a District Judge).

Between April 2008 and August 2009, four of the fourteen first-filers ended their ANDA challenges against Forest for various reasons. (ECF 566 at ¶¶ 14-16). In July 2009, Magistrate Judge Stark issued a "*Markman*"[1] Report and Recommendation rejecting every claim construction proposed by the generic challengers and adopting Forest's and Merz's positions on nine out of thirteen disputed issues. *See* *Forest Labs., Inc. v. Cobalt Labs., Inc., No. 8-21-GMS-*

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[1] In a patent litigation, "the construction of a patent, including terms of art within its claim, is exclusively within the province of the court." *Markman v. Westview Instruments, Inc., 517 U.S. 370, 372, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996)*.

LPS, 2009 U.S. Dist. LEXIS 56368, 2009 WL 1916935 (D. Del. July 2, 2009). Judge Sleet largely adopted the R&R, agreeing on all but one clerical issue. *See* Forest Labs., Inc. v. Cobalt Labs, Inc., No. 8-21-GMS-LPS, 2009 U.S. Dist. LEXIS 86772, 2009 WL 3010837 (D. Del. Sept. 21, 2009).

Following the *Markman* ruling, nine **[*15]** of the remaining ten challengers (all except for Mylan) settled the patent-infringement lawsuits between September 2009 and March 2010. (ECF 566 at ¶ 18; ECF 570 at ¶¶ 38-47). All were reverse settlements; the amounts Forest and Merz paid to the generic challengers (splitting the costs 50/50) ranged between $150,000 and $2 million. (ECF 566 at ¶ 25).

The reverse-settlement agreements provided that the generic manufacturer was not allowed to launch generic versions of Namenda IR earlier than three months before April 11, 2015 (the date of the '703 Patent's expiration) or October 11, 2015 (the expiration date if Forest obtained another six-month extension for pediatric exclusivity, which it did). Thus, the agreements effectively "locked in" the date of generic entry to be July 11, 2015.

Each agreement also provided that if Forest or Merz permitted a third-party to launch a generic of Namenda IR earlier than the date provided in the agreement, or if Forest lost its ANDA patent-infringement suit in court, then the settling manufacturer could launch its generic at the same time as the first launching generic. These "Most Favored Nation" ("MFN") or "acceleration" clauses made it such that once one generic **[*16]** entered the market, they all could. IPPs claim that these clauses greatly reduced the incentive that any individual generic manufacturer had of continuing to pursue their Paragraph IV challenge against the '703 Patent, effecting deterring any substantive challenge to patent validity.

E. The Lexapro Amendment

By April 2010, Mylan was the only remaining generic manufacturer that had yet to settle with Forest. But its situation was different from that of the other generics, in that Mylan and Forest had a pre-existing relationship related to another brand-name drug — an antidepressant known as Lexapro — that they wanted to renegotiate. Negotiations over the "Lexapro Amendment" became part and parcel of the negotiations relating to Namenda. (*See* ECF 576, Exh. 20).

The original Lexapro Agreement was executed in October 2005 between Forest and Alphapharm (later acquired by Mylan), and governed the distribution and supply of an authorized generic of Lexapro ("Lexapro AG"). The terms of the original agreement provided that Forest would manufacture and supply Alphapharm's requirements of Lexapro AG for sale and distribution, and that Alphapharm would market Lexapro AG. Alphapharm agreed to pay Forest a 40% **[*17]** share of its "product profit" on Lexapro AG, which the agreement defined as Alphapharm's net sales less Forest's manufacturing costs. (ECF 566 at ¶ 42).

Although the term of the agreement was for five years, it also provided that Alphapharm could terminate the agreement after just one year. If Alphapharm terminated the agreement, it would no longer be able to sell an authorized generic of Lexapro, but it could have theoretically launched its own competing generic and would have retained 100% of the profits of that version. At the time of the original agreement, both parties anticipated that Lexapro AG would launch at some point in early 2012, since that was when the patent upon which Lexapro was based ("the '712 Patent") was set to expire. *See* Namenda V, 331 F.3d at 192.

But between 2005 and 2010, legislative and administrative changes to Medicaid apparently would have increased Forest's Medicaid liability under the original agreement to more than it had expected when it first entered into it. *Id. at 193*. The Court will not go into needless detail on the changes; what is important is that, because the original Lexapro Agreement obligated Forest to "transfer" the supply of Lexapro AG that it manufactured to Alphapharm/Mylan, **[*18]** the price of Lexapro AG was factored into how much Forest owed in rebates back to the government. In this lawsuit, Forest asserts that its executives believed the company could reduce its Medicaid liabilities if it shifted the manufacturing of the Lexapro AG to Mylan. (ECF 566 at ¶ 46-50).

Thus, Forest proposed an amendment to the Lexapro Agreement at the same time it was trying to settle Mylan's Paragraph IV challenge. (*See* ECF 576, Exh. 20). Forest and Mylan ultimately agreed to amend the Lexapro agreement on the following terms: In exchange for a $20 million up-front payment, Mylan agreed to manufacture the Lexapro AG (instead of Forest) and also agreed to extend the minimum term of the agreement from one year to two. The parties also agreed to alter the profit-sharing percentages. Instead of 40% profit share for all sales, Forest's take was reduced to 30% on the first $100 million in profit and 35% on the next $50 million in profit; Forest would not earn the original 40% until Lexapro AG generated more than $150 million in profits. (ECF 566 at ¶¶ 61-65; ECF 570 at ¶ 80).

Forest and Mylan executed both the Lexapro Amendment and a reverse-settlement agreement to Mylan's Paragraph IV challenge on the **[*19]** same day: July 21, 2010. Forest agreed to pay $2 million to Mylan to settle the patent-infringement suit — an amount in line with the rest of the reverse-payment settlements. The settlement also contained the same MFN/acceleration clause as the other agreements. But the primary dispute for resolution in this case is whether the Lexapro Amendment qualifies as a "large and unjustified" payment made to settle the Paragraph IV patent-infringement suit in violation of *Actavis*. *570 U.S. at 158*.

F. History of Litigation

Litigation regarding Forest began in 2014. After Forest announced a plan to discontinue Namenda IR — ostensibly in an attempt to improve the prospects of Namenda XR, a new version of the drug it hoped to market — the State of New York sued Forest and Actavis to enjoin it from doing so, arguing that this "hard switch" was anticompetitive. *Namenda I, 2014 U.S. Dist. LEXIS 172918, 2014 WL 7015198, at * 1*. The Honorable Judge Robert Sweet granted a preliminary injunction, and that ruling was affirmed on appeal. *Namenda II, 787 F.3d at 663*.

In August 2015, Plaintiffs filed the instant lawsuit, and in September 2015, direct purchasers of Namenda filed a similar lawsuit. (*See* Case No. 15-cv-7488 (CM)(RWL)). Both sets of plaintiffs alleged that Defendants' actions in effectuating the hard **[*20]** switch and the reverse-payment settlements forced them to pay supra-competitive prices for memantine. In contrast to the direct purchasers, who brought their claims under the federal Sherman Act, the IPPs in this lawsuit bring their claims under state antitrust and consumer-protection laws. (ECF 326).[2]

In September 2016, this Court denied the Defendants' consolidated motions to dismiss in both the direct purchaser action and this action. *Namenda III, 2016 U.S. Dist. LEXIS 128349, 2016 WL 4992690, at * 1*. The Court then stayed the IPP litigation until a resolution of the federal claims from the direct purchasers' lawsuit. That litigation ultimately settled on the eve of trial. Following that, several of the generic defendants in this suit also settled. The only Defendants remaining in this litigation are those affiliated with the brand-name manufacturers and originators of Namenda — Forest and its parent, Actavis, and their German counterpart, Merz.

On February 11, 2021, this Court granted in part and denied in part SBA's motion for class certification. *Namenda VIII, 338 F.R.D. 527, 2021 U.S. Dist. LEXIS 26566, 2021 WL 509988*. The Court certified only the "pay for delay" theory of antitrust liability and denied certification as to the hard switch theory. This means that only the only basis for liability to be found on a class-wide **[*21]** basis (as well as for class-wide damages) pertains to the reverse settlement of the Paragraph IV lawsuits.

Presently before the Court are seven *Daubert* motions to exclude the testimony of experts for both sides: four filed by Defendants and three by SBA. Also before the Court are three motions for summary judgment.

[2] SBA brings state, rather than federal, claims because "Under the United States Supreme Court's decision in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, indirect purchasers of products sold at supra-competitive prices lack standing to sue under federal antitrust statutes" but "may still bring suit under state antitrust laws, if a state permits such claims." *Namenda VI, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *1*

II. *DAUBERT* MOTIONS

As I did when deciding the motions for summary judgment in the direct-purchaser action, I will decide the *Daubert* motions before addressing the merits. ***HN5***[] Because "only admissible evidence need be considered by the trial court in ruling on a motion for summary judgment . . . . it is appropriate for district courts to decide questions regarding the admissibility of evidence on summary judgment." *Raskin v. Wyatt Co., 125 F.3d 55, 66 (2d Cir. 1997)*. "The resolution of evidentiary questions on summary judgment conserves the resources of the parties, the court, and the jury." *Ibid.*

Defendants move to exclude the opinions and proposed testimony of: (1) Michael A. Davitz (ECF 543); (2) Jacob C. Holzer (ECF 545); (3) Susan Marchetti (ECF 547); and (4) Thomas McGuire (ECF 549). SBA moves to exclude the opinions and proposed testimony of: (1) Lona Fowdur (ECF 560); Philip Green (ECF 571); and Sue L. Robinson (ECF 574). **[*22]**

The opinions of Davitz, Holzer, and Green are admitted in full. Portions of the opinions of Marchetti, McGuire, Fowdur, and Robinson are admitted, with certain caveats.

Daubert Standard

HN6[] Under the standard set forth in *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* and *Rule 702 of the Federal Rules of Evidence*, the district court serves a "gatekeeping" function in determining whether an expert witness really qualifies as one. *Rule 702* provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

HN7[] "The Second Circuit has 'distilled *Rule 702*'s requirements into three broad criteria: (1) qualifications, (2) reliability, and (3) relevance and assistance to the trier of fact.'" *In re Aluminum Warehousing Antitrust Litig., 336 F.R.D. 5, 27 (S.D.N.Y. 2020)* (quoting *In re LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 466 (S.D.N.Y. 2018)*).

HN8[] The party proffering the expert's opinions "has the burden to establish the [*Rule 702*] admissibility requirements, with the district court acting **[*23]** as a 'gatekeeper' to ensure that the 'expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" *In re Pfizer Inc. Secs. Litig., 819 F.3d 642, 658 (2d Cir. 2016)* (quoting *United States v. Williams, 506 F.3d 151, 160 (2d Cir. 2017)*). The court need not "admit opinion evidence that is connected to the existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)*. In its evaluation, "the district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions." *Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 266 (2d Cir. 2002)*.

HN9[] Ultimately, the *Daubert* standard is a "flexible one," *Daubert, 509 U.S. at 594*, "and will necessarily vary from case to case," *Amorgianos, 303 F.3d at 266*. District courts have "broad discretion in the matter of the admission or exclusion of expert evidence." *Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996)* (quoting *Salem v. United States Lines Co., 370 U.S. 31, 35, 82 S. Ct. 1119, 8 L. Ed. 2d 313 (1962)*). Even if an expert is qualified, the court must still consider whether the probative value of the testimony is "substantially outweighed by a danger of . . . unfair prejudice" or likelihood of confusing or misleading the jury. *Fed. R. Evid. 403*; *see also* *United States v. Dukagjini, 326 F.3d 45, 55 (2d Cir. 2002)*.

Defendants' Motions to Exclude Plaintiff's Experts

A. Defendants' motion to exclude the opinion of Dr. Michael A. Davitz [*24] is denied

SBA asked Davitz to opine about what a reasonable and competent patent attorney would have informed the parties about their likelihood of success in the Namenda Paragraph IV litigation. (Davitz Report at ¶ 6). SBA offers Davitz primarily for his view that Mylan was more likely than not to succeed in the litigation against Forest — more specifically, that "Mylan had at least a seventy (70%) percent chance of prevailing." (*Id.* at ¶ 9).

Davitz is a patent attorney with extensive experience and impressive expertise in advising clients on the likelihood of whether they will prevail in patent litigation, including especially the type of patent litigation in which Mylan and Forest were engaged: Paragraph IV Hatch-Waxman litigation. He has been a registered patent attorney for twenty-three years. Of particular relevance is his six years as the Vice President of Intellectual Property at Taro Pharmaceuticals — a manufacturer of generic pharmaceuticals. During his time at Taro, Davitz directed the company's Paragraph IV ANDA litigation, which included advising executives on the probability of success on such litigation. He is thus more than qualified to offer his opinion on Mylan's likelihood **[*25]** of success on its Paragraph IV challenge. He is also a trained physician (hence, "Dr. Davitz").

It is wise that Defendants do not ask the Court to preclude Davitz from opining that Mylan was substantially likely to win its challenge or any of his other opinions, as any such motion would have failed. Instead, Defendants focus on the "70% chance of prevailing" statement, arguing that it improperly attempts to quantify an unquantifiable evaluation and that Davitz's methodology to arrive at that number was unreliable. The motion is denied.

The Court has carefully reviewed Davitz's exceptionally well written and highly readable (especially for this type of litigation) 193-page report, in which he lays out in great detail the reasons why he believes that Mylan was "substantially likely" to prevail in its Paragraph IV challenge to the '703 Patent.

His conclusion is based on his experience as a patent attorney and a variety of factors, including the statistical likelihood of success in ANDA litigation generally (success rate of generic challengers versus brand-name patent holders); his assessment of the history of the '703 Patent and its approval by the Patent and Trademark Office ("PTO"); and his assessment of the **[*26]** merits of the claims and defenses of the parties involved. Ultimately, Davitz arrived at his 70% number because it was his view that "Mylan had at least a seventy (70%) percent chance of prevailing in the Namenda ANDA Litigation *on at least one of its defenses to Forest's allegations of infringement*." (*Id.* at ¶ 427 (emphasis added)). Since Mylan only needed to win on any one of its arguments to prevail, Davitz concluded that a reasonable and competent patent attorney would have advised the parties that it was more likely than not that Mylan would have won given the merits of the arguments both sides advanced.

Dr. Davitz's 70% number was chosen carefully and with due regard for precision. He began by observing that challengers to patent validity prevail in approximately 75-76% of cases, and challengers in Paragraph IV litigation specifically prevail about 73% percent of the time. (*Id.* at ¶¶153-156). Mylan, however, prevails in only 64% of its Paragraph IV lawsuits — around 2 times in 3, but not 3 times in 4 — so Davitz decided to incorporate a "Mylan discount" of shorts into his assessment.[3] Davitz used these statistics as a "benchmark for the probability of a generic manufacturer to **[*27]** prevail in a Paragraph IV litigation." (*Id.* at ¶ 157). He then factored in his assessment of the strengths and weaknesses of Mylan's and Forest's positions relative to other Paragraph IV cases to arrive at his ultimate number.

The key question, thus, is whether his assessment of the '703 Patent case is reliable. A trier of fact could find it so.

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[3] I use the word "assessment" advisedly. Dr. Davitz did not purport to "calculate" anything, but sought to quantify, to the extent he could do so, his conclusion that Mylan was "substantially likely" to prevail in the '703 patent lawsuit.

Davitz carefully examines the factors that an experienced patent litigator would consider if asked to advise Mylan or Forest about their possibility of success in the Paragraph IV litigation. Some of these factors (such as the success-rate percentages described above) are quantifiable; some of them (such as the assessment of whether the PTO granted the patent without fully addressing issues relating to validity) consider both quantifiable and non-quantifiable factors; and some (like the importance of *Markman* rulings to the underlying infringement case, or a lawyer's evaluation of the merits of particular legal arguments in light of the evidence) are non-quantifiable.

But importantly, Dr. Davitz explains the importance of each factor he considered — or why he did not consider a factor to be of much importance — bringing to bear his experience in conducting **[*28]** precisely this sort of evaluation for real clients who want hard advice from their lawyers about whether to bring, settle, or try a Paragraph IV case.

Davitz pointed to reasons why he felt that each of Mylan's challenges, whether to patent validity or to infringement, were stronger than Forest's counterarguments — even with the presumption of validity accorded to patents that have already been granted. He observed that Mylan only needed to prevail on one of these challenges to win, whereas Forest had to win every single one if it were to succeed. Davitz also noted that the patent had been invalidated abroad, albeit under law not identical to U.S. patent law. To that he added reviews of academic research about the work of particular patent examiners (including specifically the examiners in this case), the correlations between the granting of patents and length of time on the job, and personal experience from his involvement in the patent-prosecution process (which allowed him to identify some oddities in the process used to grant the '703 Patent).

In short, Dr. Davitz gathered a huge set of information, which he assessed in light of his own considerable experience in doing precisely what SBA asked **[*29]** him to do — assess the likelihood that one side or the other would have prevailed in the Mylan Paragraph IV challenge to the '703 Patent. This is exactly what an experienced patent litigator would be expected to do for clients.

But the Court was once a lawyer, so I know that clients want more. Being told that you are "substantially likely" to prevail is never enough; it inevitably leads to the question, "Just how much is "substantial?" Every client wants a number. Dr. Davitz opines that Mylan was at least 70% likely to prevail. That estimate is admissible. Lawyers are not engineers, and much of what they are asked to predict cannot be based on anything that reduces to numbers and mathematics. That does not make it any less valuable to clients, or any less the product of expertise on the part of the advising attorneys. Nor does it mean that Dr. Davitz did not employ any ascertainable or reliable methodology in reaching his conclusions. On the contrary, he employed a very precise methodology, which involved a complete review of the patent's file wrapper, the entire record in the Paragraph IV lawsuit, and the body of patent law in effect at the time the litigation was scheduled for trial. He does **[*30]** not offer legal opinions, but clearly articulates his view of the strengths and weaknesses of each side's arguments in light of the case law at the time.

Given all of the above, I can understand why Davitz concluded that Mylan had a greater chance of winning this particular patent challenge than its overall record, and that "substantially likely" was about halfway between (i) Mylan's customary success rate when taking such lawsuits to trial, and (ii) the overall trend in the industry, which favors generics over patent holders. It is for a jury to decide whether his arguments are persuasive.

Defendants argue that another court has rejected a quantification of a party's litigation success rate. *See* *In re Intuniv Antitrust Litig., No. 16-cv-12653-ADB, 2020 U.S. Dist. LEXIS 187578, 2020 WL 5995326, at *11 (D. Mass. Oct. 9, 2020)*. But *Intuniv* observed that the expert in that case had not "provided a methodology for how he arrived at [his] 95% figure." *Id. at *12*. Here, Dr. Davitz has provided a methodology, one that I consider to be perfectly sound. It is exactly what lawyers do when counseling clients on such matters — not firmly grounded in statistical probabilities, but far from *ipse dixit*. Dr. Davitz appears to me to have considered all of the data that should be considered in evaluating the likelihood of Mylan's success. **[*31]** Notably, Forest points to nothing that he overlooked or left out of his analysis. It argues only that the number should be excluded. But Davitz's number is not a number he pulled out of thin air; he thoroughly explains how he arrived at it. If Defendants wish to challenge his conclusions at trial, that is their right. But I will allow his testimony.

Defendants' motion to exclude is denied.

B. Defendants' motion to exclude the opinions of Susan Marchetti is granted in part and denied in part

Ms. Marchetti, a former pharmaceutical executive, was asked to opine on the following three questions:

1. Does the evidence support the fact that in the years 2010-11, Forest had sufficient manufacturing capacity to produce Lexapro and did not require the resources of a third-party manufacturer to meet sales and inventory requirement?
2. Does the evidence show that Forest anticipated it would obtain cost savings as a result of subcontracting Mylan to manufacture Lexapro?
3. Did the compensation Mylan received from Forest under the terms of the 2010 Lexapro Amendment to the 2005 Lexapro Agreement represent "fair value" for the services Forest contracted Mylan to provide?

Marchetti answered the first question **[*32]** "yes," and the second and third questions "no." As to the third question, Marchetti opined that Forest received virtually nothing of value from the Lexapro Amendment, while Mylan obtained net benefits worth between $30.5 million and $31.3 million; thus, the Amendment did not constitute "fair value." (Marchetti Report at ¶ 30).

Ms. Marchetti has over 35 years' experience in the pharmaceutical industry, working at both major branded drug manufacturers and generics. She has extensive experience leading supply chain operations at these companies and had responsibility for sales forecasting, budgeting and product planning. (*Id.* at ¶ 5). She has worked on product launches of both authorized generics (generics approved by the company that held the patent on the branded drug) and competing generics. She is also intimately familiar with the manufacturing processes for solid dose (tablet and capsule) products at U.S. sites and abroad. (*Id.* at ¶ 9). Defendants do not contest Marchetti's expertise in the pharmaceutical supply chain field, but they do contest opinions which they believe are outside of her field of expertise — namely, her assessment that the Lexapro Amendment was not a "fair value" **[*33]** agreement.

Marchetti's report begins by recounting the background of the Lexapro Agreement and Amendment. The original agreement stipulated that Alphapharm/Mylan would be responsible for marketing and distributing Lexapro AG (but not manufacturing), and for paying royalties of 40% of its "Product Profit" to Forest. It also permitted Alphapharm/Mylan to terminate the agreement after one year. (*Id.* at ¶ 44). The Lexapro Amendment reduced the royalty rate Mylan had to pay Forest. Instead of 40%, Mylan needed only to pay 30% on the first $100 million in profit and $35% on the next $50 million, with the original 40% in place for any profit above $150 million. Mylan also agreed to extend the term of the contract by one year, and to manufacture Lexapro AG. In exchange, Forest paid Mylan an upfront payment of $20 million.

Marchetti's opinions focus on calculating the "cost" of the Lexapro Amendment to Forest in order to determine whether Forest's payments were "large and unjustified" in violation of *Actavis*. By her calculation, the original Lexapro Agreement would have netted Forest $60 million on the first $150 million of Lexapro AG's profits (40% of $150 million). (*Id.* at ¶ 121) In contrast, **[*34]** the Lexapro Amendment required Forest to *pay* a $20 million upfront fee *and* to accept reduced royalties — with royalties of only $47.5 million on the first $150 million in profit (a $12.5 million decrease from the original agreement). Thus, when compared to the original agreement, the "cost" of the Amendment to Forest totaled between $30.5 million and $31.3 million: the $20 million upfront payment plus the $12.5 million in reduced royalties, minus estimated "technical transfer costs" for moving the manufacturing of the product from Forest to Mylan. (*Id.* at ¶ 30).

Marchetti then explored whether Forest expected to recoup the "costs" it paid Mylan; but she focused primarily on whether Forest saved money *by offloading manufacturing costs*. She concluded that Forest did not anticipate recouping manufacturing costs that were anywhere close to the amount it paid as part of the settlement. By her calculation, Forest was saving only $1.2 million to $2 million by transferring the manufacturing of Lexapro to Mylan. (*Id.* at ¶¶ 59-60). In her view, these minimal "saved" costs did not justify the payments made to Mylan and thus the Amendment did not constitute "fair value."

Forest primarily moves to **[*35]** exclude this opinion on "fair value." It notes that Marchetti has no training or experience in "business valuation" — a fact that SBA concedes — and argues that she has never before offered an expert opinion on valuation of any sort, let alone the fair value of a business transaction involving intellectual property rights. Forest's expert, Philip Green — who does have considerable business valuation experience — observes that, in making her cost/benefit calculations, Marchetti focused only on possible manufacturing savings from the Lexapro Amendment but completely ignored certain other anticipated benefits to Forest. These included a large reduction in anticipated Medicaid liabilities by offloading the manufacture of Lexapro AG to Mylan, *see* Section I.E, *supra*, as well as Forest's expectation of what it could earn during a second year of profit sharing from the Amendment's one-year extension.

In short, Forest argues that Marchetti's conclusion on "fair value" does not encompass all that should be considered — from a legal standpoint — when evaluating whether a reverse payment was "large" and "unexplained." I agree.

In an opinion that has long bedeviled district courts, the Supreme Court's **[*36]** *Actavis* decision held that reverse-payment settlements could be challenged as violative of the antitrust laws, but also explained that there could be justifications for reverse payments other than buying off potential competitors. Therefore, the Court declined to hold that reverse-payment settlements were *per se* unlawful — only "large and unjustified" payments were subject to antitrust scrutiny. *Actavis, 570 U.S. at 158*.

In this case, the payment to Mylan (inclusive of the Lexapro amounts) is sufficiently large, on its face and in the absence of any explanation, to trigger *Actavis* scrutiny. Indeed, when compared to the rest of the reverse-payment settlements Forest entered into to stave off challenges to the '703 Patent — all of which settled for between $150,000 and $2 million — the Lexapro Amendment's payment of upwards of $30 million to Mylan appears to be inexplicably large. ***HN10***[] But where, as here, the payor (Forest) offers justifications for the payment aside from suppressing competition, there exists a question of fact as to whether the payment is "unjustified." As *Actavis* put it, while "parties may have reasons to prefer settlements that include reverse payments, the relevant antitrust question is: What are those **[*37]** reasons? If the basic reason is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the anti-trust laws are likely to forbid the arrangement." *Ibid.* Put otherwise, if the reasons proffered by the parties are not persuasive to the trier of fact to justify the payment, then a large reverse payment likely means there has been an antitrust violation.

But contrary to Marchetti's assertion, the issue is not whether Forest's payment is "unjustified" in relation to "the services Mylan agreed to deliver." (*Id.* at ¶ 31), Rather, the question is whether, weighing the costs and benefits to both parties, the payment can be explained for reasons other than solely keeping Mylan out of the market. Nothing from *Actavis* limits the acceptable "reasons" for making a reverse payment to only compensating for "services" a payor receives — in this instance, to saved manufacturing costs. Savings from elsewhere could also be an economically rational factor in deciding to settle. If Marchetti's formulation were correct, anticipated litigation cost savings — a well-known reason why parties who believe they are likely to win lawsuits choose to settle **[*38]** — could never be invoked as a justification for settling a patent case with a reverse payment. Nor could anticipated Medicaid savings. I do not read *Actavis* so narrowly.

This Court is already on record, in the direct-purchasers' case, stating that any value Forest obtained from the Lexapro Amendment, whatever its source, must be factored into an *Actavis* analysis. *See* *In re Namenda Direct Purchaser Antitrust Litig., No. 15-cv-7488 (CM), 2019 U.S. Dist. LEXIS 204827, 2019 WL 6242128, at *10 (S.D.N.Y. Aug. 2, 2019)* ("The jury will be allowed to consider evidence of the value of the Lexapro Amendment to Forest — whatever the 'source' of that value — in its evaluation of whether the settlement payment was 'large' or 'for fair value.'"). The jury in this case will be similarly instructed, and it will be for the jury to decide whether the benefits Forest claims to have received from its deal with Mylan really were benefits as claimed.

The core flaw of Marchetti's report is her assumption that the value of the Lexapro Amendment to Forest must be measured only by the cost of shifting the manufacture of Lexapro AG to Mylan. Forest disclaims that manufacturing cost savings were its only consideration, and Marchetti has essentially given no opinion about some of Forest's other stated sources of "benefit" (i.e., Medicaid savings). In the view **[*39]** of this Court, she cannot simply dismiss them out of hand — *Actavis* recognized that it was possible to settle litigation for various things of value. *See* [570 U.S. at 158] ("The fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit; they may, as in other industries, settle in other ways.").

I thus conclude that Marchetti's opinion on what is essentially the ultimate issue in the case — that the "Amended Lexapro Agreement did not represent 'fair value' to Forest since effectively all of the gains from the agreement benefitted Mylan — not Forest" (*Id.* at ¶ 121) — is unlikely to be of assistance to the trier of fact, because that is not based on the proper standard for measuring benefits to a reverse payor when applying *Actavis*. Marchetti's opinion that the Lexapro Amendment was not "fair value" thus cannot be accepted into evidence.

But that does not mean that the rest of Marchetti's opinions must also be excluded.

I reject Defendants' argument that Marchetti's testimony should be stricken in its entirety because she lacks training or experience in business valuation. As Forest's own expert, Philip Green, attested in his **[*40]** report, "*The fairness of a transaction is not the same as a business valuation for transaction purposes*. Fairness considers the relative payments and benefits to both parties to a transaction." (Green Rep. at ¶ 26 (emphasis added)). It thus seems to me beside the point that Marchetti has no formal training or experience in business valuation. Marchetti is not being asked to value a business. She is being asked her views on the value of what Forest got for conferring over $30 million in benefits on Mylan. Although she cannot opine that the value was "fair" or not, she can provide her assessment of the value of what Forest received in return. After 35 years in the pharmaceutical industry, including stints as the Chief Operation Officer at one pharmaceutical company and managing the product life cycle and product launches at others, Marchetti's extensive practical experience qualifies her to opine on the value of what Forest was getting in exchange for what it paid — including the amount that it saved in manufacturing costs. It is simply the ultimate conclusion that I will not allow, because Marchetti's ultimate conclusion is predicated on a misreading of *Actavis*.

That being so, to the **[*41]** extent that Marchetti's testimony (especially in her rebuttal report) takes issue with Forest's assertions of value received as a result of the Lexapro Amendment, her expert testimony is admissible, because it would help the jury decide whether Forest's claimed benefits are legitimately worth what Forest contends they are worth. For instance, Marchetti takes issue with the way Forest values both what it got from Mylan and what it got from other sources, including cost savings. She opines that the Lexapro Amendment's one-year extension of the term of the contract was essentially worthless because it would not have been financially sensible for Mylan to stop selling Lexapro AG after just one year. (Marchetti Rebuttal at ¶¶ 16-17). In other words, the "value" of the extended year of the contract to Forest was zero because Mylan would have continued the agreement into a second year regardless of whether it had been contractually obligated to do so.

This conclusion contrasts with that of Forest's experts, who opine that there was considerable value (from royalties) in the additional year. But Marchetti gives perfectly sensible reasons for her opinion — testimony that she is qualified to **[*42]** give. The fact that Marchetti's opinion differs from the opinions of Forest's experts is not a reason to exclude her testimony; and her extensive experience in the pharmaceutical business qualifies her to criticize Forest's reasoning. Such disputes are the stuff that expert battles are made of; disagreements between experts rarely if ever justify *Daubert* exclusions (although they are too often the basis for *Daubert* motions). In particular, there is no reason to strike Marchetti's opinion that the payment of $20 million is well in excess of what is common "in the pharmaceutical industry for the transfer of technology and manufacturing responsibilities," especially since she offers cogent reasons why the benefits Forest received for that $20 million was less. (*Id.* at ¶ 40).

Marchetti is also indubitably qualified to opine on the first two questions she was asked; her long experience in supply chain management so qualifies her. Recognizing this, Forest asks that the Court exclude her testimony relating to saved manufacturing costs and manufacturing capacity on the ground that Forest has never asserted that these things were the "primary reason" it entered into the Lexapro Amendment. I **[*43]** assume that Forest chose to insert the word "primary" in that sentence (which I take directly from its brief) advisedly. I will respond in kind: As long as saved manufacturing costs and/or manufacturing capacity were *any part* of the reason why Forest entered into the Lexapro Amendment — primary, secondary, tertiary, or even the last reason — those things are fair game for the sort of analysis that Marchetti provides.

Thus, except to the extent that Marchetti opines on the ultimate question in the case — that Forest did not receive "fair value" for its reverse payment — her report will not be stricken from the summary judgment record, and the Court will consider her testimony in deciding the motion.

Defendants' motion to exclude is granted in part and denied in part consistent with this opinion.

C. Defendants' motion to exclude the opinions of Thomas McGuire is granted in part and denied in part

Defendants move to exclude the opinions of SBA's economist Thomas McGuire, on largely the same grounds as they sought to exclude Marchetti's opinions on "fair value." For the same reasons, Defendants' motion is granted in part and denied in part.

McGuire is a professor of Health Economics in the **[*44]** Department of Health Care Policy at Harvard Medical School. The parties do not dispute that he is eminently qualified to offer opinions on economics, but — as discussed below — he is not qualified to offer legal opinions or to base certain ultimate conclusions on a legal opinion that differs from the law as the Court will give it to the jury.

McGuire was asked to "conduct an economic analysis of the settlement between Forest and Mylan . . . in order to address the question of whether or not the [Lexapro Amendment] included an anticompetitive reverse payment." (McGuire Report at ¶ 2). He was also asked whether — if the Amendment was anticompetitive — there nonetheless were "any procompetitive justifications . . . that outweigh the anticompetitive impacts." (*Ibid.*). He concluded that the Amendment was anticompetitive, and that there was "no explanation for Forest's reverse payment well in excess of its avoided litigation costs." (*Ibid.*). Defendants seek to exclude this opinion.

Like Ms. Marchetti, McGuire analyzes whether the benefits Forest expected to receive from the Amendment justified the roughly $30 million payment it made to Mylan. But instead of focusing on the manufacturing and **[*45]** transfer "services" that Mylan provided (Marchetti's focus), McGuire opines on the expected costs and benefits associated with the litigation surrounding the '703 Patent.

McGuire believes that for Forest, settling the lawsuit offset certain litigation costs it expected to incur for continuing to defend the '703 Patent. These offset litigation costs totaled only around $3 million. (*Id.* at ¶ 103). For Mylan, a settlement would necessarily preclude the ability to earn profits from winning its Paragraph IV challenge — but these expected profits totaled only around $0.9 million spread over four years. (*Id.* at ¶ 106). McGuire thus concludes that Forest's expected saved litigation costs did not justify its payments to Mylan, but instead indicated "a large, unexplained reverse payment," which was a "means to induce Mylan to delay generic entry." (*Id.* at ¶¶ 103, 114).

Most critically for purposes of this *Daubert* motion, McGuire spills considerable ink opining on what he believes constitutes a "large and unjustified" reverse payment. He interprets *Actavis*, which he views as standing for the proposition that "If the reverse payment exceeds any avoided litigation costs, we can infer that the brand must be getting higher **[*46]** profits from the settlement than it would with litigation (because if the brand expected higher profits with litigation, it would litigate)." (*Id.* at ¶ 76). In other words, McGuire believes that a reverse payment is anticompetitive if the payment exceeds the anticipated future litigation costs of continued defense against the Paragraph IV challenge. Most of Section V.A in his opening report is dedicated to supporting this view. While other justifications — like the ones proffered by Forest (i.e., reduced Medicaid liability) also matter — McGuire's calculations ignored them.

Defendants thus argue that the McGuire's opinions on the fair value of the Lexapro Amendment should be excluded because it does not conform to the relevant legal principles. I agree. McGuire's opinions regarding the ultimate issue in the case — whether the Lexapro Amendment was a "large and unjustified" payment — are excluded for the same reason that Marchetti's opinions on such matters are excluded.

McGuire's conclusions rest on an erroneous reading of *Actavis*. He ignores the fact that Forest justifies the payment on the ground that the new Lexapro arrangement would result in several benefits to its financial position **[*47]** *in* *addition to* saved litigation costs, which — from Forest's point of view — "justified" a "large" payment to settle the Paragraph IV lawsuit. For example, Forest claims that it expected to save at least $26.5 million in reduced Medicaid liabilities from the arrangement, but McGuire ignores these benefits in his analysis.

SBA is free to argue that these claimed savings did not in fact result in the economic benefits that Forest ascribes to them, and the trier of fact will ultimately conclude whether Forest's purported justifications were the real reason for settling the lawsuit on the terms chosen, or whether the real reason was suppression of competition. But the jury will not be instructed that the "justification" for a large payment must be limited in the way that McGuire has chosen to limit it. It will not be told that *Actavis* limits the justification for a reverse payment to saved litigation costs, or that saved litigation costs are the only quantitative measure of the size of the payment. In fact, the jury will be told exactly the opposite — that nothing in *Actavis* as this Court reads the case limits reverse payments to saved litigation costs. For Dr. McGuire, this eliminates **[*48]** the portion of his testimony that is summarized in Section "V.A" of his report.

McGuire also opines that the agreement was not a "competitive compromise," and that the Lexapro Amendment was designed to delay competition because Mylan would never have made as much money by winning the Paragraph IV lawsuit as it made via the reverse payment. To the extent that McGuire opines that Mylan stood to make more by settling than by winning the lawsuit (which seems a self-evident proposition), he can explain that to the jury; such testimony does not run afoul of the Court's reading of *Actavis* because it goes to the value of the payment to one of the parties. It may, therefore, be evaluated by the jury for what it is worth. That is, McGuire may say that the best case scenario for Mylan in the absence of a reverse payment, was "a win in the patent litigation allowing them, along with the other first filers with final approval, to sell generic Namenda beginning around October 1, 2011, and for 180 days thereafter, before other generics could enter." (*Id.* at ¶ 104). And he may say that the reverse payment left Mylan better off than the best-case litigation scenario.

McGuire may also offer opinions about **[*49]** the expected value of the settlement to Mylan. For example, he states that — had Mylan prevailed in its Paragraph IV challenge — its "expected profits from selling generic Namenda [would have been] small, $0.9 million in profit over a period of approximately four years and negative thereafter." (*Id.* at ¶ 101). This low amount of expected profit is due in part to the fact that the MFN/acceleration clauses contained in the reverse settlements permitted all of the generic manufacturers to launch its generic whenever any other generic manufacturer launched its version. Thus, the expected profits from generic Namenda IR would have been split among many different companies. McGuire is eminently qualified to explain this to the jury and offer his opinion of how that number compares to the economic value of the Lexapro Amendment.

However, he may not offer the ultimate conclusory opinion that "no compromise has been made, rather, Mylan has been paid to induce it to accept a delayed entry date." (*Ibid.*). The reason is that this conclusion rests on SBA's unsound reading of *Actavis* — specifically on the argument that only the value of the settlement to the settling generic (Mylan) can be considered **[*50]** under the reasoning of the Supreme Court (*see* Section III.B.2, *infra*). It will be left to the jury to make the decision about the value of the settlement to the settling parties (assuming, of course, that the Paragraph IV settlement and Lexapro Amendment constitute an integrated deal, *see* Section III.C, *infra*). McGuire's view of the situation adds nothing to the jury's ability to evaluate the evidence; his ultimate opinion rests in significant part on SBA's misreading of *Actavis* and on Marchetti's calculations, to which he tries to add an economist's gloss.

For these reasons, Defendants' motion to exclude McGuire's opinions is granted in part and denied in part consistent with this opinion.

D. Defendants' motion to exclude the opinions of Jacob Holzer is denied

SBA offers Holzer as a prior art witness. He was asked to opine on whether "as a person of ordinary skill in the art, it is [his] opinion that prior art references establish that memantine was used to treat Organic Brain Syndrome and Alzheimer's Disease Prior to April 14, 1989" — the date when Merz first filed the application that ultimately led to the '703 Patent. (Holzer Report at ¶¶ 15, 41).

Dr. Holzer has over thirty years' experience **[*51]** as a practicing psychiatrist. He has completed fellowships in neuropsychiatry and behavioral neurology at Yale and Harvard, and he has an appointment as an instructor at Harvard Medical School. He has also served as a consultant for Eli Lilly, a pharmaceutical company. Dr. Holzer currently serves as a Clinical Staff Associate of Geriatric Psychiatry Outpatient Services at McLean Hospital, and as a Staff Psychiatrist at Spaulding Rehab Hospital. As part of his work, Dr. Holzer treats patients suffering from a broad range of neurological disorders, including Alzheimer's.

In total, Holzer reviewed six clinical studies dating prior to April 14, 1989 that relate to the effects of memantine on patients with brain disease. These studies involved different patient sizes and timelines, but all focus on the effects of memantine and whether it could be used to treat certain brain conditions. Holzer goes into detail about how the studies were conducted, the characteristics of the patients involved, and the studies' conclusions. His review of the literature led him to conclude that "prior art references establish that memantine was used to treat . . . Alzheimer's Disease prior to April 14, 1989." **[*52]** (*Id.* at ¶ 87). Forest seeks to exclude this opinion.

Holzer is not a lawyer and does not purport to give legal conclusions. But his opinions on prior art are probative of the strength of Mylan's Paragraph IV challenge to the '703 Patent. A conclusion that memantine was used to treat Alzheimer's prior to 1989 means that the knowledge contained within the '703 Patent arguably already existed in the public domain prior to its being patented — which might have strengthened Mylan's Paragraph IV challenge. *See, e.g.,* *Papyrus Tech. Corp. v. New York Stock Exchange, LLC, 653 F. Supp. 2d 402, 414 (S.D.N.Y. 2009)* ***HN11***[] ("A patent claim may be held invalid if it is anticipated or made obvious by prior art.").

Dr. Holzer easily qualifies as a "Person of Ordinary Skill in the Art (POSA)" of treating Alzheimer's, and he is qualified to opine about what a POSA would have understood about using memantine to treat Alzheimer's prior to 1989 through his review of the pre-1989 studies.

Forest objects to Holzer's testimony on the ground that the studies he reviewed do not focus exclusively on Alzheimer's patients, but rather on persons suffering from both Alzheimer's *and* Organic Brain Syndrome more generally. Forest argues that this renders Holzer's opinions too broad and contravenes the *Markman* ruling from the Delaware District **[*53]** Court, which it argues rejected Mylan's proposal to define "Alzheimer's" as extending to OBS.

This characterization is inaccurate. As Dr. Holzer notes, Alzheimer's is just one form of OBS, and so if the studies referenced a potential benefit of memantine to patients suffering from OBS generally, the natural implication is that it would necessarily be beneficial to Alzheimer's patients as well. (Holzer Rebuttal at ¶ 8). Regardless, his opinions on Alzheimer's and OBS do not contradict the Delaware court's claim construction; in fact, they do not address the claim construction at all, and there is absolutely no reason why he needed to have read the *Markman* decision to form his opinions. He opines only about what a POSA in 1989 would have understood from the prior art — nothing more. He believes that a POSA would have understood that using memantine to treat OBS encompassed the treatment of Alzheimer's prior to 1989 because Alzheimer's is and at that time was one of the most prevalent forms of OBS. Holzer offers no opinion about the scope of the '703 Patent's claims or the validity of the patent. His opinion is limited to what a POSA would have understood, from the literature in existence at the **[*54]** time Merz filed for what became the '703 Patent, about the use of memantine to treat Alzheimer's. He is eminently qualified to offer that opinion.

The fact that the subjects in the studies were not, or may not have been, limited to persons who definitively had Alzheimer's — as opposed to some other form of OBS — is a matter to be taken up on cross examination and goes to the weight of Dr. Holzer's opinion, not to his ability to offer it. However, it is the Court's understanding that, even today, it is not possible to diagnose Alzheimer's definitively over other forms of OBS until after the patient's death, when the brain can be autopsied — and that was certainly the case prior to 1989, which is the relevant period for our purposes. If my understanding is correct (and that statement comes from the National Institutes of Health[4]), the fact that a POSA cannot be absolutely certain that a person suffering from dementia has Alzheimer's, as opposed to some other form of OBS, might well affect how a POSA interprets studies in which patients were not classified by the form of OBS from which they suffered. Such matters are appropriate for exploration at trial; they are not a basis to exclude under *Daubert* ***[*55]*** .

The motion to exclude is denied.

Plaintiff's Motions to Exclude Defendants' Experts

E. SBA's motion to exclude the opinions of Philip Green is denied

Defendants' expert Philip Green is a foil to SBA's expert Susan Marchetti in that he offers views on the "fair value" of the Lexapro Amendment that directly contradict hers. Since October 1996, Green has served as a founding principal of the consulting firm Hoffman Alvary & Company LLC, where he is regularly involved in the valuation and licensing of intellectual property, including patents related to pharmaceuticals. His work encompasses the valuation of intellectual property transactions and providing opinions on the fairness of the compensation provided.

Defendants asked Green to "evaluate financial aspects" of the Lexapro Amendment and to "respond as necessary" to the reports of SBA experts Susan Marchetti and Thomas McGuire. (Green Report at ¶¶ 1, 2). Green supplied a substantially similar expert report as part of the direct-purchaser litigation. The Plaintiffs in that case did not file a *Daubert* challenge to Green's report.

Green's report is like Marchetti's in that he attempts to calculate the value of the Lexapro Amendment **[*56]** to Forest. But his analysis is broader. Instead of determining only the value of the services that Mylan provided Forest, Green itemizes the specific benefits/costs that each party expected to receive to see if the Amendment was "fair" for both sides. For example, Green, like Marchetti, calculates that the Lexapro Amendment decreased the amount of profit-sharing royalties that Forest expected to receive from Mylan by $12.5 million (*Id.* at ¶ 49); but unlike Marchetti, he concluded that Forest also "reasonably expected to gain $21.1 million in net profit share in the second year of the agreement due to the minimum term extension included in the amendment." (*Id.* at ¶ 55). Green thus believes that Forest's expected profit share benefits *increased* as part of the Lexapro Amendment — to a net of $8.6 million over the first two years of the new arrangement ($21.1 million minus $12.5 million). (*Id.* at ¶ 91). The additional profit share from year two differs from Marchetti's conclusion that there was no "reasonable expectation that sales of the Lexapro AG could have been sold at a profit by year two." (Marchetti Report at ¶ 113).

Green also calculates another net benefit to Forest that Marchetti **[*57]** does not — the expected effect on Medicaid liabilities. As discussed, legislative and administrative changes to Medicaid altered the regulatory landscape underpinning the original Lexapro Agreement. Green observes that by shifting the manufacturing of Lexapro AG to Mylan, "Forest forecast $26.5 million in Medicaid best price liability savings." (Green Report at ¶ 75). Thus, in his opinion, the total net benefits that Forest expected to receive from the Lexapro Amendment — without any consideration of saved litigation costs — would have been around $15.1 million ($26.5 million in reduced Medicaid liabilities plus $21.1 million in second-year profit, minus the $20 million upfront payment, minus the $12.5 million in decreased first-year profit share). (*Id.* at ¶ 83).

Green performs a similar analysis for Mylan, concluding that — despite it receiving an additional $12.5 million in net profit from the renegotiated agreement — its potential loss of 100% profit (if it terminated the agreement) in the second year due to the extension resulted in a total net loss from the Amendment of $19.2 million. However, this

[4] *See* How is Alzheimer's Disease Diagnosed, National Institute on Aging, https://www.nia.nih.gov/health/how-alzheimers-disease-diagnosed (last visited June 10, 2021) ("It's important to note that Alzheimer's disease can be *definitively* diagnosed only after death, by linking clinical measures with an examination of brain tissue in an autopsy.").

was offset by the $20 million upfront payment such that the total expected net benefits **[*58]** to Mylan as a result of the Lexapro Amendment was a net gain of $0.8 million. (*Id.* at ¶ 83).

These calculations led Green to conclude that — because the net benefits to each side exceeded the costs — the Lexapro Amendment "constitutes fair value." (*Id.* at ¶ 33). It is this opinion and the calculations leading to this opinion that SBA seeks to exclude.

SBA seeks to exclude Green's opinions on the basis that he incorrectly included anticipated benefits from reduced Medicaid liabilities as part of his analysis. SBA insists — as it does with its defense against Defendants' *Daubert* motions against Marchetti and McGuire — that the relevant *Actavis* question is what *Mylan* stood to profit from the deal, rather than what benefits Forest anticipated from the deal.

This motion can be disposed of quickly. It is denied because SBA's motion is predicated on an incorrect premise. Mr. Green does not run afoul of the Court's prior ruling on what can be considered in assessing the value of the settlement to Forest and Mylan — the error that renders Marchetti's and McGuire's ultimate conclusions inadmissible. It is SBA, not Green, who runs afoul of *Actavis* by insisting that any analysis must be limited to **[*59]** the "services rendered" by Mylan to Forest — a concept that appears nowhere in the *Actavis* decision.

Moreover, SBA's arguments are a classic example of the "his expert doesn't agree with my expert, so we must exclude his expert's testimony" school of *Daubert* motions. Mr. Green — whose credentials as an expert in valuation are unchallenged — offers his opinion about what value Forest obtained by entering into the Lexapro Amendment as part of that settlement. In the admissible portions of her testimony, Ms. Marchetti takes issue with a number of Green's conclusions about the "value" of specific items to a patent holder in Forest's position. She will be allowed to testify that Green's opinion is not worth the paper on which it is written. But the "errors" to which SBA points in its motion to exclude are really nothing more than differences of opinion that undergird any battle of the experts. The trier of fact can decide whether Ms. Marchetti's objections to Mr. Green's opinions are valid and whether his ultimate conclusion is to be accepted or not. Green's opinions are admissible, SBA's motion is denied.

F. SBA's motion to exclude the opinions of Lona Fowdur is granted in part but principally [*60] denied

Lona Fowdur is an economist. Her areas of specialization include antitrust analyses and industrial organization. Her work consists of analyzing market definition and the competitive effects of mergers and other corporate transactions.

SBA does not contest that Fowdur is qualified as an economist but criticizes her conclusions, again based on its misinterpretations of *Actavis*.

Fowdur was asked to address the potential harms and possible damages associated with SBA's claims. Her report largely responds to the opinions of Plaintiff witnesses, including Marchetti and McGuire as well as those of Dr. Russell Lamb and William Vogt (whose opinions were key in determining class certification). Most of her analysis focuses on the class-wide impacts of the hard switch. Since the hard switch theory was not certified for class treatment, those opinions are now irrelevant and need not be addressed.

As to the reverse payment theory, Fowdur first offers her opinions on the *Actavis* decision, and how the decision is "consistent" with the principle that "there is no reasonable economic basis to infer an anticompetitive settlement when payments to the generic manufacturer approximate or are less than **[*61]** the brand's likely avoided litigation costs." (Fowdur Report at ¶ 36). She then uses these conclusions to critique how Marchetti's and McGuire's opinions misapply the decision and are therefore unreliable. For example, she claims that McGuire "inappropriately narrow[s] the elements considered to be traditional settlement considerations under his interpretation of [] *Actavis*." (*Id.* at ¶ 47).

Apart from these legal opinions, Fowdur also draws on her economics background to evaluate the economic rationality of Forest's payments. She bases her opinions from the calculations performed by Philip Green. Based on her expertise, Fowdur concludes that "Forest's payment for the Lexapro Amendment was economically rational and fully explained by the benefits that it expected to receive," and that "Forest would expect the Lexapro Amendment to make economic sense." (*Id.* at ¶¶ 69-71). Fowdur also criticizes the claims of Marchetti and McGuire — for example, by taking issue with Marchetti's conclusion that the additional second year extension from the Lexapro Amendment was practically worthless. (*Id.* at ¶¶ 72-87).

Fowdur's testimony is admissible insofar as it contests and criticizes specific opinions **[*62]** propounded by Forest's experts. Her views antithetical to Marchetti's and McGuire's provide a classic battle of experts, and SBA does not appear to contest Dr. Fowdur's ability to do this.

What SBA seeks to preclude are Fowdur's interpretations of *Actavis*, and the conclusions (principally contained in Sections VII.B, C) that rely on that interpretation. That aspect of the motion is granted — but not for the reason argued by SBA.

SBA's motion is predicated on the notion that *Actavis* limited the value of reverse payments to "avoided litigation costs or the fair value of services" rendered by Mylan to Forest. *Actavis, 570 U.S. at 156*. It did not. As this Court has now repeatedly noted, *Actavis* did not limit the allowable economic effects of reverse payments to those two items; rather, it used them as illustrations of considerations that might impel settlement (hence its use of the phrase "such as" before mentioning those two items). *Ibid.* As far as I am concerned, it is SBA whose interpretation of *Actavis* is legally erroneous.

Nonetheless, this aspect of the motion is granted, but only because no expert, for either side, will be allowed to explain *Actavis* to the jury. The Court will interpret the case for the jury. **[*63]** To the extent any expert's testimony contradicts that interpretation, it will be disallowed. But the rest of Fowdur's opinions are admissible. SBA's motion is granted in part but principally denied.

G. SBA's motion to exclude the opinions of Sue L. Robinson is granted in part and denied in part

Ms. Robinson is a retired judge who served for more than twenty-five years on the United States District Court in the District of Delaware, where she presided over many a patent trial. She served as Chief Judge of that district from 2000 to 2007.

Robinson was asked by Defendants to provide background on how patent trials are conducted in the District of Delaware, where Mylan's Paragraph IV challenge took place. She reviewed the record from the Paragraph IV litigation and the merits of the claims and defenses from each side to evaluate the strengths and weaknesses of Forest's and Mylan's positions. She also responded to the opinions of Plaintiff expert Michael A. Davitz, who similarly opined on the merits of the litigation for each side. (Robinson Report at ¶ 13).

SBA argues that Robinson lacks the unique knowledge to opine as an expert on patent litigation, claiming that she has never practiced **[*64]** as a patent attorney before becoming a judge. SBA also criticizes Robinson for offering opinions about how Forest or Mylan would have litigated the case if it had gone to trial, and also how the judge presiding over the case, Judge Sleet, would have ruled on certain evidentiary issues or would have perceived certain arguments. SBA claims that these opinions are outside her scope of expertise.

SBA's motion is granted in part and denied in part.

This Court is second to none in its acknowledgement of Judge Robinson's expertise where patent law is concerned, as well as her expertise in how patent cases are tried. But we do not need an expert in patent law or patent trial procedure in this case. So, the first thing that I must make clear is that Judge Robinson will not be allowed to express any opinions about *Actavis* or her understanding of it. Fortunately, in her report, she disclaims any such intent.

I also do not see the need for extensive testimony about how a trial that never happened would have been conducted by another judge of Judge Robinson's court, who may or may not have followed the procedures or reached the conclusions that Judge Robinson would have reached had she been the presiding **[*65]** judge in the Mylan Paragraph IV case. These are, however, matters for another day.

As for her other opinions, Robinson is well qualified to criticize Dr. Davitz's methodology and conclusions, and I will allow her to do so. For example, she notes that the judges of the District of Delaware are exceedingly well qualified to try patent cases — because they try so many of them — and points out that generics succeeded just 36% of the time in courts with large patent dockets (i.e., Delaware, New Jersey and the Southern District of New York). (*Id.* at ¶ 45). She also observes that Davitz's statistics include settlements as "wins" for generics, a conclusion with which she understandably disagrees. (*Id.* at ¶ 47). She notes that Davitz's opinions give great weight to witness testimony from the Paragraph IV litigation that is amenable to cross examination on identifiable grounds, and that the testimony appears to be internally contradictory.[5] As long as she is responding to Davitz's opinions by criticizing the factors he considers in reaching his "70% success rate" conclusion, her testimony is admissible.

As the former Chief Judge in Delaware, Robinson is familiar with the practices of her colleagues **[*66]** in conducting Paragraph IV cases.[6] She is thus also in a position to criticize Davitz's conclusions about the timing of the Paragraph IV case. Indeed, in that regard, she is arguably not testifying as an expert at all, but as a fact witness. Her testimony on this subject is perfectly acceptable.

But the critical part of Robinson's testimony is her assessment of the strength of Forest's and Mylan's case on the merits, which she bases principally on her review of the pre-trial record in the Paragraph IV litigation. However, part of her conclusions come from her views of how Judge Sleet — the judge presiding over the litigation — would have ruled on certain motions, or how he would have viewed certain arguments. (*E.g., Id.* at ¶¶ 47, 107, 109). Robinson cannot predict how Judge Sleet would have ruled; such testimony is off limits, from anyone, including especially a former colleague. Therefore, statements such as, "Judge Sleet would likely not have found this or that credible" cannot and will not be permitted. (*See, e.g., Id.* at ¶ 109).

Part of her assessment is based on Judge Sleet's "track record" in patent cases. For example, Robinson notes that, as of 2010, Judge Sleet ruled against generic **[*67]** drug manufacturers in two cases and had not ruled in favor of any. (*Id.* at ¶ 47). But this has absolutely no bearing on the likelihood of whether he would have ruled against Mylan in a totally different case. Thus, to the extent that Judge Robinson's views about the likelihood of Mylan's success are predicated on her consideration of Judge Sleet's "track record" in patent cases, her opinions may not be offered or considered. I am certain that Judge Robinson did not mean to suggest that Judge Sleet was not entirely open-minded about each new case that came before him, or that he had some sort of predisposition to rule against generic drug manufacturers. Unfortunately, her testimony about a former colleague could easily be interpreted in that way, so I will not allow a jury to consider it.

But other aspects of her testimony are admissible. Robinson reviewed an extensive evidentiary record — depositions, documents produced, papers filed, and decisions and orders of the court — that was available to the parties and to any lawyer who would have been advising Forest or Mylan on its chances of winning the case. It would have been malpractice to not be familiar with that record; and a patent **[*68]** lawyer (Davitz) or judge (Robinson) are both well-positioned to opine on the strength of the evidence supporting particular arguments. And while neither Judge Robinson nor anyone else (Davitz, for example) can employ the word "credible" when discussing a witness's testimony — because no one can assess credibility without seeing the witness and listening to both direct and cross examination — she is perfectly free to point out things in the record as it existed at the time

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[5] Of course, since the witnesses never actually testified, we cannot know whether a seeming internal contradiction was not a contradiction at all, or whether it could be explained in a way that would appeal to the common sense of the trier of fact.

[6] That is because Chief Judges get statistics about their colleagues' work, not because Chief Judges have any power to control their colleagues' dockets, to assign them work, to supervise their work, or to require that they complete their work in a timely manner—all points that I, as a former Chief Judge, would insist be made if the jury were to become aware that Ms. Robinson had been Chief Judge. The title "Chief United States District Judge," as I learned during my term, is highly misleading to the uninitiated — especially since Chief Judges in the several states tend to have a great deal of power over the conduct of business in their respective courts. Chief United States District Judges do not.

of the Forest-Mylan settlement that would have provided fodder for cross examination at a trial — even though we cannot know how that cross examination would have played out (*see* n.5, supra).

But the only things on which expert testimony about the relative merits of each party's case can be based are those that Forest and Mylan were able to consider when evaluating whether to settle the lawsuit. Ergo, Robinson cannot factor into her assessment things that Forest and Mylan did not know about in 2010 and could not possibly have known in 2010 — like the contents of internal documents of another generic manufacturer (Dr. Reddy's) discussing *its* decision to settle. (*Id.* at ¶¶ 75-76). Those items did not come to light until **[*69]** discovery in this litigation, so a reasonable patent attorney advising a client in 2010 could not possibly have factored them into his or her equation. The fact that generics other than Mylan settled soon after the *Markman* decision is an objective fact that existed in 2010, and that an expert might well believe was suggestive of Forest's having a strong case in light of claim construction.[7] But the internal discussions about settlement at another firm — discussions to which Forest and Mylan were not privy — are not factors that a competent patent attorney advising Forest or Mylan in 2010 could have considered, and are not indicative of what Forest or Mylan would have considered or viewed. How other generic manufacturers viewed the relative strength of their position is not indicative of how *Forest* or *Mylan* viewed their positions. I will not allow such factors to serve as the basis for expert testimony on the only subject in which the trier of fact in this case is interested: did *Forest* and *Mylan* have a reason other than suppression of competition to settle their Paragraph IV lawsuit on the terms they reached in 2010.

In sum, Robinson will be permitted to testify about: (1) critiques **[*70]** to Davitz's methodology insofar as they pertain to the procedural aspects of the District of Delaware and; (2) her views on the strengths and weaknesses of the merits of Mylan's Paragraph IV challenge based off of her experience as a patent judge.

She will not be permitted to testify about: (1) the "credibility" of witnesses; (2) facts that neither Forest or Mylan would have been aware of in 2010; and (3) Judge Sleet's views or "track record" on patent cases, or how he would or would not have ruled on certain motions or how he would have viewed certain arguments. SBA's motion to exclude is granted in part and denied in part in accordance with this opinion.

III. SUMMARY JUDGMENT MOTIONS

SBA alleges four[8] substantive state-law claims against Forest and Merz. Count I alleges unlawful monopolization and maintenance of monopoly power through the reverse payments to generics (focusing on the Lexapro Amendment) and the hard switch theory, as to which no class has been certified. Count II alleges conspiracy-to-monopolize and restraint-of-trade claims based on the reverse payments. Count III alleges state consumer-protection and unfair-competition claims, and Count IV alleges claims under state **[*71]** common law principles of unjust enrichment.

There are three motions for summary judgment before the Court: (1) Forest's motion for summary judgment on all counts against it; (2) Merz's motion for summary judgment on all counts against it; and (3) SBA's motion for partial summary judgment on Count I against Forest.

A. Legal standards

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[7] It is my understanding that the Court of Appeals for the Federal Circuit reverses district court claim construction decisions about 50% of the time. It could of course be that reversal is less likely for Delaware judges; that datum is not in the record. But the nationwide reversal rate is quite well known among district court judges. And a 50% reversal rate makes it a coin toss whether such interesting constructions as the one adopted by Judges Stark and Sleet about "cerebral ischemia" (a common medical term for the interruption of blood flow to the brain, a/k/a stroke) would have withstood an appeal.

[8] There is also a fifth count for declaratory relief, seeking the Court to declare that "Defendants' conduct seeking to prevent competition" constituted illegal monopolization. (ECF 326 at ¶ 246). Its fate hinges on the fate of the other claims and it is probably not a form of relief the Court will be inclined to award.

HN12[] Summary judgment is appropriate if the moving party can demonstrate that there is no "genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see also* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. In deciding a summary judgment motion, "The court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in [its] favor." *L.B. Foster Co. v. Am. Piles, Inc., 138 F.3d 81, 87 (2d Cir. 1998)*. Whether any disputes of fact remain after the evidence is considered is a matter for the court. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson, 477 U.S. at 248*.

While SBA's claims are brought under a variety of state laws, liability under each of the claims fundamentally hinges on whether SBA can prove that Defendants' actions — i.e., the reverse payments — were anticompetitive. **[*72]** This is because SBA's consumer-protection and unjust-enrichment claims all depend on injuries suffered from there being higher prices following the allegedly anticompetitive conduct. (*See* Second Amended Compl., ECF 326 at ¶¶ 223-243). Thus, at this point in the litigation the parties primarily focus on the key aspect of the case: whether the reverse-payment settlements — and specifically the Lexapro Amendment — were anticompetitive.

Although IPPs' claims arise under state antitrust statutes, each of the statutes in question contain "harmonization" provisions that make the analysis of whether all elements have been met the same as if the claim were brought under federal ***antitrust law***. *See* *Namenda VIII, 338 F.R.D. 527, 2021 U.S. Dist. LEXIS 26566, 2021 WL 509988, at *34-36*. ***HN13***[] To prove that there was unlawful monopoly maintenance, there must be evidence that a defendant (1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that power "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. To have a demonstrable restraint-of-trade claim, a plaintiff must prove "(1) a combination or some form of concerted action between at least two legally distinct economic entities **[*73]** that (2) unreasonably restraints trade." *Geneva Pharm. Tech. Corp. v. Barr Lab. Inc., 2004 U.S. App. LEXIS 21586, 386 F.3d 485, 506 (2d Cir. 2004)*.

B. Forest's and SBA's cross-motions for summary judgment as to Counts I and II are denied

Forest moves for summary judgment on all four of SBA's counts against it. The IPPs moves for summary judgment on Count I's unlawful maintenance of monopoly power issue. Fundamentally, the parties dispute whether the reverse-payment settlements were anticompetitive and — if they were anticompetitive — whether they caused a delay in generic competition. But since there are disputes of fact including, but not necessarily limited to, the issues of the "fair value" of the Lexapro Amendment and causation, these cross-motions for summary judgment are denied — just as they were in the direct-purchaser case.

1. Preliminary issues

First, one must note that there is no dispute that Forest possessed monopoly power in the memantine market during the relevant period. This issue has already been litigated, and Forest is estopped from arguing to the contrary. *See, e.g.,* *Namenda VI, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *13*.

Second, Forest purports not to "concede" that the Lexapro Amendment was "linked" to Mylan's decision to settle, but it also does not move for summary judgment on the ground that the Lexapro Amendment was **[*74]** not part and parcel of the Mylan settlement. (ECF 565 at 16 n.6). I thus assume that Forest takes the position — as it did in the DPP lawsuit — that whether the Lexapro Amendment was part and parcel of the Mylan settlement is a disputed issue of fact. It takes this position notwithstanding the fact that almost all of the reverse-settlement agreements between Forest/Merz and a generic manufacturer *except* Mylan contained a clause stating that the payments included in the settlement were the "sole consideration" being exchanged for ending the generic's Paragraph IV challenge. (ECF 606 at ¶¶ 232-34). Only the Mylan reverse-settlement agreement — and another settlement not at issue in this litigation[9] — did *not* contain the "sole consideration" representation. That fact is enough to get the question of whether the Paragraph IV settlement and the Lexapro Amendment were part of one deal to the jury. *See* *Namenda V, 331 F.3d at 199* (noting that, in the DPP case, "Plaintiffs have presented enough evidence to allow a rational juror to conclude that the Lexapro Agreement was a part of the Forest-Mylan patent settlement" thereby precluding summary judgment on the issue of whether these were two separate settlements).

2. Disputes [*75] of fact remain as to the value of the Lexapro Amendment

If indeed the Lexapro Amendment was part of the consideration for the settlement of the Paragraph IV lawsuit, then the question that arises is whether the payments Forest made to Mylan constituted "large and unjustified" payments that were anticompetitive.[10] Forest and SBA dispute whether the payments can be justified by benefits unrelated to the desire to delay generic competition — whether the payments constituted fair value for what Mylan gave up or for what Forest expected to receive. As should be obvious from the decisions on the *Daubert* motions, there are hotly disputed issues of fact concerning whether the Amendment constituted a fair bargain.

SBA argues, as a matter of law, that the trier of fact can consider only the generic's perspective, and that the Lexapro Amendment was anticompetitive if it "induced Mylan to settle rather than continue its challenge to the '703 Patent." (ECF 569 at 14). For SBA, it does not matter if Forest expected to save money in the long run by agreeing to the Amendment. "[T]he 'net benefits' that 'Forest expected to receive' . . . are immaterial" because they are not probative of "whether the reverse payment **[*76]** induced Mylan not to compete." (ECF 599 at 16). All that a factfinder can consider is whether the generic manufacturer received a payoff greater than the profits it expected to earn from winning the Paragraph IV litigation. Whatever benefits the branded manufacturer expected to gain from settling (other than saved litigation costs) are irrelevant.

As has been stated repeatedly, (*see, e.g.*, Section II.B—F, *supra*), the Court disagrees with this position. It is predicated on what I view to be a misreading of *Actavis*. We will not go to the jury on that theory. SBA's "generic inducement test" improperly narrows the scope of analysis. A factfinder must also be allowed to consider the net benefits to the branded manufacturer, which could include, among other things, reduced Medicaid liabilities and saved manufacturing costs — all in addition to the saved litigation costs from settling. The only prohibited "benefit" for which a reverse payment cannot pay are profits that a branded manufacturer could expect to earn by delaying generic competition.

Forest thus argues that the Lexapro Amendment was not a net loss for it, but a net gain. Despite paying upwards of $32.5 million to Mylan, it argues **[*77]** that it saved at least $3 million in litigation costs; $26.5 million in reduced Medicaid liabilities; and another $21.1 million in additional profit-sharing royalties from extending the term of the Agreement by another year. (ECF 565 at 17). Forest claims that it would have netted around $18.1 million from the Lexapro Amendment if all factors are considered.

Forest has the correct view of the law. Nothing from *Actavis* justifies SBA's interpretation. ***HN14***[] The Supreme Court held that, while a large payment may "provide strong evidence that the patentee seeks to induce the generic challenger to abandon its claim," *570 U.S. at 154*, there are other considerations for evaluating whether a reverse payment was anticompetitive, such as whether the payment was "a rough approximation of the litigation expenses saved through the settlement" or "reflect[ed] compensation for other services that the generic has promised to perform," *id. at 156*. Importantly, these considerations were not exhaustive; by using the phrase "such as," the

[9] The other agreement was with the generic manufacturer, Orchid. Orchid was the last generic manufacturer to settle before Mylan. Although Forest/Merz sued Orchid along with the other generics in the District of Delaware, the case was transferred to the District of New Jersey. Orchid settled on March 23, 2010, four months before Mylan settled on July 21, 2010. (ECF 570 at ¶ 27). The record does not indicate if there was any other possible consideration associated with the Orchid agreement.

[10] If the jury decides that there were two separate settlements — which would mean that the Paragraph IV lawsuit was settled for $2 million, not upwards of $32 million — the Court may well direct a verdict on the issue of "large and unjustified," although we will hash this out fully at trial.

Court made it clear that there were other things that could render a reverse settlement not anticompetitive. If SBA's reading of *Actavis* were correct, then all reverse-payment settlements would be **[*78]** illegal, because one of the effects of such a settlement is always delayed generic entry. But that is precisely what the Supreme Court refused to hold in *Actavis*, "because the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, *and the lack of any other convincing justification*." *Id. at 159* (emphasis added). The only consideration that cannot factor into whether the reverse settlement was made are the expected profits from delayed competition.

Here, Forest has provided several reasons for why it agreed to the Lexapro Amendment with Mylan. But disputes remain as to whether the benefits it claims to have received from the deal (upwards of $50 million) were actually as valuable as Forest insists.

First, a dispute exists over the value of the one-year extension on the deal. The original Lexapro Agreement was for a term of five years, but Mylan could terminate the deal after one year, after which it could develop and market its own Lexapro generic, earning 100% of the profits. The Lexapro Amendment was also for five years, but **[*79]** Mylan could not terminate the deal for two years. The parties disagree about the value of that second year of "locked-in" royalties. Forest's expert, Philip Green, opines that Forest's internal documents forecast a total of $508.7 million in profit from Lexapro AG the first year it was on the market, and a total profit of $79.3 million in year two. (Green Report at ¶ 54). The Lexapro Amendment entitled Forest to 40% of the $79.3 million second-year projection, for a total of around $31.7 million. After accounting for other royalties that Forest owed to other companies, Green concluded that Forest expected to net approximately $21.1 million from the one-year extension. (*Id.* at ¶ 55).

SBA disputes this conclusion. Its expert, Susan Marchetti, states that the $21.1 million figure is "inconsistent with the evidence" she reviewed. (Marchetti Report at ¶ 113). Marchetti claims that there is no indication that Mylan ever intended to terminate the deal after just one year, and that it would have been economically irrational for it to have done so. (Marchetti Rebuttal at ¶¶ 17-19). This is because authorized generics (generics marketed in conjunction with the branded manufacturer) "retain a **[*80]** stronger market share than competing generic" companies and so Mylan could have expected to earn more profit by continuing to sell the Lexapro AG rather than by switching to its own generic. (*Id.* at ¶ 19). She critiques Green's methodology for failing to calculate how much Mylan would have expected to earn by making and selling its own version of generic Lexapro. For it to have been economically rational for Mylan to cancel the original agreement after just one year, Mylan needed to expect to make just as much if not more by selling its own generic, but this analysis was completely lacking from Green's opinions. (*Id.* at ¶ 29). If it would not have been economically rational for Mylan to cancel the Agreement after one year, then the "additional" benefits that Forest assigns to the second year of the Agreement are nothing more than a mirage — inflated numbers that both sides knew would not have materialized, but which provide great cover against antitrust scrutiny.

HN15[] Summary judgment is inappropriate "when there are dueling experts, both of whom have put forward opinions in contradiction with each other, and when those opinions are important to resolution of a material factual dispute." **[*81]** *Realtime Data, LLC v. Stanley, 897 F. Supp.2d 146, 153 (S.D.N.Y. 2012)*. Given that the Court has already determined that both Green's and Marchetti's pure calculations of the Lexapro Amendment are admissible, this is a classic battle-of-the-experts that precludes summary judgment for either side.

Second, a dispute remains as to whether the amount Forest claims it expected to save from reducing Medicaid liabilities ($26.5 million) by shifting the manufacturing of Lexapro AG to Mylan was pretextual. SBA does not appear to quibble with Forest's calculations to arrive at the $26.5 million figure, but it argues that internal Forest documents show that its executives in 2007 — when evaluating the Medicaid changes — viewed that "Having [Lexapro] AG on market still makes sense under this scenario" given the profits that Forest still expected to receive under the original agreement. (ECF 572, Exh. 66 at 6). SBA claims this indicates that there was no need for Forest to renegotiate the Agreement, and that the Lexapro Amendment — and the payments contained within it — was a pretextual reason to hide the fact that Forest was just trying to share monopoly profits with Mylan. That, too, presents a question for the jury.

These are just two examples of the myriad factual **[*82]** disputes concerning whether the Lexapro Amendment constituted a "large and unjustified" reverse settlement that is subject to antitrust scrutiny. This issue will be decided by a factfinder.

3. Disputes of fact remain as to causation

Disputes of fact also remain as to causation — whether Forest's actions actually caused delayed generic competition such that it resulted in higher prices for memantine. Plaintiffs bear the burden of proof on causation. ***HN16***[] To survive a summary judgment motion, "An antitrust plaintiff must show that a defendant's anticompetitive act was a 'material' and 'but-for' cause of plaintiff's injury, although not necessarily the sole cause." *In re Actos End-Payor Antitrust Litig., 848 F.3d 89, 97 (2d Cir. 2017)*; *see also* Argus Inc. v. Eastman Kodak Co., 801 F. 2d 38, 41 (2d Cir. 1986). Forest insists that SBA cannot carry this burden because it cannot show that, absent the Lexapro Amendment, Mylan would have both won its challenge to the '703 Patent and then launched a competing version of generic Namenda IR.

If Mylan had won the challenge, it could have launched its version of generic Namenda IR earlier than when generics launched in the real world — July 11, 2015. But if Mylan lost the patent challenge, then the date of its generic entry in the but-for world would have been the same as in the real world. The **[*83]** market for generic memantine would have been in the same position as it is now — meaning that Forest's actions did not depress competition.

So it is important to assess whether Mylan would have won its Paragraph IV challenge, and more specifically to assess how each side *perceived* its chances of succeeding (and thus the desirability of settling). A second "battle of the experts" will queue that issue up for the jury. SBA's expert, Michael Davitz, opines that Mylan had a 70% chance of success. Forest's expert, Sue Robinson, disagrees. This disputed issue of fact precludes summary judgment on the issue of causation.

The parties also disagree about whether the acceleration clauses included in all the reverse settlements (not just Mylan's) were anticompetitive. The clauses permitted each settling manufacturer to launch its version of generic Namenda IR as soon as any other generic manufacturer launched.

SBA argues that the acceleration clauses decreased the incentive for any single generic manufacturer (like Mylan) from continuing its Paragraph IV challenge, because even if it won the litigation and the '703 Patent was declared invalid or not infringed, its competitors (the generics that settled with **[*84]** the acceleration clause) could launch their products simultaneously. Thus, any "holdout" generics would be burdened with all of the expense, effort, and risk of the litigation, while those that settled could simply wait and take advantage if a court ultimately found that the patent was invalid or was not infringed. By July 2010, Mylan was of course, the lone holdout.

Moreover, whenever any generic settled with an acceleration provision, it arguably further disincentivized any non-settling holdout from continuing its Paragraph IV challenge, because the holdout knew that it would have had to share the market with yet another competitor even if it prevailed in the litigation. The more generics that settled, the greater the pressure on remaining holdouts to settle — the expected profit "pie" would be split into smaller and smaller pieces. SBA's expert Thomas McGuire opines that, by the time Mylan ended its Paragraph IV challenge to the '703 Patent, its expected profits from prevailing in the patent lawsuit was only around $0.9 million over four years — because it would have had to share the generic market with all of the rest of the settling generics. (McGuire Report at ¶ 106). SBA claims that these **[*85]** clauses are anticompetitive because they deterred generic challenges to branded patents.

Forest counters by arguing that the acceleration clauses did not change the generic market at all, and arguably increased competition. Because there were originally fourteen ANDA "first-filers," Forest argues that, even if there had been no Paragraph IV litigation, the profit "pie" for generics would still have been split into small pieces. If all fourteen "first-filers" were allowed to launch their generics on the same day (as was their right under law), the scenario was identical to having all the generics sue and settle with an acceleration clause that merely allowed the generics to do what they otherwise would have done — enter the market on the same day. Forest insists that the clauses actually increased generic competition by averting a scenario in which one generic manufacturer (the last holdout) would have dominated the market for generic Namenda IR if it had succeeded in its Paragraph IV challenge. Forest argues that the "harm" that SBA assigns to the acceleration clauses is actually just increased competition among generics, which cannot be a factor in declaring any deal anticompetitive. **[*86]**

Whether Forest's rather appealing argument entitles it to summary judgment on this point presents a close question, but as the motion is being otherwise denied there is no need to resolve it now. At present, I am inclined to let the jury make this decision. *See* *In re Loestrin 24 Fe Antitrust Litig., 433 F. Supp. 3d 274, 321 (D.R.I. 2019)*. But I may change my mind after hearing further argument at trial.

C. Merz's motion for summary judgment dismissing Count II is denied

Merz originally moved for summary judgment on all the counts against it on the ground that it was not involved in any of Forest's allegedly unlawful acts. In particular, Merz was not party to the Lexapro Amendment; it argues that it cannot be held liable for any anticompetitive effects that may have stemmed from the agreement.

In its opposition to Merz's motion for summary judgment, SBA "requests to voluntarily dismiss its Count I — Monopolization Under State Law, Unlawful Maintenance of Monopoly Power — claims against the Merz Defendants." (ECF 599 at 51 n.20). SBA and Merz then entered a joint stipulation whereby SBA voluntarily dismissed Count I against Merz. (ECF 612). This leaves Merz as a defendant on Count II — the restraint-of-trade claim — and the various state-law unfair-competition and **[*87]** unjust-enrichment claims, which will be discussed separately.

The special argument that Merz raises for dismissing Count II as against it is that Merz was not a party to the Lexapro Amendment and did not make any payments to Mylan pursuant to the Amendment — which is the allegedly "large and unjustified" portion of the settlement. SBA does not dispute this fact. (*E.g.*, ECF 570 at ¶¶ 78-82).

If Defendants convince the jury that the Lexapro Amendment and the Mylan reverse settlement were two separate agreements here, not just one, then Merz will be dismissed as a defendant. But unless and until that happens, the fact that Merz was not a formal party to the Lexapro Amendment is not reason enough to dismiss Count II against it.

It is undisputed that Merz stood to benefit from keeping generics out of the market for memantine for as long as possible, since Forest had to pay Merz 20% of its net revenues on sales of memantine in the U.S. As the Supreme Court has noted, "acquiescence in an illegal scheme is as much a violation of the [antitrust laws] as the creation and promotion of one." *United States v. Paramount Pictures, 334 U.S. 131, 161, 68 S. Ct. 915, 92 L. Ed. 1260 (1948)*.

There is, admittedly, nothing in the record that evidences Merz's participation in discussions about or the **[*88]** drafting of the Lexapro Amendment, either its terms or as part of an overall settlement between Forest and Mylan. SBA points to two other pieces of evidence of Merz's "acquiescence" in the allegedly illegal scheme cooked up between Forest and Mylan — a scheme that had the potential to confer a great financial benefit on Merz.

First, as was mentioned previously (*see* Section III.B.1, *supra*), nearly all of the reverse-settlement agreements between Forest/Merz and the other generic manufacturers contained a clause stating that the payments included in the settlement were the "sole consideration" being exchanged for dropping the patent challenge. (ECF 606 at ¶¶ 232-34). But the Mylan reverse-settlement agreement — which Merz signed, and toward which it contributed 50% of the stated financial consideration — did *not* contain the a "sole consideration" representation. That curious and highly significant omission suggests that Merz was well aware that Mylan was receiving additional consideration for settling the Paragraph IV lawsuit — which could only have come in the form of the simultaneously executed

Lexapro Amendment — and acquiesced in the overall scheme by playing its part in the settlement **[*89]** of the patent lawsuit, to which it was a necessary party.[11]

Second, the record also shows that Merz and Forest jointly submitted both the Mylan reverse-settlement agreement *and* the Lexapro Amendment to FTC authorities as part of the disclosures mandated under Section 1112(a) of the Medicare Modernization Act, which requires all brand-generic agreements regarding any ANDA lawsuit to be transmitted to the FTC. (ECF 606 at ¶ 203).

However, this piece of "evidence" is not at all persuasive. The Lexapro Amendment itself represented an alteration in the terms of the settlement of an entirely different ANDA lawsuit — the one between Alphapharm and Forest concerning Forest's '712 Patent — so it arguably had to be transmitted to the FTC in any event. Moreover, as the cover letter transmitting the document to the FTC makes clear, Forest and Merz took the position that they were supplying the FTC with the Lexapro Amendment "for the sake of completeness" even though it was not required to be filed along with the Mylan settlement agreement:

> On behalf of Forest . . . and Merz . . . and pursuant to Section 1112(a) of the [MMA], I [Forest's counsel] enclose two copies of the agreement settling patent infringement litigation brought by Forest and Merz against Mylan . **[*90]** . . . Although we do not believe that the following documents must be submitted with this filing, for the sake of completeness we are also enclosing two copies of: (1) a Distribution and Supply Agreement between Forest . . . and Alphapharm . . . [the original Lexapro Agreement]; (2) an amendment to the Distribution and Supply Agreement between Forest. . . Mylan, and Alphapharm, dated July 21, 2010 [the Lexapro Amendment] . . . .

I do not agree with SBA that this demonstrates that Merz considered itself to have a relationship to the Lexapro Amendment; indeed, in the opinion of this Court it suggests the contrary.

But even if the FTC submission fails to raise a genuine issue of fact, there is sufficient evidence in the record of Merz's financial interest in Mylan's delayed entry into the Namenda market to make it appropriate for the jury to determine whether the Lexapro Amendment was part and parcel of a settlement that involved Merz, and whether Merz, as Forest's co-conspirator or aider and abettor, knowingly acquiesced in an anticompetitive agreement in violation of *Paramount Pictures*. I note that, in analogous circumstances, my colleague in the District of Massachusetts declined to **[*91]** dismiss a claim against generics who entered into reverse-settlement agreements with the understanding that they could have knowingly "acquiesced" in a scheme to harm competition. *See In re Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d 231, 259-60 (D. Mass. 2014)*.

A far more interesting question is whether the fact that Merz made no payment in connection with the Lexapro Amendment means that it cannot be liable for an antitrust violation under *Actavis*. It is undisputed that Merz paid Mylan $1 million — half the cost of the Mylan reverse settlement, and an amount that would not qualify as large or unexplained given the experts' estimates of the cost to the parties of continuing the Mylan Paragraph IV lawsuit. There is no evidence that Merz paid any portion of the $20 million upfront fee to Mylan per the Lexapro Amendment or that it reimbursed Forest for any portion of that payment. In fact, SBA concedes as much. (ECF 599 at 15-16, 52). Merz contends that this concession is fatal to SBA's claim that Merz was Forest's co-conspirator, "because

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[11] As the owner of the '703 Patent, Merz was a necessary party to any lawsuit that alleged the infringement of that patent. "Traditionally, when the interest transferred is deemed a license" — as was the case with Merz's licensing of the '703 Patent to Forest — "the patent-holder is a necessary party because the patent-holder is still the real party in interest with respect to the validity of the patent." *Refac Int'l, Ltd. v. Mastercard Int'l, 758 F. Supp. 152, 157 (S.D.N.Y. 1991)* (citation omitted.); *see also IpVenture, Inc. v. Prostar Computer, Inc., 503 F. 3d 1324, 1325 (Fed. Cir. 2007)*. Merz's contract with Forest also required Merz to be involved in any litigation defending its intellectual property. It included a provision stating that Merz "shall be solely responsible for taking all actions, in the courts, administrative agencies, or otherwise, to prevent or enjoin any and all such infringements and other unauthorized uses of Merz' Intellectual Property Rights" and that Forest was to "take no action with respect to any such infringement or unauthorized use of Merz' Intellectual Property Rights, without the prior written authorization of Merz." (ECF 607, Exh. 24 at 20).

there is no rational basis for Forest to bear the full cost of the alleged illegal payment if Merz was part of an alleged conspiracy." (ECF 631 at 3).

I fear I must differ with Merz on this point. If the Lexapro Amendment constituted **[*92]** a "large and unexplained" payment under *Actavis* that was made for the purpose of forestalling competition — competition that would have been economically harmful to Merz — then the fact that Forest shelled out the bulk of the consideration for that agreement does not lead inexorably to the conclusion that Merz was not involved in an anticompetitive conspiracy. As long as Merz stood to benefit from the delay in generic entry — and it indisputably did — it had a reason to participate in and promote an anticompetitive settlement. It is true that there is no "smoking gun" email evidencing Merz' overt agreement to participate in an anticompetitive scheme, but there does not need to be in order for plaintiffs to overcome Merz' motion for summary judgment. Circumstantial evidence suffices.

Merz is free to argue at trial that it had nothing to do with the "side deal" Lexapro Amendment other than being aware of it — that it was not consulted in any way about the negotiations surrounding it, that it obtained no benefit directly (or indirectly) from it, and that the only agreement to which it was a party was the $2 million reverse-settlement agreement that ended the Paragraph IV lawsuit. It is **[*93]** also free to argue that its financial contribution to the Mylan deal or deals (if it concedes that the Lexapro Amendment was part of the consideration for settling) was limited to half of the cost of settling the Paragraph IV lawsuit, or only $1 million, which hardly qualifies as a "large" or "unjustified" payment when solely viewed in light of anticipated litigation costs.

But the logic of Merz's participation in an anticompetitive settlement that would put money in its pocket[12] — not to mention any potential anticompetitive impact from the acceleration clause[13] — seems clear enough to get the issue to the jury, which can then decide whether there is a lack of evidence on this point. ***HN17***[] An alleged co-conspirator is not free from liability simply because it was not the most active participant in the scheme. "[I]t is sufficient that [a defendant], regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have anticompetitive effects." *Virginia Vermiculite, Ltd. v. W.R. Grace & Co., 156 F. 3d 535, 541 (4th Cir. 1998)* (citing cases); *see also* *In re Nexium (Esomeprazole), 42 F. Supp. 3d at 259* (denying a motion to reconsider denial of summary judgment because "the record support[ed] the inference that [defendant generic manufacturer] knew" it was agreeing to a deal that would have delayed **[*94]** generic competition and "understood generic delay to be anticompetitive").

Merz's motion for summary judgment dismissing Count II as against it is denied.

D. Forest's motions for summary judgment on Count III is granted in part and denied in part

The IPPs' claims under Count III allege violations of the consumer-protection and unfair-competition laws of thirteen states: Alabama, California, Florida, Idaho, Illinois, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, and Utah.[14] Forest now moves for summary judgment on the claims arising under eight of these thirteen states.

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[12] Exactly how much money is not clear. SBA's damages expert, William Vogt, calculated total overcharges to the IPPs as between $1.98 and $2.21 billion, depending on the date of generic entry in the but-for world. (ECF 447, Exh. 2 at tbl. 6). Assuming that to be a rough approximation of the revenues Forest expected to earn (which appears reasonable in light of Namenda's $1.5 billion in sales in 2013, *see* *Namenda II, 787 F.3d at 647*), then Merz's entitlement to 20% of Forest's revenue could have netted it between an additional $396 million and $424 million due to the delayed generic entry.

[13] Again, I am effectively "reserving" on that issue at present.

[14] The Second Amended Complaint originally included claims arising under the laws of fourteen states, not thirteen. The extra state was Missouri, but SBA did not move for class certification in connection with any actions taken in or any harmed incurred in Missouri. *See* *Namenda VIII, 338 F.R.D. 527, 2021 U.S. Dist. LEXIS 26566, 2021 WL 509988 at *5*. SBA also does not mention any Missouri claims in the summary judgment motions. Accordingly, the Court finds that the IPPs have abandoned any Missouri claims.

1. Alabama

Forest argues that the Alabama consumer-protection statute, *Ala. Code § 8-19-10, et seq.* only permits a "natural person" from recovering damages. This is true. ***HN18***[] The statute only provides a private right of action to a "consumer" which it defines as "any natural person who buys goods or services for personal, family, or household use." *Ala. Code § 8-19-3(2)*. No third-party purchaser of Namenda like the IPPs would qualify as a consumer under this definition. *See* *EBSCO Indus. V. LMN Enters., 89 F. Supp. 2d 1248, 1266 (N.D. Ala. 2000)* (granting summary judgment because the corporate plaintiff was not a "consumer"). Apparently realizing this, SBA states in its response to Forest's summary **[*95]** judgment motion that it "voluntarily dismisses its Count III claim brought under Alabama's consumer protection statute." (ECF 599 at 35).

Accordingly, Forest's motion for summary judgment is GRANTED as to Count III's claim under Alabama's consumer-protection statute.

2. Michigan

HN19[] *M.C.L.A. § 445.903*, the Michigan Consumer Protection Act ("MCPA"), prohibits "unfair, unconscionable, or deceptive methods . . . in the conduct of trade or commerce." Michigan courts interpret this statute as providing relief only for consumers who purchased a product for personal use. Although the MCPA includes "corporation" under its definition of a "person" that can sue (in contrast to the Alabama statute), Michigan courts hold that "if an item is purchased primarily for business or commercial rather than personal purposes, the MCPA does not supply protection." *Zine v. Chrysler Corp., 236 Mich. App. 261, 600 N.W.2d 384, 393 (Mich. Ct. App. 1999)*. The key question is "whether the purchaser intends to use the product himself." *Ibid.* Items purchased for commercial, rather than personal use, are outside the scope of the MCPA's protection. *See, e.g.,* *In re OnStar Contract Litig., 278 F.R.D. 352, 380 (E.D. Mich. 2011)*; *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II), No. 03-cv-4558, 2010 U.S. Dist. LEXIS 68241, 2010 WL 2813788, at *67 (D.N.J. July 9, 2010)*.

Here, IPPs did not "purchase" the drug at all, and certainly not for their own use. Rather, they r*eimbursed* their insureds, who both purchased the drug and used the memantine, presumably for personal purposes. **[*96]** SBA concedes that the IPP class members only "provide[] prescription drug benefits for *its members['] personal use*." (ECF 599 at 36 (emphasis added)). The parties have not cited, and the Court has not located, any Michigan case in which an insurer was able to sue under this statute because its insured purchased an item for personal use where the marketing of the item was tainted by unfair trade practices.

HN20[] Additionally, the MCPA appears to only prohibit *fraud* or *fraud-related* acts in commerce. The statute includes a long list of what it defines as "unfair, unconscionable, or deceptive methods." These include things like "causing a probability of confusion or misunderstanding as to the source . . . of goods"; "using deceptive representations"; "disparaging the goods, services, . . . or reputation of another by false or misleading representation of fact"; "gross discrepancies between the oral representations of the seller and the written agreement," and etc. *Mich. Code. Ann. §§ 445.903(1)(a)-(kk)*. None of the expressly prohibited acts pertains to any kind of antitrust violation. As a result, some courts have dismissed MCPA consumer-protection claims when brought in the antitrust context. *See, e.g.,* *In re Pork Antitrust Litig., 495 F. Supp. 3d 753, 785 (D. Minn. 2020)* ("The MCPA is narrower **[*97]** than other state consumer-protection statutes because it specifically defines what constitutes unfair or unconscionable conduct."); *In re Packaged Seafood Prods. Antitrust Litig., 242 F. Supp. 3d 1033, 1076 (S.D. Cal. 2017)* ("Plaintiffs do not point to a specific provision of the MCPA definitional section covering antitrust violations, and the Court is unable to find one."). I find the reasoning of these cases persuasive. So, while this issue is not a basis upon which either Forest or Merz moved for summary judgment, it provides the Court with yet another reason to dismiss the MCPA claim.

Accordingly, because IPPs did not "purchase" anything at all — which Michigan courts deem to be a prerequisite for any proper plaintiff under the MCPA — and because the conduct here complained of is not the kind of conduct reached by the MCPA, the Count III claim under Michigan law is dismissed.

Forest's summary judgment motion is GRANTED as to Count III under Michigan law.

3. Illinois

Forest makes the same "IPPs are not consumers" argument with regard to IPPs' claim under the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"). But this claim will not be dismissed. ***HN21***[] Illinois courts allow non-consumer plaintiffs to pursue relief if it "can satisfy the 'consumer nexus text,'" which requires only that the complained-of conduct "'involves trade **[*98]** practices addressed to the market generally or otherwise implicates consumer protection concerns.'" *Roppo v. Travelers Companies, 100 F. Supp. 3d 636, 651 (N.D. Ill. 2015)* (quoting *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc., 190 Ill. App. 3d 524, 534, 546 N.E.2d 33, 137 Ill. Dec. 409 (1989)*).

Here, the complained-of conduct clearly addresses the market and implicates consumer-protection concerns. If Forest's actions delayed generic entry (as IPPs allege they did), then that likely would have increased the price for memantine during the relevant period, negatively impacting consumers. This is sufficient to sustain IPPs' claim under the ICFA.

Forest's summary judgment motion dismissing this count under Illinois law is DENIED.

4. Florida

Forest concedes that the Florida Deceptive and Unfair Practices Act ("FDUTPA") permits third-party purchasers like the IPPs to bring a consumer-fraud claim. Instead, Forest claims that it is still entitled to summary judgment because IPPs cannot demonstrate that there was any injury or detriment to consumers.

But whether consumers were harmed by Forest's actions is an issue of fact to be decided by a factfinder.***HN22***[] "[W]hile the claimant would have to prove that *there was an injury or detriment to consumers* in order to satisfy all of the elements of a FDUTPA claim, the claimant *does not have to be a consumer* to bring the claim." *Caribbean Cruise Line, Inc. v. Better Business Bureau of Palm Beach Cnty., Inc., 169 So. 3d 164, 169 (Fla. 4th Dist. Ct. App. 2015)*. The IPPs are alleging that Forest's actions harmed consumers **[*99]** by paying more for memantine than they otherwise would have. Whether there truly was any harm — and the extent of that harm — is an issue of fact to be resolved at trial.

Forest's summary judgment motion dismissing this count under Florida law is DENIED.

5. Massachusetts

Forest argues that the Massachusetts statute, Mass. Gen. Laws ch. 93A, *et seq.*, does not provide a cause of action for indirect purchasers that are businesses.

HN23[] Massachusetts has two standing provisions for consumer-protection suits. *Section 11 of 93A* provides a right of action to "Any person who engages in the conduct of any trade or commerce" while *Section 9* provides a right of action to "Any person other than a person entitled to bring action under section eleven." *Mass. Gen. L. c. 93A §§ 9*, 11. This effectively splits the claims raised by "consumers" (under *§ 9)* and those raised by "businesses" (under *§ 11*). *See* *Cont'l Ins. Co. v. Bahnan, 216 F.3d 150, 156 (1st Cir. 2000)*. The key difference between *§§ 9* and 11 is that the latter does not provide for indirect-purchaser standing; it follows the Supreme Court's holding in *Illinois Brick. See* *In re Asacol Antitrust Litig., 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at *13 (D. Mass. July 20, 2016)*; *Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 62-63, 762 N.E.2d 303 (2002)* (noting that "in any action brought under [*§ 11*], the court shall be guided in its interpretation of unfair methods of competition by the provisions of the [Massachusetts] Antitrust Act," which bars indirect-purchaser suits pursuant to ***[*100]*** *Illinois Brick*). Put simply, *businesses* cannot sue under *§ 11* for antitrust violations if they are indirect purchasers.

SBA makes a "law of the case" argument, stating that this Court held, in its decision and order denying the motions to dismiss, that "Chapter 93A [of the Massachusetts statute] . . . allows indirect purchaser claims." *Namenda VI, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233 at *22*. **HN24**[] That statement is technically true: Chapter 93A *does* allow indirect purchaser claims, but only if the entity is not a business and is suing under *§ 9, not § 11*. *See Ciardi, 436 Mass. at 63* ("[W]e cannot conclude that the application of . . . *§ 9*, is to be guided by the provisions of the Antitrust Act, and by association, *Illinois Brick Co. v. Illinois* . . . so as to preclude indirect purchasers" from suing.) To the extent that the earlier decision may have implied that businesses like the plaintiff indirect purchasers could bring *§ 11* claims, the decision was wrong and I happily correct it.

SBA also argues that IPPs are not "motivated by business considerations" but are nonprofit organizations. While it may be true for some IPPs contained within the class, it certainly is not true for all class members. Moreover, many nonprofits are motivated by the commercial aspects of their enterprises. Frankly, **[*101]** it strains credulity to argue that third-party insurers are altruistically motivated. Moreover, I do not understand the Massachusetts Legislature to have allowed indirect purchaser businesses to bring *§ 11* suits if their motivation was pure.

The Court concludes that IPPs lack standing to pursue an indirect-purchaser claim under *§ 11 of Mass. Gen. L. c. 93A*. Forest's summary judgment motion dismissing this count under Massachusetts law is GRANTED.

6. California

Forest argues that it is entitled to summary judgment on IPPs' California claim because, under the statute, **HN25**[] "Prevailing plaintiffs are generally limited to injunctive relief and restitution." *Cel-Tech Commc'ns., Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 179, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*; *see also* *Cal. Bus. & Prof. Code § 17203*. The IPPs do not dispute this conclusion, but argue that there is no reason to dismiss their claim because they are seeking restitution. I agree. **HN26**[] Just because a certain type of monetary recovery is unavailable to a plaintiff does not mean that the substantive claim itself must be dismissed. *See In re Loestrin 24 FE Antitrust Litig., 410 F. Supp. 3d 352, 377 (D.R.I. 2019)*. If IPPs succeed in proving liability, it is likely that they would be entitled to some form of restitution.

Forest's summary judgment motion dismissing this count under California law is DENIED.

7. Nebraska

Forest claims that IPPs' claims under Nebraska's Consumer Protection Act ("NCPA"), Neb. Rev. Stat. §§50-1601, *et seq.*, must be dismissed because **[*102]** the statute requires the defendant to have engaged in "deception," which Forest claims the evidence does not support. The IPPs insist that the NCPA does not have a "deception" element. Their disagreement centers on one case — cited by both sides — from the Supreme Court of Nebraska, *State ex rel. Stenberg v. Consumer's Choice Foods, Inc., 276 Neb. 481, 755 N.W.2d 583 (Neb. 2008)*.

In *Stenberg*, Nebraska's Attorney General sued suppliers of food items for entering into installment contracts with customers knowing full well that the contracts could not be fulfilled, and ultimately not delivering on their terms. **HN27**[] The Court noted that the NCPA prohibits "'Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce'" but does not define "unfair" or "deceptive." *Id. at 590* (quoting *Neb. Rev. Stat. § 59-1602*). Nevertheless, the State's allegations were more than enough for a violation of the NCPA since the record was "replete with examples of deceptive acts . . . that were unethical and unscrupulous." *Id. at 591*. This was because liability exists under the NCPA if the plaintiff proves "that the practice either '(1) fell within some common-law, statutory, *or other established concept of unfairness* or (2) was immoral, unethical, oppressive, or unscrupulous.'" *Ibid.* (quoting *Road v. Wal-Mart Stores, Inc., 13 F. Supp. 2d 1003, 1014 (D. Neb. 1998)*) (emphasis **[*103]** added).

The Court notes that *Stenberg* is a breach-of-contract case, which gives it little value in assessing claims under the NCPA for alleged antitrust violations. But I do not read *Stenberg* as precluding liability except in cases where actual deception is alleged. For well over a century, "established concept[s] of unfairness," have included antitrust violations.

Forest's summary judgment motion dismissing this count under Nebraska law is DENIED.

8. Utah

Finally, Forest argues that IPPs cannot bring sue under ***HN28***[] Utah's consumer-protection statute, *Utah Code Ann. § 13-11-5*, which requires that the defendant have engaged in an "unconscionable act or practice." Forest contends that Utah courts interpret "unconscionable" to mean "gross bargaining power inequality or oppressive contractual terms." *Imperial Mobile Home Park, L.L.C. v. Kelsch, No. 971591-CA, 1998 Utah App. LEXIS 171, 1998 WL 1758393, at *1 (Ct. App. Utah Nov. 27, 1998).*

But the *Imperial Mobile Home Park* case does not appear to have been a restraint-of-trade case, and that single short, non-precedential opinion does not persuade this Court that Utah law defines the term "unconscionable act or practice" so narrowly. Other federal courts that have ***HN29***[] evaluated Utah's statute in the antitrust context have all permitted such claims to proceed, construing the statute liberally to conclude that an **[*104]** antitrust violation can be unconscionable. *See, e.g., In re Packaged Seafood, 242 F. Supp. 3d at 1087*; *In re Microprocessors Antitrust Litig., 2007 U.S. Dist. LEXIS 50654, 496 F. Supp. 2d 404, 418 (D. Del. 2007)*. This Court agrees.

Forest's summary judgment motion dismissing this count under Utah law is DENIED.

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As a result of these rulings, the only consumer-protection claims remaining against Forest under Count III are those arising under the laws of California, Florida, Idaho, Illinois, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, and Utah.

E. Merz's motion for summary judgment on Count III is granted as to all of the claims except the one arising under California law

Merz is entitled to summary judgment on the Count III claims arising under the consumer-protection statutes of Alabama, Massachusetts, and Michigan, for the same reasons that Forest was entitled to dismissal of the claims under those states' laws.

But Merz also goes further, insisting that it is entitled to summary judgment on all claims arising under Count III.

Merz notes that most of the remaining consumer-protection statutes (all but California) require that a plaintiff prove that the defendant engaged in "trade" or "commerce" within the state. Because Merz has never advertised, marketed, or sold Namenda or any other memantine product within the United **[*105]** States (having licensed the '703 Patent to Forest), it insists that it cannot be held liable under any of the remaining consumer-protection statutes.

Merz correctly points out that the consumer-protection statutes of Florida, Idaho, Illinois, Nevada, New Hampshire, New Mexico, and Utah all require that the allegedly "unfair" or "deceptive" practice have involved some form of advertising, purchase, sale, or distribution *by the defendant within the state. See, e.g.*, *Fla. Stat. § 501.203* (defining "trade or commerce" to mean "the advertising, soliciting, providing, offering, or distributing . . . of any good or service"); *Idaho Code § 48-602* ("advertising, offering for sale, selling, leasing, renting, collecting debts . . . or distributing goods or services"); *815 Ill. Comp. Stat. Ann. 505/1(f)* ("advertising, offering for sale, sale, or distribution"); *Nev. Rev. Stat. Ann. § 598.094* ("any sale, offer for sale or attempt to sell property"); *N.H. Rev. Stat.*

Ann. § 358-A:1 ("advertising, offering for sale, sale, or distribution"); *N.M. Stat. Ann. § 57-12-2(C)* ("advertising, offering for sale or distribution"); *Utah Code Ann. § 13-11-3* ("sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property").

The statutes of Nebraska and North Carolina contain more expansive definitions of "commerce." See *Neb. Rev. Stat. Ann. § 59-1601* ("Trade and commerce **[*106]** shall mean the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska"); *N.C. Gen. Stat. § 75-1.1(b)* ("For purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.").

It is undisputed that Merz did not advertise, buy, sell, or distribute memantine in the U.S. This, alone, is enough to dismiss the claims arising under the laws of all the states except Nebraska and North Carolina from the lawsuit. There is no evidence in the record that Merz conducted any commercial activity related to the promotion or sale of any memantine product in the United States — let alone that it did so in any of the specific states in question. Indeed, SBA alleges that Forest had *exclusive rights* to market a memantine product in the U.S., and that it was Forest, not Merz, that had 100% market share of the relevant market. (ECF 326 at ¶¶ 65, 175). ***HN30***[] A defendant cannot be liable for an unfair trade practice if it did not engage in any relevant trade in the United States.

SBA insists that these statutes should still apply to Merz because it engaged in "commerce" **[*107]** by licensing the '703 Patent to Forest and by initiating the patent-infringement lawsuits against the generic manufacturers. But SBA completely misses the point. ***HN31***[] The consumer-protection statutes require that the actual unfair method of competition or deceptive act be associated with the commerce in question. All of the consumer-protection statutes (including those of North Carolina and Nebraska) include language specifically prohibiting "unfair methods of competition . . . *in the conduct of any trade or commerce*." *Fla. Stat. § 501.204* (emphasis added); *see also* *Idaho Code § 48-603* (same); *815 Ill. Comp. Stat. Ann. 505/2* (same); *Neb. Rev. Stat. Ann. § 59-1602* (same); *N.H. Rev. Stat. Ann. § 358-A:2* (same); *N.M. Stat. Ann. § 57-12-3* (same); *Nev. Rev. Stat. Ann. § 598.0923(3)* ("A person engages in a 'deceptive trade practice' when *in the course of his or her business* . . . he or she knowingly . . . violates a state or federal statute"); *N.C. Gen. Stat. § 75-1.1(a)* ("Unfair methods of competition *in or affecting commerce* . . . are declared unlawful"); *Utah Code Ann. § 13-11-5* ("An unconscionable act or practice *by a supplier in connection with a consumer transaction* violates this act"). The licensing of its patent, which is the only commercial activity that Merz undertook with respect to memantine in the United States, does not fall within any of those statutes.

There is no allegation from SBA — nor any evidence in the record — that **[*108]** there was any unfair, deceptive, or otherwise unlawful practice when Merz licensed the '703 Patent to Forest in 2000, or when Merz filed suit against the generic challengers beginning in 2007. SBA denominates these actions as the "commerce" to try to hold Merz to account, but as there is no evidence that these actions were deceptive or otherwise unlawful in respect of the consumers in the respective states, and so they cannot be used to sustain the consumer-protection claims against Merz.

Accordingly, the consumer-protection claims against Merz arising under the laws of Alabama, Massachusetts, Michigan, Florida, Idaho, Illinois, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, and Utah are dismissed. Summary judgment dismissing Count III against Merz under the laws of those states is GRANTED.

The only remaining consumer-protection claim against Merz is the one arising under California law. Merz — for whatever reason — does not move for summary judgment on this claim on the same basis that it moved for summary judgement as to the other claims — namely, that it did not engage in "trade or commerce" in California. Instead, it argues that it is entitled to summary judgment because California's **[*109]** statute limits a plaintiff's recovery to injunctive relief or restitutionary relief.

But as I noted above, just because a certain type of monetary recovery is unavailable does not mean that the substantive claim must be dismissed. Since this is the only basis upon which Merz moves for summary judgment on the California claim, its motion is denied.

F. Forest's and Merz's motions for summary judgment on Count IV is granted in part and denied in part without prejudice

Finally, the IPPs bring claims arising under the common law doctrine of unjust enrichment of 28 states and the District of Columbia.[15] In its Second Amended Complaint, SBA acknowledged that these claims were "pled in the alternative to the other claims" in the complaint, to the extent necessary and permitted by *Rule 8(a)*. (ECF 326 at ¶ 230).

Forest and Merz move for summary judgment on this count on the same basis: first, that the claims are duplicative of the antitrust and consumer-protection claims; and second, for various, independent reasons under certain states' unjust-enrichment jurisprudence. I will address the individualized arguments first, before addressing the generalized argument of duplicative claims.

1. Arkansas

Defendants **[*110]** first argue that indirect-purchaser antitrust actions under Arkansas law must be brought by the State's Attorney General and cannot be brought by a private plaintiff. *See* *Ark. Code Ann. §§ 4-75-309*, 310, 315. ***HN32***[] This means that indirect purchasers lack standing to bring a claim under the statute, mirroring the doctrine enshrined under the federal antitrust statutes by *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. As many courts (including this one) have held, IPPs cannot bring unjust-enrichment claims in states that do not explicitly permit indirect-purchasers to bring suit, as permitting them to do so would "constitute an impermissible 'end run' around the *Illinois Brick* prohibition on indirect purchaser actions." *Namenda VI, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *56*. Defendants claim that since IPPs did not bring an antitrust claim under Arkansas law, allowing an unjust-enrichment claim to proceed in light of Arkansas's prohibition on indirect-purchaser suits would allow the impermissible "end run" around *Illinois Brick* I had referenced in the earlier decision.

In the motion-to-dismiss order in this action, I deferred deciding the Arkansas unjust-enrichment claim until "a later date on proper briefing." *Id.* at 58. That day has come. SBA does not contest that Arkansas does not permit indirect-purchaser antitrust **[*111]** suits, arguing only that Forest's citations were insufficient because they did not come directly from an Arkansas court. But other courts — in cases extremely similar to the present one — have dismissed indirect-purchaser claims on the basis that "Arkansas flatly outlaws indirect-purchaser antitrust claims *ab initio* unless asserted by . . . the State Attorney General." *In re Packaged Seafood, 242 F. Supp. 3d at 1069*; *In re Cast Iron Soil Pipe and Fittings Antitrust Litig., No. 14-md-2508, 2015 U.S. Dist. LEXIS 121620, 2015 WL 5166014, at *22 (E.D. Tenn. June 24, 2015)*; *In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1192 (N.D. Cal. 2009)* ("[P]laintiffs have not cited any authority from Arkansas . . . holding that an indirect purchaser plaintiff may bring an unjust enrichment claim when that same claim would be barred under state ***antitrust law***").

Accordingly, the unjust-enrichment claim under Arkansas law is dismissed. Defendants' motion for summary judgment dismissing this count under Arkansas law is GRANTED.

2. Florida

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[15] Alabama, Arizona, Arkansas, California, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. IPPs also originally included claims arising under the unjust-enrichment laws of Missouri, Wyoming, and Puerto Rico, but the IPPs did not move for class certification based on any actions undertaken or any harmed incurred in those four territories. *See* *Namenda VIII, 338 F.R.D. 527, 2021 U.S. Dist. LEXIS 26566, 2021 WL 509988 at *5*. Accordingly, the Court assumes that those claims are dropped.

Defendants move for summary judgment on the Florida unjust-enrichment claim because they argue that Florida courts require that a plaintiff have conferred a "direct benefit" on the defendant. Because indirect purchasers pay for Namenda that is purchased and used by their insureds, they do not confer a "direct benefit" on Forest or Merz such that an unjust-enrichment claim can be sustained.

This Court originally denied Defendants' motion **[*112]** to dismiss the Florida claim on this basis, noting "that while some Florida courts had not allowed plaintiffs to rely on the doctrine of unjust enrichment absent a direct benefit, other courts had allowed these claims to proceed." *Namenda VI, 2018 U.S. Dist. LEXIS 220574 2018 WL 7197233, at *60*. The Court thus denied the motion to dismiss "at this stage" of the litigation. *Ibid.*

Defendants now move for summary judgment based on a ***HN33***[] 2017 Florida Supreme Court case, which squarely held that "to prevail on an unjust enrichment claim, the plaintiff must directly confer a benefit to the defendant." *Kopel v. Kopel, 229 So. 3d 812, 818 (2017)*. Courts following *Kopel* have dismissed indirect-purchaser claims for lack of a "direct benefit" being conferred from an indirect-purchaser plaintiff to a defendant. *See, e.g., Sandee's Catering v. Agri Stats, Inc., No. 20-cv-2295, 2021 U.S. Dist. LEXIS 47443, 2021 WL 963812, at *4 (Mar. 15, 2021)*; *South Broward Hosp. Dist. v. ELAP Servs., LLC, No. 20-cv-61007, 2020 U.S. Dist. LEXIS 226859, 2020 WL 7074645, at *7 (Dec. 3, 2020)*; *Johnson v. Catamaran Health Solutions, LLC, 687 F. App'x 825, 830 (11th Cir. 2017)*; *In re Packaged Seafood, 242 F. Supp. 3d at 1090*. The issue has now been resolved.

Defendants' motion is, therefore, GRANTED, and Count IV is dismissed insofar as it alleges a claim under Florida law.

3. Utah

Defendants make the same "direct benefits" argument regarding unjust enrichment under Utah law. They cite to a 2015 Utah Supreme Court case which held that "unjust enrichment does not result if the defendant has received only an incidental benefit from the plaintiff's service[s]." *Jones v. Mackey Price Thompson & Ostler, 2015 UT 60, 355 P.3d 1000, 1018 (2015)* (citation omitted). However, this Court does **[*113]** not read the Utah case the same way as the Florida directive. An "incidental benefit" is not the same as an "indirect benefit" — at least not how Utah's courts have interpreted the phrase.

HN34[] Florida case law plainly precludes unjust-enrichment claims if the plaintiff only indirectly benefitted the defendant. For example, in *Peoples Nat'l Bank of Commerce v. First Union Nat'l Bank of Florida, N.A., 667 So.2d 876 (Fla. 3d Dist. Ct. App. 1996)* — the principal case cited by the Florida Supreme Court in *Kopel* — the court held that a plaintiff bank did not directly confer a benefit upon several defendant banks even though the defendants had allegedly received overpayments from a third-party lender that had used some of the plaintiff's funds to make the overpayments. The court held that whatever overpayments the defendants received "could only have been conferred upon them by [the third-party lender], not [the plaintiff]." *Id. at 879*; *see also* *Extraordinary Title Services, LLC v. Florida Power & Light Co., 1 So.3d 400 (Fla. 3d Dist. Ct. App. Fla. 2009)* (noting that a plaintiff's payments to a defendant's subsidiary did not constitute a direct benefit).

HN35[] But Utah's Supreme Court has held that

> While unjust enrichment does not result if the defendant has received only an incidental benefit from the plaintiff's service . . . this court has found that a large variety of items fall under the definition of "benefit," including an "interest **[*114]** in money, land, chattels, or choses in action; beneficial services conferred; satisfaction of a debt or duty owed by [the defendant]; or anything which adds to [the defendant's] security or advantage."

Emergency Physicians Integrated Care v. Salt Lake Cnty., 2007 UT 72, 167 P.3d 1080, 1086 (2007) (quoting *Baugh v. Darley, 112 Utah 1, 184 P.2d 335, 337 (1947)*).

Accordingly, courts interpreting Utah law have construed "benefit" broadly and have declined to dismiss claims when there has arguably been an *indirect* benefit conferred by the plaintiff to the defendant. *See* *Johnson v. Blendtec, Inc., 500 F. Supp. 3d 1271, No. 19-cv-83, 2020 WL 6710432, at *14 (Nov. 16, 2020)*; *In re Packaged Seafood, 242 F. Supp. 3d at 1092*.

In this case, the IPPs indirectly benefitted the Defendants when they reimbursed the cost of Namenda that was purchased by their clients in Utah. For example, the record indicates that SBA paid out $351,797 in reimbursement[16] to their clients for Namenda between 2012 through 2017. (Expert Report of Laura Craft at ¶ 67). Presumably many Alzheimer's patients would not have purchased Namenda if they could not obtain insurance reimbursement for it. Put differently, if a patient would not have received reimbursement, he or she may have not been able to afford the drug and would not have made a purchase. That is enough to confer a benefit recognizable under Utah law.

The motion for summary judgment dismissing Count IV under Utah law is DENIED.

4. Whether unjust-enrichment claims [*115] from ten states are precluded because adequate statutory remedies exist

Defendants move for summary judgment on the unjust-enrichment claims of ten states, arguing that they prohibit unjust-enrichment claims when adequate statutory remedies already exist: Arizona, California, Hawaii, Illinois, Massachusetts, Minnesota, Mississippi, New York, North Dakota, and Utah.

Defendants cite only one unpublished case from the Eastern District of Arkansas for this proposition, and do not point to any state-specific cases to support their argument. *See* *Thompson v. Bayer Corp., No. 4:07-cv-17, 2009 U.S. Dist. LEXIS 15190, 2009 WL 362982, at *6 (E.D. Ark. Feb. 12, 2009)* (noting that "some states do not allow an unjust enrichment claim to survive if there is an adequate remedy at law" and citing cases from Arizona, California, Hawaii, Delaware, Idaho, Illinois, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, New York, North Dakota, Oklahoma, Utah, and Washington). But the Defendants do not explain whether the cases cited in *Thompson* pertain to antitrust claims, how unjust-enrichment claims in these states should be evaluated in the context of their state's antitrust laws, or even whether the cases cited by *Thompson* in support of its proposition are still good law, as many of the cases cited are now over **[*116]** twenty years old.

The Court is dissatisfied with the briefing on this point, and it will not "independently undertake a review of each state's requirements, armed with only" a mere reference to inquire further into the state laws at issue. *Namenda VI, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *20*. If it was not important enough for Forest to brief the issue as it should have been briefed, there is no reason why the Court should do Forest's work for it.

HN36[] However, because this federal court sits in New York, it is acutely aware of New York law, under which an unjust-enrichment claim "is an equitable claim that is unavailable where an adequate remedy at law exists." *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l N.V., 400 F. App'x 611, 613 (2d Cir. 2010)* (summary order); *see also* *Samiento v. World Yacht Inc., 10 N.Y. 3d 70, 81, 883 N.E.2d 990, 854 N.Y.S.2d 83 (2008)*. "Courts in the Second Circuit have recognized that 'an unjust enrichment claim cannot survive where it simply duplicates, or replaces, a conventional contract or tort claim.'" *Reynolds v. Lifewatch, Inc., 136 F. Supp. 3d 503, 524 (S.D.N.Y. 2015)* (quoting *Koenig v. Boulder Brands, Inc., 995 F. Supp. 2d 274, 290 (S.D.N.Y. 2014)*); *see also* *Corsello v. Verizon New York, Inc., 18 N.Y. 3d 777, 790, 967 N.E.2d 1177, 944 N.Y.S.2d 732 (2012)*.

An adequate remedy exists under the New York antitrust statutes. IPPs acknowledge that their "unjust enrichment claims are premised on the same alleged facts, arise from an identical course of conduct by the Defendants, and will be proven using the same evidence as their antitrust and consumer protection claims." (ECF 445 at 19). There

[16] This is a nationwide number, not just a Utah number; in fact, I do not know whether it included any consumers in Utah. However, the certified class undoubtedly includes plaintiffs who reimbursed Utah consumers for Namenda.

is no reason to conclude **[*117]** that the New York claim will require demonstrating anything different than what IPPs need to prove for its antitrust claims. Accordingly, that claim simply "duplicates" the antitrust claims and must be dismissed as duplicative unjust-enrichment claims cannot exist under New York law.

Defendants' motion for summary judgment dismissing the New York unjust-enrichment claim is GRANTED.

5. Whether the remaining unjust-enrichment claims must be dismissed because they are duplicative

Defendants also argue that *all* of the unjust-enrichment claims are duplicative — whether or not a statutory remedy exists — and so need to be dismissed. Defendants make no more than a conclusory assertion on this point, in the hope that this Court will "streamlin[e] the litigation proceedings of a complex case." *In re Novartis and Par Antitrust Litig., No. 18-cv-4361 (AKH), 2019 U.S. Dist. LEXIS 138133, 2019 WL 3841711, at *7 (S.D.N.Y. Aug. 15, 2019)*.

However, the question of whether an unjust-enrichment claim is duplicative is a state-law issue, and Forest has not elected to brief that issue on a state-by-state basis. As I stated in the motion-to-dismiss order, whether these claims must be dismissed "turns on a case-by-case examination of whether each state's antitrust or consumer protection statute has 'override[n]' or 'limit[ed] ... the scope of restitutionary **[*118]** relief' that would normally be available to a plaintiff at equity." *Namenda VI, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *57* (quoting *In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 413 (S.D.N.Y. 2011)*). For whatever reason, Defendants have elected not to present the court with the sort of analysis required to dispose of these issues on summary judgment.

For that reason, I deny Defendants' motion for summary judgment, without prejudice. "Without prejudice" should not be read as an invitation to make yet another summary judgment motion. I will not entertain another round of motion; these matters will have to be dealt with at trial. Any new motion for summary judgment will be summarily denied.

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In sum, each Defendant's motion for summary judgment is GRANTED as to the unjust-enrichment claims arising under Arkansas, Florida, and New York. It is DENIED without prejudice as to the rest of the states. The unjust-enrichment claims remaining under IPPs' Count IV are those arising under Alabama, Arizona, California, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and the District of Columbia.

G. Remaining Issues

1. Proof of [*119] Injury in Certain States

Forest argues that SBA cannot proceed as the class plaintiff for claims arising under the antitrust laws of twelve[17] states and the consumer-protection laws of three[18] states, because there is no evidence that SBA reimbursed for Namenda (i.e., paid overcharges) in any of those states. I assume Forest is making this motion to preserve its appellate rights — because the Court has already denied it. It is denied again.

In my order on the motions to dismiss, I noted that — per the Second Circuit's decision in *Langan v. Johnson & Johnson Consumer Companies, Inc., 897 F.3d 88 (2d Cir. 2018)* — ***HN37***[] the Class Action Fairness Act ("CAFA") provides Article III standing to class plaintiffs who represent out-of-state class members. *See Namenda*

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[17] Hawaii, Maine, Minnesota, Mississippi, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, West Virginia, Wisconsin, and Washington D.C. (ECF 565 at 39).

[18] Idaho, Illinois, and Nebraska. (ECF 565 at 39).

*VI, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233 at *22*. But I also observed that *Langan* did not necessarily "foreclose[] consideration of a properly made *Rule 12(b)(6)* motion" if the plaintiff is otherwise unable to state a claim. *Ibid.* Forest appears now to take up this line of argument, asserting that because SBA would be unable to state a claim as an individual plaintiff in certain states, it cannot be a proper class representative for plaintiffs in those states and thus those claims must be dismissed. In other words, because SBA may be unable to assert an *individual* claim in any state in which it did not make a reimbursement, **[*120]** Defendants claim that the whole class cannot proceed for those state-law claims.

This argument fails. The statutes that Forest cite to as requiring a specific "injury-in-the-state" are not as they seem. Forest argues that the statutes require the *plaintiff* to have been injured in the state, when in fact, they simply prohibit potential *defendants* from acting "in restraint of trade or commerce" within the state. *See, e.g.*, *D.C. Code § 28-4502*; *Haw. Rev. Stat. § 480-4*; *Me. Rev. Stat. tit. 10 § 1102*; *Minn. Stat. § 325D.54*; *Neb. Rev. Stat. Ann. § 59-801*; *N.M. Stat. Ann. § 57-1-2*. This means that — contrary to Forest's assertion — the focus is on whether the *defendants'* actions affected competition in the market for memantine in that state, not whether the lead plaintiff in a class action was injured in that particular state.

In the present case, where the market for Namenda was nationwide and reached approximately $1.5 billion by 2013, it is safe to assume that Forest's products (and therefore the consequences of its allegedly illegal behavior) reached all of the states implicated. And while it may be the case that SBA did not reimburse any clients in all 50 states, that does not render it an inadequate representative of class members located in those states. SBA's injuries (paying overcharges) are the same injuries allegedly suffered **[*121]** by all class members regardless of in whichever state they reimbursed for Namenda. The class has already been certified, and this Court concluded that it "does not see any substantive discrepancy between the various state antitrust laws that would preclude this case's going forward as a class action." *Namenda VIII, 338 F.R.D. 527, 2021 U.S. Dist. LEXIS 26566, 2021 WL 509988, at *36*. SBA's injuries are "typical" of the class and there is nothing that indicates it would be unable to adequately represent all class members, including those who suffered the same "typical" injury but under the law of a different state.

Of course, if no members of the plaintiff class reimbursed anyone in a particular state, then claims under that state's laws must be dismissed. Forest, however, has limited its motion to the Lead Plaintiff.

I note that other courts have refused to dismiss class actions based on similar arguments. *See, e.g., In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., 355 F. Supp. 3d 145, 158 (E.D.N.Y. 2018)*; *Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 166 (E.D. Pa. 2009)*.

2. Statute of Limitations in Certain States

Forest also argues — regardless of how the Court rules on any merits-related issues — that claims arising under the laws of certain states must be dismissed as untimely under the state's statute of limitations. (ECF 565 at 39).

Forest insists that any cause of action stemming from the reverse settlements accrued **[*122]** on the date of the first overcharge associated with that conduct, which IPPs claim to be on June 1, 2012 (the date the class period begins). However, SBA did not file this lawsuit until August 20, 2015, which Forest argues bars the claims in states that have statutes of limitations of three years or less. These would bar the antitrust claims under Mississippi, Tennessee, and Kansas law (each have three-year statutes of limitations), and the consumer-protection claims in Illinois, New Hampshire, Utah (three years each), and Idaho (two years).[19]

All of the class' antitrust claims are timely. ***HN38***[] For federal antitrust statutes, the statute of limitations restarts whenever there is an overcharge associated with the anticompetitive conduct. The Supreme Court has held that if

[19] Forest also raised a statute-of-limitations argument about consumer-protection claims under Alabama law, but since that claim has been dismissed, the statute-of-limitations argument is now moot.

there are a "series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts the statutory period running again.'" *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* (quoting 2 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 338b, p. 145 (rev. ed.1995)). Obviously, reimbursement cannot be obtained for periods that fall outside of the statute of limitations, but **[*123]** that does not mean that the claims as a whole are time barred.

Defendants point out that the highest courts of the states at issue — Mississippi, Tennessee, and Kansas — have not definitively decided whether such a "continuing violation" doctrine applies to their state's antitrust statute-of-limitations. But this is not a "continuing violation" rule, in that it does not permit the recovery of damages for reimbursements that were made prior to the commencement of the limitations period, as measured from the date on which this lawsuit was filed. The rule is that each reimbursement constitutes a separate injury. There is no reason for this Court to assume that these high courts would refuse to apply the doctrine when evaluating whether the present claims are time-barred. The antitrust statutes of the states in question all either contain harmonization provisions or have been interpreted in such a way that supports construing the statute conterminously with federal antitrust statutes. *See* *Kan. Stat. Ann. § 50-163* ("[T]he Kansas restraint of trade act shall be construed in harmony with ruling judicial interpretations of federal ***antitrust law*** by the United States Supreme Court."); *Walker v. U-Haul Co. of Mississippi, 734 F.2d 1068, 1070 n.5 (5th Cir. 1984)* (noting that claims under Mississippi's **[*124]** and the United States' antitrust statutes must be treated as "analytically identical"); *Freeman Indus. LLC v. Eastman Chem. Co., 172 S.W. 3d 512, 521 (Tenn. 2005)* ("[T]he enforcement of the state antitrust laws should be consistent with the federal laws.").

The same logic applies to the statutes-of-limitations of the consumer-protection laws of Illinois, New Hampshire, Utah, and Idaho. These statutes also contain harmonization provisions that require it to be construed in accordance with "the interpretation of the federal trade commission and the federal courts" relating to the FTC Act when deciding cases. *Idaho Code Ann. § 48-604*; *see also* *815 Ill. Comp. Stat. Ann. 505/2*; N.H. Rev. Stat. Ann. § 358-A: 13; *Utah Code Ann. § 13-11-2(4)*.

HN39[↑] Accordingly, this Court agrees with others that have concluded that claims in indirect-purchaser actions are timely because there are allegations of overcharges within the class period that are within the statute of limitations. *See, e.g.,* *In re Loestrin 24 FE, 433 F. Supp. 3d at 333*; *In re Glumetza Antitrust Litig., No. C 19-05822 WHA, 2020 U.S. Dist. LEXIS 39649, 2020 WL 1066934, at *11 (N.D. Cal. Mar. 5, 2020)*; *In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 551 (D.N.J. 2004)*.

H. The Motion for Summary Judgment on the Hard Switch Theory Must Be Re-briefed

One last piece of housekeeping. Forest moves for summary judgment on the hard switch theory of liability. Forest filed its motion and its memorandum of law in support before this Court issued its decision declining to certify a class as to the hard switch theory, and so its arguments are all generalized at the class-wide **[*125]** level and are not specific to SBA. The same is true of SBA's responses.

No class having been certified as to the theory, SBA must demonstrate that it was personally harmed by the hard switch. It has not done this. It points to no evidence showing the harm that it and it alone suffered as a result of the hard switch. In her expert report, Laura A. Craft, noted that, between 2012-2017, SBA reimbursed for 2,219 class products, paying a total of $351,797. (Craft Report at ¶ 67). But Craft does not tie any of these reimbursements to the "hard switch," or even the period when the "hard switch" could have resulted in damage to SBA (i.e., between the February 2014 hard switch announcement and Judge Sweet's injunction in December 2014). Not a single SBA customer is identified as having switched to Namenda XR during this period, nor is there any testimony from any single doctor that he switched his patient to XR because of the "hard switch." To have suffered injury, not only would a patient have to have switched from Namenda IR to XR as a result of the hard switch, but SBA would need to show that that patient would have opted for generic Namenda IR once it became available. *See* *Namenda VIII, 338 F.R.D. 527, 2021 U.S. Dist. LEXIS 26566, 2021 WL 509988, at *31* ("For the hard **[*126]** switch to have injured a TPP, that TPP must have reimbursed for Namenda XR, and the XR reimbursement must have been for a prescription *that would otherwise have been a generic but for the hard switch*.").

Once the Court declined to certify a hard switch class, SBA needed to prove *its own* case, with evidence relating to *its own* customers, and *its own* reimbursements. SBA cannot rely on class-wide evidence to proves its individual claims. Therefore, SBA has not raised a genuine issue of fact in relation to its hard switch claim. Nor has it sought to supplement the record in opposition to Forest's motion to take account of this new reality since the class certification decision was announced almost four months ago.

Fairness, however, compels me to give SBA one last chance to oppose Forest's motion with evidence that is pertinent to it and it alone. SBA has twenty days from today's date to supply the court with evidence that ties any portion of its claimed damages to the "hard switch." Forest will have ten days after that to file a reply.

IV. CONCLUSION

The motions to exclude the expert reports and testimony of Michael Davitz, Jacob Holzer, and Philip Green are denied. The motions to exclude **[*127]** the expert reports and testimony of Susan Marchetti, Thomas McGuire, Lona Fowdur, and Sue Robinson are granted in part and denied in part consistent with this opinion.

As for the summary judgment motions, the cross-motions for summary judgment on Counts I and II — the antitrust claims — are denied in full. These claims will go to trial as to whether the reverse-payment settlements (including the Lexapro Amendment) were anticompetitive, and whether they caused any delay in generic competition. Defendants' motions for summary judgment as to Counts III and IV are granted in part and denied in part consistent with this opinion.

If we are still on centralized trial scheduling due to the COVID pandemic in late 2021, the Court will be applying for a trial date for this case during the first quarter of 2022. If I am back in control of my own trial calendar, I will be assigning a first quarter trial date as soon as I am authorized to do so.

The Clerk of Court is respectfully directed to close Dkt. Nos. 543, 545, 547, 549, 555, 560, 564, 568, 571, 574, and 614 and to remove them from this Court's list of open motions.

Dated: June 11, 2021

/s/ Colleen McMahon

United States District Judge

Ekbatani v. Cmty. Care Health Network, LLC

United States District Court for the Middle District of Florida, Orlando Division

June 14, 2021, Decided; June 14, 2021, Filed

Case No: 6:20-cv-2224-PGB-DCI

Reporter
2021 U.S. Dist. LEXIS 127772 *

SHAHRIAR "JAMES" EKBATANI, SHAHRZAD EKBATANI and TERRENCE DIAZ, Plaintiffs, v. COMMUNITY CARE HEALTH NETWORK, LLC, FRAZIER MANAGEMENT, LLC, FRAZIER HEALTHCARE VENTURES, FRAZIER HEALTHCARE VII, L.P., FRAZIER HEALTHCARE VII-A,L.P., FRAZIER HEALTHCARE GROWTH BUYOUT FUND VIII, L.P., FRAZIER HEALTHCARE GROWTH BUYOUT AFFILIATES VIII, L.P. and THE PROVIDENCE SERVICE CORPORATION, Defendants.

Subsequent History: Dismissed by, Without prejudice *Shahriar "James" Ekbatani v. Cmty. Care Health Network, 2021 U.S. Dist. LEXIS 127780 (M.D. Fla., June 14, 2021)*

Core Terms

Clayton Act, state court, abstention, state court action, federal court, cases, discovery, parties, exclusive jurisdiction

Counsel: **[*1]** For Community Care Health Network LLC, doing business as, Community Care Health Network LLC, Matrix Medical Network, Defendants: David M. Wells, LEAD ATTORNEY, Gunster Yoakley & Stewart PA, Jacksonville, FL; Nathan W. Hill, LEAD ATTORNEY, Gunster Yoakley and Stewart, Orlando, FL; William J. Schifino Jr., Gunster, Tampa, FL.

For Frazier Healthcare Growth Buyout Affiliates VIII L.P., Frazier Healthcare Growth Buyout Fund VIII L.P., Frazier Healthcare Ventures, Frazier Healthcare VII L.P., Frazier Healthcare VII-AL.P., Frazier Management LLC, doing business as, Frazier Management LLC, Frazier Healthcare Partners, Defendants: Benjamin Timothy Christian Hayes, LEAD ATTORNEY, PRO HAC VICE, Goodwin Procter LLP, Washington, DC; Brian John Lechich, Horner Bonner Jacobs Ortiz PA, Miami, FL; Christopher T. Holding, LEAD ATTORNEY, PRO HAC VICE, Goodwin Proctor LLP, Boston, MA; Jordan David Weiss, LEAD ATTORNEY, PRO HAC VICE, Goodwin Procter LLP, New York, NY; Jose Antonio Ortiz, LEAD ATTORNEY, Homer Bonner Jacobs Ortiz, Miami, FL.

For Shahriar James Ekbatani, Shahrzad Ekbatani, as Trustee for Nobility Trust and Dignity Trust, Terrence Diaz, Plaintiffs: Desmonne Alana Bennett, LEAD ATTORNEY, PRO HAC **[*2]** VICE, Bryan Cave Leighton Paisner LLP, Denver, CO; Kathryn E. Bettini, LEAD ATTORNEY, PRO HAC VICE, Faegre Drinker Biddle & Reath LLP, Washington, DC; Lawrence G. Scarborough, LEAD ATTORNEY, PRO HAC VICE, Faegre Drinker Biddle & Reath LLP, New York, NY; Michael Adam Sasso, Michael C. Sasso PA, Winter Park, FL; Randall H. Miller, LEAD ATTORNEY, PRO HAC VICE, Bryan Cave Leighton Paisner LLP, Denver, CO.

For The Providence Service Corporation, a Delaware Corporation, Defendant: Jason Alan Ross, LEAD ATTORNEY, Arnold & Porter Kaye Scholer LLP, Washington, DC; Jonathan I Gleklen, LEAD ATTORNEY, PRO HAC VICE, Arnold and Porter Kaye Scholer LLP, Washington, DC; Richard Dean Rivera, Smith Gambrell & Russell LLP, Jacksonville, FL; Robert Reeves Anderson, LEAD ATTORNEY, PRO HAC VICE, Arnold & Porter Kaye Scholer LLP, Denver, CO.

Judges: PAUL G. BYRON, UNITED STATES DISTRICT JUDGE.

Opinion by: PAUL G. BYRON

Opinion

ORDER

This cause is before the Court on Defendants' Motion to Stay (Doc. 43 (the "**Motion**")) and Plaintiffs' response thereto (Doc. 50). Upon consideration, the Motion is due to be denied.

I. BACKGROUND

The procedural and factual background as set forth in the Court's Order on Defendants' Motion to Dismiss is hereby **[*3]** adopted and made a part of this Order. (*See* Doc. 57).

II. STANDARD OF REVIEW

It may be appropriate for the district court to stay a case where a pending state court action arises out of the same controversy. *Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817-19, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)*.[1] This type of abstention "avoid[s] duplicative litigation" and promotes "wise judicial administration." *Id.* However, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule," and, "[g]enerally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Id. at 813, 817* (internal quotations and citations omitted).

The Eleventh Circuit employs a two-part test to determine whether abstention under *Colorado River* is proper. First, the district court must evaluate whether the *Colorado River* analysis is applicable to the case. *Ambrosia Coal & Const. Co. v. Pages Morales, 95 Fed. Appx. 1320, 368 F.3d 1320, 1330-31 (11th Cir. 2004)*. The *Colorado River* analysis is only applicable "when federal and state proceedings involve substantially the same parties and substantially the same issues." *Id. at 1330*. "[T]he balance in these situations begins tilted heavily in favor of the exercise of the court's jurisdiction. Thus, if there is any substantial **[*4]** doubt about whether two cases are parallel the court should not abstain." *Acosta v. James A. Gustino, P.A., 478 F. App'x 620, 622 (11th Cir. 2012)*[2] (citing *Huon v. Johnson & Bell, Ltd., 657 F.3d 641, 646 (7th Cir. 2011)*).

If the *Colorado River* analysis is applicable, then the district court considers the "permissibility of abstention." *Ambrosia, 368 F.3d at 1331*. The Eleventh Circuit uses several factors to analyze the propriety of abstention: (1) whether one of the courts has assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the potential for piecemeal litigation; (4) the order in which the fora obtained jurisdiction; (5) whether state or federal law will be applied; and (6) the adequacy of the state court to protect the parties' rights. *Id.* (citing *Am. Bankers Ins. Co. of Fla. v. First State Ins., 891 F.2d 882, 884 (11th Cir. 1990)*). Additionally, "'the vexatious or reactive nature of either the federal or the state litigation may influence the decision whether to defer to a parallel state litigation under *Colorado River*,'" and the policies underlying the relevant federal statute are important considerations to the

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[1] In the Eleventh Circuit, "a stay, not a dismissal, is the proper procedural mechanism for a district court to employ when deferring to a parallel state-court proceeding under the *Colorado River* doctrine." *Moorer v. Demopolis Waterworks & Sewer Bd., 374 F.3d 994, 998 (11th Cir. 2004)* (internal quotations and citations omitted).

[2] "Unpublished opinions are not controlling authority and are persuasive only insofar as their legal analysis warrants." *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007).

abstention inquiry. *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 17 n.20, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)*).

III. DISCUSSION

Defendants request a stay for a period of 90 days or more in light of the ongoing State Court Action under the *Colorado River* abstention doctrine. (Doc. 43). However, Defendants cannot satisfy either prong of the Eleventh Circuit's **[*5]** two-part *Colorado River* test.

First, the *Colorado River* analysis is inapplicable here. Defendants argue that this action and the State Court Action involve "substantially the same issues" because "Both cases arise out of [Defendant] Matrix's acquisition of HealthFair . . . and Plaintiffs' theory of liability in both cases postulates that HealthFair failed to meet its benchmarks because of [Defendant] Matrix's subsequent business decisions, and not some other cause." (*Id.* at p. 8). They posit that the only distinction between the cases is that, in this action, Plaintiffs allege that Defendant Matrix "sought to *permanently* eliminate mobile services offered by HealthFair as an alternative product to [its] home services" whereas, in the State Court Action, Plaintiffs counterclaim that Defendant Matrix "halted HealthFair's mobile business only *temporarily*" to avoid its Earnout Payment obligation. (*Id.* at p. 6) (emphasis added in original).

It is true that the *factual* circumstances giving rise to the two cases are the same. (*See* Docs. 1, 50-2, 50-3). But the *legal* issues are ultimately very different: this case presents questions of federal ***antitrust law*** under the Clayton Act, and the State **[*6]** Court Action presents questions of state contract law. In this action, the Court must assess the alleged permanent damage to the risk adjustment service provider market and to the public while Plaintiffs act as private attorney generals. In the State Court Action, the state court must address the alleged private harm to the parties while each party acts on their own behalf. Given the variance in the cases' legal issues, there is no risk of conflicting rulings. *Cf. Atlantic Games of Delray, LLC v. Atlantic Games, LLC, No. 14-81610, 2015 U.S. Dist. LEXIS 182426, 2015 WL 12672725, at *4 (S.D. Fla. June 17, 2015)* (stating that it was possible for the federal court and the state court to "reach different decisions as to the competing counts of trademark infringement in both cases," resulting in "deleterious duplication of resources").[3]

Second, abstention is impermissible here because Plaintiffs can *only* assert their Clayton Act claim in this Court. *Aquatherm Indus., Inc. v. Fla. Power & Light Co., 84 F.3d 1388, 1392 n.2 (11th Cir. 1996)*, *cert. denied*, *526 U.S. 1050 (1999)*, (citing *15 U.S.C. § 15(a)* and stating that "Exclusive federal jurisdiction is provided by statute for . . . Clayton Act claims"). Consequently, abstaining from the exercise of jurisdiction over Plaintiffs' Clayton Act claim would completely contravene the statutory language withholding jurisdiction from the state courts, and it would run afoul of Congress' intent **[*7]** to restrict adjudication of Clayton Act claims—which can involve regional or national monopolies that have regional or national effects—to the federal courts. *See Andrea Theatres, Inc. v. Theatre Confections, Inc., 787 F.2d 59, 63 (2d Cir. 1986)* ("[A]bstention is clearly improper when a federal suit alleges claims within the exclusive jurisdiction of the federal courts. . . . Indeed, abstention would run counter to Congress' determination, reflected in grants of exclusive federal jurisdiction, that federal courts should be the primary fora for handling such claims. The grant of such jurisdiction could be seriously hampered if federal courts exercised discretionary power to await the outcome of related state court proceedings."); *Key v. Wise, 629 F.2d 1049, 1059 (5th Cir. 1980)* (recognizing that "When Congress has directed . . . not only that the federal courts may take jurisdiction of a particular class of cases, but also that they have exclusive jurisdiction of those cases, abstention to permit adjudication of the entire case in a state forum defeats the purpose of that legislation").[4] Abstention would

[3] Because the Court finds that the proceedings do not involve "substantially the same issues," there is no need to consider whether the proceedings involve "substantially the same parties." However, the Court notes that Defendant Matrix sues two individuals in the State Court Action that are not parties in this case, and, in this case, Plaintiffs sue six entities (*i.e.*, Defendants Providence and the Frazier Entities) that are not parties in the State Court Action. (*See* Docs. 1, 50-2). Although *Colorado River* does not require an exact match, these dissimilarities are likely so substantial as to tip the balance in favor of the Court's exercise of jurisdiction. *See Acosta, 478 F. App'x at 622*.

also be unfair to Plaintiffs and to the public because it would deprive them of a forum to litigate their Clayton Act claim, and it would conflict with Congress' purpose of authorizing private lawsuits for effective **[*8]** and efficient enforcement. *See Palmyra Park Hosp. Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1299 (11th Cir. 2010)* (stating that "The government has limited resources with which to uncover and prosecute antitrust violations, which is precisely why Congress created a private right of action with treble damages as an incentive").

Relatedly, it is worth noting that this case only raises a Clayton Act claim. As a matter of federal ***antitrust law*** designated solely to the federal courts, this Court not only "possess[es] greater experience in the determination of the substantive claims," but it is also the only forum authorized to do so. *Vacation Break, U.S.A., Inc. v. Mktg. Response Grp. & Laser Co., 28 F. Supp. 2d 651, 653 (M.D. Fla. 1998)* (denying the defendant's motion to stay in part because of the presence of Clayton Act claims and stating that "'The presence of federal law issues must always be a major consideration weighing against surrender.'" (quoting *Moses H. Cone Mem'l Hosp., 460 U.S. at 26*)).[5]

Moreover, because this Court *must* adjudicate Plaintiffs' Clayton Act claim, the state court cannot adequately protect Plaintiffs' federal antitrust rights. And because the state court does not have jurisdiction to adjudicate Plaintiffs' Clayton Act claim, abstention would only "encourage piecemeal adjudication of the issues raised in the federal suit" and delay litigation of this claim. *Andrea Theatres, 787 F.2d at 62*; *see also* *Aquatherm, 84 F.3d at 1391-94* ("Florida's **[*9]** preclusion laws do not permit a prior state court judgment to act as a bar to claims over which the state court did not have subject matter jurisdiction.").[6]

The Court realizes that the State Court Action has been pending for over two years and that, during this time, Defendant Matrix amended its state court complaint three times and has moved for leave to amend again to add a claim for punitive damages. (Doc. 43-1, p. 3, ¶ 4). The Court also recognizes that the parties exchanged discovery requests and objections, that the parties filed motions to compel (one of which required the state court's intervention), that Defendant Matrix produced more than 2.1 million pages of documents and received millions of documents from HealthFair, and that fact discovery concludes on June 9, 2021. (*Id.* at p. 4, ¶¶ 10-11).[7]

However, depositions have not been taken, export reports have not been exchanged, and the parties have represented to the state court that they may move to extend the June fact discovery deadline, depending on the status of the ongoing COVID-19 pandemic, to safely conduct key depositions in person. (Doc. 50-1, p. 4, ¶ 13; Doc. 50-14, pp. 5-6 n.3). And, notably, the Court's **[*10]** retention of this case does not undermine the discovery efforts taken in the State Court Action because the parties agreed "that all discovery produced in the state court case may be used in this case" in their Case Management Report. (Doc. 34, p. 2). Thus, the State Court Action's progress is not so substantial as to weigh in favor of abstention. *See* *Moses H. Cone Mem'l Hosp., 460 U.S. at 21* (stating that "priority should not be measured exclusively by which complaints was filed first, but rather in terms of how much progress has been made in the two actions").

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[4] The Eleventh Circuit has adopted as binding precedent the decisions of the former Fifth Circuit issued before October 1, 1981. *Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)* (en banc).

[5] Defendants contend that the fifth factor is neutral because this case does not involve "complex questions of state law that a state court might be best suited to resolve." (Doc. 43, p. 10) (internal quotations omitted). However, Defendants misconstrue this factor; the inquiry is whether state *or federal* law is at issue. The absence of complex state law issues is irrelevant—the presence of a federal claim that can only be adjudicated in federal court is what matters here.

[6] Defendants assert that the resolution of the State Court Action will be determinative of this case, but that result is far from inevitable given the difference in the issues. Regardless, in *Aquatherm*, the Eleventh Circuit found that the Florida court judgment as to the parties' state antitrust claims did not have preclusive effect in a federal action brought under the federal antitrust laws due to lack of subject matter jurisdiction. *See id.* Accordingly, the third factor weighs against abstention.

[7] The Motion states that the state court resolved a motion to dismiss, but the cited paragraphs of Ernest Leonard's Declaration in Support of Defendants' Motion to Stay does not mention a motion to dismiss. (Doc. 43, p. 9; Doc. 43-1, pp. 3, 5, ¶¶ 4, 10-11). However, the resolution of a motion to dismiss by the state court does not change the Court's conclusion.

Finally, contrary to Defendants' argument, the fact that Plaintiffs initiated this action a year and a half after their original counterclaim in the State Court Action does not demonstrate that their Clayton Act claim is vexatious or reactive. (Doc. 43, p. 10). Defendants cite to *Atlantic Games*, wherein the Southern District of Florida ruled that the plaintiff's federal trademark case, filed approximately two months after the state trademark case, was reactive because the plaintiff should have been raising its arguments as defenses or counterclaims in the state case. *2015 U.S. Dist. LEXIS 182426, 2015 WL 12672725, at *5*. But it found that the federal trademark case was not vexatious, reasoning that the plaintiff "may **[*11]** have felt compelled to file [the] federal suit to protect any potential interest it may have under federal law." *Id.*

Here, unlike *Atlantic Games*, Plaintiffs could not have raised its Clayton Act arguments as defenses or counterclaims in the State Court Action due to this Court's exclusive jurisdiction over such claims. *See id.* And Plaintiffs did not merely "feel compelled" to file this case—Plaintiffs *had to* file this case to protect any potential interest they may have under the Clayton Act. *See id.*

Furthermore, the timing of the filing of this action is not necessarily suspect. It is reasonable that Plaintiffs would file this case after the commencement of discovery and the elapse of a substantial amount of time because the alleged Clayton Act violation may not have been immediately apparent, and Plaintiffs may have a legitimate claim for relief.[8] *See Clay v. AIG Aerospace Ins. Servs., Inc., 61 F. Supp. 3d 1255, 1265 (M.D. Fla. 2014)* (finding that the litigation was not vexatious or reactive where the plaintiffs "have stated what appear on the face of their Amended Complaint to be legitimate claims for relief"). "It is not the case that Plaintiffs have filed this lawsuit after an unfavorable disposition of a claim on its merits or continue to file lawsuit after lawsuit **[*12]** against Defendants in numerous different forums." *Id.* There is nothing else in the record that suggests Plaintiffs filed this action for any improper purpose.[9]

Because the *Colorado River* analysis is inapplicable and impermissible, and because abstention would blatantly defy the text of and the policies supporting the Clayton Act, it is not justified on grounds of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colo. River, 424 U.S. at 817* (internal quotations omitted) (stating that the "most important" factor in considering whether to abstain was "the McCarran Amendment itself"); *see Cottrell v. Duke, 737 F.3d 1238, 1248 (8th Cir. 2013)* (stating "we join the Second, Seventh, and Ninth Circuits and hold that the *Colorado River* doctrine may not be used to stay or dismiss a federal proceeding in favor of a concurrent state proceeding when the federal proceeding contains a claim over which Federal courts have exclusive jurisdiction").[10] "As long as this Court has jurisdiction over the matter, it must not skirt the duties conferred to it by the United States Constitution," particularly when that matter is

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[8] Defendants also argue that Plaintiffs' "conflicting allegations" shows that this case is "an illegitimate pressure tactic." (Doc. 43, p. 10). Plaintiffs counter that "Defendants do not explain how, even if there were an inconsistency between the state court counterclaim and the Clayton Act claim here, that inconsistency would render this action 'vexatious.' . . . Plaintiffs first asserted their state court counterclaim *in 2019*, before it was known whether Defendants' wrongful halt of Plaintiffs' mobile business was permanent. *By late 2020*, when Plaintiffs filed this action, it was clear that Defendants' actions were permanent." (Doc. 50, p. 20) (emphasis in original). The Court agrees that the discrepancy in the pleadings is not inherently vexatious, reiterates that the distinction merely seems reflective of the different legal issues presented in the two actions, and notes that Defendants do not provide an explanation for how the inconsistency is vexatious. Moreover, the Court finds Plaintiffs' explanation conceivable, and it again notes that they may have a legitimate Clayton Act claim. The Court dismissed the Complaint without prejudice, and therefore the legitimacy of Plaintiffs' claim is unknown at this stage of the litigation.

[9] The parties agree that neither court has assumed jurisdiction over property and that the federal forum and the state forum are equally convenient. (Doc. 43, p. 10; Doc. 50, pp. 13-14). Thus, the first and second factors are neutral.

[10] Defendants also request a stay under the Court's inherent staying authority. (Doc. 43). District courts have broad discretion to stay proceedings. *Clinton v. Jones, 520 U.S. 681, 706, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997)*. The party seeking a stay has the burden to show good cause for and reasonableness of the requested stay. *Belloso v. Asplundh Tree Expert Co., No. 6:18-cv-460, 2018 U.S. Dist. LEXIS 157936, 2018 WL 4407088, at *2 (M.D. Fla. Sept. 17, 2018)*. For the reasons stated above, the Court finds that a stay under its inherent staying authority is unreasonable and unsupported by good cause.

within the Court's exclusive jurisdiction. *See* *Clay, 61 F. Supp. 3d at 1266*. Thus, the Court declines **[*13]** to abstain pending the resolution of the State Court Action.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that Defendants' Motion to Stay is **DENIED**.

DONE AND ORDERED in Orlando, Florida on June 14, 2021.

/s/ Paul G. Byron

PAUL G. BYRON

UNITED STATES DISTRICT JUDGE

In re Inclusive Access Course Materials Antitrust Litig.

United States District Court for the Southern District of New York

June 14, 2021, Decided; June 14, 2021, Filed

20 MDL NO. 2946; 20cv3162; 20cv3660; 20cv6314; 20cv6317; 20cv6331; 20cv6333; 20cv6334; 20cv6335; 20cv6364; 20cv6840; 20cv6842; 20cv6845; 20cv6847; 20cv6848

Reporter
544 F. Supp. 3d 420 *; 2021 U.S. Dist. LEXIS 111140 **; 2021 WL 2418333

IN RE: INCLUSIVE ACCESS COURSE MATERIALS ANTITRUST LITIGATION. This Opinion and Order applies to the following actions: 20cv3162, 20cv3660, 20cv6314, 20cv6317, 20cv6331, 20cv6333, 20cv6334, 20cv6335, 20cv6364, 20cv6840, 20cv6842, 20cv6845 20cv6847, 20cv6848.

Prior History: *In re Inclusive Access Course Materials Antitrust Litig., 482 F. Supp. 3d 1358, 2020 U.S. Dist. LEXIS 144444, 2020 WL 4670703 (J.P.M.L., Aug. 11, 2020)*

Core Terms

textbooks, Inclusive, Publisher, conspiracy, Retailer, digital, Institutions, bookstores, on-campus, alleges, motion to dismiss, plaintiffs', conspired, Defendants', antitrust, tuition, fails, relevant market, horizontal, supplies, monopolize, consumers, markets, prices, faculty, subscriptions, purchasers, hardcopy, secondary market, hub-and-spoke

Counsel: **[**1]** For the plaintiffs: Natasha J. Fernandez-Silber, John Radice, April Lambert, Daniel Rubenstein, Rishi Raithatha, Radice Law Firm, PC, Princeton, NJ; Lauren G. Barnes, Thomas M. Sobol, Abbye Klamann Ognibene, Hannah Schwarzchild, Rochella T. Davis, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA.

For defendant McGraw Hill LLC: William F. Cavanaugh, Jr., Saul B. Shapiro, Amy N. Vegari, Patterson Belknap Webb & Tyler LLP, New York, NY.

For defendant Pearson Education, Inc.: Jennifer Quinn-Barabanov, Zachary B. Schreiber, Steptoe & Johnson LLP, Washington, DC; Michael Dockterman, Steptoe & Johnson LLP, Chicago, IL.

For defendant Cengage Learning, Inc.: Eric Mahr, Andrew J. Ewalt, Richard Snyder, Lauren Kaplin, Freshfields Bruckhaus Deringer US LLP, Washington DC, DC.

For defendants Barnes & Noble College Booksellers, LLC and Barnes & Noble Education, Inc.: Rachel S. Brass, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Adam J. Di Vincenzo, Gibson, Dunn & Crutcher LLP, Washington, DC.

For defendant Follett Higher Education Group, Inc.: Craig C. Martin, Matt D. Basil, Willkie Farr & Gallagher LLP, Chicago, IL.

Judges: DENISE L. COTE, United **[**2]** States District Judge.

Opinion by: DENISE L. COTE

Opinion

[*426] OPINION & ORDER

DENISE COTE, District Judge:

The plaintiffs, who are college and graduate school students, bring antitrust claims against three publishers of textbooks and two on-campus bookstore operators. The plaintiffs assert that the defendants have conspired to eliminate competition presented by the robust market for used textbooks. The defendants are alleged to have convinced universities and their faculty to require students to purchase their textbooks and associated course materials in a digital format through a program referred to as Inclusive Access. This is alleged to have restricted consumer choice in the market for textbooks and to have raised textbook prices for students. The defendants have moved for dismissal of the entire complaint. For the reasons stated below, the defendants' motion is granted.

Background

The following facts are taken from the Second Consolidated Amended Class Action Complaint ("SAC") and documents integral to it, unless otherwise noted, and are taken to be true for purposes of this motion. *Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 48-49 (2d Cir. 2018)*. The plaintiffs bring this action as representatives of a class defined as "All students at colleges or graduate schools in the **[**3]** United States who purchased subscriptions to Inclusive Access Materials."[1] The SAC defines "Inclusive Access Materials" as "textbooks and Ancillary Required Course Materials assigned through the Inclusive Access system." It defines "Ancillary Required Course Materials" as "required assignments, homework problems, exams, and quizzes." "University" is defined as "any institution of undergraduate or graduate higher education, including any college of higher education." This Opinion will use the term Institutions to refer to colleges and universities, except when quoting directly from the SAC.

Three of the four named plaintiffs purchased subscriptions to Inclusive Access from the Retailer Defendants. The SAC asserts, however, that a fourth plaintiff, Kira Cloonan ("Cloonan"), "was required to and did purchase subscriptions to Inclusive Access Materials from [Publisher] Defendant Pearson."

A. Secondary Market for Textbooks

The three Publisher Defendants -- Cengage Learning, Inc. ("Cengage"); McGraw Hill, LLC ("McGraw Hill"); and Pearson Education, Inc. ("Pearson") -- are the dominant publishers of college textbooks in the United States. Together, they control 80-90% of the market for new textbooks. **[**4]**

In the early 2000s, the Publisher Defendants began to face increasing competition from the rapidly growing secondary marketplace for textbooks. At online sites such as Amazon, eBay, and Chegg, and at brick-and-mortar vendors, college students could buy, sell, and rent used textbooks at prices **[*427]** dramatically below the prices for new textbooks.

On-campus bookstores also suffered from the rapid growth of the secondary market for textbooks. Although on-campus bookstores sold both new and used textbooks, they faced competition in the market for used textbooks from off-campus and online bookstores. The majority of on-campus bookstores are operated by the Retailer Defendants: Barnes & Noble College Booksellers, LLC and Barnes & Noble Education, Inc. (collectively, "Barnes & Noble") and Follett Higher Education Group, Inc. ("Follett"). Together, they manage on-campus bookstores at over 700 Institutions.

B. Inclusive Access

[1] Alternatively, in the event they are determined not to be direct purchasers, the plaintiffs explain that they bring this action on behalf of "all persons and entities who indirectly purchased Inclusive Access Materials from the Defendants or co-conspirators for personal use."

1. Origins

In response to the rise of the secondary market for college textbooks, the Publisher Defendants adopted a "digital-first strategy" that aimed to curtail the growth of the secondary market by reducing sales of new hardcopy textbooks. As part of that strategy, the Publisher **[**5]** Defendants developed "Inclusive Access,"

> a system of providing time-limited access to digital course content[2] that requires University students to obtain their textbooks only in an online format and only from their official on-campus bookstore (or from publishers themselves) and not from any other source.[3]

The Publisher Defendants first experimented with products similar to Inclusive Access in 2014 and 2015 through "pilot programs," but the products failed to take root. The plaintiffs claim that:

> Inclusive Access was rolled back at a number of institutions after a study showed that, in a majority of classes where an Inclusive Access pilot program was launched [in 2014 or 2015], the percentage of students with a grade of "C" or better declined.

On May 18, 2015, the United States Department of Education ("DOE") published for comment a proposed rule pursuant to Title VII of the *Higher Education Act of 1965* that would permit, among other things, Institutions to include the cost of textbooks as part of tuition and fees ("Notice"). *80 Fed. Reg. 28484 (2015)*. In the Notice, the DOE stated that it "initially considered prohibiting institutions from including books and supplies as part of tuition and fees," but had

> decided against a total prohibition on including **[**6]** books and supplies as part of tuition and fees, and agreed to a compromise position that would still benefit students, allow institutional flexibility when materials are integral to the course, and hold institutions accountable through cost transparency.

Id. at 28521-22.

On October 30, 2015, the DOE published the final rule, which became effective on July 1, 2016 ("*Rule 164*"). Id. at 67126. *Rule 164* allows Institutions to directly bill students for textbooks and supplies on their tuition statements in some circumstances. It provides:

> **[*428]** An institution may include the costs of books and supplies as part of tuition and fees under paragraph (c)(1)(i) of this section if -
>
> (i) The institution -
>
> (A) Has an arrangement with a book publisher or other entity that enables it to make those books or supplies available to students below competitive market rates;
>
> (B) Provides a way for a student to obtain those books and supplies by the seventh day of a payment period; and
>
> (C) Has a policy under which the student may opt out of the way the institution provides for the student to obtain books and supplies under this paragraph (c)(2). . . .
>
> (ii) The institution documents . . . that the books or supplies, including digital or electronic course materials, are not available elsewhere **[**7]** or accessible by students enrolled in that program from sources other than those provided or authorized by the institution[] . . . .

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[2] The SAC notes that digital textbooks, whether offered through Inclusive Access or otherwise, are sometimes accompanied by Ancillary Required Course Materials.

[3] The plaintiffs vacillate between using the term Inclusive Access to refer to digital textbooks and course materials sold by the Publisher Defendants to the Institutions and using it to describe the process and contractual arrangements for the delivery of these materials. The Defendants contend that the plaintiffs "mischaracterize[] . . . Inclusive Access as if it were the educational materials themselves, rather than one of several mechanisms for the distribution and sale of those materials."

34 C.F.R. § 668.164(c)(2) (2016) (emphasis supplied).

The DOE explained that it was motivated by its statutory mandate to protect "the rights of students as consumers." 80 Fed. Reg. 67138 (2015). Commentators had persuaded it "that including books and supplies [in tuition] would not only enable an institution to negotiate better prices for its students, it would result in students having acquired course materials at the beginning of a term or payment period." Id. Aware, however, that the inclusion of the cost of books as part of tuition would mean that "students will not have the option of seeking even lower cost alternatives such as used books, rentals, or e-books," the Rule requires the Institution to provide the student an opt-out. Id. at 67139.

The DOE also justified its adoption of the Rule by reference to the increased demand for digital course material:

> We are convinced that digital platforms, and digital course content in general, will become more ubiquitous and that including digital content as part of tuition and fees ensures that students have access to this technology.

Id. at 67126-01.[4] The **[**8]** DOE cited "the best financial interests of students" as its guiding principle in drafting the Rule. Id. at 67138.

2. Adoption of Inclusive Access

The SAC alleges that the Defendants "began working together in 2015 and 2016 to promote" Inclusive Access. McGraw Hill launched a "precursor" to Inclusive Access "in 2015," Cengage's "earliest known contracts with Universities for Inclusive Access programs date back to early 2016," and Pearson "launched its Inclusive Access program in 2016." They began to "evangelize" Inclusive Access, and Inclusive Access programs were introduced at Institutions across the United States. For example, between July 2016 and November 2017, Pearson executed agreements to implement Inclusive Access with over 200 Institutions. The SAC alleges that by promoting Inclusive Access, "the Defendants are effectively 'aging out' traditional textbooks."

[*429] 3. Features

Digital textbooks delivered through Inclusive Access programs are typically cheaper than new hardcopy textbooks. On the other hand, they are more expensive than used hardcopy textbooks sold or rented on the secondary market.

Students are "automatically" subscribed to Inclusive Access when they enroll in a college **[**9]** course that has adopted it and are automatically charged for the digital textbooks on their tuition bills. Students may elect to purchase "print upgrades" for an additional fee, but the Publisher Defendants limit the number of students who may do so in any given course. Although students nominally have the right to opt out of Inclusive Access, they are often warned that opting out of Inclusive Access will make passing the course "impossible" since they will not have access to Inclusive Access if they opt out.

C. Agreements

The plaintiffs allege that the Defendants entered into agreements that "induce[] Universities to mandate Inclusive Access" and "create[] exclusive dealing relationships between the Publisher Defendants and on-campus bookstores, including those run by the Retailer Defendants." They further allege that "[e]ach of these contracts has the purpose and effect of destroying the Defendants' major source of competition (the secondary marketplace for textbooks)." The SAC describes agreements between Institutions and their on-campus bookstores, which are referred to as Bookstore Operating Agreements, and between Institutions and Publisher Defendants, which are referred to as **[**10]** Institution Agreements.

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[4] The SAC does not highlight the enactment of Rule 164 in its description of the adoption of Inclusive Access, but it does mention that the Rule "govern[s] automatic billing for textbooks." The SAC also asserts that the Defendants have violated Rule 164 because textbooks distributed through Inclusive Access are not offered at a lower-than-competitive market rate and students are provided only an "illusory" opt-out.

1. Bookstore Operating Agreements

Through Bookstore Operating Agreements, the Institutions engage the Retailer Defendants to operate and provide services for their on-campus bookstores. Under a Barnes & Noble Bookstore Operating Agreement ("B&N Agreement"),[5] for example, Barnes & Noble "shall fill orders for books and required supply items from term to term in accordance with textbook and supply adoptions by the faculty," and shall contact "all faculty members for their textbook and supply adoptions." The Institution is "not . . . responsible for compiling, nor shall it maintain, a list of such adoptions."

The B&N Agreement made Barnes & Noble the exclusive buyer and seller of the Institution's textbooks, including digitally published or distributed course materials. To underscore the exclusive nature of the relationship between Barnes & Noble and the Institution, the Agreement states:

> [The Institution] shall not contract with any third party to provide any services of the type outlined in this Agreement whether on or off campus, through e-commerce sites, hyperlinks to alternate sources, or otherwise endorsed or supported by [the Institution].

The B&N Agreement gives **[**11]** the Institution commissions on the gross sales of any hardcopy and digital textbooks. The SAC explains that "in some instances" the Retailer Defendants also pay the Institutions up-front signing bonuses of $1 million or more when the Institution signs an on-campus bookstore contract.

2. Institution Agreements

The SAC also describes an Institution Agreement between each of the Publisher Defendants and an Institution that participates **[*430]** in Inclusive Access. The Defendants have provided the full agreements with their motion to dismiss.

i. Pearson Agreement

Under a Pearson Institution Agreement ("Pearson Agreement"),[6] for example, the Institution selects, and Pearson approves, a third-party (in this case, Follett) to operate the Institution's on-campus bookstores and "purchase, on its behalf," for two years, digital textbooks and Ancillary Required Course Materials from Pearson. If the Institution does not enroll a minimum number of its students in Inclusive Access, the Publisher Defendant can terminate the agreement or raise the prices of Inclusive Access textbooks.[7] An exhibit attached to the Pearson Agreement provides an initial list of courses that will adopt Inclusive Access textbooks.

The **[**12]** Pearson Agreement also contemplates discounts for Inclusive Access textbooks. For instance, Pearson will sell its digital textbooks[8] at a discount to the online purchase price for the corresponding "nationally available eBook." The Institution and its on-campus bookstore may not sell the digital textbooks to students at a price more than a defined margin above the agreement's discounted price. Pearson also agrees to provide the Institution or its on-campus bookstore "the option" to purchase, at a set price, a loose-leaf print upgrade version of the digital textbooks.

ii. Cengage Agreement

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[5] A B&N Agreement between Barnes & Noble and Eastern Kentucky University, dated June 30, 2017, was described in the SAC. The Defendants provided that agreement as an exhibit to their motion to dismiss.

[6] The agreement is between Pearson and the University of Florida Board of Trustees, dated May 1, 2017.

[7] The Pearson Agreement provides that the Institution must achieve thousands of enrollments in the first year and multiples of that number in the second year. An enrollment is defined as "one student registered in one Course."

[8] The SAC does not separately define digital textbooks and eBooks. This Opinion therefore only uses the term digital textbooks except when quoting from the SAC or the agreements upon which it relies.

Under a Cengage Institution Agreement ("Cengage Agreement"),[9] Cengage agrees to offer the Institution digital textbooks for a two-year period at a discount and to give the Institution's on-campus bookstore the right to acquire access to those textbooks on the Institution's behalf. The discount is off of Cengage's "then current digital list price." Cengage agrees to provide loose-leaf versions of the digital textbooks that have been purchased under the agreement for a substantial minority of the enrollments at a defined price per book.

iii. McGraw Hill Agreement

Under a McGraw Hill Institution Agreement **[**13]** ("McGraw Hill Agreement"), the Institution's "Auxiliary," which is described as the Subscriber, agrees to adopt digital McGraw Hill textbooks as the required course materials for courses described in an attachment to the agreement.[10] The McGraw Hill Agreement provides that the Subscriber "shall purchase and [McGraw Hill] shall provide access for each of the Registered Students in each Course" at the discounted fees listed in the attachment. The Agreement also allows the Subscriber to order a loose-leaf print version of the digital textbook for each student for an additional per-semester fee.[11]

[*431] D. Electronic Publishers Enforcement Group

In 2016, the Publisher Defendants and two other publishing companies formed a trade association, Electronic Publishers Enforcement Group ("EPEG"). EPEG maintains a website and promulgates anti-counterfeiting "best practices" guidelines for the purpose of eliminating counterfeit textbooks.

E. Procedural History

On January 22, 2020, off-campus college textbook retailers and online booksellers filed a class action in the District of Delaware asserting antitrust claims against the Defendants over their use of Inclusive Access ("Retailer Plaintiffs Action"). Student **[**14]** plaintiffs filed over a dozen similar actions thereafter.

On August 11, the Judicial Panel on Multidistrict Litigation ordered the centralization of Inclusive Access-related cases in this Court. Of the fourteen cases that have been transferred, thirteen are class actions brought by student purchasers of Inclusive Access.[12] Lead counsel for both sets of actions were chosen at a September 3 conference.

The student plaintiffs filed a consolidated amended complaint on October 16. On December 18, the student plaintiffs filed the SAC instead of opposing a December 4 motion to dismiss filed by the Defendants. The Defendants' motion to dismiss the SAC was filed on January 22, 2021, and became fully submitted on March 9. Meanwhile, the defendants in the Retailer Plaintiffs Action moved to dismiss that action as well. That motion is addressed in a separate Opinion filed today.

The SAC alleges that the Defendants entered into a conspiracy to restrain trade in several textbook markets through the implementation of Inclusive Access. The plaintiffs claim that the conspiracy is an unreasonable restraint

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[9] The Cengage Agreement, dated March 21, 2017, is between Cengage and Central Washington University.

[10] The McGraw Hill Agreement, dated March 27, 2019, is between McGraw Hill and Aztec Shops, Ltd., "an Auxiliary" of San Diego State University.

[11] None of the Bookstore Operating Agreements or Institution Agreements use the term "Inclusive Access." The McGraw Hill Agreement, for example, refers to a "web-based solution" that enables students to subscribe to "MHE Content," consisting of "certain online products and services . . . offered by MHE through [its] website . . . ." The Pearson Agreement refers to "Pearson Products," including "eBooks," "Revel," "MyLabs," and "Mastering." The Cengage Agreement describes "Titles" that comprise "eBooks and digital homework solutions." The B&N Agreement covers, among other things, digital textbooks and "course materials and supplies, including . . . materials published or distributed electronically and/or through learning management systems, or sold over the Internet."

[12] An additional student purchaser class action that is before this Court, Cabral v. Cengage Learning, Inc., et al., 20cv3660, is related to this multi-district litigation.

of trade in violation of *§ 1 of the Sherman Act, 15 U.S.C. § 1*. The SAC also alleges that each Defendant **[**15]** monopolized each of the textbook markets it describes, and has conspired to do so, in violation of *§ 2 of the Sherman Act, 15 U.S.C. § 2*. In addition, the plaintiffs bring a variety of state law claims. The plaintiffs seek damages and injunctive relief under the Clayton Act. *15 U.S.C. §§ 15*, *26*.

Discussion

When deciding a motion to dismiss under *Rule 12(b)(6), Fed. R. Civ. P.*, a court must "constru[e] the complaint liberally, accept[] all factual allegations as true, and draw[] all reasonable inferences in the plaintiff's favor." *Zibelman, 906 F.3d at 48-49*. To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. A complaint must do more than offer "naked assertions devoid of further factual enhancement," and a court is not "bound to accept as true a legal conclusion couched as a factual allegation." Id. (quoting *Bell Atl. Corp. v.* ***[*432]*** *Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). In determining the adequacy of a complaint, "a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010)*.

This Opinion will first address the plaintiffs' claims under the Sherman Act. It will then turn to their claims under the state antitrust statutes.

I. Sherman **[**16]** Act Claims

To survive a motion to dismiss, a Sherman Act claim must allege an antitrust injury, define a relevant market, and plausibly allege conduct in violation of the antitrust laws. *Concord Assocs., L.P. v. Ent. Properties Tr., 817 F.3d 46, 52 (2d Cir. 2016)*. This section will first determine whether each of the four representative plaintiffs has antitrust standing. It will then evaluate the plaintiffs' claims brought under *§ 1 of the Sherman Act*. Finally, it will examine the plaintiffs' claims brought under *§ 2*.

A. Antitrust Standing

The Defendants contend that, as indirect purchasers of Inclusive Access, the plaintiffs lack standing to sue the Defendants for damages. See *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. *Section 4* of the Clayton Act entitles "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to treble damages. *15 U.S.C. § 15*. Applying *§ 4*, the Supreme Court has "consistently stated that the immediate buyers from the alleged antitrust violators may maintain a suit against the antitrust violators," but "indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue." *Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520, 203 L. Ed. 2d 802 (2019)* (citation omitted). This "indirect purchaser rule" stems from the Supreme Court's decision in Illinois Brick, which "established a bright-line rule that authorizes **[**17]** suits by direct purchasers but bars suits by indirect purchasers." Id. (citation omitted). "The Illinois Brick Court listed three reasons for barring indirect-purchaser suits: (1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants." *Id. at 1524*.

1. Retailer Defendants

The SAC adequately pleads standing to sue the Retailer Defendants for damages. The SAC alleges that three of the named plaintiffs purchased their Inclusive Access subscriptions from on-campus bookstores operated by one or the other of the two Retailer Defendants. Throughout the SAC, the plaintiffs allege that on-campus bookstores are the exclusive sellers of Inclusive Access. The SAC alleges that the Bookstore Operating Agreements are agreements "between a University and a Retailer Defendant vesting the retailer with exclusive rights to distribute Inclusive Access Materials on the University's campus." This allegation is borne out by the Bookstore Operating Agreements themselves, which provide that an on-campus Retailer Defendant shall be the Institution's "exclusive" seller of any Inclusive Access textbooks **[**18]** that the Institution's students require for their courses.

The Defendants do not deny that the SAC plausibly alleges that students purchase Inclusive Access from the Retailer Defendants. They instead emphasize that it is the Institutions that purchase Inclusive Access from the Publisher Defendants. **[*433]** These arrangements between the Publisher Defendants and the Institutions do not affect, however, the plaintiffs' standing to sue the Retailer Defendants.

2. Publisher Defendants

While three of the four plaintiffs are alleged to have purchased Inclusive Access from the Retailer Defendants, one of the plaintiffs is alleged to have purchased Inclusive Access from one of the Publisher Defendants. In a single paragraph, the SAC asserts that Cloonan "was required to and did purchase subscriptions to Inclusive Access Materials from Defendant Pearson." The Defendants argue that the SAC

> fail[s] to explain how . . . Cloonan's alleged direct purchase from Pearson, made through Pearson's website or by other means, qualifies as Inclusive Access, whose signature characteristics, according to the [SAC], include automatic subscription and direct billing by the university.

The SAC's conclusory assertion regarding **[**19]** Cloonan's purchase does not plausibly plead that she directly purchased an Inclusive Access textbook from Pearson. The SAC consistently alleges that Inclusive Access is sold by the Publisher Defendants to the Institutions and sold to the students by those Institutions' on-campus bookstores. The SAC defines Inclusive Access as "a partnership between an institution, bookstore, and publisher to deliver digital course materials to students." Nowhere does the SAC allege that the Publisher Defendants operate separate distribution channels for Inclusive Access in which they directly sell the product to students. Accordingly, with its meager allegation regarding Cloonan's purchase, the SAC fails to plausibly plead that Cloonan directly purchased an Inclusive Access subscription from Pearson.

In opposing the Defendants' motion, the plaintiffs argue that the factual circumstances of Cloonan's alleged purchase from Pearson are ill-suited to resolution on a motion to dismiss. But the Supreme Court's decisions in *Iqbal* and *Twombly* require "factual amplification where needed to render a claim plausible . . . ." *Arista Recs., LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010)* (citation omitted). The plaintiffs have provided no such amplification. Their pleading **[**20]** of Cloonan's direct purchase is instead a threadbare attempt to circumvent the requirement that each plaintiff plead antitrust standing. This the plaintiffs may not do.

The plaintiffs have standing to sue the Retailer Defendants, but they are barred from suing the Publisher Defendants by the indirect purchaser rule of *Illinois Brick*. Accordingly, the plaintiffs' damages claims against the Publisher Defendants, counts 4, 5, and 6, are dismissed.[13]

B. Section 1

Defendants move to dismiss the plaintiffs' claims under *§ 1*, counts 1, 2, 4, and 5,[14] on the ground that the SAC fails **[*434]** to plead an agreement with respect to any of these alleged conspiracies. *Section 1 of the Sherman Act* prohibits contracts, combinations, or conspiracies in restraint of trade. *US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 54 (2d Cir. 2019)*. "Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' the Supreme Court has long recognized that Congress intended to outlaw only unreasonable restraints." United States v. Apple, Inc., *791 F.3d 290, 320 (2d Cir. 2015)* (citation omitted). "Thus, to succeed **[**21]** on an antitrust claim, a plaintiff must prove that the common scheme designed by the conspirators constituted an

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[13] The plaintiffs in this case seek both damages and injunctive relief. The Supreme Court stated in Apple Inc. v. Pepper:

> Illinois Brick held that the direct-purchaser requirement applies to claims for damages. Illinois Brick did not address injunctive relief, and we likewise do not address injunctive relief in this case.

139 S. Ct. 1514, 1520 n.1, 203 L. Ed. 2d 802 (2019); see also *id. at 1527 & n.1* (Gorsuch, J., dissenting) (arguing that under "traditional proximate cause principles," Illinois Brick should be read to bar suits by indirect purchasers for injunctive relief).

[14] Counts 1 and 2 are for injunctive relief; counts 4 and 5 are for damages. Each of these counts also alleges a conspiracy-to-monopolize claim in violation of *§ 2*. That claim is addressed as part of the *§ 2* discussion below.

unreasonable restraint of trade either per se or under the rule of reason." *Id. at 320-21*. Section 1 embraces both horizontal and hub-and-spoke conspiracies. *Id. at 313-14*; *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 182 (2d Cir. 2012)*.

"The first crucial question in a *Section 1* case is therefore whether the challenged conduct stems from independent decision or from an agreement, tacit or express." *Apple, 791 F.3d at 314-15* (citation omitted). At the pleading stage, a plaintiff must allege sufficient facts to support the inference that a conspiracy existed. *Mayor and City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013)*. An allegation of parallel conduct, standing alone, is not sufficient to plead the existence of a conspiracy. *Apple, 791 F.3d at 315*. "[S]uch behavior could be the result of coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." Id. (citation omitted).

Antitrust conspiracies are "rarely evidenced by explicit agreements and nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators." *Gelboim v. Bank of Am. Corp., 823 F.3d 759, 781 (2d Cir. 2016)* (citation omitted). Therefore, the existence of "additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction **[**22]** with the parallel acts" can serve to permit an inference that a conspiracy exists. *Apple, 791 F.3d at 315* (citation omitted). A non-exhaustive list of plus factors includes: "(1) a common motive to conspire; (2) evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators; and (3) evidence of a high level of interfirm communications." *Gelboim, 823 F.3d at 781* (citation omitted).

The SAC principally alleges a horizontal conspiracy among the Publisher Defendants "to eliminate competition from the secondary marketplace and raise the prices students pay for textbooks." The SAC appears to allege two other forms of conspiracies, although it does not state them with particularity. These are: (1) a horizontal conspiracy between the Retailer Defendants, and (2) hub-and-spoke conspiracies, with each Publisher as the "hub" and the Retailer Defendants and/or Institutions as the "spokes." In opposing the Defendants' motion, however, the plaintiffs almost exclusively defend their claim that the Publisher Defendants entered into a horizontal conspiracy. The plaintiffs argue that the "Inclusive Access conspiracy is a fundamentally horizontal conspiracy" "driven by the Publishers." **[**23]** Under any of its proposed conspiracies, however, the SAC fails to plausibly allege that the Defendants entered into an agreement.

1. Horizontal Conspiracy: Publisher Defendants

The SAC fails to plausibly allege that the three Publisher Defendants agreed with each other to restrain trade. The SAC does not describe any direct evidence of such an agreement. Nor does it **[*435]** plead facts that circumstantially suggest a meeting of the minds to restrain trade as alleged here. Instead, the SAC describes market conditions that would have independently suggested to any publisher of textbooks that digital innovations such as Inclusive Access might help their bottom line. As detailed in the SAC, there was a flourishing secondary marketplace for textbooks and the sales of new textbooks had declined. These phenomena had a negative impact on publishers' revenue and profits. Then, in 2016, the DOE adopted a rule that permitted Institutions to include the cost of books and supplies, including digital textbooks, in tuition bills. Meanwhile, the digital revolution was well underway and both faculty and students were accustomed to using electronic devices to access information. These phenomena affected every **[**24]** textbook publisher and gave each of them an incentive to develop digital textbooks that could be charged on a tuition bill.

Underscoring this commonsense reaction to market phenomena, the SAC pleads that the adoption of the Inclusive Access program for courses was significantly more profitable for a publisher than the sale of hardcopy textbooks. Digital materials are less expensive to produce and reduce the opportunity for competition in the secondary market. Taken together, these allegations suggest that the Publisher Defendants' decisions to implement Inclusive Access were likely the result of "independent responses to common stimuli." *Apple, 791 F.3d at 315*. They do not support an inference that Inclusive Access was adopted and promoted because there was a conspiracy among the Publisher Defendants.

The plaintiffs argue that they have plausibly alleged a horizontal conspiracy among the three Publisher Defendants by pointing principally to three "plus" factors. Taken singly or together, these allegations in the SAC do not plausibly plead a conspiratorial agreement.

First, the plaintiffs argue that the Publisher Defendants had a common motive to conspire to protect their historical prices and market shares. **[**25]** This argument confuses two phenomena. While the SAC describes a commercial environment that would motivate any textbook publisher to independently consider the advantages of adopting a digital textbook regime like Inclusive Access, it does not describe an environment that encouraged or required them to conspire with each other to do so. After all, a motive to innovate is different than a motive to conspire. At best, the SAC describes conscious parallelism, and that is insufficient to plead that the Publisher Defendants conspired with each other. *Connecticut Fine Wine & Spirits, LLC v. Seagull, 932 F.3d 22, 38 (2d Cir. 2019)*; *Twombly, 550 U.S. at 553-54*.

As a second plus factor, the plaintiffs claim that each Publisher Defendant acted against its own economic self-interest when it introduced Inclusive Access. The SAC alleges that

> [i]f an individual Publisher Defendant moved on its own to introduce a digital-only subscription model like Inclusive Access, it would have been perceived as offering an experimental, overly restrictive, and higher priced product and would have lost sales to competitors willing to sell textbooks in a variety of formats, including e-books and print, which students prefer.

Based on this analysis, the plaintiffs contend that no single publisher could "shift the marketplace **[**26]** away from print" textbooks. In support of this claim, the SAC points to the independent efforts by the Publisher Defendants to promote programs like Inclusive Access before 2016 **[*436]** and alleges that it was only in 2016 that the Publisher Defendants implemented a "hard switch" by "rolling out their Inclusive Access programs together."

There are at least three problems with this argument. First, it ignores the impact of the DOE's adoption of *Rule 164* in 2016. With that adoption, Inclusive Access became a government-sanctioned billing option for Institutions, allowing the costs of Inclusive Access to be added to tuition bills.

Second, the plaintiffs' argument implies that the Publisher Defendants colluded to remove hardcopy textbooks from the marketplace and thereby coerce Institutions into accepting digital textbooks through Inclusive Access.[15] But the SAC stops short of actually asserting that the Publisher Defendants discontinued their hardcopy offerings. Moreover, any such allegation would be in tension with the very Institution Agreements on which the SAC relies. Those contracts include references to the comparable hardcopy textbook.

Finally, according to the SAC, Institutions adopted **[**27]** Inclusive Access in order to increase the revenues at their on-campus bookstores, which pay them commissions. Based on the SAC's allegations, it was in each Institution's economic self-interest to adopt Inclusive Access for its students and faculty. These overlapping incentives did not require any collusion among the Publisher Defendants.

As a third plus factor, the SAC alleges that there was a high level of interfirm communication among the Publisher Defendants. It points to the high degree of concentration in the textbook publishing industry and alleges that the Publisher Defendants' trade association EPEG served as a convenient forum for their conspiratorial planning. This

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[15] The plaintiffs briefly contend that the Publisher Defendants also coerced students into purchasing Inclusive Access materials and that this coercion constitutes another plus factor. It is the Institution, presumably in consultation with faculty, that decides whether to purchase Inclusive Access for any particular course. The extent to which students are deprived of a voice in that decision is irrelevant to the question of whether the SAC contains a plausible claim that the Publisher Defendants colluded with each other.

Moreover, the plaintiffs misread the precedent on which they rely, *Ambook Enterprises v. Time Inc., 612 F.2d 604, 616 (2d Cir. 1979)*, in arguing that consumer coercion is a plus factor for purposes of *§ 1*. The "coercion" that the *Ambook* court identified as a possible plus factor was "[c]oerced parallelism," i.e., coerced participation in a conspiracy, rather than consumer coercion. Id. & n.19.

description of opportunities to conspire to restrict competition does not raise the inference that the Publisher Defendants actually engaged in any unlawful activity. Having failed to plausibly plead an agreement, the SAC fails to allege a horizontal conspiracy among the Publisher Defendants.

2. Horizontal Conspiracy: Retailer Defendants

The SAC also appears to allege that the two Retailer Defendants conspired with each other to restrain trade in violation of *§ 1 of the Sherman Act*. The plaintiffs do not explicitly oppose the Defendants' **[**28]** motion to dismiss this *§ 1* claim.

The SAC fails to plead sufficient facts to support a plausible claim that the two Retailer Defendants conspired with each other. Barnes & Noble and Follett compete with each other and with other retailers for the opportunity to become an Institution's on-campus bookstore. The SAC alleges that Inclusive Access "is a win" for the Retailer Defendants, who "directly benefit" from it. As the SAC itself concedes, therefore, agreeing to be an Institution's **[*437]** exclusive partner in providing that Institution's students with all of their textbooks, including digital textbooks sold through Inclusive Access, was very much in each Retailer Defendant's independent financial interest.

3. Hub-and-Spoke Conspiracy

The third form of conspiracy that the SAC may attempt to plead is a so-called "hub-and-spoke" conspiracy among the Defendants, with each Publisher Defendant at the hub of a conspiracy with the two Retailer Defendants and the many Institutions that have adopted Inclusive Access. The plaintiffs do not explicitly oppose the Defendants' motion to dismiss this alternative *§ 1* claim.

"[C]ourts have long recognized the existence of 'hub-and-spoke' conspiracies in which an entity **[**29]** at one level of the market structure, the 'hub,' coordinates an agreement among competitors at a different level, the 'spokes.'" *Apple, 791 F. 3d at 314* (citation omitted). The SAC fails to plead that the Retailer Defendants and the Institutions, the "spokes" in the alleged hub-and-spoke conspiracy, entered into a horizontal agreement with each other. This alone is fatal to the plaintiffs' claim. The SAC pleads a series of vertical agreements between each Publisher Defendant and Institution and between each Retailer Defendant and Institution. It does not, however, plead that any of the Publisher Defendants used these vertical agreements to coordinate a horizontal agreement among the Retailer Defendants and/or the Institutions. The plaintiffs' claim for a hub-and-spoke conspiracy fails. The SAC's claims under *§ 1* are dismissed.

C. Section 2

The plaintiffs bring claims under *§ 2 of the Sherman Act*, counts 1 through 6, as well. Counts 3 and 6 assert that the Publisher Defendants monopolized those markets. Counts 1, 2, 4, and 5 allege that the Defendants conspired to monopolize certain textbook markets. The Defendants move to dismiss the plaintiffs' monopolization claims on the ground that, among other deficiencies, the SAC does not plausibly **[**30]** plead a relevant market. They move to dismiss the SAC's conspiracy-to-monopolize claims on the ground that it fails to plead an agreement. For the reasons discussed below, the Defendants' motion is granted with respect to each of the plaintiffs' *§ 2* claims.

1. Market Definition

For purposes of the Sherman Act, "the relevant market is the area of effective competition within which the defendant operates." *Concord, 817 F.3d at 52* (citation omitted). "[A] market consists of an area where sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level." Id. (citation omitted). "[T]he concept of a market has two components: a product market and a geographic market." Id.

"A relevant product market consists of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered." Id. (citation omitted). The "outer boundaries" of the relevant product market are "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Sabre, 938 F.3d at 64* (citation omitted); see *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481-82, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. Thus, products will be considered to be reasonably interchangeable **[**31]** "if consumers treat them as acceptable substitutes." *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002)* (citation omitted). "Cross-elasticity **[*438]** of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product." *Todd v. Exxon Corp., 275 F.3d 191, 201-02 (2d Cir. 2001)* (citation omitted). In defining the relevant market, courts are to consider the "'commercial realities' faced by consumers." *Kodak, 504 U.S. at 482* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*).

The inquiry into the relevant geographic market, on the other hand, "seeks to identify the precise geographic boundaries of effective competition in order to reach a more informed conclusion on potential harm to the market." *Concord, 817 F.3d at 52-53* (citation omitted). "Courts generally measure a market's geographic scope, the area of effective competition, by determining the areas in which the seller operates and where consumers can turn, as a practical matter, for supply of the relevant product." *Id. at 53* (citation omitted). "Taken together, the product and geographic components illuminate the relevant market analysis, which is essential for assessing the potential harm to competition from the defendants' alleged misconduct." Id. (citation omitted).

"To survive a *Rule 12(b)(6)* motion to dismiss, an alleged product market must bear a rational relation to the methodology courts **[**32]** prescribe to define a market for antitrust purposes -- analysis of the interchangeability of use or the cross-elasticity of demand, and it must be 'plausible.'" *Todd, 275 F.3d at 200* (citation omitted). "Although market definition is a deeply fact-intensive inquiry not ordinarily subject to dismissal at the pleadings stage, there is no absolute rule against dismissal where the plaintiff has failed to articulate a plausible explanation as to why a market should be limited in a particular way." *Concord, 817 F.3d at 53* (citation omitted). "Thus, in order to survive a motion to dismiss, it is appropriate for a district court to assess whether the plaintiffs' complaint asserts sufficient facts to allege plausibly the existence of both a product and geographic market." Id.

The SAC alleges that the relevant product markets in this action are "the markets for each textbook assigned in courses subject to Inclusive Access" ("Textbook Markets"). Although the SAC claims that "used, electronic, and earlier versions of textbooks, which are available on the secondary market, are no longer interchangeable with Inclusive Access textbooks," in opposing the Defendants' motion to dismiss, the plaintiffs clarify that the Textbook Markets "include **[**33]** the textbooks assigned for a particular course in whatever format and from whatever source." (Emphasis in original.) The SAC alleges that the relevant geographic market is the United States. It also claims that "a Publisher Defendant has a market share of over 95% in each Textbook Market."

Even if it is assumed that the Textbook Markets are not limited to any single format or source, defining a Textbook Market as a single textbook is too narrow. The relevant market must include every product that consumers treat as an acceptable substitute. Here, it is the Institutions (and their faculty) that decide which textbooks to assign for their courses and therefore which textbooks the Institution and/or its on-campus bookstore will purchase. In making this decision, an Institution is presented with a menu of options. For example, when choosing a textbook for an introductory economics course, an Institution and its faculty can elect to assign any author's introductory economics textbook. Accordingly, "each textbook" cannot serve as the relevant market because it excludes interchangeable products -- namely, rival **[*439]** authors' and publishers' textbooks for each course.

The plaintiffs defend their relevant **[**34]** market definition by switching the focus from the Institution's choice and purchase of a book, including Inclusive Access digital textbooks, to the students. The plaintiffs argue that it is the students, not the Institutions and their faculty, who are the "consumers" for purposes of the relevant market inquiry. Highlighting the disconnect "between the party selecting the product and the party buying it," the plaintiffs emphasize that the students pay for the Inclusive Access textbooks. But, as the SAC explains, the Institution first purchases Inclusive Access textbooks from the Publisher Defendants at negotiated prices. The Institutions then authorize their on-campus bookstores to resell the textbooks to the students at a markup. Thus, both the Institutions and their students are consumers and pay for Inclusive Access, albeit at different stages of the process.

The fundamental "commercial realit[y]" dictates that the Institutions and their faculty are the relevant consumers for the antitrust claims pursued here. *Kodak, 504 U.S. at 482* (citation omitted). Given this reality, the plaintiffs' Textbook Markets are too narrowly defined. Accordingly, the SAC fails to plead a plausible relevant market, and its **[**35]** *§ 2* monopolization claims are dismissed.

2. Conspiracy to Monopolize

The SAC also alleges that the Defendants conspired to monopolize the Relevant Markets. The Defendants move to dismiss this claim on the ground that the SAC also fails to plead evidence of an agreement.

Section 2 of the Sherman Act prohibits entities from "combin[ing] or conspir[ing] with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . ." *15 U.S.C. § 2*. The elements of a *§ 2* conspiracy to monopolize claim are: "(1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy." *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 233 (2d Cir. 1999)*. "[I]n deciding whether there is concerted action, courts routinely apply the same analysis under both *Sections 1* and *2*." 2 Julian von Kalinowski, Peter Sullivan, & Maureen McGuirl, Antitrust Laws and Trade Regulation § 26.02 (2d ed. 2021).

The plaintiffs' conspiracy-to-monopolize claims fail for the same reason that their claims brought under *§ 1* do -- namely, the SAC fails to plausibly plead an agreement. More fundamentally, accepting the plaintiffs' market definition, it would be unnecessary for any of the Publisher Defendants **[**36]** to conspire to monopolize a Textbook Market. The copyright laws give each publisher a monopoly in its textbook. For both of these reasons, the plaintiffs' *§ 2* conspiracy-to-monopolize claims are dismissed.

II. State Law Claims

The SAC also asserts that the Defendants are liable under the antitrust statutes of 26 states and the District of Columbia. The parties agree that the state antitrust statutes should be construed in harmony with federal ***antitrust law*** where possible. Because the plaintiffs' federal antitrust claims under the Sherman Act fail, their claims under the state antitrust statutes must be dismissed as well.

Conclusion

The Defendants' January 22, 2021 motion to dismiss is granted. The Clerk of Court shall close the case and enter judgment for the Defendants.

Dated: New York, New York

June 14, 2021

/s/ Denise L. Cote

DENISE L. COTE

United States District Judge

In re Inclusive Access Course Materials Antitrust Litig.

United States District Court for the Southern District of New York

June 14, 2021, Decided; June 14, 2021, Filed

20 MDL NO. 2946; 20cv6339

Reporter

2021 U.S. Dist. LEXIS 111135 *; 2021 WL 2419528

IN RE: INCLUSIVE ACCESS COURSE MATERIALS ANTITRUST LITIGATION. This Opinion and Order applies to the following action: 20cv6339.

Prior History: *In re Inclusive Access Course Materials Antitrust Litig., 482 F. Supp. 3d 1358, 2020 U.S. Dist. LEXIS 144444, 2020 WL 4670703 (J.P.M.L., Aug. 11, 2020)*

Core Terms

Inclusive, textbooks, Publisher, digital, conspiracy, Retailer, antitrust, monopolization, fails, Institutions, bookstores, alleges, Markets, plaintiffs', motion to dismiss, prices, conspired, monopoly power, on-campus, relevant market, anticompetitive, tuition, anti trust law, faculty, unincorporated association, hardcopy, supplies, price discrimination, Defendants', horizontal

Counsel: [*1] For the plaintiffs: Bruce Steckler, Stuart Cochran, L. Kirstine Rogers, Steckler Wayne Cochran PLLC, Dallas, TX; Nicole L. Williams, Mackenzie Wallace, Thompson Coburn LLP, Dallas, TX; Jasmine S. Wynton, Thompson Coburn LLP, Dallas, TX; Christine Couvillon, Thompson Coburn LLP, Washington, D.C.

For defendant McGraw Hill LLC: William F. Cavanaugh, Jr., Saul B. Shapiro, Amy N. Vegari, Patterson Belknap Webb & Tyler LLP, New York, NY.

For defendant Pearson Education, Inc.: Jennifer Quinn-Barabanov, Zachary B. Schreiber, Steptoe & Johnson LLP, Washington, DC. Michael Dockterman, Steptoe & Johnson LLP, Chicago, IL.

For defendant Cengage Learning, Inc.: Eric Mahr, Andrew J. Ewalt, Richard Snyder, Lauren Kaplin, Freshfields Bruckhaus Deringer US LLP, Washington DC, DC.

For defendants Barnes & Noble College Booksellers, LLC and Barnes & Noble Education, Inc.: Rachel S. Brass, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Adam J. Di Vincenzo, Gibson, Dunn & Crutcher LLP, Washington, DC.

For defendant Follett Higher Education Group, Inc.: Craig C. Martin, Matt D. Basil, Willkie Farr & Gallagher LLP, Chicago, IL.

Judges: DENISE COTE, United States District Judge.

Opinion by: DENISE COTE

Opinion

(DLC)

OPINION & ORDER

DENISE COTE, **[*2]** District Judge:

The plaintiffs, on behalf of a class of businesses that sell college textbooks online or through off-campus bookstores, assert that the defendants have conspired to eliminate competition in the market for college textbooks. The defendants are the three principal publishers of textbooks, two large operators of on-campus bookstores, and a textbook industry trade association. The plaintiffs assert that the publishers' promotion of digital textbooks to colleges and their faculty at the expense of traditional hardcopy textbooks has reduced the size of the secondary market for textbooks. Pointing to contracts between colleges and on-campus bookstore operators that make the latter the exclusive sellers of digital textbooks at each college's campus, the plaintiffs claim that they have been denied the opportunity to distribute digital textbooks, and that competition in the market for textbooks has suffered as a result. The defendants have moved for dismissal of the entire complaint. For the reasons stated below, the defendants' motions are granted.

Background

The following facts are taken from the Second Consolidated Amended Class Action Complaint ("SAC") and documents integral **[*3]** to it, unless otherwise noted, and are taken to be true for purposes of this motion. *Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 48-49 (2d Cir. 2018)*. The plaintiffs are independent off-campus bookstores and online sellers of college textbooks. They bring this action as representatives of a class defined as "All persons or entities in the United States who were in the business of selling Course Materials at off-campus retail outlets serving students at the Universities or online" from January 1, 2015 to the present. The SAC defines "Course Materials" as "traditional printed textbooks . . . as well as digital textbooks and e-textbooks."[1] It defines "Universities" as "colleges and universities . . . throughout the United States." For simplicity, this Opinion will use the term Institutions rather than colleges or universities except when quoting directly from the SAC.

A. Secondary Market for Textbooks

The three Publisher Defendants -- Cengage Learning, Inc. ("Cengage"); McGraw Hill, LLC ("McGraw Hill"); and Pearson Education, Inc. ("Pearson") -- are the dominant publishers of college textbooks in the United States. Together, they control 80-90% of the market for new textbooks.

In the early 2000s, the Publisher Defendants began to face increasing competition **[*4]** from the rapidly growing secondary marketplace for textbooks. At online sites such as Amazon and Chegg, and at brick-and-mortar vendors, college students could buy, sell, and rent used textbooks at prices dramatically below the prices for new textbooks.

On-campus bookstores also suffered from the rapid growth of the secondary market for textbooks. Although on-campus bookstores sold both new and used textbooks, they faced competition in the market for used textbooks from off-campus and online bookstores. The majority of on-campus bookstores are operated by the Retailer Defendants: Barnes & Noble College Booksellers, LLC and Barnes & Noble Education, Inc. (collectively, "Barnes & Noble") and Follett Higher Education Group, Inc. ("Follett").

B. Inclusive Access

1. Origins

In response to the rise of the secondary market for college textbooks, the Publisher Defendants adopted a "digital-first strategy" that aimed to curtail the growth of the secondary market by reducing sales of new hardcopy textbooks. As part of that strategy, the Publisher Defendants developed "Inclusive Access," a program through which a professor at a participating Institution may designate her chosen textbook to be offered **[*5]** digitally to

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[1] The SAC does not separately define digital and e-textbooks. This Opinion therefore only uses the term digital textbooks.

students.[2] Subscriptions to Inclusive Access last only for the length of the course. Once the course concludes, students lose access to the textbooks that they received through Inclusive Access.

The Publisher Defendants first experimented with products similar to Inclusive Access in 2014 and 2015 through "pilot programs," but the product "was not well-received" and failed to take root. The plaintiffs claim that:

> [A] variety of studies showed the products did not evidence improvement in areas such as affordability, quality, or learning outcomes, and further showed that the students (and in many cases, the faculty) did not like the products. There were no significant movements of the market to Inclusive-Access-style products at that time.

On May 18, 2015, the United States Department of Education ("DOE") published for comment a proposed rule pursuant to *Title VII of the Higher Education Act of 1965* that would permit, among other things, postsecondary institutions to include the cost of textbooks as part of tuition and fees ("Notice"). *80 Fed. Reg. 28484 (2015)*. In the Notice, the DOE stated that it "initially considered prohibiting institutions from including books and supplies as part of tuition and fees," but had

> decided against a total prohibition **[*6]** on including books and supplies as part of tuition and fees, and agreed to a compromise position that would still benefit students, allow institutional flexibility when materials are integral to the course, and hold institutions accountable through cost transparency.

Id. at 28521-22.

On October 30, 2015, the DOE published the final rule, which became effective on July 1, 2016 ("*Rule 164*"). Id. at 67126. *Rule 164* allows postsecondary institutions in some circumstances to directly bill students for textbooks and supplies on their tuition statements. It provides:

> An institution may include the costs of books and supplies as part of tuition and fees under *paragraph (c)(1)(i)* of this section if -
>
> (i) The institution -
>
> (A) Has an arrangement with a book publisher or other entity that enables it to make those books or supplies available to students below competitive market rates;
> (B) Provides a way for a student to obtain those books and supplies by the seventh day of a payment period; and
>
> (C) Has a policy under which the student may opt out of the way the institution provides for the student to obtain books and supplies under this *paragraph (c)(2)*. . . .
>
> (ii) The institution documents on a current basis that the books or supplies, including digital or electronic **[*7]** course materials, are not available elsewhere or accessible by students enrolled in that program from sources other than those provided or authorized by the institution[] . . . .

34 C.F.R. § 668.164(c)(2) (2016) (emphasis supplied).

The DOE explained that it was motivated by its statutory mandate to protect "the rights of students as consumers." *80 Fed. Reg. 67138 (2015)*. Commentators had persuaded it "that including books and supplies [in tuition] would not only enable an institution to negotiate better prices for its students, it would result in students having acquired course materials at the beginning of a term or payment period." Id. Aware, however, that the inclusion of the cost of books as part of tuition would mean that "students will not have the option of seeking even lower cost alternatives such as used books, rentals, or e-books," the Rule requires the Institution to provide the student an opt-out. Id. at 67139.

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[2] The SAC notes that digital textbooks, whether offered through Inclusive Access or otherwise, are sometimes accompanied by other educational materials, such as digital homework, quizzes, and exams.

The DOE also justified its adoption of the Rule by reference to the increased demand for digital course material:

> We are convinced that digital platforms, and digital course content in general, will become more ubiquitous and that including digital content as part of tuition and fees ensures that students have access **[*8]** to this technology.

Id. at 67126-01.[3] The DOE cited "the best financial interests of students" as its guiding principle in drafting the Rule. Id. at 67138.

2. Adoption of Inclusive Access

The SAC alleges that in 2016, Inclusive Access was implemented "in its current form" by "all of the Publishers practically simultaneously." They began to "evangelize" Inclusive Access, and Inclusive Access programs were introduced at Institutions across the United States. For example, between July 2016 and November 2017, Pearson executed agreements to implement Inclusive Access with over 200 Institutions. The Publisher Defendants have announced "that they would be restricting and eventually discontinuing their production of all Course Materials other than Inclusive Access Materials." The SAC defines "Inclusive Access Materials" as textbooks delivered through Inclusive Access.

3. Features

Digital textbooks delivered through Inclusive Access programs are typically cheaper than new hardcopy textbooks. On the other hand, they are more expensive than used hardcopy textbooks sold or rented on the secondary market.

Students are "automatically" subscribed to Inclusive Access when they enroll in a college course **[*9]** that has adopted it and are automatically charged for the digital textbooks on their tuition bills. Students may elect to purchase "print upgrades" for an additional fee, but the Publisher Defendants limit the number of students who may do so in any given course. Although students nominally have the right to opt out of Inclusive Access, they are often warned that opting out of Inclusive Access will make passing the course "impossible" since the students will not have access to Inclusive Access if they opt out.

C. Bookstore Operating Agreements

The plaintiffs allege that the Defendants entered into agreements that "compel" Institutions and students "to deal with the Defendants on an exclusive or nearly exclusive basis" for textbooks delivered through Inclusive Access. The SAC describes in particular agreements between Institutions and their on-campus bookstores, which are referred to as Bookstore Operating Agreements.

Through Bookstore Operating Agreements, the Institutions engage the Retailer Defendants to operate and provide services for their on-campus bookstores. Under a Barnes & Noble Bookstore Operating Agreement ("B&N Agreement"),[4] for example, Barnes & Noble "shall fill orders for **[*10]** books and required supply items from term to term in accordance with textbook and supply adoptions by the faculty," and shall contact "all faculty members for their textbook and supply adoptions." The Institution is "not . . . responsible for compiling, nor shall it maintain, a list of such adoptions."

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[3] The SAC does not highlight the enactment of *Rule 164* in its description of the adoption of Inclusive Access, but it does assert that the Publisher Defendants coordinated their efforts related to the DOE rulemaking that resulted in the Rule's promulgation. The SAC also asserts that the Defendants have violated *Rule 164* because textbooks distributed through Inclusive Access are not offered at a lower-than-competitive market rate and students are not allowed to opt out.

[4] Two B&N Agreements that were excerpted in the SAC were provided as exhibits to the Defendants' motion to dismiss. This Opinion refers only to the agreement between Barnes & Noble and Eastern Kentucky University, dated June 30, 2017. The other exemplar B&N Agreement, which is with Northwest Arkansas Community College, dates from 2012.

The B&N Agreement made Barnes & Noble the exclusive buyer and seller of the Institution's textbooks, including digitally published or distributed course materials. To underscore the exclusive nature of the relationship between Barnes & Noble and the Institution, the Agreement states:

> [The Institution] shall not contract with any third party to provide any services of the type outlined in this Agreement whether on or off campus, through e-commerce sites, hyperlinks to alternate sources, or otherwise endorsed or supported by [the Institution].

The B&N Agreement gives the Institution commissions on the gross sales of any hardcopy and digital textbooks. The SAC explains that "in some instances" the Retailer Defendants also pay the Institutions up-front signing bonuses of $1 million or more when the Institution signs an on-campus bookstore contract.

A Follett Bookstore Operating Agreement ("Follett **[*11]** Agreement") that is described in the SAC has many provisions that are similar to those in the B&N Agreement, including the duty to "develop and maintain strong relationships with faculty at each campus and market and promote course materials to students at each campus." It also has a provision requiring Follett to protect the campus bookstore's market share.[5] It also adds that Follett "shall provide a non-exclusive digital delivery program that addresses the changing types" of textbooks. It adds:

> [Follett] shall provide an Inclusive Access/Course Fee Program at [the Institution], if required by [the Institution]. Inclusive/Course Fee Program course materials commissions and gross profit margins shall be mutually agreed upon by [Follett] and [the Institution] prior to implementation.

An amendment to the Follett Agreement addresses the implementation of Inclusive Access.[6] The amendment states:

> The parties will agree at the outset of each academic term which students or courses are automatically part of the [Inclusive Access] Program. [The Institution] will provide Follett with the student data necessary to administer the Program . . . . [The Institution] will be responsible for the collection **[*12]** of [Inclusive Access] Fees . . . from students . . . .

It further provides:

> [Inclusive Access] course material adoptions will continue to be the responsibility of [the Institution] and [its] faculty. . . . Follett will work with [the Institution] to set adoption guidelines to be used by faculty that respect the academic integrity and freedom of the faculty but strive to keep the [Inclusive Access] fees low.

In addition, the amendment states that Follett will determine the fees for Inclusive Access for each semester, and if the Institution accepts the fee, the Institution will "record the appropriate Fee . . . for each student enrolled in a class participating in the program." Then, Follett "shall invoice [the Institution] with supporting data (including student name, enrollment numbers and the Program course materials) . . . . [The Institution] shall pay Follet the Fees . . . ."

D. Electronic Publishers Enforcement Group

In 2016, the Publisher Defendants and two other publishing companies formed a trade association, Electronic Publishers Enforcement Group ("EPEG"). EPEG maintains a website and promulgates anti-counterfeiting "best practices" guidelines (the "EPEG Guidelines") for the purpose **[*13]** of eliminating counterfeit textbooks.[7]

E. Procedural History

This action was filed on January 22, 2020 in the District of Delaware. Over a dozen actions filed on behalf of a class of student plaintiffs were filed thereafter. On April 24, the Defendants moved to dismiss this action.

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[5] The Follett Agreement that was excerpted in the SAC was provided as an exhibit to the Defendants' motion to dismiss. The Agreement is between Follett and the Tennessee Board of Regents and is dated April 2, 2018.

[6] The amendment to the Follett Agreement is dated September 6, 2018.

[7] The website for EPEG is located at https://stopcounterfeitbooks.com/.

On August 11, the Judicial Panel on Multidistrict Litigation (the "JPML") ordered the centralization of Inclusive Access-related class action cases in this Court.[8] Lead counsel for both the retailer plaintiffs class action and the consolidated student plaintiffs class action ("Student Plaintiffs Action") were chosen at a September 3 conference.

The plaintiffs in this action filed a consolidated amended complaint on October 16. In response to a December 4 motion to dismiss, on December 18, the plaintiffs filed the SAC. The Defendants renewed their motions to dismiss on January 22, 2021, which became fully submitted on March 9. Meanwhile, the defendants in the Student Plaintiffs Action moved to dismiss that action as well. That motion is addressed in a separate Opinion filed today.

The SAC alleges that the Defendants entered into a conspiracy to restrain trade in several textbook **[*14]** markets through the implementation of Inclusive Access. The plaintiffs claim that the conspiracy is an unreasonable restraint of trade in violation of *§ 1 of the Sherman Act, 15 U.S.C. § 1*. The SAC also alleges that each Defendant monopolized each of the textbook markets it describes, has attempted to do so, and has conspired to do so, in violation of *§ 2 of the Sherman Act, 15 U.S.C. § 2*. In addition, the plaintiffs bring price discrimination claims under the *Robinson-Patman Act, 15 U.S.C. §§ 13(a)* and *(f)*, and a variety of state law claims. The plaintiffs seek damages and injunctive relief under the *Clayton Act*. *15 U.S.C. §§ 15*, *26*.

Discussion

When deciding a motion to dismiss under *Rule 12(b)(6), Fed. R. Civ. P.*, a court must "constru[e] the complaint liberally, accept[] all factual allegations as true, and draw[] all reasonable inferences in the plaintiff's favor." *Zibelman, 906 F.3d at 48-49*. To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. A complaint must do more than offer "naked assertions devoid of further factual enhancement," and a court is not "bound to accept as true a legal conclusion couched as a factual allegation." Id. (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). In determining the adequacy of a complaint, "a district court may consider the facts alleged in the complaint, **[*15]** documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010)*.

This Opinion will first address the plaintiffs' claims under the Sherman Act. It will then turn to their claims under the Robinson-Patman Act and various state antitrust statutes. Finally, it will determine whether EPEG may be named as a defendant.

I. Sherman Act Claims

To survive a motion to dismiss, a Sherman Act claim must allege an antitrust injury, define a relevant market, and plausibly allege conduct in violation of the antitrust laws. *Concord Assocs., L.P. v. Ent. Properties Tr., 817 F.3d 46, 52 (2d Cir. 2016)*. After addressing the plaintiffs' standing to bring an antitrust claim, the adequacy of the plaintiffs' claims brought under *§ 1* and then *§ 2 of the Sherman Act* will be discussed.

A. Antitrust Standing

The Defendants move to dismiss counts 1 through 9 on the ground that the plaintiffs lack antitrust standing. *Section 4* of the Clayton Act establishes a private right of action for violations of the federal antitrust laws. It entitles "[a]ny person who [is] injured in his business or property by reason of anything forbidden in the antitrust laws" to treble damages. *15 U.S.C. § 15*. The Supreme Court has explained that "Congress was primarily interested in creating an effective remedy for consumers **[*16]** who were forced to pay excessive prices." *Associated Gen. Contractors of Ca., Inc. v. Ca. State Council of Carpenters, 459 U.S. 519, 530, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. But Congress did not "intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be

[8] An additional student purchaser class action that is before this Court, Cabral v. Cengage Learning, Inc., et al., 20cv3660, is related to this multi-district litigation.

traced to an antitrust violation." *Id. at 534* (citation omitted). Courts have therefore imposed "limiting contours" on the right to pursue private actions. *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 75 (2d Cir. 2013)*. "Absent such boundaries, the potent private enforcement tool that is an action for treble damages could be invoked without service to -- and potentially in disservice of -- the purpose of the antitrust laws: to protect competition." Id.

The "limiting contours" imposed on the private right to pursue actions for treble damages under *§ 4* "are embodied in the concept of 'antitrust standing.'" Id. (citation omitted). "To satisfy antitrust standing at the pleading stage a plaintiff must plausibly allege two things: (1) that it suffered a special kind of antitrust injury, and (2) that it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an efficient enforcer of the antitrust laws." *IQ Dental Supply, Inc. v. Henry Schein, Inc., 924 F.3d 57, 62 (2d Cir. 2019)* (citation omitted). The Defendants do not contest that the plaintiffs are efficient enforcers of the antitrust laws.

"[W]hether seeking relief in law or equity, an antitrust plaintiff **[*17]** must demonstrate "antitrust injury." *Freedom Holdings, Inc. v. Cuomo, 624 F.3d 38, 52 n.14 (2d Cir. 2010)*. Courts consider three factors in determining whether a private plaintiff satisfies the antitrust injury requirement:

> (1) the court must identify the practice complained of and the reasons such a practice is or might be anticompetitive, (2) the court must identify the actual injury the plaintiff alleges which requires us to look to the ways in which the plaintiff claims it is in a worse position as a consequence of the defendant's conduct, and (3) the court compares the anticompetitive effect of the specific practice at issue to the actual injury the plaintiff alleges.

IQ Dental Supply, 924 F.3d at 62-63 (citation omitted).

At the first step of the analysis, plaintiffs "need allege only that the Defendants have engaged in unlawful anticompetitive conduct." *Id. at 63*. Although "[t]he bar for such a showing is a low one," id., plaintiffs must demonstrate standing. *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 437 (2d Cir. 2005)*. Courts have noted the difficulty of "distinguish[ing] the question of whether an antitrust violation occurred from whether plaintiffs have standing to pursue it." Id. "To avoid confusing these issues, some courts and commentators have suggested assuming the existence of a violation in addressing the issue of standing." Id.

Once a plaintiff **[*18]** has identified its injuries at the second step of the test, the third step requires a court to compare that alleged injury to the anticompetitive effect of the challenged practice. *Gatt, 711 F.3d at 76*. This comparison requires more than an allegation that the practice and injury are "causally linked." Id. (citation omitted). "Rather, in order to establish antitrust injury, the plaintiff must demonstrate that its injury is of the type the antitrust laws were intended to prevent and that [it] flows from that which makes or might make defendants' acts unlawful." Id. (citation omitted). In other words, the plaintiff must plead that its injury "stems from a competition-reducing aspect or effect of the defendant's behavior." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. If a plaintiff can make such a showing, then its injury falls within the "zone of interests" protected by the antitrust laws. *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 129, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)* (citation omitted).

The plaintiffs contend that they have antitrust standing because they participate in a market restrained by the anticompetitive conduct of the Defendants and have been injured. The injury that the plaintiffs identify is their exclusion from the retail market for the sale of Inclusive Access textbooks.

It will be assumed, for purposes of analyzing **[*19]** the plaintiffs' standing, that the SAC identifies a practice that is anticompetitive. It is worth noting, however, that the plaintiffs argue that the Defendants' conduct has been anti-competitive largely by focusing on the students' lack of choice when a faculty member or Institution has decided that the textbooks for the student's course will be digital textbooks provided through Inclusive Access. They assert as well that Inclusive Access provides students with an inferior product in comparison to hardcopy textbooks. The plaintiffs fail to grapple with the fact that the creation of Inclusive Access increases the options available to the faculty members and Institutions who make the choices about which textbooks will be required reading for any particular course.

But even if it is assumed that the Defendants' conduct is anticompetitive, the plaintiffs have not carried their burden to demonstrate that the injury they have suffered -- the decline in their textbook sales due to their exclusion from the Inclusive Access market -- resulted from any competition-reducing aspects of the Defendants' conduct. Rather, it is the result of the Institutions' decisions to adopt digital textbooks and **[*20]** to use on-campus bookstores to manage that digital program. And, as significantly, any injury to the plaintiffs is due to the Institutions selecting brick-and-mortar retailers other than the plaintiffs as their on-campus bookstores. The harm to the plaintiffs' revenue and profits, therefore, is not due to any anticompetitive harm that this lawsuit challenges. The antitrust laws "are not concerned with injuries to competitors . . . resulting from their participation in or exile from [anticompetitive] schemes." *Gatt, 711 F.3d at 77*.

The SAC therefore fails to plead that the plaintiffs have suffered a cognizable antitrust injury, and the plaintiffs do not have standing to pursue their Sherman Act claims. Even if the plaintiffs had standing, however, their Sherman Act claims would fail on the merits, as explained next.

B. Section 1

Defendants move to dismiss the plaintiffs' *§ 1* claims, counts 1 through 3, on the ground that the SAC fails to plead an agreement with respect to any of these alleged conspiracies. *Section 1 of the Sherman Act* prohibits contracts, combinations, or conspiracies in restraint of trade. *US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 54 (2d Cir. 2019)*. "Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' the Supreme Court has long recognized **[*21]** that Congress intended to outlaw only unreasonable restraints." *United States v. Apple, Inc., 791 F.3d 290, 320 (2d Cir. 2015)* (citation omitted). "Thus, to succeed on an antitrust claim, a plaintiff must prove that the common scheme designed by the conspirators constituted an unreasonable restraint of trade either per se or under the rule of reason." *Id. at 320-21*. Section 1 embraces both horizontal and hub-and-spoke conspiracies. *Id. at 313-14*; *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 182 (2d Cir. 2012)*.

"The first crucial question in a *Section 1* case is therefore whether the challenged conduct stems from independent decision or from an agreement, tacit or express." *Apple, 791 F.3d at 314-15* (citation omitted). At the pleading stage, a plaintiff must allege sufficient facts to support the inference that a conspiracy existed. *Mayor and City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013)*. An allegation of parallel conduct, standing alone, is not sufficient to plead the existence of a conspiracy. *Apple, 791 F.3d at 315*. "[S]uch behavior could be the result of coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." Id. (citation omitted).

Antitrust conspiracies are "rarely evidenced by explicit agreements and nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators." *Gelboim v. Bank of Am. Corp., 823 F.3d 759, 781 (2d Cir. 2016)* (citation omitted). Therefore, the existence **[*22]** of "additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts" can serve to permit an inference that a conspiracy exists. *Apple, 791 F.3d at 315* (citation omitted). A non-exhaustive list of plus factors includes: "(1) a common motive to conspire; (2) evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators; and (3) evidence of a high level of interfirm communications." *Gelboim, 823 F.3d at 781* (citation omitted). "Coerced parallelism," that is, coerced participation in a conspiracy, can serve as a plus factor as well. *Ambook Enterprises v. Time Inc., 612 F.2d 604, 616 & n.19 (2d Cir. 1979)*.

The SAC alleges three forms of conspiracies that violate *§ 1 of the Sherman Act*: (1) A horizontal conspiracy among the Publisher Defendants, (2) a horizontal conspiracy among the Retailer Defendants, and (3) hub-and-spoke conspiracies between each Publisher Defendant and the Retailer Defendants. The SAC fails to plausibly allege any of these conspiracies.

1. Horizontal Conspiracy: Publisher Defendants

The SAC fails to plausibly allege that the three Publisher Defendants agreed with each other to restrain trade. The SAC does not describe any direct evidence of such an agreement. Nor does it plead facts **[*23]** that circumstantially suggest a meeting of the minds to restrain trade as alleged here. Instead, the SAC describes market conditions that would have independently suggested to any publisher of textbooks that digital innovations such as Inclusive Access might help their bottom line. As detailed in the SAC, there was a flourishing secondary marketplace for textbooks and the sales of new textbooks had declined. These phenomena had a negative impact on publishers' revenue and profits. Then, in 2016, the DOE adopted rules that permitted Institutions to include the cost of books and supplies, including digital textbooks, in tuition bills. Meanwhile, the digital revolution was well underway and both faculty and students were accustomed to using electronic devices to access information. These phenomena affected every textbook publisher and gave each of them an incentive to develop digital textbooks that could be charged on a tuition bill. Underscoring this commonsense reaction to market phenomena, the SAC pleads that the adoption of the Inclusive Access program for courses was significantly more profitable for a publisher than the sale of hardcopy textbooks. Digital materials are less expensive **[*24]** to produce and reduce the opportunity for competition in the secondary market. Taken together, these allegations suggest that the Publisher Defendants' decisions to implement Inclusive Access were likely the result of "independent responses to common stimuli." *Apple, 791 F.3d at 315*. They do not support an inference that Inclusive Access was adopted and promoted because there was a conspiracy among the Publisher Defendants.

The plaintiffs argue that they have plausibly alleged a horizontal conspiracy among the three Publisher Defendants by pointing principally to four "plus" factors. Taken singly or together, these allegations in the SAC do not plausibly plead a conspiratorial agreement.

First, the plaintiffs argue that the Publisher Defendants had a common motive to conspire to protect their historical prices and market shares. This argument confuses two phenomena. While the SAC describes a commercial environment that would motivate any textbook publisher to independently consider the advantages of adopting a digital textbook regime like Inclusive Access, it does not describe an environment that encouraged or required them to conspire with each other to do so. After all, a motive to innovate is different **[*25]** than a motive to conspire. At best, the SAC describes conscious parallelism, and that is insufficient to plead that the Publisher Defendants conspired with each other. *Connecticut Fine Wine & Spirits, LLC v. Seagull, 932 F.3d 22, 38 (2d Cir. 2019)*; *Twombly, 550 U.S. at 553-54*.

As a second plus factor, the plaintiffs claim that each Publisher Defendant acted against its own economic self-interest when it introduced Inclusive Access. In opposing the Defendants' motion, the plaintiffs argue that it was in each Publisher Defendant's self-interest to sell Inclusive Access through as many retailers and in as many different formats as possible. The plaintiffs also argue that the Institutions would never have adopted a restrictive format such as Inclusive Access unless given no other choice, suggesting that it was not in an individual Publisher Defendant's self-interest to introduce Inclusive Access unless it could be certain that the other Publisher Defendants would do so as well. The plaintiffs point to the independent efforts by the Publisher Defendants to promote programs like Inclusive Access before 2016 and allege that it was only in 2016 that each of the Publisher Defendants "practically simultaneously" adopted Inclusive Access in its current form.

There are at least two problems with this **[*26]** argument. First, the plaintiffs' claims regarding the timing of Inclusive Access ignore the impact of the DOE's adoption of *Rule 164* in 2016. With that adoption, Inclusive Access became a government-sanctioned billing option for Institutions, allowing the costs of Inclusive Access to be added to tuition bills. The DOE justified its adoption of the Rule on the ground that digital textbooks will inevitably become "more ubiquitous" and that including those materials as part of students' tuition would "ensure that students have access to this technology." *80 Fed. Reg. 67126-01 (2015)*.

Second, the plaintiffs' argument about the Publisher Defendants' economic self-interest contradicts the other allegations in the SAC. The SAC explains that it is in each Publisher Defendant's interest to sell digital textbooks and that it is up to each Institution to decide whether to purchase Inclusive Access and add the cost of those digital materials to tuition (with the appropriate mark-up). According to the SAC as well, it is in the financial interest of each Institution to grant its on-campus bookstore the exclusive right to supply the Institution's students with all course materials. Thus, as much as anything else, it is the structure **[*27]** of the relationship between each Institution and its on-campus bookstore, a relationship that long predated the adoption of Inclusive Access, that has excluded other retailers from Inclusive Access. Simply put, the SAC does not plausibly plead that the exclusion of the plaintiff retailers from the Inclusive Access market was against the self-interest of any Publisher Defendant.

As a third plus factor, the SAC alleges that there was a high level of interfirm communication among the Publisher Defendants and that their trade association EPEG served as a convenient forum for their conspiratorial planning. This description of opportunities to conspire to restrict competition does not raise the inference that the Publisher Defendants actually engaged in any unlawful activity.

As a fourth and final plus factor, the SAC alleges that the Defendants coerced Institutions into joining their conspiracy. This allegation fails because the SAC does not identify coercion but only describes financial incentives that were provided to Institutions by the Defendants. The SAC explains that Institutions increasingly took textbook choice away from the faculty and entered into contracts that required all or **[*28]** many core classes to use Inclusive Access. While the SAC asserts that coercive activity by the Publisher Defendants prevented Institutions from making "any truly free choice," that conclusory statement is not a plausible allegation of actual coercion. For instance, the SAC does not allege that the Institutions that adopted Inclusive Access did not have the option of selecting hardcopy textbooks for their courses.[9] Instead, the SAC pleads that, principally for financial reasons, hundreds of Institutions elected to adopt Inclusive Access for some courses.

Having failed to plausibly plead an agreement, the SAC fails to allege a horizontal conspiracy among the Publisher Defendants. Accordingly, count 1 is dismissed.

2. Horizontal Conspiracy: Retailer Defendants

The SAC alleges that the two Retailer Defendants conspired with each other to restrain trade in violation of *§ 1 of the Sherman Act*. The SAC fails to plead sufficient facts, however, to support a plausible claim that the Retailer Defendants entered into a conspiratorial agreement.

Barnes & Noble and Follett compete with each other and with other retailers for the opportunity to become an Institution's on-campus bookstore. This competition presents a significant **[*29]** hurdle to the SAC's assertion of collusion. It is unsurprising, therefore, that the SAC contains no direct allegation that Barnes & Noble and Follett conspired together to sell Inclusive Access. Moreover, the SAC describes a commercial environment in which every on-campus bookstore faced competition from the secondary textbook market. Faced with this competition, the willingness to support an Institution's adoption of Inclusive Access was in each Retailer Defendant's own interest and did not require collusion with its co-defendant. Therefore, agreeing to be an Institution's exclusive partner in providing that Institution's students with all of their textbooks, including digital textbooks sold through Inclusive Access, was very much in its independent financial interest.

In opposing the motion to dismiss the *§ 1* claim, the plaintiffs chiefly focus on the *§ 1* claim against the Publisher Defendants. They argue in passing that the SAC adequately pleads this claim of collusion by the two Retailer Defendants by pointing to the large up-front bonuses that each Retailer Defendant paid to the Institutions that adopted Inclusive Access. Nothing about these payments, however, raises the inference that **[*30]** the Retailer Defendants conspired with each other. Rather, it suggests that they acted in accordance with their own self-interest to become the on-campus bookstore. Because the SAC fails to plead an agreement between the Retailer Defendants, count 2 is dismissed.

3. Hub-and-Spoke Conspiracy

The third form of conspiracy that the SAC pleads is a socalled "hub-and-spoke" conspiracy among the Defendants, with each Publisher Defendant at the hub of a conspiracy with the two Retailer Defendants. "[C]ourts have long recognized the existence of 'hub-and-spoke' conspiracies in which an entity at one level of the market structure, the 'hub,' coordinates an agreement among competitors at a different level, the 'spokes.'" *Apple, 791 F.3d at 314* (citation omitted). "These arrangements consist of both vertical agreements between the hub and each spoke and a

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[9] The SAC asserts that the Publisher Defendants announced that they "would be" restricting and eventually discontinuing their production of hardcopy textbooks, but stops short of alleging that hardcopy textbooks are not available.

horizontal agreement among the spokes 'to adhere to the hub's terms,' often because the spokes 'would not have gone along with the vertical agreements except on the understanding that the other spokes were agreeing to the same thing.'" Id. (citation omitted).

The SAC does not allege that there is direct evidence of an agreement among the Defendants to form a hub-and-spoke **[*31]** conspiracy. It also fails to plead that the Retailer Defendants, the "spokes" in the alleged hub-and-spoke conspiracy, entered into a horizontal agreement with each other. This alone is fatal to the plaintiffs' claim. The SAC pleads a series of vertical agreements between each Retailer Defendant and each Publisher Defendant. It does not, however, plead that any of the Publisher Defendants used these vertical agreements to coordinate a horizontal agreement between the Retailer Defendants. The plaintiffs' claim for a hub-and-spoke conspiracy fails, and count 3 is dismissed.

C. Section 2

The SAC asserts that each of the Defendants violated *§ 2* in three ways: each of them monopolized each of the textbook markets that the SAC describes, attempted to do so, and conspired to do so. The Defendants have moved to dismiss each of these claims. Although the *§ 2* claims are purportedly brought against each Defendant, the plaintiffs' opposition to the motion defends the *§ 2* claims solely as brought against the three Publisher Defendants. After a discussion of the SAC's definition of the relevant markets, the *§ 2* claims as to each Publisher Defendant are addressed.

1. Market Definition

For purposes of the Sherman **[*32]** Act, "the relevant market is the area of effective competition within which the defendant operates." *Concord, 817 F.3d at 52* (citation omitted). "[A] market consists of an area where sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level." Id. (citation omitted). "[T]he concept of a market has two components: a product market and a geographic market." Id.

"A relevant product market consists of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered." Id. (citation omitted). The "outer boundaries" of the relevant product market are "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Sabre, 938 F.3d at 64* (citation omitted); see *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481-82, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. Thus, products will be considered to be reasonably interchangeable "if consumers treat them as acceptable substitutes." *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002)* (citation omitted). "Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product." *Todd v. Exxon Corp., 275 F.3d 191, 201-02 (2d Cir. 2001)* (citation omitted).

Within a relevant product market, "well-defined submarkets may **[*33]** exist which, in themselves, constitute product markets for antitrust purposes." *Sabre, 938 F.3d at 64* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*). Commentators have cautioned, however, that "speaking of submarkets is both superfluous and confusing in an antitrust case," and "nothing would be lost by deleting the word 'submarket' from the antitrust lexicon." Phillip E. Areeda et al., ***Antitrust Law*** ¶ 510b, at 170, 173 (Supp. 1998).

The inquiry into the relevant geographic market, on the other hand, "seeks to identify the precise geographic boundaries of effective competition in order to reach a more informed conclusion on potential harm to the market." *Concord, 817 F.3d at 52-53* (citation omitted). "Courts generally measure a market's geographic scope, the area of effective competition, by determining the areas in which the seller operates and where consumers can turn, as a practical matter, for supply of the relevant product." *Id. at 53* (citation omitted). "Taken together, the product and geographic components illuminate the relevant market analysis, which is essential for assessing the potential harm to competition from the defendants' alleged misconduct." Id. (citation omitted).

"To survive a *Rule 12(b)(6)* motion to dismiss, an alleged product market must bear a rational relation to **[*34]** the methodology courts prescribe to define a market for antitrust purposes -- analysis of the interchangeability of use or the crosselasticity of demand, and it must be 'plausible.'" *Todd, 275 F.3d at 200* (citation omitted). "Although market definition is a deeply fact-intensive inquiry not ordinarily subject to dismissal at the pleadings stage, there is no absolute rule against dismissal where the plaintiff has failed to articulate a plausible explanation as to why a market should be limited in a particular way." *Concord, 817 F.3d at 53* (citation omitted). "Thus, in order to survive a motion to dismiss, it is appropriate for a district court to assess whether the plaintiffs' complaint asserts sufficient facts to allege plausibly the existence of both a product and geographic market." Id.

The plaintiffs allege that the relevant product market in this action is the market for "higher education course materials," which consists of traditional hardcopy textbooks as well as digital textbooks (collectively, the "Course Materials Market"). The SAC also alleges several submarkets, which are themselves relevant product markets. These include: (1) Topic Markets, such as History Course Materials; (2) Individual Course Markets, such as **[*35]** the European History Course Market; (3) the Inclusive Access Course Materials Market; (4) Inclusive Access Topic Markets; and (5) Inclusive Access Individual Course Markets.

The SAC alleges that the relevant geographic market for the Course Materials Market, Topic Markets, and Individual Course Markets is the United States. For the Inclusive Access Markets, the SAC alleges that each individual Institution or the United States as a whole is the relevant geographic market.

The Defendants do not dispute that the Individual Course Markets, such as the European History Course Market, can serve as the relevant product market. In addition, they do not take issue with the SAC's proposed geographic markets. They do dispute, however, that the Course Materials Market, Topic Markets, or any of the Inclusive Access Markets is a relevant product market.

In support of their Inclusive Access market definitions, the plaintiffs emphasize that the students, as the purchasers of Inclusive Access, have no choice as to which textbook they must buy. Those choices are made by the faculty member teaching the course or by the Institution.[10] The SAC adds that students are discouraged from opting out of Inclusive **[*36]** Access.

It is unnecessary to resolve the many disputes among the parties regarding the relevant market definitions because the plaintiffs fail to allege that any one of the Publisher Defendants possesses monopoly power in any of the plaintiffs' proposed markets or has engaged in anticompetitive behavior in that market. Even at its narrowest -- an Inclusive Access Individual Course Market at a single Institution -- the SAC fails to plead a market in which a Publisher Defendant has a monopoly.

2. Monopolization

The SAC alleges that each of the three Publisher Defendants monopolized each of the Relevant Markets in violation of *§ 2 of the Sherman Act*. The Publisher Defendants move to dismiss the plaintiffs' monopolization claim on the ground that the SAC does not plausibly allege that any of the three Publisher Defendants possessed either monopoly power or engaged in anticompetitive conduct.

Section 2 of the Sherman Act provides that it is unlawful to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*. To plead a monopolization claim under *§ 2*, a plaintiff must allege both: (1) "the possession of monopoly power in the relevant market, and (2) the willful acquisition **[*37]** or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *PepsiCo, 315 F.3d at 105* (citation omitted).

i. Possession of Monopoly Power

"The core element of a monopolization claim is market power." *Id. at 107*. "Market power is the ability to raise price profitably by restricting output." *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2288, 201 L. Ed. 2d 678 (2018)* (emphasis in original) (citation omitted). A plaintiff can plead market power through either direct evidence that the

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[10] It is unnecessary to decide here whether the consumers, for purposes of a relevant market analysis, should be defined as the Institution and its faculty or the students.

defendant can control prices or exclude competitors from the market, or through indirect evidence, such as the defendant's share of the relevant market. Kaufman v. Time Warner, 836 F.3d 137, 143 (2d Cir. 2016). Thus, a defendant's share of the relevant market "can be used as a proxy for market power." Pepsico, 315 F.3d at 108. A market share of over 70% is "usually strong evidence of monopoly power." Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 99 (2d Cir. 1998) (citation omitted). See also United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966) (87%); Am. Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946) (80%); United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (Hand, J.) (90%). Absent additional evidence, however, "a 64 percent market share is insufficient to infer monopoly power." PepsiCo, 315 F.3d at 109. "A high market share alone, however, is insufficient to infer a seller's market power if other characteristics of the product market, such as low barriers to entry, high cross elasticity of demand, or technological developments in the industry, **[*38]** interfere with the seller's control of prices." Kaufman, 836 F.3d at 143.

"Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue," and "[p]art of that attention to economic context is an awareness of the significance of regulation." Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 411, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004). "One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm." Id. at 412. "Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." Id. Where, by contrast, there is nothing built into the regulatory scheme which performs the antitrust function, "the benefits of antitrust are worth its sometimes considerable disadvantages." Id.

The SAC fails to plead direct evidence of monopoly power. The plaintiffs do not plausibly allege that any Publisher Defendant was able to control prices within any one of their Relevant Markets or exclude another publisher from that market.

In opposition to this motion, the plaintiffs assert, with little explanation, that the SAC does allege that the Publisher Defendants have excluded **[*39]** competition and engaged in supracompetitive pricing. The paragraphs in the SAC to which the plaintiffs point to support that assertion do not plausibly allege direct evidence of monopoly power. Those paragraphs appear to allege first that Inclusive Access textbooks are more expensive than used hardcopy textbooks. This does not constitute supracompetitive pricing. For example, the SAC does not assert that Inclusive Access textbooks are more expensive than new hardcopy textbooks. Nor could it. Rule 164 explicitly requires Institutions to make Inclusive Access available at "below competitive market rates." 34 C.F.R. § 668.164(c)(2) (2016).

Next, the paragraphs to which the plaintiffs point appear to assert that the adoption of digital textbooks eliminates competition in the secondary market. This feature of the digital revolution is not direct evidence of monopolistic power. To successfully plead that a Publisher Defendant has excluded competitors, the SAC would have to plead that the Publisher Defendant excluded other publishers from developing and marketing digital textbooks. This the SAC does not plead.

The SAC also fails to plead indirect evidence of monopoly power. To the extent it pleads market share at all, the **[*40]** SAC relies on joint market shares, for example, that the three Publisher Defendants control 70% or more of the relevant market. But a shared monopoly does not state a § 2 claim. See In re Credit Default Swaps Antitrust Litig., No. 13MD2476 (DLC), 2014 U.S. Dist. LEXIS 123784, 2014 WL 4379112, at *13 (S.D.N.Y. Sept. 4, 2014) (citing H.L. Hayden Co. of New York v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1018 (2d Cir. 1989)) (attempt and conspiracy to monopolize claims). In opposition to this motion, the plaintiffs argue that the SAC does succeed in one paragraph in pleading that the Publisher Defendants had a monopolistic market share in the Individual Course Markets. That paragraph asserts: "On information and belief, a significant number (if not all) of the Individual Course Markets are monopolistic, with each Publisher having specific monopoly control over a subset of these markets." Even if this sentence is read to suggest that each one of the Publisher Defendants has a monopolistic market share in the hardcopy and digital textbook market for at least one individual course, for instance European History, it fails to give the fair notice required to plead such a central element of its monopolization claim. This failure is not surprising. The SAC brings a monopolization claim against three publishers, each of which is a significant publisher of U.S. textbooks. If any one of them attempted to charge supracompetitive **[*41]** prices for textbooks, it would run the risk of competition from another publisher. To the extent this allegation is an effort to plead a *§ 1* claim against the three Publisher Defendants for dividing the market, it is far too conclusory to do so.

ii. Anticompetitive Conduct

The SAC also fails to plausibly allege that a Publisher Defendant willfully acquired or maintained monopoly power through anticompetitive means. "To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *In re Adderall XR Antitrust Litig., 754 F.3d 128, 133 (2d Cir. 2014)* (quoting *Trinko, 540 U.S. at 407*). "Anticompetitive conduct is conduct without a legitimate business purpose that makes sense only because it eliminates competition." Id. (citation omitted).

The plaintiffs claim that each Publisher Defendant willfully maintained its alleged monopoly power by refusing to sell Inclusive Access to the plaintiffs. "[A]s a general matter, the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Trinko, 540 U.S. at 408* (quoting *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*). "However, the high value that we have placed **[*42]** on the right to refuse to deal with other firms does not mean that the right is unqualified." Id. (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*). There are "limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 448, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*. Under the "limited exception recognized in Aspen Skiing," a case that is "at or near the outer boundary of *§ 2* liability," the "unilateral termination of a voluntary (and thus presumably profitable) course of dealing" can suggest "a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko, 540 U.S. at 409*.

The SAC fails to plausibly plead that a Publisher Defendant's refusal to distribute Inclusive Access through the plaintiffs exhibits anticompetitive behavior. According to the SAC, the preexisting course of dealing between the Publisher Defendants and the plaintiffs continues to exist -- the Publisher Defendants continue to distribute textbooks other than Inclusive Access through the plaintiffs. It is only a new product, Inclusive Access, that the Publisher Defendants refuse to distribute through the plaintiffs. When an Institution selects Inclusive Access for its courses, it distributes Inclusive Access through its on-campus bookstore. Thus, **[*43]** unlike in *Aspen Skiing*, the Publisher Defendants have not unilaterally terminated a preexisting course of dealing. Rather, they have declined to extend their dealings with the plaintiffs to their newest product. Accordingly, the SAC fails to plead that any one of the Publisher Defendants willfully acquired or maintained its alleged monopoly power through anticompetitive means. The SAC's monopolization claims, in count 4, are dismissed.

3. Attempted Monopolization

The SAC claims that the Defendants attempted to monopolize the Relevant Markets in violation of *§ 2 of the Sherman Act*. The Defendants move to dismiss this claim, count 6, arguing that it fails for the same reasons that the plaintiffs' monopolization claim does -- namely, that the SAC does not allege monopoly power or any anticompetitive conduct.

In order to plead attempted monopolization, the plaintiff must allege: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 651 (2d Cir. 2015)* (citation omitted). "Attempted monopolization, unlike monopolization, requires a finding of specific intent." Id.

As was true for the monopolization claim, in **[*44]** opposing this motion, the plaintiffs focus on the conduct of the Publisher Defendants. The SAC fails to plausibly allege that any Publisher Defendant attempted to monopolize any one of the Relevant Markets or engaged in anticompetitive conduct. Also, the SAC fails to allege either a specific intent by a Publisher Defendant to monopolize or a dangerous probability that a defendant would succeed in achieving monopoly power. Count 6 is dismissed.

4. Conspiracy to Monopolize

The SAC also alleges the Defendants conspired to monopolize the Relevant Markets. The Defendants move to dismiss this claim, count 5, on the ground that the SAC fails to plead evidence of an agreement.

Section 2 of the Sherman Act prohibits entities from "combin[ing] or conspir[ing] with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . ." *15 U.S.C. § 2*. The elements of a *§ 2* conspiracy to monopolize are: "(1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy." *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 233 (2d Cir. 1999)*. "[I]n deciding whether there is concerted action, courts routinely apply the same analysis under both *Sections 1* and *2*." 2 **[*45]** Julian von Kalinowski, Peter Sullivan, & Maureen McGuirl, Antitrust Laws and Trade Regulation § 26.02 (2d ed. 2021).

The SAC fails to allege that one or more of the Defendants entered into an agreement with others to monopolize a Relevant Market for the same reasons that it fails to allege that they violated *§ 1*. Count 5 is therefore dismissed.

II. Robinson-Patman Act Claims

The SAC brings two claims for violation of the Robinson-Patman Act. It alleges that the Publisher Defendants sold textbooks, which it refers to as Course Materials, to the Retailer Defendants at prices that were "substantially less" than those that they charged the plaintiffs. The SAC claims that this conduct amounts to price discrimination in violation of *§ 13(a)* of the Act. *15 U.S.C. § 13(a)*. The plaintiffs separately allege that the Retailer Defendants "knowingly induced" and "received" discriminatory pricing for those materials in violation of *§ 13(f)* of the Act. *15 U.S.C. § 13(f)*. The Defendants move to dismiss both claims, counts 7 and 8.

> *Section 2(a)* of the Robinson-Patman Act makes it unlawful to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition **[*46]** . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them[.]

15 U.S.C. § 13(a). *Section 2(f)* provides that "[i]t shall be unlawful for any person . . . knowingly to induce or receive a discrimination in price which is prohibited by this section." Id. *§ 13(f)*. "'Price discrimination' in this context means a difference in the price charged for the items of like grade and quality to two different buyers." *Cash & Henderson Drugs, Inc. v. Johnson & Johnson, 799 F.3d 202, 209 (2d Cir. 2015)*.

The competitive injury that the plaintiffs assert is what is known as "secondary-line injury," which is "an injury to competition between different purchasers of the same product. Id. To state a claim for secondary-line injury through price discrimination, a plaintiff must allege:

> (1) that the seller's sales were made in interstate commerce; (2) that the seller discriminated in price as between the two purchasers; (3) that the product or commodity sold to the competing purchasers was of the same grade and quality; and (4) that the price discrimination had a prohibited effect on competition.

Id. at 209-10 (citation omitted). "Plaintiffs attempting to establish competitive injury generally have two routes available **[*47]** to them: showing substantial discounts to a competitor over a significant period of time, known as the Morton Salt inference, or proof of sales lost to favored purchasers." *Id. at 210*. "[I]f the loss attributable to impaired competition is de minimis, then the challenged practice cannot be said to have had a 'substantial' affect on competition." Id.; see also *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 180, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006)*.

The SAC alleges that "in almost every case" where the plaintiffs "encountered Inclusive Access Materials," the Publisher Defendants refused to sell them Inclusive Access textbooks. In a "very few instances," however, the Publisher Defendants did offer to sell Inclusive Access textbooks to the plaintiffs, but only "at a higher price compared to that offered to the [Retailer Defendants] operating at the same" Institutions. The SAC provides just two examples of instances in which Pearson allegedly sold Inclusive Access textbooks to one of the plaintiffs at a discriminatory price. It contains no examples of any discriminatory pricing by either McGraw Hill or Cengage.

First, at one Institution's campus, after "originally refus[ing]" to sell digital textbooks to one of the plaintiffs through Inclusive Access, Pearson "sold [the] product to [that **[*48]** plaintiff] at prices that were substantially higher than those for sales to Defendant Follett . . . ." Second, at a different Institution's campus, Pearson offered to sell a print upgrade for a digital textbook to one of the plaintiffs for a course that was subscribed to Inclusive Access. It charged that plaintiff "a significantly higher price" than it charged Barnes & Noble, however. Citing these examples, the plaintiffs allege that "[i]n these few instances where the Plaintiff Retailers were sold any product related to Inclusive Access Materials (including the supplemental print products)," they were offered higher prices than the Retailer Defendants were given.

The SAC does not state a claim for price discrimination under either *§ 2(a)* or *§ 2(f)* of the Robinson-Patman Act. According to the SAC, the plaintiffs assert the central feature of Inclusive Access is its exclusivity: The Publisher Defendants distribute digital textbooks through the Retailer Defendants and refuse to offer those products to the plaintiffs. The SAC relies on only two examples in which Pearson offered one of the plaintiffs the chance to distribute either a digital textbook or its print upgrade. These two isolated incidents **[*49]** fall far short of the "significant period of time" that is required to plead a substantial effect on competition in a secondary-line price discrimination case.

The SAC does not contain any developed allegations against the Retailer Defendants in support of the *§ 2(f)* claim and the plaintiffs do not oppose its dismissal. Accordingly, counts 7 and 8 are dismissed.[11]

III. State Law Claims

The Defendants move to dismiss the plaintiffs' state law claims, counts 10 through 14, on the ground that they are inapplicable or derivative of the plaintiffs' federal claims. The SAC fails to state a claim under any of its state law causes of action.

The SAC brings state law price discrimination claims under the *Arkansas Unfair Practices Act ("AUPA"), Ark. Code Ann. §§ 4-75-201, et seq.*; the *Kentucky Unfair Trade Practices Act ("KUTPA")*, *Ky. Rev. Stat. Ann. §§ 365.020, et seq.*; and the *New Mexico Price Discrimination Act ("NMPDA"), N.M. Stat. Ann. §§ 57-14-1, et seq.* The AUPA and KUTPA are broader than the federal Robinson-Patman Act in that they prohibit price discrimination in the sale of a "product" or "service" in addition to a "commodity." They are narrower, however, in that they only prohibit price discrimination among different localities within the state. Because the SAC does not allege discrimination on that basis, its claims under those statutes fail. The NMPDA, on the other hand, "closely parallels" the Robinson-Patman Act. *Jay Walton Enterprises, Inc. v. Rio Grande Oil Co. of Bernalillo Cty., 1987- NMCA 070, 106 N.M. 55, 56-57, 738 P.2d 927 (N.M. Ct. App. 1987)*. Because of **[*50]** this similarity, courts "look to the federal law for assistance in interpretation and application of the state act." *Id. at 57*. Since the SAC fails to state a claim under the Robinson-Patman Act, its claim under the NMPDA fails as well.

The plaintiffs also bring unjust enrichment claims under Arkansas, Kentucky, New Mexico, Tennessee, and Texas common law.[12] Each of these claims fails as well. In connection with these claims, the SAC alleges that the Defendants "received higher prices for Course Materials and Inclusive Access Materials" by "engaging in the wrongful conduct described herein." Since the SAC fails to plead that the Defendants engaged in any unlawful conduct, its unjust enrichment claims fail.

The SAC also asserts claims under the *New Mexico Unfair Practices Act ("NMUPA"), N.M. Stat. Ann. §§ 57-12-1, et seq.* and the *Texas Free Enterprise and Antitrust Act of 1983 ("TFEAA"), Tex. Bus. & Com. Code §§ 15.01, et seq.* The NMUPA "does not provide a cause of action for competitive injury claims." *Gandydancer, LLC v. Rock House*

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[11] The Defendants also move to dismiss the plaintiffs' Robinson-Patman Act claims on the ground that digital textbooks are not "commodities" within the meaning of the Act. They describe Inclusive Access as a method of delivering content. This Opinion assumes without deciding that discriminatory pricing of Inclusive Access is subject to redress under the Robinson-Patman Act.

[12] The Arkansas, New Mexico, and Texas unjust enrichment claims are brought against both the Publisher and Retailer Defendants. The Kentucky and Tennessee unjust enrichment claims are directed toward the Publisher Defendants alone.

CGM, LLC, 2019- NMSC 021, 453 P.3d 434, 438 (N.M. 2019). The plaintiffs' claim under the TFEAA must be dismissed because it is derivative of their federal antitrust claims. See *Tex. Bus. & Com. Code § 15.04* (providing that the TFEAA "shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes"). Counts 10 through 14 are therefore dismissed.

IV. Claims Against EPEG

The Publisher Defendants[13] move to dismiss **[*51]** the claims against EPEG, counts 1, 3, and 9, on the ground that the SAC fails to plausibly allege two related issues: that EPEG has the capacity to be sued and that EPEG has a legal existence such that there is jurisdiction over it.[14] The SAC asserts that EPEG is an "unincorporated association recognized as a legal entity under the laws of Delaware and federal law."[15]

Under *Rule 17(b)(3)*, the capacity of an unincorporated association to be sued is determined in the first instance by the law of the state where the court is located, except that an "unincorporated association with no such capacity under that state's law may . . . be sued in its common name to enforce a substantive right existing under the United States Constitution or laws." *Fed. R. Civ. P. 17(b)(3)*. The purpose of the federal law exception in *Rule 17(b)(3)(A)* is to "prevent[] state law from frustrating the enforcement of federal substantive rights where state law does not grant unincorporated associations and partnerships the capacity to be sued." *E.E.O.C. v. St. Francis Xavier Parochial Sch., 77 F. Supp. 2d 71, 77 (D.D.C. 1999)*, aff'd sub nom. *E.E.O.C. v. St. Francis Xavier Sch., 254 F.3d 315, 349 U.S. App. D.C. 238 (D.C. Cir. 2000)*.[16]

Delaware law grants unincorporated associations the capacity to bring suits and to be **[*52]** sued. Under Delaware law, "[a]n unincorporated association of persons[] . . . using a common name may sue and be sued in such common name . . . ." *Agar v. Judy, 151 A.3d 456, 488 (Del. Ch. 2017)* (quoting *10 Del. C. § 3904*).

The question next becomes which body of law governs the determination of whether EPEG is in fact an unincorporated association capable of being sued. The Court of Appeals for the Second Circuit does not appear to have addressed this question, but the Ninth Circuit has explained that federal law should govern this determination. "For purposes of [*Rule 17(b)(3)(A)*], the determination of what constitutes an 'unincorporated association' is a question of federal law" when the action arises under federal law. *Comm. for Idaho's High Desert, Inc. v. Yost, 92 F.3d 814, 820 (9th Cir. 1996)* (citation omitted); *Sierra Ass'n for Env't v. F.E.R.C., 744 F.2d 661, 662 (9th Cir. 1984)*. See also *Goldenberg v. Indel, Inc., 741 F. Supp. 2d 618, 628 (D.N.J. 2010)*.; *In re Magnetic Audiotape Antitrust Litig., No. 99 CIV. 1580 (LMM), 2000 U.S. Dist. LEXIS 18197, 2000 WL 1855119, at *1 (S.D.N.Y. Dec. 19, 2000)*; *St. Francis, 77 F. Supp. 2d at 76*. Federal courts have generally defined an unincorporated association as "a voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common

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[13] The Publisher Defendants, as members of EPEG, have standing to move to dismiss the claims against EPEG. The plaintiffs' argument to the contrary is rejected.

[14] Counts 1, 3, and 9 plead that EPEG violated *§ 1 of the Sherman Act*.

[15] Where a legal standard is supplied by state law, Delaware law will be applied since this lawsuit was filed in Delaware. "An MDL transferee court 'applies the substantive state law, including choice-of-law rules, of the jurisdiction in which the action was filed.'" *In re Mirena IUD Prods. Liab. Litig., 29 F. Supp. 3d 345, 350 (S.D.N.Y. 2014)* (quoting *Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir. 1993)*). In any event, the parties' briefs assume that Delaware rather than New York law controls. This "implied consent . . . is sufficient to establish choice of law." *Santalucia v. Sebright Transp., Inc., 232 F.3d 293, 296 (2d Cir. 2000)* (citation omitted).

[16] The Advisory Committee Notes to *Rule 17(b)* identify Charles E. Clark, A New Federal Civil Procedure - II. Pleadings and Parties, 44 Yale L.J 1291 (1935) and *United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 975 (1922)*, among other authorities, as influences on the Rule's development. Advisory Committee Notes of 1937, *Rule 17, Fed. R. Civ. P.* In United Mine Workers, the Supreme Court "treated a defendant unincorporated association as an entity, though the state court of the forum had earlier refused to recognize the association as such." Clark, A New Federal Civil Procedure, 44 Yale L.J. at 1316. Professor Clark notes with approval that the rule of United Mine Workers is "desirable" when a "federal right would otherwise be impaired." Id.

objective." *Yost, 92 F.3d at 820* (citation omitted); *Goldenberg, 741 F. Supp. 2d at 628*; *In re Magnetic, 2000 U.S. Dist. LEXIS 18197, 2000 WL 1855119, at *1*.

The SAC pleads that EPEG is a voluntary association formed by the mutual consent of the Publisher Defendants for the purpose of engaging in anti-counterfeiting efforts. The SAC has plausibly plead that EPEG is an unincorporated association, and as such, it has the capacity to be sued under **[*53]** Delaware law.[17] Nonetheless, because the SAC fails to plead an agreement with respect to any of the Defendants, the plaintiffs' claims against EPEG, counts 1, 3, and 9, are dismissed.

Delaware law controlled the question of whether EPEG was an unincorporated association such that it had the capacity to sue and be sued, it appears that the SAC adequately pleads such existence. The Delaware cases that have addressed this issue do not describe the minimum characteristics that an organization must have to qualify as an unincorporated association. See, e.g., *Furek v. Univ. of Delaware, 594 A.2d 506 (Del. 1991)*; *Twardowski v. Jester, 39 Del. Ch. 221, 163 A.2d 242 (1960)*. While both of these decisions found the entity under consideration to have a more formal existence than EPEG has, neither purports to set out the boundaries for this determination. They do not supply a basis to find therefore that Delaware law is in conflict with federal law on this issue.

Conclusion

The Defendants' January 22, 2021 motions to dismiss are granted. The Clerk of Court shall close the case and enter judgment for the Defendants.

Dated: New York, **[*54]** New York

June 14, 2021

/s/ Denise Cote

DENISE COTE

United States District Judge

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[17] The Defendants' motion to dismiss pursuant to *Rule 12(b)(2)* for lack of personal jurisdiction is denied. The SAC has pleaded sufficient facts to make a prima facie showing of jurisdiction. See *SPV Osus Ltd. v. UBS AG, 882 F.3d 333, 342 (2d Cir. 2018)*. The plaintiffs' assertion that the *Rule 12(b)(2)* motion is untimely is rejected.

O.M. v. Nat'l Women's Soccer League, LLC

United States District Court for the District of Oregon

June 17, 2021, Decided; June 17, 2021, Filed

Case No. 3:21-cv-00683-IM

Reporter
544 F. Supp. 3d 1063 *; 2021 U.S. Dist. LEXIS 113666 **; 2021 WL 2478439

O.M., by and through her parent and guardian, K.C. MOULTRIE, Plaintiff, v. NATIONAL WOMEN'S SOCCER LEAGUE, LLC, Defendant.

Prior History: *O.M. v. Nat'l Women's Soccer League, LLC, 2021 U.S. Dist. LEXIS 97840, 2021 WL 2073475 (D. Or., May 24, 2021)*

Core Terms

teams, Age Rule, players, League, preliminary injunction, soccer, injunction, procompetitive, exemption, collective bargaining agreement, non-statutory, antitrust, initial burden, entities, negotiated, changes, public interest, irreparable, enjoining, bargain, compete, argues, rights, terms, mandatory injunction, bargaining process, rule of reason, soccer player, anticompetitive, unilateral

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

The analysis courts apply to assess whether a preliminary injunction should be granted is substantially identical to the analysis used to assess whether to grant a temporary restraining order.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Grounds for Injunctions, Balance of Hardships**

A plaintiff seeking a preliminary injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] Grounds for Injunctions, Balance of Hardships

A stronger showing of one element of the preliminary injunction test may offset a weaker showing of another. Thus, when the balance of hardships tips sharply towards the plaintiff, the plaintiff need demonstrate only serious questions going to the merits.

Civil Procedure > Remedies > Injunctions > Mandatory Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] Injunctions, Mandatory Injunctions

The already high standard for granting a preliminary injunction is further heightened when the type of injunction sought is a mandatory injunction. To obtain a mandatory injunction, a plaintiff must establish that the law and facts clearly favor her position, not simply that she is likely to succeed. In plain terms, mandatory injunctions should not issue in doubtful cases.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN5[] Sherman Act, Claims

15 U.S.C.S. § 1 of the Sherman Anti-Trust Act prohibits any contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. 15 U.S.C.S. § 1. It is intended to prohibit actions that unreasonably restrain competition.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN6[] Sherman Act, Claims

The rule of reason is the accepted standard for testing whether an alleged restraint on competition imposed by a sports league violates the Sherman Anti-Trust Act, 15 U.S.C.S. § 1.

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

Evidence > Burdens of Proof > Allocation

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

Evidence > Burdens of Proof > Burden Shifting

HN7[] Per Se Rule Tests, Manifestly Anticompetitive Effects

To determine whether a restraint violates the rule of reason, courts apply a three-step, burden-shifting framework. The plaintiff bears the initial burden to show that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries this burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes that showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

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

Evidence > Burdens of Proof > Allocation

HN8[] Conspiracy to Monopolize, Elements

A plaintiff must establish three elements to meet its initial burden that the challenged restraint has a substantial effect that harms consumers in the relevant market: (1) the existence of a contract, combination, or conspiracy among two or more separate entities that; (2) unreasonably restrains trade; and (3) affects interstate or foreign commerce.

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

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

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

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

HN9[] Per Se Rule Tests, Manifestly Anticompetitive Effects

A plaintiff can show that an agreement unreasonably restrains trade either directly or indirectly. Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market. Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition.

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

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

HN10[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Justifications offered under the rule of reason may be considered only to the extent that they tend to show that, on balance, the challenged restraint enhances competition. Procompetitive benefits are those that improve or broaden competitive choices and include increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice. Cost-cutting, promoting social or ethical values, public policy, and public safety are not considered procompetitive benefits.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN11[] **Scope, Exemptions**

The United States Supreme Court has recognized that a proper accommodation between the congressional policy favoring collective bargaining under the National Labor Relations Act and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. The Court has explained that the purpose behind the exemption is to effectuate the intent of the United States Congress to prevent judicial use of ***antitrust law*** to resolve labor disputes.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN12[] **Sherman Act, Claims**

In the context of professional sports leagues, courts have consistently held that rules created through or incorporated by collective bargaining agreements between leagues and their respective players unions are immune from scrutiny under the Sherman Anti-Trust Act, 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN13[] **Scope, Exemptions**

To give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.

Antitrust & Trade Law > Sherman Act > Claims

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

HN14[] **Sherman Act, Claims**

The mere existence of an agreement outlining the process through which collective bargaining might begin in the future does not insulate the Age Rule from scrutiny under 15 U.S.C.S. § 1 of the Sherman Anti-Trust Act.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN15[] **Grounds for Injunctions, Irreparable Harm**

To obtain a preliminary injunction, a plaintiff must also demonstrate that irreparable injury is likely in the absence of an injunction.

Counsel: [1]** For Plaintiff: Eric R. Mills, Joshua M. Sasaki, Bruce L. Campbell, Max Louis Forer, Erica A. Clausen, Miller Nash LLP, Portland, OR; Dennis Stewart, Michelle J. Looby, Mickey L. Stevens, Gustafson Gluek pLLC, Minneapolis, MN; Leonard B. Simon, Law Offices of Leonard B. Simon P.C., San Diego, CA.

For Defendant: Christopher S. Yates, Elizabeth H. Yandell, Latham & Watkins LLP, San Francisco, CA; David H. Angeli, Michelle Holman Kerin, Peter D. Hawkes, Angeli Law Group LLC, Portland, OR; Anna M. Rathbun, Latham & Watkins LLP, Washington, DC; Lawrence E. Buterman, Latham & Watkins LLP, New York, NY.

Judges: Karin J. Immergut, United States District Judge.

Opinion by: Karin J. Immergut

Opinion

[*1066] OPINION AND ORDER

IMMERGUT, District Judge.

Before this Court is Plaintiff's Motion for Preliminary Injunction. ECF 2. Plaintiff, a 15-year-old soccer player, seeks an order from this Court enjoining Defendant National Women's Soccer League ("NWSL" or "the League") from enforcing against her its rule that all players in the League must be at least 18 years old (the "Age Rule"). This Court previously granted Plaintiff's request for a temporary restraining order ("TRO") prohibiting enforcement of the Age Rule pending this Court's ruling **[**2]** on the Motion for Preliminary Injunction. ECF 47; ECF 77.

The preliminary injunction sought by Plaintiff is limited in its scope. Plaintiff seeks an order prohibiting the League from preventing her from playing professional soccer on an NWSL team through its requirement that players be at least 18 years of age. ECF 1 at 12; ECF 2 at 31. As Plaintiff clarified during the hearing on the TRO, she does not seek an order requiring the NWSL or any of its member teams to hire her. Further, Plaintiff does not seek an order that interferes with negotiations between the NWSL and the NWSL Players Association ("NWSL PA"). Plaintiff concedes that if the NWSL and the NWSL PA enter into a collective bargaining agreement ("CBA") that includes an age restriction, she could lose her ability to play for the NWSL until she is age-eligible and would not have grounds to challenge such a restriction. ECF 1 at 12; ECF 50 at 17. Through this preliminary injunction, Plaintiff solely seeks the opportunity to compete for a position on a professional soccer team free from the Age Rule's restrictions.

On May 4, 2021, Plaintiff filed her complaint and a motion for a temporary restraining order and preliminary injunction. **[**3]** ECF 1; ECF 2. Plaintiff's complaint challenges the NWSL's Age Rule as a violation of the *Sherman Anti-Trust Act, 15 U.S.C. § 1*, and argues that "[t]he ten teams in the NWSL have agreed among themselves, and with the League, not to contract with soccer players under the age of 18, without regard to their talents or their ability to compete in the League." ECF 1 at ¶¶ 3, 40. Plaintiff further argues that the NWSL is the only option for women to play professional soccer in the United States, and that the Age Rule serves no legitimate business justification or procompetitive purpose. *Id.* at ¶¶ 41, 44. Plaintiff points to the absence of any age restrictions for male soccer players to demonstrate that the public interest in open competition and the equal treatment of women favors an injunction in this case. *Id.* at ¶ 45. Plaintiff asserts that keeping her out of the NWSL, which has already started its season of games, "will continually slow her development, delay her improvement, and more generally impede her career as a soccer player." *Id.* at ¶ 35.

On May 20, 2021, this Court held a hearing on Plaintiff's TRO motion at which both sides had an opportunity to present **[*1067]** additional evidence and argument.[1] ECF 46. On May 24, 2021, this **[**4]** Court granted Plaintiff's TRO motion, finding that Plaintiff had presented facts and legal support sufficient to warrant a TRO enjoining the enforcement of the Age Rule against her until a preliminary injunction hearing could be held. ECF 47. After this Court entered the TRO against Defendant, five of the NWSL's ten teams submitted discovery requests for Plaintiff's rights. ECF 80, Levine Decl., at ¶ 3.[2]

After this Court issued the TRO, the parties submitted supplemental briefing addressing whether the Court should issue a preliminary injunction. Plaintiff submitted briefing and multiple declarations containing NWSL governing documents and agreements which she obtained through discovery. ECF 50; ECF 54; ECF 55; ECF 67; ECF 68; ECF 69. Defendant submitted briefing and a declaration from the NWSL's general counsel containing League documents and outlining Defendant's efforts to comply with the TRO. ECF 62; ECF 63.

On June 7, 2021, this Court held a hearing on Plaintiff's preliminary injunction motion. ECF 77. The parties again had the opportunity to present additional evidence and argument. The Court heard testimony from Plaintiff which it found credible. Defendant presented no new evidence **[**5]** at the preliminary injunction hearing.

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[1] The Court adopted the parties' proposed briefing schedule leading up to the TRO hearing. ECF 23. In its Response to Plaintiff's TRO Motion, Defendant argued that the *Norris LaGuardia Act's* ("NLGA") anti-injunction provision, *29 U.S.C. § 101*, divested this Court of jurisdiction to issue an injunction in this case unless it conformed with the NLGA's enumerated special requirements. ECF 35 at 25-30. This Court ordered the parties to provide briefing addressing whether the NLGA's anti-injunction provision applied to this case. ECF 40. On May 19, 2021, this Court issued an order finding that the NLGA's anti-injunction provision does not apply to this case. ECF 45.

[2] In her supplemental memorandum in support of the preliminary injunction motion, Plaintiff alleges that Defendant has violated the spirit of the Court's TRO by adopting new "age-related barriers" to delay Plaintiff's entry into the League. ECF 50 at 12-17. Plaintiff therefore requests that this Court enter a preliminary injunction that not only enjoins Defendant from enforcing the Age Rule but also (1) prohibits Defendant "from implementing any new measure, policy, or rule that has the effect of delaying or impeding the processing and approval of the Thorns' discovery request for [Plaintiff]; (2) prohibits [Defendant] from revoking or interfering with [Plaintiff's] status as a contracted player unless and until the League enters into a final CBA that includes an Age Rule which [Plaintiff] does not meet, and (3) expressly retains jurisdiction to monitor [Defendant's] compliance with the preliminary injunction and to award appropriate relief for any noncompliance." *Id.* at 17. Defendant denies that it has violated the spirit of the TRO and insists that it "is making all reasonable efforts to accommodate [Plaintiff's] desire to join a team as expeditiously as possible." ECF 62 at 29. This afternoon, Plaintiff filed supplemental briefing and a declaration from counsel alleging further misconduct by Defendant and seeking intervention from this Court. ECF 85; ECF 86. Defendant has not yet had an opportunity to respond. Whether Defendant has violated the spirit of the TRO is an issue distinct from whether this Court should grant Plaintiff's request for a preliminary injunction. Accordingly, the Court considers only whether Plaintiff has met her burden of establishing that the preliminary injunction she sought in her complaint and the initial motion, ECF 2, is warranted at this time. Once Defendant has been afforded the opportunity to respond to Plaintiff's latest allegations, this Court will decide whether further action is required to ensure Defendant's compliance with its orders.

HN1[] The analysis courts apply to assess whether a preliminary injunction should be granted is "substantially identical" to the analysis used to assess whether to grant a TRO. *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 839 n.7 **[*1068]** (9th Cir. 2001)*. As explained further below, the evidence presented since this Court granted the TRO does not alter its conclusion that the NWSL and its ten teams have agreed to impose the NWSL's age restriction which excludes female competitors from the only available professional soccer opportunity in the United States because they are under 18, regardless of talent, maturity, strength, and ability. Indeed, the new evidence in the record bolsters this Court's prior conclusion that the NWSL and its member teams are not a single entity under the *Sherman Act*. Rather, the teams function as separate economic entities competing for player rights. The NWSL's governing documents also support the Court's prior conclusion that the NWSL and its member teams formed an agreement to enforce the Age Rule, and that the member teams play a central role in its continued implementation.

This Court again finds that Defendant has not presented any compelling procompetitive reasons to justify its anticompetitive **[**6]** policy, nor has it shown that eliminating the Age Rule will cause any concrete injury to the NWSL. Instead, Defendant repeats its previously rejected procompetitive justifications for the Age Rule, which strain credulity.

Accordingly, this Court adopts its reasoning and conclusions from the TRO opinion, ECF 47, and supplements its findings as explained below. This Court again finds that the merits clearly favor Plaintiff's position, that she will be irreparably harmed if it does not grant the preliminary injunction, and that the balance of equities and the public interest strongly favor affording girls in the United States the same opportunities as boys. Plaintiff's Motion for Preliminary Injunction, ECF 2, is GRANTED.[3]

STANDARDS

HN2[] A plaintiff seeking a preliminary injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Winter v. NRDC, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*. A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." **[**7]** *Id. at 22*.

The Ninth Circuit applies a "sliding scale" approach in considering the factors outlined in *Winter*. *HN3*[] A stronger showing of one element of the preliminary injunction test may offset a weaker showing of another. *All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-35 (9th Cir. 2011)*. Thus, when the balance of hardships "tips sharply towards the plaintiff," the plaintiff need demonstrate only "serious questions going to the merits." *Id. at 1135* (internal quotation marks omitted).

HN4[] Finally, the already high standard for granting a preliminary injunction is further heightened when the type of injunction sought is a "mandatory injunction." *Garcia v. Google, Inc., 786 F.3d 733, 740 (9th Cir. 2015)*. To obtain a mandatory injunction, a plaintiff must "establish that the law and facts *clearly favor* her position, not simply that she is likely to succeed." *Id.* (emphasis in original). "In plain terms, mandatory injunctions should not issue in 'doubtful cases.'" *Id.* (quoting **[*1069]** *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust, 636 F.3d 1150, 1160 (9th Cir. 2011)*).

DISCUSSION

A. Form of Injunction

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[3] In granting the preliminary injunction motion, this Court is not making a final ruling on the merits of this case. The preliminary injunction will remain in place until there is a trial on the merits, which this Court is willing to oversee on an expedited schedule.

Defendant argues that Plaintiff seeks a mandatory injunction and thus this Court must apply the heightened standard described above. ECF 35 at 24-25. Plaintiff asserts that her requested relief can be properly categorized as prohibitory. ECF 41 at 12. At the TRO stage, this Court found that Plaintiff met her burden under either standard **[**8]** and assumed without finding that Plaintiff sought a mandatory injunction. ECF 47 at 5. This Court again finds that Plaintiff has met her burden under either the mandatory or prohibitory injunction standard, and therefore assumes without deciding that Plaintiff requests a mandatory injunction.

B. Preliminary Injunction Factors

1. The Law and the Facts Clearly Favor Plaintiff's Position

Plaintiff alleges Defendant's Age Rule violates *§ 1 of the Sherman Act, 15 U.S.C. § 1*. ECF 1 at ¶ 3. ***HN5***[] Section 1 prohibits any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. It "is intended to prohibit actions that unreasonably restrain competition." *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1033 (9th Cir. 2005)* (citing *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*).

a. Rule of Reason Analysis

HN6[] In its TRO, this Court analyzed the Age Rule under the "rule of reason," which is the accepted standard for testing whether an alleged restraint on competition imposed by a sports league violates *§ 1 of the Sherman Act*. ECF 47 at 5-12; *see also Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 202-03, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*; *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc., 883 F.3d 32, 41 (2d Cir. 2018)* ("Regulation of league sports is a textbook example of when the rule of reason applies.").

HN7[] To determine whether a restraint violates the rule of reason, courts apply a three-step, burden-shifting framework. *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018)*. The plaintiff bears the initial burden to show that the challenged restraint **[**9]** has a substantial anticompetitive effect that harms consumers in the relevant market. *Id.* If the plaintiff carries this burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. *Id.* If the defendant makes that showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. *Id.*

i. Anticompetitive Effect

HN8[] A plaintiff must establish three elements to meet its initial burden: "(1) the existence of a contract, combination, or conspiracy among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstate or foreign commerce." *Jack Russell Terrier, 407 F.3d at 1033*.

At the TRO stage, this Court found that Plaintiff met her initial burden. ECF 47 at 6-11. In so finding, the Court rejected Defendant's arguments that the NWSL and its member teams are a single entity incapable of conspiring under *§ 1 of the Sherman Act* and that Plaintiff had not shown evidence of "concerted action" between separate entities sufficient to establish a conspiracy. *Id.*

[*1070] In her supplemental briefing on the preliminary injunction motion, Plaintiff provides additional evidence further supporting the **[**10]** Court's conclusion that the NWSL and its member teams are not a single entity for the purposes of a *§ 1* claim. ECF 50 at 4-7. Specifically, Defendant points to provisions of the Operating Agreement attached to the NWSL's LLC Agreement which demonstrate ways in which the NWSL and its member teams function as separate economic entities competing for player rights:

• Each Team Operator is required to deposit a "Collateral Deposit" amount in cash into a Collateral Account, in order to ensure each and every team operator meets its financial obligations. ECF 55 at 169-70.

• Each Team Operator has the exclusive right to operate a team in its Home Territory. *Id.* at 168.

• Each Team Operator's accounting and operational records, annual budget, and business and marketing plan are kept confidential from other Team Operators and parties. *Id.* at 168-69.

• Each Team Operator is authorized to (i) license Local Broadcast Rights and sell Local Commercial Affiliations, (ii) sell tickets to home games, (iii) market and sell NWSL-sponsored, local promotional programs, (iv) sell and collect revenues generated by stadium concessions, parking, and other revenue-providing sources under the Stadium Lease, (v) sell **[**11]** team-branded merchandise in the Home Territory or via team website, and (vi) manage, promote, and sell and take other actions in connection with team-branded soccer camps, clinics, training, and academy and local soccer club affiliations. *Id.* at 170.

• Each Team Operator is also authorized to negotiate agreements with players, conduct all local marketing within the Home Territory, and take other such actions on behalf of NWSL as NWSL shall expressly authorize. *Id.*

• Each Team Operator hires its own general manager or executive in charge of soccer operations for the Team, head coach and assistant coaches, and local office staff and other personnel to carry out its obligations under the form Operating Agreement. *Id.* at 171.

• Each Team Operator selects players for the team from NWSL's pool of eligible players pursuant to the rules and procedures established by the NWSL. *Id.* at 171.

• The Team Operator is entitled to, upon the prior written consent of the NWSL, trade players to other NWSL teams pursuant to rules and procedures established by NWSL. *Id.*

• Each Team Operator must carry its own insurance. *Id.*

• Each Team Operator executes its own Stadium Lease and pays all rent, expenses, and any **[**12]** other fees, penalties, and interest under the lease. *Id.* at 172.

• The Team Operator is required to provide uniforms and certain types of equipment. *Id.* at 173.

• Each Team Operator is required to pay all travel expenses associated with players and team staff. *Id.* at 175-76.

• Each Team Operator is required to pay for players' per-diem expenses and any ticket deductions. *Id.*

This additional evidence bolsters this Court's prior finding that the NWSL and **[*1071]** its member teams are not a single entity under § 1 of the Sherman Act despite the League's legal classification as one LLC.

In its response brief addressing the instant motion, Defendant again argues that the Age Rule does not constitute concerted action between the NWSL and its member teams because the NWSL unilaterally created the rule before any member teams existed and the member teams merely accepted the Age Rule. ECF 62 at 10-15. Defendant relies on *Toscano v. Prof'l Golfers' Ass'n, 258 F.3d 978 (9th Cir. 2001)*. In *Toscano*, the Ninth Circuit found that no concerted action had been shown between the PGA Tour and "local sponsors" who organized the tournament events because the local sponsors "merely accepted the PGA Tour's rules and regulations and played no role in creating or enforcing them." *Toscano, 258 F.3d at 983*. Unlike *Toscano*, the **[**13]** member teams here play a central role in enforcing the Age Rule. No athlete can play in the League unless one of the member teams chooses her through one of the League's player allocation methods. Further, while there was no evidence in *Toscano* that the "sponsors [had] an economic interest in the eligibility and participation rules challenged," the member teams here are direct competitors in the market for players that the Age Rule restricts. *Toscano v. PGA Tour, Inc., 70 F.*

Supp. 2d 1109, 1117 n. 10 (E.D. Cal. 1999), *aff'd sub nom.* Toscano v. Professional Golfers Ass'n, 258 F.3d 978 (9th Cir. 2001).[4]

The member teams' agreement to enforce the Age Rule is evidenced by the fact that they each must annually reaffirm in Rules Compliance Affidavits that they are not aware of any violation of "NWSL rules related to . . . any aspect of the NWSL competition." ECF 63-1 at 2. Further, each member team has also signed the NWSL Team Operating Agreement. ECF 67 at 4. The Operating Agreement states that the members' operation of a team in the League is "[s]ubject to the provisions of this Agreement and the Operating Rules" and that the member teams "shall (i) abide by the Operating Rules; [and] (ii) enforce all Operating Rules concerning the designation and conduct of the Team Staff and Players assigned to the Team." **[**14]** ECF 55 at 963, 966. "Operating Rules" are defined as "such procedures, policies, standards, requirements, guidelines and rules of general application to all NWSL team operators as may be duly adopted or modified by NWSL and expressed to the team operators and in effect from time to time." *Id.* at 986. Both the Rules Compliance Affidavits and the Operating Agreement constitute affirmative agreements by the member teams to abide by and enforce the NWSL's rules, including its Age Rule.

Finally, although Defendant argues that Plaintiff "has not made any showing that the NWSL or its members took any action on the Age Rule after its LLC agreement was amended to join its member-operators," ECF 62 at 15, the record shows that the NWSL and its member teams have enforced the Age Rule by prohibiting otherwise eligible players from playing in the League until they turned 18, even when they already had a signed contract,[5] ECF 52 at ¶¶ 9-10. Moreover, the fact that five **[*1072]** of the NWSL's ten teams submitted discovery requests for Plaintiff's rights after this Court enjoined enforcement of the Age Rule further demonstrates that the teams had previously been enforcing its restriction. ECF 80 at ¶ 3.

In sum, **[**15]** Plaintiff has established concerted action between the NWSL and its member teams to enforce the Age Rule, restricting the market for players in which the member teams compete. Thus, this Court again finds that Plaintiff has satisfied the first step of her initial burden by showing "the existence of a contract, combination, or conspiracy among two or more separate entities." *See* Jack Russell Terrier, 407 F.3d at 1033.

Next, Defendant repeats its argument that Plaintiff cannot satisfy the second step of her initial burden because she has not established that the Age Rule "unreasonably restrains trade." ECF 62 at 15; *see also* Jack Russell Terrier, 407 F.3d at 1033. ***HN9***[] A plaintiff can show that an agreement unreasonably restrains trade either directly or indirectly. Ohio, 138 S. Ct. at 2284. "Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market." *Id.* (internal quotation marks, citations and alterations omitted). "Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition." *Id.* (citations omitted).

In its TRO, this Court found that as the only professional women's soccer league in the United States, **[**16]** the NWSL clearly has market power in the labor market for women professional soccer players. ECF 47 at 9. The Court then found that the Age Rule unreasonably harmed competition in the same way the NBA's "four years from high school" rule did in *Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971) injunction reinstated by* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 91 S. Ct. 672, 28 L. Ed. 2d 206 (1971). ECF 47 at 10-11.

Defendant now points to *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712 (6th Cir. 2003)*, to argue that Plaintiff has shown that the Age Rule causes harm only to her personally rather than to competition in the market.[6] ECF 62 at 15-17. Defendant's argument is based on a flawed reading of *Plymouth*

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[4] Defendant also argues that *Jack Russell Terrier* is "instructive." ECF 62 at 13-14. However, that case held that a national breed club and registry and its regional affiliates were incapable of conspiring because, among other things, the JRTCA and its regional affiliates were not alleged to be actual or even potential competitors in the relevant market. Jack Russell Terrier, 407 F.3d at 1035-36. Here, the member teams of the NWSL compete directly with each other for players' services.

[5] The NWSL discovery rule permits a player to be discovered at 17, but she cannot play until she is 18. ECF 52 at ¶ 10.

Whalers. While Defendant suggests that the *Plymouth Whalers* court's determination that there was no harm to competition stemmed from the fact that the plaintiff alleged injury only to himself, the court actually found that the plaintiff failed to define a relevant market and prove that market was being injured by the challenged policy. *Plymouth Whalers, 325 F.3d at 719-20*. The plaintiff there had defined the relevant market as competition among teams in two minor hockey leagues—the Ontario Hockey League (OHL) and Canadian Hockey League **[*1073]** (CHL)—for player services. *Id. at 714-15, 720*. The Sixth Circuit held that the plaintiff alleged insufficient injury to economic competition because the OHL, as an amateur league, limited the **[**17]** amount a player could be paid to schooling expenses and a limited stipend. *Id. at 715, 720*. Accordingly, "the market for player services in the OHL [wa]s not a market that involve[d] economic competition." *Id. at 720*. Additionally, the plaintiff's allegations focused on competition between leagues, rather than amongst teams in a league. Because the OHL and CHL were but two of many hockey leagues, the restriction on competition was minimal.

In contrast to *Plymouth Whalers*, the relevant market here for the services of professional women soccer players involves economic competition. As Plaintiff alleges in her complaint and notes in her briefing, the NWSL's member teams can use Allocation Money to attract and retain players by paying them more than would otherwise be permitted. ECF 1 at ¶ 29; ECF 65 at 11-12. The teams also compete with each other for players' rights through league mechanisms like the NWSL Draft, the discovery process, and the ability to trade players. ECF 1 at ¶ 29; ECF 65 at 11-12. Rather than alleging an impact on amateur athletic competition, Plaintiff alleges that the Age Rule adversely impacts economic competition among the ten professional teams of the NWSL, who all **[**18]** pay and compete economically for the services of prospective professional soccer players. ECF 1 at ¶¶ 29-30, 40-44; *see also* *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 474 (6th Cir. 2005)* (distinguishing between arguments regarding non-economic harm to "quality" of athletic competition and limitations placed on the competition for "players' services" which make that economic market "less competitive").

Defendant also argues that Plaintiff has not shown that the Age Rule impacts competition in the market. ECF 62 at 17. This argument is undermined by the fact that half of the teams in the NWSL put in discovery requests for Plaintiff's rights within days of this Court enjoining the enforcement of the Age Rule. Once the teams were no longer allowed to enforce their anticompetitive agreement, they immediately sought to compete for Plaintiff's services. Accordingly, this Court again finds that Plaintiff has satisfied the second step of her initial burden by showing that the Age Rule unreasonably restrains trade.

Defendant does not contest the Court's prior determination that Plaintiff satisfied the third step of her initial burden by showing that the Age Rule "affects interstate commerce." ECF 47 at 11. Thus, this Court concludes that Plaintiff has made **[**19]** a sufficient showing of all three elements to satisfy her initial burden under the rule of reason.

ii. Procompetitive Rationales

Because Plaintiff has met her initial burden, the burden shifts to Defendant to show a procompetitive rationale for the Age Rule's restraint. *Ohio, 138 S. Ct. at 2284*. The antitrust laws are concerned with competition. ***HN10***[] Accordingly, "[j]ustifications offered under the rule of reason may be considered only to the extent that they tend to show that, on balance, 'the challenged restraint enhances competition.'" *Law v. NCAA, 134 F.3d 1010, 1021 (10th Cir. 1998)* (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 104, 104 S.*

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[6] At the preliminary injunction hearing, counsel for Defendant for the first time argued that this Court could not find that the Age Rule unreasonably restrained trade absent expert testimony from a PhD economist. When asked for authority to support this position, counsel pointed the Court to *United States v. Am. Express Co., 838 F.3d 179 (2d Cir. 2016)* and *Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290 (2d Cir. 2008)*. To start, counsel should not be raising unbriefed arguments for the first time at oral argument. Regardless, the cited cases do not support counsel's position. Neither *Am. Express Co.* nor *Salvino* stand for the proposition that testimony from economists is always required to prove an unreasonable restraint on a relevant market. The relevant market here, the competition for services of professional women soccer players, is controlled by a monopsony, the NWSL. It does not require a PhD in economics to see how an anticompetitive rule promulgated by a monopsony controlling an entire market has market-wide impact.

Ct. 2948, 82 L. Ed. 2d 70 (1984)). Procompetitive benefits are those that improve or broaden competitive choices and include increasing output, creating operating efficiencies, making a new product available, enhancing product or **[*1074]** service quality, and widening consumer choice. *Id. at 1023*; *see also* *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1257 (9th Cir. 2020)* (citing *O'Bannon v. Nat'l Collegiate Athletic Ass'n ("O'Bannon II"), 802 F.3d 1049, 1072 (9th Cir. 2015)*); *Bd. of Regents, 468 U.S. at 102* (expanding consumer choice is procompetitive). Cost-cutting, promoting social or ethical values, public policy, and public safety are not considered procompetitive benefits. *Law, 134 F.3d at 1022-23*; *F.T.C. v. Superior Ct. Trial. Laws. Assn., 493 U.S. 411, 423-24, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)*; *F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447, 462-64, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*; *Bd. of Regents, 468 U.S. at 117*; *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 695-96, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*.

At the TRO stage, this Court found that Defendant failed to show a procompetitive rationale for the Age Rule's restraint on the market. ECF 47 at 11-12. Defendant had offered justifications for the Age Rule which focused on **[**20]** cost reduction without explaining how its proffered rationales improve or broaden competitive choices in any way. *Id.* In its preliminary injunction briefing supported by a new declaration from the NWSL's general counsel, Defendant again focuses on cost-cutting as the rationale behind the Age Rule. ECF 62 at 17-20; ECF 63 at ¶ 8. Defendant argues that by limiting employment to players who have reached the legal age of majority, the NWSL avoids expending the "significant time and resources" that would be required to comply with laws aimed at protection of minors. ECF 62 at 18.

Defendant claims that the Age Rule is designed to create "operating efficiencies" but fails to demonstrate how the rule increases efficiency. *Id.* Defendant does not attempt to quantify the costs of having a minor on a team nor identify whether such costs would be borne by the NWSL or the team that decides to hire the minor. Instead, Defendant speculates that allowing minors to play "could further increase administrative costs" which "could lead to reduced output." ECF 63 at ¶ 8. This Court finds that Defendant's justifications for the Age Rule are not only speculative, but they also do not show that the Age Rule **[**21]** enhances competition. Accordingly, this Court concludes that Defendant has failed to meet its burden of demonstrating a procompetitive rationale for the Age Rule and Plaintiff has shown that the law and facts clearly favor her position that it violates *§ 1 of the Sherman Act*.

b. The Non-statutory Labor Exemption

Defendant also repeats its previously rejected argument that the Age Rule falls under the non-statutory labor exemption to the antitrust laws. ECF 62 at 22-26. ***HN11***[] The Supreme Court has recognized "that a proper accommodation between the congressional policy favoring collective bargaining under the [National Labor Relations Act] and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)* (citing *Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*). The Court has explained that the purpose behind the exemption is to effectuate the intent of Congress to prevent "judicial use of ***antitrust law*** to resolve labor disputes." *Brown v. Pro Football, Inc., 518 U.S. 231, 236, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)*.

[*1075] ***HN12***[] In the context of professional sports leagues, courts have consistently held that rules created through or incorporated by collective bargaining agreements between leagues and their respective players unions **[**22]** are immune from scrutiny under *§ 1 of the Sherman Act*. *See* *Wood v. National Basketball Asso., 809 F.2d 954, 963 (2d Cir. 1987)*; *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 474-75 (6th Cir. 2005)*; *Clarett v. Nat'l Football League, 369 F.3d 124, 142-43 (2d Cir. 2004)*. The NWSL and the NWSL PA have never entered into a collective bargaining agreement.

In its TRO, this Court rejected Defendant's argument that the Age Rule became immunized from antitrust scrutiny once Defendant recognized the NWSL PA as an exclusive bargaining agent and began the collective bargaining process. ECF 47 at 12-15. First, the Court found that Defendant had not identified a single case where the non-statutory labor exemption applied to a regulation created before the recognition of a union, and which had not been subsequently included or implicitly incorporated into a collective bargaining agreement. *Id.* This Court reasoned that extending the non-statutory exemption as Defendant urged would mean that employers could fully insulate themselves from antitrust scrutiny by simply recognizing a union and commencing the (often years-long) collective bargaining process. *Id.* Second, this Court found that nothing about the injunction Plaintiff seeks would interfere with the NWSL PA's ability to collectively bargain over the terms or conditions of employment with Defendant. *Id.* Plaintiff acknowledges in her complaint that an injunction prohibiting **[**23]** Defendant from enforcing its current Age Rule against Plaintiff in no way prevents the NWSL PA and Defendant from including a new age rule into a collective bargaining agreement, at which point it could be lawfully enforced against Plaintiff. *See* ECF 1 at ¶ 3, 12-13 (requesting injunctive relief preventing Age Rule enforcement "unless and until such Age Rule is contained in a fully effective collective bargaining agreement that would apply to her, as permitted by law").

At the preliminary injunction hearing, this Court asked Defendant's counsel for his best case supporting the notion that the non-statutory labor exemption can apply to a regulation created before the recognition of a union which had not been subsequently included or implicitly incorporated into a collective bargaining agreement. Counsel referred the Court to *Brown v. Pro Football, Inc., 518 U.S. 231, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)* and *Zimmerman v. Nat'l Football League, 632 F. Supp. 398 (D.D.C. 1986)*. Neither case helps Defendant. Both *Zimmerman* and *Brown* were cases where a collective bargaining agreement had previously been reached between the relevant employers and unions. ***HN13***[] Further, *Brown* stands for the proposition that "to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition **[**24]** imposed *through the bargaining process* must be shielded from antitrust sanctions." *518 U.S. at 237* (emphasis added). There, after the expiration of a collective bargaining agreement between football club owners and a players' union, the parties bargained for a new agreement until they reached impasse. *Id. at 234-35*. The owners then agreed among themselves, but not with the union, to implement the terms of their own last best bargaining offer. *Id.* The Supreme Court found that the non-statutory exemption applied because "impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process," and therefore the challenged policy that the owners implemented "grew out of, and was directly related to, the **[*1076]** lawful operation of the bargaining process." *Id. at 239, 250*.

Unlike *Brown*, where the challenged policy was imposed during the collective bargaining process itself via a recognized labor negotiation tactic, the Age Rule was created years before the NWSL's recognition of the NWSL PA and the commencement of collective bargaining. As Plaintiff recognizes, her requested relief may be displaced by any contrary collective bargaining agreement term. ECF 1 at 12. Thus, this Court enjoining the Age Rule's **[**25]** enforcement does not interfere with the NWSL and the NWSL PA's ability to meaningfully collectively bargain. *See id. at 250* ("Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.").

Similarly, in *Zimmerman*, the court held that the non-statutory exemption applied to shield a supplemental draft mechanism from antitrust scrutiny where the NFL and the NFLPA specifically negotiated and agreed to the terms of the draft itself. *632 F. Supp. at 406*. Here, it is undisputed that the neither the Age Rule nor any of the NWSL's current rules have been negotiated with and agreed to by the NWSL PA. Thus, Defendant's cases are inapposite.

Defendant also repeats its previously rejected argument that the "Voluntary Recognition Agreement" ("VRA") between the NWSL and the NWSL PA places the Age Rule beyond antitrust scrutiny. ECF 62 at 23-25; *see also* ECF 38-3 at 1-3. As noted in the TRO, that agreement reflects that it is not the result of collective **[**26]** bargaining negotiations, which had not yet begun in November 2018. ***HN14***[] The mere existence of an agreement outlining the process through which collective bargaining might begin in the future does not insulate the Age Rule from *§ 1* scrutiny.

Defendant insists that the VRA implicates the non-statutory exemption because under its terms and the *National Labor Relations Act ("NLRA")*, it may no longer make any unilateral changes to the League's status quo with respect to terms and conditions of employment without negotiating with the NWSL PA. ECF 62 at 24-25. Defendant has provided no evidence or legal authority demonstrating that the Age Rule is a term or condition of employment which must be negotiated under the VRA or the NLRA before it can make unilateral changes. First, this Court doubts whether the Age Rule is a term or condition of employment subject to any obligation to bargain that the NLRA imposes on Defendant. *See, e.g., Star Trib., 295 NLRB 543, 546 (1989)* (pre-employment requirements imposed by management on non-employee applicants are "not encompassed within the statutory duty to bargain about terms and conditions of employment of the employer's employees in an appropriate unit"). Second, the plain language in the VRA does not impose any obligations on Defendant **[**27]** before making unilateral changes to the NWSL's rules. The VRA provides that during the pre-bargaining period, the NWSL reserves the unilateral right to make changes to the terms and conditions of employment. ECF 38-3 at 3 (requiring the League to give "notice of any unilateral material changes" to terms and consider input but stating that "NWSL's ability to implement such changes" will not be delayed or limited). After the expiration of the pre-bargaining period, the VRA provides that Defendant's ability to make changes to the terms and conditions of employment is limited solely by any relevant provisions of the NLRA. **[*1077]** *Id.* Defendant does not identify any NLRA provisions which would prevent it from making changes to the Age Rule. Finally, Defendant has cited no cases finding that a voluntary recognition agreement between an employer and a union on its own brings all of the employer's preexisting rules under the umbrella of the non-statutory labor exemption.

Thus, this Court again finds that the non-statutory labor exemption does not apply to this case.

2. Irreparable Harm

HN15[] To obtain a preliminary injunction, Plaintiff must also "demonstrate that irreparable injury is likely in the absence **[**28]** of an injunction." *Winter, 555 U.S. at 22* (emphasis omitted). In its TRO, this Court found that Plaintiff had shown that she has the requisite skills and is ready to play professional soccer, that the Age Rule is impeding her development as a soccer player in an irreversible manner, that the career of a professional soccer player is short, and that there are no substitutes to actual professional competition to help her realize her full potential. ECF 47 at 16-17.

Defendant challenges the Court's irreparable harm finding by arguing that because no player on the U.S. Women's National Team ever played in the NWSL as a minor, "there is no evidence that employment with the NWSL before the age of 18 is necessary for a soccer player to excel in the sport or to compete on a national team." ECF 62 at 20-21. This argument misses the mark. Plaintiff does not contend that playing in the NWSL as a minor is necessary to achieve her goal of playing on the National Team. Rather, she asserts that the Age Rule interferes with that goal by requiring her to wait several years before she can play professional soccer. Defendant's argument that Plaintiff is not harmed by the barrier it creates because the women who came before **[**29]** her were also subjected to the barrier is nonsensical.

Thus, this Court again finds that Plaintiff has shown that she will suffer irreparable injury in the absence of an injunction.

3. The Balance of the Equities and the Public Interest

In its TRO, this Court found that the threat of irreparable injury to Plaintiff was not counterbalanced by any cognizable harm to Defendant from a temporary injunction, and that the public interest weighed in favor of granting the requested injunction. ECF 47 at 17-18. Specifically, the Court found that Defendant provided insufficient evidence of the hardships it would allegedly suffer in the face of an injunction, and that enjoining the Age Rule serves the public interest because it both preserves free and open competition and promotes gender equity. *Id.* The Court noted that the NWSL's comparable men's league in the United States, MLS, has no age limit and employs players under 18. ECF 47 at 18 (citing ECF 1 at ¶ 4). As of the date Plaintiff's Complaint was filed, more than half of MLS teams allegedly had one or more players on their roster under the age of 18. ECF 1 at ¶ 4. In other words, the only thing currently standing between Plaintiff and her aspiration **[**30]** to be a professional soccer player in this country is her gender.

Defendant did not challenge this Court's findings on the balance of the equities or the public interest. Accordingly, this Court finds Plaintiff has satisfied these elements of the preliminary injunction analysis.

By satisfying all four of the elements outlined above, Plaintiff has met her burden of establishing that a preliminary injunction is appropriate in this case until a trial on the merits can be held. Accordingly, Plaintiff's Motion for Preliminary Injunction, ECF 2, is GRANTED as follows:

[*1078] PRELIMINARY INJUNCTION

1. Defendant and its members, officers, agents, servants, employees, attorneys, teams, and all persons in active concert or participation with them are enjoined from enforcing the Age Rule against Plaintiff, unless and until such Age Rule is contained in a fully effective collective bargaining agreement that would apply to her, as permitted by law.

IT IS SO ORDERED.

DATED this 17th day of June 2021.

/s/ Karin J. Immergut

Karin J. Immergut

United States District Judge

NCAA v. Alston

Supreme Court of the United States

March 31, 2021, Argued; June 21, 2021, Decided[*]

Nos. 20-512 and 20-520.

Reporter

141 S. Ct. 2141 *; 210 L. Ed. 2d 314 **; 2021 U.S. LEXIS 3123 ***; 28 Fla. L. Weekly Fed. S 915; 2021 WL 2519036

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Petitioner (No. 20-512) v. SHAWNE ALSTON, et al. AMERICAN ATHLETIC CONFERENCE, et al., Petitioners (No. 20-520) v. SHAWNE ALSTON, et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [*1]** ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Alston v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 958 F.3d 1239, 2020 U.S. App. LEXIS 15789, 2020 WL 2519475 (9th Cir. Cal., May 18, 2020)

Disposition: *958 F. 3d 1239*, affirmed.

Core Terms

student-athletes, athletic, district court, benefits, schools, sports, procompetitive, restrictions, student athlete, antitrust, football, limits, conferences, consumer demand, anti trust law, consumer, awards, education-related, rule of reason, amateurism, injunction, Sherman Act, anticompetitive, courts, questions, league, achievement, basketball, salaries, internships

LexisNexis® Headnotes

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

HN1[] **Per Se Rule & Rule of Reason, Sherman Act**

In view of the common law and the law in this country when the Sherman Act was passed, the phrase "restraint of trade" is best read to mean undue restraint. Determining whether a restraint is undue for purposes of the Sherman Act presumptively calls for what the United States Supreme Court has described as a rule of reason analysis. That manner of analysis generally requires a court to conduct a fact-specific assessment of market power and market structure to assess a challenged restraint's actual effect on competition. Always, the goal is to distinguish between

[*] Together with No. 20-520, *American Athletic Conference et al.* v. *Alston et al.*, also on certiorari to the same court.

restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

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

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

HN2[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which the United States Supreme Court has described as a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's actual effect on competition—especially its capacity to reduce output and increase price.

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

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

HN3[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

For purposes of the Sherman Act, the United States Supreme Court has suggested that sometimes it can determine the competitive effects of a challenged restraint in the twinkling of an eye. That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.

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

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

HN4[] **Per Se Rule & Rule of Reason, Per Se Violations**

For purposes of the Sherman Act, at one end of the competitive spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. If the exercise of market power is not plausible, the challenged practice is legal. Unless firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign or beneficial. At the other end of the competitive spectrum, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful per se or rejected after only a quick look. Recognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—the United States Supreme Court takes special care not to deploy these condemnatory tools until the Court has amassed considerable experience with the type of restraint at issue and can predict with confidence that it would be invalidated in all or almost all instances.

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

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

HN5[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

For purposes of the Sherman Act, that some restraints are necessary to create or maintain a league sport does not mean all aspects of elaborate interleague cooperation are. While a quick look will often be enough to approve the restraints necessary to produce a game, a fuller review may be appropriate for others.

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

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

Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. If those market realities change, so may the legal analysis.

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

HN7[] **Private Actions, Sherman Act**

The statutory policy of the Sherman Act is one of competition and it precludes inquiry into the question whether competition is good or bad.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

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

HN8[] **Scope, Exemptions**

The orderly way to temper the Sherman Act's policy of competition is by legislation and not by court decision. A party is free to argue that, because of the special characteristics of its particular industry, it should be exempt from the usual operation of the antitrust laws—but that appeal is properly addressed to Congress. Nor has Congress been insensitive to such requests. It has modified the antitrust laws for certain industries in the past, and it may do so again in the future. But until Congress says otherwise, the only law it has asked courts to enforce is the Sherman Act, and that law is predicated on one assumption alone—competition is the best method of allocating resources in the Nation's economy.

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

Evidence > Burdens of Proof > Allocation

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

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

Evidence > Burdens of Proof > Burden Shifting

HN9[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

When describing the rule of reason, the United States Supreme Court has sometimes spoken of a three-step, burden-shifting framework as a means for distinguishing between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest. The plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect. Should the plaintiff carry that burden, the burden then shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. What is required to assess whether a challenged restraint harms competition can vary depending on the circumstances.

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

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

HN10[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The whole point of the rule of reason is to furnish an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint to ensure that it unduly harms competition before a court declares it unlawful. The factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

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

HN11[] **Per Se Rule & Rule of Reason, Sherman Act**

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

Antitrust & Trade Law > Sherman Act > Claims

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

HN12[] **Sherman Act, Claims**

Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. After all, even under the best of circumstances, applying the antitrust laws can be difficult—and mistaken condemnations of legitimate business arrangements are especially costly, because they chill the very procompetitive conduct the antitrust laws are designed to protect. Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. To know that the Sherman Act prohibits only unreasonable restraints of trade is thus to know that attempts to meter small deviations is not an appropriate antitrust function.

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

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

HN13[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

However framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits. To be sure, the two questions can be collapsed into one, since a legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative.

Antitrust & Trade Law > Sherman Act > Claims

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

HN14[] **Sherman Act, Claims**

Firms deserve substantial latitude to fashion agreements that serve legitimate business interests—agreements that may include efforts aimed at introducing a new product into the marketplace. But none of that means a party can relabel a restraint as a product feature and declare it immune from Sherman Act §1, 15 U.S.C.S. § 1, scrutiny. In any suit, the district court has to determine whether the defendants' agreements harmed competition and whether any procompetitive benefits associated with their restraints could be achieved by substantially less restrictive alternative means.

Antitrust & Trade Law > Sherman Act > Scope

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

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

HN15[] **Antitrust & Trade Law, Sherman Act**

Antitrust courts must give wide berth to business judgments before finding liability. Judges must be sensitive to the possibility that the continuing supervision of a highly detailed decree could wind up impairing rather than enhancing competition. Costs associated with ensuring compliance with judicial decrees may exceed efficiencies gained; the decrees themselves may unintentionally suppress procompetitive innovation and even facilitate collusion. Judges must be wary, too, of the temptation to specify the proper price, quantity, and other terms of dealing—cognizant that they are neither economic nor industry experts. Judges must be open to reconsideration and modification of decrees in light of changing market realities, for what they see may vary over time. And throughout courts must have a healthy respect for the practical limits of judicial administration: An antitrust court is unlikely to be an effective day-to-day enforcer of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. Nor should any court impose a duty that it cannot explain or adequately and reasonably supervise. In short, judges make for poor central planners and should never aspire to the role.

Antitrust & Trade Law > Sherman Act > Remedies

Governments > Courts > Authority to Adjudicate

HN16[] **Sherman Act, Remedies**

When it comes to fashioning an antitrust remedy, caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to set sail on a sea of doubt.

Lawyers' Edition Display

Decision

[314]** District court properly applied rule of reason analysis in finding that National Collegiate Athletic Association violated Sherman Act, 15 U.S.C.S. § 1, by limiting education-related benefits schools could offer student-athletes; restraints were found to be stricter than necessary to achieve demonstrated procompetitive benefits.

Summary

Overview: HOLDINGS: [1]-The district court did not err in finding that the National Collegiate Athletic Association (NCAA) violated the Sherman Act, 15 U.S.C.S. § 1, by limiting the education-related benefits schools could offer student-athletes, such as rules limiting scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships. The district court properly applied a rule of reason analysis and nowhere required the NCAA to show that its compensation rules constituted the least restrictive means of preserving consumer demand, and it was only after finding that the restraints were stricter than necessary to achieve demonstrated procompetitive benefits that the district court declared a violation of the Sherman Act.

Outcome: Judgment affirmed. Unanimous decision; 1 concurrence.

Headnotes

[315]**

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > SHERMAN ACT -- UNDUE RESTRAINT -- RULE OF REASON > Headnote:
LEdHN1.[] 1.

In view of the common law and the law in this country when the Sherman Act was passed, the phrase “restraint of trade” is best read to mean undue restraint. Determining whether a restraint is undue for purposes of the Sherman Act presumptively calls for what the United States Supreme Court has described as a rule of reason analysis. That manner of analysis generally requires a court to conduct a fact-specific assessment of market power and market structure to assess a challenged restraint's actual effect on competition. Always, the goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > SHERMAN ACT -- RULE OF REASON > Headnote:
LEdHN2.[] 2.

Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which the United States Supreme Court has described as a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's actual effect on competition—especially its capacity to reduce output and increase price.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > SHERMAN ACT -- COMPETITIVE EFFECTS > Headnote:
LEdHN3.[] 3.

For purposes of the Sherman Act, the United States Supreme Court has suggested that sometimes it can determine the competitive effects of a challenged restraint in the twinkling of an eye. That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.

[316]**

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > SHERMAN ACT -- QUICK LOOK > Headnote:
LEdHN4.[] 4.

For purposes of the Sherman Act, at one end of the competitive spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. If the exercise of market power is not plausible, the challenged practice is legal. Unless firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign or beneficial. At the other end of the competitive spectrum, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful per se or rejected after only a quick look. Recognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—the United States Supreme Court takes special care not to deploy these condemnatory tools until the Court has amassed considerable experience with the type of restraint at issue and can predict with confidence that it would be invalidated in all or almost all instances.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > SHERMAN ACT -- SPORTS LEAGUES > Headnote:
LEdHN5.[] 5.

For purposes of the Sherman Act, that some restraints are necessary to create or maintain a league sport does not mean all aspects of elaborate interleague cooperation are. While a quick look will often be enough to approve the restraints necessary to produce a game, a fuller review may be appropriate for others.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 19 > ANTITRUST ANALYSIS -- MARKET REALITIES > Headnote:
LEdHN6.[] 6.

Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. If those market realities change, so may the legal analysis.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 6 > SHERMAN ACT -- STATUTORY POLICY > Headnote:
LEdHN7.[] 7.

The statutory policy of the Sherman Act is one of competition and it precludes inquiry into the question whether competition is good or bad.

Courts § 141 > ANTITRUST EXEMPTIONS -- LEGISLATIVE REMEDY > Headnote:
LEdHN8.[] 8.

The orderly way to temper the Sherman Act's policy of competition is by legislation and not by court decision. A party is free to argue that, because of the special characteristics of its particular industry, it should be exempt from the usual operation of the antitrust laws—but that appeal is properly addressed to Congress. Nor has Congress been insensitive to such requests. It has modified the antitrust laws for certain industries in the past, and it may do so again in the future. But until Congress says otherwise, the only law it has asked courts to enforce is the Sherman Act, and that law is predicated on one assumption alone—competition is the best method of allocating resources in the Nation's economy.

[317]**

Evidence § 343.5 > RULE OF REASON -- BURDEN SHIFTING > Headnote:
LEdHN9.[] 9.

When describing the rule of reason, the United States Supreme Court has sometimes spoken of a three-step, burden-shifting framework as a means for distinguishing between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest. The plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect. Should the plaintiff carry that burden, the burden then shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. What is required to assess whether a challenged restraint harms competition can vary depending on the circumstances.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > RULE OF REASON -- CIRCUMSTANCES OF CASE > Headnote:
LEdHN10.[] 10.

The whole point of the rule of reason is to furnish an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint to ensure that it unduly harms competition before a court declares it unlawful. The factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > ***ANTITRUST LAW*** -- LEGITIMATE BUSINESS PURPOSES > Headnote:
LEdHN11.[] 11.

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

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > ***ANTITRUST LAW*** -- APPROPRIATE FUNCTION > Headnote:
LEdHN12.[] 12.

Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. After all, even under the best of circumstances, applying the antitrust laws can be difficult—and mistaken condemnations of legitimate business arrangements are especially costly, because they chill the very procompetitive conduct the antitrust laws are designed to protect. Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. To know that the Sherman Act prohibits only unreasonable restraints of trade is thus to know that attempts to meter small deviations is not an appropriate antitrust function.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > RULE OF REASON -- SUBSTANTIALLY LESS RESTRICTIVE MEANS > Headnote:
LEdHN13.[] 13.

However framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits. To be sure, the two questions can be collapsed into one, since a legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative.

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Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > SHERMAN ACT -- SUBSTANTIALLY LESS RESTRICTIVE MEANS > Headnote:
LEdHN14.[] 14.

Firms deserve substantial latitude to fashion agreements that serve legitimate business interests—agreements that may include efforts aimed at introducing a new product into the marketplace. But none of that means a party can relabel a restraint as a product feature and declare it immune from Sherman Act §1, 15 U.S.C.S. § 1, scrutiny. In any suit, the district court has to determine whether the defendants' agreements harmed competition and whether any procompetitive benefits associated with their restraints could be achieved by substantially less restrictive alternative means.

Courts § 141 > ***ANTITRUST LAW*** -- ROLE OF COURT > Headnote:
LEdHN15.[] 15.

Antitrust courts must give wide berth to business judgments before finding liability. Judges must be sensitive to the possibility that the continuing supervision of a highly detailed decree could wind up impairing rather than enhancing competition. Costs associated with ensuring compliance with judicial decrees may exceed efficiencies gained; the decrees themselves may unintentionally suppress procompetitive innovation and even facilitate collusion. Judges must be wary, too, of the temptation to specify the proper price, quantity, and other terms of dealing—cognizant that they are neither economic nor industry experts. Judges must be open to reconsideration and modification of decrees in light of changing market realities, for what they see may vary over time. And throughout courts must have a healthy respect for the practical limits of judicial administration: An antitrust court is unlikely to be an effective day-to-day enforcer of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. Nor should any court impose a duty that it cannot explain or adequately and reasonably supervise. In short, judges make for poor central planners and should never aspire to the role.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 74 > ANTITRUST REMEDY -- LIMITS > Headnote:
LEdHN16.[] 16.

When it comes to fashioning an antitrust remedy, caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to set sail on a sea of doubt.

Syllabus

[319]** Colleges and universities across the country have leveraged sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. That profitable enterprise relies on “amateur” student-athletes who compete under horizontal restraints that restrict how the schools may compensate them for their play. The National Collegiate Athletic Association (NCAA) issues and enforces these rules, which restrict compensation for student-athletes in various ways. These rules depress compensation for at least some student-athletes below what a competitive market would yield.

Against this backdrop, current and former student-athletes brought this antitrust lawsuit challenging the NCAA's restrictions on compensation. Specifically, they alleged that the NCAA's rules violate *§ 1 of the Sherman Act*, which prohibits “contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce.” *15 U. S. C. § 1*. Key facts were undisputed: The NCAA and its members have agreed to compensation limits for student-athletes; the NCAA enforces these limits on its member-schools; and these compensation limits affect interstate commerce. **[***2]** Following a bench trial, the district court issued a 50-page opinion that refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court found unlawful and thus enjoined certain NCAA rules limiting the education-related benefits schools may make available to student-athletes. Both sides appealed. The Ninth Circuit affirmed in full, holding that the district court “struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports.” *958 F. 3d 1239, 1263*. Unsatisfied with that result, the NCAA asks the Court to find that all of its existing restraints on athlete compensation survive antitrust scrutiny. The student-athletes have not renewed their across-the-board challenge and the Court thus does not consider the **[**320]** rules that remain in place. The Court considers only the subset of NCAA rules restricting education-related benefits that the district court enjoined. The Court does so based on the uncontested premise that the NCAA enjoys monopsony control in the relevant market—such that **[***3]** it is capable of depressing wages below competitive levels for student-athletes and thereby restricting the quantity of student-athlete labor.

Held: The district court's injunction is consistent with established antitrust principles. Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___.

(a) The courts below properly subjected the NCAA's compensation restrictions to antitrust scrutiny under a "rule of reason" analysis. In the Sherman Act, Congress tasked courts with enforcing an antitrust policy of competition on the theory that market forces "yield the best allocation" of the Nation's resources. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U. S. 85, 104, n. 27, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. The Sherman Act's prohibition on restraints of trade has long been understood to prohibit only restraints that are "undue." *Ohio v. American Express Co., 585 U. S. ___, ___, 138 S. Ct. 2274, 201 L. Ed. 2d 678*. Whether a particular restraint is undue "presumptively" turns on an application of a "rule of reason analysis." *Texaco, Inc. v. Dagher, 547 U. S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1*. That manner of analysis generally requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition." *American Express, 585 U. S., at ___, 138 S. Ct. 2274, 201 L. Ed. 2d 678*. *Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

(1) The NCAA maintains the courts below should have analyzed its compensation restrictions under an extremely deferential standard because it is a joint venture among members who must collaborate **[***4]** to offer consumers the unique product of intercollegiate athletic competition. Even assuming the NCAA is a joint venture, though, it is a joint venture with monopoly power in the relevant market. Its restraints are appropriately subject to the ordinary rule of reason's fact-specific assessment of their effect on competition. *American Express, 585 U. S., at ___, 138 S. Ct. 2274, 201 L. Ed. 2d 678*. Circumstances sometimes allow a court to determine the anticompetitive effects of a challenged restraint (or lack thereof) under an abbreviated or "quick look." See *Dagher, 547 U. S., at 7, n. 3, 126 S. Ct. 1276, 164 L. Ed. 2d 1*; *Board of Regents, 468 U. S., at 109, n. 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. But not here. *Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

(2) The NCAA next contends that the Court's decision in *Board of Regents* expressly approved the NCAA's limits on student-athlete compensation. That is incorrect. The Court in *Board of Regents* did not analyze the lawfulness of the NCAA's restrictions on student-athlete compensation. Rather, that case involved an antitrust challenge to the NCAA's restraints on televising games—an antitrust challenge the Court sustained. Along the way, the Court commented on the NCAA's critical role in maintaining the revered tradition of amateurism in college sports as one "entirely **[**321]** consistent with the goals of the Sherman Act." *Id., at 120, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. But that sort of passing comment on an issue not **[***5]** presented is not binding, nor is it dispositive here. *Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

(3) The NCAA also submits that a rule of reason analysis is inappropriate because its member schools are not "commercial enterprises" but rather institutions that exist to further the societally important noncommercial objective of undergraduate education. This submission also fails. The Court has regularly refused these sorts of special dispensations from the Sherman Act. See *FTC v. Superior Court Trial Lawyers Assn., 493 U. S. 411, 424, 110 S. Ct. 768, 107 L. Ed. 2d 851*. The Court has also previously subjected the NCAA to the Sherman Act, and any argument that "the special characteristics of [the NCAA's] particular industry" should exempt it from the usual operation of the antitrust laws is "properly addressed to Congress." *National Soc. of Professional Engineers v. United States, 435 U. S. 679, 689, 98 S. Ct. 1355, 55 L. Ed. 2d 637*. *Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

(b) The NCAA's remaining attacks on the district court's decision lack merit. *Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

(1) The NCAA contends that the district court erroneously required it to prove that its rules are the least restrictive means of achieving the procompetitive purpose of preserving consumer demand for college sports. True, a least restrictive means test would be erroneous and overly intrusive. But the district court nowhere expressly or effectively required the NCAA to show that its rules met that standard. **[***6]** Rather, only after finding the NCAA's restraints "patently and inexplicably stricter than is necessary" did the district court find the restraints unlawful. Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___.

(2) The NCAA contends the district court should have deferred to its conception of amateurism instead of "impermissibly redefin[ing]" its "product." But a party cannot declare a restraint "immune from § 1 scrutiny" by relabeling it a product feature. *American Needle, Inc. v. National Football League, 560 U. S. 183, 199, n. 7, 130 S. Ct. 2201, 176 L. Ed. 2d 947*. Moreover, the district court found the NCAA had not even maintained a consistent definition of amateurism. Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___.

(3) The NCAA disagrees that it can achieve the same pro-competitive benefits using substantially less restrictive alternatives and claims the district court's injunction will "micromanage" its business. Judges must indeed be sensitive to the possibility that the "continuing supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U. S. 398, 415, 124 S. Ct. 872, 157 L. Ed. 2d 823*. The district court's injunction honored these principles, though. The court enjoined only certain restraints—and only after finding both that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand, and further that this **[***7]** course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive **[**322]** benefits as the NCAA's current rules. Finally, the court's injunction preserves considerable leeway for the NCAA, while individual conferences remain free to impose whatever rules they choose. To the extent the NCAA believes meaningful ambiguity exists about the scope of its authority, it may seek clarification from the district court. Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___.

958 F. 3d 1239, affirmed.

Counsel: Seth P. Waxman argued the cause for petitioners.

Jeffrey L. Kessler argued the cause for respondents.

Elizabeth B. Prelogar argued the cause for the United States, as amicus curiae, by special leave of court.

Judges: Gorsuch, J., delivered the opinion for a unanimous Court. Kavanaugh, J., filed a concurring opinion.

Opinion by: GORSUCH

Opinion

[*2147] JUSTICE **GORSUCH** delivered the opinion of the Court.

In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces "yield the best allocation" of the Nation's resources. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U. S. 85, 104, n. 27, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. The plaintiffs before us brought this lawsuit alleging that the National Collegiate Athletic Association (NCAA) and certain of its member institutions violated this policy by agreeing to restrict the compensation colleges and universities may offer the student-athletes who play for their teams. After amassing a vast record and conducting an exhaustive trial, the district court issued a 50-page opinion **[***8]** that cut both ways. The court refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court struck down NCAA rules limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships. Before us, the student-athletes do not challenge the district court's judgment. But the NCAA does. In essence, it seeks immunity from the normal operation of the antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints. We took this case to consider those objections.

[*2148] I

A

From the start, American colleges and universities have had a complicated relationship with sports and money. In 1852, students from Harvard and Yale participated in what many regard as the Nation's first intercollegiate competition—a boat race at Lake Winnipesaukee, New Hampshire. But this was no pickup match. A railroad executive sponsored the event to promote train travel to the picturesque lake. T. Mendenhall, The Harvard-Yale Boat Race 1852-1924, pp. 15-16 (1993). He offered **[***9]** the competitors an all-expenses-paid vacation with lavish prizes—along with unlimited alcohol. See A. Zimbalist, Unpaid Professionals 6-7 (1999) (Zimbalist); Rushin, Inside the Moat, Sports Illustrated, Mar. 3, 1997. The event filled the resort with "life and excitement," N. Y. Herald, Aug. 10, 1852, p. 2, col. 2, and one student-athlete described the " 'junket' " as an experience " 'as unique and irreproducible as the Rhodian colossus,' " Mendenhall, Harvard-Yale Boat Race, at 20.

Life might be no "less than a boat race," Holmes, On Receiving the Degree **[**323]** of Doctor of Laws, Yale University Commencement, June 30, 1886, in Speeches by Oliver Wendell Holmes, p. 27 (1918), but it was football that really caused college sports to take off. "By the late 1880s the traditional rivalry between Princeton and Yale was attracting 40,000 spectators and generating in excess of $25,000 . . . in gate revenues." Zimbalist 7. Schools regularly had "graduate students and paid ringers" on their teams. *Ibid.*

Colleges offered all manner of compensation to talented athletes. Yale reportedly lured a tackle named James Hogan with free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards from **[***10]** his games—and a job as a cigarette agent for the American Tobacco Company. *Ibid.*; see also Needham, The College Athlete, McClure's Magazine, June 1905, p. 124. The absence of academic residency requirements gave rise to " 'tramp athletes' " who "roamed the country making cameo athletic appearances, moving on whenever and wherever the money was better." F. Dealy, Win at Any Cost 71 (1990). One famous example was a law student at West Virginia University—Fielding H. Yost—"who, in 1896, transferred to Lafayette as a freshman just in time to lead his new teammates to victory against its arch-rival, Penn." *Ibid.* The next week, he "was back at West Virginia's law school." *Ibid.* College sports became such a big business that Woodrow Wilson, then President of Princeton University, quipped to alumni in 1890 that " 'Princeton is noted in this wide world for three things: football, baseball, and collegiate instruction.' " Zimbalist 7.

By 1905, though, a crisis emerged. While college football was hugely popular, it was extremely violent. Plays like the flying wedge and the players' light protective gear led to 7 football fatalities in 1893, 12 deaths the next year, and 18 in 1905. *Id.*, at 8. President **[***11]** Theodore Roosevelt responded by convening a meeting between Harvard, Princeton, and Yale to review the rules of the game, a gathering that ultimately led to the creation of what we now know as the NCAA. *Ibid.* Organized primarily as a standard-setting body, the association also expressed a view at its founding about compensating college athletes—admonishing that "[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession." Intercollegiate Athletic Association of the United States Constitution By-Laws, Art. VII, §3 (1906); see also Proceedings of the Eleventh Annual Convention of the National **[*2149]** Collegiate Athletic Association, Dec. 28, 1916, p. 34.

Reality did not always match aspiration. More than two decades later, the Carnegie Foundation produced a report on college athletics that found them still "sodden with the commercial and the material and the vested interests that these forces have created." H. Savage, The Carnegie Foundation for the Advancement of Teaching, American College Athletics Bull. 23, p. 310 (1929). Schools across the country sought to leverage sports **[***12]** to bring in revenue, attract attention, boost enrollment, and raise money from alumni. The University of California's athletic revenue was over $480,000, while Harvard's football revenue alone came in at $429,000. *Id*., at 87. College football was "not a student's game"; it was an "organized **[**324]** commercial enterprise" featuring athletes with "years of training," "professional coaches," and competitions that were "highly profitable." *Id*., at viii.

The commercialism extended to the market for student-athletes. Seeking the best players, many schools actively participated in a system "under which boys are offered pecuniary and other inducements to enter a particular college." *Id*., at xiv-xv. One coach estimated that a rival team "spent over $200,000 a year on players." Zimbalist 9. In 1939, freshmen at the University of Pittsburgh went on strike because upperclassmen were reportedly earning more money. Crabb, The Amateurism Myth: A Case for a New Tradition, *28 Stan. L. & Pol'y Rev. 181, 190 (2017)*. In the 1940s, Hugh McElhenny, a halfback at the University of Washington, "became known as the first college player 'ever to take a cut in salary to play pro football.' " Zimbalist 22-23. He reportedly said: " '[A] wealthy guy puts big bucks **[***13]** under my pillow every time I score a touchdown. Hell, I can't afford to graduate.' " *Id*., at 211, n. 17. In 1946, a commentator offered this view: "[W]hen it comes to chicanery, double-dealing, and general undercover work behind the scenes, big-time college football is in a class by itself." Woodward, Is College Football on the Level?, Sport, Nov. 1946, Vol. 1, No. 3, p. 35.

In 1948, the NCAA sought to do more than admonish. It adopted the "Sanity Code." Colleges Adopt the 'Sanity Code' To Govern Sports, N. Y. Times, Jan. 11, 1948, p. 1, col. 1. The code reiterated the NCAA's opposition to "promised pay in any form." Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Congress, 2d Sess., pt. 2, p. 1094 (1978). But for the first time the code also authorized colleges and universities to pay athletes' tuition. *Ibid.* And it created a new enforcement mechanism—providing for the "suspension or expulsion" of "proven offenders." Colleges Adopt 'Sanity Code,' N. Y. Times, p. 1, col. 1. To some, these changes sought to substitute a consistent, above-board compensation system for the varying under-the-table schemes that **[***14]** had long proliferated. To others, the code marked "the beginning of the NCAA behaving as an effective cartel," by enabling its member schools to set and enforce "rules that limit the price they have to pay for their inputs (mainly the 'student-athletes')." Zimbalist 10.

The rules regarding student-athlete compensation have evolved ever since. In 1956, the NCAA expanded the scope of allowable payments to include room, board, books, fees, and "cash for incidental expenses such as laundry." *In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1063 (ND Cal. 2019)* (hereinafter D. Ct. Op.). In 1974, the NCAA began permitting paid professionals in one sport to compete on an amateur basis in another. Brief for Historians as *Amici Curiae* 10. In **[*2150]** 2014, the NCAA "announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance." *O'Bannon v. National Collegiate Athletic Assn., 802 F. 3d 1049, 1054-1055 (CA9 2015)*. The 80 member schools of the "Power Five" athletic conferences—the conferences with the highest revenue in Division I—promptly voted to raise their scholarship **[**325]** limits to an amount that is generally several thousand dollars higher than previous limits. *D. Ct. Op., at 1064*.

In recent years, changes have continued. The NCAA has created the "Student Assistance Fund" and **[***15]** the "Academic Enhancement Fund" to "assist student-athletes in meeting financial needs," "improve their welfare or academic support," or "recognize academic achievement." *Id., at 1072*. These funds have supplied money to student-athletes for "postgraduate scholarships" and "school supplies," as well as "benefits that are not related to education," such as "loss-of-value insurance premiums," "travel expenses," "clothing," and "magazine subscriptions." *Id., at 1072, n. 15*. In 2018, the NCAA made more than $84 million available through the Student Activities Fund and more than $48 million available through the Academic Enhancement Fund. *Id., at 1072*. Assistance may be provided in cash or in kind, and there is no limit to the amount any particular student-athlete may receive. *Id., at 1073*. Since 2015, disbursements to individual students have sometimes been tens of thousands of dollars above the full cost of attendance. *Ibid.*

The NCAA has also allowed payments " 'incidental to athletics participation,' " including awards for "participation or achievement in athletics" (like "qualifying for a bowl game") and certain "payments from outside entities" (such as for "performance in the Olympics"). *Id., at 1064, 1071, 1074*. **[***16]** The NCAA permits its member schools to award up to (but no more than) two annual "Senior Scholar Awards" of $10,000 for students to attend graduate school after their athletic eligibility expires. *Id., at 1074*. Finally, the NCAA allows schools to fund travel for student-athletes' family members to attend "certain events." *Id., at 1069*.

Over the decades, the NCAA has become a sprawling enterprise. Its membership comprises about 1,100 colleges and universities, organized into three divisions. *Id., at 1063*. Division I teams are often the most popular and attract the most money and the most talented athletes. Currently, Division I includes roughly 350 schools divided across 32 conferences. See *ibid.* Within Division I, the most popular sports are basketball and football. The NCAA divides Division I football into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision, with the FBS generally featuring the best teams. *Ibid.* The 32 conferences in Division I function similarly to the NCAA itself, but on a smaller scale. They "can and do enact their own rules." *Id., at 1090*.

At the center of this thicket of associations and rules sits a massive business. The NCAA's **[***17]** current broadcast contract for the March Madness basketball tournament is worth $1.1 billion annually. See *id., at 1077, n. 20*. Its television deal for the FBS conference's College Football Playoff is worth approximately $470 million per year. See *id., at 1063*; Bachman, ESPN Strikes Deal for College Football Playoff, Wall Street Journal, Nov. 21, 2012. Beyond these sums, the Division I conferences earn substantial revenue from regular-season games. For example, the Southeastern Conference (SEC) "made more than $409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding $650 million that **[*2151]** year." *D. Ct. Op., at 1063*. **[**326]** All these amounts have "increased consistently over the years." *Ibid.*

Those who run this enterprise profit in a different way than the student-athletes whose activities they oversee. The president of the NCAA earns nearly $4 million per year. Brief for Players Association of the National Football League et al. as *Amici Curiae* 17. Commissioners of the top conferences take home between $2 to $5 million. *Ibid.* College athletic directors average more than $1 million annually. *Ibid.* And annual salaries for top Division I college **[***18]** football coaches approach $11 million, with some of their assistants making more than $2.5 million. *Id*., at 17-18.

B

The plaintiffs are current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball. They filed a class action against the NCAA and 11 Division I conferences (for simplicity's sake, we refer to the defendants collectively as the NCAA). The student-athletes challenged the "current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services." *D. Ct. Op., at 1062, 1065, n. 5*. Specifically, they alleged that the NCAA's rules violate *§ 1 of the Sherman Act*, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce." *15 U. S. C. § 1*.

After pretrial proceedings stretching years, the district court conducted a 10-day bench trial. It heard experts and lay witnesses from both sides, and received volumes of evidence and briefing, all before issuing an exhaustive decision. In the end, the court found the evidence undisputed on certain points. The NCAA did not "contest evidence showing" that it and its members have agreed to compensation limits on student-athletes; the NCAA **[***19]** and its conferences enforce these limits by punishing violations; and these limits "affect interstate commerce." *D. Ct. Op., at 1066*.

Based on these premises, the district court proceeded to assess the lawfulness of the NCAA's challenged restraints. ***HN1***[] ***LEdHN[1]***[] [1] This Court has "long recognized that in view of the common law and the law in this country when the *Sherman Act* was passed, the phrase 'restraint of trade' is best read to mean 'undue restraint.' " *Ohio v. American Express Co., 585 U. S. ___, ___, 138 S. Ct. 2274, 201 L. Ed. 2d 678, 689 (2018)* (brackets and some internal quotation marks omitted). Determining whether a restraint is undue for purposes of the Sherman Act "presumptively" calls for what we have described as a "rule of reason analysis." *Texaco Inc. v. Dagher, 547 U. S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*; *Standard Oil Co. of N. J. v. United States, 221 U. S. 1, 60-62, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. That manner of analysis generally requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition." *American Express, 585 U. S., at ___-___, 138 S. Ct. 2274, 201 L. Ed. 2d 678* (internal quotation marks omitted). Always, "[t]he goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Ibid.*(brackets and internal quotation marks omitted).

[327]** In applying the rule of reason, the district **[***20]** court began by observing that the NCAA enjoys "near complete dominance of, and exercise[s] monopsony power in, the relevant market"—which it defined as the market for "athletic services in men's and women's Division I basketball and **[*2152]** FBS football, wherein each class member participates in his or her sport-specific market." *D. Ct. Op., at 1097*. The "most talented athletes are concentrated" in the "markets for Division I basketball and FBS football." *Id., at 1067*. There are no "viable substitutes," as the "NCAA's Division I essentially *is* the relevant market for elite college football and basketball." *Id., at 1067, 1070*. In short, the NCAA and its member schools have the "power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance." *Id., at 1070*.

The district court then proceeded to find that the NCAA's compensation limits "produce significant anticompetitive effects in the relevant market." *Id., at 1067*. Though member schools compete fiercely in recruiting student-athletes, the NCAA uses its monopsony power to "cap artificially the compensation offered to recruits." *Id., at 1097*. In a market without the challenged restraints, **[***21]** the district court found, "competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result." *Id., at 1068*. "Student-athletes would receive offers that would more closely match the value of their athletic services." *Ibid.* And notably, the court observed, the NCAA "did not meaningfully dispute" any of this evidence. *Id., at 1067*; see also Tr. of Oral Arg. 31 ("[T]here's no dispute that the—the no-pay-for-play rule imposes a significant restraint on a relevant antitrust market").

The district court next considered the NCAA's procompetitive justifications for its restraints. The NCAA suggested that its restrictions help increase output in college sports and maintain a competitive balance among teams. But the district court rejected those justifications, *D. Ct. Op., at 1070, n. 12*, and the NCAA does not pursue them here. The NCAA 's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports. Admittedly, this asserted benefit accrues to consumers in the NCAA 's seller-side consumer market rather **[***22]** than to student-athletes whose compensation the NCAA fixes in its buyer-side labor market. But, the NCAA argued, the district court needed to assess its restraints in the labor market in light of their procompetitive benefits in the consumer market—and the district court agreed to do so. *Id., at 1098*.

Turning to that task, the court observed that the NCAA's conception of amateurism has changed steadily over the years. See *id., at 1063-1064, 1072-1073*; see also *supra*, at ___ - ___, 210 L. Ed. 2d, at ___ - ___. The court noted that the NCAA "nowhere define[s] the nature of the amateurism they claim consumers insist upon." *D. Ct. Op., at 1070*. And, given all this, the court struggled to ascertain for itself "any coherent definition" of the term, *id., at 1074*, noting the testimony of a former SEC commissioner that he's **[**328]** " 'never been clear on . . . what is really meant by amateurism.' " *Id., at 1070-1071*.

Nor did the district court find much evidence to support the NCAA's contention that its compensation restrictions play a role in consumer demand. As the court put it, the evidence failed "to establish that the challenged compensation rules, in and of themselves, have any direct connection to consumer demand." *Id., at 1070*. The court observed, for example, that the NCAA's "only **[***23]** economics expert on the issue of consumer demand" did not "study any standard measures of consumer demand" but instead simply "interviewed people connected with the NCAA and its schools, who were chosen for him by defense **[*2153]** counsel." *Id., at 1075*. Meanwhile, the student-athletes presented expert testimony and other evidence showing that consumer demand has increased markedly despite the new types of compensation the NCAA has allowed in recent decades. *Id., at 1074, 1076*. The plaintiffs presented economic and other evidence suggesting as well that further increases in student-athlete compensation would "not negatively affect consumer demand." *Id., at 1076*. At the same time, however, the district court did find that one particular aspect of the NCAA's compensation limits "may have some effect in preserving consumer demand." *Id., at 1082*. Specifically, the court found that rules aimed at ensuring "student-athletes do not receive unlimited payments unrelated to education" could play some role in product differentiation with professional sports and thus help sustain consumer demand for college athletics. *Id., at 1083*.

The court next required the student-athletes to show that "substantially less restrictive alternative rules" existed that "would achieve the **[***24]** same procompetitive effect as the challenged set of rules." *Id., at 1104*. The district court emphasized that the NCAA must have "ample latitude" to run its enterprise and that courts "may not use antitrust laws to make marginal adjustments to broadly reasonable market restraints." *Ibid.* (internal quotation marks omitted). In light of these standards, the court found the student-athletes had met their burden in some respects but not others. The court rejected the student-athletes' challenge to NCAA rules that limit athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education. These may be price-fixing agreements, but the court found them to be reasonable in light of the possibility that "professional-level cash payments . . . could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand." *Ibid.*

The court reached a different conclusion for caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships. *Id., at 1088*. On no account, the court found, could such education-related benefits **[***25]** be "confused with a professional athlete's salary." *Id., at 1083*. If anything, they "emphasize that the recipients are students." *Ibid.* Enjoining the NCAA's restrictions on these forms of compensation alone, the court concluded, would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports. *Id., at 1088*.

[329]** The court then entered an injunction reflecting its findings and conclusions. Nothing in the order precluded the NCAA from continuing to fix compensation and benefits unrelated to education; limits on athletic scholarships, for example, remained untouched. The court enjoined the NCAA only from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball. App. to Pet. for Cert. in No. 20-512, p. 167a, ¶1. The court's injunction further specified that the NCAA could continue to limit cash awards for academic achievement—but only so long as those limits are no lower than the cash awards allowed for athletic achievement (currently $5,980 annually). *Id*., at 168a-169a, ¶5; Order Granting Motion for Clarification of Injunction in No. 4:14-md-02541, **[***26]** ECF Doc. 1329, pp. 5-6 (ND Cal., Dec. 30, 2020). The court added that the NCAA and its members were free to propose a definition of compensation or benefits " 'related to education.' " App. to Pet. for Cert. in No. 20-512, at 168a, ¶4. And the court **[*2154]** explained that the NCAA was free to regulate how conferences and schools provide education-related compensation and benefits. *Ibid.* The court further emphasized that its injunction applied only to the NCAA and multi-conference agreements—thus allowing individual conferences (and the schools that constitute them) to impose tighter restrictions if they wish. *Id*., at 169a, ¶6. The district court's injunction issued in March 2019, and took effect in August 2020.

Both sides appealed. The student-athletes said the district court did not go far enough; it should have enjoined all of the NCAA's challenged compensation limits, including those "untethered to education," like its restrictions on the size of athletic scholarships and cash awards. *In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig., 958 F. 3d 1239, 1263 (CA9 2020)*. The NCAA, meanwhile, argued that the district court went too far by weakening its restraints on education-related compensation and benefits. In the end, the court of appeals affirmed in full, explaining its **[***27]** view that "the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports." *Ibid.*

C

Unsatisfied with this result, the NCAA asks us to reverse to the extent the lower courts sided with the student-athletes. For their part, the student-athletes do not renew their across-the-board challenge to the NCAA 's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined.

Before us, as through much of the litigation below, some of the issues most frequently debated in antitrust litigation are uncontested. The parties do not challenge the district court's definition of the relevant market. They do not contest that the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete **[**330]** labor. Nor does the NCAA dispute that its member schools compete fiercely for student-athletes **[***28]** but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer. Put simply, this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control.

Other significant matters are taken as given here too. No one disputes that the NCAA's restrictions *in fact* decrease the compensation that student-athletes receive compared to what a competitive market would yield. No one questions either that decreases in compensation also depress participation by student-athletes in the relevant labor market—so that price and quantity are both suppressed. See 12 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶2011b, p. 134 (4th ed. 2019) (Areeda & Hovenkamp). Nor does the NCAA suggest that, to prevail, the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) market as well as in its buyer-side (or labor) market. See, *e.g.*, *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219, 235, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)*; *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U. S. 312, 321, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)*; 2A Areeda & Hovenkamp ¶352c, pp. 288-289 (2014); 12 *id*., ¶2011a, at 132-134.

[*2155] Meanwhile, the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the **[***29]** consumer market. Some *amici* argue that "competition in input markets is incommensurable with competition in output markets," and that a court should not "trade off " sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one; review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury. Brief for American Antitrust Institute as *Amicus Curiae* 3, 11-12. But the parties before us do not pursue this line.

II

A

With all these matters taken as given, we express no views on them. Instead, we focus only on the objections the NCAA *does* raise. Principally, it suggests that the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis. In the NCAA's view, the courts should have given its restrictions at most an "abbreviated deferential review," Brief for Petitioner in No. 20-512, p. 14, or a " 'quick look,' " Brief for Petitioners in No. 20-520, p. 18, before approving them.

The NCAA offers a few reasons why. Perhaps dominantly, it argues that it is a joint venture and that collaboration among its members is necessary if they are to offer consumers the **[***30]** benefit of intercollegiate athletic competition. We doubt little of this. There's no question, for example, that many "joint ventures are calculated to enable firms to do something more cheaply or better than they did it before." 13 Areeda & Hovenkamp ¶2100c, at 7. And the fact that joint ventures can have such procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively. See **[**331]** *Dagher, 547 U. S., at 7, 126 S. Ct. 1276, 164 L. Ed. 2d 1*; *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U. S. 1, 22-23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*.

But even assuming (without deciding) that the NCAA is a joint venture, that does not guarantee the foreshortened review it seeks. ***HN2***[] ***LEdHN[2]***[] [2] Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which (again) we have described as "a fact-specific assessment of market power and market structure" aimed at assessing the challenged restraint's "actual effect on competition"—especially its capacity to reduce output and increase price. *American Express, 585 U. S., at ___-___, 138 S. Ct. 2274, 201 L. Ed. 2d 678* (internal quotation marks omitted).

Admittedly, the amount of work needed to conduct a fair assessment of these questions can vary. As the NCAA observes, ***HN3***[] ***LEdHN[3]***[] [3] this Court has suggested that sometimes we can determine the competitive effects of a challenged restraint in the " 'twinkling **[***31]** of an eye.' " *Board of Regents, 468 U. S., at 110, n. 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70* (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981)); *American Needle, Inc. v. National Football League, 560 U. S. 183, 203, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*. That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.

HN4[] ***LEdHN[4]***[] [4] At one end of the spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. In **[*2156]** *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F. 2d 210, 253 U.S. App. D.C. 142 (CADC 1986)*, for example, Judge Bork explained that the analysis could begin and end with the observation that the joint venture under review "command[ed] between 5.1 and 6% of the relevant market." *Id., at 217*. Usually, joint ventures enjoying such small market share are incapable of impairing competition. Should they reduce their output, "there would be no effect upon market price because firms making up the other 94% of the market would simply take over the abandoned business." *Ibid.*; see also 7 Areeda & Hovenkamp ¶1507a, p. 444 (2017) (If "the exercise of market power is not plausible, the challenged practice is legal"); *Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F. 2d 185, 191 (CA7 1985)* ("Unless the firms have the power to raise price by curtailing output, their agreement is unlikely **[***32]** to harm consumers, and it makes sense to understand their cooperation as benign or beneficial").

At the other end, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look. See *Dagher, 547 U. S., at 7, n. 3, 126 S. Ct. 1276, 164 L. Ed. 2d 1*; *California Dental Assn. v. FTC, 526 U. S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*. Recognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—we take special care not to **[**332]** deploy these condemnatory tools until we have amassed "considerable experience with the type of restraint at issue" and "can predict with confidence that it would be invalidated in all or almost all instances." *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U. S. 877, 886-887, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*; Easterbrook, On Identifying Exclusionary Conduct, *61 Notre Dame L. Rev. 972, 975 (1986)* (noting that it can take "economists years, sometimes decades, to understand why certain business practices work [and] determine whether they work because of increased efficiency or exclusion"); see also *infra, at ___ - ___, 210 L. Ed. 2d, at ___ - ___* (further reasons for caution).

None of this helps the NCAA. The NCAA. *accepts* that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact **[***33]** do) harm competition. See *D. Ct. Op., at 1067*. Unlike customers who would look elsewhere when a small van company raises its prices above market levels, the district court found (and the NCAA does not here contest) that student-athletes have nowhere else to sell their labor. Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions.

Nor does the NCAA's status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review. We do not doubt that some degree of coordination between competitors within sports leagues can be procompetitive. Without some agreement among rivals—on things like how many players may be on the field or the time allotted for play—the very competitions that consumers value would not be possible. See *Board of Regents, 468 U. S., at 101, 104 S. Ct. 2948, 82 L. Ed. 2d 70* (quoting R. Bork, The Antitrust Paradox 278 (1978)). Accordingly, even a sports league with market power might see some agreements among its members win antitrust approval in the " 'twinkling of an eye.' " *American Needle, 560 U. S., at 203, 130 S. Ct. 2201, 176 L. Ed. 2d 947*.

But this insight does not always apply. ***HN5***[] ***LEdHN[5]***[] [5] That *some* restraints are necessary to create or maintain a league sport does not mean *all* "aspects **[***34]** of elaborate interleague cooperation are." *Id., at 199, n. 7,* ***[*2157]*** *130 S. Ct. 2201, 176 L. Ed. 2d 947*. While a quick look will often be enough to approve the restraints "necessary to produce a game," *ibid.*, a fuller review may be appropriate for others. See, *e.g.*, *Chicago Professional*

Sports Ltd. Partnership v. National Basketball Assn., 95 F. 3d 593, 600 (CA7 1996) ("Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not imply an ability to set wages for players").

The NCAA's rules fixing wages for student-athletes fall on the far side of this line. Nobody questions that Division I basketball and FBS football can proceed (and have proceeded) without the education-related compensation restrictions the district court enjoined; the games go on. Instead, the parties dispute whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive **[**333]** means. That dispute presents complex questions requiring more than a blink to answer.

B

Even if background antitrust principles counsel in favor of the rule of reason, the NCAA replies that a particular precedent ties our hands. The NCAA directs **[***35]** our attention to *Board of Regents*, where this Court considered the league's rules restricting the ability of its member schools to televise football games. 468 U. S., at 94, 104 S. Ct. 2948, 82 L. Ed. 2d 70. On the NCAA's reading, that decision expressly approved its limits on student-athlete compensation—and this approval forecloses any meaningful review of those limits today.

We see things differently. *Board of Regents* explained that the league's television rules amounted to "[h]orizontal price fixing and output limitation[s]" of the sort that are "ordinarily condemned" as " 'illegal *per se*.' " Id., at 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70. The Court declined to declare the NCAA's restraints *per se* unlawful only because they arose in "an industry" in which some "horizontal restraints on competition are essential if the product is to be available at all." Id., at 101-102, 104 S. Ct. 2948, 82 L. Ed. 2d 70. Our analysis today is fully consistent with all of this. Indeed, if any daylight exists it is only in the NCAA's favor. While *Board of Regents* did not condemn the NCAA's broadcasting restraints as *per se* unlawful, it invoked abbreviated antitrust review as a path to condemnation, not salvation. Id., at 109, n. 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70. If a quick look was thought sufficient before rejecting the NCAA's procompetitive rationales in that case, it is hard **[***36]** to see how the NCAA might object to a court providing a more cautious form of review before reaching a similar judgment here.

To be sure, the NCAA isn't without a reply. It notes that, in the course of reaching its judgment about television marketing restrictions, the *Board of Regents* Court commented on student-athlete compensation restrictions. Most particularly, the NCAA highlights this passage:

> "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." Id., at 120, 104 S. Ct. 2948, 82 L. Ed. 2d 70.

See also id., at 101, 102, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (the NCAA "seeks to market a particular brand of football" in which "athletes must not be paid, must be required to attend class, and the like"). On the NCAA 's telling, **[*2158]** these observations foreclose any rule of reason review in this suit.

Once more, we cannot agree. *Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, **[***37]** sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions. Student-athlete compensation rules were not even at issue in Board of Regents. And the Court made clear it was only assuming the reasonableness **[**334]** of the NCAA's restrictions: "It is reasonable to *assume* that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and are therefore procompetitive . . . ." Id., at 117, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (emphasis added). Accordingly, the Court simply did not have occasion to declare—nor did it declare—the NCAA's compensation restrictions procompetitive both in 1984 and forevermore.

Our confidence on this score is fortified by still another factor. ***HN6***[] ***LEdHN[6]***[] [6] Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. See, *e.g.*, *American Express Co., 585 U. S., at ___-___, 138 S. Ct. 2274, 201 L. Ed. 2d 678*; 2B Areeda & Hovenkamp ¶500, p. 107 (2014). If those market realities change, so may the legal analysis.

When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984. Since then, the NCAA has dramatically increased the amounts **[***38]** and kinds of benefits schools may provide to student-athletes. For example, it has allowed the conferences flexibility to set new and higher limits on athletic scholarships. *D. Ct. Op., at 1064*. It has increased the size of permissible benefits "incidental to athletics participation." *Id., at 1066*. And it has developed the Student Assistance Fund and the Academic Enhancement Fund, which in 2018 alone provided over $100 million to student-athletes. *Id., at 1072*. Nor is that all that has changed. In 1985, Division I football and basketball raised approximately $922 million and $41 million respectively. Brief for Former NCAA Executives as *Amici Curiae* 7. By 2016, NCAA Division I schools raised more than $13.5 billion. *Ibid.* From 1982 to 1984, CBS paid $16 million per year to televise the March Madness Division I men's basketball tournament. *Ibid.* In 2016, those annual television rights brought in closer to $1.1 billion. *D. Ct. Op., at 1077, n. 20*.

Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that. This Court may be "infallible only because **[***39]** we are final," *Brown v. Allen, 344 U. S. 443, 540, 73 S. Ct. 397, 97 L. Ed. 469 (1953)* (Jackson, J., concurring in result), but those sorts of stray comments are neither.

C

The NCAA submits that a rule of reason analysis is inappropriate for still another reason—because the NCAA and its member schools are not "commercial enterprises" and instead oversee intercollegiate athletics "as an integral part of the undergraduate experience." Brief for Petitioner in No. 20-512, at 31. The NCAA represents that it seeks to "maintain amateurism in college sports as part of serving [the] societally important non-commercial objective" of "higher education." *Id*., at 3.

Here again, however, there may be less of a dispute than meets the eye. The NCAA does not contest that its restraints affect interstate trade and commerce and are thus subject to the Sherman Act. See **[*2159]** *D. Ct. Op., at 1066*. The NCAA acknowledges that this Court already analyzed (and struck down) some of its restraints as anticompetitive **[**335]** in *Board of Regents*. And it admits, as it must, that the Court did all this only after observing that the Sherman Act had already been applied to other nonprofit organizations—and that "the economic significance of the NCAA's nonprofit character is questionable at best" given **[***40]** that "the NCAA and its member institutions are in fact organized to maximize revenues." *468 U. S., at 100-101, n. 22, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. Nor, on the other side of the equation, does anyone contest that the status of the NCAA's members as schools and the status of student-athletes as students may be relevant in assessing consumer demand as part of a rule of reason review.

With this much agreed it is unclear exactly what the NCAA seeks. To the extent it means to propose a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade—that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money—we cannot agree. This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.

Take two examples. In *National Soc. of Professional Engineers v. United States, 435 U. S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*, a trade association argued that price competition between engineers competing for building projects had to be restrained to ensure quality work and protect public safety. *Id., at 679-680, 98 S. Ct. 1355, 55 L. Ed. 2d 637*. This Court rejected that appeal as "nothing less than a frontal assault on the basic policy **[***41]** of the Sherman Act." *Id., at 695, 98 S. Ct. 1355, 55 L. Ed. 2d 637*. ***HN7***[] ***LEdHN[7]***[] [7] The "statutory policy" of the Act is one of competition and it "precludes inquiry into the question whether competition is good or bad." *Ibid.* In

FTC v. Superior Court Trial Lawyers Assn., 493 U. S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990), criminal defense lawyers agreed among themselves to refuse court appointments until the government increased their compensation. Id., at 414, 110 S. Ct. 768, 107 L. Ed. 2d 851. And once more the Court refused to consider whether this restraint of trade served some social good more important than competition: "The social justifications proffered for respondents' restraint of trade . . . do not make it any less unlawful." Id., at 424, 110 S. Ct. 768, 107 L. Ed. 2d 851.

To be sure, this Court once dallied with something that looks a bit like an antitrust exemption for professional baseball. In Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U. S. 200, 42 S. Ct. 465, 66 L. Ed. 898, 20 Ohio L. Rep. 211 (1922), the Court reasoned that "exhibitions" of "base ball" did not implicate the Sherman Act because they did not involve interstate trade or commerce—even though teams regularly crossed state lines (as they do today) to make money and enhance their commercial success. Id., at 208-209, 42 S. Ct. 465, 66 L. Ed. 898. But this Court has refused to extend Federal Baseball's reasoning to other sports leagues—and has even acknowledged criticisms of the decision as " 'unrealistic' " and " 'inconsistent' " and "aberration[al]." Flood v. Kuhn, 407 U. S. 258, 282, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972) (quoting **[**336]** Radovich v. National Football League, 352 U. S. 445, 452, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957)); see also Brief for Advocates for Minor **[***42]** Leaguers as *Amicus Curiae* 5, n. 3 (gathering criticisms). Indeed, as we have seen, this Court has already recognized that the NCAA itself *is* subject to the Sherman Act.

[*2160] ***HN8***[] ***LEdHN[8]***[] [8] The "orderly way" to temper that Act's policy of competition is "by legislation and not by court decision." Flood, 407 U. S., at 279, 92 S. Ct. 2099, 32 L. Ed. 2d 728. The NCAA is free to argue that, "because of the special characteristics of [its] particular industry," it should be exempt from the usual operation of the antitrust laws—but that appeal is "properly addressed to Congress." National Soc. of Professional Engineers, 435 U. S., at 689, 98 S. Ct. 1355, 55 L. Ed. 2d 637. Nor has Congress been insensitive to such requests. It has modified the antitrust laws for certain industries in the past, and it may do so again in the future. See, *e.g.*, 7 U. S. C. §§ 291-292 (agricultural cooperatives); 15 U. S. C. §§ 1011-1013 (insurance); 15 U. S. C. §§ 1801-1804 (newspaper joint operating agreements). But until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone—"competition is the best method of allocating resources" in the Nation's economy. National Soc. of Professional Engineers, 435 U. S., at 695, 98 S. Ct. 1355, 55 L. Ed. 2d 637.

III

A

While the NCAA devotes most of its energy to resisting the rule of reason in its usual form, the league lodges some objections to the district court's application of it as well.

HN9[] ***LEdHN[9]***[] [9] When describing the rule of reason, **[***43]** this Court has sometimes spoken of "a three-step, burden-shifting framework" as a means for " 'distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.' " American Express Co., 585 U. S., at ___, 138 S. Ct. 2274, 201 L. Ed. 2d 678, 690. As we have described it, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect." *Ibid.* Should the plaintiff carry that burden, the burden then "shifts to the defendant to show a procompetitive rationale for the restraint." *Ibid.* If the defendant can make that showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." Id., at ___-___, 138 S. Ct. 2274, 201 L. Ed. 2d 678, 690.

These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. As we have seen, what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances. See supra, at ___-___, 210 L. Ed. 2d, at ___-___. ***HN10***[] ***LEdHN[10]***[] [10] The whole point of the rule of reason is to furnish "an enquiry meet for the case, looking to the circumstances, **[***44]** details, and logic of a restraint" to ensure that it unduly harms competition before a court declares it unlawful. California Dental, 526 U. S., at 781, 119 S. Ct. 1604, 143 L. Ed. 2d 935; see also, *e.g.*, Leegin

Creative, 551 U. S., at 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (" '[T]he **[**337]** factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition' "); *Copperweld Corp. v. Independence Tube Corp., 467 U. S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*; 7 Areeda & Hovenkamp ¶1507a, at 442-444 (slightly different "decisional model" using sequential questions).

In the proceedings below, the district court followed circuit precedent to apply a multistep framework closely akin to *American Express*'s. As its first step, the district court required the student-athletes to show that "the challenged restraints produce significant anticompetitive effects in the relevant market." *D. Ct. Op., at 1067*. This was no slight burden. According to **[*2161]** one *amicus*, courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect. Brief for 65 Professors of Law, Business, Economics, and Sports Management as *Amici Curiae* 21, n. 9 ("Since 1977, courts decided 90% (809 of 897) on this ground"). This suit proved different. As we have seen, based on a voluminous **[***45]** record, the district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes' labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects. See *D. Ct. Op., at 1067*. Perhaps even more notably, the NCAA "did not meaningfully dispute" this conclusion. *Ibid.*

Unlike so many cases, then, the district court proceeded to the second step, asking whether the NCAA could muster a procompetitive rationale for its restraints. *Id., at 1070*. This is where the NCAA claims error first crept in. On its account, the district court examined the challenged rules at different levels of generality. At the first step of its inquiry, the court asked whether the NCAA 's entire package of compensation restrictions has substantial anticompetitive effects *collectively*. Yet, at the second step, the NCAA says the district court required it to show that each of its distinct rules limiting student-athlete compensation has procompetitive benefits *individually*. The NCAA says this mismatch had the result of effectively—and erroneously—requiring it to prove that each rule is the least restrictive means of achieving the **[***46]** procompetitive purpose of differentiating college sports and preserving demand for them.

We agree with the NCAA's premise that ***HN11***[] ***LEdHN[11]***[] [11] ***antitrust law*** does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess "degrees of reasonable necessity" so that "the lawfulness of conduct turn[s] upon judgments of degrees of efficiency." *Rothery Storage, 792 F. 2d, at 227*; *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U. S. 36, 58, n. 29, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. That would be a recipe for disaster, for a "skilled lawyer" will "have little difficulty imagining possible less restrictive alternatives to most joint arrangements." 11 Areeda & Hovenkamp ¶1913b, p. 398 (2018). And judicial acceptance of such imaginings would risk interfering "with the legitimate objectives at issue" without "adding that much to competition." 7 *id*., ¶1505b, at 435-436.

HN12[] ***LEdHN[12]***[] [12] Even worse, "[r]ules that seek **[**338]** to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." *Barry Wright Corp. v. ITT Grinnell Corp., 724 F. 2d 227, 234 (CA1 1983)* (BREYER, J.). After all, even "[u]nder the best of circumstances," applying the antitrust laws " 'can be difficult' "—and mistaken condemnations of legitimate business **[***47]** arrangements " 'are especially costly, because they chill the very' " procompetitive conduct " 'the antitrust laws are designed to protect.' " *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U. S. 398, 414, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. *Ibid.* To know that the Sherman Act prohibits only *unreasonable* restraints of trade is thus to know that attempts to " '[m]ete[r]' small deviations is not an appropriate antitrust function." Hovenkamp, Antitrust Balancing, *12 N. Y. U. J. L. & Bus. 369, 377 (2016)*.

[*2162] While we agree with the NCAA's legal premise, we cannot say the same for its factual one. Yes, at the first step of its inquiry, the district court held that the student-athletes had met their burden of showing the NCAA's restraints collectively bear an anticompetitive effect. And, given that, yes, at step two the NCAA had to show only that those same rules collectively yield a procompetitive benefit. The trouble for the NCAA, though, is not the level of generality. It is the fact that the district court found unpersuasive much of its proffered evidence. See *D. Ct. Op., at 1070-1076, 1080-1083*. Recall that the court found the NCAA failed "to establish that the challenged compensation rules . . . have **[***48]** any direct connection to consumer demand." *Id., at 1070*.

To be sure, there is a wrinkle here. While finding the NCAA had failed to establish that its rules collectively sustain consumer demand, the court did find that "some" of those rules "may" have procompetitive effects "to the extent" they prohibit compensation "unrelated to education, akin to salaries seen in professional sports leagues." *Id., at 1082-1083*. The court then proceeded to what corresponds to the third step of the *American Express* framework, where it required the student-athletes "to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules." *D. Ct. Op., at 1104*. And there, of course, the district court held that the student-athletes partially succeeded—they were able to show that the NCAA could achieve the procompetitive benefits it had established with substantially less restrictive restraints on education-related benefits.

Even acknowledging this wrinkle, we see nothing about the district court's analysis that offends the legal principles the NCAA invokes. The court's judgment ultimately turned on the key question at the third step: whether the student-athletes **[***49]** could prove that "substantially less restrictive alternative rules" existed to achieve the same procompetitive benefits the NCAA had proven at the second step. *Ibid.* Of course, deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because, ***HN13***[] ***LEdHN[13]***[] [13] however **[**339]** framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits. See, *e.g.*, 7 Areeda & Hovenkamp ¶1505, p. 428 ("To be sure, these two questions can be collapsed into one," since a "legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative").

Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA's restraints " 'patently and inexplicably stricter than is necessary' " to achieve the procompetitive benefits the league had demonstrated **[***50]** that the district court proceeded to declare a violation of the Sherman Act. *D. Ct. Op., at 1104*. That demanding standard hardly presages a future filled with judicial micromanagement of legitimate business decisions.

B

In a related critique, the NCAA contends the district court "impermissibly redefined" its "product" by rejecting its views about what amateurism requires and replacing them with its preferred conception. **[*2163]** Brief for Petitioner in No. 20-512, at 35-36.

This argument, however, misapprehends the way a defendant's procompetitive business justification relates to the antitrust laws. ***HN14***[] ***LEdHN[14]***[] [14] Firms deserve substantial latitude to fashion agreements that serve legitimate business interests—agreements that may include efforts aimed at introducing a new product into the marketplace. *Supra, at ___ - ___, 210 L. Ed. 2d, at ___ - ___*. But none of that means a party can relabel a restraint as a product feature and declare it "immune from *§ 1* scrutiny." *American Needle, 560 U. S., at 199, n. 7, 130 S. Ct. 2201, 176 L. Ed. 2d 947*. In this suit, as in any, the district court had to determine whether the defendants' agreements harmed competition and whether any procompetitive benefits associated with their restraints could be achieved by "substantially less restrictive alternative" means. *D. Ct. Op., at 1104*. **[***51]**

The NCAA's argument not only misapprehends the inquiry, it would require us to overturn the district court's factual findings. While the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition. *Id., at 1070*. Instead, the court found, the NCAA's rules and restrictions on compensation have shifted markedly over time. *Id., at 1071-1074*. The court found, too, that the NCAA adopted these restrictions without any reference to "considerations of consumer demand," *id., at 1100*, and that some were "not necessary to preserve consumer demand," *id., at 1075, 1080, 1104*. None of this is product redesign; it is a straightforward application of the rule of reason.

C

Finally, the NCAA attacks as "indefensible" the lower courts' holding that substantially less restrictive alternatives exist capable of delivering the same procompetitive benefits as its current rules. Brief for Petitioner **[**340]** in No. 20-512, at 46. The NCAA claims, too, that the district court's injunction threatens to "micromanage" its business. *Id*., at 50.

Once more, we broadly agree with the legal principles the NCAA invokes. As we have discussed,***HN15***[] ***LEdHN[15]***[] [15] antitrust courts must give wide berth to business judgments before finding liability. **[***52]** See *supra, at ___ - ___, 210 L. Ed. 2d, at ___ - ___*. Similar considerations apply when it comes to the remedy. Judges must be sensitive to the possibility that the "continuing supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. *Trinko, 540 U. S., at 415, 124 S. Ct. 872, 157 L. Ed. 2d 823*. Costs associated with ensuring compliance with judicial decrees may exceed efficiencies gained; the decrees themselves may unintentionally suppress procompetitive innovation and even facilitate collusion. See *supra, at ___ - ___, 210 L. Ed. 2d, at ___ - ___*. Judges must be wary, too, of the temptation to specify "the proper price, quantity, and other terms of dealing"—cognizant that they are neither economic nor industry experts. *Trinko, 540 U. S., at 408, 124 S. Ct. 872, 157 L. Ed. 2d 823*. Judges must be open to reconsideration and modification of decrees in light of changing market realities, for "what we see may vary over time." *California Dental, 526 U. S., at 781, 119 S. Ct. 1604, 143 L. Ed. 2d 935*. And throughout courts must have a healthy respect for the practical limits of judicial administration: "An antitrust court is unlikely to be an effective day-to-day enforcer" of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. *Trinko, 540 U. S., at 415, 124 S. Ct. 872, 157 L. Ed. 2d 823*. Nor should any court " 'impose a duty . . . that it cannot explain or adequately and reasonably supervise.' " *Ibid.* In short, judges make **[***53]** for poor "central planners" and **[*2164]** should never aspire to the role. *Id., at 408, 124 S. Ct. 872, 157 L. Ed. 2d 823*.

Once again, though, we think the district court honored these principles. The court enjoined only restraints on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like. The court did so, moreover, only after finding that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand—and only after finding that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules. *D. Ct. Op., at 1104-1105*.

Even with respect to education-related benefits, the district court extended the NCAA considerable leeway. As we have seen, the court provided that the NCAA could develop its own definition of benefits that relate to education and seek modification of the court's injunction to reflect that definition. App. to Pet. for Cert. in No. 20-512, at 168a, ¶4. The court explained that the NCAA and its members could agree on rules regulating how conferences and schools go about providing these education-related benefits. ***[***54]*** *Ibid.* The court said that the NCAA and its members could continue fixing education-related cash awards, too—so long as those "limits are never lower than the limit" on awards for athletic performance. *D. Ct. Op., at 1104*; App. to Pet. for Cert. in No. **[**341]** 20-512, at 168a-169a, ¶5. And the court emphasized that its injunction applies only to the NCAA and multi-conference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still. *Id*., at 169a-170a, ¶¶6-7.

In the end, it turns out that the NCAA's complaints really boil down to three principal objections.

First, the NCAA worries about the district court's inclusion of paid posteligibility internships among the education-related benefits it approved. The NCAA fears that schools will use internships as a way of circumventing limits on payments that student-athletes may receive for athletic performance. The NCAA even imagines that boosters might promise posteligibility internships "at a sneaker company or auto dealership" with extravagant salaries as a "thinly disguised vehicle" for paying professional-level salaries. Brief for Petitioner in No. 20-512, at 37-38.

This argument **[***55]** rests on an overly broad reading of the injunction. The district court enjoined only restrictions on education-related compensation or benefits "that may be made available *from conferences or schools*." App. to Pet. for Cert. in No. 20-512, at 167a, ¶1 (emphasis added). Accordingly, as the student-athletes concede, the injunction "does not stop the NCAA from continuing to prohibit compensation from" sneaker companies, auto dealerships, boosters, "or anyone else." Brief for Respondents 47-48; see also Brief for United States as *Amicus Curiae* 33. The NCAA itself seems to understand this much. Following the district court's injunction, the organization adopted new regulations specifying that only "a conference or institution" may fund post-eligibility internships. See Decl. of M. Boyer in No. 4:14-md-02541, ECF Doc. 1302-2, p. 6 (ND Cal., Sept. 22, 2020) (NCAA Bylaw 16.3.4(d)).

Even when it comes to internships offered by conferences and schools, the district court left the NCAA considerable flexibility. The court refused to enjoin NCAA rules prohibiting its members from providing compensation or benefits unrelated to legitimate educational activities—thus leaving the league room to police **[***56]** phony internships. As we've observed, the **[*2165]** district court also allowed the NCAA to propose (and enforce) rules defining what benefits do and do not relate to education. App. to Pet. for Cert. in No. 20-512, at 168a, ¶4. Accordingly, the NCAA may seek whatever limits on paid internships it thinks appropriate. And, again, the court stressed that individual conferences may restrict internships however they wish. *Id*., at 169a, ¶6. All these features underscore the modesty of the current decree.

Second, the NCAA attacks the district court's ruling that it may fix the aggregate limit on awards schools may give for "academic or graduation" achievement no lower than its aggregate limit on parallel athletic awards (currently $5,980 per year). *Id*., at 168a-169a, ¶5; *D. Ct. Op., at 1104*. This, the NCAA asserts, "is the very definition of a professional salary." Brief for Petitioner in No. 20-512, at 48. The NCAA also represents that "[m]ost" of its currently permissible athletic awards are "for genuine individual or team *achievement*" and that "[m]ost . . . are received by only a few student-athletes each year." *Ibid.* Meanwhile, the NCAA says, the district **[**342]** court's decree would allow a school to **[***57]** pay players thousands of dollars each year for minimal achievements like maintaining a passing GPA. *Ibid.*

The basis for this critique is unclear. The NCAA does not believe that the athletic awards it presently allows are tantamount to a professional salary. And this portion of the injunction sprang directly from the district court's finding that the cap on athletic participation awards "is an amount that has been shown not to decrease consumer demand." *D. Ct. Op., at 1088*. Indeed, there was no evidence before the district court suggesting that corresponding academic awards would impair consumer interest in any way. Again, too, the district court's injunction affords the NCAA leeway. It leaves the NCAA free to reduce its athletic awards. And it does not ordain what criteria schools must use for their academic and graduation awards. So, once more, if the NCAA believes certain criteria are needed to ensure that academic awards are legitimately related to education, it is presently free to propose such rules—and individual conferences may adopt even stricter ones.

Third, the NCAA contends that allowing schools to provide in-kind educational benefits will pose a problem. This relief focuses **[***58]** on allowing schools to offer scholarships for "graduate degrees" or "vocational school" and to pay for things like "computers" and "tutoring." App. to Pet. for Cert. in No. 20-512, at 167a-168a, ¶2. But the NCAA fears schools might exploit this authority to give student-athletes " 'luxury cars' " "to get to class" and "other unnecessary or inordinately valuable items" only "nominally" related to education. Brief for Petitioner in No. 20-512, at 48-49.

Again, however, this over-reads the injunction in ways we have seen and need not belabor. Under the current decree, the NCAA is free to forbid in-kind benefits unrelated to a student's actual education; nothing stops it from enforcing a "no Lamborghini" rule. And, again, the district court invited the NCAA to specify and later enforce rules delineating which benefits it considers legitimately related to education. To the extent the NCAA believes meaningful ambiguity really exists about the scope of its authority—regarding internships, academic awards, in-kind benefits, or anything else—it has been free to seek clarification from the district court since the court issued its injunction three years ago. The NCAA remains free to do so today. **[***59]** To date, the NCAA has sought clarification only once—about the precise amount at which it can cap academic awards—and the question was quickly resolved. Before conjuring hypothetical concerns **[*2166]** in this Court, we believe it best for the NCAA to present any practically important question it has in district court first.

HN16[] ***LEdHN[16]***[] [16] When it comes to fashioning an antitrust remedy, we acknowledge that caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and **[**343]** reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to "set sail on a sea of doubt." *United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (CA6 1898)* (Taft, J.). But we do not believe the district court fell prey to that temptation. Its judgment does not float on a **[***60]** sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility.

*

Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics. For our part, though, we can only agree with the Ninth Circuit: " 'The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of ***antitrust law***.' " *958 F. 3d, at 1265*. That review persuades us the district court acted within the law's bounds.

The judgment is

Affirmed.

Concur by: KAVANAUGH

Concur

JUSTICE **KAVANAUGH**, concurring.

The NCAA has long restricted the compensation and benefits **[***61]** that student athletes may receive. And with surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny. Today, however, the Court holds that the NCAA has violated the antitrust laws. The Court's decision marks an important and overdue course correction, and I join the Court's excellent opinion in full.

But this case involves only a narrow subset of the NCAA's compensation rules—namely, the rules restricting the *education-related* benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools. The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports. And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like.

I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions **[*2167]** under the antitrust laws. Three points warrant emphasis.

First, the Court does not address the legality of the NCAA's **[***62]** remaining compensation rules. As the Court says, "the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the **[**344]** district court's judgment upholding them. Our review is confined to those restrictions now enjoined." *Ante, at ___, 210 L. Ed. 2d, at ___*.

Second, although the Court does not weigh in on the ultimate legality of the NCAA's remaining compensation rules, the Court's decision establishes how any such rules should be analyzed going forward. After today's decision, the

NCAA's remaining compensation rules should receive ordinary "rule of reason" scrutiny under the antitrust laws. The Court makes clear that the decades-old "stray comments" about college sports and amateurism made in *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U. S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*, were dicta and have no bearing on whether the NCAA's current compensation rules are lawful. *Ante, at ___, 210 L. Ed. 2d, at ___*. And the Court stresses that the NCAA is not otherwise entitled to an exemption from the antitrust laws. *Ante, at ___ - ___, 210 L. Ed. 2d, at ___ - ___*; see also *Radovich v. National Football League, 352 U. S. 445, 449-452, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957)*. As a result, absent legislation or a negotiated agreement between the NCAA and the student athletes, the NCAA 's remaining compensation rules should be subject to ordinary rule of **[***63]** reason scrutiny. See *ante, at ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

Third, there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAAmust supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAAmay lack such a justification.

The NCAA acknowledges that it controls the market for college athletes. The NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules.

The NCAA nonetheless asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA , is that the student athletes are not paid.

In my view, that argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The **[***64]** NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood.

[345]** Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook **[*2168]** antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work. See, *e.g.*, *Texaco Inc. v. Dagher, 547 U. S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.

The **[***65]** bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing. See Brief for African American Antitrust Lawyers as *Amici Curiae* 13-17.

Everyone agrees that the NCAA can require student athletes to be enrolled students in good standing. But the NCAA 's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student **[***66]** athletes. And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.

If it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions would undoubtedly ensue. Among them: How would paying greater compensation to student athletes affect non-revenue-raising sports? Could student athletes in some sports but not others receive compensation? How would any compensation regime comply with Title IX? If paying student athletes requires something like a salary cap in some sports in order to preserve competitive balance, how would that cap be administered? And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes?

Of course, those difficult questions could be resolved in ways other than litigation. Legislation would be one option. Or colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate **[***67]** for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues. Cf. *Brown v. Pro Football, Inc., 518 U. S. 231, 235-237, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)*; *Wood v. National Basketball Assn., 809 F. 2d 954, 958-963 (CA2 1987)* (R. Winter, J.). Regardless of how those issues ultimately would be resolved, however, **[**346]** the NCAA's current compensation regime raises serious questions under the antitrust laws.

To be sure, the NCAA and its member colleges maintain important traditions that have become part of the fabric of America—game days in Tuscaloosa and South Bend; the packed gyms in Storrs and Durham; the women's and men's lacrosse championships on Memorial Day weekend; track and field meets in Eugene; the spring softball and baseball World Series **[*2169]** in Oklahoma City and Omaha; the list goes on. But those traditions alone cannot justify the NCAA 's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of ***antitrust law***, it is not evident why college sports should be any different. The NCAA is not above **[***68]** the law.

References

15 U.S.C.S. § 1

1 Antitrust Laws and Trade Regulation §§ 2.02, 12.01[3], 12.02 (Matthew Bender 2d ed.)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 16

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[Parks v. Ala. Bd. of Pharm.](#)

United States District Court for the Middle District of Alabama, Northern Division

June 22, 2021, Decided; June 22, 2021, Filed

CASE NO. 2:20-CV-304-KFP

Reporter
2021 U.S. Dist. LEXIS 116150 *; 2021 WL 2556003

DEMETRIUS YVONNE PARKS, d/b/a Parks Pharmacy, Inc., Plaintiff, v. ALABAMA BOARD OF PHARMACY, et al, Defendants.

Prior History: *Ala. State Bd. of Pharm. v. Parks, 296 So. 3d 316, 2019 Ala. Civ. App. LEXIS 96, 2019 WL 3398984 (Ala. Civ. App., July 26, 2019)*

Core Terms

state court, pharmacies, antitrust claim, statute of limitations, plaintiff's claim, district court, allegations, final order, circuit court, antitrust, due process claim, Sherman Act, competitor, violations, sanctions, charges, tolling, unfair, lack subject matter jurisdiction, factual allegations, motion to dismiss, federal claim, proceedings, time-barred, conclusory, conspiracy, purported, rights

Counsel: **[*1]** For Demetrius Yvonne Parks, doing business as, Parks Pharmacy, Inc., Plaintiff: Gerald Maxwell, LEAD ATTORNEY, Gerald Maxwell, Gadsden, AL.

For Alabama Board of Pharmacy, Tim Martin, Individually, member of the Alabama Board of Pharmacy, ABOP, Buddy Bunch, individually, member of the ABOP, David Darby, individually, member of the ABOP, Donna Yeatman, individually, member of the ABOP, Ralph Sorrell, individually, member of the ABOP, Defendants: James Stephen Ward, LEAD ATTORNEY, Ward & Wilson LLC, Birmingham, AL; John A Selden, LEAD ATTORNEY, Office of the Attorney General, Montgomery, AL.

Judges: KELLY FITZGERALD PATE, UNITED STATES MAGISTRATE JUDGE.

Opinion by: KELLY FITZGERALD PATE

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiff Demetrius Yvonne Parks, doing business as Parks Pharmacy, Inc., brings this action against the Alabama Board of Pharmacy and five individual Board members, alleging due process and antitrust violations arising from action taken against her by the Board in 2016. Defendants collectively moved to dismiss Plaintiff's Complaint (Doc. 27), Plaintiff filed a response (Doc. 32), Defendants filed a reply (Doc. 33), and both parties filed subsequent sur-replies (Docs. 34, 37). Upon consideration of **[*2]** the parties' submissions and the relevant law, the motion to dismiss is GRANTED for the reasons set forth below.

I. BACKGROUND[1]

Plaintiff is a pharmacist who owns and operates multiple pharmacies in Montgomery, Gadsden, and Hayneville. Doc. 1 at 2-3. In 2015, the Board received a complaint from the Alabama Medicaid Agency regarding one or more of Plaintiff's pharmacies. *Id.* at 3. Accordingly, the Board initiated inspections of Plaintiff's pharmacies and discovered numerous illegal or improper practices in which Plaintiff and her pharmacies were allegedly engaged.[2] *Id.* Subsequently, the Board charged Plaintiff and her pharmacies with 46 counts of improper conduct, and it held a public hearing on those charges on August 23-24, 2016. *Id.* at 4. Plaintiff received timely notice of the hearing, and she and her legal counsel were present at the hearing. *See* Docs. 1-4, 34 at 11.

Following the hearing, the Board found Plaintiff and her pharmacies guilty of all 46 charges. On October 6, 2016, the Board entered a final order concluding that Plaintiff and her pharmacies had violated the Alabama Pharmacy Practice Act ("APPA"), the Alabama Uniform Controlled Substances Act ("AUCSA"), and various Board rules and regulations. Doc. 1-5. As sanctions, the Board suspended **[*3]** Plaintiff's pharmacy license for five years; ordered Plaintiff to pay an administrative fine of $27,000; placed the permits of several of her pharmacies on probation for five years; and ordered several of her pharmacies to pay administrative fines in varying amounts. *Id.*

In November 2016, Plaintiff filed a complaint in the Montgomery County Circuit Court, seeking judicial review of the Board's final order. *See Parks v. Ala. State Bd. of Pharmacy*, 03-CV-2016-901576.00 (Montgomery Cty. Cir. Ct. Nov. 22, 2016), Doc. 2. Plaintiff's state court complaint contained many of the allegations in her current Complaint. *See id.* In a subsequent motion to the state court, Plaintiff alleged that the proceedings initiated by the Board violated various provisions of the Alabama Administrative Code, "violated [her] due process rights," and "resulted in a finding contrary to her due process rights." *Id.*, Doc. 24 at 2-3. As relief, Plaintiff sought a court order "overturning all counts of the Board's Final Order of October 6, 2016." *Id.*, Doc. 2 at 5. After reviewing the record from Plaintiff's hearing before the Board, hearing oral arguments from the parties, and reviewing briefs in support of their respective positions, the circuit court determined that Plaintiff engaged in the improper conduct the **[*4]** Board alleged; that "the Board's Final Order and the Finding of Facts set out therein [were] supported by substantial evidence"; and that the Board's conclusions of law based on its findings were correct, with the exception of the sanctions imposed, which the court found too severe. *Id.*, Doc. 143 at 3.

The Board appealed the circuit court's ruling finding the sanctions too severe and, on July 26, 2019, the Alabama Court of Civil Appeals reversed the circuit court's ruling, finding that the sanctions imposed were both statutorily authorized and reasonable. The appellate court stated:

> In this case, the board found that Parks and the pharmacies were guilty of the 46 charges it had alleged against them. The board also found that, in addition to violating the [A]PPA, Parks and the pharmacies were guilty of violating the AUCSA. The circuit court found that the board's findings as to the charges were supported by substantial evidence. The board had the statutory authority to suspend Parks's license, to place the pharmacies on probation, and to impose the administrative fines against Parks and the pharmacies. Under the applicable standard of review, we conclude that the board did not act in **[*5]** an unreasonable, arbitrary, or capricious manner in imposing those sanctions. In reducing the sanctions, the circuit court improperly substituted its judgment for that of the board.

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[1] The following history is derived from Plaintiff's Complaint (Doc. 1), exhibits attached thereto, and state court records. *See* *Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1368 (11th Cir. 1997)* (noting that, in considering a motion to dismiss, a court may consider both the contents of a complaint and its attachments); *see also* *U.S. ex rel. Osheroff v. Humana Inc., 776 F.3d 805, 811-12 n.4 (11th Cir. 2015)* ("Courts may take judicial notice of publicly filed documents, such as those in state court litigation, at the *Rule 12(b)(6)* stage.").

[2] For purposes of this Order, the Court need not discuss the specific conduct underlying the Board's charges against Plaintiff. A recitation of the events and activities that led to the charges can be found in *Ala. State Bd. of Pharmacy v. Parks, 296 So. 3d 316 (Ala. Civ. App. 2019)*, *cert. denied* (Oct. 11, 2019).

> Accordingly, we reverse the circuit court's judgment and remand the cause to the circuit court for it to enter a judgment reinstating the board's decision in its entirety.

Parks, 296 So. 3d at 321, *cert. denied* (Oct. 11, 2019). Thereafter, Parks appealed to the Alabama Supreme Court, which denied certiorari on October 11, 2019. *See Parks*, 03-CV-2016-901576.00, Doc. 173.

Following the Alabama Supreme Court's denial of certiorari, Plaintiff filed suit in this Court on May 7, 2020. *See* Doc. 1. In her Complaint, Plaintiff claims the way the Board handled her inspections, hearing, and sanctions—the same underlying issues previously addressed in state court—violated her due process rights and constitutes anticompetitive and unfair methods of competition in violation of the Sherman Act.[3] *Id.* at 3-7. As relief, she seeks a Court order holding that Defendants' conduct violated due process and the Sherman Act; for all sanctions imposed by the Board to be discharged (that is, for her license to be reinstated, the probationary status of her pharmacy **[*6]** permits to be ended, and all fines and assessments levied against her to be released); $750,000 in compensatory damages; and $5,000,000 in punitive damages. *Id.* at 7-8.

II. DISCUSSION

In their motion and subsequent filings, Defendants argue that Plaintiff's claims must be dismissed for numerous reasons, including that (1) Plaintiff's due process claims are time-barred by the applicable two-year statute of limitations; (2) Plaintiff has failed to state an antitrust claim; and (3) the Court lacks subject matter jurisdiction over Plaintiff's claims under the *Rooker-Feldman* doctrine.[4] After careful review of these arguments, Plaintiff's responses to each, and pertinent case law, the Court finds that Plaintiff's claims are subject to dismissal for the reasons discussed below.

A. Plaintiff's due process claims are time-barred.

Defendants contend that a two-year statute of limitations applies to Plaintiff's due process claims and, therefore, they are time-barred. "All constitutional claims brought under *§ 1983* are tort actions, subject to the statute of limitations governing personal injury actions in the state where the *§ 1983* action has been brought." *McNair v. Allen, 515 F.3d 1168, 1173 (11th Cir. 2008)* (citation omitted). "In Alabama, the statute **[*7]** of limitations in an action for alleged constitutional violations is two years." *Daniel v. Colee*, No. 2:07-CV-01460, 2008 WL 11424117, at *4 (N.D. Ala. Mar. 20, 2008) (citing *McKissick v. Busby, 936 F.2d 520, 521 (11th Cir. 1991)* and *Ala. Code § 6-2-38(l)*); *see also McNair, 515 F.3d at 1173* ("[Plaintiff's] claim was brought in Alabama, where the governing limitations period is two years."). Generally, "the statute of limitations begins to run from the date 'the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.'" *Brown v. Ga. Bd. of Pardons & Paroles, 335 F.3d 1259, 1261 (11th Cir. 2003)* (quoting *Rozar v. Mullis, 85 F.3d 556, 561-62 (11th Cir. 1996)*).

Plaintiff does not dispute that a two-year statute of limitations applies to her due process claims; she argues that the limitations period did not begin to run until late 2019, when her state court litigation concluded. *See* Docs. 32 at 38, 34 at 27. Plaintiff is incorrect. Plaintiff's due process claims are based solely on the Board's administrative actions

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[3] Plaintiff also references, in passing, the Federal Trade Commission Act ("FTC Act"). However, the Eleventh Circuit has made clear that "a private right of action . . . does not exist under the FTC Act." *Holmes v. Ocwen Fin. Corp., 747 F. App'x 836, 837 (11th Cir. 2019)* (citing *Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1174 n.5 (11th Cir. 1985)*).

[4] Defendants also argue that (1) Plaintiff's due process claims are barred by res judicata, barred by collateral estoppel, and fail under *Federal Rule of Civil Procedure 12(b)(6)*; (2) Plaintiff's antitrust claims fail because Defendants are entitled to state-action, or *Parker*, immunity; (3) the Board is entitled to *Eleventh Amendment* sovereign immunity; and (4) the individual Defendants are entitled to quasi-judicial immunity. However, because the Court finds the legal theories above to be dispositive of Plaintiff's claims, it need not address Defendants' additional theories for dismissal.

against her—that is, the inspections of her pharmacies, the subsequent charges, the hearing on those charges, and the resulting imposed sanctions—and not on anything that took place during her state court litigation. All of the Board's action with respect to Plaintiff concluded at the time of its final order in October 2016. Upon receipt of that order,[5] "the facts which would support a cause of action **[*8]** [were] apparent" to Plaintiff; indeed, immediately thereafter, Plaintiff filed suit in state court, based on the same facts, alleging due process and other violations. *See Parks*, 03-CV-2016-901576.00, Docs. 2, 24. Thus, the statute of limitations on Plaintiff's due process claims began to run, at the latest, in October 2016, when Plaintiff received the Board's final order—not when Plaintiff's state court litigation regarding that order ended.[6]

Furthermore, the statute of limitations was not tolled during Plaintiff's state court litigation. In *§ 1983* actions, just as a court must apply the appropriate state statute of limitations, it must also apply that state's rules for tolling that limitations period. *Bowman v. City of Birmingham*, No. 2:04-CV-3487, 2007 WL 9711415, at *1 n.2 (N.D. Ala. Jan. 29, 2007) (citing *Bd. of Regents of Univ. of State of N.Y. v. Tomanio, 446 U.S. 478, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980)*). In Alabama, the statute of limitations for personal injury actions may be tolled "only if there is intentional misrepresentation or fraud committed by the defendant." *Bowman*, 2007 WL 9711415, at *1 n.2 (citing *Ala. Code § 6-2-3*; *Dorsey v. U.S. Pipe & Foundry Co., 353 So. 2d 800 (Ala. 1977)*; and *City of Gadsden v. Harbin, 398 So. 2d 707 (Ala. Civ. App. 1981)* (holding that fraudulent concealment of a tort or injury by the defendant will toll the running of the statute of limitations until the tort or injury is discovered or could have been discovered by due diligence)). Plaintiff has not alleged any misrepresentation or fraud by Defendants **[*9]** in this case, intentional or otherwise, that would warrant tolling.

Accordingly, because Plaintiff did not file this action until May 7, 2020, more than three years after the Board issued its final order and the two-year statute of limitations began to accrue, and because there is no basis for tolling, Plaintiff's due process claims are time-barred and must be DISMISSED.

B. Plaintiff's Complaint fails to state an antitrust claim.

Defendants argue that Plaintiff has failed to state a valid antitrust claim under the Sherman Act,[7] and, therefore, any purported antitrust claims must be dismissed under *Federal Rule of Civil Procedure 12(b)(6)*. Under the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. While detailed factual allegations are not required, a plaintiff must present "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly, 550 U.S. at 557*). "Threadbare recitals **[*10]** of the

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5 Plaintiff stated in her circuit court complaint that she received the Board's final order on or about October 14, 2016 (*Parks*, 03-CV-2016-901576.00, Doc. 2 at 2) or October 17, 2016 (*Id.* at 4). Both dates fall well outside of the two-year statute of limitations.

6 *See Arezzo v. City of Hoboken, 719 F. App'x 115, 118 (3d Cir. 2018)* (rejecting plaintiff's argument that his due process claim accrued when the state supreme court denied review, instead finding that it accrued when defendant issued its final administrative decision to terminate his employment; "After [defendant] took final administrative action, [plaintiff] could have filed his *Section 1983* claim alleging that [defendant] removed him without providing sufficient due process."); *Foudy v. Indian River Cty. Sheriff's Office, 845 F.3d 1117, 1123 (11th Cir. 2017)* (citing *Chardon v. Fernandez, 454 U.S. 6, 8, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981)* (holding a *§ 1983* action for unlawful termination accrued when the unlawful act, namely the decision to terminate, took place)).

7 The *Sherman Act* is a federal ***antitrust law*** enacted in 1890 to prohibit combinations and conspiracies in restraint of trade (Section 1) and to regulate monopolies (Section 2). *Ramos v. Tomasino, 701 F. App'x 798, 802 (11th Cir. 2017)* (citing *15 U.S.C. §§ 1-2*). As will be discussed below, it is unclear from the Complaint under which section of the Sherman Act Plaintiff purports to state a claim.

elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly, 550 U.S. at 555* (noting that, although a court must accept all factual allegations in a complaint as true at the motion to dismiss stage, it need not "accept as true a legal conclusion couched as a factual allegation")).

With respect to her purported antitrust claim(s), Plaintiff's Complaint contains only vague, conclusory allegations. For instance, she states broadly that Defendants "engag[ed] in purposeful unilateral broadly prohibitive conduct against Plaintiff that monopolizes or attempts to monopolize the market Plaintiff is engaged in . . . amounting to unfair competition." Doc. 1 at 2. She further states that Defendants, "either jointly or severally, have engaged in prohibitive conduct through either direct acts, attempted acts, purposeful, unfair, and illegal practices against Plaintiff that forces her businesses out of the pharmaceutical markets amounting to unfair competition . . . ." *Id.* at 5. These statements are mere legal conclusions couched as factual allegations, which are insufficient to state an antitrust claim. *See* *Twombly, 550 U.S. at 555*; *see also* *Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974, 975 (11th Cir. 1985)* ("A conclusory allegation of conspiracy to restrain **[*11]** trade will not survive a motion to dismiss.") (citing *Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 273-74 (5th Cir. 1979)*).

The only other allegations in the Complaint purportedly related to an antitrust claim are as follows: (1) Defendants made "damaging recorded statements to other professionals in the business" that they "were trying to set [Plaintiff] up for charges"[8] ; (2) Defendants "caused or greatly contributed to the termination of [Plaintiff's] contract with [her] primary vendor"; (3) Defendants "have recklessly taken on conduct that prevented the sale by Plaintiff to a willing buyer of one of her [p]harmacies"; (4) Defendants "intentionally provided or made . . . false statements, or otherwise supplied untrue information regarding Plaintiff on the National Practitioner Data Bank"; and (5) Defendants "illegally confiscated certain medicines belonging to Plaintiff from her stores . . . in violation of due process of law." Doc. 1 at 6-7. First, these allegations are conclusory with no supporting factual allegations, including what specifically occurred, when, and which specific defendants committed each alleged act. *See* *Lombard's, Inc., 753 F.2d at 975* ("The present claim states only a conclusory allegation that there was a conspiracy in violation of the Sherman Act.[] [N]ot **[*12]** only are no facts alleged to demonstrate the conspiracy but the specific participants of the conspiracy are not even identified. Such pleading is inadequate to give the defendant fair notice of [plaintiff's] claim."). Second, and most importantly, Plaintiff alleges injury only to herself, not to competition in general.

As noted above, it is unclear from the Complaint whether Plaintiff purports to state a claim under *Section One* or *Section Two of the Sherman Act*. Under either section, however, a plaintiff must allege facts sufficient to demonstrate injury or harm to competition as a whole, rather than to a specific individual. *See* *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1069 (11th Cir. 2004)* ("Critically, under both sections [of the Sherman Act], an antitrust plaintiff must show harm to competition in general, rather than merely damage to an individual competitor.") (citing *Am. Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 n.8 (11th Cir. 1985)* ("Harm to competition is a necessary element of all private antitrust suits under *Sections 1* and *2 of the Sherman Act* . . . ."); *see also* *Weight-Rite Golf Corp. v. U.S. Golf Ass'n, 766 F. Supp. 1104, 1110 (M.D. Fla. 1991)*, *aff'd sub nom. Weight-Rite Golf v. U.S. Golf, 953 F.2d 651 (11th Cir. 1992)* ("[S]howing merely injury to oneself as a competitor is insufficient [to state an antitrust claim]. [I]njury to a competitor need not result in injury to competition.") (citing *L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 421-22 (11th Cir. 1984)*); *Fla. Seed Co., Inc. v. Monsanto Co., 105 F.3d 1372, 1375 (11th Cir. 1997)* ("[Plaintiff] complains not about higher prices or about injury to competition, but about injury to **[*13]** itself. Thus, [plaintiff] had suffered no antitrust injury.").

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[8] For the reasons stated herein, this allegation—even accepted as true—fails to state an antitrust claim. However, the Court notes as an aside that evidence provided by Plaintiff in support of this allegation actually belies it. Indeed, the affidavit of Tony Bodiford (Doc. 32-1), attached to Plaintiff's response to the motion to dismiss, does not indicate that any of the named Defendants "were trying to set [Plaintiff] up for charges," as Plaintiff suggests. Instead, the affidavit simply indicates that "Sue Roxie, Executive Assistant to Board Secretary, Susan Alverson," neither of whom are named as defendants in this action, told Bodiford that he could work as a pharmacist for Parks Pharmacy despite his license being expired and that, thereafter, Inspector Daniels, who is also not a named defendant in this action, arrived to inspect one of the pharmacies and confiscated Bodiford's expired license. Doc. 32-1 at 1. Nowhere does the affidavit state that Defendants were trying to "set [Plaintiff] up," as Plaintiff repeatedly indicates.

Indeed, in *Spanish Broadcasting*, the Eleventh Circuit affirmed a district court's dismissal of a plaintiff's claims under both sections of the Sherman Act because the plaintiff alleged injury or harm only to itself, rather than to competition in general. *376 F.3d at 1069-77*. The Court recognized that an antitrust plaintiff must show harm to competition rather than to competitors and that "[h]arm to one or many competitors will not suffice." *Id. at 1071-72* (citing *Dickson v. Microsoft Corp., 309 F.3d 193, 206 (4th Cir. 2002)*). The Court noted that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Id. at 1076* (citing *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*). This includes situations in which one competitor disseminates false information about another. *Id. at 1072* (citing *Aquatherm Indus., Inc. v. Fla. Power & Light Co., 145 F.3d 1258, 1263 (11th Cir. 1998)* ("[Plaintiff's] only claim is [that defendant] acted unfairly by disseminating false information, and this unfair competition in turn harmed [plaintiff's] business. This claim of unfair competition is *not* sufficient to support a claim under *§ 1* or any other federal antitrust provision.") (emphasis in original)).

Like in *Spanish Broadcasting*, Plaintiff fails to allege any injury or harm to competition in general; she **[*14]** simply alleges that Defendants acted unfairly to her.[9] The Eleventh Circuit has made clear that this is insufficient to support an antitrust claim. Accordingly, even construing Plaintiff's Complaint liberally and accepting her allegations as true, Plaintiff has failed to state an antitrust claim under the Sherman Act.

C. The Court lacks subject matter jurisdiction over Plaintiff's claims under the *Rooker-Feldman* doctrine.[10]

Finally, Defendants argue that, even if Plaintiff had stated any valid claims that were not time-barred—which she has not—the Court lacks subject matter jurisdiction over Plaintiff's claims under the *Rooker-Feldman* doctrine.[11] The *Rooker-Feldman* doctrine "is a jurisdictional rule that precludes the lower federal courts from reviewing state court judgments." *Alvarez v. Att'y Gen. for Fla., 679 F.3d 1257, 1262 (11th Cir. 2012)* (citation omitted). The doctrine derives from *28 U.S.C. § 1257*, which "vests authority to review a state court's judgment solely in [the Supreme] Court." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 292, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)*. It applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id. at 284*. The doctrine "operates **[*15]** as a bar to federal court jurisdiction where the issue before the federal court was 'inextricably intertwined' with the state court judgment so that (1) the success of the federal claim would 'effectively nullify' the state court judgment, or that (2) the federal claim would succeed 'only to the extent that the state court wrongly decided the issues.'" *Alvarez, 679 F.3d at 1262-63* (quoting *Casale v.*

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[9] Additionally, throughout her filings, Plaintiff repeatedly states that the individual Defendants are both members of the Board and, as pharmacists themselves, active market participants. However, to the extent Plaintiff believes that fact—alone and without any further factual development—establishes the requisite injury or harm to competition, she is incorrect. *See Robb v. Conn. Bd. of Veterinary Med., 157 F. Supp. 3d 130, 146 (D. Conn. 2016)* ("[T]o . . . hold that [plaintiff's] bare allegations make out an antitrust [claim] would effectively mean that nearly all actions of an adjudicative body controlled by a majority of industrial participants would constitute an antitrust [claim] *per se*, an unsupportable argument . . . ."); *see also Ala. Power Co. v. Ala. Elec. Co-op., Inc., 394 F.2d 672, 677 (5th Cir. 1968)* ("The Supreme Court has repeatedly held that, where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out.") (citations omitted).

[10] *See Rooker v. Fid. Tr. Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923)*; *D.C. Ct. of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983)*.

[11] In their motion, Defendants only address the applicability of *Rooker-Feldman* to Plaintiff's due process claims, not her antitrust claims. However, because the doctrine is jurisdictional, the Court may consider the doctrine's application to all of Plaintiff's claims sua sponte. *See Jackson v. Farmers Ins. Grp./Fire Ins. Exch., 391 F. App'x 854, 856-57 (11th Cir. 2010)* (affirming sua sponte dismissal of plaintiff's complaint under *Rooker-Feldman* and stating that "a district court may sua sponte consider subject matter jurisdiction at any stage in the litigation and must dismiss a complaint if it concludes that subject matter jurisdiction is lacking").

Tillman, 558 F.3d 1258, 1260 (11th Cir. 2009)). In other words, the doctrine bars the losing party "from seeking what in substance would be appellate review of" the state court's judgment. Ramos, 701 F. App'x at 801 (citing Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1330 (11th Cir. 2010)).

Here, Plaintiff seeks, at least in part, the same relief based on the same facts and allegations that were adjudicated in her prior state court proceedings. In both cases, Plaintiff has sought to overturn the Board's final order and do away with the sanctions it imposed. And, in both cases, this relief is or was premised on Plaintiff's allegations that Defendants' conduct violated various statutory provisions and her due process rights.[12] Accordingly, for Plaintiff to prevail in this action, this Court would have to find the circuit court was wrong in determining that the Board's factual findings were supported by substantial evidence, the Board's **[*16]** legal conclusions were correct, and the Board acted lawfully.[13] This Court would also have to invalidate the appellate court's judgment directing the circuit court to "reinstat[e] the board's decision in its entirety." In other words, the only way for Plaintiff to succeed here is for this Court to decide that the state courts—which heard the same facts and underlying issues presented here—wrongfully decided those issues. As such, Plaintiff's current claims are inextricably intertwined with her prior state court claims, and this Court lacks jurisdiction over them. *See, e.g.,* Powell v. Powell, 80 F.3d 464, 468 (11th Cir. 1996) (holding district court lacked jurisdiction over Plaintiff's constitutional claim because, if a federal district court were to hold in Plaintiff's favor on his federal claim, that holding would "effectively nullify" the state court's judgment).

Notably, Rooker-Feldman applies in this instance notwithstanding Plaintiff's purported federal antitrust claims, as those claims are premised on the exact same conduct alleged and considered in the state court litigation.[14] Although *Rooker-Feldman* may generally not apply where a plaintiff did not have a reasonable opportunity to raise her federal claim in state proceedings, ***[*17]*** *see* Casale, 558 F.3d at 1260, the Eleventh Circuit has nevertheless applied *Rooker-Feldman* when a plaintiff's federal claim amounts to nothing more than "an invitation for the district court to review judgments entered against [her] by . . . state courts." Stack v. Mason & Assocs., 245 F. App'x 920, 923-24 (11th Cir. 2007). In *Stack*, the Eleventh Circuit held that the district court lacked subject matter jurisdiction over Plaintiff's antitrust claims under *Rooker-Feldman*. The court stated:

> Although the Stacks' amended complaint alleges RICO conspiracy violations, Sherman Antitrust Act violations, and common law fraud, all of those allegations are based upon the premise that the defendants either extorted or aided the extortion of unreasonably high costs and fees during the foreclosure of their home and the proceedings to enforce Mr. Stack's credit card debt. As such, the Stacks' amended complaint was without a doubt an invitation for the district court to review judgments entered against them by Florida state courts. However, the Stacks have already filed several motions in state court contesting the amount of attorney's fees awarded, and every state court that entertained one of those motions decided that the fees and costs were both appropriate and reasonable. The Stacks **[*18]** are not entitled to have a federal district court review those determinations. Therefore, the district court did not err in dismissing their complaint based on the *Rooker-Feldman* doctrine.

Id.

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[12] In her response to the motion to dismiss, "Plaintiff concedes that the issues before this Court [are] identical to the issues at the administrative hearing [before the Board]." Doc. 32 at 34. In her subsequent sur-reply, she admits that she "prayed the [circuit court] to review the legalities of Defendants' actions, and reverse [the Board's] decision." Doc. 34 at 15. She also makes clear throughout her various responses that the issues presented here and the issues considered in state court are premised on the same acts and events.

[13] As noted above, Plaintiff admits that she "prayed the [circuit court] to review the legalities of Defendants' actions, and reverse [the Board's] decision," but the court found no illegalities and affirmed the Board's decision, determining "that Plaintiff was . . . guilty of the charges filed by Defendants." Doc. 32 at 12-13.

[14] Indeed, Plaintiff states in her complaint and throughout her various responses that Defendants have violated the Sherman Act "by suspending her personal license . . . and business permits and licenses" (Doc. 34 at 6, n.3) and not following proper procedure in conducting her inspections and subsequent hearing (*Id.* at 8, n.4).

Similarly, Plaintiff's purported antitrust claims in this case are based on the general premise that the Board's final order and sanctions were unlawful. However, both state courts that reviewed the final order found it was based on substantial evidence; contained correct conclusions of law; and was not unreasonable, arbitrary, or capricious. Plaintiff is not entitled to have a federal district court review those determinations under *Rooker-Feldman*, and Plaintiff cannot circumvent *Rooker-Feldman* by simply wrapping the same facts and issues in a different legal theory. *See id.*; *Staley v. Ledbetter, 837 F.2d 1016, 1017-18 (11th Cir. 1988)* (holding district court lacked jurisdiction to review a county agency's decision that had been upheld by the state court of appeals).[15]

Additionally, the fact that the Board was the sole named defendant or respondent in Plaintiff's state court proceedings rather than individual Board members does not render *Rooker-Feldman* inapplicable. **[*19]** The Eleventh Circuit has held that the doctrine may apply even where a party to the federal proceeding was not, and could not have been, a party to the state proceeding. *See* *Powell, 80 F.3d at 467*. The relevant question is not whether a particular party was present in the prior proceeding, but whether the plaintiff had a "reasonable opportunity" to bring his claim in the state court proceeding. *Id. at 468* ("The absence of the Secretary from the state court proceeding did not deprive [plaintiff] of an opportunity to press his claim. If [plaintiff] had prevailed on his claim . . . the Secretary's absence would have been immaterial.").

Plaintiff presented to the circuit court her claim that the Board's conduct was unlawful, but the circuit court found that Plaintiff was guilty of the conduct alleged by the Board and that the Board was statutorily entitled to issue sanctions for that conduct. Like in *Powell*, if Plaintiff had prevailed on her claims in state court and the state court had overturned the Board's final order like she asked, the absence of the individual Board members would have been immaterial.

Accordingly, even if Plaintiff's claims were not subject to dismissal based on the statute of limitations or failure **[*20]** to state a claim, the Court nevertheless lacks subject matter jurisdiction over Plaintiff's claims under *Rooker-Feldman*, and they must be DISMISSED.

III. CONCLUSION

For the reasons set forth above, it is

ORDERED that Defendants' Motion to Dismiss (Doc. 27) is GRANTED, and this case is DISMISSED.

DONE this 22nd day of June, 2021.

/s/ Kelly Fitzgerald Pate

KELLY FITZGERALD PATE

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[15] *See also* *Sarhan v. Rothenberg, No. 07-22818, 2008 U.S. Dist. LEXIS 48901, 2008 WL 2474645, at *11 (S.D. Fla. June 17, 2008)* ("A litigant may not circumvent [*Rooker-Feldman*] by instituting a federal action which, although not styled as an appeal, 'amounts to nothing more than an attempt to seek review of [the state court's] decision by a lower federal court.'" (quoting *Am. Reliable Ins. Co. v. Stillwell, 336 F.3d 311, 316 (4th Cir. 2003)*); *Scannell v. Wash. State Bar Ass'n, No. 12-00683, 2013 U.S. Dist. LEXIS 203701, 2013 WL 12423276, at *5-6 (W.D. Wash. July 1, 2013)* ("Plaintiff may be suing under different causes of action than were chosen in the State Court, but the parties are essentially the same, Plaintiff's goal is the same, and the only real effect of his additional claims, including his *RICO* and Sherman Anti-Trust Act charges, is to provide additional grounds to overturn [defendant's] decision to disbar him."); *Guerrero v. Bensalem Racing Ass'n, Inc., 25 F. Supp. 3d 573, 584 (E.D. Pa. 2014)* (holding plaintiff's Sherman Act claims were barred by *Rooker-Feldman* and stating, "Plaintiff's 'manufactured effort' to re-characterize the source of his injuries is insufficient to circumvent the *Rooker—Feldman* bar.") (citations omitted); *Stern v. Nix, 840 F.2d 208, 212 (3d Cir. 1988)* ("Despite this genuflecting to the *Rooker-Feldman* doctrine, closer consideration convinces us that [plaintiff's] complaint is simply a skillful attempt to mask the true purpose of the action, which essentially is to reverse the judicial decision of the Supreme Court of Pennsylvania, in contravention of *Rooker-Feldman*."), *cert. denied* ***488 U.S. 826, 109 S. Ct. 77, 102 L. Ed. 2d 53 (1988)***).

UNITED STATES MAGISTRATE JUDGE

Reorganized FLI, Inc. v. Williams Cos.

United States Court of Appeals for the Tenth Circuit

June 22, 2021, Filed

No. 20-3056

Reporter
1 F.4th 1214 *; 2021 U.S. App. LEXIS 18505 **

REORGANIZED FLI, INC., Plaintiff - Appellee, v. THE WILLIAMS COMPANIES, INC.; DYNEGY MARKETING & TRADE; WILLIAMS MERCHANT SERVICES COMPANY, INC.; WILLIAMS ENERGY MARKETING & TRADING COMPANY, Defendants - Appellants.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS. (D.C. NO. 2:05-CV-02389-JAR-GEB).

Core Terms

repeal, damages, retroactively, full consideration, retroactive application, apply retroactively, summary judgment, violations, statutory change, district court, vested right, treble damages, prevails, cause of action, quotation, courts, merits, rights, default, measure of compensation, amended complaint, available remedy, eliminating, extinguish, antitrust, changes

LexisNexis® Headnotes

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

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

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

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

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

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

A federal appellate court reviews a district court's decision on a summary judgment motion de novo, applying the standard set out in *Fed. R. Civ. P. 56(a)*. Under that standard, a district court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Rule 56(a)*. Where there is no assertion the matter involves a genuine dispute as to any material fact, appellate review is limited to determining if the district court correctly applied the law.

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

Governments > Courts > Judicial Precedent

HN2[] **Federal & State Interrelationships, Erie Doctrine**

When an appeal presents an unsettled question of state law, a federal appellate court must ordinarily attempt to predict how the highest court would interpret the issue. The appellate court may seek guidance from decisions rendered by lower courts in the relevant state, appellate decisions in other states with similar legal principles, district court decisions interpreting the law of the state in question, and the general weight and trend of authority in the relevant area of law.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

HN3[] **Procedural Due Process, Scope of Protection**

Many decades ago, the Kansas Supreme Court held that unless there is legislative intent to the contrary, when a change of law merely affects the remedy or law of procedure, all rights of action will be enforced under the new procedure without regard to whether they accrued before or after such change of law. A change that affects the substantive rights of the parties, however, operates prospectively unless its language clearly indicates that the legislature intended it to operate retroactively. These general rules are applicable unless retroactive application of the statutory change would infringe vested rights and thereby violate due process.

Governments > Legislation > Statutory Remedies & Rights

HN4[] **Legislation, Statutory Remedies & Rights**

The Kansas Supreme Court has held that substantive laws give or define the right, give the right or denounce the wrong, or create liability against a defendant for a tort committed. Substantive legislation that creates a cause of action is distinguishable from a provision entitling a party to recover damages if it prevails in its action.

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

HN5[] **Deceptive & Unfair Trade Practices, State Regulation**

The full-consideration provision of *Kan. Stat. Ann. § 50-115* was not a substantive provision because it did not create liability; it merely set out the remedy available to a plaintiff upon proof a defendant was liable for violating *Kan. Stat. Ann. § 50-112*.

Governments > Courts > Rule Application & Interpretation

HN6[] **Courts, Rule Application & Interpretation**

The Kansas Court of Appeals has held that a provision setting out the type of relief a plaintiff may obtain from the court and the procedure for doing so is remedial.

Torts > Wrongful Death & Survival Actions > Defenses > Statute of Limitations

HN7[] **Defenses, Statute of Limitations**

An increase, decrease or repeal of the statutory maximum recoverable in wrongful death actions is not retroactive because statutory increases in damage limitations are changes in substantive rights and not mere remedial changes.

Torts > ... > Damages > Types of Damages > Compensatory Damages

HN8[] **Types of Damages, Compensatory Damages**

Under the Kansas wrongful death statute, the death limitation is not a measure of compensation. Instead, it is simply a limitation upon recovery.

Governments > Legislation > Statute of Limitations > Time Limitations

HN9[] **Statute of Limitations, Time Limitations**

The Kansas Supreme Court has made it clear that a statutory change to a measure of compensation is not substantive, expressly distinguishing the statutory death limitation from a measure of compensation.

Governments > Legislation > Effect & Operation > Retrospective Operation

HN10[] **Effect & Operation, Retrospective Operation**

A remedial change applies retroactively by default unless there is clear legislative intent to the contrary or the retroactive application would affect a party's vested rights.

Governments > Legislation > Effect & Operation > Retrospective Operation

HN11[] **Effect & Operation, Retrospective Operation**

There is no statutory language exempting the repeal of *Kan. Stat. Ann. § 50-115* from retroactive application.

Governments > Legislation > Effect & Operation > Prospective Operation

HN12[] **Effect & Operation, Prospective Operation**

Kan. Stat. Ann. § 50-164 provides limited exemptions to the Kansas default rule that substantive legislation applies only prospectively.

Governments > Legislation > Effect & Operation > Retrospective Operation

HN13[] **Effect & Operation, Retrospective Operation**

To determine whether applying a statutory change retroactively infringes vested rights, Kansas courts consider three factors: (1) the nature of the rights at stake (e.g., procedural, substantive, remedial), (2) how the rights were affected (e.g., were the rights partially or completely abolished by the legislation; was any substitute remedy provided), and (3) the nature and strength of the public interest furthered by the legislation.

Governments > Legislation > Effect & Operation > Retrospective Operation

HN14[] **Effect & Operation, Retrospective Operation**

Under the default Kansas rule, changes to remedial statutes apply retroactively when there is no legislative intent to the contrary.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > Legislation > Effect & Operation > Retrospective Operation

HN15[] **Procedural Due Process, Scope of Protection**

The second factor for determining whether applying a statutory change retroactively infringes vested rights requires the court to examine how retroactive application of the statutory change affects the parties' rights. The Kansas Supreme Court has held that the legislature may retroactively modify remedies by which rights are enforced, unless the modification has the practical effect of abolishing the right. Thus, in some circumstances, the repeal of a purely remedial statutory provision, like *Kan. Stat. Ann. § 50-115*, cannot be applied retroactively because of due process concerns.

Governments > Courts > Rule Application & Interpretation

HN16[] **Courts, Rule Application & Interpretation**

The general rule is that there are no vested rights in a particular remedy or method of procedure.

Governments > Legislation > Effect & Operation > Retrospective Operation

HN17[] **Effect & Operation, Retrospective Operation**

As to the third and final factor for determining whether applying a statutory change retroactively infringes vested rights, the court examines the nature and strength of the public interest furthered by the legislation.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN18[] **Reviewability of Lower Court Decisions, Preservation for Review**

If a party specifically asks for full consideration damages under repealed *Kan. Stat. Ann. § 50-115* but it also requests such other and further relief as the court may deem necessary and appropriate, *Fed. R. Civ. P. 54* does not require any greater specificity than this to preserve a remedy.

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

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

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

HN19[] **Appellate Jurisdiction, Certified Questions**

The Tenth Circuit has previously exercised its discretion in an interlocutory appeal to resolve whether a party is entitled to summary judgment even though the district court did not expressly certify the question of whether a genuine issue of material fact precluded summary judgment. Under the standard set out in Rural Water Dist. No. 4 v. City of Eudora, the appellate court should exercise its discretion if an issue is fairly included within the certified order and is a controlling question of law.

Counsel: Jennifer Caughey, Jackson Walker L.L.P., Houston, Texas (Robert T. Adams, Steven D. Soden, and Mitchell F. Engel, Shook, Hardy & Bacon LLP, Kansas City, Missouri; Joseph A. Fischer, III, Jay K. Wieser, Edwin Buffmire, and Adam W. Aston, Jackson Walker L.L.P., Houston, Texas; and Patrick N. Fanning, Peak Litigation, L.L.P., Kansas City, Missouri, with her on the briefs), for Defendants - Appellants.

Leslie V. Pope, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, D.C. (Michael J. Guzman, Kevin J. Miller, and T. Dietrich Hill, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, D.C.; Thomas J. Brill, Law Office of Thomas H. Brill, Leawood, Kansas; Gary D. McCallister, McCallister Law Group, LLC, Chicago, Illinois; Isaac L. Diel, Sharp Law LLP, Overland Park, Kansas; Eric I. Unrein, Cavanaugh, Biggs & Lemon, P.A., Topeka, Kansas; and Donald D. Barry, Barry Law Offices, LLC, Donald D. Barry, Chartered, Topeka, Kansas, with her on the brief), for Plaintiff - Appellee.

Judges: Before HARTZ, MURPHY, and McHUGH, Circuit Judges.

Opinion by: MURPHY

Opinion

[*1217] **MURPHY**, Circuit Judge.

I. Introduction [2]**

In 2005, Appellee Reorganized FLI, Inc.[1] ("Farmland") brought an action against Appellants alleging violations of the *Kansas Restraint of Trade Act ("KRTA")*. Farmland sought, *inter alia*, full consideration damages pursuant to

[1] The named plaintiff in this action was J.P. Morgan Trust Company in its capacity as the Liquidating Trustee of the Farmland Industries Liquidating Trust.

Kan. Stat. Ann. § 50-115. In 2019, Appellants moved for summary judgment on Farmland's claims, arguing the repeal of *§ 50-115* operated retroactively to preclude Farmland from obtaining any relief. The Kansas District Court denied the motion for summary judgment but granted Appellants' motion for leave to file an interlocutory appeal with this court. In this interlocutory appeal, Appellants seek reversal of the district court's denial of summary judgment and a ruling ordering the district court to enter judgment in their favor.

Exercising jurisdiction pursuant to *28 U.S.C. § 1292(b)*, this court **affirms** the denial of summary judgment but for reasons different from those of the district court. Although we conclude *§ 50-115* applies retroactively to foreclose Farmland from recovering full consideration damages, Farmland is entitled to other relief if it prevails on the merits of its claims. Thus, the repeal of *§ 50-115* does not leave Farmland without a remedy and Appellants are not entitled to summary judgment.

II. Background

On August 8, 2005, Farmland filed an action in **[**3]** Kansas state court alleging, *inter* ***[*1218]*** *alia*, that Appellants engaged in anti-competitive conduct by conspiring to manipulate the price of natural gas, in violation of the KRTA, *Kan. Stat. Ann § 50-112*.[2] According to Farmland's complaint, Appellants' conduct distorted and artificially inflated the price Farmland paid for natural gas. After Appellants removed the matter to the United States District Court for the District of Kansas, Farmland filed an amended complaint. The matter was thereafter transferred to the United States District Court for the District of Nevada where it was consolidated with multi-district litigation addressing similar claims made by other plaintiffs (the "MDL Case"). In 2019, the matter was returned to the District of Kansas.

At the time Farmland's claims arose, Kansas law permitted "any person injured or damaged by any such arrangement, contract, agreement, trust or combination, described in [*Kan. Stat. Ann § 50-112*] . . . [to] sue for and recover . . . the full consideration or sum paid by such person." *Kan. Stat. Ann. § 50-115* (repealed 2013). Plaintiffs who alleged violations of *§ 50-112* could also seek treble damages. *Id. § 50-161(b)*. Farmland's amended complaint contains the following paragraph related to damages:

> During the relevant period of the **[**4]** antitrust violations by defendants and their co-conspirators, plaintiff purchased natural gas, and by reason of the violations alleged herein, paid more for natural gas than it would have paid in the absence of such antitrust violations. As a result, plaintiff has been injured. Plaintiff is seeking damages under the full consideration damage remedy of *Kansas Statutes Annotated § 50-115* during the relevant time period, January 1, 2000 thru December 31, 2001, the exact dates being undetermined at this time. The amount of damages sustained by plaintiff is presently undetermined.

In its Prayer for Relief, the amended complaint also asked that Farmland "be awarded such other and further relief as [the] Court may deem necessary and appropriate." *Section 50-115* was repealed in 2013, thereby eliminating full consideration damages for violations of *§ 50-112*. Farmland did not amend its complaint after the statute was repealed to remove its request for full consideration damages.

In 2019, Appellants moved for summary judgment, asserting the repeal of full consideration damages applies retroactively, leaving Farmland with no available remedy and, thus, no viable suit. The district court denied Appellants' motion, concluding the repeal of *§ 50-115* operated only **[**5]** prospectively and, thus, Farmland remains entitled to full consideration damages if it prevails on the merits of its claims. The district court, however, certified for interlocutory appeal the question of whether the repeal of *§ 50-115* applies retroactively under Kansas law, noting there was substantial ground for difference of opinion.

III. Discussion

[2] Farmland's complaint was brought pursuant to *Kan. Stat. Ann §§ 50-101*, *-108*, *-112*, *-115*, *-117*, and *-161*.

A. Standard of Review

HN1[] This court reviews a district court's decision on a summary judgment motion de novo, applying the standard set out in *Rule 56(a) of the Federal Rules of Civil Procedure*. *Doe v. Univ. of Denver, 952 F.3d 1182, 1189 (10th Cir. 2020)*. Under that standard, a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. **[*1219]** Because there is no assertion this matter involves a genuine dispute as to any material fact, our review is limited to determining if the district court correctly applied the law. *See Wolf v. Prudential Ins. Co. of Am., 50 F.3d 793, 796 (10th Cir. 1995)*; *see also Knoll v. Olathe Sch. Dist. No. 233, 309 Kan. 578, 439 P.3d 313, 315 (Kan. 2019)* ("A statute's applicability presents a question of law.").

B. Retroactivity Under Kansas Law

Both parties acknowledge Kansas law controls the analysis of whether the repeal of *§ 50-115* applies retroactively. They also agree the Kansas courts have not definitively decided the question. ***HN2***[] When an appeal presents an unsettled question **[**6]** of state law, we must ordinarily attempt to predict how the highest court would interpret the issue.[3] *Schrock v. Wyeth, Inc., 727 F.3d 1273, 1284 (10th Cir. 2013)*. We "may seek guidance from decisions rendered by lower courts in the relevant state, appellate decisions in other states with similar legal principles, district court decisions interpreting the law of the state in question, and the general weight and trend of authority in the relevant area of law." *Wade v. EMCASCO Ins. Co., 483 F.3d 657, 666 (10th Cir. 2007)* (quotation and citations omitted).

HN3[] Many decades ago, the Kansas Supreme Court held that unless there is legislative intent to the contrary, "when a change of law merely affects the remedy or law of procedure, all rights of action will be enforced under the new procedure without regard to whether they accrued before or after such change of law." *Jones v. Garrett, 192 Kan. 109, 386 P.2d 194, 199 (Kan. 1963)*. A change that affects the substantive rights of the parties, however, "operates prospectively unless its language clearly indicates that the legislature intended it to operate retroactively." *Norris v. Kan. Empl. Sec. Bd. of Review, 303 Kan. 834, 367 P.3d 1252, 1257 (Kan. 2016)* (quotation omitted). These general rules are applicable unless retroactive application of the statutory change would infringe vested rights and thereby violate due process. *Owen Lumber Co. v. Chartrand, 276 Kan. 218, 73 P.3d 753, 756 (Kan. 2003)* (noting the Kansas Supreme Court has repeatedly held that procedural and remedial **[**7]** statutes "will be given retrospective application only if such retrospective application will not affect a vested right of a party" (quotation and alteration omitted)); *Brennan v. Kan. Ins. Guar. Ass'n, 293 Kan. 446, 264 P.3d 102, 113 (Kan. 2011)*.

The parties do not quarrel with any of these general principles of Kansas law. Their disagreement centers on whether *§ 50-115* was remedial or substantive. If substantive, the repeal operates prospectively under the general Kansas rule, and Farmland's right to full consideration damages if it prevails on the merits is unaffected. If remedial, however, the repeal operates retroactively unless the Kansas legislature intended otherwise or unless retroactive application would affect Farmland's vested rights. If applied retroactively, the repeal of *§ 50-115* will extinguish Farmland's ability to recover full consideration damages.

C. Section 50-115's Full-Consideration Provision Was Remedial

HN4[] The Kansas Supreme Court has held that "[s]ubstantive laws give or define the right, give the right or denounce the wrong, or create liability against a defendant for a tort committed." *Brennan, 264 P.3d at 113*. Substantive legislation that **[*1220]** creates a cause of action is distinguishable from a provision entitling a party to recover damages if it prevails in its action. *Foster v. Humburg, 180 Kan. 64, 299 P.2d 46, 50 (Kan. 1956)* ("The

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[3] Neither party has asked this court to certify the retroactivity question to the Kansas Supreme Court.

'cause **[**8]** of action' is the wrong done, not the measure of compensation for it, or the character of relief sought."). "Damage is not the cause of action. It is merely a part of the remedy which the law allows for the injury resulting from a breach or wrong." *Id.* ***HN5***[] Applying these principles of Kansas law, we conclude the full-consideration provision of *§ 50-115* was not a substantive provision because it did not create liability; it merely set out the remedy available to a plaintiff upon proof a defendant was liable for violating *§ 50-112*.[4] This conclusion is supported by the express language used by the Kansas legislature in *§ 50-112* and *§ 50-115*.

Section 50-112 provides as follows:

> Except as provided in *K.S.A. 50-163*, and amendments thereto, all arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorney or doctor fees, and all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, **[**9]** reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of moneys to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void.

Section 50-112 describes multiple arrangements that wrongly restrain competition in violation of Kansas public policy, plainly fitting within the definition of a substantive provision under settled Kansas law. *See* *Brennan, 264 P.3d at 113*. *Section 50-115*, on the other hand, did not define any right, denounce any wrongs, or create liability. It merely referenced *§ 50-112* and provided that once a litigant proved a defendant engaged in the conduct prohibited by *§ 50-112*, he was entitled to damages equal to "the full consideration or sum paid . . . for any goods, wares, merchandise and articles included in or advanced or controlled in price by such combination, or the full amount of money borrowed."[5] *Kan. Stat. Ann. § 50-115* (repealed 2013). ***HN6***[] The Kansas Court of Appeals has held that a provision setting "out the type of relief a [plaintiff] may obtain from the court and the procedure for doing so" is remedial. **[*1221]** *Dester v. Dester, 50 Kan. App. 2d 914, 335 P.3d 119, 123 (Kan. Ct. App. 2014)*. The full-consideration provision **[**10]** of *§ 50-115* did just that and no more.

Relying on statements made by the Kansas Supreme Court in *Kleibrink v. Missouri-Kansas-Texas Railroad Co., 224 Kan. 437, 581 P.2d 372 (Kan. 1978)*, Farmland argues the repeal of *§ 50-115* affected the amount of damages recoverable for violations of the KRTA and, under Kansas law, amendments affecting the amount of damages are substantive. The *Kleibrink* court addressed the question of whether an increase in the statutory limit recoverable in a wrongful death action applied prospectively or retroactively. *Id. at 378*. ***HN7***[] Concluding the statutory change applied prospectively, the Kansas Supreme Court adopted the position that "an increase, decrease or repeal of the statutory maximum recoverable in wrongful death actions is Not retroactive" because "[s]tatutory increases in damage limitations are changes in substantive rights and not mere remedial changes." *Id. at 378-79* (quotation omitted). ***HN8***[] As support for this conclusion, the *Kleibrink* court stated that "under [the Kansas] wrongful death statute, the death limitation is Not a measure of compensation. Instead, it is simply a limitation upon recovery." *Id. at 379*. It is not surprising that Kansas treats an increase in statutory damages as substantive. Such a change

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[4] Our retroactivity analysis has no bearing on whether the damages provisions of the KRTA are procedural or substantive for purposes of *Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*.

[5] *Section 50-115* also gave any person injured or damaged by the conduct set out in *§ 50-112* the right to "sue for" full consideration damages. But this appeal does not involve the question of whether a provision creating a private right of action is substantive or procedural. Further, the repeal of *§ 50-115* had no affect on the ability of "any person who may be damaged or injured by any agreement, monopoly, trust, conspiracy or combination which is declared unlawful by the Kansas restraint of trade act" to bring suit pursuant to *Kan. Stat. Ann. § 50-161(b)*. And, more to the point, Appellants have not argued Farmland's suit should be dismissed because the repeal of *§ 50-115* retroactively stripped Farmland of the right to bring a cause of action alleging a violation of *§ 50-112*. Appellants have argued only that Farmland can no longer seek full consideration damages as a result of the repeal of *§ 50-115*. Accordingly, our review is limited to the damages provision of *§ 50-115*.

impacts the amount of a defendant's maximum liability based on legislative **[**11]** decree, not wrongful conduct. Thus, if applied retroactively, an increase in statutory damage limitations could increase a defendant's liability for past conduct without regard to the specifics of defendant's conduct or plaintiff's evidence of damages.

The situation presented here is not analogous to that in *Kleibrink* because the repeal of § 50-115 was not a change to a statutory damage limitation and did not, on its face, increase or decrease a defendant's liability for past conduct. It, instead, involved a change to the measure of compensation for violations of the KRTA by eliminating full consideration damages. ***HN9***[] The Kansas Supreme Court in *Kleibrink* made it clear that a statutory change to a measure of compensation is not substantive, expressly distinguishing the statutory "death limitation" from "a measure of compensation." *Id.* Thus, *Kleibrink* supports, rather than undermines, the proposition that the repeal of § 50-115 applies retroactively because § 50-115 was remedial and not substantive.[6]

Farmland also relies on the decision of the United States Supreme Court in *Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)*. *Landgraf* involved changes made to Title VII by the Civil Rights Act of 1991, including the addition of the right **[**12]** to recover compensatory and punitive damages for violations of the statute. *Id. at 247*. Before the amendment, "the law did not then authorize any recovery of damages even though [the plaintiff] was injured." *Id. at 250*; *see also id. at 252* ("Before the enactment of the 1991 Act, Title VII afforded only 'equitable' remedies. The primary **[*1222]** form of monetary relief available was backpay."). After the amendment, a plaintiff was able to sue for "monetary relief for some forms of workplace discrimination that would not previously have justified *any* relief." *Id. at 254*. Because the new compensatory damages provision "effect[ed] a major expansion in the relief available to victims of employment discrimination" and "attache[d] an important new legal burden" to the conduct of the defendant occurring before its enactment, the Court held the amendment was substantive and did not apply retroactively. *Id. at 255, 282-83*. The Court characterized the amendments to Title VII made by the Civil Rights Act of 1991 as "creating a new cause of action" by "confer[ring] a new right to monetary relief on [employees] who were victims of a hostile work environment but were not constructively discharged." *Id. at 283*. The repeal of § 50-115, however, did not affect a plaintiff's right to recover compensatory damages **[**13]** for violations of the KRTA. That right existed before the repeal and continues to exist after. Neither did the repeal impose new duties on a defendant or expand the conduct prohibited by the KRTA. Thus, the analysis of the Supreme Court in *Landgraf* has no bearing on the question before us and does not alter our conclusion that the repeal of § 50-115 was remedial, not substantive.[7]

D. The Repeal of § 50-115 Applies Retroactively

Having concluded § 50-115 was a remedial provision, not a substantive provision, we must now address whether its repeal applies retroactively. ***HN10***[] Kansas law on the point is clear: a remedial change applies retroactively by default unless there is clear legislative intent to the contrary or the retroactive application would affect a party's vested rights. *Owen Lumber Co., 73 P.3d at 755-56*. ***HN11***[] As to the first part of this inquiry, there is no statutory language exempting the repeal of § 50-115 from retroactive application.

[6] For the same reasons, the Kansas Supreme Court's decision in *In re Estate of Laue, 225 Kan. 177, 589 P.2d 558 (Kan. 1979)*, does not support Farmland's argument that the repeal of § 50-115 was substantive. *In re Estate of Laue* involved an amendment to the statutory allowance of a surviving spouse. *Id. at 567*. Like the change at issue in *Kleibrink*, the statutory amendment in *In re Estate of Laue* was substantive because it legislatively established the amount to which the surviving spouse was entitled. The Kansas Supreme Court noted "[t]he statutory allowance does not involve a mere remedy or procedure." *Id.* Again, that is not the situation presented in this matter because § 50-115 did not dictate a minimum or maximum damages award prior to its repeal.

[7] Further, the Supreme Court's decision in *Landgraf* was not grounded in Kansas law and the issue currently before this court involves only a question of Kansas law.

At the same time it repealed *§ 50-115*, the Kansas legislature enacted a separate provision addressing the retroactivity of the changes made to *§§ 50-101*, *50-112*, and *50-163*. That provision, *Kan. Stat. Ann. § 50-164*, is still part of the Kansas Code and reads as follows:

> *K.S.A. 50-163* and the amendments to *K.S.A. 50-101* and *50-112* by this act shall be applied retroactively to any choses in action **[**14]** or defenses premised on any provision of the Kansas restraint of trade act amended or repealed by this act, and any such choses in action or defenses that have accrued as of the effective date of this act shall be abated, but causes of action that were pending in any court before the effective date of this act, shall not be abated. All other non-remedial provisions of this section shall be applied prospectively.

By its express terms, *§ 50-164* directs that substantive amendments made to *§ 50-101* and *§ 50-112* and the 2013 enactment of *§ 50-163* apply retroactively in certain circumstances. ***HN12***[] In other words, *§ 50-164* provided limited exemptions to the Kansas default rule that substantive legislation applies only prospectively. *Section 50-164* also reiterated the default Kansas rule that non-remedial statutory provisions apply prospectively. But, as we held above, *§ 50-115* was remedial and, thus, this clause is inapplicable. Further, the statutory provision at issue here, *i.e.*, *§ 50-115*, is not referenced in *§ 50-164*. Thus, the Kansas legislature did not express any intention in *§ 50-164* to exempt the repeal of **[*1223]** *§ 50-115* from the default Kansas rules on retroactivity.

This leaves only the question of whether the retroactive application of the statutory change would affect Farmland's vested **[**15]** rights. *Owen Lumber Co., 73 P.3d at 755-56*. ***HN13***[] To determine whether applying a statutory change retroactively infringes vested rights, Kansas courts consider three factors: "(1) the nature of the rights at stake (e.g., procedural, substantive, remedial), (2) how the rights were affected (e.g., were the rights partially or completely abolished by the legislation; was any substitute remedy provided), and (3) the nature and strength of the public interest furthered by the legislation." *Brennan, 264 P.3d at 113* (quotation omitted). As to the first factor, we have already concluded *§ 50-115* was a remedial statute. ***HN14***[] Thus, the first factor weighs in favor of retroactive application because, under the default Kansas rule, changes to remedial statutes apply retroactively when there is no legislative intent to the contrary. *See* *Owen Lumber Co., 73 P.3d at 755-56*.

HN15[] The second factor requires this court to examine how retroactive application of the statutory change affects the parties' rights. The Kansas Supreme Court held in *Brennan* that "the legislature may retroactively modify remedies by which rights are enforced, unless the modification has the practical effect of abolishing the right." *Brennan, 264 P.3d at 114* (citing *Owen Lumber Co., 73 P.3d at 753*). Thus, in some circumstances, the repeal of a purely remedial statutory provision, like *§ 50-115*, cannot **[**16]** be applied retroactively because of due process concerns. *See id.* ("[A] statute may be remedial and affect a vested right . . . ."). *Brennan* involves a medical malpractice suit brought by a patient against his doctor. *Id. at 106*. After the complaint was filed, the doctor's malpractice insurer became insolvent, triggering the statutory obligation of the Kansas Insurance Guaranty Association ("KIGA") to cover the claim. *Id.* While the suit was pending, the Kansas legislature passed a law authorizing KIGA to offset its liability to claimants with amounts paid by the claimant's health insurance. *Id. at 106*. The statutory change was expressly made retroactive to pending claims. *Id.* The Kansas Supreme Court held that retroactive application of the change to Mr. Brennan's pending claim against KIGA adversely impacted his "vested right" because it "extinguished Brennan's right to recover from KIGA," a "statutory right [that] arose at the time [the doctor's malpractice insurer] was declared insolvent." *Id. at 114*; *see also* *id. at 106* (noting Mr. Brennan "received medical reimbursements from his personal health insurance policy that totaled more than the insolvent insurer's policy limits"). Thus, even though the statutory change was **[**17]** purely remedial, the Kansas Supreme Court held there were due process concerns if it was applied retroactively to Mr. Brennan. *Id. at 114*.

In *Norris*, the Kansas Supreme Court addressed the retroactivity of a procedural amendment. *367 P.3d at 1253*. *Norris* involved a statutory deadline that was shortened after the plaintiff filed a petition for judicial review of an adverse decision by the Kansas Employment Security Board of Review. *Id. at 1255*. The Kansas Supreme Court held the new law was procedural and, thus, would generally apply retroactively. *Id. at 1258*. However, retroactive application would bar the plaintiff's action even though it was timely when filed, eliminating the plaintiff's cause of action entirely. *Id.* Accordingly, the court held that retroactive application was inappropriate. *Id.*

The repeal of *§ 50-115* did not completely or even partially extinguish any of Farmland's vested rights. Both before and after the 2013 repeal, Farmland, or any **[*1224]** other plaintiff, could bring a private action for alleged violations of the KRTA—including violations detailed in *§ 50-112*—pursuant to *§ 50-161(b)* and could recover "treble the actual damages sustained." The repeal of *§ 50-115* only affected Farmland's right to recover full consideration damages, which is not a substantive **[**18]** right but merely a remedy by which the substantive rights set out in the KRTA are enforced. ***HN16***[] *See State v. Dupree, 304 Kan. 43, 371 P.3d 862, 873 (Kan. 2016)* ("[T]he general rule is that there are no vested rights in a particular remedy or method of procedure." (quotation omitted)). Further, unlike the situations in *Brennan* and *Norris*, retroactive application of the statutory change *in this matter* does not have the practical effect of eliminating Farmland's cause of action alleging a violation of the KRTA. Farmland is not precluded from recovering treble damages if it prevails on the merits of its claims. *See infra* § III. F.

HN17[] As to the third and final factor, we examine "the nature and strength of the public interest furthered by the legislation." *Brennan, 264 P.3d at 113* (quotation omitted). The purposes of the 2013 amendments to the KRTA were set out by the Kansas legislature in *Kan. Stat. Ann. § 50-163*. Those purposes include "harmoniz[ing]" the KRTA with federal ***antitrust law*** which does not allow for recovery of full consideration damages. *Kan. Stat. Ann. § 50-163(b)*; *see also 15 U.S.C. § 15(a)* (providing treble damages may be recovered by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws"). *Section 50-163(d)(3)* also states that the KRTA "shall not be construed to prohibit . . . recovery **[**19]** of damages pursuant to *[Kan. Stat. Ann. §] 50-161*, and amendments thereto." According to Farmland, however, if retroactive application of the repeal of *§ 50-115* results in the dismissal of its claims against Appellants, none of these interests are furthered. To the contrary, Farmland argues, dismissal of long-pending claims—assuming they have merit—permits antitrust violators to escape liability. As we have already concluded, Farmland's concern is unfounded. Retroactive application of the statutory elimination of full consideration damages does not compel dismissal of Farmland's claims and it is entitled to treble damages if it prevails on the merits and proves entitlement to damages. Accordingly retroactive application of the repeal furthers the purposes of the statutory change by harmonizing Kansas law with federal law while still providing a prevailing plaintiff with a remedy.[8]

Having considered all the factors deemed relevant by the Kansas Supreme Court, we conclude the repeal of *§ 50-115* applies retroactively in this matter. All three factors weigh in favor of retroactivity: the repealed statute was purely remedial, applying the repeal retroactively does not present any due process concerns because Farmland's vested rights **[**20]** are not affected by retroactive application, and retroactive application of the repeal promotes the purposes of the legislative change.

E. Kansas Courts Have Not Considered Whether the Repeal of § 50-115 Applies Prospectively or Retroactively

The only remaining consideration is whether the Kansas courts have previously indicated the repeal of *§ 50-115* should not be applied retroactively. Farmland relies on two Kansas cases for the proposition the Kansas courts, if squarely presented **[*1225]** with the question, would rule in favor of prospective application. The first, *Smith v. Philip Morris Cos., 50 Kan. App. 2d 535, 335 P.3d 644, 651 (Kan. Ct. App. 2014)*, involved a class action brought against cigarette manufacturers, alleging the manufacturers conspired to fix the wholesale price of cigarettes in violation of the KRTA. In its opinion, the Kansas Court of Appeals provided a short overview of the KRTA, noting "substantial changes" had been made to the law in 2013. *Id. at 652-53*. The court mentioned the repeal of *§ 50-115* as one of the changes that did "not apply retroactively to cases . . . already pending" at the time of the amendments. *Id. at 652* Although the plaintiff in *Smith* sought full consideration damages, *id. at 653*, the matter before the Kansas Court of Appeals involved only the question of whether defendants were entitled **[**21]** to summary judgment on plaintiffs' conspiracy claim. *Id. at 651-52* ("The case is now before us because the district court found Plaintiffs stated only a claim for a wholesale price-fixing conspiracy and granted Defendants summary judgment on that claim."). To answer that question, the court focused its attention on *§ 50-112*, the provision of the KRTA proscribing certain activities in restraint of trade. *Id. at 653*. Because the court concluded summary judgment

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[8] Farmland has not argued the treble damages remedy set out in *§ 50-161(b)* is insufficient to make a plaintiff whole.

was appropriate, any mention of full consideration damages or the retroactivity of the repeal of § 50-115 was dicta. Further, the statement in *Smith* is neither precedent for nor a suggestion that the repeal in 50-115 applies only prospectively since the Kansas Court of Appeals did not engage in any retroactivity analysis.

The second case on which Farmland relies, *O'Brien v. Leegin Creative Leather Prods., 321 P.3d 799, 2014 WL 1362657 (Kan. Ct. App. 2014)* ("*O'Brien II*"), is no more helpful. The Kansas Court of Appeals issued an unpublished decision in *O'Brien II* addressing a KRTA case pending at the time § 50-115 was repealed. The issue appealed was whether the district court abused its discretion when it modified the class by narrowing it. *321 P.3d 799, [WL] at *4*. As it did in *Smith*, the Kansas Court of Appeals began its analysis with a brief overview of the changes made to the KRTA in **[**22]** 2013. *321 P.3d 799, [WL] at *5*. It then stated, without any analysis of the Kansas retroactivity principles discussed at length above, that it was evaluating the district court's ruling based on "the law as it stood before April 18, 2013, not afterward." *Id.* Although the court later discussed § 50-115 in its analysis of the district court's ruling, *321 P.3d 799, [WL] at *9*, the discussion was based on the court's assumption that all the pre-2013 statutory provisions applied. Because the *O'Brien II* memorandum opinion lacks any meaningful retroactivity analysis, it does not support Farmland's assertion that the Kansas courts have indicated they would not apply the repeal of § 50-115 retroactively to cases pending at the time of the repeal.

Having considered the parties' arguments, we conclude no Kansas appellate court has directly, or even indirectly, addressed the retroactivity issue currently before this court.[9] Thus, no Kansas case law affects our conclusion that the repeal of § 50-115 operates retroactively to extinguish **[*1226]** Farmland's ability to recover full consideration damages.

F. Appellants' Request for Summary Judgment

In Appellants' opening brief, they ask for three forms of relief: (1) a ruling that the repeal of § 50-115's full consideration **[**23]** remedy applies retroactively; (2) reversal of the district court's decision denying their motion for summary judgment; and (3) remand of the matter to the district court with instructions to enter judgment in their favor. Although we conclude the repeal of full consideration damages applies retroactively, Appellants are not entitled to summary judgment.

In support of their request for summary judgment, Appellants argue the repeal of § 50-115 has left Farmland without any available remedy because it has only sought full consideration damages and cannot now change tack and seek treble damages. They assert Farmland had ample opportunity after the repeal of § 50-115 to amend its complaint to specifically seek treble damages pursuant to § 50-161(b) but purposefully chose not to do so. *See Norris, 367 P.3d at 1258* (holding a procedural statute did not apply retroactively, in part, because the plaintiff "d[id] not have a reasonable time after the enactment of the statute to comply" with the statutory change). Appellants characterize Farmland's decision to challenge retroactive application of the statutory change as a choice "to exclusively pursue a potentially more lucrative remedy" even though the treble damages remedy has always been available. **[**24]** According to Appellants, the lack of any available remedy is the result of Farmland's litigation strategy, not the mere retroactive application of the statutory change.

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[9] We note the United States District Court for the District of Nevada concluded the repeal of § 50-115 operates retroactively. *In re W. States Wholesale Nat. Gas Antitrust Litig., MDL No. 1566, 2017 U.S. Dist. LEXIS 134890, 2017 WL 3610553, at *3-*4 (D. Nev. Aug. 22, 2017)*, *rev'd on other grounds by 743 F. App'x 802 (9th Cir. 2018)*. That ruling was based on the district court's conclusion the statute was remedial, not substantive. *2017 U.S. Dist. LEXIS 134890, [WL] at *3*. The court, however, did not engage in any extended analysis of why § 50-115 was remedial or examine whether retroactive application of its repeal would affect vested rights.

We conclude Farmland's amended complaint, filed on October 17, 2005, preserves the treble damages remedy available under *§ 50-161(b)*.[10] In the "Jurisdiction and Damages" paragraph of its amended complaint, Farmland stated its claims were brought pursuant to several Kansas statutes, including *§ 50-161* which is the treble damages provision. As to the damages sought, the paragraph further stated Farmland was suing to "obtain damages and injunctive and other equitable relief which plaintiff has sustained due to violations by defendants named herein **of these statutes** (emphasis added)." In its prayer for relief, Farmland specifically asked for full consideration damages under *§ 50-115* but it also requested "such other **[*1227]** and further relief as [the] Court may deem necessary and appropriate."[11] ***HN18***[] *Rule 54 of the Federal Rules of Civil Procedure* does not require any greater specificity than this to preserve a remedy.[12] *See* *Fed. R. Civ. P. 54* (stating that other than default judgments, "[e]very other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings"). **[**25]** Because retroactive application of the statutory change at issue in this matter does not extinguish Farmland's right to pursue its claims against Appellants and recover some measure of damages if it prevails on the merits, Appellants are not entitled to summary judgment.

IV. Conclusion

We **affirm** the district court's order denying Appellants' motion for summary judgment but for reasons other than those given by the district court. Specifically, we hold the repeal of *Kan. Stat. Ann. § 50-115* applies retroactively in this matter. If Farmland prevails on the merits of its KRTA claims, it may not recover full consideration damages but it may recover **[**26]** any other damages to which it shows entitlement.

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[10] Ironically, Appellants seek summary judgment from this court but also assert the controlling legal question of whether Farmland's complaint sufficiently preserves the treble damages remedy is not properly before us as part of this interlocutory appeal. ***HN19***[] This court, however, has previously exercised its discretion in an interlocutory appeal to resolve whether a party is entitled to summary judgment even though the district court did not expressly certify the question of whether a genuine issue of material fact precluded summary judgment. *Rural Water Dist. No. 4 v. City of Eudora, 720 F.3d 1269, 1278 (10th Cir. 2013)*. Under the standard set out in *City of Eudora*, we should exercise our discretion "if an issue is 'fairly included within the certified order' and is 'a controlling question of law.'" *Id.* Here, the district court's order certifying this interlocutory appeal addressed the parameters of Farmland's complaint, concluding it did not preserve the treble damages remedy. That conclusion, while erroneous, was one basis on which the district court certified this interlocutory appeal. It is also central to the question presented in the district court's retroactivity order, *i.e.*, whether Farmland has no available remedies if it prevails on the merits of its KRTA claims. *See supra* § III. D. Thus, we conclude the issue is "fairly included within the certified order" and must be addressed to resolve "a controlling question of law." In the interest of judicial economy, we exercise our discretion to resolve it.

[11] The parties have not directed this court to any pretrial order refining or narrowing the scope of the damages recoverable by Farmland.

[12] Although Appellants assert in a single phrase in their reply brief that they will be prejudiced if Farmland is permitted to pursue the treble damages remedy, they do not explain the nature of this alleged prejudice in any detail. And, in any event, even if prejudice may be relevant to what evidence Farmland is permitted to present on the treble-damages issue, it is not relevant to the purely legal question of whether Farmland's amended complaint is sufficient to preserve the treble damages remedy.

In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices and Antitrust Litig.

United States District Court for the District of Kansas

June 23, 2021, Decided; June 23, 2021, Filed

MDL No: 2785; Case No. 17-md-2785-DDC-TJJ

Reporter

545 F. Supp. 3d 922 *; 2021 U.S. Dist. LEXIS 116925 **; 2021 U.S.P.Q.2D (BNA) 684; 2021 WL 2585065

IN RE: EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation. (This Document Applies to Consumer Class Cases)

Subsequent History: Reconsideration denied by, Motion denied by *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., 568 F. Supp. 3d 1184, 2021 U.S. Dist. LEXIS 204797 (D. Kan., Oct. 25, 2021)*

Prior History: *In re EpiPen Mktg., 268 F. Supp. 3d 1356, 2017 U.S. Dist. LEXIS 121974, 2017 WL 3297989 (J.P.M.L., Aug. 3, 2017)*

Core Terms

EpiPen, FDA, settlement, rebate, generic, summary judgment, plaintiffs', Nuvigil, defendants', formulary, patent, contracts, patients, launch, epinephrine, products, manufacturers, payors, prices, pretrial order, antitrust, auto-injector, damages, infer, coverage, Tier, dose, anti trust law, foreclosure, discount

LexisNexis® Headnotes

Constitutional Law > ... > Freedom of Speech > Free Press > Public Access

Governments > Courts > Court Records

HN1[] **Free Press, Public Access**

The public enjoys a common-law right of access to judicial records. A litigant can rebut the strong presumption in favor of public access when countervailing interests heavily outweigh the public interests in access to the judicial record.

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

HN2[] **Entitlement as Matter of Law, Appropriateness**

The court's summary judgment analysis relies on the factual information submitted by the parties to determine the litigants' rights; so, the public has a strong interest in accessing the information. Especially where documents are used to determine litigants' substantive legal rights, a strong presumption of access attaches.

Evidence > ... > Exceptions > Residual Exception > Necessity

Evidence > ... > Exceptions > Residual Exception > Trustworthiness

HN3[] **Residual Exception, Necessity**

Fed. R. Evid. 807(a) provides an exception permitting the admission of hearsay evidence if: (1) the statement is supported by sufficient guarantees of trustworthiness and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts. *Fed. R. Evid. 807(a)*.

Evidence > Admissibility > Statements as Evidence > Hearsay

HN4[] **Statements as Evidence, Hearsay**

Scholarly articles, standing alone, contain inadmissible hearsay and have limited utility under the Federal Rules of Evidence.

Evidence > ... > Hearsay > Rule Components > Assertions

Evidence > ... > Hearsay > Rule Components > Statements

Evidence > ... > Hearsay > Rule Components > Truth of Matter Asserted

Evidence > ... > Hearsay > Rule Components > Declarants

HN5[] **Rule Components, Assertions**

The Federal Rules of Evidence define hearsay as a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. *Fed. R. Evid. 801(c)*. But, statements that are offered for purposes other than proving the truth of the matter asserted don't count as hearsay. In short, a statement that is offered to show its effect on the listener isn't hearsay because it isn't offered to prove the truth of the matter asserted i.e., to prove the truth of the contents of the declarant's statement but instead is offered to prove how the statement affected the person who heard the statement. A statement offered to show its effect on the person who heard the statement is not hearsay.

Evidence > Judicial Notice > Scientific & Technical Facts

Evidence > Types of Evidence > Documentary Evidence > Summaries

HN6[] **Judicial Notice, Scientific & Technical Facts**

Under *Fed. R. Evid. 1006*, a summary is admissible to prove the content of voluminous writings that cannot be conveniently examined in court.

Evidence > ... > Exceptions > Public Records > Investigative Reports

HN7[] Public Records, Investigative Reports

Fed. R. Evid. 803(8)'s public records exception to the hearsay rule defines a public record as: A record or statement of a public office if: (A) it sets out: (i) the office's activities; (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) the opponent does not show that the source of the information or other circumstances indicate a lack of trustworthiness. Fed. R. Evid. 803(8). The justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. Fed. R. Evid. 803 advisory committee's note to Paragraph (8). And, cases illustrating the admissibility of records of the office's or agency's own activities are numerous. Fed. R. Evid. 803 advisory committee's note to Paragraph (8).

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN8[] Defenses, Experimental Use & Testing

Under the Hatch-Waxman Act, all ANDA applicants, and certain NDA applicants, must make certifications for patents associated with their RLD counterparts, including a Paragraph IV certification, which is a certification by the applicant that, in the opinion of the applicant, the relevant patent is invalid or will not be infringed by the new proposed generic product. 21 U.S.C.S. § 355(j)(2)(A)(vii)(IV); 21 U.S.C.S. § 355(b)(2)(A)(iv). Any applicant filing a Paragraph IV certification must notify the holder of the relevant patent and the holder of the approved drug application who claims that patent. 21 U.S.C.S. § 355(j)(2)(B)(iii)(II); 21 U.S.C.S. § 355(b)(3)(C). Once a patent holder receives a Paragraph IV certification, it may file an infringement suit within 45 days, triggering an automatic 30-month stay of FDA approval of the ANDA. 21 U.S.C.S. § 355(j)(5)(B)(iii); 21 U.S.C.S. § 355(c)(3)(C).

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

HN9[] Patent, US Patent & Trademark Office Proceedings

The fact that some patents might not be valid does not affect the fact that a patent filed with the United States Patent and Trademark Office remains part of the public record.

Evidence > ... > Hearsay > Rule Components > Truth of Matter Asserted

HN10[] Rule Components, Truth of Matter Asserted

Patents were admissible evidence because the documents offered are not hearsay when they were offered not to prove the truth of any of the matters which they assert, but rather to prove that various patents use a particular term, but in any event, even if the patents were hearsay, they would be subject to the public records exception to the hearsay rule. Fed. R. Evid. 803(8).

Administrative Law > Agency Adjudication

HN11[] Administrative Law, Agency Adjudication

A citizen petition is a document that anyone may submit to the FDA asking it to issue, amend, or revoke a regulation or order, or to take or refrain from taking any other form of administrative action. *21 C.F.R. § 10.25(a)*.

Business & Corporate Compliance > ... > Negotiable Instruments > Types of Negotiable Instruments > Promissory Notes

HN12[] Negotiable Instruments, Promissory Notes

Signed instruments such as wills, contracts, and promissory notes are writings that have independent legal significance and are not hearsay.

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

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

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

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

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

HN13[] Entitlement as Matter of Law, Appropriateness

Summary judgment is appropriate if the moving party demonstrates that no genuine dispute exists about any material fact, and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. When the court applies this standard, it views the evidence and draws reasonable inferences in the light most favorable to the non-moving party. An issue of material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party on that issue. And, an issue of fact is material if it has the ability to affect the outcome of the suit under the governing law.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Absence of Essential Element

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

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

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

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

HN14[] Burdens of Proof, Absence of Essential Element

The party moving for summary judgment bears the initial burden of showing the basis for its motion. The moving party bears both the initial burden of production on a motion for summary judgment and the burden of establishing that summary judgment is appropriate as a matter of law. A summary judgment movant can satisfy this burden by demonstrating there is an absence of evidence to support the nonmoving party's case. The moving party, to meet its summary judgment burden, need not negate the non-movant's claim, but need only point to an absence of evidence to support the non-movant's claim.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Accompanying Documentation

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

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

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

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

HN15[] **Opposing Materials, Accompanying Documentation**

If the moving party satisfies its initial burden, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. If the movant carries the initial burden, the nonmovant may not rest on its pleadings, but must bring forward specific facts showing a genuine issue for trial on those dispositive matters for which it carries the burden of proof. To satisfy this requirement, the nonmoving party must go beyond the pleadings and by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. When deciding whether a party has shouldered its summary judgment burden, the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

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

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Need for Trial

HN16[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is not a disfavored procedural shortcut. Instead, it is an important procedure designed to secure the just, speedy and inexpensive determination of every action.

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

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

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

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

HN17[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment should be used sparingly in antitrust cases. But still, a court must apply the usual rules governing summary judgment to antitrust cases. Like any *Fed. R. Civ. P. 56* motion, an antitrust plaintiff has the burden to set forth specific facts showing that there is a genuine issue for trial. Summary judgments have a place in the antitrust field because some of the law in this area is so well developed that when the gist of the case turns on documentary evidence, the rule at times can be divined without a trial. Even in antitrust litigation, if the pertinent area of law is well developed and the case turns on documentary evidence, disposition by summary judgment may be appropriate.

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

HN18[] **Venue, Multidistrict Litigation**

A Multi-district Litigation transferee court applies the law of the circuit in which it sits. Although the U.S. Court of Appeals for the Tenth Circuit hasn't addressed this question, an appellate court has explained that this ruling is consistent with the rule followed by a number of circuit courts that have considered the question. The transferee court applies its own Circuit's cases on the meaning of federal law. Questions of federal law in cases transferred under *28 U.S.C.S. § 1407* are governed by the clearly settled law of the transferee court's circuit.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN19[] **Sherman Act, Claims**

An antitrust conspiracy requires the plaintiff to establish: (1) concerted action in the form of a contract, combination, or conspiracy, and (2) an unreasonable restraint of trade. *15 U.S.C.S. § 1*. *15 U.S.C.S. § 1*. And, to prevail on a monopolization claim, a plaintiff must prove: (1) defendants have monopoly power in a properly defined relevant market; and (2) that defendants willfully acquired or maintained this power by means of anticompetitive conduct. *15 U.S.C.S. § 2*.

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

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

HN20[] **Cartels & Horizontal Restraints, Price Fixing**

A patent settlement involving a large and unjustified reverse payment can violate the antitrust laws if its objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market because that objective is the very anticompetitive consequence that underlies the claim of antitrust unlawfulness.

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN21[] **Noerr-Pennington Doctrine, Sham Exception**

In reverse payment settlement claims, it is normally not necessary to litigate patent validity to answer the antitrust question unless, perhaps, to determine whether the patent litigation is a sham.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN22[] **Remedies, Damages**

The Sherman Act requires an antitrust plaintiff to show that its injury was caused by reason of the defendant's anticompetitive conduct. *15 U.S.C.S. § 15(a)*. The fact of injury and damages suffered by reason of a violation of the antitrust laws must also be shown for a private litigant to recover on a claim of monopolization. Thus, to recover under the antitrust laws, an antitrust plaintiff must establish that defendant's unlawful conduct caused plaintiff injury in its business or property. An antitrust plaintiff must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Allocation

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

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN23[] **Sherman Act, Claims**

An antitrust plaintiff cannot shoulder its burden to prove an antitrust violation if the injury is attributable to its lack of desire, its limited production capabilities, or to other factors independent of the alleged unlawful conduct. But, at the same time, an antitrust plaintiff need not show that defendant's conduct was the exclusive cause of plaintiff's injury. A plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury. Instead, it is enough that the illegality is shown to be a material cause of the injury. An antitrust plaintiff must show that a defendant's anticompetitive act was a material and but-for cause of plaintiff's injury, although not necessarily the sole cause.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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

HN24[] **Remedies, Damages**

A material cause is often interpreted as proximate cause of an antitrust violation. An antitrust violation is a material cause of an injury if it is a proximate cause of that injury. The doctrine of proximate cause in the antitrust context considers whether the alleged injury is too remote to be fairly attributed to the asserted antitrust violation.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Torts > ... > Elements > Causation > Intervening Causation

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

Torts > ... > Proof > Evidence > Province of Court & Jury

HN25[] **Remedies, Damages**

An antitrust plaintiff demonstrates proximate cause by showing there is a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of damage. But, if an independent cause fully accounts for the plaintiff's alleged injury, then that intervening, independent cause breaks the causal connection between the alleged antitrust violation and the plaintiff's injury. Proximate cause and intervening cause are usually issues for the jury to decide. Causation is generally a question best left for the jury to decide.

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

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

HN26[] **Summary Judgment, Burdens of Proof**

To avoid summary judgment, the non-moving party must adduce evidence that is based on more than mere speculation, conjecture, or surmise.

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

Torts > ... > Elements > Causation > Intervening Causation

HN27[] **Jury Trials, Province of Court & Jury**

Whether conduct constitutes intervening conduct that breaks the chain of causation and whether intervening conduct is a foreseeable consequence of a defendant's actions are questions of fact to be submitted to the jury.

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

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

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

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

HN28[] Noerr-Pennington Doctrine, Right to Petition Immunity

The Noerr-Pennington doctrine exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition. But Noerr-Pennington immunity does not apply to sham activities. Petitioning the government is a sham activity if: (1) it is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and (2) it uses the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon.

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

HN29[] Noerr-Pennington Doctrine, Sham Exception

The question whether petitioning activity is a sham is generally one for the jury. Whether something is a genuine effort to influence governmental action, or a mere sham, is a question of fact. A court can rule the objectively baseless question as a matter of law where there is no dispute over the predicate facts of the underlying proceeding.

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

HN30[] Standing, Requirements

In the context of finding of causation, plaintiffs must also show that the launch would have been legal because if the launch were stopped because it was illegal, then the antitrust injury, if it could still be called that, would be caused not by the settlement but by the patent laws prohibiting the launch.

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

Evidence > Inferences & Presumptions > Inferences

HN31[] Conspiracy to Monopolize, Elements

The district court correctly defined direct evidence of an antitrust conspiracy as evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted. With direct evidence the factfinder is not required to make inferences to establish facts.

Antitrust & Trade Law > Procedural Matters

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Inferences & Presumptions > Inferences

HN32[] Antitrust & Trade Law, Procedural Matters

Circumstantial evidence must tend to exclude the possibility of independent action. This standard requires an antitrust plaintiff to show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed plaintiff.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Inferences & Presumptions > Inferences

HN33[] Sherman Act, Claims

One cannot infer a conspiracy if the defendants had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations. And when considering circumstantial evidence that is just as consistent with unilateral action as with concerted action, it does not, standing alone, support an inference of antitrust conspiracy.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN34[] Inequitable Conduct, Anticompetitive Conduct

A reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects. A reverse payment if otherwise unexplained likely seeks to prevent the risk of competition.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN35[] Sherman Act, Claims

The rule of reason is described as calling for a holistic assessment of the parties' evidence to determine whether a challenged practice restrains trade unreasonably thus violating the Sherman Act, *15 U.S.C.S. § 15(a)*.

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

HN36[] Exclusive & Reciprocal Dealing, Exclusive Dealing

An exclusive dealing arrangement is a contract between a manufacturer and a buyer that forbids the buyer from purchasing the contracted good from any other seller or that requires the buyer to take all of its needs in the contract good from that manufacturer.

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

HN37[] Exclusive & Reciprocal Dealing, Exclusive Dealing

An exclusive dealing arrangement is described as one that entails a commitment by a buyer to deal only with a particular seller. Such an agreement need not specifically require the buyer to forgo other supply sources if the practical effect of the agreement is the same. Even though a contract does not contain specific agreements not to use the goods of a competitor, if the practical effect is to prevent such use, it comes within the prohibition against exclusivity. The antitrust vice of these arrangements is the foreclosure of part of the market in which the seller competes by taking away the freedom of the buyer to choose from the products of competing traders in the seller's market. The primary antitrust concern with exclusive dealing arrangements is that they may be used by a monopolist to strengthen its position, which may ultimately harm competition.

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

HN38[] Exclusive & Reciprocal Dealing, Exclusive Dealing

An exclusionary contract doesn't violate the antitrust laws simply because it excludes competitors. Exclusive dealing agreements are often entered into for entirely procompetitive reasons, and generally pose little threat to competition. It is widely recognized that in many circumstances exclusive dealing arrangements may be highly efficient, to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all. On the other hand, exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods. Also, exclusive dealing arrangements are of special concern when imposed by a monopolist. Behavior that otherwise might comply with ***antitrust law*** may be impermissibly exclusionary when practiced by a monopolist.

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

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

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

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

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

HN39[] Exclusive & Reciprocal Dealing, Exclusive Dealing

Because exclusive dealing arrangements may actually enhance competition, they are not deemed per se illegal. Instead, courts apply the rule of reason to determine the legality of exclusive dealing arrangements. The U.S. Court of Appeals for the Eleventh Circuit has joined the consensus that exclusive dealing arrangements are reviewed under the rule of reason. Thus, to prevail, an exclusive dealing claim plaintiff must prove it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected. A plaintiff bringing an antitrust claim based on an exclusive dealing contract must allege and prove that a particular arrangement unreasonably restricts the opportunities of the seller's competitors to market their product.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

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

HN40[] **Clayton Act, Claims**

Although Tampa Elec. Co. v. Nashville Coal Co. involved a Clayton Act claim, courts also apply its analysis to exclusive dealing claims asserted under the Sherman Act because each statute includes an anticompetitive conduct element, although each statute articulates that element in a slightly different way. In substance, the Tampa Elec. Co. v. Nashville Coal Co. standard for Clayton Act, *15 U.S.C.S. § 3* claims differs very marginally, if at all, from the fact-intensive rule-of-reason analysis that applies to the case under Sherman Act, *15 U.S.C.S. § 1*. Tampa Elec. Co. v. Nashville Coal Co. applies to Sherman Act cases even though it was decided under Clayton Act, *15 U.S.C.S. § 3*.

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

HN41[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

To determine substantiality in a given case by weighing the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.

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

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

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

HN42[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

No set formula exists for evaluating the legality of an exclusive dealing agreement, but listed the factors courts consider when making this determination. They include: (1) whether the defendant has significant market power; (2) whether there is substantial market foreclosure; (3) whether the contract's duration is sufficient to prevent meaningful competition by rivals; (4) an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects; (5) whether defendant engaged in coercive behavior; (6) the ability of customers to terminate the agreements; and (7) the use of exclusive dealing by competitors of the defendant.

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

HN43[] Exclusive & Reciprocal Dealing, Exclusive Dealing

Exclusive dealing will generally only be unlawful where the market is highly concentrated, the defendant possesses significant market power, and there is some element of coercion present.

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

HN44[] Exclusive & Reciprocal Dealing, Exclusive Dealing

The court couldn't ignore the demands of the marketplace in which the exclusive agreements arose because if retailers have made supplier exclusivity a barrier to entry, one cannot bring an antitrust claim against a supplier for acquiescing to that requirement. Retailers and manufacturers like exclusive deals implies that they serve their interests and when the consumers favor a product or practice, and only rivals squawk, the most natural inference is that the complained-of practice promotes rather than undermines competition, for what helps consumers often harms other producers.

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

HN45[] Exclusive & Reciprocal Dealing, Exclusive Dealing

Short-term exclusive dealing arrangements present little threat to competition. The short duration and easy terminability of exclusivity agreements negates substantially their potential to foreclose competition. Discounts conditioned on exclusivity in relatively short-term contracts are rarely problematic. This is so because while a dominant firm's ongoing policy of offering discounts in exchange for exclusivity gives buyers incentives to stay with the same firm, any above-cost discount can be matched by an equally efficient firm. And, even an exclusive-dealing contract covering a dominant share of a relevant market need have no adverse consequences if the contract is let out for frequent rebidding.

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

HN46[] Per Se Rule & Rule of Reason, Sherman Act

There are no exclusionary effects from contracts that expire every year or two thus giving other competitors a shot at obtaining the next contract by outbidding defendant. The short duration, i.e., one year terms and easy terminability of the agreements, i.e., 60 days' written notice negate substantially their potential to foreclose competition because a competing manufacturer need only offer a better product or a better deal to acquire their services.

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

HN47[] Exclusive & Reciprocal Dealing, Exclusive Dealing

As already explained, an exclusive contract does not violate the antitrust laws unless it is probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected. This type of foreclosure occurs when the opportunities for other traders to enter into or remain in the market are significantly limited by the exclusive dealing arrangements.

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

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

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

HN48[] Attempts to Monopolize, Elements

Traditionally a foreclosure percentage of at least 40% has been a threshold for liability in exclusive dealing cases. The recent decisions uniformly favor defendants where foreclosure levels are 40 percent or less, and so it is fair to say that foreclosure in excess of that amount is a threshold requirement where foreclosure is the asserted basis of the antitrust violation. But some courts have found that a lesser degree of foreclosure is required when the defendant is a monopolist. A monopolist's use of exclusive contracts may give rise to a *15 U.S.C.S. § 2* violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a *15 U.S.C.S. § 1* violation. Courts have found liability in some cases even when the amount of foreclosure is zero and if price, output, quality, choice, or innovation have been harmed, the lack of percentage foreclosure is no defense.

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

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

HN49[] Exclusive & Reciprocal Dealing, Exclusive Dealing

The relevant question when evaluating foreclosure is always what percentage of the market is effectively unrestricted during a specific time period. The unrestricted set includes: (a) those dealers who are not bound by exclusive-dealing arrangements at all; plus, (b) those dealers whose contracts will expire during that time period in any event; and (c) those dealers whose contracts have termination clauses permitting them to sever existing arrangements during that time period and who realistically can do so.

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

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

HN50[] Attempts to Monopolize, Elements

The Supreme Court expressly has approved competition based on price, recognizing that low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. The exclusionary effect of prices above a relevant measure of cost reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting. Given this economic reality, the Supreme Court has established two prerequisites to recovery on claims of predatory pricing. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. And second, a plaintiff must demonstrate that the competitor had a dangerous probability of recouping its investment in below-cost prices. This two-prong test is known as the price-cost test.

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

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

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

HN51[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

A plaintiff's characterization of its claim as an exclusive dealing claim does not take the price-cost test off the table. Instead, the price-cost test still may apply because contracts in which discounts are linked to purchase volume or market share targets are frequently challenged as de facto exclusive dealing arrangements on the grounds that the discounts induce customers to deal exclusively with the firm offering the rebates. So, when price is the clearly predominant mechanism of exclusion, the price-cost test tells us that, so long as the price is above-cost, the procompetitive justifications for, and the benefits of, lowering prices far outweigh any potential anticompetitive effects.

Governments > Legislation > Statute of Limitations > Tolling

HN52[] **Statute of Limitations, Tolling**

Whether plaintiffs diligently pursued their claims, thus permitting them to avail themselves of the various tolling doctrines, is a factual issue that the jury must decide at trial. The question of whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law.

Governments > Legislation > Statutory Remedies & Rights

HN53[] **Legislation, Statutory Remedies & Rights**

Restitution is the only monetary remedy authorized by that statute.

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

Contracts Law > Remedies > Restitution

Torts > Business Torts > Unfair Business Practices > Remedies

Civil Procedure > Preliminary Considerations > Equity > Relief

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

HN54[] Trade Practices & Unfair Competition, State Regulation

The case law is clear that restitution under the (Cal.) Unfair Competition Law (UCL) does not include remedies at law; instead, it only provides for equitable remedies. Equitable remedies, injunctive relief, restitution, and civil penalties are the only remedies available under the UCL. *Cal. Bus. & Prof. Code § 17200* is an equitable action, and restitution is an equitable remedy. Restitution is ordinarily a substitute for rather than a form of damages.

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

HN55[] Conferences, Pretrial Orders

A pretrial order should be liberally construed to cover any of the legal or factual theories that might be embraced by its language. But, a district court may more strictly construe a pretrial order when that order has been refined over time, properly drawn, and drafted with substantial specificity.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

HN56[] Judges, Discretionary Powers

The pretrial order is the controlling document for trial. Claims not included in the pretrial order are waived. The decision to exclude facts or issues as not found in the pretrial order is committed to the trial court's sound discretion.

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

HN57[] Jurisdiction, Subject Matter Jurisdiction

Subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Instead, the Federal Rules require that the court must dismiss the action if it determines at any time that it lacks subject-matter jurisdiction. *Fed. R. Civ. P. 12(h)(3)*.

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

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

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

HN58[] Supplemental Jurisdiction, Pendent Parties

18 U.S.C.S. § 1965 establishes nationwide service of process for RICO claims. The concept of pendent personal jurisdiction which exists when a court possesses personal jurisdiction over a defendant for one claim but lacks an independent basis for personal jurisdiction over the defendant for another claim that arises out of the same nucleus of operative fact. And supplemental jurisdiction presupposes the existence of a case, already properly before the court, to which the other claims may be attached. In other words, supplemental jurisdiction does not create original jurisdiction, it merely sweeps other claims under the federal court's jurisdictional rug.

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

Securities Law > RICO Actions > Remedies

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Private Conspirators

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Statutory Attorney Fee Awards

HN59[] **Racketeer Influenced & Corrupt Organizations, Remedies**

18 U.S.C.S. § 1962(d) makes it unlawful for any person to conspire to violate *18 U.S.C.S. 1962(c)*. *18 U.S.C.S. § 1962(d)*. RICO provides a private civil cause of action for those who are injured by violations of *18 U.S.C.S. § 1962* and allows recovery of treble damages, costs, and attorney's fees. *18 U.S.C.S. § 1964(c)*.

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

Securities Law > RICO Actions > Elements of Proof > Definition of Racketeering Activity

HN60[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

To prove a violation of *18 U.S.C.S. § 1962(c)*, a plaintiff must establish four elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The word racketeering tends to evoke images of mobsters and organized criminals, and true enough, RICO, at least initially was an aggressive initiative to supplement old remedies and develop new methods for fighting crime. But the plain language of RICO defines racketeering far more broadly in a way that allows the statute to reach both legitimate and illegitimate businesses. Indeed, among many other qualifying acts, RICO defines a racketeering activity as any act which is indictable under the federal statute outlawing wire fraud, a crime that any modern business could commit. Also, the Supreme Court has instructed that RICO is to be read broadly.

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

Securities Law > RICO Actions > Elements of Proof > Definition of Racketeering Activity

HN61[] **Racketeer Influenced & Corrupt Organizations, Claims**

Proving a RICO violation requires more than racketeering activity alone. To prevail on a RICO claim, a plaintiff must establish: (1) that the defendant violated *18 U.S.C.S. § 1962*; (2) that the plaintiff's business or property was injured; and (3) that the defendant's violation is the cause of that injury.

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

Evidence > Burdens of Proof > Allocation

HN62[] **Racketeer Influenced & Corrupt Organizations, Claims**

The RICO statute's by reason of requirement demands that a RICO plaintiff show the defendant's violation not only was a but for cause of his injury, but was the proximate cause as well. A RICO claim requires plaintiff to show that a RICO predicate offense not only was a but for cause of his injury, but was the proximate cause as well. Sufficiently establishing the element of causation, both actual and proximate, is crucial to proving any violation of RICO.

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

HN63[] **Racketeer Influenced & Corrupt Organizations, Claims**

When discussing the RICO causation requirement, the compensable injury resulting from a violation of *18 U.S.C.S. § 1962(c)* necessarily is the harm caused by the predicate acts.

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

HN64[] **Racketeer Influenced & Corrupt Organizations, Claims**

Civil RICO requires a plaintiff to show that a RICO predicate offense not only was a but for cause of his injury, but was the proximate cause as well.

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

HN65[] **Claims, Fraud**

A RICO plaintiff, to allege a plausible predicate act, need not allege that the mailings or the wire communications themselves were fraudulent, instead, he needs only allege that they were incident to an essential part of a fraudulent scheme.

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

HN66[] **Claims, Fraud**

In the context of alleging a plausible predicate act in RICO, a plaintiff need only show use of the mail in furtherance of a scheme to defraud and an injury proximately caused by that scheme.

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

HN67[] **Racketeer Influenced & Corrupt Organizations, Claims**

A RICO plaintiff need not establish first-party reliance to satisfy the causation requirement. In most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation. RICO plaintiffs must prove, at a minimum, indirect reliance because, logically, a plaintiff cannot even establish but-for causation if no one relied on the defendant's alleged misrepresentation. RICO plaintiffs must prove, at a minimum, indirect reliance because, logically, a plaintiff cannot even establish but-for causation if no one relied on the defendant's alleged misrepresentation.

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

Evidence > Burdens of Proof > Preponderance of Evidence

HN68[] Racketeer Influenced & Corrupt Organizations, Claims

An inference of reliance does not shift the burden of proof at trial on the element of RICO causation or any other elements of the claim plaintiffs will still have to prove RICO causation by a preponderance of the evidence to win on the merits.

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

HN69[] Racketeer Influenced & Corrupt Organizations, Claims

By its terms, 18 U.S.C.S. § 1962(d) requires that a plaintiff must first allege an independent violation of 18 U.S.C.S. § 1962(a), (b), or (c), in order to plead a conspiracy claim under 18 U.S.C.S. § 1962(d). And, if a plaintiff has no viable claim under 18 U.S.C.S. § 1962(a), (b), or (c), then its 18 U.S.C.S. § 1962(d) conspiracy claim fails as a matter of law.

Counsel: **[**1]** For All Plaintiffs (for Lead/Liaison Counsel ONLY), In Re: Amanda Klevorn, Korey Nelson, LEAD ATTORNEYS, PRO HAC VICE, Burns Charest, LLP - New Orleans, New Orleans, LA; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, Ryan C. Hudson, LEAD ATTORNEYS, Sharp Barton, LLP, Prairie Village, KS; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

For Consumer Class Cases Plaintiffs, (For Filings as to All Consumer Class Cases Plaintiffs), In Re: Alison Elizabeth Chase, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLP - Santa Barbara, Santa Barbara, CA; Amanda Klevorn, LEAD ATTORNEY, Burns Charest, LLP - New Orleans, New Orleans, LA; Arthur L. Shingler, III, Brian O. O'Mara, LEAD ATTORNEYS, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, PRO HAC VICE, Canadian Pacific Plaza, Minneapolis, MN; Devon Paul Allard, Mahde Youssef Abdallah, Sharon S. Almonrode, William L. Kalas, LEAD ATTORNEYSSS, PRO HAC VICE, The **[**2]** Miller Law Firm, PC, Rochester, MI; Eric Fierro, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLP - Phoenix, Phoenix, AZ; Felicia Craick, LEAD ATTORNEY, Lynn Lincoln Sarko, Maxwell Goins, Ryan McDevitt, LEAD ATTORNEYSS, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Gregory M. Bentz, Rex A. Sharp, Ryan C. Hudson, LEAD ATTORNEYSS, Sharp Barton, LLP, Prairie Village, KS; Spencer Cox, LEAD ATTORNEY, PRO HAC VICE, Warren T. Burns, LEAD ATTORNEY, Burns Charest, LLP - Dallas, Dallas, TX; Stacy A. Burrows, LEAD ATTORNEY, Law Offices of George A. Barton, PC, Overland Park, KS; Stuart A. Davidson, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Tanya Korkhov, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLP - New York, New York, NY; Taylor Foye, LEAD ATTORNEY, Sharp Barton, LLP - Metcalf, Overland Park, KS.

For All Defendants (for Lead/Liaison Counsel ONLY), In Re: Philip A. Sechler, LEAD ATTORNEY, PRO HAC VICE, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC.

For Rosetta Serrano, -- Consumer Class -- (KS #16-2711) on behalf of themselves, Plaintiff: Amanda Klevorn, Korey Nelson, Lydia Wright, LEAD ATTORNEYSS, **[**3]** PRO HAC VICE, Burns Charest, LLP - New Orleans, New Orleans, LA; Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Charles Jacob Gower, LEAD ATTORNEY, PRO HAC VICE, CAD Law, LC, Salina, KS; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Greenwood Village, Greenwood Village, CO; Dennis Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYSS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Derek William Loeser, Gretchen Freeman Cappio, Lynn Lincoln Sarko, LEAD ATTORNEYSS, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Elizabeth C. Pritzker, LEAD

ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan **[**4]** C. Hudson, Scott B. Goodger, LEAD ATTORNEYSS, Sharp Barton, LLP, Prairie Village, KS; Spencer Cox, Warren T. Burns, LEAD ATTORNEYS, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX; Stephen J. Fearon, Jr., LEAD ATTORNEY, PRO HAC VICE, Squitieri & Fearon, LLP, New York, NY; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Shannon Clements, -- Consumer Class -- (KS #16-2711) on behalf of themselves and all other similiarly situated, Annette Sutorik, -- Consumer Class -- (KS #16-2711) on behalf of themselves and all other similiarly situated, formerly known as Annette P. Wilcome Sutorik, Plaintiffs: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYSS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Derek William Loeser, Gretchen Freeman Cappio, Lynn Lincoln Sarko, LEAD ATTORNEYSS, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, **[**5]** Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYSS, Sharp Barton, LLP, Prairie Village, KS; Spencer Cox, Warren T. Burns, LEAD ATTORNEYS, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX; Stephen J. Fearon, Jr., LEAD ATTORNEY, PRO HAC VICE, Squitieri & Fearon, LLP, New York, NY; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Lesley Huston, -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Charles T. Schimmel, LEAD ATTORNEY, Wright Schimmel, LLC, Overland Park, KS; Dennis **[**6]** Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYSS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Isaac L. Diel, LEAD ATTORNEY, Sharp McQueen, PA - OP, Overland Park, KS; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYSS, Sharp Barton, LLP, Prairie Village, KS; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX; W. Greg Wright, LEAD ATTORNEY, Wright Schimmel LLC, Overland Park, KS.

For Chris Rippy, -- Consumer Class -- (KS #16-2711), Lee Seltzer, -- Consumer Class -- (KS #16-2711), Joy **[**7]** Shepard, -- Consumer Class -- (KS #16-2711), Lorraine Wight, -- Consumer Class -- (KS #16-2711), Teia Amell, -- Consumer Class -- (KS #16-2711), Todd Beaulieu, -- Consumer Class -- (KS #16-2711), Heather DeStefano, -- Consumer Class -- (KS #16-2711), Sonya North, -- Consumer Class -- (KS #16-2711), Elizabeth Huelsman, -- Consumer Class -- (KS #16-2711), formerly known as Liz Huelzman, Nikitia Marshall, -- Consumer Class -- (KS #16-2711), Stacee Svites, -- Consumer Class -- (KS #16-2711), Linda Wagner, -- Consumer Class -- (KS #16-2711), Mark Kovarik, -- Consumer Class -- (KS #16-2711), Suzanne Harwood, -- Consumer Class -- (KS #16-2711), Donna Wemple, -- Consumer Class -- (KS #16-2711), Meredith Krimmel, -- Consumer Class -- (KS #16-2711), Plaintiffs: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYSS, PRO HAC

VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, **[**8]** PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYSS, Sharp Barton, LLP, Prairie Village, KS; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Raymond C. Buchta, III, -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYSS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jason Scott Goldstein, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, New York, NY; Jonathan **[**9]** K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYSS, Sharp Barton, LLP, Prairie Village, KS; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Laura Chapin, -- Consumer Class -- (KS #16-2711), Anastasia Johnston, -- Consumer Class -- (KS #16-2711), Elizabeth Williamson, -- Consumer Class -- (KS #16-2711), Jennifer Walton, -- Consumer Class -- (KS #16-2711), Plaintiffs: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYSS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, **[**10]** CA; Emily Hughes, LEAD ATTORNEY, PRO HAC VICE, Miller Law Firm, PC, Rochester, MI; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYSS, Sharp Barton, LLP, Prairie Village, KS; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Vishal Aggarwal, -- Consumer Class -- (ILN #17-2189 / KS #17-2450) individually and on behalf of all other similarly situated, Plaintiff: Ben Barnow, Erich Paul Schork, LEAD ATTORNEYS, PRO HAC VICE, Barnow and Associates, PC, Chicago, IL; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller **[**11]** Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Rosemary Medellin Rivas, LEAD ATTORNEY, PRO HAC VICE, Levi & Korsinsky, LLP, San Francisco, CA; Timothy Gordon Blood, LEAD ATTORNEY, PRO HAC VICE, Blood Hurst & O'Reardon, LLP, San Diego, CA.

For Angie Nordstrum, -- Consumer Class -- (NJ #17-2401 / KS #17-2451) Individually and on Behalf of All Others Similarly Situated, Carly Bowersock, -- Consumer Class -- (NJ #17-2401 / KS #17-2451) Individually and on Behalf of All Others Similarly Situated, Plaintiffs: Arthur L. Shingler, III, Brian O. O'Mara, Eugene Mikolajczyk, Lea Bays, LEAD ATTORNEYSSS, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Bradley Beall, LEAD ATTORNEY, Paul J. Geller, Stuart A. Davidson, LEAD ATTORNEYS, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Brian D. Penny, LEAD ATTORNEY, PRO HAC VICE, Goldman Scarlato & Penny, PC, Conshohocken, PA; Damien J. Marshall, Duane L. Loft, LEAD ATTORNEYS, PRO HAC VICE, Boies, Schiller & Flexner, LLP - NY, New York, NY; Donald A. Ecklund, James E.

Cecchi, LEAD ATTORNEYS, PRO HAC VICE, Carella, Byrne, Cecchi, **[**12]** Olstein, Brody & Agnello, PC, Roseland, NJ; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jennifer Kan, Matthew S. Tripolitsiotis, LEAD ATTORNEYS, PRO HAC VICE, Boies, Schiller & Flexner, LLP - Armonk, Armonk, NY; Joseph Alm, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - DC, Washington, DC; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS.

For Sanofi-Aventis US, LLC, -- Sanofi -- (NJ #17-2763 / KS #17-2452), Plaintiff: Adam Scott Tolin, Diane P. Sullivan, LEAD ATTORNEYS, PRO HAC VICE, Weil, Gotshal & Manges, LLP - NJ, Princeton, NJ; Eric Shaun Hochstadt, Erin Marie James, Joseph Adamson, Lauren Jacobson, Lisa Marie Madalone, Luna Ngan Barrington, Robert William Taylor, Sarah L. Segal, Yehudah L. Buchweitz, LEAD ATTORNEYSSSSSSSS, PRO HAC VICE, Melissa Rutman, Randi Singer, LEAD ATTORNEYS, Weil, Gotshal & Manges, LLP - New York, New York, NY; Eric Andrew Rivas, LEAD ATTORNEY, John A. Stratford, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP- CA, Redwood Shores, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jacob Benjamin Ebin, LEAD ATTORNEY, PRO HAC VICE, Mayer Brown LLP, **[**13]** New York, NY; Nathaniel David White, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - Dallas, Dallas, TX; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL.

For Kenneth Evans, -- Consumer Class -- (ALS #17-336 / KS #17-2485) as an individual and as representative of the class, Plaintiff: Brian Murphy, Kasie M. Braswell, LEAD ATTORNEYS, PRO HAC VICE, Braswell Murphy, LLC, Mobile, AL; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; James Bringhurst Eubank, LEAD ATTORNEY, W. Daniel Miles, III, LEAD ATTORNEY, PRO HAC VICE, Beasley Allen Crow Methvin Portis & Miles, PC, Montgomery, AL; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS.

For Local 282 Welfare Trust Fund, -- Consumer Class -- (NJ #17-6110 / KS #17-2498) Individually and on Behalf of All Others Similarly Situated, Plaintiff: Arthur L. Shingler, III, Brian O. O'Mara, Eugene Mikolajczyk, Lea Bays, LEAD ATTORNEYSSS, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Bradley Beall, LEAD **[**14]** ATTORNEY, Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; James E. Cecchi, LEAD ATTORNEY, PRO HAC VICE, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, NJ; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS.

For Donna Anne Dvorak, -- Consumer Class -- (KS#17-2785), Michael Gill, -- Consumer Class -- (KS#17-2785), April Sumner, -- Consumer Class -- (KS#17-2785), Landon Ipson, -- Consumer Class -- (KS#17-2785), Plaintiffs: Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Sharp Barton, LLP, Prairie Village, KS; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

For Kenneth Steinhauser, -- Consumer Class -- (KS #16-2711), Plaintiff: Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis **[**15]** Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYSS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Emeryville, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYSS, Sharp Barton, LLP, Prairie Village, KS; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Mylan N.V., Defendant: Adam K. Levin, Benjamin Frederick Holt, Carolyn Anne DeLone, David M. Foster, Justin Bernick, Sue Lin, LEAD ATTORNEYSSSSS, PRO HAC VICE, Charles A. Loughlin, Kimberly Rancour, LEAD ATTORNEYS, Washington, DC; Brian C. Fries, LEAD ATTORNEY, Lathrop GPM, LLP - Kansas City, Kansas City, MO; Chad E. Blomberg, James Moloney, LEAD ATTORNEYS, Lathrop Gage, LLP - Kansas City, Kansas City, MO;

Christopher D. Edelman, LEAD ATTORNEY, PRO **[**16]** HAC VICE, U.S. Department of Justice, Civil Division, Washington, DC; Daniel Thomas Graham, Timothy Robert Herman, LEAD ATTORNEYS, PRO HAC VICE, Clark Hill, PLC - IL, Chicago, IL; Jon Myer Talotta, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP, Tysons, VA; Katherine Booth Wellington, Keith O'Doherty, LEAD ATTORNEYS, Yuri Fuchs, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC, Washington, DC; Kathryn M. Ali, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP - DC, Washington, DC; Michael David Gendall, LEAD ATTORNEY, Hogan Lovells US LLP, Washington, DC.

For Mylan Specialty, LP, a Delaware limited partnership, Defendant: Adam K. Levin, Benjamin Frederick Holt, Carolyn Anne DeLone, David M. Foster, Justin Bernick, Sue Lin, LEAD ATTORNEYSSSSS, PRO HAC VICE, Charles A. Loughlin, Kimberly Rancour, LEAD ATTORNEYS, Washington, DC; Arnold B. Calmann, Jeffrey S. Soos, LEAD ATTORNEYS, PRO HAC VICE, Saiber, LLC, Newark, NJ; Brian C. Fries, LEAD ATTORNEY, Lathrop GPM, LLP - Kansas City, Kansas City, MO; Chad E. Blomberg, James Moloney, LEAD ATTORNEYS, Lathrop Gage, LLP - Kansas City, Kansas City, MO; Christopher D. Edelman, LEAD ATTORNEY, PRO HAC VICE, U.S. Department of Justice, Civil **[**17]** Division, Washington, DC; Daniel Thomas Graham, Timothy Robert Herman, LEAD ATTORNEYS, PRO HAC VICE, Clark Hill, PLC - IL, Chicago, IL; David A. Perez, Thomas L. Boeder, LEAD ATTORNEYS, PRO HAC VICE, Perkins Coie, LLP - Seattle, Seattle, WA; Jessica Arden Ettinger, Kathryn Zecca, Lee Turner Friedman, Philip A. Sechler, Ralph C. Mayrell, LEAD ATTORNEYSSSS, PRO HAC VICE, John Goerlich, Roy T. Englert, Jr., LEAD ATTORNEYS, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC; Jon Myer Talotta, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP, Tysons, VA; Katherine Booth Wellington, Keith O'Doherty, LEAD ATTORNEYS, Yuri Fuchs, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC, Washington, DC; Kathryn M. Ali, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP - DC, Washington, DC; Michael David Gendall, LEAD ATTORNEY, Hogan Lovells US LLP, Washington, DC; Susan E. Foster, LEAD ATTORNEY, PRO HAC VICE, Yarmuth Wilsdon Calfo, PLLC, Seattle, WA.

For Mylan Pharmaceuticals, Inc., Defendant: Adam K. Levin, Benjamin Frederick Holt, Carolyn Anne DeLone, David M. Foster, Justin Bernick, Kathryn M. Ali, Sue Lin, LEAD ATTORNEYSSSSSS, PRO HAC VICE, Charles A. Loughlin, Kimberly **[**18]** Rancour, LEAD ATTORNEYS, Washington, DC; Brian C. Fries, LEAD ATTORNEY, Lathrop GPM, LLP - Kansas City, Kansas City, MO; Chad E. Blomberg, LEAD ATTORNEY, Lathrop Gage, LLP - Kansas City, Kansas City, MO; Christopher D. Edelman, LEAD ATTORNEY, PRO HAC VICE, U.S. Department of Justice, Civil Division, Washington, DC; Daniel Thomas Graham, Timothy Robert Herman, LEAD ATTORNEYS, PRO HAC VICE, Clark Hill, PLC - IL, Chicago, IL; Jon Myer Talotta, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP, Tysons, VA; Katherine Booth Wellington, Keith O'Doherty, LEAD ATTORNEYS, Yuri Fuchs, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC, Washington, DC; Michael David Gendall, LEAD ATTORNEY, Hogan Lovells US LLP, Washington, DC.

For Heather Bresch, (KS #16-2711), Defendant: Adam K. Levin, LEAD ATTORNEY, Hogan Lovells US LLP - DC, Washington, DC; Benjamin Frederick Holt, Carolyn Anne DeLone, David M. Foster, Justin Bernick, Sue Lin, LEAD ATTORNEYSSSS, PRO HAC VICE, Kimberly Rancour, LEAD ATTORNEY, Washington, DC; Brian C. Fries, LEAD ATTORNEY, Lathrop GPM, LLP - Kansas City, Kansas City, MO; Chad E. Blomberg, LEAD ATTORNEY, Lathrop Gage, LLP - Kansas City, Kansas City, MO; Christopher D. Edelman, **[**19]** LEAD ATTORNEY, PRO HAC VICE, U.S. Department of Justice, Civil Division, Washington, DC; Jon Myer Talotta, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP, Tysons, VA; Katherine Booth Wellington, Keith O'Doherty, LEAD ATTORNEYS, Yuri Fuchs, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC, Washington, DC; Michael David Gendall, LEAD ATTORNEY, Hogan Lovells US LLP, Washington, DC.

For King Pharmaceuticals, Inc., Defendant: Brendan Woodard, LEAD ATTORNEY, PRO HAC VICE, White & Case, LLP - NY, New York, NY; Dimitrios Drivas, Edward Thrasher, Kathryn Swisher, Raj Gandesha, Robert Milne, Sheryn George, LEAD ATTORNEYSSSSS, PRO HAC VICE, White & Case LLP - NY, New York, NY; Joseph M. Rebein, LEAD ATTORNEY, Shook, Hardy & Bacon LLP - KC/Grand, Kansas City, MO.

For Meridian Medical Technologies, Inc., Defendant: Ada Wang, Brendan Woodard, Brigid Bone, Chenyuan Fu, Ivan Navedo, Sean Murray, Steven Rivera, LEAD ATTORNEYSSSSSS, PRO HAC VICE, White & Case, LLP - NY, New York, NY; David E. Delorenzi, LEAD ATTORNEY, PRO HAC VICE, Gibbons, PC, Newark, NJ; Devan Calleen

Rittler-Patton, Joseph M. Rebein, LEAD ATTORNEYS, Shook, Hardy & Bacon LLP - KC/Grand, Kansas City, MO; Dimitrios Drivas, Edward **[**20]** Thrasher, Kathryn Swisher, Raj Gandesha, Robert Milne, Sheryn George, Silvia M. Medina, LEAD ATTORNEYSSSSSS, PRO HAC VICE, White & Case LLP - NY, New York, NY.

For Mylan, Inc., Defendant: Adam K. Levin, Charles A. Loughlin, David M. Foster, Kimberly Rancour, LEAD ATTORNEYSSS, Benjamin Frederick Holt, Carolyn Anne DeLone, Justin Bernick, LEAD ATTORNEYSS, PRO HAC VICE, Washington, DC; Arnold B. Calmann, Jeffrey S. Soos, LEAD ATTORNEYS, PRO HAC VICE, Saiber, LLC, Newark, NJ; Brian C. Fries, LEAD ATTORNEY, Lathrop GPM, LLP - Kansas City, Kansas City, MO; Chad E. Blomberg, LEAD ATTORNEY, Lathrop Gage, LLP - Kansas City, Kansas City, MO; Jessica Arden Ettinger, Kathryn Zecca, Lee Turner Friedman, Philip A. Sechler, Ralph C. Mayrell, LEAD ATTORNEYSSSS, PRO HAC VICE, John Goerlich, Roy T. Englert, Jr., LEAD ATTORNEYS, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC; Jon Myer Talotta, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP, Tysons, VA; Katherine Booth Wellington, Keith O'Doherty, LEAD ATTORNEYS, Hogan Lovells US, LLP - DC, Washington, DC; Michael David Gendall, LEAD ATTORNEY, Hogan Lovells US LLP, Washington, DC.

For Pfizer, Inc., Defendant: Ada Wang, Brigid **[**21]** Bone, Chenyuan Fu, Ivan Navedo, Sean Murray, Steven Rivera, LEAD ATTORNEYSSSSS, PRO HAC VICE, White & Case, LLP - NY, New York, NY; David E. Delorenzi, LEAD ATTORNEY, PRO HAC VICE, Gibbons, PC, Newark, NJ; Devan Calleen Rittler-Patton, Joseph M. Rebein, LEAD ATTORNEYS, Shook, Hardy & Bacon LLP - KC/Grand, Kansas City, MO; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Silvia M. Medina, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP - NY, New York, NY.

For King Pharmaceuticals, LLC, Defendant: Ada Wang, Brigid Bone, Chenyuan Fu, Ivan Navedo, Sean Murray, Steven Rivera, LEAD ATTORNEYSSSSS, PRO HAC VICE, White & Case, LLP - NY, New York, NY; David E. Delorenzi, LEAD ATTORNEY, PRO HAC VICE, Gibbons, PC, Newark, NJ; Devan Calleen Rittler-Patton, Joseph M. Rebein, LEAD ATTORNEYS, Shook, Hardy & Bacon LLP - KC/Grand, Kansas City, MO; Silvia M. Medina, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP - NY, New York, NY.

For Teva Pharmaceutical USA, Inc., Defendant, Miscellaneous: Christopher Holding, LEAD ATTORNEY, PRO HAC VICE, Goodwin Procter, LLP - MA, Boston, MA.

For UnitedHealth Group, Inc., (Defendant in Related Case #17-2497-DCC-TJJ) **[**22]** (Termed, Doc. 102), OptumRx, Inc., (Defendant in Related Case #17-2497-DCC-TJJ) (Termed, Doc. 102), Miscellaneous: Bradley Joseph Schlozman, Mitchell L. Herren, LEAD ATTORNEYS, Hinkle Law Firm LLC - East Wichita Office, Wichita, KS.

For Elan Klein, (Plaintiff in MN#17-1884 Klein, et al. v. Prime Therapeutics, LLC, et al.), Adam Klein, (Plaintiff in MN#17-1884 Klein, et al. v. Prime Therapeutics, LLC, et al.), Leah Weaver, (Plaintiff in MN#17-1884 Klein, et al. v. Prime Therapeutics, LLC, et al.), Arissa Paschalidis, (Plaintiff in MN#17-1884 Klein, et al. v. Prime Therapeutics, LLC, et al.), Miscellaneous: Patrick Thomas Egan, LEAD ATTORNEY, PRO HAC VICE, Berman Tabacco, Boston, MA.

For Humana, Inc., Miscellaneous: Ursula A. Taylor, LEAD ATTORNEY, PRO HAC VICE, Strategic Health Law, Chicago, IL.

For Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc., Miscellaneous: Mark Palley, LEAD ATTORNEY, Marion's Inn, LLP, Oakland, CA.

For Aetna Inc., Blue Horizon Cross Blue Shield of New Jersey, Coventry Health Care, Blue Cross Blue Shield Massachusetts, Miscellaneous: Peter D. St. Phillip, Jr., LEAD ATTORNEY, PRO HAC VICE, Lowey Dannenberg, PC, White Plains, NY.

For Thomas Hadley, Miscellaneous: **[**23]** Robert E. Boston, LEAD ATTORNEY, PRO HAC VICE, Waller, Lansden, Dortch & Davis, LLC, Nashville, TN.

For Segal Group, Inc., Miscellaneous: Michael J. Prame, Sarah Humble, LEAD ATTORNEYS, PRO HAC VICE, Groom Law Group, Chartered, Washington, DC.

For Anthem, Inc., Anthem Insurance Companies, Inc., Amerigroup Corporation, Movants: John Bagnall Webb, Samuel Kadosh, LEAD ATTORNEYS, PRO HAC VICE, Reed Smith, LLP, New York, NY.

For CareFirst, Inc., Movant: Scott Simmer, LEAD ATTORNEY, PRO HAC VICE, Baron & Budd, PC, Washington, DC; Thomas J. Hershewe, LEAD ATTORNEY, Dollar, Burns & Becker, LC, Kansas City, MO.

For Judicial Panel on Multidistrict Litigation, Interested Party: Jeffrey N. Luthi, LEAD ATTORNEY, Clerk of the MDL Panel, Washington, DC.

For MedImpact Healthcare Systems, Inc., Interested Party: Jennifer B. Wieland, LEAD ATTORNEY, Berkowitz Oliver LLP - KCMO, Kansas City, MO.

For Change Healthcare, Inc., Interested Party: Mary Mifflin Drake, LEAD ATTORNEY, PRO HAC VICE, Robert Ashby Pate, PRO HAC VICE, Lightfoot Franklin White, Birmingham, AL.

For CVS Health Corporation, Interested Party: J. Nick Badgerow, LEAD ATTORNEY, Spencer Fane LLP - Overland Park, Overland Park, KS; Kersten L. Holzhueter, **[**24]** LEAD ATTORNEY, Spencer Fane LLP - KC, Kansas City, MO.

For kaleo, Inc., Interested Party: John Bredehoft, LEAD ATTORNEY, PRO HAC VICE, Kaufman & Canoles, Norfolk, VA.

For KPH Healthcare Services, Inc., (Plaintiff in Case #20-cv-2065), also known as Kinney Drugs, Inc., Interested Party: Eric D. Barton, Thomas P. Cartmell, Tyler W. Hudson, LEAD ATTORNEYSS, Wagstaff & Cartmell, LLP, Kansas City, MO.

For Mylan Specialty, LP, a Delaware limited partnership, Counter Claimant: Adam K. Levin, LEAD ATTORNEY, David M. Foster, LEAD ATTORNEY, PRO HAC VICE, Washington, DC; Arnold B. Calmann, Jeffrey S. Soos, LEAD ATTORNEYS, Saiber, LLC, Newark, NJ; Brian C. Fries, LEAD ATTORNEY, Lathrop GPM, LLP - Kansas City, Kansas City, MO; Daniel Thomas Graham, Timothy Robert Herman, LEAD ATTORNEYS, Clark Hill, PLC - IL, Chicago, IL; David A. Perez, LEAD ATTORNEY, Thomas L. Boeder, LEAD ATTORNEY, PRO HAC VICE, Perkins Coie, LLP - Seattle, Seattle, WA; James Moloney, LEAD ATTORNEY, Lathrop Gage, LLP - Kansas City, Kansas City, MO; Jessica Arden Ettinger, Kathryn Zecca, Lee Turner Friedman, Philip A. Sechler, Ralph C. Mayrell, LEAD ATTORNEYSSSS, PRO HAC VICE, John Goerlich, Roy T. Englert, Jr., LEAD ATTORNEYS, Robbins, **[**25]** Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC; Katherine Booth Wellington, LEAD ATTORNEY, Hogan Lovells US, LLP - DC, Washington, DC; Kathryn M. Ali, LEAD ATTORNEY, Hogan Lovells US LLP - DC, Washington, DC; Michael David Gendall, LEAD ATTORNEY, Hogan Lovells US LLP, Washington, DC; Susan E. Foster, LEAD ATTORNEY, PRO HAC VICE, Yarmuth Wilsdon Calfo, PLLC, Seattle, WA.

For Sanofi-Aventis US, LLC, -- Sanofi -- (NJ #17-2763 / KS #17-2452), Counter Defendant: Adam Scott Tolin, Diane P. Sullivan, LEAD ATTORNEYS, Weil, Gotshal & Manges, LLP - NJ, Princeton, NJ; Eric Shaun Hochstadt, Yehudah L. Buchweitz, LEAD ATTORNEYS, Weil, Gotshal & Manges, LLP - New York, New York, NY; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL.

Judges: Daniel D. Crabtree, United States District Judge.

Opinion by: Daniel D. Crabtree

Opinion

[*930] **MEMORANDUM AND ORDER**

This case involves a certified class action brought by consumers and third-party payors of the EpiPen. They allege that the Mylan and Pfizer defendants, who manufacture and sell the EpiPen, violated certain state antitrust laws and the federal civil RICO statute. Doc. 2169 at 42, 44-45 (Pretrial Order ¶¶ 4.a., **[**26]** 4.d.).

This matter comes before the court on the summary judgment motion filed by the Mylan defendants (Doc. 2141).[1] The Mylan defendants seek summary judgment against plaintiffs' remaining claims: (1) state antitrust conspiracy and monopolization **[*931]** claims asserted under certain state laws;[2] and (2) RICO claims asserted under *18 U.S.C. § 1962(c)* & *(d)*. Doc. 2169 at 42, 44-45 (Pretrial Order ¶¶ 4.a., 4.d.).

The court has considered the parties' thorough and well-presented arguments. And, the court now is prepared to decide the motion for summary judgment.[3]

I. Undisputed Facts

The following facts are either uncontroverted, or, where genuinely controverted, are viewed in the light most favorable to the consumer class plaintiffs, the non-moving party opposing summary judgment. *Scott v. Harris, 550 U.S. 372, 378-80, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*.

The Use of EAI Drug Devices to Treat Anaphylaxis

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[1] The named defendants in this case are: Mylan N.V., Mylan Specialty L.P., Mylan Pharmaceuticals Inc., and Heather Bresch (collectively "Mylan") and Pfizer, Inc., King Pharmaceuticals, Inc. (n/k/a King Pharmaceuticals LLC), and Meridian Medical Technologies, Inc. (collectively "Pfizer"). Doc. 2169 at 1 (Pretrial Order).

This Order rules just the summary judgment motion filed by the Mylan defendants (Doc. 2141). Thus, the court's references to "defendants" in this Order refer only to the Mylan defendants unless specifically noted that the term is meant to refer to other named defendants in this action.

[2] Plaintiffs assert their state antitrust claims under the laws of the following states: Alabama, California, Florida, Hawaii, Illinois, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New York, North Carolina, Tennessee, and Utah. Doc. 2169 at 2 n.3, 44-45 (Pretrial Order ¶¶ 1.d., 4.d.).

[3] Defendants' summary judgment motion asks "that a hearing be set for oral argument" on the motion "if the Court believes that would be helpful." Doc. 2141 at 2. Our court's local rule provides: "The court may set any motion for oral argument or hearing at the request of a party or on its own initiative." *D. Kan. Rule 7.2*. The court carefully has reviewed the parties' written submissions. And, the parties' papers have explained their positions quite effectively. The court finds that oral argument will not assist its work. Also, it concludes that ordering oral argument here would contradict *Fed. R. Civ. P. 1*. So, the court denies defendants' request to set the matter for oral argument.

Also, the court enters this Order as a publicly-available document on the court's docket. The court recognizes that the parties have moved for leave to file under seal portions of their summary judgment briefs as well as many of the exhibits submitted either supporting or opposing the summary judgment motion. But, ***HN1***[] the public enjoys a "common-law right of access" to judicial records. *Nixon v. Warner Communications, Inc., 435 U.S. 589, 599, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978)*; ***United States v. Bacon, 950 F.3d 1286, 1292 (10th Cir. 2020)***. A litigant can rebut the "strong presumption in favor of public access" when "countervailing interests heavily outweigh the public interests in access to the judicial record." ***Bacon, 950 F.3d at 1293*** (citations and internal quotation marks omitted). The court finds that none of the information in this Order qualifies for sealing under the governing legal standard for several reasons. *First*, ***HN2***[] the court's summary judgment analysis relies on the factual information submitted by the parties to determine the litigants' rights; so, the public has a strong interest in accessing the information. *See* *Riker v. Fed. Bureau of Prisons, 315 F. App'x 752, 755 (10th Cir. 2009)* ("Especially 'where documents are used to determine litigants' substantive legal rights, a strong presumption of access attaches.'" (quoting *Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 121 (2d Cir. 2006)*)). *Second*, a good portion of the factual information already is publicly-available through other sources. *And third*, most of this information is quite stale—ranging in date from 2007 to 2017. The court finds that the public's right to access the entire contents of this Order to understand the summary judgment facts and the court's analysis of plaintiffs' antitrust claims and RICO claims outweighs any privacy interest that the parties assert over the information.

Anaphylaxis is a serious allergic reaction that can be life-threatening if not promptly and properly treated. Doc. 2165-1 at 2 (Defs.' Ex. 3).[4] Epinephrine is the only appropriate first-line treatment for anaphylaxis. Doc. 2142-5 at 8-9 (Defs.' Ex. 5). **[*932]** An epinephrine auto-injector ("EAI") is a device used to self-deliver a controlled dose of epinephrine. *Id.* at 9. EAIs have **[**27]** been available in the U.S. since the 1980s, when the EpiPen EAI first was approved by the FDA and marketed to consumers. Doc. 2169 at 4 (Pretrial Order ¶ 2.a.19.). But still, by 2007, fewer than one million of the 43 million patients who are at risk for anaphylaxis had access to an EAI. *Reviewing the Rising Price of EpiPens: Hearing Before the Comm. on Oversight and Gov't Reform H.R.*, 114th Cong. 17 (2016) (statements of Heather Bresch, CEO of Mylan), https://docs.house.gov/meetings/GO/GO00/20160921/105373/HHRG-114-GO00-Transcript-20160921.pdf (hereinafter, "Bresch Statements").[5]

Mylan Acquires the Rights To Market and Sell the EpiPen

In 2007, Mylan Pharmaceuticals, Inc. acquired Dey Pharma L.P. ("Dey"), which later was renamed Mylan Specialty. Doc. 2169 at 3 (Pretrial Order ¶¶ 2.a.7-8.). Dey had "the exclusive right and license to market, distribute and sell" EpiPen Auto-Injector in the United States under a Supply Agreement with Meridian Medical Technologies, Inc. ("Meridian"),[6] which manufactures EpiPen products. Doc. 2142-6 at 4, 6, 35 (Defs.' Ex. 7). So, since 2007, Mylan Specialty has marketed and sold EpiPen devices, which Meridian supplies under the Supply Agreement. Doc. **[**28]** 2169 at 3 (Pretrial Order ¶¶ 2.a.7., 2.a.11., 2.a.12.); *see also* Docs. 2142-6, 2142-7, 2142-8 (Defs.' Exs. 7, 8, & 9).

The 2010 Supply Agreement established a "Joint Commercial Committee" ("JCC") designed to streamline "distribution of EpiPen products." Doc. 2142-7 at 29 (Defs.' Ex. 8). The Agreement obligated Meridian to supply Mylan with the quantities of EpiPen products Mylan requested, for which Mylan compensated Meridian on a per-unit basis. *Id.* at 10, 17, & 42-44. Also, it requires Meridian to "prosecute and maintain any patents or patent applications" for EpiPen products. *Id.* at 27. Meridian held the "New Drug Application" ("NDA") for EpiPen and was thus responsible for filing advertising and promotional materials with the FDA until July 2013, when Pfizer transferred the NDA to Mylan. *See generally* Doc. 2142-10 (Defs.' Ex. 11).

As Mylan developed its branding strategy for EpiPen, it recognized that anaphylaxis was "[h]ighly prevalent but under-recognized and undertreated," that "[o]ne out of 25 people is at risk for anaphylaxis," that "1,500 people die from anaphylaxis each year," and that "5 out of 6 people at risk for anaphylaxis have not been prescribed an epinephrine **[**29]** injector[.]" Doc. 2142-11 at 7-8 (Defs.' Ex. 12).[7]

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[4] Plaintiffs don't controvert this statement of fact, but they argue that this exhibit is inadmissible hearsay for which no exception applies. Doc. 2190-1 at 20, 77; *see also* Doc. 2226-3 at 2 (discussing "SMF ¶ 1"). Defendants respond that the exhibit—a scholarly medical article—is admissible under the residual hearsay exception of *Fed. R. Evid. 807*. Doc. 2226-1 at 21. Even if defendants' cited exhibit doesn't qualify for admission under *Rule 807*, the parties have stipulated to the following factual statement that contains information almost identical to the fact supported by defendants' summary judgment exhibit: "Anaphylaxis is a life-threatening allergic reaction that can occur rapidly after exposure to an allergen." Doc. 2169 at 3 (Pretrial Order ¶ 2.a.14.).

[5] Plaintiffs have submitted the hearing's transcript as part of the summary judgment record. Doc. 2207-17 (Pls.' Ex. 349).

[6] Meridian now is a subsidiary of Pfizer, Inc. Doc. 2169 at 3 (Pretrial Order ¶ 10). Pfizer acquired King Pharmaceuticals LLC ("King") and Meridian in 2011. *Id.* And now, Meridian and King are indirect wholly-owned subsidiaries of Pfizer, Inc. *Id.* (Pretrial Order ¶¶ 2.a.6., 2.a.10.). This Order refers to Pfizer, Meridian, and King collectively as "Pfizer" unless otherwise noted.

[7] Plaintiffs assert that this exhibit constitutes inadmissible hearsay to which no exception applies. Doc. 2190-1 at 77. Defendants respond that this document is admissible under the business records exception to hearsay under *Fed. R. Evid. 803(6)*. Doc. 2226-1 at 21. Defendants have the better argument because this exhibit—an internal Mylan document—appears to qualify as a business record under the hearsay exception of *Fed. R. Evid. 803(6)*.

[*933] Mylan developed a marketing strategy designed to expand anaphylaxis awareness by focusing on schools. Doc. 2142-12 at 77 (Defs.' Ex. 13).[8] When Mylan acquired Dey, some state laws barred schools from keeping EAIs not prescribed to a particular child and prohibited school personnel from administering an EAI to a child who did not have a prescription, even in an emergency. *Id.* Mylan cites two examples where these prohibitions produced tragic and preventable consequences. *See* Noreen S. Ahmed-Ullah, *Epinephrine Bill Sparked By Death of CPS Student Passes Legislature*, Chi. Trib., May 18, 2011, https://bit.ly/2ZU3gSv (describing the death of a seventh-grader who had an anaphylactic episode after eating food served at a classroom party and didn't have access to epinephrine); *see also* Emma Brown, *Virginia First-grader Ammaria Johnson Dies After Allergic Reaction*, Wash. Post, Jan. 5, 2012, https://wapo.st/2Ze2roH (reporting the death of a first-grader who had an allergic reaction at school and didn't have access to epinephrine).[9] So, Mylan worked to pass legislation in every state allowing schools to maintain **[*934]** epinephrine not prescribed to a particular **[**30]** student and permitting school personnel to administer epinephrine to anyone experiencing an anaphylactic emergency. Doc. 2142-12 at 77 (Defs.' Ex. 13). Forty-eight states adopted this legislation, and in 2013, President Obama signed the School Access to Emergency Epinephrine Act, which encouraged schools to keep epinephrine (whether an EpiPen or some other EAI) on-hand.[10] Plaintiff's expert, allergist Dr. Jay Portnoy, agreed that this legislation providing access to epinephrine in schools is a "good thing." Doc. 2165-4 at 18 (Defs.' Ex. 14) (Portnoy Dep. 139:7-12). Also, several named plaintiffs in this lawsuit agree this legislation was a "good idea." *See, e.g.*, Doc. 2165-5 at 7 (Defs.' Ex. 15) (Bowersock Dep. 107:8-23); Doc. 2165-6 at 3-4 (Defs.' Ex. 17) (Wemple Dep. 237:25-238:6); Doc. 2165-7 at 8-9 (Defs.' Ex. 18) (Beaulieu Dep. 102:14-103:14).

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[8] Like the exhibit discussed in the preceding footnote, plaintiffs assert that defendants' Exhibit 13 is inadmissible hearsay. Doc. 2190-1 at 77. Indeed, plaintiffs assert that more than 150 of defendants' exhibits are inadmissible hearsay. *See id.* Defendants respond that Exhibit 13—along with hundreds of others of their summary judgment exhibits—are admissible under the business records exception to the hearsay rule under *Fed. R. Evid. 803(6)*. Doc. 2226-1 at 21; *see also* Doc. 2227-1 at 11-12 (Cuthbertson Decl.). Each of these exhibits that defendants cite as admissible under *Fed. R. Evid. 803(6)* are internal Mylan records. For the same reasons discussed above, *supra* note 7, the court finds that Exhibit 13—as well as the other, challenged exhibits that are internal Mylan business records—are admissible under *Fed. R. Evid. 803(6)*'s business records exception to the hearsay rule.

Also, the court finds plaintiffs' blanket hearsay objections to Mylan documents disingenuous. Plaintiffs themselves rely on many Mylan-produced business records to support their asserted summary judgment facts. For example, plaintiffs assert a hearsay objection to defendants' Exhibit 100. *See* Doc. 2190-1 at 77 (objecting to defendants' Exhibit 100 (Doc. 2167-2)). And, with their blanket hearsay objection, plaintiffs assert: "At the very least, *the Court should not consider any of the exhibits and other documents specifically identified in this paragraph* because Defendants failed to meet their burden of showing the documents' admissibility at trial." *Id.* (emphasis added). Incredibly, while plaintiffs ask the court to ignore defendants' Exhibit 100 (and hundreds of other documents defendants submitted as summary judgment exhibits), plaintiffs also cite the very same document to support one of their summary judgment facts. *See* Doc. 2190-1 at 69 (Statement of Additional Material Fact ¶ 147) (citing Pls.' Ex. 322 (Doc. 2207-14 at 2-15)). This is not the only example. The court identifies more in footnotes below. Plaintiffs provide no explanation for why they contend the court should consider their proffered exhibits as admissible evidence under the Federal Rules of Evidence but simultaneously preclude defendants from offering the very same evidence on summary judgment. The court is unimpressed with plaintiffs' tactic. The only thing it has accomplished is complicating the court's work.

[9] Defendants cite these news reports, but don't attach them as exhibits to their summary judgment motion. Plaintiffs complain that these two news reports—along with some 56 other documents that defendants have cited to support their summary judgment facts—aren't attached as exhibits to their summary judgment motion. Doc. 2190-1 at 76-77. And, plaintiffs argue that the unattached exhibits are inadmissible hearsay for which no exception applies. *Id.* To the extent plaintiffs challenge defendants' citation to these news articles because they aren't attached as summary judgment exhibits, *see id*. at 76-77, the court rejects that challenge because plaintiffs also don't controvert the summary judgment facts cited in this statement of fact, *see id*. at 20. Also, the court rejects plaintiffs' hearsay challenge because defendants don't offer these news articles to prove the truth of the matters asserted. Instead, they offer them to show the information—true or not—that Mylan considered when deciding how to sell and market the EpiPen. Thus, these exhibits don't qualify as hearsay under *Fed. R. Evid. 801(c)*. *See infra* n.12.

[10] The citation defendants provide for this statement of fact is no longer available online, but plaintiffs don't controvert this fact. So, the court accepts it for this summary judgment motion.

In August 2012, Mylan launched the EpiPen4Schools® Program, which made free EpiPen devices available—"with no strings attached"—to K-12 schools across the United States. Doc. 2143-3 **[**31]** at 10-11 (Defs.' Ex. 21) (Bresch Dep. 129:6-130:24); *see also* Doc. 2142-5 at 25-26 (Defs.' Ex. 5). By 2017, Mylan had donated more than one million EAIs through this program. Doc. 2142-5 at 25 (Defs.' Ex. 5). Patients have used these donated devices more than 2,000 times to treat anaphylaxis in schools, accounting for up to 60% of the EAIs used in the participating schools. *Id.* Mylan's costs associated with this program totaled $71 million in the first four years alone. Doc. 2143-4 at 2 (Defs.' Ex. 22).

Mylan implemented another marketing strategy in October 2009, when it launched the "Next Generation Auto-injector ('NGA')." *Dey Launches and Unveils Next-Generation, Needle-Protected EpiPen(R) (Epinephrine) Auto-Injector with Enhanced Patient-Friendly Features*, Mylan (Oct. 26, 2009), https://bit.ly/38HRzCD.[11] The NGA had several new features—including built-in needle protection—which made it the first EAI with no exposed needle before and after use. *See id.*; *see also* Doc. 2143-5 at 2 (Defs.' Ex. 23). Other new features included an ergonomically designed barrel to prevent the device from rolling out of reach during an emergency, a flip-top case for single-handed removal, and bright orange **[**32]** colors and arrows to help identify quickly the needle end of the device and to make the product more usable for people who are color-blind. Doc. 2143-5 at 2-3 (Defs.' Ex. 23); Doc. 2143-6 at 2-3 (Defs.' Ex. 25); Doc. 2143-8 at 4, 7 (Defs.' Ex. 27).

EpiPen Pricing

Mylan reported in a securities filing that during 2008—the first full year after it acquired Dey—the net product profitability of EpiPen was $1 per device, and in 2009 that number increased to $2. Mylan N.V., Current Report (Form 8-K), Ex. 99.1 (Sept. 26, 2016), https://www.sec.gov/Archives/edgar/data/1623613/000119312516719397/d265624dex991.htm. A Mylan executive **[*935]** testified that the EpiPen franchise was "very undervalued" when Mylan acquired its rights. Doc. 2143-11 at 5 (Defs.' Ex. 30) (Graybill Dep. 71:10-12). And, Joshua Parks, defendants' pricing expert, opines that as late as 2009, EpiPen products likely were "not . . . sufficiently profitable to justify [their] continued promotion at a major drug company." Doc. 2143-12 at 32 (Defs.' Ex. 31) (Parks Expert Report ¶ 72).

Between 2009 to 2016, Mylan Specialty periodically increased the EpiPen's Wholesale Acquisition Costs ("WAC"). Doc. 2143-14 at 5 (Defs.' Ex. 33) (Graham Dep. **[**33]** 67:5-10); Doc. 2143-12 at 16-28 (Defs.' Ex. 31) (Parks Expert Report ¶¶ 33-63). The WAC is a list price that manufacturers charge wholesalers. Doc. 2143-12 at 15-16 (Defs.' Ex. 31) (Parks Expert Report ¶ 32). The WAC is not the price that consumers or health plans pay for pharmaceutical products. *Id.* Mylan Specialty's largest WAC increase for EpiPen products (on a percentage basis) occurred in October 2009, when Mylan Specialty launched the Next Generation Auto-injector. *Id.* at 16 (Parks Expert Report ¶ 34). EpiPen's WAC increased by 20.1%. *Id.*; *see also* Doc. 2143-13 at 2 (Defs.' Ex. 32). Mylan Specialty's President testified that Mylan—not Pfizer—made EpiPen pricing decisions unilaterally. Doc. 2142-9 at 10 (Defs.' Ex. 10) (Graham Dep. 103:12-17).

Mylan CEO Heather Bresch's Congressional Testimony

In September 2016, Mylan CEO Heather Bresch testified before the House Committee on Oversight and Government reform. Bresch Statements, 114th Cong. at 17-22. Ms. Bresch testified about Mylan's efforts to improve access to EAIs. *Id.* at 17-18. She explained:

> Before Mylan acquired the company that owned EpiPen in 2007, fewer than 1 million of the 43 million people at risk had access to an epinephrine **[**34]** auto-injector. At the same time, it was estimated that anaphylaxis was

[11] This fact is tied to another public record—a press release—that defendants didn't attach as a summary judgment exhibit. To the extent plaintiffs object to this citation, the court rejects that objection. This press release is publicly available online, and likely qualifies as a Mylan business record that is admissible under *Fed. R. Evid. 803(6)*'s exception to the hearsay rule.

> causing 1,500 deaths annually. We've read stories of children dying at school because they did not have access to an epinephrine auto-injector or due to a lack of education about the need. We saw this as an unacceptable and largely preventable health problem.
>
> We've worked diligently and invested to enhance EpiPen and make it more available. In fact, we have invested more than $1 billion in these efforts over the last few years and have succeeded on many fronts. We put an improved EpiPen device on the market in 2009. We now reach 80 percent more patients. And today, approximately 85 percent of EpiPen patients pay less than $100 for two and a majority less than $50.

Id. at 17-18.

Ms. Bresch also testified about the EpiPen4Schools® program and explained how Mylan had used this program to donate free EpiPens "with no strings attached." *Id.* at 18. And, Ms. Bresch testified that the $608 WAC per two-pack was not the actual "pricing of EpiPens" or what Mylan profited from each EpiPen sale. *Id.* at 18, 21. She explained that Mylan's actual profit per EpiPen device is "approximately $50 per pen." *Id.* at 21. Also, Ms. Bresch **[**35]** testified, "[o]ver the last decade, Mylan's medicines have reduced the U.S. healthcare costs by approximately 180 billion." *Id.* at 17.

As a supplement to Ms. Bresch's testimony, Mylan provided Congress a profitability analysis for EpiPen that applied a 37.5% tax rate. Doc. 2208-20 at 2 (Pls.' Ex. 353). Mylan's securities filings show that Mylan had a negative effective tax rate in the U.S. in 2015 and 2016. Doc. 2207-19 at 142 (Pls.' Ex. 352). Following the congressional hearing, 17 members of the United States Senate noted that Ms. Bresch's testimony about EpiPen profits was based on **[*936]** "calculations [that] included an *undisclosed* 37.5% tax rate—which reduced [Mylan's] reported profits by 60%." Doc. 2205-7 at 2 (Pls.' Ex. 354). Using the 37.5% tax rate to calculate Mylan's profits reduced its annual profits by $264 million. Doc. 2207-22 at 3 (Pls.' Ex. 356).

Of the "one billion dollars" that Ms. Bresch testified Mylan had invested to enhance the EpiPen and make it more available, $879 million was spent on marketing and selling the EpiPen. Doc. 2194-17 at 9, 16 (Pls.' Ex. 118). And, a letter signed by 17 Senators noted that "Mylan's My EpiPen Savings Card and Patient Assistance Program **[**36]** do not help the vast majority of EpiPen users." Doc. 2205-7 at 3 (Pls.' Ex. 354). The 17 Senators also criticized Ms. Bresch for her "lack of information and lack of clarity" in her September 12, 2016 response to the Senators' letter addressing EpiPen price increases, as well as her "insistence that [she was] not aware of the basic facts about sale of [Mylan's] own drug[.]" *Id.* at 2.

Before Ms. Bresch gave her testimony to Congress, Mylan had issued a press release on August 24, 2016. Doc. 2206-2 (Pls.' Ex. 3). The press release quoted Ms. Bresch as stating: "Patients deserve . . . price transparency[.]" *Id.* at 2. And, Ms. Bresch suggested Mylan was "addressing" this "problem" with its "actions" that day. *Id.* The press release also asserted that 80% of patients paid "nothing out of pocket" for EpiPen products. *Id.*

Ms. Bresch's compensation from Mylan includes a "long-term incentive" that compensates her based on the company's performance using "several metrics" including "earnings." Doc. 2194-9 at 3 (Pls.' Ex. 109) (Bresch Dep. 43:13-45:7).

The Medical Guidance about Repeat Doses of Epinephrine

In December 2010, the National Institute of Allergy and Infectious Diseases ("NIAID")—a division **[**37]** of the National Institutes of Health ("NIH"), who conducts and supports research relating to infectious, immunologic, and allergic diseases—published "Guidelines for the Diagnosis and Management of Food Allergy in the US: Report of the NIAID-Sponsored Expert Panel" ("NIAID Guidelines"). Doc. 2165-10 at 6 (Defs.' Ex. 34).[12] Dr. Anthony Fauci—

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[12] Plaintiffs assert that this exhibit is inadmissible hearsay for which no exception applies. Doc. 2190-1 at 20. Plaintiffs make this same objection to more than 40 of defendants' exhibits—many of which are scholarly medical articles. *Id.* Defendants respond that each exhibit is admissible under the residual hearsay exception of *Fed. R. Evid. 807*. Doc. 2226-1 at 21. ***HN3***[] *Rule*

Director of NIAID—explained that **[*937]** "[t]he Guidelines were developed over a 2-year period through the combined efforts of an Expert Panel and Coordinating Committee representing 34 professional organizations, federal agencies, and patient advocacy groups." *Id.* at 5. Each member of the Expert Panel was vetted by the NIAID for financial conflicts of interest and approved by the Coordinating Committee. *Id.* at 7.

The NIAID Guidelines assert that "repeated dosing" of epinephrine "may be required" to treat anaphylaxis. *Id.* at 41. The Guidelines describe that "[r]eports of patients receiving epinephrine for food-induced or nonfood-induced anaphylaxis note that as high as 10% to 20% of individuals who receive epinephrine will require more than 1 dose before **[**38]** recovery of symptoms." *Id.* And, the NIAID Guidelines explain, "it is impossible to predict the severity

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807(a) provides an exception permitting the admission of hearsay evidence if "(1) the statement is supported by sufficient guarantees of trustworthiness . . . and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." Fed. R. Evid. 807(a). The parties haven't provided the court enough information here to determine whether the scholarly medical articles at issue satisfy both requirements of Rule 807's residual exception. And, as our court has noted before, "***HN4***[] scholarly articles, standing alone, contain inadmissible hearsay and have limited utility under the Federal Rules of Evidence." *In re Universal Serv. Fund Tel. Billing Pracs. Litig., No. 02-MD-1468-JWL, 2008 U.S. Dist. LEXIS 34542, 2008 WL 1884125, at *2 (D. Kan. Apr. 25, 2008)*.

Nevertheless, the court considers the scholarly articles because they aren't hearsay evidence in the context of this summary judgment motion. ***HN5***[] The Federal Rules of Evidence define hearsay as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence *to prove the truth of the matter asserted in the statement*." Fed. R. Evid. 801(c). But, statements that are offered for purposes other than proving the truth of the matter asserted don't count as hearsay. *See, e.g., Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1434-35 (10th Cir. 1993)* (holding that statements about job applicants' bad conduct wasn't hearsay because they weren't offered to prove the truth of the matter asserted but instead offered to establish the employer's state of mind when it decided not to hire applicants); *Allen v. Montgomery, 728 F.2d 1409, 1412 (11th Cir. 1984)* (recognizing that newspaper articles about jury sequestration during a criminal trial "were not objectionable as hearsay because they were not offered to prove the truth of the matter asserted—that the jury stayed with the sheriff" but instead were offered "to establish . . . pretrial publicity"); *Eaton v. Harsha, 505 F. Supp. 2d 948, 952-53 nn. 4 & 6 (D. Kan. 2007)* (Robinson, J.) (finding that statements made to a police chief by members of the public who had complained that two police officers had made offensive and racially insensitive comments were not hearsay because statements weren't offered to prove the truth of the matters asserted by the complaints—*i.e.*, that the police officers' comments were offensive and racially insensitive—but instead to show that the police chief had received complaints from community members). In short, a statement that is offered to show its effect on the listener isn't hearsay because it isn't offered to prove the truth of the matter asserted—*i.e.*, to prove the truth of the contents of the declarant's statement—but instead is offered to prove how the statement affected the person who heard the statement. *See United States v. Smalls, 605 F.3d 765, 785 n.18 (10th Cir. 2010)* (holding that statements weren't inadmissible hearsay when "they are not offered to prove the truth of the matter asserted, but rather are offered to establish their effect on [the listener] and provide context for his statement"); *see also Schindler v. Seiler, 474 F.3d 1008, 1010 (7th Cir. 2007)* (explaining that "a statement offered to show its effect on the person who heard the statement is not hearsay" (citing *United States v. Robinzine, 80 F.3d 246, 252 (7th Cir. 1996)*)).

Here, defendants don't offer the scholarly articles to prove that their contents are true. Instead, defendants offer them as evidence of the relevant medical guidance about anaphylaxis and the proper treatment for that condition that Mylan asserts it considered when marketing and selling the EpiPen. To illustrate the principle, defendants don't offer the NIAID Guidelines to prove the truth of the Guidelines' contents about appropriate treatment of anaphylaxis or the number of epinephrine doses required to treat an anaphylactic reaction. Instead, defendants offer the NIAID Guidelines to show how they affected Mylan and its decision to discontinue selling single EpiPens and switch to selling EpiPens exclusively in a 2-Pak. So, because defendants don't offer the NIAID Guidelines to prove the truth of the matter asserted, the exhibit isn't hearsay. And, plaintiffs provide no other reason to exclude it from the summary judgment evidence.

Moreover, the court observes that plaintiffs object to many of defendants' exhibits as inadmissible hearsay, but then they turn around and rely on those same documents to support their statements of additional material facts. *Compare* Doc. 2190-1 at 77 (objecting to defendants' Exhibits 34, 36, 38-48 as inadmissible hearsay) *with id*. at 39 (relying on defendants' Exhibits 34, 36, 46, 47, & 48 to support plaintiffs' Statement of Additional Material Fact ¶ 12). Plaintiffs' blanket hearsay objections—which the court has attempted to address thoroughly in this order—have increased the court's work substantially. And, plaintiffs' practice of objecting to exhibits that they also rely on as summary judgment evidence appears to contravene Rule 1's directive to the parties to "employ[ ]" the Federal Rules of Civil Procedure—including Rule 56—"to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

of any subsequent reactions with accuracy." *Id.* at 43. So, the NIAID Guidelines recommend **[*938]** that "[a]ll patients experiencing anaphylaxis should be provided directly with an epinephrine auto injector or, if this is not possible, with a prescription (recommended prescription is for 2 doses of epinephrine), and advised to fill it immediately." *Id.*; *see also id*. at 40 (recommending as therapy for patient at discharge an EAI "prescription (2 doses) and instructions").

But also, the NIAID Guidelines "did not specifically address whether, let alone recommend that, all patients should carry two doses of epinephrine at all times." Doc. 2206-3 at 11 (Pls.' Ex. 5) (Portnoy Expert Report ¶ 24). The NIAID Guidelines "are specific to food allergy and were intended for use by health care professionals." *Id.* (citation, internal quotation marks, and ellipses omitted); *see also* Doc. 2165-10 at 9 (Defs.' Ex. 34) ("The Guidelines are intended to assist health care professionals in making appropriate decisions about patient care in the United States."). Internally, Mylan recognized that the "NIAID guidelines **[**39]** are food specific[,]" but noted World Allergy Organization "guidelines are being published soon" that "will have a similar message" and will be "better to leverage[.]" Doc. 2193-15 at 11 (Pls.' Ex. 96).

Then, in February 2011, the World Allergy Organization ("WAO") published another set of anaphylaxis guidelines. Doc. 2165-11 at 2 (Defs.' Ex. 36). The WAO Guidelines state that "up to 23% of adults" will need "more than one epinephrine injection" for anaphylaxis and that "more than 2 doses are occasionally required." *Id.* at 23, 26. So, the WAO Guidelines suggest that medical providers "consider prescribing more than one epinephrine auto-injector." *Id.* at 26.

Plaintiffs' expert testified that it's "very hard to predict" whether "somebody with a food allergy" will need more than one dose of epinephrine. Doc. 2165-4 at 8 (Defs.' Ex. 14) (Portnoy Dep. 70:7-16). Medical researchers have identified various factors that may put patients at greater risk of needing more than one dose, but they have not identified any particular type of patient for whom a single dose is necessarily sufficient. *See, e.g.*, Doc. 2165-12 at 2 (Defs.' Ex. 38); Doc. 2165-13 at 2 (Defs.' Ex. 39); Doc. 2165-14 at 2 (Defs.' **[**40]** Ex. 40); Doc. 2165-15 at 2, 5-9 (Defs.' Ex. 41). But, both plaintiffs and defendants' experts opine that "a majority of patients will not need a second dose." Doc. 2190-7 at 3 (Pls.' Ex. 7) (Blaiss Dep. 27:12-16) (agreeing with Dr. Portnoy's conclusion that a majority of patients won't need a second dose).

Some patients whose initial experience with anaphylaxis is mild later may experience life-threatening anaphylaxis. Doc. 2165-10 at 19 (Defs.' Ex. 34). For example, one study of children "diagnosed with clinical hypersensitivity to peanut prior to the age of 4 years" found that of "patients who had an initial reaction that was not life-threatening and had a subsequent reaction, 44% (19 of 43) had potentially life-threatening reactions during at least 1 of these subsequent reactions." *Id.* Also, some patients may require more than one dose of epinephrine for a variety of reasons: some might require a repeat dose to treat a severe allergic reaction, Doc. 2165-10 at 41 (Defs.' Ex. 34); others might experience a biphasic reaction which is the "complete clinical resolution of initial symptoms followed by onset of late-phase symptoms," Doc. 2165-17 at 2 (Defs.' Ex. 43);[13] some might have received **[**41]** an improperly administered first dose, Doc. 2165-18 at 2-7 (Defs.' Ex. 44); Doc. 2165-4 at 14-15 **[*939]** (Defs.' Ex. 14) (Portnoy Dep. 83:25-84:12); other patients with high body mass sometimes require more than one standard dose of epinephrine, Doc. 2143-16 at 21 (Defs.' Ex. 37) (Blaiss Expert Report ¶ 7.1); and some patients with certain mast cell diseases are at greater risk of severe anaphylaxis, which may require two doses to treat, Doc. 2165-19 at 6 (Defs.' Ex. 45).

Some medical guidance has recommended that patients at risk for anaphylaxis should carry two EAIs. *See* Doc. 2165-20 at 9 (Defs.' Ex. 46) ("Therefore, patients need to be prepared for possible recurrent anaphylaxis and should be given 2 auto-injectable epinephrine devices to carry with them at all times."); *see also* Doc. 2165-21 at 9 (Defs.' Ex. 47) ("Because anaphylactic episodes might require more than 1 dose of epinephrine, all patients should carry 2" EAIs.). But, none of the guidance mandates carrying two EAIs as "a medical necessity for patients at risk for anaphylaxis." Doc. 2190-7 at 4 (Pls.' Ex. 7) (Blaiss Dep. 40:13-25).

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[13] The "reported incidence of biphasic anaphylactic reactions varies from 1% to 20%" but typically are "mild, tend to be self-limited, and have not required additional epinephrine." Doc. 2164-17 at 2, 7 (Defs.' Ex. 43).

In 2017, the American Academy of Pediatrics ("AAP") published a Clinical Report stating that "[t]wo **[**42]** epinephrine autoinjectors should be available at all times, because a second administration may be needed if there is not a quick or adequate response to the first dose of epinephrine." Doc. 2165-22 at 5 (Defs.' Ex. 48). The Report also contains a disclaimer that the "guidance in this report does not indicate an exclusive course of treatment or serve as a standard of medical care." *Id.* at 2.

The EpiPen 2-Pak

Starting in 2001, Dey (and later Mylan) sold EpiPen devices in two-packs and single-packs. Doc. 2143-3 at 12 (Defs.' Ex. 21) (Bresch Dep. 204:6-15). Some patients purchased EpiPens in two-packs or multiple single-packs per year (during the period when single-packs still were available). Doc. 2143-17 at 58 (Defs.' Ex. 49) (Johnson Report ¶ 84). Defendants' expert opines that consumers, before Mylan discontinued the EpiPen single-pack, "were opting to purchase, and doctors were prescribing, an increasing proportion of EpiPen two-pack products at a time." *Id.*

On November 24, 2010, Bruce Foster, a Senior Director at Mylan, emailed Ron Graybill, a Mylan Vice President, with a proposal to eliminate single-pack EpiPen sales. Doc. 2190-14 at 2 (Pls.' Ex. 15). The proposal provided two reasons **[**43]** for the elimination: (1) it would "double the revenue" per prescription, and (2) Mylan had a "[s]trong potential generic defense[.]" *Id.* at 5. It never mentioned medical guidance or patient safety as rationale for the strategy. *Id.* Mr. Graybill responded that the proposal was a "[g]reat idea" and recognized the potential to "double" sales. Doc. 2193-13 at 2 (Pls.' Ex. 94).

On January 6, 2011, a Mylan Project Manager emailed Bruce Foster about his "(genius) idea of removing the EpiPen single pack off the market" and working with him to manage the project in the coming year. Doc. 2193-14 at 2 (Pls.' Ex. 95). While Mr. Foster initially presented the idea of eliminating the EpiPen single-pack from the market, he didn't have authority to make that decision within Mylan. Doc. 2143-21 at 7 (Defs.' Ex. 53) (Foster Dep. 410:9-18); Doc. 2143-14 at 10 (Defs.' Ex. 33) (Graham Dep. 191:8-19). But, later that month—in January 2011—Mylan put together a working group consisting of regulatory, medical, legal, and business personnel to consider "removing the single-pack EpiPen off the market[.]" Doc. 2143-19 at 5-6 (Defs.' Ex. 51). Mylan referred to the working group as "Project X2" or "Project Times **[**44]** Two." *Id.* at 4; *see also* Doc. 2143-21 at 3 (Defs.' Ex. 53) (Foster Dep. 28:19-20). No Pfizer employees were members of the Project X2 working group. Doc. 2165-23 at 4 (Kashtan Dep. 51:10-12).

[*940] On January 12, 2011, Mylan Manager Ivona Kopanja scheduled a Project X2 meeting. Doc. 2193-16 at (Pls.' Ex. 97). She explained the "purpose of the meeting is to evaluate EpiPen's opportunity around eliminating the single pack." *Id.* A presentation for the January 25, 2011 meeting noted the "compelling financial upside" for eliminating single EpiPen sales. Doc. 2190-12 at 6 (Pls.' Ex. 13). The presentation reported that the move to eliminate single EpiPens from the market could "[i]ncrease revenue by $81 million and gross profit by $41 million annually." *Id.* at 11. Also, the presentation noted that EpiPen was "still flying under the radar," such that the "[c]ombination of aggressive price increases plus sizing-up" that "may upset some payers" could be "smooth[ed] over" by "enhanced rebating" to "maintain preferred formulary position[.]" *Id.* at 16.

In a March 2011 email, Ms. Kopanja asked Project X2 Team member and Medical Director Ray Wolf: "I know that you were working on creating a 'medical' rationale **[**45]** for Project X2?" Doc. 2194-2 at 2 (Pls.' Ex. 102). In response, Mr. Wolf referenced the NIAID Guidelines, provided citations to medical literature, and noted that up "to 20% of patients have been reported to require a second dose of epinephrine, either due to ongoing symptoms or a biphasic reaction." Doc. 2226-7 at 2 (Defs.' Ex. 378).

In an April 2011 email, Mylan COO W. Lloyd Sanders reported internal concerns that removing single EpiPens from the market was "inconsistent with the guidelines." Doc. 2194-3 at 2 (Pls.' Ex. 103). But, after Mylan CEO Heather Bresch "learned that the co-pay that 'most' patients pay is the same for a single as it is for a two-pack, she became VERY motivated to pull the singles[.]" *Id.*

In minutes from later meetings of the Project X2 Team, Mylan cited the medical guidance advising that patients at risk for anaphylaxis carry two EAIs at all times as the "medical rationale" for discontinuing single-pack EpiPen sales. Doc. 2143-22 at 2 (Defs.' Ex. 55); Doc. 2143-23 at 5 (Defs.' Ex. 56). But, as Pfizer pointed out, the medical guidelines didn't include language about carrying two EAIs "at all times." Doc. 2190-11 at 2 (Pls.' Ex. 12). In 2010, about 75% of retail **[**46]** EpiPen devices were sold as two-packs, while an additional 11% of retail devices were sold as two or more single-packs together. Doc. 2143-24 at 5 (Defs.' Ex. 57). At the time, retail pens comprised 87% of all EpiPen sales. *Id.* But, in the non-retail market, single-pack sales made up 80% of sales. *Id.*

When making its decision to discontinue selling EpiPen single-packs, Mylan considered feedback from various stakeholders, including healthcare providers, pharmacists, and consumers; wholesalers, retail chains, and payors; and key opinion leaders in the medical field. Doc. 2143-24 at 10-17 (Defs.' Ex. 57); Doc. 2143-25 at 12, 14 (Defs.' Ex. 58). Also, Mylan considered the potential financial effect on its business if it eliminated single EpiPen sales. Doc. 2143-23 at 9-17 (Defs.' Ex. 56). As noted, the initial proposal for eliminating single EpiPens recognized that such action would "double the revenue" per prescription and that Mylan had a "[s]trong potential generic defense[.]" Doc. 2190-14 at 5 (Pls.' Ex. 15). And, Mylan projected that eliminating the single-pack would increase its net revenue by $43.9M and Pfizer's net revenue by $15.9M in 2011 alone. Doc. 2190-10 at 26 (Pls.' Ex. 11). **[**47]**

The working group also considered the financial effect for customers. Doc. 2143-24 at 6 (Defs.' Ex. 57). It found that about 76% of consumers would receive two devices—instead of just one—for a single average co-pay of $25. *Id.* But, about 16% of customers with co-insurance would pay $32 instead of $16. *Id.* And, customers paying cash would have their costs increase **[*941]** from $85 to $170 per EpiPen purchase. *Id.* The working group also proposed developing a coupon program to mitigate increased prices faced by some customers. Doc. 2143-25 at 20 (Defs.' Ex. 58).

In May 2011, the working group recommended selling EpiPen devices exclusively in packages of two—which Mylan later named the 2-Pak. *See* Doc. 2143-22 at 2-3 (Defs.' Ex. 55); *see also* Doc. 2169 at 7 (Pretrial Order ¶ 2.a.54.) (referring to the product as the "2-Pak"). The Project X2 Team's meeting minutes note as an "[a]dded medical rationale" that as "many as 10-20% of individuals who receive epinephrine will require more than 1 dose before resolution of symptoms." *Id.* at 2. The minutes also reflect that the Team made the decision to "deplete 1 pak inventory in market" instead of "re-packag[ing]" the inventory. *Id.* And, the minutes note **[**48]** the following as a "message point[ ]" explaining the reason why the 2-Pak conversion took effect only in the U.S. is that there are "[n]o international guidelines[.]" *Id.*

Several Mylan witnesses testified that the decision to sell EpiPen devices exclusively in the 2-Pak was driven by medical guidance. *See* Doc. 2143-3 at 14-15 (Defs.' Ex. 21) (Bresch Dep. 211:14-212:3) (Mylan's CEO testifying that that decision was "based on guidelines that people should have two doses immediately available if you went into anaphylactic shock"); *see also* Doc. 2143-14 at 7-8 (Defs.' Ex. 33) (Graham Dep. 160:19-161:2) (Mylan's corporate representative testifying that the decision "aligned with the guidelines of the world's smartest people in the area of treating allergies"). But, internally, Mylan recognized that the "WAO guidelines do not directly suggest 2 doses[.]" Doc. 2194-4 at 5 (Defs.' Ex. 104). And, on May 21, 2011, Mylan COO W. Lloyd Sanders emailed Heather Bresch stating that the WAO Guidelines "do not explicitly call for 2 epinephrine auto-injectors[.]" Doc. 2194-5 at 3 (Defs.' Ex. 105). Also, Ivona Kopanja noted it was "odd" to cite the WAO Guidelines as medical rationale and it "begs the question **[**49]** of why [Mylan is] not doing this ex-US." Doc. 2194-6 at 3 (Defs.' Ex. 106). Mylan recognized that "[a]nytime [it] reference[s] the NIAID food allergy guidelines as the reason" for the 2-Pak conversion, it "can only speak in terms of food-induced anaphylaxis." Doc. 2194-10 at 2 (Defs.' Ex. 110); *see also* Doc. 2194-12 at 2 (Defs.' Ex. 112) (Mylan public relations manager noting that "NIAID guidelines . . . only addresses food allergies" and recommending citing to the WAO Guidelines as medical rationale). According to Mylan's records, about 40% of people at risk for anaphylaxis have a food allergy. Doc. 2194-11 at 3 (Defs.' Ex. 111) (identifying "28M 'at risk' for anaphylaxis" with 11M due to food allergies).

In a June 2011 email, a Mylan public relations manager posed a list of Project X2 "Q&A," which included the question: "Is this change being driven in part to increase sales?" Doc. 2195-6 at 4 (Pls.' Ex. 126). The manager noted: "We don't need to reveal the true answer to these questions[.]" *Id.* Another proposed question was: "What should a patient do if they have an odd number of pens and cannot replenish to an even amount because they can't purchase a single EpiPen?" Doc. 2190-13 **[**50]** at 5 (Pls.' Ex. 14). Mylan chose to "delete the question" from the final version of the "Q&A." *Id*; *see also* Doc. 2195-8 (Pls.' Ex. 128). Mylan also removed questions about the percentages of prescriptions and purchases of EpiPen single packs and 2-Paks. *Compare* 2190-13 at 7 (Pls.' Ex. 14) (questions 30 & 31), *with* Doc. 2195-8 (Pls. Ex. 128). Also, in 2011, Bruce Foster emailed Lloyd Sanders suggesting that Mylan "package" the 2-Pak conversion as part of a "bigger program" so that "it goes over better[.]" Doc. 2195-14 at 2 (Pls.' Ex. 134).

[*942] In a June 21, 2011 email, Mylan Vice President Ron Graybill reported that Heather Bresch "wanted to implement" Project X2's initiative of removing single EpiPens from the market "ASAP." Doc. 2193-18 at 2 (Pls.' Ex. 99). Then, in July 2011, Mylan informed Pfizer of its decision to stop selling EpiPen single-packs, explaining that the decision "aligns [with] NIAID guidelines [which] recommend that patients at risk for anaphylaxis have immediate access to two doses of epinephrine at all times." Doc. 2143-25 at 5 (Defs.' Ex. 58). Mylan told Pfizer that EpiPen's revenue is "'below the radar' for most managed care organizations" but if "managed care organizations **[**51]** do raise concerns," Mylan had reserved "1.5% of all revenue . . . as rebates[.]" *Id.* at 16. Mylan prepared a presentation about Project X2 to provide at the July 14, 2011 JCC meeting. Doc. 2195-5 at 3 (Pls.' Ex. 125). But, the meeting minutes for that date reflect that the "2 Pack Conversion was the only topic that the JCC was not able to review." Doc. 2143-29 at 18 (Defs.' Ex. 62).

Meridian's General Manager testified that the decision to withdraw the single-pack was "Mylan's alone" and that Pfizer did not have any right to reject Mylan's decision. Doc. 2143-31 at 9-10 (Defs.' Ex. 64) (Handel Dep. 376:20-377:19). But, in some Pfizer communications about the proposal to eliminate EpiPen single-packs, a Pfizer executive stated that they did not "have agreement to [discontinue] the single-injector[;]" "such decisions need to be vetted" through the "JCC[;]" and "Pfizer/Meridian cannot approve this piece until the manufacturing issues are resolved and there is commercial alignment around this change." Doc. 2190-16 at 2, 4 (Pls.' Ex. 17). Early on in Project X2, Mylan understood that it "need[ed] to bring Meridian in the loop soon" about the proposal to eliminate single EpiPens because the **[**52]** project involved "a significant manufacturing/packing component." Doc. 2195-1 at 3 (Pls.' Ex. 121). And, in May 2011, Mylan approached Meridian with the "2 Pack Conversion" proposal noting that Mylan "believes EpiPen is a $1B brand." Doc. 2195-2 at 3 (Defs.' Ex. 122). In July 2011, Lloyd Sanders reported to Heather Bresch that Pfizer was "completely on board" with the 2-Pak conversion and "will rapidly push through [the] talking points." Doc. 2195-4 at 2 (Pls.' Ex. 124). Heather Bresch testified that Mylan didn't "persuade[ ] Pfizer on anything" and instead Pfizer was Mylan's "partner in the product." Doc. 2194-9 at 5 (Pls.' Ex. 109) (Bresch Dep. 227:9-228:19).

Pfizer "charged Mylan for EpiPen units" and "earned a 2% royalty on Mylan's profits." Doc. 2194-1 at 5 (Pls.' Ex. 101) (Handle Dep. 391:22-392:9). Pfizer recognized that its "revenue growth is largely driven by volume" and that the "majority of [its] growth comes from increases in the number of units sold to Mylan." Doc. 2194-14 at 8-9 (Pls.' Ex 115) (Muma Dep. 73:12-75:23, 80:1-13). And, Pfizer forecasted that the switch to the 2-Pak "could add approximately 15 percent to the current EpiPen annual sales figure (approximately **[**53]** $280 million)[.]" *Id.* at 12-13 (Muma Dep. 98:18-101:24).

In August 2011, Mylan stopped selling EpiPen single-packs in the United States and began selling EpiPen devices exclusively in packages of two. Doc. 2169 at 7 (Pretrial Order ¶¶ 2.a.54., 2.a.56.). After that switch, patients no longer could purchase a single EpiPen. Doc. 2193-19 at 4-5 (Graham Dep. 92:16-93:1). Patients only could purchase EpiPens in a 2-Pak. *Id.*; *see also id*. at 4-7 (Graham Dep. 171:8-23).

Mylan prepared communications to send to wholesalers, payors, pharmacists, and others about its conversion to the EpiPen 2-Pak. Doc. 2195-9 (Pls.' Ex. 129); Doc. 2195-10 (Pls.' Ex. 130); Doc. 2196-11 (Pls.' Ex. 131). An internal Mylan communication noted, "in advance of the public **[*943]** announcement on Aug. 24, [Mylan] proactively communicated to health care professionals, customers, wholesalers, pharmacists, payers and advocacy groups to inform them of" the 2-Pak switch, along with "the rationale for this change." Doc. 2195-11 at 2 (Pls.' Ex. 131). Mylan made the communications by "letters, emails and conference calls." *Id.* Also, Mylan concluded it didn't "need to call/write FDA" about the 2-Pak conversion. Doc. 2195-13 at 2 (Pls.' **[**54]** Ex. 133). A Mylan Vice President noted "it's not necessary and will raise more questions than we have answers." *Id.* at 9.

On August 15, 2011, Mylan's Director of Sales Training emailed a presentation titled "Project X2 Training" to Ron Graybill who then sent it to other Mylan employees. Doc. 2195-10 at 2 (Pls.' Ex. 130). The presentation cited the NIAID and WAO Guidelines as "rationale" for Mylan's switch to the 2-Pak. *Id.* at 10. It instructed the sales team to "be sure to speak to the medical rationale" and then mention the 2-Pak switch "at the end of the call" because "[i]t is critical to position this news in a secondary position." *Id.* at 12.

Mylan sells EpiPens in single packs in every country in the world except the United States and France. Doc. 2194-15 at 10 (Pls.' Ex. 116). When defendants solicited Pfizer Canada to introduce the 2-Pak in Canada, its "key opinion leaders" "push[ed] back" and reported they did "not plan to force patients to a 2 Pak." Doc. 2194-19 at 2 (Defs.' Ex. 120); Doc. 2194-14 at 6 (Defs.' Ex. 115) (Muma Dep. 63:15-65:3). In Canada, where "Pfizer Canada Inc. is the exclusive distributor of EpiPen devices[,]" it "markets and sells EpiPen devices in single-unit **[**55]** packages because it has determined that marketing or selling EpiPen devices in other package configurations would not be commercially viable in the Canadian market." Doc. 2194-16 at 18 (Defs.' Ex. 117).

Mylan's 2-Pak Press Release

On August 24, 2011, Mylan issued a press release titled "Dey Pharma to Offer EpiPen 2-Pak® and EpiPen Jr 2-Pak® Exclusively." Doc. 2169 at 7 (Pretrial Order ¶ 2.a.55.); *see also* Doc. 2206-16 (Pls.' Ex. 135). The press release referenced, quoted from, and cited to the NIAID and WAO Guidelines. Doc. 2206-16 at 2-5 (Pls.' Ex. 135). Also, it quoted Mylan's then-President Heather Bresch and Dr. Phillip Lieberman, Clinical Professor of Medicine and Pediatrics at the University of Tennessee College of Medicine and a member of the NIAID expert panel. *Id.* at 2-3. The press release stated, "The decision to exclusively offer the EpiPen 2-Pak, which contains two single EpiPen Auto-Injectors, aligns with [the NIAID] guidelines, as well as with the [WAO] anaphylaxis guidelines which recommend that physicians consider prescribing more than one epinephrine auto-injector." *Id.* at 2. The press release did not state that either set of Guidelines imposed any requirements for EpiPen **[**56]** packaging.

Dr. Lieberman testified that "in [his] mind" "there's no option" but to prescribe two doses of epinephrine, "based upon what [he] would consider what is ethical as a physician." Doc. 2165-24 at 3-4 (Defs.' Ex. 66) (Lieberman Dep. 47:10-48:6). He consistently has prescribed two-packs for his patients since the 1970s. *Id.* at 4 (Lieberman Dep. 48:8-15). And, he told Mylan that it was a "'good idea'" to sell EpiPen devices exclusively in packages of two. Doc. 2144-1 at 2 (Defs' Ex. 67).[14] But, Dr. Lieberman also testified that he never advised **[*944]** Mylan to start selling the EpiPen exclusively in the 2-Pak, that he agrees with the FDA that "[w]hether a patient requires one or two doses is at the discretion of the prescriber and the patient or caregiver," and his decision "in [his] personal practice" to prescribe all patients two doses is "a philosophical decision, and it's debatable." Doc. 2190-9 at 3-5 (Pls.' Ex. 10) (Lieberman Dep. 45:6-9, 66:20-67:2, 101:7-19) (internal quotation marks omitted). Some physicians testified that they use their judgment to determine whether to prescribe EpiPen (or competing) devices based on a variety of factors, including the patient's medical history **[**57]** and the physician's product preferences. Doc. 2165-4 at 91 (Defs.' Ex. 14) (Portnoy Dep. 91:1-16); Doc. 2165-24 at 6 (Defs.' Ex. 66) (Liberman Dep. 79:14-25) (explaining reasons why he would prescribe Auvi-Q instead of EpiPen).

In the weeks leading up to the August 24 2-Pak press release, Mylan and Pfizer executives, including Heather Bresch, sent emails with edits to the language of the 2-Pak press release. *See, e.g.*, Doc. 2190-11 (Pls.' Ex. 12); Doc. 2195-17 (Pls.' Ex. 139). Ms. Bresch, Pfizer, and then Mylan CEO Robert Coury approved the 2-Pak press release. Doc. 2195-15 at 2 (Pls.' Ex. 137); Doc. 2195-16 at 2 (Pls.' Ex. 138). On August 24, 2011, Mylan emailed the 2-Pak press release to more than 100 Mylan employees. Doc. 2206-17 (Pls.' Ex. 136).

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[14] Plaintiffs object that this exhibit contains inadmissible hearsay. Doc. 2190-1 at 77. Defendants respond that it qualifies as a business record under *Fed. R. Evid. 803(6)*'s exception to the hearsay rule. Doc. 2226-1 at 21. They also argue that it doesn't qualify as hearsay because defendants don't offer the exhibit to prove the truth of the matter asserted. *Id.* The court agrees with defendants on the latter point. Defendants don't offer this exhibit to prove that it was a "good idea" to sell EpiPens exclusively in a 2-Pak. Instead, they offer it to show what Dr. Lieberman—as a member of the NIAID expert panel—told Mylan about its decision to discontinue selling single EpiPens.

None of the named plaintiffs testified that he or she saw the August 2011 press release before becoming involved in this litigation. *See* Doc. 2142-1 at 34 & n.110 (Defs.' Mem.) (citing named plaintiffs' deposition testimony).[15] And, no named plaintiff testified that he or she relied on any statements by defendants when purchasing EpiPen devices. *Id.*

Many of the named plaintiffs purchased 2-Paks or multiple single-packs before 2011. Doc. 2144-16 **[**58]** at 2-8 (Defs.' Ex. 102 (citing Defs.' Ex. 102-A)).[16] At least 11 named plaintiffs purchased multiple devices in a single transaction while the single-pack was available. *Id.* Also, several named plaintiffs testified that they prefer to have more than one EpiPen device at any given time. *Id.* For example, named plaintiff Stacee Svites testified, "I have to have two packs. I mean, I have to carry two. I've known it all along." Doc. 2144-9 at 4 (Defs.' Ex. 90) (Svites Dep. 148:4-8). **[*945]** Also, plaintiff Angie Nordstrum testified that she wanted to purchase two EAI devices "because that's what I was advised as medically necessary." Doc. 2166-1 at 5 (Defs.' Ex. 70) (Nordstrum Dep. 132:17-20). And, plaintiff Lorraine Wight testified: "We were told by our doctors that we needed to have a minimum of two." Doc. 2144-1 at 6-7 (Defs.' Ex. 92) (Wight Dep. 141:17-142:7). Plaintiffs' expert, Meredith Rosenthal, testified that 62-68% of patients were not "forced" to buy EpiPen 2-Paks. Doc. 2166-17 at 15-16 (Defs.' Ex. 96) (Rosenthal Dep. 197:12-198:2).

Effects of the 2-Pak Switch

On August 24, 2011, Harry Jordan, Mylan's Director of National Accounts, emailed Bruce Foster and Ron Graybill, giving Mr. Foster **[**59]** "some major kudos for coming up with" the 2-Pak conversion idea and "Ron for seeing it through." Doc. 2195-18 at 3 (Pls.' Ex. 140). Mr. Graybill then emailed Mr. Jordan asking where was his "idea to bring $50 million per year to the bottom line?" *Id.* at 2. Mr. Graybill responded: "Why don't we just have an EpiPen 6 pack. . . . We can charge $450. Heck with 50 million. How about 150 million to the bottom line." *Id.* In January 2012, Mylan named Bruce Foster as the "President's Circle Winner for 2011." Doc. 2196-4 at 2 (Pls.' Ex. 146). Ron Graybill noted that Mr. Foster had "proposed and helped implement the idea to remove the EpiPen single pack from the market" which "resulted in an increase in sales of over $20 million in 2011, should increase sales in 2012 by over $50 million and will continue to have a similar positive impact in 2013 and beyond." *Id.*

In October 2011, Lloyd Sanders emailed Heather Bresch to propose raising the EpiPen price. Doc. 2196-2 at 2 (Pls.' Ex. 144). He reported that Mylan had implemented the 2-Pak switch without "ANY issues" and "no backlash" by payors. *Id.* He forecasted that the price increase would produce "$5.5M-$6.0M and it all drops to the bottom line." **[**60]** *Id.*

The switch to the 2-Pak "resulted in an increase in sales of over $20 million" for Mylan in 2011. Doc. 2196-4 at 2 (Pls.' Ex. 146). Between 2010 (when EpiPen single packs still were available) and 2012 (after the switch to the 2-Pak), Mylan's net sales increased from $278.6 million to $623.3 million and Pfizer's EpiPen revenue increased from $142 million to $225 million. Doc. 2196-6 at 4-5 (Pls.' Ex. 148). Pfizer attributed the majority "of growth" to "increases in number of units sold to Mylan." *Id.* at 3.

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[15] One plaintiff, Donna Dvorak, when asked whether she had seen the press release, testified, "I think I have[,]" but she wasn't "sure when [she] first saw" it, and she testified that she didn't "think that [the press release] would have influenced" her decision to purchase an EpiPen. Doc. 2144-3 at 9 (Defs.' Ex. 73) (Dvorak Dep. 340:2-22).

[16] Plaintiffs assert defendants' Exhibit 102 is inadmissible hearsay. Doc. 2190-1 at 77. Defendants respond that: (1) the exhibit's contents aren't hearsay under *Fed. R. Evid. 801(c)(2)*'s definition of hearsay; and (2) the contents qualify as an admission by a party opponent under *Fed. R. Evid. 801(d)(2)*. Doc. 2226-1 at 21. Exhibit 102 is a summary of each plaintiff's EAI purchasing history and deposition testimony about purchasing EAIs with citations to the supporting evidence which is attached to Exhibit 102 as Exhibits 102-A-102-Z. *See* Doc. 2144-16 at 14-177. Exhibit 102 accurately cites the supporting exhibits, which plaintiffs don't challenge as inadmissible on summary judgment. So, the court considers the evidence summarized in Exhibit 102 because the supporting exhibits accurately support the evidence presented in summary fashion. And, ***HN6***[] under *Fed. R. Evid. 1006*, a summary is admissible "to prove the content of voluminous writings . . . that cannot be conveniently examined in court."

In February 2017, Mylan received a letter from the FDA confirming that Mylan still was authorized to sell single EpiPen devices, recognizing that Mylan currently was selling the EpiPen only in a 2-Pak, and noting that the "number of patients reported to require more than one dose of epinephrine for treatment of anaphylaxis is generally quoted as approximately 12-36%." Doc. 2144-14 at 2 (Defs.' Ex. 98).[17] The letter also recognized that, **[*946]** by selling EpiPen exclusively as a 2-Pak, "patients are unable to obtain a single dose even if their health care practitioner determines a single dose is appropriate or the patient needs to replace one used dose." *Id.* The letter noted that "the approved **[**61]** labeling does not recommend that patients be prescribed two doses" and "[w]hether a patient requires one or two doses is at the discretion of the prescriber and the patient or caregiver." *Id.* at 2-3. And, the FDA told Mylan that offering the EpiPen in both single packs and the 2-Pak would "provide patients and caregivers greater options and in turn access to care when only a single dose is necessary." *Id.* at 3.

Plaintiffs' expert asserts that "patients should have the ability to purchase only one" EpiPen because "it is not always medically necessary for every patient who uses EAIs to purchase or carry two doses[.]" Doc. 2206-3 at 17 (Pls.' Ex. 5) (Portnoy Expert Report ¶ 45). And, he opines, **[**62]** "the unavailability of a one-pack interferes with patient choice and with the provider's ability to exercise and implement medical judgment." *Id.*

The packaging of every EpiPen device contains the following FDA-approved instructions about the second dose: "With severe persistent anaphylaxis, repeat injections with an additional EpiPen or EpiPen Jr may be necessary." *Label: EPIPEN-epinephrine injection EPIPEN JR-epinephrine injection*, U.S. Nat'l Library of Medicine, https://dailymed.nlm.nih.gov/dailymed/drugInfo.cfm?setid=7560c201-9246-487c-a13b-6295db04274a (Updated Dec. 29, 2020).

Patent Litigation with Teva

EAIs may not be sold in the United States absent FDA approval. Doc. 2169 at 4 (Pretrial Order ¶ 2.a.18.). To secure FDA approval, a new generic drug product must submit an Abbreviated New Drug Application ("ANDA") proposing that the FDA approve the new product for sale and marketing in the United States. *New Drug Application*, FDA (last updated June 10, 2019), https://www.fda.gov/drugs/types-applications/new-drug-application-nda. In the context of an ANDA, the FDA sometimes uses the phrases "Reference Listed Drug" ("RLD") and "innovator drug" to refer to the branded product to which **[**63]** the FDA will compare the proposed generic. *Drugs@FDA Glossary*, FDA, https://www.accessdata.fda.gov/scripts/cder/daf/index.cfm?event=glossary.page (last visited May 3, 2020).

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[17] Plaintiffs object that this exhibit is inadmissible hearsay to which no exception applies. Doc. 2190-1 at 77. Defendants respond that this letter from the FDA is a public record that qualifies for admission under *Fed. R. Evid. 803(8)*'s exception to the hearsay rule. Doc. 2226-1 at 21. ***HN7***[] *Rule 803(8)*'s public records exception to the hearsay rule defines a public record as:

> A record or statement of a public office if: (A) it sets out: (i) the office's activities; (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) the opponent does not show that the source of the information or other circumstances indicate a lack of trustworthiness.

Fed. R. Evid. 803(8). The advisory committee's notes explain that the "[j]ustification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." *Fed. R. Evid. 803* advisory committee's note to *Paragraph (8)*. And, cases "illustrating the admissibility of records of the office's or agency's own activities are numerous." *Id.* The court agrees that defendants' Exhibit 98 falls within the public records exception to the hearsay rule because it is a record of a public office—the FDA—setting out its activities and plaintiffs have marshaled no circumstances "indicat[ing] a lack of trustworthiness" with the document. *Fed. R. Evid. 803(8)*.

Also, once again, plaintiffs object to an exhibit that they then turn around and cite as an exhibit supporting their own asserted summary judgment facts. *See* Doc. 2190-1 at 42 (Statement of Additional Material Fact ¶ 24 (citing Pls.' Ex. 22)). Plaintiffs' Exhibit 22 is the very same document as defendants' Exhibit 98—all the way down to the Bates numbering. Again, plaintiffs' cat-and-mouse tactics—asserting blanket evidentiary objections to defendants' summary judgment exhibits while relying themselves on the same exhibits—is unimpressive advocacy.

Since 1984, the Hatch-Waxman Amendments (the "*Hatch-Waxman Act*") have provided a framework for the FDA to evaluate ANDA applications while also allowing generic manufacturers to challenge patents associated with RLDs. *Patent Certifications and Suitability Petitions*, FDA **[*947]** (last updated Apr. 22, 2021), https://www.fda.gov/drugs/abbreviated-new-drug-application-anda/patent-certifications-and-suitability-petitions.

HN8[] Under the Hatch-Waxman Act, all ANDA applicants, and certain NDA applicants, must make certifications for patents associated with their RLD counterparts, including a "Paragraph IV certification," which is a certification by the applicant that, "in the opinion of the applicant," the relevant patent is "invalid or will not be infringed by" the new proposed generic product. *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*; *id.* *§ 355(b)(2)(A)(iv)*. Any applicant filing a Paragraph IV certification must notify the holder of the relevant patent and the holder of the approved drug application who claims that patent. *21 U.S.C. § 355(j)(2)(B)(iii)(II)*; *id.* *§ 355(b)(3)(C)*. Once a patent holder receives a Paragraph IV certification, **[**64]** it may file an infringement suit within 45 days, triggering an automatic 30-month stay of FDA approval of the ANDA. *21 U.S.C. § 355(j)(5)(B)(iii)*; *id.* *§ 355(c)(3)(C)*.

In 2007, Teva filed ANDA 90-0589 to develop a generic EAI. Doc. 2144-15 at 2 (Defs.' Ex. 101).[18] Teva submitted additional information to the FDA in May, June, and November 2008. Doc. 2201-3 at 2 (Pls.' Ex. 252). And, the FDA found Teva's application "acceptable for filing" on November 21, 2008. *Id.* Plaintiffs' expert, Dr. Carl Peck, who is a former Director of the FDA's Center for Drug Evaluation and Research, asserts that the "FDA could have sent Teva a 'refuse to receive' letter in early 2008 since the ANDA was not 'substantially complete' and required additional information/data." Doc. 2191-7 at 20 (Pls.' Ex. 30) (Peck Expert Report ¶ 40). But, he asserts that "the FDA proactively worked directly with Teva to enable the Teva ANDA to be substantially complete for filing." *Id.*

With its ANDA, Teva's goal was to develop and secure approval for a generic product that the FDA would consider "A-rated" to the EpiPen EAI.[19] Doc. 2144-7 at 11 (Defs' Ex. 103) (Weisman Expert Report ¶ 35); *see also* Doc. 2144-18 at 2 (Defs.' Ex. 104) (Teva email explaining that without **[**65]** an "A-rating," Teva "would then be required to have a sales team dedicated to training and education of the use of our device/product").

On May 1, 2009, the FDA sent Teva a deficiency letter. Doc. 2203-7 at 2 (Pls.' Ex. 299). In response, Teva submitted amendments to its application on May 22, 2009 and June 12, 2009. *See id.* at 2-153; *see also* Doc. 2203-8 at 2 (Pls.' Ex. 300) (referring to "May 23 and June 12, 2009 amendments"). On June 4, 2009, the FDA sent Teva another deficiency letter. Doc. 2203-9 at 2 (Pls.' Ex. 301). Teva responded with an amendment to its ANDA, but not until October 11, 2010. *Id.* On July 6, 2009, the FDA sent another deficiency letter to Teva. Doc. 2203-10 at 2 (Pls.' Ex. 302). On **[*948]** September 8, 2009, Teva responded with another amendment to its ANDA. *Id.* Dr. Peck opines that this part of the FDA's review process "proceeded in a timely manner" and "the FDA's review times were generally consistent with its review times as reported by the Inspector General's 2008 report and also not far afield from the statutory mandate of 180 days." Doc. 2191-7 at 20 (Pls.' Ex. 30) (Peck Expert **[**66]** Report ¶¶ 40-41).

When Teva submitted its ANDA, Pfizer's subsidiary Meridian held a patent on the auto-injector component of the branded EpiPen product. Doc. 2167-3 (Defs.' Ex. 105) (the '012 Patent).[20] To secure approval of its ANDA, Teva

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[18] The court rejects plaintiffs' objection that defendants' Exhibit 101 is inadmissible hearsay to which no exception applies. Doc. 2190-1 at 77. As defendants have shown, documents produced by Teva qualify for admission as business records under *Fed. R. Evid. 803(6)*'s exception to the hearsay rule. Doc. 2226-1 at 21 & n.35; *see also* Doc. 2227-1 at 15-17 (Savage Decl. Concerning Teva Docs.). For the same reasons, the court rejects plaintiffs' objections to defendants' Exhibits 104, 106, 108, 114, 117-28, 131-33, 144-52, 159-60, & 163. All of these exhibits consist of Teva-produced business records that qualify for admission under *Fed. R. Evid. 803(6)*'s exception to the hearsay rule.

[19] An A-rating (sometimes referred to as "AB" or "AP" in the context of injectable products) signifies that two products are "therapeutically equivalent" and can be substituted for one another at the pharmacy counter. *Approved Drug Products with Therapeutic Equivalence Evaluations ("Orange Book Preface")*, FDA at ¶ 1.7 (last updated Jan. 21, 2021), https://www.fda.gov/drugs/development-approval-process-drugs/orange-book-preface.

[20] Plaintiffs dispute that the '012 Patent was a valid patent. But, that dispute doesn't controvert the undisputed fact that Meridian held the '012 Patent when Teva filed its ANDA. *See* *United States v. You, No. 2:19-CR-14, 2021 U.S. Dist. LEXIS 74813, 2021*

had to demonstrate that its device was "equivalent to" the EpiPen. Doc. 2167-2 at 6 (Defs.' Ex. 100); *see also id.* at 14. At the same time, however, Teva could not just copy the EpiPen without infringing on patents held by Pfizer's subsidiaries. Doc. 2144-19 at 9-10 (Defs.' Ex. 106). To avoid infringing these patents, Teva's proposed generic product for which it sought FDA approval included a different auto-injector than EpiPen. Doc. 2144-20 at 2 (Defs.' Ex. 108); Doc. 2145-1 at 20-26 (Defs' Ex. 109).

In July 2009, consistent with the Hatch-Waxman Act, Teva notified King and Meridian that it had filed ANDA 90-0589 to market a generic version of EpiPen Auto-Injector and had submitted a Paragraph IV certification. Complaint ¶ 17, *King Pharms., Inc. v. Teva Parenteral Meds., Inc.*, No. 1:09-cv-00652-GMS (D. Del. Aug. 28, 2009), ECF No. 1 at 4. Then, on August 28, 2009, King and Meridian sued **[**67]** Teva in the District of Delaware to enforce U.S. Patent No. 7,449,012B2 (the "'012 Patent"). *See generally id.* Mylan and Pfizer entered a Common Interest Agreement in connection with the EpiPen patent litigation against Teva. Doc. 2201-4 at 2 (Pls.' Ex. 253).

In 2007, King Pharmaceuticals, Inc. submitted a citizen petition[21] (the "King Petition") to the FDA asking it to apply certain standards to ANDAs for proposed EAI products. Doc. 2167-1 at 2 (Defs.' Ex. 99) (describing King Petition in FDA response letter).[22] Specifically, it **[*949]** asked the FDA to "[d]ecline to approve" any ANDA "unless it has been demonstrated that the proposed auto-injector is . . . 'the same' as the auto-injected in the refence listed drug (RLD)[.]" *Id.*

The FDA responded to the King Petition on July 29, 2009. *Id.* The response recognized that an ANDA must "ensure that its performance characteristics and critical design attributes will result in a product that will perform the same as the RLD[,]" but "[t]his does not mean, however, that all design features of the autoinjector in the ANDA and its RLD must be exactly the same." *Id.* at 7. Also, the FDA's letter stated, for emergency use products like EAIs, "it is particularly important to ensure that patients in **[**68]** an emergency situation can use the product safely and effectively in accordance with instructions provided for the RLD without additional physician intervention or retraining[.]" *Id.* The FDA further explained that if it were to determine that the auto-injector constituent of a product proposed in an ANDA is not the "same as" the auto-injector constituent of the RLD, "FDA will refuse to approve the ANDA." *Id.* at 7-8. But, the FDA did note that some "design differences may be acceptable as long as they do not significantly alter product performance or operating principles and do not result in impermissible differences in labeling." *Id.* The FDA's letter also explained: "Clinical usability or human factor studies may also be required," and such studies "are beyond the scope of studies that can be reviewed and approved in an ANDA." *Id.* at 8. And, the FDA stated: "For products that require physician training before unsupervised patient use, differences in operation that require retraining prior to use are not expected to be acceptable in an ANDA." *Id.* at 11-12. In addition to the

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*WL 1539579, at *3 (E.D. Tenn. Apr. 19, 2021)* ("***HN9***[] The fact that some patents might not be valid does not affect the fact that a patent filed with the United States Patent and Trademark Office remains part of the public record.").

Also, plaintiffs object that defendants' Ex. 105 is inadmissible hearsay to which no exception applies. Doc. 2190-1 at 77. The court disagrees. The '012 Patent itself likely doesn't qualify as hearsay because defendants don't offer the '012 Patent to prove any of its contents, but even if they did, the '012 Patent is a public record that qualifies for admission under *Fed. R. Evid. 803(8)*. *See* *Hay & Forage Indus. v. New Holland N. Am., Inc., 25 F. Supp. 2d 1170, 1175 n.2 (D. Kan. 1998)* (holding that ***HN10***[] patents were admissible evidence because "the documents offered are not hearsay" when they were offered "not to prove the truth of any of the matters which they assert, but rather to prove that various patents use" a particular term, but in "any event, even if the patents were hearsay, they would be subject to the public records exception to the hearsay rule" (citing *Fed. R. Evid. 803(8)*)). *Cf.* *SB IP Holdings, LLC v. Vivint Smart Home, Inc., No. 4:20-cv-886, 2021 U.S. Dist. LEXIS 82871, 2021 WL 1721715, at *1 (E.D. Tex. Apr. 30, 2021)* ("Courts routinely take judicial notice of patents, prosecution history, and patent applications.").

[21] ***HN11***[] A citizen petition is a document that anyone may submit to the FDA asking it "to issue, amend, or revoke a regulation or order, or to take or refrain from taking any other form of administrative action." *21 C.F.R. § 10.25(a)*.

[22] Again, plaintiffs object to this exhibit as inadmissible hearsay to which no exception applies. Doc. 2190-1 at 77. Defendants respond that this FDA response letter is a public record that qualifies for admission under *Fed. R. Evid. 803(8)*'s exception to the hearsay rule. Doc. 2226-1 at 21. The court agrees. Defendants' Exhibit 99 falls within the public records exception to the hearsay rule in *Fed. R. Evid. 803(8)* because it is a record of a public office setting out its activities and plaintiffs have not shown any circumstances indicating a lack of trustworthiness with the document.

Citizen Petition, Meridian's Director of Regulatory Affairs, Dr. Thomas G. Fruend, wrote letters to the FDA on **[**69]** December 5, 2012 and May 7, 2013, about Teva's pending ANDA. Doc. 2204-3 at 2-7 (Pls.' Ex. 324).

In December 2009, Dey submitted a citizen petition (the "Dey Petition") asking the FDA to apply certain conditions to its approval of a generic EAI. Doc. 2167-2 at 2 (Defs.' Ex. 100) (describing Dey Petition in FDA response letter).[23] Specifically, Dey asked that the FDA "[d]ecline to approve any ANDA . . . and decline to assign an 'AB' rating for a generic product that is not the same as the currently marketed EpiPen auto-injector[.]" *Id.* Also, Dey asked that the FDA "[d]etermine that generic versions of EpiPen auto-injector must have the same design, operation, and function of the RLD[.]" *Id.* at 8. King and Meridian employees provided comments and input on Dey's Citizen Petition. Doc. 2204-2 at 2 (Pls.' Ex. 323).

[*950] On May 27, 2010, the FDA denied Dey's Citizen Petition. Doc. 2167-2 at 2 (Defs.' Ex. 100). In its response to the Dey Petition, the FDA noted that the "King Petition response specifically addressed situations such as the one the [Dey] Petition addresses" and that "there is no requirement in the Act, implementing regulations, guidance, or Agency precedent that would mandate as narrow **[**70]** an interpretation of sameness as [Dey] would have the [FDA] adopt." *Id.* at 9-10. The letter also recognized that because EAIs are emergency-use products, the FDA must use "particular vigilance" in ensuring product safety. *Id.* at 9.

On November 1, 2010, Teva submitted a Paragraph IV certification concerning an additional Pfizer EpiPen patent: U.S. Patent No. 7,794,432B2 (the "'432 Patent"). First Amended Complaint ¶ 21, *King Pharms., Inc. v. Teva Parenteral Meds., Inc.*, No. 1:09-cv-00652-GMS (D. Del. Nov. 11, 2010), ECF No. 37-1 at 5. On November 11, 2010, King and Meridian amended their Complaint in the Delaware suit against Teva to enforce the second patent. *See generally id.* Both the '012 and '432 Patents are listed in the FDA Orange Book and expire in September 2025. Doc. 2169 at 4 (Pretrial Order ¶ 2.a.27.).

As the patent litigation progressed, Teva continued to pursue FDA approval of its generic EAI. *See, e.g.*, Doc. 2145-2 at 2-4 (Defs.' Ex. 113) (correspondence between Teva and the FDA about the ANDA application).[24] In March 2010, the FDA sent Teva a "bioequivalence" deficiency letter. *Id.* In an internal e-mail, the Teva project manager overseeing the product stated that this deficiency was primarily concerned with the fact that the Teva **[**71]** device was not "similar enough" to the RLD, *i.e.*, the EpiPen and EpiPen Jr Auto-Injectors. Doc. 2145-3 at 3 (Defs.' Ex. 114).

Then, in February 2011, the FDA cited differences between Teva's EAI and EpiPen in a "labeling deficiency" letter. Doc. 2145-4 (Defs.' Ex. 115).[25] Among other comments, the FDA noted that Teva's proposed device instructions did "not read the same as the innovator" and were "difficult to follow and to ensure that the sequence of steps match the innovator." *Id.* at 4. Thus, the FDA predicted that the proposed instructions "may present confusion for customers that have used the innovator's product." *Id.*

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[23] The court rejects plaintiffs' objection that defendants' Exhibit 100 is inadmissible hearsay to which no exception applies. The court finds that this document arguably qualifies for admission under *Fed. R. Evid. 803(8)*'s public record exception to the hearsay rule. Also, it qualifies as a business record under *Fed. R. Evid. 803(6)*'s exception to the hearsay rule. And, plaintiffs have submitted the exact same document as part of an exhibit supporting their own asserted summary judgment facts. Doc. 2190-1 at 69 (Statement of Additional Material Fact ¶ 147) (citing Pls.' Ex. 322 (Doc. 2207-14 at 2-15)). This ploy is no more impressive than plaintiffs' other similar attempts to enforce a "heads I win, tails you lose" paradigm.

[24] The court rejects plaintiffs' objection to defendants' Exhibit 113 as inadmissible hearsay to which no exception applies. Doc. 2190-1 at 20. Defendants assert that this exhibit doesn't qualify as hearsay because it's not offered to prove the truth of the matter asserted. Doc. 2226-1 at 21. The court agrees. Defendants don't offer this exhibit to prove the truth of any of its contents. Instead, it is offered to show that Teva was communicating with the FDA about its ANDA for its proposed generic EAI. So, this exhibit isn't inadmissible hearsay under *Fed. R. Evid. 801(c)*.

[25] The court rejects plaintiffs' objection to defendants' Exhibit 115 as inadmissible hearsay to which no exception applies. Doc. 2190-1 at 20. Defendants assert that this exhibit qualifies as a public record subject to *Fed. R. Evid. 803(8)*'s exception to the hearsay rule. Doc. 2226-1 at 21. The court agrees for the same reasons discussed *supra* note 17.

In a March 2011 internal e-mail exchange, Teva personnel discussed these and other deficiency communications that the FDA had sent to Teva, including a chemistry deficiency that requested "stability data" for the stability of the epinephrine inside Teva's device. Doc. 2145-3 at 3 (Defs.' Ex. 114). The Teva correspondence concluded with a March 15, 2011 e-mail stating: "This product needs a reformulation as well as a new device." *Id.*

Also in March 2011, Teva and Pfizer discussed in an email titled "Fre 408: couple of things" setting up a phone call to **[*951]** discuss the **[**72]** Teva/EpiPen patent infringement litigation. Doc. 2203-11 at 2 (Pls.' Ex. 304).

On May 17, 2011, Teva received another deficiency letter from the FDA. Doc. 2145-5 at 2 (Defs.' Ex. 116).[26] This letter asked Teva to "conduct a design validation (human factors) study" and stated that the FDA "recommend[s] that you submit a draft of the test protocol before you implement it for our review and feedback to ensure that your methods will be acceptable." *Id.* at 3. A human factors study is a study "conducted with representative users to assess[,]" among other things, "the ability of the user" to operate the device safely and effectively. Doc. 2144-17 at 10 (Defs.' Ex. 103) (Weisman Expert Report ¶ 30).

On the same day—May 17, 2011—Teva's "epinephrine core team" met. Doc. 2145-6 at 2 (Defs.' Ex. 117). The meeting minutes reflect that Teva's device manufacturer had received a warning letter from the FDA, and Teva was in the process of evaluating potential alternative manufacturing sites. *Id.* at 3-5. The minutes also note that "[n]o [epinephrine] batches made so far have met shelf life requirements." *Id.* at 2. Also, Teva experienced additional manufacturing problems with needle corrosion, needle **[**73]** separation, fill volume, dosage delivery, stopper placement, and impurities. Docs. 2145-7-2145-14 (Defs.' Exs. 118-125).

In the summer of 2011, Teva decided to amend and resubmit its ANDA with changes to both the epinephrine formulation and the device itself. Doc. 2145-15 at 8 (Defs.' Ex. 126). In a September 8, 2011 internal e-mail, Cory Wohlbach, the Teva regulatory affairs employee assigned to the epinephrine project, estimated that the "probability of success for the approval of the Epinephrine drug product is around 60%." Doc. 2144-20 at 2 (Defs.' Ex. 108). Mr. Wolhbach explained that "differences in the RLD device [EpiPen] to the [Teva] device . . . add[ ] to the complexity of the approval." *Id.* He noted the two devices "are not exactly the same[,]" and because "[e]pinephrine is a rescue product, similarities between the RLD and the [Teva] devices are critical." *Id.* In January 2012, Teva informed Pfizer that "it is modifying its proposed epinephrine auto-injector and that it intends to submit an amendment to its ANDA after the trial in this matter." Proposed Joint Pretrial Order, Ex. 21 ¶ 2, *King Pharms., Inc. v. Teva Parenteral Meds., Inc.*, No. 1:09-cv-00652-GMS (D. Del. Jan. **[**74]** 24, 2012), ECF No. 142-1 at 291.

Teva began testing new batches of its product in December 2011, but at an April 17, 2012 meeting, it was reported that these batches had failed because of a "needle separation issue." Doc. 2145-16 at 3 (Defs.' Ex. 127). Also, Teva meeting minutes from February 10, 2012 reported "several technical issues" that occurred "during testing of the Epinephrine stability batches[.]" Doc. 2145-17 at 2 (Defs.' Ex. 128). Six days later, on February 16, 2012, the EpiPen bench trial began. Day 1 of Trial Transcript, *King Pharms., Inc. v. Teva Parenteral Meds., Inc.*, No. 1:09-cv-00652-GMS (D. Del. July 25, 2012), ECF No. 150 at 1 (transcript dated "Thursday, February 16, 2012").

Settlement of the Teva Patent Litigation

After Pfizer rested its case-in-chief in the bench trial, Teva moved for judgment as a matter of law. Day 2 of Trial Transcript, *King Pharms., Inc. v. Teva Parenteral* ***[*952]*** *Meds., Inc.*, No. 1:09-cv-00652-GMS (D. Del. July 25, 2012), ECF No. 151 at 140-64 (Tr. 363:12-387:2). The presiding Judge, The Honorable Gregory M. Sleet, denied the motion. *Id.*

During the trial, Pfizer and Teva simultaneously engaged in settlement negotiations in Judge Sleet's chambers. Day **[**75]** 4 of Trial Transcript, *King Pharms., Inc. v. Teva Parenteral Meds., Inc.*, No. 1:09-cv-00652-GMS (D. Del.

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[26] The court rejects plaintiffs' objection to defendants' Exhibit 116 as inadmissible hearsay to which no exception applies. Doc. 2190-1 at 20. Defendants assert that this exhibit qualifies as a public record subject to Fed. R. Evid. 803(8)'s exception to the hearsay rule. Doc. 2226-1 at 21. The court agrees for the same reasons discussed *supra* n.17.

July 25, 2012), ECF No. 154 at 85 (Tr. 750:1-11). On March 9, 2012, at the end of the fourth and last day of trial, Judge Sleet told the parties that he would hold off on issuing an opinion for "as long as it takes—and I really mean that, as long as it takes" to allow the parties to pursue settlement negotiations. *Id.* Pfizer and Teva continued settlement talks through March and April 2012. Letter to The Honorable Gregory M. Sleet, *King Pharms., Inc. v. Teva Parenteral Meds., Inc.*, No. 1:09-cv-00652-GMS (D. Del. Mar. 30, 2012), ECF No. 144.

At the same time, Teva's regulatory team "d[id] not believe FDA would approve the product." Doc. 2145-20 at 3 (Defs.' Ex. 131) (noting in April 3, 2012 meeting minutes that that the FDA likely wouldn't approve the product even if Teva "highlight[ed] [its] intent to amend the application"). The position of Teva's Quality Team was: "With a critical defect such as this (needle dislodgement) the amendment should not be filed and new syringes should not be ordered or new batches made until root cause has been identified and corrective and preventative **[**76]** actions put in place[.]" *Id.* Then President and CEO of Teva-Americas William Marth acknowledged in an April 2012 internal e-mail that "[t]he product is challenging[.]" Doc. 2145-21 at 2 (Defs.' Ex. 132). Mr. Marth was willing to negotiate "any date in 2016 or earlier." Doc. 2145-22 at 2 (Defs.' Ex. 133).

Also, while the Teva litigation was pending, two additional EpiPen patents were pending approval by the U.S. Patent and Trademark Office ("USPTO"). Doc. 2146-1 at 2 (Defs.' Ex. 134); Doc. 2146-2 at 4 (Defs.' Ex. 135);[27] *see also* Doc. 2169 at 5-6 (Pretrial Order ¶¶ 2.a.38., 2.a.39.). In December 2010, the application for what would become U.S. Patent No. 8,870,827 (the "'827 Patent") was made publicly available. Doc. 2146-1 at 2 (Defs.' Ex. 134). Then, in October 2014, the USPTO issued the '827 Patent. *Id.* In November 2011, the USPTO issued another EpiPen-related patent, U.S. Patent No. 8,048,035 ("'035 Patent"). Doc. 2146-2 at 4 (Defs.' Ex. 135). The disputes at issue in the Teva litigation did not involve either the '827 and '035 Patents. Days 1-4 of Trial Transcript, *King Pharms., Inc. v. Teva Parenteral Meds., Inc.*, No. 1:09-cv-00652-GMS (D. Del. July 25, 2012), ECF Nos. 150-51, 153-54. These two patents do not expire until 2025. Doc. 2169 at 4 (Pretrial Order ¶ 2.a.27.) (explaining that **[**77]** the EpiPen Device Patents expire in 2025).

On April 26, 2012, Pfizer and Teva executed a binding term sheet that granted Teva a license to launch its EAI by June 22, 2015, subject to FDA approval. Doc. 2146-3 at 14-20 (Defs.' Ex. 136). The term sheet did not include any monetary payment between Pfizer and Teva. *Id.* The draft settlement agreements exchanged by the parties never proposed a licensed entry date earlier than June 2015. Doc. 2145-18 **[*953]** at 7-9 (Defs.' Ex. 129) (Myers Dep. 93:15-95:11).

On July 20, 2012, Pfizer and Teva executed the final Settlement and License Agreement to resolve the EpiPen litigation. Doc. 2146-3 at 2-29 (Defs.' Ex. 136). On that same date, Mylan executed a Covenant Not to Sue Teva with respect to any patents in the ownership or control of Mylan. *Id.* at 28-29. By settling, the parties to the Teva litigation avoided litigation risk and millions of dollars in expected litigation costs. Doc. 2146-5 at 74-75 (Defs.' Ex. 138) (Torrance Expert Report ¶ 146).

Mylan was not a signatory to the binding term sheet or the Settlement and License Agreement. Doc. 2146-3 at 10-12, 19-20 (Defs.' Ex. 136). But, as discussed, Mylan signed a Form of Covenant Not to Sue **[**78]** and Mutual Releases, which was attached to the settlement agreement. *Id.* at 24-29. A Mylan witness testified that Mylan signed the covenant "to appease Teva" though Mylan "didn't think [it] was necessary given that these weren't [Mylan's] patents." Doc. 2146-6 at 6-7 (Defs.' Ex. 139) (Jenkins Dep. 116:13-117:5).

Mylan witnesses testified that Mylan received updates from Pfizer about the Teva litigation, including during trial and settlement negotiations, but as one witness put it, Mylan "played no active role in the case itself." Doc. 2146-7 at 5-6 (Defs.' Ex. 140) (Ondos Dep. 63:23-64:2); *see also* Doc. 2146-6 at 6 (Defs.' Ex. 139) (Jenkins Dep. 116:13-

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[27] The court rejects plaintiffs' objections to defendants' Exhibits 134 and 135 as inadmissible hearsay to which no exception applies. Doc. 2190-1 at 77. Exhibit 134 is a patent which likely doesn't qualify as hearsay because defendants don't offer the '827 Patent to prove any of its contents. But even if they had offered the exhibit to prove the truth of its contents, the '827 Patent is a public record that qualifies for admission under *Fed. R. Evid. 803(8)*. *See supra* n.20. And Exhibit 135 is a Mylan business record that qualifies for admission under *Fed. R. Evid. 803(6)*'s business records exception.

25) (testifying that "Pfizer was the party responsible for the negotiation and settlement" and that "[u]ltimately it was their call whether to settle or not settle"). Some witnesses testified that Mylan had no decision-making rights in the litigation. Doc. 2146-7 at 4 (Defs.' Ex. 140) (Ondos Dep. 60:14-23); Doc. 2145-18 at 13 (Defs.' Ex. 129) (Myers Dep. 127:2-12). One witness testified that Mylan didn't provide any legal or business advice to Pfizer about the settlement, including the agreed licensing date for the Teva generic found **[**79]** in the binding term sheet. Doc. 2146-6 at 3-5 (Defs.' Ex. 139) (Jenkins Dep. 96:6-9, 99:1-8, 15:1-8); Doc. 2145-18 at 20 (Defs.' Ex. 129) (Myers Dep. 209:7-14). Also, Pfizer's counsel testified that it didn't need Mylan's consent to settle the litigation. Doc. 2145-18 at 7-9 (Defs.' Ex. 129) (Myers Dep. 208:18-20).

But, in email correspondence dated March 8, 2012 (the day before the last day of the Teva/EpiPen bench trial), William Marth noted that he had "talked to Heather yesterday throughout the afternoon and evening about settlement" and that "[s]he (Heather) wants to give [Teva] a 2018 entry date but would likely agree to 2017." Doc. 2201-21 at 2 (Pls.' Ex. 255). Also, Mylan and Pfizer's Supply Agreement requires the parties to notify each other of potential infringement and "jointly determine in good faith the appropriate course of action[.]" Doc. 2201-7 at 27 (Pls.' Ex. 256). And, several documents reference that Mylan's lawyers spoke with Teva and Pfizer about the settlement. Doc. 2201-11 at 2 (Pls.' Ex. 260) (explaining that Mylan General Counsel had called Teva "to ask if there is anything we can do to get Epi back on track"); Doc. 2201-13 at 2 (Pls.' Ex. 262) (stating that **[**80]** Teva had called Mylan's Deputy General Counsel and "relayed the following proposal: epipen in 2014 and nuvigil in 2018"); Doc. 2201-14 at 2 (Pls.' Ex. 263) (scheduling telephone conference with Teva, Mylan, and Pfizer); Doc. 2201-22 at 3 (Pls.' Ex. 266) (Haggerty Dep. 78:8-24) (Mylan's General Counsel testifying that he can't confirm or dispute entries on a privilege log showing that he spoke with Pfizer about the EpiPen litigation 56 times in March and April 2012).

On April 26, 2012, Mylan and Pfizer issued a joint press release announcing that "Meridian Medical Technologies, a Pfizer subsidiary, has entered into a settlement **[*954]** agreement with Teva that will resolve pending patent litigation related to [the Teva/EpiPen litigation]." Doc. 2146-9 at 2 (Defs.' Ex. 142).[28] The press release doesn't say that Mylan was a party to the suit or settlement. *Id.* Mylan's Nina Devlin drafted the press release. Doc. 2201-20 at 2-4 (Pls.' Ex. 269). And, others within Mylan reviewed and provided comment on the press release. Doc. 2202-2 at 2 (Pls.' Ex. 271); Doc. 2202-3 at 2 (Pls.' Ex. 272); Doc. 2202-1 at 2-3 (Pls.' Ex. 270). Also, several months after the settlement, in a July 2012 earnings call, Heather **[**81]** Bresch commented that "the runway was absolutely clear . . . through 2015, through *our settlement* with Teva[.]" Doc. 2207-4 at 12 (Pls.' Ex. 273) (emphasis added).

The settlement agreement gave Teva a license to all issued patents and a covenant not to sue based on any current or future patents covering EpiPen devices (including the '035 Patent not at issue in the litigation, and any future patents like the '827 Patent). Doc. 2146-3 at 3, 14-15 (Defs.' Ex. 136). It did not contain any monetary payment. *See generally id.*

Plaintiffs' expert Dr. Carl Peck testified that he has no opinion whether the settlement agreement caused any delay in Teva's product development or FDA approval. Doc. 2142-3 at 9 (Defs.' Ex. 1) (Peck Dep. 115:14-116:2) (testifying that he was not giving a "casual explanation" for why it took Teva so long to achieve FDA approval). Also, he testified that Teva's generic device did not satisfy the requirements for FDA approval until around August 2018. *Id.* at 12 (Peck Dep. 121:9-11); *see also* Doc. 2191-7 at 8 (Pls.' Ex. 30) (Peck Expert Report ¶ 16). But, he also opines about the issue "whether the FDA caused delays in the review and approval of [Teva's] ANDA[,]" concluding "based **[**82]** on [his] independent review and analysis of materials identified in [his] report, [his] expertise, and [his] knowledge of the FDA drug-approval process . . . that these delays were not due to the FDA's conduct or inaction." Doc. 2191-7 at 8 (Pls.' Ex. 30) (Peck Expert Report ¶ 17).

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[28] Plaintiffs object that this exhibit is inadmissible hearsay for which no exception applies. Doc. 2190-1 at 77. But, plaintiffs don't controvert the statement of fact that relies on it. *Id.* at 20; *see also* Doc. 2226-3 at 34 (discussing "SMF ¶ 93"). And, as defendants respond, Exhibit 142 is admissible because it's not hearsay. Doc. 2226-1 at 21. Defendants don't offer the press release to prove the truth of the matter of any of the contents in the press release. And, even if it is hearsay, the Mylan press release likely qualifies as a business record subject to *Fed. R. Evid. 803(6)*'s exception to the hearsay rule.

Teva's Continued Attempts to Secure FDA Approval

As defendants' expert testified, Teva is a large, sophisticated pharmaceutical company "skilled in the art" of drug development. Doc. 2203-6 at 3-4 (Pls.' Ex. 298) (Weisman Dep. 42:24-45:6). Internal Teva documents from late 2011 and early 2012 projected that Teva would launch its generic EAI by 2014. Doc. 2203-20 at 5 (Pls.' Ex. 317); Doc. 2203-21 at 3-5 (Pls.' Ex. 318).

On July 31, 2013, Teva sent a letter to the FDA responding to a deficiency letter dated March 29, 2010—more than three years earlier. Doc. 2203-13 at 2 (Pls.' Ex. 309). On August 29, 2013, Teva submitted its first human factors study to the FDA—responding to the FDA's deficiency letter of May 17, 2011. Doc. 2146-11 at 2-5 (Defs.' Ex. 144). Earlier, in January 2012, Teva had submitted a draft protocol for this study to the FDA and requested feedback "within one month to enable Teva to proceed **[**83]** with the study and promptly respond to the rest of requests contained in the deficiency letter." Doc. 2146-12 at 2 (Defs.' Ex. 145). More than one and a half years later, and after Teva followed up at least three times, the FDA still had not **[*955]** provided feedback about the protocol. Doc. 2146-13 at 2 (Defs.' Ex. 146); Doc. 2146-14 at 1-2 (Defs.' Ex. 147); *see also* Doc. 2142-3 at 34 (Defs' Ex. 1) (Peck Dep. 208:6-10) (agreeing that Teva "went ahead and did the human factors study even though FDA had not yet gotten back to it about the draft protocol").

In 2013, Teva discovered that when the device "was dropped without the safety cap, [it] had a tendency to fire, yet it wasn't evident to the end user that the device had in fact fired." Doc. 2146-15 at 2 (Defs.' Ex. 148). So, Teva had to redesign its device again "so that the user clearly knows the device has been fired[.]" *Id.* Teva recognized that the device, "being a life saving product[,]" made it "critical [for Teva] to make this change." *Id.*

Teva recognized that "a new Human factor study will be required for this device modification[.]" *Id.* at 3. In 2014, Teva completed a new human factors study. Doc. 2146-16 at 2 (Defs.' Ex. 149). That **[**84]** same year, an internal Teva document estimated the net present value of the EpiPen generic at $193 million—$70 million more than any other product Teva was working to develop. Doc. 2146-17 at 4 (Defs.' Ex. 150).

As it worked to secure FDA approval, Teva implemented a "Tiger Team" to work on its generic EAI. Doc. 2205-1 at 7 (Pls.' Ex. 344); Doc. 2205-2 at 2-3 (Pls.' Ex. 345). One Teva communication defined a "Tiger Team" as "a group of experts assembled to solve a crisis or to have a reliable/predictable performance on important projects and/or tasks with high priorities." Doc. 2205-2 at 3 (Pls.' Ex. 345). In May 2014, Rosario Lobrutto asked for "more resources (and the right resources/best experts) to address current issues[.]" Doc. 2205-3 at 3 (Pls.' Ex. 346). She asked for 8.5 additional persons "to backfill the resource gaps[.]" Doc. 2205-4 at 7 (Pls.' Ex. 347). Teva agreed to "reallocate [its] existing resources from agreed upon other projects (with portfolio) to Epi[.]" *Id.* at 4.

On August 1, 2014, Teva responded to the FDA's deficiency letter dated February 2, 2011. Doc. 2203-18 at 2 (Pls.' Ex. 314). On December 30, 2014, Teva submitted an amended ANDA to the FDA that one Teva **[**85]** executive described as "basically . . . a completely new ANDA." Doc. 2146-18 at 2 (Defs.' Ex. 151). Teva's submission stated that it was prepared in response to the FDA's March, 2, 2010 deficiency letter. Doc. 2146-19 at 2 (Defs.' Ex. 152). Also, this response explained that Teva had "changed the site of the drug product manufacture/testing . . . and device assembly[,]" "changed the formulation" of epinephrine, and "changed the device to improve the design to ensure the user will not be presented with a device that has delivered the drug product but has not engaged the safety guard." *Id.* Teva asked the FDA to review its ANDA on an "expedited" basis. *Id.* Dr. Peck asserts that Teva could have requested "expedited review" as early as "April 2012" when the Teva/EpiPen litigation settled because "by that time . . . there were no blocking patents or exclusivities based on the Agreement." Doc. 2191-7 at 15-16 (Pls.' Ex. 30) (Peck Expert Report ¶¶ 33-34). Defendants' expert, Dr. Steven M. Weisman, agreed that Teva "theoretically could have requested expedited review at any point in time; however, [Teva] didn't have an application . . . that was likely to be approved within that time frame, **[**86]** so that would have certainly frustrated the FDA and not have been an appropriate request." Doc. 2203-6 at 5 (Pls.' Ex. 298) (Weisman Dep. 289:17-25). Also, Dr. Weisman testified that Teva had "deficiencies throughout a large part of the development program that weren't entirely addressed until the complete response in 2014." *Id.* at 6 (Pls.' Ex. 298) (Weisman Dep. 309:13-20).

[*956] Also, Dr. Peck opines that when "Teva finally did submit its major amendment" on December 30, 2014, "as Teva was aware, the FDA would have reviewed it under the more stringent data requirements that went into effect in mid-2014." Doc. 2191-7 at 26 (Pls.' Ex. 30) (Peck Expert Report ¶ 56.d.). Dr. Peck explains that "a new standard policy went into effect on June 20, 2014, under which generic drugs now had to follow ICH drug product stability requirements in their ANDA filings[,]" where "both ANDAs and NDAs had the same CMC requirements for approval." *Id.* at 17 (¶ 37). Before June 2014, "generics only had to file minimal CMC data." *Id.*

Defendants did not know about the interactions between Teva and the FDA. Doc. 2143-14 at 11 (Defs.' Ex. 33) (Graham Dep. 318:21-25). So, Mylan wouldn't have known that the FDA had asked **[**87]** Teva to conduct a human factors study. *Id.*; *see also* Doc. 2146-20 at 20 (Defs.' Ex. 153) (Peck Rebuttal Expert Report ¶ 43).

On January 16, 2015, Mylan Specialty submitted a citizen petition to the FDA about the Teva ANDA. Doc. 2146-21 (Defs.' Ex. 154).[29] The citizen petition asked the FDA to "refrain from approv[ing] the Teva ANDA unless . . . the agency concludes that the proposed product is the 'same as' the EpiPen auto-injector." *Id.* at 2. Also, Mylan's citizen petition noted that "[p]ublicly available (and recently confirmed) information indicates that the design and operating principles of the Teva proposed product differ significantly from those of the EpiPen® auto-injector." *Id.* at 3. Based on these differences, the petition stated that Teva should provide, "at a minimum, very carefully designed human factors studies that would demonstrate the Teva product's safety and effectiveness and its comparability to the EpiPen® auto-injector." *Id.* at 4.

On April 28, 2015, Mylan Specialty submitted a supplement to its January 16, 2015 citizen petition. Doc. 2167-8 (Defs.' Ex. 155). It included a report from a study that Mylan cited as further support for its argument that the FDA should **[**88]** require Teva to submit a human factors study. Doc. 2147-1 (Defs.' Ex. 156). On June 15, 2015, the FDA "den[ied] without comment" Mylan's citizen petition. Doc. 2147-2 at 2 (Defs.' Ex. 157).[30]

After the FDA denied Mylan's citizen petition, Mylan's counsel sent a letter to the FDA. Doc. 2206-9 (Pls.' Ex. 38). Among other things, the correspondence noted that "Mylan is considering its options for seeking judicial review of FDA's decision" due to "the lack of guidance and clarity from the Agency on how it is ensuring sameness[.]" *Id.* at 12.

Plaintiffs' expert Dr. Peck testified that he was not offering an opinion whether Mylan Specialty's citizen petition caused **[*957]** any delay in Teva's FDA approval process, but he agreed that "citizen petitions rarely delay generic drug approvals." Doc. 2142-3 at 66 (Defs.' Ex. 1) (Peck Dep. 346:14-17). However, in his Rebuttal Expert Report, Dr. Peck describes how citizen petitions may delay generic entry, and he cites an empirical study. Doc. 2191-3 at 18-19 (Pls.' Ex. 25) (Peck Rebuttal Expert Report ¶¶ 38-41) (citing an empirical study that analyzed citizen petitions filed close to the approval date of generic drug applications).

On February 23, 2016, the FDA **[**89]** issued a "complete response letter"[31] denying Teva's ANDA application. Doc. 2147-3 (Defs.' Ex. 158). The complete response letter cited "MAJOR" deficiencies with product quality, bioequivalence, microbiology, and labeling. *Id.* at 11. The FDA also criticized Teva's human factors study, stating:

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[29] The court rejects plaintiffs' objection to Exhibit 154—as well as Exhibits 155 and 156—based on inadmissible hearsay. Doc. 2190-1 at 77. As defendants correctly argue, these exhibits don't qualify as hearsay under *Fed. R. Evid. 801(c)(2)*'s definition of hearsay evidence because defendants don't offer the exhibits to prove the truth of the matters asserted in the documents. Instead, they offer the exhibits to show that Mylan communicated with the FDA about Teva's ANDA. Also, again, the court notes that plaintiffs have objected to defendants' Exhibit 154, but yet plaintiffs rely on the very same document—plaintiffs' Exhibit 325—as support for one of their summary judgment facts. Doc. 2190-1 at 70 (plaintiffs' Statement of Additional Material Fact ¶ 152 (citing Pls.' Ex. 325 (Doc. 2204-4))).

[30] The court rejects plaintiffs' objection to Exhibit 157—as well as Exhibits 158 and 160—based on inadmissible hearsay. Doc. 2190-1 at 77. As defendants correctly argue, these exhibits are public records that qualify for admission under *Fed. R. Evid. 803(8)*'s exception to the hearsay rule.

> The human factors study data that you provided with respect to your proposed epinephrine auto-injector (AJE) device, which differs in a critical design attribute from EpiPen (use of a twist-off cap rather than a removable carrier tube), is insufficient to support a conclusion that your product can be substituted for EpiPen without additional training or physician intervention before use of the AJE.

Id. at 7.

Teva never re-performed its human factors study. Doc. 2191-3 at 7-8 (Pls.' Ex. 25) (Peck Rebuttal Expert Report ¶ 14) (recognizing that Teva's last human factors study "was completed years before the Human Factors Guidance was issued"). But, on August 15, 2018, the FDA alerted Teva that it had found its 2014 Teva human factors study adequate—the same study it had rejected in the 2016 complete response letter. Doc. 2147-4 at 2-3 (Defs.' Ex. 159).

The next day, August 16, 2018, the FDA approved Teva's **[**90]** ANDA. Doc. 2147-5 at 2 (Defs.' Ex. 160). The FDA approval letter noted that it had found Teva's generic EAI "therapeutically equivalent to the referenced listed drug (RLD), EpiPen Jr. Auto-Injector, 0.12 mg and EpiPen Auto-Injector, 0.3 mg, of Mylan Specialty L.P. (Mylan)." *Id.*

The FDA issued a press release announcing the approval. *FDA Approves First Generic Version of EpiPen*, FDA (Aug. 16, 2018), https://www.fda.gov/news-events/press-announcements/fda-approves-first-generic-version-epipen. It noted: "The development of generic combination products" like an EAI "can be more challenging than typical drug products." *Id.*

Although Teva received FDA approval in August 2018, the company did not launch its generic EAI at that time. Instead, it launched the 0.3 mg strength product (corresponding to EpiPen Auto-Injector in limited quantity) on November 27, 2018, and the 0.15 mg strength (corresponding to EpiPen Jr Auto-Injector) on August 20, 2019. *See Teva's Generic Version of EpiPen® Auto-Injector 0.3mg Now Available in Limited Quantity in the United States*, Business Wire (Nov. 27, 2018), https://www.businesswire.com/news/home/20181127005573/en/Teva%E2%80%99s-Generic-Version-EpiPen%C2%AE%C2%A0-Epinephrine-Injection-USP; **[**91]** *see also Teva Announces Availability of a Generic Equivalent of EpiPen Jr® Auto-Injector, 0.15mg in the United States*, Business Wire (Aug. 20, 2019), https://www.businesswire.com/news/home/20190820005419/en/Teva-Announces-Availability-Generic-Equivalent-EpiPen-Jr%C2%AE.[32]

[*958] Plaintiff's expert, Dr. Carl Peck, calculates that it took Teva "9 years and 9 months" to secure FDA approval. Doc. 2191-7 at 26-27 (Pls.' Ex. 30) (Peck Expert Report ¶ 58 & Table 2). He measures that time starting on November 21, 2008—when the FDA accepted Teva's ANDA for filing—and ending on August 16, 2018—the date the FDA approved Teva's generic. *Id.* Dr. Peck compared the time it took Teva to secure FDA approval to those of other EAI manufacturers, and he opines that "none have required the lengthy time for review and approval exhibited by the Teva generic EAI." *Id.* at 26 (¶ 58). He asserts that "the other EAIs all were subject to the more stringent NDA standards (as opposed to ANDA standards)" yet "most were approved in 2-3 years, while the longest review and approval time was 6.5 years from initial filing." *Id.*

Also, Dr. Peck reviewed the approval time for other auto-injector products. *Id.* at 27-28 (¶ 59 & **[**92]** Table 3); *see also* Doc. 2191-3 at 16-17 (Peck Rebuttal Expert Report ¶ 35 & Table 3). He notes that with other auto-injector products that "[a]gain, none have required the lengthy time for review and approval exhibited by the Teva generic epinephrine autoinjector." Doc. 2191-7 at 27 (¶ 59). Instead, the approval time for other auto-injector products has

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[31] A complete response letter is a letter the FDA sends to an applicant "if the agency determines that [it] will not approve the application or abbreviated application in its present form[.]" *21 C.F.R. § 314.110(a)*.

[32] To the extent plaintiffs challenge defendants' citation to these news articles because they aren't attached as summary judgment exhibits, *see* Doc. 2190-1 at 76-77, the court rejects that challenge because plaintiffs don't controvert the summary judgment facts cited in this statement of fact, *see* Doc. 2190-1 at 20.

ranged from six months to 69 months. *Id.* at 28 (Table 3). Dr. Peck asserts that this data shows "autoinjectors are common, their technology is well-developed, and that all of the autoinjectors on the market today were reviewed and approved in less than half the time of the Teva EAI." Doc. 2191-3 at 16 (¶ 35). Also, "at least six of the EAIs" that Dr. Peck lists "required an HFS[,]" which, he asserts, "shows that Teva had the same opportunity as other EAI manufacturers to develop and prosecute ANDA and NDA injectable products within a reasonable time period." *Id.*

Last, Dr. Peck reviewed other Teva injectable products and opines that "on average, they were approved in under 30 months." Doc. 2191-7 at 29 (¶ 60 & Table 4). He notes that "the longest submission to approval time" for the other Teva injectable products "was 48 months or about **[**93]** one half the time" that it took Teva to secure approval of its generic EAI. *Id.* at 29 (¶ 60).

Dr. Peck opines that "the FDA review and guidance did not delay the approval of Teva's application." *Id.* at 9 (¶ 18). "On the contrary," he asserts, "the evidence confirms that the FDA treated this as a priority application and was responsive well within the metrics for review time of the application." *Id.* But, he opines that "Teva 'dropped the ball' in the 2011-2014 time frame by not pursuing the application aggressively or responding to the FDA[.]" *Id.* at 25 (¶ 56(c)). Based on his review of Teva's communications with the FDA, he concludes that "it is reasonable to expect that the FDA would have completed its review and approval of Teva's EAI application by 2014 . . . if not earlier—had Teva been responsive to the FDA's requests in prosecuting its application." *Id.* at 10 (¶ 21).

Cephalon's Lawsuit Against Mylan Involving Unrelated Drug Nuvigil

On December 11, 2009, pharmaceutical company Cephalon, Inc. filed a lawsuit in the District of Delaware alleging patent infringement against Mylan based on Mylan's ANDA to manufacture and sell a generic version of the pharmaceutical product Nuvigil (armodafinil). **[**94]** *See generally*, **[*959]** Complaint, *Cephalon, Inc. v. Mylan Pharms., Inc.*, No. 1:09-cv-00954 (D. Del. Dec. 11, 2009), ECF No. 1. Nuvigil is a "prescription drug" used to "improve wakefulness in patients with excessive sleepiness[.]" *Id.* at 1. Cephalon sued six other generic manufacturers, along with Mylan, who were seeking ANDA approval to manufacture and sell armodafinil tablets. *See* Transfer Order at Schedule A, *In re: Armodafinil Patent Litig.*, No. 1:10-md-02200 (D. Del. Dec. 8, 2010), ECF No. 1. In December 2010, the Judicial Panel on Multi-District Litigation consolidated the cases into a multidistrict litigation in the District of Delaware before Judge Sleet. *Id.* In this MDL, the Nuvigil defendants advanced similar defenses and relied on the same experts. *See* Doc. 2147-6 at 50-51 (Defs.' Ex. 161) (Folsom Rebuttal Expert Report ¶ 142).

In October 2011, while the Nuvigil litigation was pending, Teva acquired Cephalon.[33] *Press Release Details: Teva Completes Acquisition of Cephalon*, Teva Pharm. (Oct. 14, 2011), https://ir.tevapharm.com/news-and-events/press-releases/press-release-details/2011/Teva-Completes-Acquisition-of-Cephalon/default.aspx.

As discussed above, after Teva filed the Nuvigil **[**95]** lawsuits, the Hatch-Waxman Act triggered a 30-month stay for each Nuvigil defendant's ANDA, meaning the FDA couldn't finally approve those ANDAs while the Nuvigil litigation was ongoing. *21 U.S.C. § 355(j)(5)(B)(iii)*; *Id.* *§ 355(c)(3)(C)*. But, during the 30-month stay, the FDA tentatively had approved Mylan's ANDA, Doc. 2147-7 at 2 (Def's Ex. 162), which meant that the ANDA met substantive requirements for final approval, *ANDA Submissions-Amendments and Requests for Final Approval to Tentatively Approved ANDAs Guidance for Industry*, FDA (Sept. 2020), https://www.fda.gov/media/119718/download. Mylan's stay was set to expire on May 3, 2012, which meant that the FDA potentially could have granted final approval on that day. Letter to Judge Sleet, *In re: Armodafinil Patent Litig.*, No. 1:10-md-02200 (D. Del. Mar. 13, 2012), ECF No. 225 at 1-2. Teva asserted in a brief seeking a temporary restraining order and a preliminary injunction, filed in the Nuvigil litigation that: "Other than this patent litigation, there are likely to be no legal impediments to Mylan's launching of its products on or after May 3[, 2012]." Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary

[33] Cephalon continued to litigate the Nuvigil litigation as Cephalon even after Teva acquired it. The parties refer to Cephalon as Teva going forward, and the court adopts that convention.

Injunction **[**96]** at 1, *In re: Armodafinil Patent Litig.*, No. 1:10-md-02200 (D. Del. Apr. 10, 2012), ECF No. 270 at 5. In contrast, the FDA never granted tentative approval to Teva's ANDA for a generic EAI while the Teva/EpiPen litigation was pending. *See* Doc. 2147-3 (Defs.' Ex. 158) (explaining the deficiencies with Teva's ANDA identified in the FDA's February 23, 2016 complete response letter).

Mylan refused to agree to forgo launching its product on May 3, 2012. Letter to Judge Sleet at 1, *In re: Armodafinil Patent Litig.*, No. 1:10-md-02200 (D. Del. Mar. 13, 2012), ECF No. 225 at 1. And, on March 30, 2012, as the parties were in settlement negotiations, Mylan rejected Teva's request to extend the stay until May 15, 2012. Doc. 2147-8 at 2 (Defs.' Ex. 163). The next day, Teva sent a draft term sheet to Mylan. Doc. 2147-9 at 2 (Defs.' Ex. 164); Doc. 2147-10 at 2-11 (Defs.' Ex. 165).[34]

[*960] On April 26, 2012, Mylan and Teva executed a binding term sheet to resolve the claims against Mylan in the Nuvigil litigation. Doc. 2147-11 at 2-18 (Defs.' Ex. 166). As already discussed, this was the same day that Pfizer and Teva executed a binding term sheet that resolved the Teva/EpiPen litigation. Doc. 2146-3 at 14-20 **[**97]** (Defs.' Ex. 136).

Under the agreement to resolve the Nuvigil litigation, Mylan acquired the right to launch certain armodafinil products on June 1, 2016 (50mg, 150mg, and 250mg strength tablets) and others on June 1, 2019 (100mg and 200mg strength tablets) without infringing Teva's patents, which were set to expire in 2024. Doc. 2147-11 at 3-4, 6-7; *see also* Doc. 2147-16 at 3 (Defs.' Ex. 171) (listing the Nuvigil patents' 2024 expiration dates).[35] The settlement did not include any monetary payment between Mylan and Teva. *See generally* Doc. 2147-11 (Defs.' Ex. 166). By settling, both Mylan and Teva avoided litigation risk and millions of dollars in expected litigation costs. Doc. 2146-5 at 103 (Defs.' Ex. 138) (Torrance Expert Report ¶ 214). Pfizer, King, and Meridian were not parties to the Nuvigil MDL or settlement. *See generally* Doc. 2147-11 (Defs.' Ex. 166).

The other defendants in the Nuvigil MDL went to trial in July 2012 and didn't prevail. Memorandum at 1, *In re: Armodafinil Patent Litig.*, No. 1:10-md-02200 (D. Del. Mar. 30, 2013), ECF No. 329 at 1; *see also* Doc. 2147-12 at 13 (Defs.' Ex. 167) (admitting in response to defendants' request for admission that "Mylan's non-settling **[**98]** codefendants . . . did not prevail at trial"). The non-prevailing defendants appealed. Notices of Appeal, *In re: Armodafinil Patent Litig.*, No. 1:10-md-02200 (D. Del. Mar. 30, 2013), ECF Nos. 331, 332, 334, & 336. While the appeal was pending, the parties settled. *See* Doc. 2202-4 (Pls.' Ex. 274); Doc. 2202-5 (Pls.' Ex. 275); Doc. 2202-6 (Pls.' Ex. 276); Doc. 2202-7 (Pls.' Ex. 277).

The draft agreements granted defendants a "License Effective Date" for their generic Nuvigil products that was at least 180 days after Mylan's first sale of a generic product. *See* Doc. 2202-4 at 5 (Pls.' Ex. 274); Doc. 2202-5 at 3 (Pls.' Ex. 275); Doc. 2202-6 at 3 (Pls.' Ex. 276); Doc. 2226-10 at 3 (Defs.' Ex. 381). And, some of the draft settlement agreements required Teva to pay defendants for their legal fees. *See* Doc. 2202-4 at 6 (Pls.' Ex. 274); Doc. 2202-5 at 5 (Pls.' Ex. 275); Doc. 2202-6 at 6 (Pls.' Ex. 276).

Then President and CEO of Teva-Americas William Marth had discussions with Heather Bresch about both the Teva/EpiPen settlement and the Nuvigil settlement. *See* Doc. 2201-21 at 2 (Pls.' Ex. 255) (explaining that Mr. Marth had "talked to Heather . . . about settlement" of the EpiPen litigation and **[**99]** that "[s]he (Heather) wants to give us a 2018 entry date but would likely agree to 2017" and noting that "[j]ointly but not directly connected is the Nuvigil litigation" where Mr. Marth "offered a 2018 entry date"); *see also* Doc. 2202-20 at 2 (Pls.' Ex. 278) (stating in

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[34] The court rejects plaintiffs' objection to Exhibits 164 and 165 based on inadmissible hearsay. Doc. 2190-1 at 77. As defendants correctly argue, these exhibits don't qualify as hearsay under *Fed. R. Evid. 801(c)(2)*'s definition of hearsay because defendants don't offer the exhibits to prove the truth of the matters asserted in the documents. Instead, they offer the exhibits to show Mylan and Teva exchanged a binding term sheet.

[35] The court rejects plaintiffs' objection to Exhibit 171 based on inadmissible hearsay. Doc. 2190-1 at 77. As defendants correctly argue, this letter from the FDA qualifies as a business record under *Fed. R. Evid. 803(6)*'s exception to the hearsay rule. Also, this exhibit—a letter from the FDA—likely is a public record that qualifies for admission under *Fed. R. Evid. 803(8)*'s exception to the hearsay rule.

first email that "Bill [Marth] got a call from **[*961]** Heather at Mylan" and asking what "exactly did we propose re epi and nuvigil?" and responding in another email with "2014 for epi and 2018 for nuvigil. No months specified."); Doc. 2202-9 at 2 (Pls.' Ex. 279) (sending the Nuvigil term sheet and discussing changes that were "agreed to between Heather and Mr. Marth"). Also, other Mylan and Teva employees discussed the EpiPen and Nuvigil settlements in the same communications. *See* Doc. 2201-13 at 2 (Pls.' Ex. 262) (stating that Teva had called Mylan's Deputy General Counsel and "relayed the following proposal: epipen in 2014 and nuvigil in 2018"); *see also* Doc. 2202-13 at 2 (Pls.' Ex. 283) (noting that "the signed Nuvigil deal was" complete and "language w Pfizer on Epipen is done"); Doc. 2201-20 at 2 (Pls.' Ex. 269) (Mylan employees emailing with the subject line "Epipen—Teva/Potential Settlement" and attaching a "Nuvigil **[**100]** Settlement DRAFT").

On April 30, 2012, Mylan issued a press release announcing the Nuvigil settlement.[36] On May 10, 2012, Mylan's outside counsel sent a letter to the FTC and DOJ providing copies of the Nuvigil Settlement and EpiPen Settlement agreements. Doc. 2147-13 at 2 (Defs.' Ex. 168). The letter stated: "While Mylan does not believe it is required to file the EpiPen Settlement in connection with the Nuvigil Settlement, it nonetheless files this agreement as a potentially 'related' agreement solely out of an abundance of caution." *Id.* Mylan's 30(b)(6) witness testified that it submitted the settlements to the FTC and DOJ "solely out of an abundance of caution. We certainly don't believe they actually are related." Doc. 2146-6 at 10 (Defs.' Ex. 139) (Jenkins Dep. 136:23-137:23).

On July 3, 2012, the FTC responded, stating that while it reserved the right to investigate, "nothing in this letter should be construed to indicate that a violation of law has occurred." Doc. 2147-14 at 2 (Defs.' Ex. 169).[37] But, the FTC noted that its "Bureau of Competition is concerned that the Teva-Mylan agreement on [another drug product,] generic Provigil[,] may be related to delayed generic **[**101]** Nuvigil entry and/or delayed generic EpiPen entry." *Id.*

A few years later, in May 2015, the FTC announced that it had "entered into a landmark settlement with Cephalon, Inc. and its parent company, Teva . . . to resolve its action against Cephalon for illegally monopolizing the market for the sale of its blockbuster sleep-disorder drug Provigil." Doc. 2207-5 at 2 (Pls.' Ex. 295). The FTC said it "was prepared to prove that Cephalon paid four generic competitors to abandon their challenges to Cephalon's Provigil patent and stay off the market for six years in violation of the antitrust laws, resulting in significantly higher prices for the drug and substantial consumer harm." *Id.* Then, in February 2017, Mylan "agreed to pay $96.5 million to settle claims by **[*962]** drug purchasers that it delayed launching a generic version of Cephalon Inc.'s narcolepsy drug Provigil in exchange for payment from Cephalon." Doc. 2207-6 at 2 (Pls.' Ex. 296). And, in January 2017, Mylan reported that it had "received a 'preliminary' inquiry from" the FTC "asking about the company's commercial practices for its EpiPen severe-allergy treatments." Doc. 2207-7 at 2 (Pls.' Ex. 297). As of August 2019, the FTC investigation **[**102]** still was pending. Doc. 2191-15 at 5 (Pls.' Ex. 44) (Ondos Dep. 89:14-17).

The Pfizer attorneys who handled the EpiPen litigation testified that they never had heard of the Nuvigil litigation, or even the Nuvigil product, until after the present lawsuit was filed. Doc. 2145-18 at 16-17 (Defs.' Ex. 129) (Myers Dep. 205:16-206:7) (testifying that the "first time [he] heard of Nuvigil" was in "connection with" this lawsuit); Doc. 2146-8 at 5 (Defs.' Ex. 141) (Rennecker Dep. 164:8-13) (testifying that he "never heard of Nuvigil prior to this litigation"). Also, they testified that they were not aware of anyone at Pfizer who had any involvement with the Nuvigil litigation and that the Nuvigil litigation was not discussed in any joint Pfizer-Mylan telephone conferences. Doc. 2145-18 at 12 (Defs.' Ex. 129) (Myers Dep. 115:4-13); Doc. 2146-8 at 6-7 (Defs.' Ex. 141) (Rennecker Dep.

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[36] The citation defendants provide for this statement of fact is no longer available online, but plaintiffs don't controvert this statement of fact. *See* Docs. 2142-1 at 50, 2190-1 at 20; *see also* Doc. 2226-3 at 40 (discussing "SMF ¶ 118"). So, the court accepts it for purposes of this summary judgment motion.

[37] The court rejects plaintiffs' objection to Exhibit 169 based on inadmissible hearsay. Doc. 2190-1 at 77. As defendants correctly argue, this letter from the FDA qualifies as a public record that is admissible under *Fed. R. Evid. 803(8)*'s exception to the hearsay rule. Also, plaintiffs quote language from this letter to support one of their own statements of fact. Doc. 2190-1 at 63 (plaintiffs' Statement of Additional Material Fact ¶ 118). While the court understands that some hearsay issues can turn on the identity of the offering party, *see Fed. R. Evid. 801(d)(2)*, that isn't the case here. Plaintiffs have used the same FDA letter to support their facts, but also they object to defendants using it. This tact is not impressive.

167:10-18, 168:4-7). Some Mylan witness likewise testified that the Nuvigil and EpiPen settlements were independent, and that Mylan played no role in directing or managing the Teva/EpiPen litigation or settlement. Doc. 2146-7 at 89-90 (Defs.' Ex. 140) (Ondos Dep. 89:18-90:9) (testifying that "both lawsuits had separate, **[**103]** independent tracks and negotiations" and "their terms were not linked"); *see also id.* at 3-4 (Ondos Dep. 59:17-60:23) (testifying that Mylan had no "decisionmaking right" in the Teva/EpiPen litigation); Doc. 2150-1 at 3-4 (Def's Ex. 174) (Bresch Dep. 57:17-58:23) (testifying that "even though the settlements occurred on the same date" there "was no linkage between EpiPen and Nuvigil").

Other Patent Litigation

In 2011, Pfizer—through its subsidiaries—filed a patent infringement lawsuit against Intelliject after it sought to secure FDA approval to market "e-cue," the predecessor to competing EAI, Auvi-Q. Complaint, *King Pharms. Inc. v. Intelliject Inc.*, No. 1:11-cv-00065-GMS (D. Del. Jan. 19, 2011), ECF No. 1. Pharmaceutical company Sanofi-Aventis later secured the rights to the Auvi-Q device. Doc. 2169 at 6 (Pretrial Order ¶ 2.a.46.). After that acquisition of rights, Sanofi executed a settlement with Pfizer to resolve the case. Doc. 2191-16 at 2 (Pls.' Ex. 45). Mylan wasn't a party to the agreement, but yet, Mylan drafted the press release announcing the settlement and the initial draft didn't include references to Pfizer's involvement. *See id.* ("Mylan [and Pfizer] Announce Epinephrine **[**104]** Auto-Injector Settlement Agreement"). The agreement allowed Sanofi to launch "e-cue" in November 2012. *Id.*

EAIs in the United States

When Mylan acquired Dey in 2007, another branded EAI called Twinject was available for purchase in the United States in both .3mg and .15mg doses. Doc. 2150-3 at 9 (Defs.' Ex. 176).[38] Twinject's name is a reference to the fact that each device contained two doses. *Id.* at 6. It was removed from the market in 2012. Doc. 2150-4 at 12 (Defs.' Ex. 177). Another branded product, **[*963]** Adrenaclick, secured FDA approval under a modified version of the Twinject NDA and launched in 2009 in both .3mg and .15mg doses. Doc. 2150-3 at 9 (Defs.' Ex. 176). In 2010, an authorized generic to the Adrenaclick product became available in both .3mg and .15mg doses. *Id.*; *see also* Doc. 2150-5 (Defs.' Ex. 178); Doc. 2150-6 (Defs.' Ex. 179).

In January 2013, Sanofi launched a branded EAI called Auvi-Q. Doc. 2169 at 6 (Pretrial Order ¶ 2.a.46.). In October 2015, Sanofi issued a Class I voluntary recall of all Auvi-Q devices in the United States. *Id.* (Pretrial Order ¶ 2.a.47.).

Some named plaintiffs continued to purchase EpiPens after filing this lawsuit. Doc. 2144-16 at 11-13 (Defs.' **[**105]** Ex. 102) (citing Defs.' Ex. 102-A). And, some named plaintiffs testified that they purchased EpiPen products even though a generic or other alternative was available for purchase. *Id.*

Sale of Pharmaceutical Products in the United States

Pharmaceutical manufacturers sell prescription drugs through a multi-step distribution chain—from manufacturer to wholesaler to pharmacy to patient. Doc. 2150-9 at 14-18 (Defs.' Ex. 182) (Navarro Expert Report ¶ 23). For patients with insurance, the price at the pharmacy depends on the terms of their insurance coverage, among other factors. *Id.* at 20, 29-30 (¶¶ 36, 51). Uninsured patients generally pay the price set by the pharmacy, although patients can lower the pharmacy price by using discount cards and coupons. *Id.* at 19-20 (¶ 35).

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[38] The court rejects plaintiffs' objection to Exhibit 176—as well as Exhibits 177, 178, 179, 180, & 181—based on plaintiffs' argument that the documents are inadmissible hearsay to which no exception applies. Doc. 2190-1 at 77. These documents produced by Mylan qualify for admission as business records under Fed. R. Evid. 803(6)'s exception to the hearsay rule. Doc. 2226-1 at 21; *see also* Doc. 2227-1 at 11-12 (Cuthbertson Decl.).

The term "formulary" refers to a published list of prescription drugs covered by a health plan. *Id.* at 28 (¶ 48). Another name for a "formulary" is a "preferred drug list." *Id.* Pharmacy Benefit Managers ("PBMs") develop, manage, and administer prescription drug benefit programs for commercial payors and other insurance programs, including Medicare and Medicaid. *Id.* at 12 (¶ 18). Among other things, PBMs create formularies **[**106]** for insurance companies and payors. *Id.* at 28 (¶¶ 48-71).

Formularies organize drugs by therapeutic category and are designed to include a selection of medicines to satisfy the needs of insured customers. *Id.* at 29 (¶¶ 49-50). Formularies change over time as drugs enter or leave the market, and as new data becomes available. *Id.* (¶ 49). Formularies also use different levels of "control," referring to how strictly the plan enforces the list of covered drugs. *Id.* at 32-33 (¶ 57). With an "open" or "low control" plan design, a health plan typically covers many (sometimes all) of the drugs on the formulary, or covers at least some portion of the cost of drugs that are not included on the formulary. *Id.* In contrast, with a "closed" or "high control" plan design, a health plan typically covers only the products listed on the formulary. *Id.*

PBMs typically develop standard formularies, giving their clients options from which to choose. Doc. 2150-11 at 25, 35 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 190:2-21, 273:5-19). Also, some PBMs allow health-plan and large-employer clients to customize drug formularies. Doc. 2150-10 at 5-6 (Defs.' Ex. 183) (Anderson (CVS) Dep. 67:15-68:7); Doc. 2150-11 at **[**107]** 35 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 273:5-19). Some of the largest PBMs maintain hundreds or thousands of formularies. Doc. 2150-10 at 3-4 (Defs.' Ex. 183) (Anderson (CVS) Dep. 35:17-36:5); Doc. 2150-11 at 18 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 178:5-20); Doc. 2150-12 at 3 (Defs.' Ex. 185) (Rogers (OptumRx) Dep. 36:7-21).

Also, PBMs use "Utilization Management" techniques—such as copayments and tiering, step edits, prior authorization, and benefit exclusion—to incentivize the use of one drug over another. Doc. 2150-9 at 33-37 (Defs.' Ex. 182) (Navarro Expert **[*964]** Report ¶¶ 58-60). Payors use these techniques to encourage patients to use more cost-effective products. *Id.* at 36 (¶ 59). They also use these tools to negotiate lower prices from manufacturers by offering preferred formulary placement in exchange for greater rebates. *See* Doc. 2150-16 at 3 (Defs.' Ex. 189) (Stein (Humana) Dep. 210:1-8); *see also* Doc. 2150-11 at 28 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 197:7-18).

The use of copayments and tiering involves a payor requiring patients to pay a portion of the cost for a prescription drug, either a fixed-dollar copayment or a percentage-based coinsurance. Doc. 2150-9 at 29-30 (Defs.' **[**108]** Ex. 182) (Navarro Expert Report ¶ 51). The most common formularies have three or more "tiers" with increasing copayments. *Id.* Copayment differentials encourage patients to purchase lower-tier drugs, *e.g.*, to purchase a preferred Tier 2 brand over a non-preferred Tier 3 brand. *See, e.g.*, Doc. 2150-17 at 5-7 (Defs.' Ex. 190) (Kronberg (Cigna) Dep. 58:17-60:4); Doc. 2150-12 at 10 (Defs.' Ex. 185) (Rogers (OptumRx) Dep. 43:13-24).

A "step edit" or "step therapy" requirement usually requires a patient to fill a prescription for a preferred drug before the plan will reimburse for purchasing a branded alternative. Doc. 2150-9 at 35 (Defs.' Ex. 182) (Navarro Expert Report ¶ 58(c)); *see also* Doc. 2197-12 at 3 (Pls.' Ex. 176) (Brodeur Dep. 32:7-13) (explaining that a step edit requires a patient "to have the trial or failure or a reason [the patient] can't take the" preferred drug before the payor will cover the alternative drug).

Prior authorization requirements mean a plan will cover a drug product only if the patient's physician formally requests the payor to approve coverage. *Id.* at 35-36 (¶ 59(d)). Each payor determines the approval criteria for a prior authorization. *Id.* If a Tier 3 drug **[**109]** has a prior authorization requirement, the patient must secure that authorization and then pay the Tier 3 copayment. *Id.*

A benefit exclusion excludes a drug from coverage altogether. *Id.* at 34 (¶ 58(a)). Since 2012, payors increasingly have excluded drugs from coverage (rather than covering them on a higher copay tier), sometimes covering only one branded product per therapeutic class of drugs. *Id.* at 53-54 (¶¶ 95-97).

A PBM's ability to promote or prefer drugs to prescribers and patients gives it leverage when negotiating price discounts from branded drug manufacturers. *Id.* at 52 (¶ 89). Manufacturers set a WAC (or list price) for their prescription drugs. *Id.* at 13-14 (¶ 22). But, they also may offer retrospective rebates to PBMs. *Id.* at 45 (¶¶ 75-77). A retrospective rebate is what a manufacturer pays to a PBM after the PBM reimburses a pharmacy for the balance of the cost of a prescription drug that the pharmacy sold to an insured consumer. *Id.* Defendants' expert opines that "most of the rebate value (approximately 90%) paid to PBMs is transferred back to the purchaser or insured individual to reduce pharmacy costs." *Id.* at 52 (¶ 90). Rebates are common in the pharmaceutical industry. **[**110]** *Id.* at 45-46 (¶ 78).

Many PBMs solicit rebates from manufacturers by inviting manufacturers to fill out "bid grids." *Id.* at 55 (¶ 98). A bid grid is a table with blank cells corresponding to different levels of control. *Id.* at 56-57 (¶ 100 & Fig. 6). Manufacturers fill out the blank cells of the bid grid with rebate percentages that represent their bids for various formulary placements. *Id.* Often, after submitting a bid grid with proposed rebate percentages, the manufacturers and PBMs enter negotiations where the PBMs try to secure the highest possible rebates, sometimes by pitting competing manufacturers against each other. *See, e.g.*, Doc. **[*965]** 2150-11 at 6-7 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 119:18-120:8) (testifying about how Express Scripts, Inc. "continu[es] to try to push rebates up" with manufacturers); Doc. 2150-15 at 12 (Defs.' Ex. 188) (Hall (Prime) Dep. 58:12-17) (testifying how the entry of a competing drug gave Prime "the opportunity . . . to renegotiate improved rates"); Doc. 2150-19 at 5 (Defs.' Ex. 192) (Minton (Anthem) Dep. 75:1-14) (testifying about how Anthem goes "back to the manufacturers to press" for higher rebates).

If negotiations are successful, PBMs and manufacturers **[**111]** enter rebate agreements. *See e.g.*, Doc. 2152-1 at 2-5 (Defs.' Ex. 201) (Mylan/ESI Rebate Agreement); Doc. 2152-2 at 2-22 (Defs.' Ex. 202) (Mylan/CVS Agreement). Often, the rebate agreements contain a menu of options from which a PBM's clients can choose. *See e.g.*, Doc. 2152-1 at 4-5 (Defs.' Ex. 201); Doc. 2152-2 at 19-21 (Defs.' Ex. 202). As one example, in 2015, Mylan and Express Scripts, Inc. ("ESI") entered a Rebate Agreement that contained a menu of rebate opinions. Doc. 2152-5 at 4 (Defs.' Ex. 205). This Agreement memorialized Mylan's offer of up to a 50.625% rebate for exclusive position for EpiPen. *Id.* But, Mylan also offered up to 40.625% for 1-of-2 placement, meaning that health plans could access both EpiPen and competing EAI Auvi-Q and still realize about 80% of the discount that Mylan offered for exclusivity. *Id.* So, depending on what the payor preferred, it could select EpiPen as the exclusive product for a 10% increase in the rebate Mylan was offering. *Id.* Or, it could offer both products and receive the 40.635% rebate.

Mylan's rebate agreements with payors typically specified a term of three years or less. Doc. 2152-8 at 2, 9 (Defs.' Ex. 208) (Mylan/MedImpact Rebate Agreement **[**112]** with two year term); Doc. 2152-9 at 2 (Defs.' Ex. 209) (Mylan/Aetna Rebate Agreement with two year term); Doc. 2152-10 at 2-3 (Defs.' Ex. 211) (Mylan/OptumRx Rebate Agreement with two year term); Doc. 2192-8 at 11 (Pls.' Ex. 57) (Mylan/CVS Rebate Agreement with three year term). And, PBMs typically renegotiate their rebate agreements at least annually. *See* Doc. 2150-16 at 6 (Defs.' Ex. 189) (Stein (Humana) Dep. 228:1-5) (testifying that rebates were renegotiated annually); *see also* Doc. 2150-11 at 23-24 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 185:24-186:22). Also, Sanofi's rebate agreements typically "were annual contracts" and sometimes were renegotiated midterm. Doc. 2152-11 at 3-4 (Defs.' Ex. 212) (Borneman Dep. 28:9-29:17). Most of Mylan's rebate agreements with payors allowed termination without cause on 90 days' notice or less. *See, e.g.*, Doc. 2152-8 at 9 (Defs.' Ex. 208) (Mylan/MedImpact Rebate Agreement with 90 days' notice provision); Doc. 2152-12 at 5 (Defs.' Ex. 213) (Mylan/Aetna Rebate Agreement with 90 days' notice provision); Doc. 2155-1 at 3 (Defs.' Ex. 215) (Mylan/CIGNA Rebate Agreement with 60 days' notice provision).

Mylan's rebate agreements generally reserve to PBMs **[**113]** the right to alter their commercial formularies at any time. *See* Doc. 2155-2 at 4 (Defs.' Ex. 216) (Mylan/ESI rebate agreement) ("Nothing in this Agreement shall be construed to limit the ability of ESI or any ESI Client to remove a Product from formulary."); *see also* Doc. 2155-3 at 8 (Defs.' Ex. 217) (Mylan/CVS rebate agreement containing similar language); Doc. 2155-4 at 8 (Defs.' Ex. 218) (Mylan/OptumRx rebate agreement containing similar language); Doc. 2155-5 at 7 (Defs.' Ex. 219) (Mylan/Prime rebate agreement containing similar language). And, Mylan has renegotiated its rebate agreement with a PBM during a contract term when the PBM initiated negotiations as a way to seek better rebates. *See, e.g.*, Doc. 2150-10 at 34-37 (Defs.' Ex. 183) (Anderson (CVS) Dep. 231:2-234:3) (describing **[*966]** how CVS asked Sanofi and Mylan for better rebate offers mid-contract term).

Pfizer asserts that neither it nor its subsidiaries played any role in negotiating contracts, rebates, formulary placement, or discounts with wholesalers, payors, PBMs, or other industry partners. Doc. 2143-31 at 3, 6-8 (Defs.' Ex. 64) (Handel Dep. 138:9-12, 151:10-153:5); *see also* Doc. 2155-6 at 3 (Defs.' Ex. 220). Mylan's **[**114]** CEO Heather Bresch testified that she was not involved in the "day to day" negotiations and contract strategies with PBMs. Doc. 2143-3 at 17 (Defs.' Ex. 21) (Bresch Dep. 316:19-317:17). But Mylan documents show that Ms. Bresch was involved in discussions about EpiPen formulary placements and exclusions as Mylan negotiated these terms with PBMs. Doc. 2206-13 at 2 (Pls.' Ex. 61); Doc. 2206-14 at (Pls.' Ex. 62).

Sanofi Launches Auvi-Q

In 2013, Sanofi's revenue exceeded $43 billion. *See* Sanofi, Annual Report pursuant to *Section 13* or *15(d)* of the Securities Exchange Act of 1934, at 2-3 (Form 20-F) (Mar. 6, 2014), https://www.sec.gov/Archives/edgar/data/1121404/000104746914001951/a2217900z20-f.htm (reporting almost $44 billion, calculated using average exchange rate for 2013). Around the same time, Mylan's revenue was less than $7 billion. *See* Mylan Inc., Annual Report pursuant to *Section 13* or *15(d)* of the Securities Exchange Act of 1934, at 46 (Form 10-K) (Feb. 27, 2014), https://www.sec.gov/Archives/edgar/data/69499/000006949914000007/myl10k_20131231xdoc.htm (listing "Total revenues" as more than $6.9 billion).

In 2009, Sanofi secured a license to market and sell Auvi-Q. Doc. 2155-8 (Defs.' Ex. 222).[39] And, in January **[**115]** 2013, Sanofi launched Auvi-Q in the U.S. Doc. 2169 at 6 (Pretrial Order ¶ 2.a.46.). The Auvi-Q was the first and only EAI drug device with audiovisual cues to guide patients how to administer epinephrine. Doc. 2206-18 at 2-3 (Pls.' Ex. 150).

Mylan's Response to Auvi-Q

Before Auvi-Q's launch, Mylan internally referred to EpiPen as having "100% market share." Doc. 2192-17 at 3 (Pls.' Ex. 68). Mylan recognized there was a "strong interest" in Auvi-Q "due to is size shape and advanced technology." Doc. 2196-8 at 3 (Pls.' Ex. 151). And, Pfizer recognized that Auvi-Q posed "a significant threat to [its] EpiPen business." Doc. 2196-15 at 2 (Pls.' Ex. 158); *see also* Doc. 2196-10 at 3 (Pls.' Ex. 153) ("Auvi-Q represents a significant threat to EpiPen market share[.]").

So, Mylan decided to implement a "proactive" response to Auvi-Q that included using "[e]xclusivity language" in rebate agreements. Doc. 2196-19 at 35 (Pls.' Ex. **[*967]** 162). One Mylan employee suggested "only pay[ing] rebates if a client is willing to exclude Auvi[-]Q." Doc. 2206-19 at 2 (Pls.' Ex. 165). Mylan also proposed a strategy of using prior authorization and step edits against Auvi-Q. Doc. 2197-10 at 34 (Pls.' **[**116]** Ex. 174). Mylan referred to these strategies as "high controls." Doc. 2197-16 at 10 (Pls.' Ex. 180). Plaintiffs' expert opines that Mylan's use of "all three of these restrictive coverage statuses [*i.e.*, exclusive rebating, prior authorization, and step edits] significantly restrained the usage of rival EAIs." Doc. 2193-4 at 82 (Pls.' Ex. 85) (Elhauge Expert Report ¶ 155).

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[39] Once again, plaintiffs assert an objection to defendants' exhibit offered as evidentiary support for this factual statement. Defendants' Exhibit 222 is Sanofi's License and Development Agreement with Intelliject that granted Sanofi the right to market and sell Auvi-Q. Plaintiffs assert this Agreement is inadmissible hearsay to which no exception applies. Doc. 2190-1 at 77. Defendants respond that this document qualifies as a business record that is admissible under *Fed. R. Evid. 803(6)*'s exception to the hearsay rule. Doc. 2226-1 at 21. The court agrees. This document was produced by Sanofi. *See generally* Doc. 2155-8 (Sanofi Bates-numbered document). It's an Agreement that it entered in the course of its business. And, it likely qualifies as a business record that is admissible under the exception to the hearsay rule. *Fed. R. Evid. 803(6)*. Also, because this exhibit is a contract, it isn't hearsay because it has independent legal significance. *See* *Kepner-Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d 527, 540 (5th Cir. 1994)* ("***HN12***[] Signed instruments such as wills, contracts, and promissory notes are writings that have independent legal significance and are not hearsay." (citation and internal quotation marks omitted)). The court rejects plaintiffs' objection as utterly baseless.

Some PBMs testified that EAIs were not "historically managed aggressively" before Auvi-Q's launch. Doc. 2192-5 at 6 (Pls.' Ex. 54) (Minton (Anthem) Dep. 279:3-13); *see also* Doc. 2192-13 at (Pls.' Ex. 64) (Jan (Horizon) Dep. 143:23-144:2) (testifying that rebates weren't restrictive in the EAI class before 2013). Other witnesses recognized that the EAI market was "unique" but they provided different reasons for that conclusion. Doc. 2192-1 at 4 (Pls.' Ex. 50) (Eaton Dep. 122:13-123:25) (testifying that the EAI was "unique" because "patients get one prescription per year" and the product involves "a life-and-death situation" so "people are adamant [and] want to get [the] prescription filled"); Doc. 2192-2 at 3 (Pls.' Ex. 51) (Rogers Dep. 333:5-9) (testifying that the EAI category was "unique" because "market share for **[**117]** EpiPen was so dominant"); Doc. 2194-9 at 6 (Pls.' Ex. 109) (Bresch Dep. 248:3-18) (testifying that the EAI market was "unique" because it had a need to "expand the market"); Doc. 2197-6 at 3 (Pls.' Ex. 170) (Loreaux Dep. 213:12-214:15) (testifying that the EAI market was "unique" because it "predominately had one market player [with] nearly a hundred percent of the market share").

Before 2013, Mylan typically offered rebates below 10 percent. *See* Doc. 2155-9 at 5 (Defs.' Ex. 224);[40] *see also* Doc. 2197-7 at 3-4 (Pls.' Ex. 171) (Foster Dep. 212:17-213:8) (testifying that Mylan rebates were in the range of "3 to 5 percent"); Doc. 2197-8 at 3 (Pls.' Ex. 172) (Jordan Dep. 39:2-8) (testifying that, in 2011, Mylan rebates were in the single digits).

As Auvi-Q prepared to launch, Mylan implemented a strategy to "negotiate, where possible, language requiring plans to put EpiPen in sole preferred position and no restrictions." Doc. 2197-17 at 4 (Pls.' Ex. 181) (Korczynski Dep. 254:3-10). Mylan also sought to require prior authorizations and step edits. Doc. 2197-19 at 2 (Pls.' Ex. 183). Mylan told PBMs that, if they wanted to secure larger rebates, Mylan would require restrictions **[**118]** on Auvi-Q. Doc. 2197-13 at 3 (Pls.' Ex. 177) (Willing Dep. 63:17-25).

Mylan sought to "hammer Sanofi at launch." Doc. 2197-20 at 4 (Pls.' Ex. 184). Mylan proposed "strategic imperatives" that would "[p]reemptively blunt adoption of new entrants (branded and generic)[.]" Doc. 2198-1 at 132 (Pls.' Ex. 185). Robert Coury, then Mylan's CEO, instructed the **[*968]** marketing team to "pre-empt any new market entry[.]". Doc. 2198-2 at 2 (Pls.' Ex. 186). And, Mylan's Director of National Accounts expressed a desire to "block further competition." Doc. 2198-3 at 3 (Pls.' Ex. 187); *see also* Doc. 2206-20 at 2 (Pls.' Ex. 189) (discussing Mylan's efforts of "locking [Auvi-Q] out").

Also in anticipation of Auvi-Q's launch, Mylan increased the WAC price on the EpiPen several times. *See* Doc. 2198-16 at 15 (Pls.' Ex. 202) (recommending an "increase" of EpiPen's "WAC price [by] 19.9%" because there was an opportunity to "[g]ain incremental revenue on current volume before competition comes to market"); Doc. 2199-4 at 7 (Pls.' Ex. 210) (recommending "an immediate price increase on EpiPen, the size" of which "should depend on the launch timing of" Auvi-Q); Doc. 2199-5 at 16 (Pls.' Ex. 211) (noting that EpiPen price **[**119]** increases "now will elevate the overall market price giving the ability to take a discount off a higher WAC"). EpiPen's WAC price rose from a little over $100 for two EpiPens in 2007 to more than $600 for two EpiPens in 2016. Doc. 2199-6 at 2 (Pls.' Ex. 212). When one PBM complained that the EpiPen price increases were "not sustainable or acceptable[,]" a Mylan executive commented that a "reason for the higher WAC is these massive rebates" Mylan was paying. Doc. 2199-7 at 2 (Pls.' Ex. 213).

Mylan told various PBMs, including ESI, MedImpact, and Humana, that it would offer higher rebates but conditioned those rebates on excluding or restricting Auvi-Q from their formularies. *See* Doc. 2198-6 at 2 (Pls.' Ex. 191) (discussing with ESI that Mylan would not offer more rebates unless ESI was willing to block or restrict Auvi-Q); *see also* Doc. 2198-11 at 3 (Pls.' Ex. 197) (discussing that MedImpact cannot have access to rebates unless it controls

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[40] It's like a broken record. Plaintiffs assert an objection to defendants' Exhibit 224 based on inadmissible hearsay to which no exception applies. Doc. 2190-1 at 77. Yet, plaintiffs also don't dispute this statement of fact. *Id.* at 20; *see also* Doc. 2226-3 at 52 (discussing "SMF ¶ 156"). Defendants respond that this document qualifies as a business record that is admissible under *Fed. R. Evid. 803(6)*'s exception to the hearsay rule. Doc. 2226-1 at 21. The court agrees. As defendants have shown, this document, produced by Mylan, qualifies for admission as a business record under *Fed. R. Evid. 803(6)*'s exception to the hearsay rule. Doc. 2226-1 at 21; *see also* Doc. 2227-1 at 11-12 (Cuthbertson Decl.). The court thus overrules this objection, yet another of plaintiffs' meritless and needless evidentiary objections.

the EAI class); Doc. 2198-12 at 2 (Pls.' Ex. 198) (offering Humana "more rebate" if it makes EpiPen "1 of 1 and block[s] competitors"). As plaintiffs' expert explains, the "PBM industry is highly concentrated" and the "large PBMs generally offer the **[**120]** same set of pharmacy benefit formularies to many different insurers," so, as a consequence, "a single contract between a manufacturer and a PBM can affect the pharmacy benefit formularies of many different insurers." Doc. 2193-4 at 81 (Pls.' Ex. 85) (Elhauge Expert Report ¶ 153).

By mid-November 2013, Mylan reported that its "[m]ajor wins have resulted in Auvi-Q not being covered or requiring patients to try EpiPen before Auvi-Q in about 20% (87 million) of the US population." Doc. 2199-1 at 4 (Pls.' Ex. 207). One of Mylan's consultants commented that Mylan would "go down in pharma history" because Auvi-Q was offering a "better mousetrap" but was "at 7% share 1 year post launch—unheard of." Doc. 2199-2 at 2 (Pls.' Ex. 208). By June 2015, Mylan's Pricing Committee had approved Mylan offering rebates in the range of 50% to 60% off the EpiPen WAC for the largest PBMs and up to 30% for specifically targeted managed care accounts, conditioned on exclusive or preferred formulary coverage for EpiPen. Doc. 2199-3 at 2-5 (Pls.' Ex. 209).

After Auvi-Q entered the market, Mylan trained its sales force to understand "the 'spillover' effect[,]" meaning that in territories where Mylan was preferred **[**121]** on a majority of plans, the sales force should "emphasize the preferred plans[.]" Doc. 2199-9 at 2 (Pls.' Ex. 215); *see also* Doc. 2197-7 at 5 (Pls.' Ex. 171) (Foster Dep. 278:1-9) (explaining that the "concept of spillover typically refers to when a doctor is used to writing [a] product" because the manufacturer has "strong formulary positions" and "then it tends to have a spillover effect where the doctor just gets patterned into" **[*969]** prescribing the product). And, Mylan's sales force sought to "leverage EpiPen's superior formulary coverage" when competing against Auvi-Q. Doc. 2199-12 at 2 (Pls.' Ex. 218) (urging team to "put Sanofi out of business!"); *see also* Doc. 2197-15 at 8 (Pls.' Ex. 179) (noting in an email that recent "wins are HUGE!" and Mylan should "leverage them beyond belief!").

Mylan also listed as one of its "Message Areas with the most expansion potential" as "anti-competitive messages" about Auvi-Q. Doc. 2199-10 at 9 (Pls.' Ex. 216). It noted that "[b]undling of anticompetitive messages can move physicians, even if individual anticompetitive messages may not[.]" *Id.* at 11; *see also* Doc. 2199-11 at 6 (Pls.' Ex. 217) (suggesting that physicians "need to hear anticompetitive **[**122]** messages" about Auvi-Q).

Mylan marketed to physicians that EpiPen was "preferred" on many health plans while Auvi-Q was restricted. Doc. 2200-1 at 3 (Pls.' Ex. 227) (stating for "the 95 million patients in these major plans," EpiPen "is the preferred brand"). Mylan's marketing materials noted that "[h]ealth plans and PBMs make formulary decisions based on internal clinical and financial recommendations." *Id.* In one email, Mylan noted that "[f]rom a clinical perspective the plans have 'spoken' by selecting EpiPen over Auvi-[Q]" and encouraged sales people to "understand and leverage that [message] with their customers." Doc. 2199-9 at 2 (Pls.' Ex. 215). But, Mylan is not aware of any payor who chose EpiPen over Auvi-Q based on "clinical or superiority" reasons because that's not information that payors share with Mylan. Doc. 2200-3 at 3 (Pls.' Ex. 229) (Graham Dep. 179:15-21). And, as Mylan's expert testified, he is unaware of any PBM or payor refusing to cover Auvi-Q for "clinical reasons" because "both products have the same amount of epinephrine and [are] deemed bioequivalent by the FDA." Doc. 2200-4 at 3 (Pls.' Ex. 230) (Zieziula Dep. 26:13-20).

Also, Mylan funded and presented a **[**123]** study titled: "Auvi-Q Versus EpiPen Auto-Injectors: Failure to Demonstrate Bioequivalence of Epinephrine Delivery Based on Partial Area Under the Curve." Doc. 2200-5 at 3-5 (Pls.' Ex. 231). But, Mylan also recognized that the FDA had reviewed Auvi-Q and concluded that the epinephrine "demonstrat[ed] bioequivalence" with the epinephrine in EpiPen. *Id.* at 31.

Pfizer was apprised of Mylan's strategies for competing against Auvi-Q through its participation in the JCC. *See* Doc. 2199-14 at 89 (Pls.' Ex. 220) (JCC presentation discussing "a pre-emptive and launch action plan for future competition"). Also, Pfizer learned through its participation in the JCC about Mylan's success in blocking Auvi-Q from formulary access. Doc. 2199-15 at 44 (Pls.' Ex. 221) (JCC presentation discussing competitive intelligence about Auvi-Q and noting that "[m]ajor wins have resulted in Auvi-Q not being covered or requiring patients to try EpiPen before Auvi-Q in about 31% (93 million in the US population)").

Pfizer "raised concerns about EpiPen pricing" with Mylan. Doc. 2199-19 at 2 (Pls.' Ex. 225). Meridian's General Manager and President testified that he "didn't think" it "was an accurate description for the **[**124]** cost drivers" of EpiPen to say that the "wholesale price has changed over time to better reflect the multiple important product features and the value the product provides." Doc. 2194-1 at 3 (Pls.' Ex. 101) (Handel Dep. 163:15-164:22).

Sanofi's Rebate Agreements with PBMs

Sanofi's pricing strategy was to launch Auvi-Q at parity with EpiPen and then price at a premium because Sanofi felt that it "had the better product." *See also* Doc. 2150-24 at 3-4, 12 (Defs.' Ex. 197) (Viehbacher Dep. 93:14-94:6, 210:8-16). In January 2013, Sanofi launched **[*970]** Auvi-Q at a WAC of $241.00 per two-pack—just slightly above the $240.66 WAC for an EpiPen two-pack. Doc. 2143-13 at 2 (Defs.' Ex. 32).[41]

In July 2013, Mylan increased the WAC for EpiPen devices by 9.9%. Doc. 2157-1 at 3 (Defs.' Ex. 225). Sanofi adopted a "fast follower strategy," where it quickly followed any EpiPen WAC increases by raising the Auvi-Q WAC even higher. Doc. 2157-2 at 5 (Defs.' Ex. 226).[42] Sanofi increased Auvi-Q's WAC six times during the 33 months it marketed Auvi-Q, maintaining a premium over EpiPen for most of the period. Doc. 2157-3 at 3 (Defs.' Ex. 227).

Sanofi initially decided that it would not compete **[**125]** with Mylan on price, instead pursuing a "Mix of T2 and T3 access (not T2 at all cost)." Doc. 2157-4 at 5 (Defs.' Ex. 228). Sanofi's Vice President in charge of Auvi-Q, Bryan Downey, testified that Sanofi was "not planning for a lot of tier two access" for Auvi-Q and was "perfectly fine with tier two or tier three" placement for Auvi-Q. Doc. 2157-5 at 5-6 (Defs.' Ex. 229) (Downey Dep. 8:8-9:7). The head of Sanofi's allergy division agreed that Sanofi was "trying to really negotiate . . . for tier three coverage." Doc. 2157-7 at 3 (Defs.' Ex. 231) (Barry Dep. 156:2-12). And Sanofi's former Head of North America testified that Sanofi's strategy for Auvi-Q was to "get[] Tier 3 access so patients would have the product available versus going to Tier 2." Doc. 2157-8 at 3-4 (Defs.' Ex. 232) (Whitaker Dep. 45:16-46:3).

Sanofi's initial contracting guidelines for Auvi-Q rebates were "pretty small"—in the range of 3-10% for Tier 2. Doc. 2157-10 at 3-4 (Defs.' Ex. 234) (Denney Dep. 99:25-100:13). But, Sanofi's account executives reported that PBMs and payors were rejecting offers in this range as "not competitive" and even "laughable." *See, e.g.*, Doc. 2157-12 at 2 (Defs.' Ex. 236) (explaining **[**126]** Auvi-Q offer rejected by PBM as "inadequate"); Doc. 2157-13 at 2 (Defs.' Ex. 237) (informing Sanofi that its offer to PBM was "not competitive"); Doc. 2157-14 at 2 (Defs.' Ex. 238) (reporting that PBM called Auvi-Q offer "'laughable'"). Within a few months of launch, Mr. Downey questioned whether Sanofi was "being aggressive enough." Doc. 2157-15 at 3 (Defs.' Ex. 239).

PBMs' Coverage Decisions

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[41] The court rejects plaintiffs' objection to defendants' Exhibit 32—as well as their objection to Exhibit 225 cited in the first sentence of the next paragraph—based on inadmissible hearsay to which no exception applies. Doc. 2190-1 at 77. Plaintiffs don't dispute these statements of fact. *Id.* at 20; *see also* Doc. 2226-3 at 52 (discussing "SMF ¶¶ 156-157"). And, in any event, defendants correctly explain that these Mylan-produced documents qualify as business records that are admissible under *Fed. R. Evid. 803(6)*'s exception to the hearsay rule. Again, the court is perplexed by plaintiffs' purposeless objection tactics.

[42] Plaintiffs object to defendants' Exhibits 226 and 227 as inadmissible hearsay to which no exception applies. Doc. 2190-1. But, plaintiffs also don't dispute the factual statements that the exhibits support. *Id.* at 20; *see also* Doc. 2226-3 at 52-53 (discussing "SMF ¶ 158"). Nevertheless, defendants correctly explain that these Sanofi-produced documents qualify as business records that are admissible under *Fed. R. Evid. 803(6)*'s exception to the hearsay rule. For the same reasons, the court rejects all of plaintiffs' other objections to Sanofi-produced documents as inadmissible hearsay because the Sanofi documents qualify as business records that fall outside the definition of hearsay under *Fed. R. Evid. 803(6)*. Also, plaintiffs' objections fail the sincerity standard because plaintiffs themselves rely on Sanofi-produced business records as summary judgment evidence to support their own factual statements. *See, e.g.*, Doc. 2190-1 at 34 (citing Doc. 2192-12 (Pls.' Ex. 63) (Sanofi-produced internal email)).

When Auvi-Q launched, many PBMs and commercial insurers determined that either EpiPen or Auvi-Q devices **[*971]** were clinically adequate to treat anaphylaxis. *See, e.g.*, Doc. 2157-16 at 4 (Defs.' Ex. 240) (noting that ESI's Pharmacy & Therapeutics ("P&T") review committee had recommended Auvi-Q as an "optional" treatment for anaphylaxis); Doc. 2157-17 at 22 (Defs.' Ex. 241) (explaining that CVS had identified Auvi-Q and EpiPen as part of a "[t]herapeutically interchangeable class"); Doc. 2157-18 at 13 (Defs.' Ex. 242) (stating that Prime would choose "one epinephrine product" to cover); Doc. 2159-1 at 20 (Defs.' Ex. 243) (asserting that UnitedHealthcare's P&T committee "determined Auvi-Q to be therapeutically equivalent . . . to EpiPen"); Doc. 2159-2 at 5-6 (Defs.' Ex. 244) (Shia (Kaiser) Dep. 95:14-96:7) **[**127]** (testifying that Kaiser determined the "clinical efficacy would be the same" for Auvi-Q and EpiPen).[43] *But see* Doc. 2192-13 at 3 (Pls.' Ex. 64) (Jan (Horizon) Dep. 56:11-57:10) (testifying that Auvi-Q and EpiPen were "clinically . . . the same" but noting a "preference" for Auvi-Q because of its "convenience" and because it was a "more-consumer-friendly device").

Several large PBMs and payors told both Sanofi and Mylan that they might cover or prefer only one EAI product on their formularies. *See, e.g.*, Doc. 2159-3 at 3 (Defs.' Ex. 245) (stressing the "need to raise the level of importance with the brand team around CVS Caremark's plan to review the [EAI] class and choose an exclusive product"); Doc. 2159-4 at 2 (Defs.' Ex. 246) (reporting that Kaiser has "suggested that [it] only want[s] one product" and "there has been discussion of replacing Epi-Pen"); Doc. 2159-5 at 2 (Defs.' Ex. 247) (reporting that "MedImpact likes the Auvi-Q product but wishes to have only one product in the category"); Doc. 2159-6 at 2 (Defs.' Ex. 248) (reporting that OptumRx asked whether Mylan was "interested in a guaranteed exclusive position for EpiPen in exchange for the addition of 10% price protection"). **[**128]**

For example, in late 2012, OptumRx warned Mylan that "EpiPen is at risk" if it didn't offer price protection because the PBM was "well aware of the price increases Mylan [had] taken." Doc. 2159-7 at 3 (Defs.' Ex. 249). OptumRx also gave Mylan an example where "the benefit exclusion can be flipped to exclude the prominent brand." *Id.* About a month later, OptumRx told Mylan that it expected Sanofi to make a "strong rebate offer to gain coverage and potentially displace EpiPen[,]" so it was seeking a "competitive bid" from Mylan "to maintain [its] current positioning." Doc. 2159-8 at 2 (Defs.' Ex. 250). In early 2013, Cigna told Mylan that it "can use tier differential and step therapy" with the EAI class and that it was "looking for an offer for exclusive epinephrine positioning." Doc. 2159-9 at 2 (Defs.' Ex. 251).

But not all PBMs sought to manage the EAI class by excluding products from coverage. *See* Doc. 2192-13 at 3 (Pls.' Ex. 64) (Jan (Horizon) Dep. 56:11-57:23) (testifying that Auvi-Q and EpiPen both were offered on the "preferred tier" of the formulary); *see also* Doc. 2192-5 at 6 (Pls.' Ex. 54) (Minton (Anthem) Dep. 280:1-25) (testifying that Anthem was willing to cover multiple **[**129]** EAIs and not "seeking out exclusive offers"). And, some PBMs expressed concern about excluding EpiPen because of its large market share. *See* Doc. 2198-14 at 2 (Pls.' Ex. 200) (noting that, if forced to switch to Auvi-Q, patient disruption at Optum "would be really significant"); Doc. 2198-15 at 2 (Pls.' Ex. 201) **[*972]** (recognizing that, at MedImpact, it "would be very difficult for Sanofi to neutralize that savings advantage given [EpiPen's] current share"); Doc. 2192-5 at 7 (Pls.' Ex. 54) (Minton (Anthem) Dep. 292:22-293:5) (testifying that Mylan's market share had an impact in Anthem's decision to accept Mylan's offer because "the more share [Mylan] had, the more the rebate was attributable to that share" and "the value of selecting that scenario where [Anthem] would edit Auvi-Q was increased").

Also, Mylan recognized that PBMs would be "heavily impacted" if they worked against Mylan because of the large amount of administrative fees Mylan had paid them. Doc. 2198-16 at 15 (Pls.' Ex. 202). And, at least one PBM recognized that "with EpiPen's presence in the market and being established . . . there's basically going to be no way you could get everybody off of EpiPen" because that would require **[**130]** "mov[ing] at least 60 percent of [the] market share just to break even." Doc. 2192-20 at 65 (Pls.' Ex. 71).

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[43] The court rejects plaintiffs' objections to all of these third-party produced documents as inadmissible hearsay to which no exception applies. Doc. 2190-1 at 77 (objecting to defendants' Exhibits 235 through 243). Defendants assert that these documents—produced by PBMs—qualify as business records subject to *Fed. R. Evid. 803(6)*'s hearsay exception. Doc. 2226-1 at 21. The court agrees and thus overrules plaintiffs' objections.

When Auvi-Q launched in January 2013, many PBMs, including ESI, CVS, Prime, Aetna, and Cigna—covered Auvi-Q on Tier 3 by default before any review by their P&T Committees. Doc. 2157-4 at 17-18 (Defs.' Ex. 228). However, United, following its standard policy "not [to] cover new products . . . with the same active ingredients as other covered products" before P&T review, did not cover Auvi-Q at launch. Doc. 2150-13 at 10 (Defs.' Ex. 186) (Etemad (United) Dep. 84:9-16); *see also* Doc. 2159-8 at 2 (Defs.' Ex. 250).

PBMs and payors then solicited rebate offers from Mylan and Sanofi, giving them the opportunity to compete through rebates or other discounts, and with some payors suggesting a willingness to exclude or place restrictions on one of the products. *See, e.g.*, Doc. 2159-3 at 3 (Defs.' Ex. 245) (discussing "CVS Caremark's plan to review the [EAI] class and choose an exclusive product"); Doc. 2159-11 at 2 (Defs.' Ex. 253) (noting in CVS's bid solicitation letter to Mylan the availability of "exclusion opportunities"); Doc. 2159-13 at 5 (Defs.' Ex. 255) (explaining that OptumRx **[**131]** "intends to manage the products" in the EAI class "using a combination of tier placement and product exclusion"); Doc. 2160-1 at 2 (Defs.' Ex. 257) (explaining MedImpact was "looking for a 1 or 1 offer for the" EAI class); Doc. 2159-9 at 2 (Defs.' Ex. 251) (asserting that Cigna was "looking for an offer for exclusive epinephrine positioning"). When payors asked for non-exclusive rebate offers—or several rebate options—Mylan provided them. *See, e.g.*, Doc. 2152-1 at 4 (Defs.' Ex. 201) (providing several rebate offers to ESI but also providing "no bid" for several categories); Doc. 2152-2 at 19 (Defs.' Ex. 202) (same to CVS); Doc. 2160-3 at 2 (Defs.' Ex. 260) (same to OptumRx); Doc. 2160-4 at 5, 7 (Defs.' Ex. 261) (same to Prime); Doc. 2160-5 at 2-5 (Defs.' Ex. 262) (same to MedImpact).

Several PBMs testified that, after negotiating with both Mylan and Sanofi, each PBM and payor made its own independent formulary determinations for the EAI class and that Mylan never threatened to cut off EpiPen supply based on a PBMs' formulary decisions.[44] *See, e.g.*, Doc. 2160-7 **[*973]** at 3-5 (Defs.' Ex. 264) (Cunico (Presbyterian) Dep. 148:17-150:24, 178:21-179:5); Doc. 2150-16 at 8-10 (Defs.' Ex. 189) (Stein **[**132]** (Humana) Dep. 282:7-284:2); Doc. 2160-6 at 3-4 (Defs.' Ex. 263) (Brodeur (Aetna) Dep. 130:3-131:7); Doc. 2150-15 at 28 (Defs.' Ex. 188) (Hall (Prime) Dep. 150:11-25); Doc. 2152-13 at 6-7 (Defs.' Ex. 214) (Vargo (Aetna) Dep. 130:17-131:9); Doc. 2150-11 at 30-34 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 204:4-211:23); Doc. 2150-19 at 141 (Defs.' Ex. 192) (Minton (Anthem) Dep. 141:19-24). With the PBMs that chose to cover Auvi-Q, Mylan still paid rebates to those PBMs which covered both EpiPen and Auvi-Q. *See, e.g.*, Doc. 2152-2 at 2-22 (Defs.' Ex. 202) (Mylan/CVS Agreement); Doc. 2152-4 at 2-5 (Defs.' Ex. 204).

Three PBMs—CVS, Prime, and Cigna—never restricted or excluded Auvi-Q, covering it on Tier 2 or Tier 3 without restriction. Doc. 2150-10 at 9-13 (Defs.' Ex. 183) (Anderson (CVS) Dep. 112:12-116:23); Doc. 2150-15 at 16-17, 23-24 (Defs.' Ex. 188) (Hall (Prime) Dep. 110:22-111:9, 129:24-130:7); Doc. 2150-17 at 18-22 (Defs.' Ex. 190) (Kronberg (Cigna) Dep. 79:3-83:8). Also, with MedImpact, EpiPen had an exclusive Tier 2 position with a step-edit placed on Auvi-Q on MedImpact's three standard commercial formularies, but MedImpact's custom clients remained **[**133]** eligible for rebates from Sanofi if they covered Auvi-Q. Doc. 2160-9 at 2 (Defs.' Ex. 266). For example, MedImpact client University of Michigan added Auvi-Q in a Tier 2 position. Doc. 2160-10 at 2 (Defs.' Ex. 267). Also, on open plans—about 15% of MedImpact's clients—Auvi-Q had equal preferred positioning with EpiPen. Doc. 2160-9 at 2 (Defs.' Ex. 266).

PBMs made different decisions about how they would cover EpiPen and Auvi-Q. For example, Blue Cross Blue Shield of California covered both EpiPen and Auvi-Q on the preferred brand tier. Doc. 2160-11 at 2 (Defs.' Ex. 268). Humana covered EpiPen on the preferred tier, and Auvi-Q as non-preferred. *See* Doc. 2160-12 at 3 (Defs.' Ex.

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[44] Plaintiffs attempt to controvert the statement that Mylan never threatened to cut off supply by citing two Mylan documents. But neither document, even when construed in plaintiffs' favor, suggests that Mylan threatened to cut off supply of EpiPens. *See* Doc. 2192-17 at 2-3 (Pls.' Ex. 68) (listing as a "talking point" for a meeting with MedImpact that "Mylan will terminate its current contract if MedImpact implements a step edit *against EpiPen*[,]" meaning that Mylan will withdraw its current rebates if the PBM imposed a restriction on EpiPen but never saying anything about cutting off EpiPen supply (emphasis added)); Doc. 2192-18 at 2 (Pls.' Ex. 69) (informing OptumRx that "[i]f for some reason, [OptumRx/UnitedHealthcare] decides *to exclude EpiPen* in 2014, we will not pay any enhanced rebates in 2013[,]" but never mentioning that Mylan would cut off EpiPen supply (emphasis added)).

269); *see also* Doc. 2160-16 at 3 (Defs.' Ex. 270). Presbyterian Health covered Auvi-Q on the preferred tier and EpiPen as non-preferred. Doc. 2160-14 at 2 (Defs.' Ex. 271).[45] Anthem/Wellpoint covered EpiPen as the preferred brand and placed a restriction on Auvi-Q. Doc. 2161-1 at 2 (Defs.' Ex. 274). Kaiser Permanente chose to cover only just one device and selected EpiPen.[46] Doc. 2161-5 at 3-4 (Defs.' Ex. 278). And, Geisinger Health Plan restricted EpiPen in favor of Auvi-Q. Doc. 2161-6 at 2 (Defs.' Ex. 279).

By **[**134]** the beginning of 2014, Sanofi recognized that Mylan's "very aggressive approach on pricing to try to exclude Auvi-Q" was affecting Auvi-Q's sales, so "it became clear" to Sanofi that it had "no choice but to try to gain access to the marketplace by significantly discounting" Auvi-Q. Doc. 2150-24 at 5-6 (Viehbacher Dep. 121:18-122:10). In January 2014, Sanofi's CEO suggested "mak[ing] an offer that kicks [Mylan] off a formulary. If Mylan knows we can be aggressive it may help." Doc. **[*974]** 2161-7 at 2 (Defs.' Ex. 280). Sanofi's Head of North America agreed that Sanofi should "get aggressive." Doc. 2161-8 at 2 (Defs.' Ex. 281).

Sanofi succeeded in reversing its exclusion from ESI's national formulary. Doc. 2161-10 at 2 (Defs.' Ex. 283). As part of its negotiations with ESI to achieve coverage for Auvi-Q, Sanofi offered additional rebates on its insulin drug Lantus. *See* Doc. 2192-23 at 3 (Pls.' Ex. 74); *see also* Doc. 2192-14 at 2 (Pls.' Ex. 75). As a Sanofi witness testified, the Lantus offers were an "unprecedented" and "desperate move" by Sanofi to secure more formulary access for Auvi-Q. Doc. 2192-4 at 3 (Pls.' Ex. 53) (Borneman Dep. 138:18-139:17).

ESI then approached Mylan for a better rebate **[**135]** offer, and initially, Mylan offered just a 2% enhancement. Doc. 2161-9 at 8 (Defs.' Ex. 282). ESI responded by telling Mylan that it would switch to covering Auvi-Q as a preferred product in 2015. *Id.* ESI then gave Mylan an ultimatum: Either offer a 45% rebate to share Tier 2 with Auvi-Q or offer a 58% rebate to remain exclusive. *Id.* Mylan responded by offering a 45% rebate to share Tier 2 with Auvi-Q but offered just a 55% rebate to remain exclusive. Doc. 2161-11 at 3 (Defs.' Ex. 284). ESI accepted Mylan's 45% rebate offer and covered both EpiPen and Auvi-Q on its main formulary in 2015. Doc. 2161-10 at 2 (Defs.' Ex. 283). But, it excluded EpiPen on its High Performance formulary in favor of Auvi-Q. Doc. 2161-12 at 3 (Defs.' Ex. 285).

Sanofi had success with Aetna too. It offered Aetna a 65% rebate for exclusivity for 2015. Doc. 2161-13 at 2 (Defs.' Ex. 286). Aetna then used Sanofi's offer to push Mylan to offer a 45% rebate for EpiPen to be co-preferred on Tier 2. Doc. 2161-14 at 2 (Defs.' Ex. 287). Ultimately, Sanofi agreed to a 30% rebate for Auvi-Q to be co-preferred on Tier 2 (a lower rebate than Mylan for the same access). Doc. 2162-1 at 7-9 (Defs.' Ex. 289). Aetna then made **[**136]** EpiPen and Auvi-Q co-preferred on its value and premier formularies effective January 1, 2015. Doc. 2162-3 at 2 (Defs.' Ex. 291).

Also, Sanofi improved its coverage at CVS by offering rebates of 40% for unrestricted coverage, 50% for exclusive preferred coverage, and 65% for exclusive formulary coverage with EpiPen and Adrenaclick excluded. Doc. 2162-4 at 19-20 (Defs.' Ex. 292).[47] The parties memorialized the rebate menu in a rebate agreement effective July 1, 2014, through December 31, 2015. Doc. 2162-5 at 2-28 (Defs.' Ex. 293). With this offer, Sanofi not only secured co-preferred Tier 2 formulary coverage for Auvi-Q on CVS's Preferred Drug List, but it also became the sole preferred drug (with EpiPen excluded) on CVS's Value Based Formulary beginning July 1, 2014, and CVS's Advanced Control Formulary beginning October 1, 2014. Doc. 2162-6 at 2 (Defs.' Ex. 294). And, CVS then used this offer to persuade Mylan to offer increased rebates to avoid exclusion on its Preferred Drug List. Doc. 2162-7 at 3-4 (Defs.' Ex. 295); Doc. 2162-8 at 6 (Defs.' Ex. 296); Doc. 2162-9 at 3-5 (Defs.' Ex. 297). CVS continued to exclude EpiPen

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[45] Sanofi offered 25% rebates to Presbyterian Health, Doc. 2160-15 at 3 (Defs.' Ex. 272), while Mylan offered 15.5% rebates, Doc. 2160-16 at 2 (Defs.' Ex. 273).

[46] A Kaiser Permanente witness testified that the company usually contracts for one drug and it solicits up-front discounts instead of rebates. Doc. 2159-2 at 3-4, 14-15 (Defs.' Ex. 244) (Shia (Kaiser) Dep. 82:14-83:3, 264:14-265:19). The witness further testified that when it chose to stay with EpiPen Auvi-Q launched because Mylan offered "the better price." *Id.* at 7-9 (Defs.' Ex. 244) (Shia (Kaiser) Dep. 106:11-108:1).

[47] The percentages include base rebates, incremental rebates, and a 4% administrative fee.

devices on the Value Based Formulary and Advanced Control Formulary **[**137]** until Sanofi recalled Auvi-Q from the market. Doc. 2162-12 at 2-3 (Defs.' Ex. 300); *see also* Doc. 2150-10 at 38-39 (Anderson (CVS) Dep. 252:16-253:22).

Sanofi also maintained coverage it had previously secured at Prime and Cigna, among others. Doc. 2162-13 at 7 (Defs.' Ex. 301). An August/September 2014 internal **[*975]** Sanofi document recognized the advances it had made in coverage by stating, "Thanks for Your Tremendous Efforts to Recapture and Secure Access[,]" and then listing "Great Recent Auvi-Q Decisions" with 10 PBMs. *Id.*

But Sanofi wasn't able to secure favorable coverage with every PBM in 2015. For example, United gave Sanofi the opportunity to renegotiate. Doc. 2162-14 at 3 (Defs.' Ex. 302). United expressly requested an offer for exclusive coverage, and it told Sanofi its target rebate was 60%. *Id.* Sanofi did not make an exclusive offer, offering instead a lower rebate (35%) for coverage at any tier. Doc. 2162-15 at 5 (Defs.' Ex. 303). In contrast, Mylan offered a higher rebate (37%) for exclusive coverage and maintained its exclusive position. Doc. 2163-1 at 10 (Defs.' Ex. 304).

Similarly, in March 2014, Sanofi approached MedImpact about removing a step-edit on Auvi-Q. Doc. 2163-2 **[**138]** at 3 (Defs.' Ex. 305). MedImpact told Sanofi it "would need to offer a discount in the upper 30s to low 40s . . . to even open the conversation." *Id.* at 2. And, MedImpact recognized that it "would be very difficult for Sanofi to neutralize that [EpiPen] savings advantage given [EpiPen's] current share." *Id.* at 2. Sanofi declined to offer the requested discount. Doc. 2163-3 at 2 (Defs.' Ex. 306); Doc. 2163-4 at 2 (Defs.' Ex. 307).

A 2016 Pfizer email identified the "cost of goods sold" for an EpiPen 2-Pak as $18.32. Doc. 2193-9 at 2 (Pls.' Ex. 90). Mylan never sold EpiPen devices at a price below production costs. Doc. 2163-5 at 9-10, 39-55 (Defs.' Ex. 308) (Willig Expert Report ¶¶ 14, 89-122) (concluding that "Mylan's prices, taking full account of rebates and price protection, were above an appropriate measure of its cost" in analysis of PBM contracts).[48] Also, there is no evidence that a PBM or payor ever excluded Sanofi when it offered a lower per-unit price than Mylan. *See id.* at 64 (¶ 142) (emphasizing that plaintiffs' expert had failed to identify "a single instance where Auvi-Q was offered at a lower net price per unit than EpiPen" and still "a plan 'restricted' Auvi-Q on its formulary"). **[**139]** There are, however, examples where Sanofi offered higher rebates and price protection to PBMs, but it was unable to secure exclusivity for Auvi-Q over EpiPen. *See, e.g.*, Doc. 2193-1 at 4 (Defs.' Ex. 82) (showing Sanofi's offer to ESI of a 60.625% rebate with 10% price protection for exclusivity); *see also* Doc. 2193-3 at 2 (showing Sanofi offer Aetna 65% rebates for exclusive coverage compared to Mylan's 55% exclusive offer).

Prof. Elhauge performed an analysis showing the percentage of Auvi-Q foreclosure to consumers—both insured and uninsured. Doc. 2192-6 at 90 (Pls.' Ex. 55) (Elhauge Reply Expert Report Fig. 104). His analysis shows that, in 2013, about 80% of consumers had access to Auvi-Q. *Id.* In 2014, that number fell to around 65%, but it grew again in 2015, to about 69%, meaning that Auvi-Q was foreclosed from about 31% of consumers. *Id.* In Canada, where Auvi-Q had access equal to EpiPen, Auvi-Q reached a 30% market share **[*976]** within at least three years of launch. Doc. 2200-12 at 4 (Pls.' Ex. 240) (Fairest Dep. 236:20-237:24); Doc. 2200-13 at 2 (Pls.' Ex. 241).

PBM Negotiations

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[48] Plaintiffs try to controvert this fact by citing their own expert's opinion that Mylan's rebate agreements violate the discount attribution test. Doc. 2192-6 at 237-38, 247-50 (Pls.' Ex. 55) (Elhauge Reply Expert Report ¶¶ 402, 419-22). As Prof. Elhauge explains, the discount attribution test "shows that [Mylan's rebate agreements] have the potential to force an equally efficient rival to exit the market." *Id.* at 237-38 (¶ 402). And, applying that test to rebate agreements at issue here, he concludes that "many or most of Mylan's agreements did in fact fail the discount attribution test by resulting in below-cost incremental prices." *Id.* But, as defendants correctly explain, Prof. Elhauge's analysis isn't evidence that Mylan sold an EpiPen device at a price below its production cost.

Pfizer played no role in PBM negotiations.[49] Several PBMs testified that their negotiations with Mylan **[**140]** were "spirited" and even "contentious." *See, e.g.*, Doc. 2150-11 at 30-31 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 207:7-208:8); Doc. 2150-16 at 7 (Defs.' Ex. 189) (Stein (Humana) Dep. 229:1-4). PBMs and drug manufacturers have "competing priorities" where the manufacturer is trying to secure the lowest rebates but also with favorable formulary position while PBMs are trying to secure larger rebate offers on drug products. Doc. 2150-11 at 29 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 206:2-20); Doc. 2150-16 at 7 (Defs.' Ex. 189) (Stein (Humana) Dep. 229:6-13); Doc. 2150-10 at 29-30 (Defs.' Ex. 183) (Anderson (CVS) Dep. 209:21-210:1). Several PBMs and payors testified that they never conspired with Mylan to exclude Auvi-Q. Doc. 2150-11 at 30-31 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 207:7-208:8); Doc. 2150-16 at 7 (Defs.' Ex. 189) (Stein (Humana) Dep. 229:14-17); Doc. 2159-2 at 10 (Shia (Kaiser) Dep. 154:3-9).

Some PBMs and payors testified that they used exclusivity to extract higher rebates from both Mylan and Sanofi. *See, e.g.*, Doc. 2150-14 at 6-7, 9 (Defs.' Ex. 187) (Ayers (MedImpact) Dep. 150:18-151:2, 162:1-22) (agreeing that MedImpact sought "to create the perception within Mylan" that **[**141]** Auvi-Q "could be a formidable challenger" to EpiPen in order "to induce Mylan to provide a larger rebate[,]" and that MedImpact asked both Sanofi and Mylan for 1-of-1 (exclusive position) proposals); Doc. 2150-19 at 7 (Defs.' Ex. 192) (Minton (Anthem) Dep. 281:17-25) (testifying that Auvi-Q was "the highest costing product" and Anthem was "looking to see how we could bring down a cost in the class by making EpiPen more preferred").

Several payors testified that—despite EpiPen's market share—they could have excluded EpiPen because they could shift product use from EpiPen to Auvi-Q. *See, e.g.*, Doc. 2150-17 at 26-27 (Defs.' Ex. 190) (Kronberg (Cigna) Dep. 148:19-149:14) (testifying that "people will be okay with moving" products when "they're clinically equivalent"); Doc. 2150-13 at 13 (Defs.' Ex. 186) (Etemad (United) Dep. 115:21-23) (testifying that "it was a possibility to exclude" EpiPen from coverage); Doc. 2159-2 at 10-11 (Shia (Kaiser) Dep. 260:36-261:13) (testifying that "it would not be difficult" to move consumers from "one branded EAI device to another branded EAI device"). ESI implemented a strategy that sought "to make the product that has lots of market share [*i.e.*, EpiPen] **[**142]** feel threatened" by potential exclusion "to get the lowest net cost." Doc. 2150-11 at 12 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 154:18-24). Sanofi reported internally that "Aetna believe[d] Auvi-Q would see an 80% shift of utilization from Epi-Pen in [Year] 1" if Aetna accepted Sanofi's exclusive offer. Doc. 2161-13 at 3 (Defs.' Ex. 286).

CVS serves as an example of a PBM who successfully shifted patients to Auvi-Q after it excluded EpiPen from its Advanced Control Formulary ("ACF"). Doc. 2163-11 at 2-3 (Defs.' Ex. 314). On this plan, EpiPen's market share went from 92% in Q4 2014 to 0.2% by Q2 2015. *Id.* CVS told Mylan in 2015 that its market share on that formulary was "all but gone." *Id.* at 3. CVS also noted that EpiPen's market share on CVS's Value Based **[*977]** Formulary was "still holding share." *Id.* But, it warned Mylan that it "view[ed] the ACF as a trial balloon" and that there had "been no noise or complaints . . . which would indicate not a big deal excluding epipen." *Id.* Mylan confirmed that EpiPen utilization on the plans that adopted the CVS Value Formulary, including plans of large corporations like Comcast and Home Depot, "completely disappeared in Q4 2014," necessitating an enhanced **[**143]** rebate offer to "reverse the exclusion." Doc. 2163-12 at 11-12 (Defs.' Ex. 315). CVS projected that EpiPen's share, if CVS excluded EpiPen in favor of Auvi-Q on its national template formulary, would drop from 66% to 7%, with Auvi-Q's share increasing from 10% to 75%. Doc. 2163-13 at 3 (Defs.' Ex. 316). West Virginia's Medicaid program also shifted 90% of its market share to Auvi-Q in just two quarters. Doc. 2163-14 at 2 (Defs.' Ex. 317). Also, some PBMs testified about past success in other markets shifting patient volume from market leading drugs to upstart competitors for other products. *See, e.g.*, Doc. 2150-10 at 26-28 (Defs.' Ex. 183) (Anderson (CVS) Dep. 200:18-202:1); Doc. 2150-11 at 26-27 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 191:21-192:15).

As an ESI witness testified, the increased rebates ESI negotiated from Mylan and Sanofi produced lower net prices for EAI devices. Doc. 2150-11 at 13 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 155:7-11) (testifying that, by 2015, ESI was "highly effective in making this a very competitive class and bringing the rates down, lowering that cost, both for our plans and ultimately for many members").

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[49] Plaintiffs don't dispute this fact. Doc. 2190-1 at 20 (noting that defendants' SMF ¶ 179 is undisputed).

Sanofi Recalls Auvi-Q and Returns Its Rights

In the **[**144]** summer of 2015, Sanofi learned that some of its Auvi-Q devices may fail to inject epinephrine. Doc. 2163-15 at 2 (Defs.' Ex. 318); Doc. 2163-16 at 4-6 (Defs.' Ex. 319). On October 22, 2015, the FDA conducted a surprise inspection at Sanofi's manufacturing facility. Doc. 2163-17 at 2-4 (Defs.' Ex. 320). A few days later, Sanofi issued a Class I voluntary recall of all Auvi-Q devices in the United States and discontinued Auvi-Q manufacturing operations. Doc. 2169 at 6 (Pretrial Order ¶ 2.a.47.). The FDA reserves a Class I recall for cases involving "a reasonable chance that a product will cause serious health problems or death." *What is a Medical Device Recall*?, FDA (current as of Sept. 26, 2018), https://www.fda.gov/medical-devices/medical-device-recalls/what-medical-device-recall. In a letter to the FDA, Sanofi explained that its recall was "[b]ased on the complexity of the Auvi-Q device (27 components, including an audio device) and the occurrence of three distinct potential quality events over the past four months." Doc. 2164-1 at 3 (Defs.' Ex. 322).

Sanofi considered renegotiating its contract rights with kaléo. Doc. 2200-15 at 4-28 (Pls.' Ex. 243). In a presentation discussing that **[**145]** strategy, Sanofi noted that when it "signed the deal 5 years ago, the market was quite different and neither company anticipated the managed care response or the aggressive tactics that Mylan would employ." *Id.* at 7; *see also* Doc. 2200-16 at 3 (Pls.' Ex. 244) (assuming that Auvi-Q would have strong formulary access at launch).

On December 7, 2015, Sanofi advised kaléo it would return the rights for Auvi-Q and terminate the license agreement. Doc. 2164-2 at 3-7 (Defs.' Ex. 323) (Barry Dep. 21:8-25:3). On February 24, 2016, Sanofi and kaléo signed a termination agreement. Doc. 2164-3 at 2 (Defs.' Ex. 324). Sanofi's then-Head of Global Commercial Operations testified that "the recall was the single and only reason" that Sanofi returned its rights to Auvi-Q. Doc. 2163-6 at 5-6 **[*978]** (Defs.' Ex. 309) (Guenter Dep. 327:23-328:6). Also, he testified:

> So the only reason why [Sanofi] decided to [return the Auvi-Q rights] was a potential relaunch after whatever it would be, 12, 15 months, would have been a very, very costly endeavor because we would anticipate that Mylan would of course be at least as aggressive in the second potential relaunch period as compared to the first. So that's what made us **[**146]** decide that given the recall of the product that it didn't make economic sense to relaunch the product.

Doc. 2193-6 at 5 (Pls.' Ex. 87) (Guenter Dep. 358:17-359:15); *see also* Doc. 2200-17 at 4-5 (Pls.' Ex. 245) (Barry Dep. 37:24-38:14) (testifying that after "[c]onsidering the market environment" and "the behaviors of the competitor, and assuming that there was a likelihood that [Mylan] would continue to try to blunt our launch in terms of using their lion's share of the market inappropriately and the level of investment that would be required to achieve a relaunch," Sanofi "determined that based on the pro forma of the general medicines team that it would be best to put those investments somewhere else and then . . . transition the product back to" kaléo).

Shortly after Sanofi removed Auvi-Q from the market in October 2015, Mylan "took a 14.9% WAC increase on" November 21, 2015, "increasing the WAC/pen to $264.85." Doc. 2200-21 at 3 (Pls.' Ex. 249). And, Mylan began "evaluating all contracts (both with the States and Payors) now that Auvi-Q [had] exited the market" and "working [to] improve these rates for 2016[.]" *Id.* In negotiations with a PBM, Mylan's Bruce Foster noted that Mylan **[**147]** was "hoping to reduce [its] average rebate percentage" based on a "directive [that came] down from the very top leadership at Mylan." Doc. 2201-1 at 2 (Pls.' Ex. 250). As PBM Magellan recognized, now that "EpiPen is the only game in town[,]" Mylan didn't "need to be as aggressive with rebates to compete. It's that simple." Doc. 2201-2 at 2 (Pls.' Ex. 251).

In February 2017, kaléo reintroduced Auvi-Q in the United States. Doc. 2169 at 6 (Pretrial Order ¶ 2.a.48.). It offered Auvi-Q at a WAC of $4,500. Matthew Herper, *In Rube Goldberg Price Scheme, EpiPen Competitor Auvi-Q To Be Free For Patients, $4,500 For Their Insurers*, Forbes (Jan. 19, 2017), https://www.forbes.com/sites/matthewherper/2017/01/19/epipen-competitor-auvi-q-to-be-free-for-most-patients-but-cost-4500-for-insurers-in-rube-goldberg-scheme/#3ea207ae3fe6.[50]

Mylan Enters Settlement Agreement with DOJ

In 2017, Mylan agreed to pay $465 million to the Department of Justice to resolve claims that it knowingly misclassified the EpiPen as a generic drug to avoid paying rebates owed to Medicaid. Doc. 2207-3 at 2 (Pls.' Ex. 238). "The claims settled by [the] agreement [were] allegations only, and there [was] no determination **[**148]** of liability." *Id.* But, at least one payor recognized that Mylan was paying lower rebates on Medicaid plans based on its classification of EpiPen as a generic. *See* Doc. 2200-11 at 3 (Pls.' Ex. 239) (noting that "[e]very data point we have suggest[s] **[*979]** the Epipen is a brand (because it is); however; [Mylan has] been paying federal rebates at 13% of AMP as if it was a generic" and recognizing that "[i]f CMS requires Mylan to recalculate their rebates to reflect a branded status as we are expecting, the federal rebate has the potential to increase drastically").

II. Summary Judgment Standard

The standard for deciding summary judgment under *Federal Rule of Civil Procedure 56* is well-known. ***HN13***[] Summary judgment is appropriate if the moving party demonstrates that "no genuine dispute" exists about "any material fact[,]" and the moving party is "entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see also* *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. When the court applies this standard, it views the evidence and draws reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*. An issue of "material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" on that issue. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. And, an issue of fact is "material" **[**149]** if it has the ability to "affect the outcome of the suit under the governing law[.]" *Id.*

HN14[] The party moving for summary judgment bears the initial burden of showing "the basis for its motion." *Celotex, 477 U.S. at 323*; *Kannady v. City of Kiowa, 590 F.3d 1161, 1169 (10th Cir. 2010)* (explaining that the moving party bears "'both the initial burden of production on a motion for summary judgment and the burden of establishing that summary judgment is appropriate as a matter of law'" (quoting *Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 979 (10th Cir. 2002)*)). A summary judgment movant can satisfy this burden by demonstrating "there is an absence of evidence to support the nonmoving party's case." *Celotex, 477 U.S. at 325*; *see also* *Kannady, 590 F.3d at 1169* (explaining that the moving party, to meet its summary judgment burden, "need not negate the non-movant's claim, but need only point to an absence of evidence to support the non-movant's claim" (citation and internal quotation marks omitted)).

HN15[] If the moving party satisfies its initial burden, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson, 477 U.S. at 250* (citation and internal quotation marks omitted); *see also* *Kannady, 590 F.3d at 1169* ("If the movant carries [the] initial burden, the nonmovant may not rest on its pleadings, but must bring forward specific facts showing a genuine issue for trial [on] those dispositive **[**150]** matters for which it carries the burden of proof." (citation and internal quotation marks omitted)). To satisfy this requirement, the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex, 477 U.S. at 324* (citation and internal quotation marks omitted). When deciding whether a party has

[50] As noted previously, *see supra* note 9, plaintiffs assert a blanket objection to documents that defendants cite as summary judgment evidence but which they didn't submit as exhibits to their summary judgment motion. Doc. 2190-1 at 76-77. The above-cited *Forbes* article is one of the citations to which plaintiffs object. *Id.* at 77 n.439 (asserting that the court can't consider the citation in defendants' footnote 429). But, plaintiffs also don't dispute defendants' factual assertion that defendants support with the exhibit. *See* Doc. 2190-1 at 20 (noting that plaintiffs don't dispute defendants' SMF ¶ 188). So, the court includes the above-recited fact because plaintiffs don't controvert it.

shouldered its summary judgment burden, "the judge's function" is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249.

HN16[] Summary judgment is not a "disfavored procedural shortcut[.]" Celotex, 477 U.S. at 327. Instead, it is an important procedure "designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id.* (quoting Fed. R. Civ. P. 1).

[*980] Just recently, our Circuit[51] has reiterated that "'HN17[] summary judgment should be used sparingly in antitrust cases[.]'" N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs., 994 F.3d 1166, 1174 (10th Cir. 2021) (quoting Bell v. Fur Breeders Agric. Co-op., 348 F.3d 1224, 1229 (10th Cir. 2003)). But still, a court must apply "'the usual rules governing summary judgment'" to antitrust cases. *Id.* (quoting Bell, 348 F.3d at 1229); *see also* id. at 1172 (affirming trial court's decision granting summary judgment against plaintiff's Sherman Act § 2 claims because **[**151]** plaintiff "failed to establish that Defendants had engaged in exclusionary or anticompetitive conduct"). Like "any Rule 56 motion," an antitrust plaintiff "has the burden 'to set forth specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting In re Rumsey Land Co., 944 F.3d 1259, 1270 (10th Cir. 2019)). And, as the Supreme Court has recognized, "[s]ummary judgments have a place in the antitrust field" because "[s]ome of the law in this area is so well developed that [when] the gist of the case turns on documentary evidence, the rule at times can be divined without a trial." White Motor Co. v. United States, 372 U.S. 253, 259, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963); *see also* SEC v. Geyser Mins. Corp., 452 F.2d 876, 881 (10th Cir. 1971) (explaining that "even in antitrust litigation, if the pertinent area of law is well developed and the case turns on documentary evidence, disposition by summary judgment may be appropriate" (citing White Motor Co., 372 U.S. at 259)).

With this governing legal standard explained, the court now turns to defendants' arguments supporting summary judgment against plaintiffs' claims.

III. Analysis

Defendants move for summary judgment against plaintiffs' two claims—one asserting antitrust claims violations and the other claiming RICO violations. The court addresses defendants' summary judgment arguments, below. *First*, the court addresses whether the summary judgment facts **[**152]** present any triable issue for plaintiffs' antitrust claims. *Second*, the court decides whether the undisputed facts warrant summary judgment against plaintiffs' RICO claims.

A. Antitrust Claims

Plaintiffs assert state antitrust conspiracy and monopolization claims under certain state laws. Doc. 2169 at 42, 44-45 (Pretrial Order ¶¶ 4.a., 4.d.).

Generally, HN19[] an antitrust conspiracy requires the plaintiff to establish: "(1) concerted action in the form of a contract, combination, or conspiracy, and (2) an unreasonable restraint of trade." Systemcare, Inc. v. Wang Lab.

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[51] Our court has held that "HN18[] an MDL transferee court applies the law of the circuit in which it sits." In re: Syngenta AG Mir 162 Corn Litig., No. 14-md-2591-JWL, 2016 U.S. Dist. LEXIS 135658, 2016 WL 5481997, at *1 n.1 (D. Kan. Sept. 29, 2016). Although the Tenth Circuit hasn't addressed this question, our court has explained that this "ruling is consistent with the rule followed by a number of circuit courts that have considered the question." *Id.* (first citing Murphy v. FDIC, 208 F.3d 959, 965-66 (11th Cir. 2000); then citing In re U.S. Dep't of Defense & U.S. EPA Final Rule, 817 F.3d 261, 272 (6th Cir. 2016)); *see also* AER Advisors, Inc. v. Fid. Brokerage Servs., LLC, 921 F.3d 282, 288-89 (1st Cir. 2019) (joining every Circuit that has considered the issue by holding that "the transferee court applies its own Circuit's cases on the meaning of federal law"); In re Takata Airbag Prods. Liab. Litig., 464 F. Supp. 3d 1291, 1300 (S.D. Fla. 2020) ("Questions of federal law in cases transferred under 28 U.S.C. Section 1407 are governed by the clearly settled law of the transferee court's circuit.").

Corp., 117 F.3d 1137, 1139 (10th Cir. 1997) (citing 15 U.S.C. § 1); *see also* Bushnell Corp. v. ITT **[*981]** Corp., 973 F. Supp. 1276, 1285 (D. Kan. 1997) (Lungstrum, J.) (citing 15 U.S.C. § 1).[52] And, to prevail on a monopolization claim, a plaintiff must prove: (1) defendants have "monopoly power in a properly defined relevant market;" and (2) that defendants "willfully acquired or maintained this power by means of anticompetitive conduct." United States v. AMR Corp., 335 F.3d 1109, 1113 (10th Cir. 2003) (citing 15 U.S.C. § 2 (further citation omitted)).

Here, plaintiffs allege two theories to support their conspiracy and monopolization claims under the antitrust laws. *First*, they allege that defendants entered a "reverse payment" settlement that unlawfully delayed generic competition from entering the market and competing against the EpiPen. *Second*, they allege that defendants **[**153]** foreclosed competition by entering unlawful exclusive dealing arrangements in the form of Mylan's rebate agreements with PBMs. Defendants challenge both theories on summary judgment. The court addresses each theory, in turn, below.

1. Generic Delay Theory

Plaintiffs' first antitrust theory asserts that defendants and Teva entered settlement agreements in "tandem" that resolved the EpiPen and Nuvigil patent litigations. Doc. 2169 at 16 (Pretrial Order ¶ 3.a.1.b.). Plaintiffs contend that "[n]either settlement, viewed independently, was economically rational[,]" but "through the tandem EpiPen and Nuvigil settlements, Mylan and Teva guaranteed that they would both profit by limiting competition in their respective monopoly marketplaces rather than compete." *Id.* Plaintiffs assert that the settlements "effectively precluded generic competition for at least 3 years" in the EAI market and "allowed Mylan to raise the EpiPen's price without fear of generic competition and ensured that Pfizer and Mylan would continue to share millions of dollars in unlawful monopoly profits." *Id.*

The Supreme Court has recognized that ***HN20***[] a patent settlement involving a "large [and] unjustified reverse payment" can **[**154]** violate the antitrust laws if its "objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market" because that objective is "the very anticompetitive consequence that underlies the claim of antitrust unlawfulness." FTC v. Actavis, Inc., 570 U.S. 136, 157-58, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013). But here, defendants assert, plaintiffs' antitrust claims premised on a generic delay theory cannot survive summary judgment for four reasons. Defendants say that the undisputed summary judgment facts establish that: (1) the EpiPen settlement never caused any delay in Teva's generic entry; (2) the EpiPen and Nuvigil settlements were independent and lawful settlements; (3) the summary judgment evidence doesn't support a triable issue whether defendants made a "reverse payment"; and (4) both the EpiPen and Nuvigil settlements were procompetitive.

Below, the court addresses all four arguments. Before turning to them, however, the court recognizes that defendants' arguments call on the court to analyze and consider the underlying facts of the EpiPen and Nuvigil patent litigation and eventual settlements. When presented with a **[*982]** similar scenario involving a reverse payment settlement **[**155]** claim, the Eleventh Circuit's Judge Carnes observed the work of "deciding a patent case within an antitrust case about the settlement of the patent case" is something he called "a turducken task."[53] FTC v. Watson Pharms., Inc., 677 F.3d 1298, 1315 (11th Cir. 2012). But, on appeal, the Supreme Court disagreed, finding that "an antitrust action" based on a reverse payment settlement "is likely to prove more feasible

[52] Although plaintiffs assert their antitrust claims under particular state laws, they ask the court to evaluate them "under the same legal standards as Sherman Act Section One (Conspiracy)" and "Sherman Act Section Two (Monopolization)[.]" Doc. 2169 at 43 (Pretrial Order ¶¶ 4.b.3.-4.). Defendants agree for "the purpose of summary judgment." Doc. 2142-1 at 69 n.431. So, consistent with the parties' agreement, the court evaluates plaintiffs' antitrust claims on summary judgment under the legal standards that apply to the Sherman Act.

[53] For those who don't recall John Madden's telestrated explanation on Thanksgiving Day broadcasts of NFL games, a turducken is a deboned chicken stuffed inside a deboned duck, the two then stuffed inside a deboned turkey. The British sometimes replace the turkey with a goose, producing a gooducken. Will Iredale, *Three in One Bird is Big This Christmas*, Times (London), Nov. 21, 2004, https://www.thetimes.co.uk/article/three-in-one-bird-is-big-this-christmas-8569w2jppgg.

administratively than the Eleventh Circuit believed." Actavis, 570 U.S. at 157. **HN21**[] In reverse payment settlement claims, the Supreme Court ruled, "it is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham)." *Id.* (citation omitted). Following that guidance from the Supreme Court, the court now endeavors to decide this question: Does this case's summary judgment facts present a triable question whether defendants violated the antitrust laws by entering into a reverse payment settlement to resolve the EpiPen litigation with Teva?

a. Whether EpiPen Settlement Delayed Teva's Generic Entry

First, defendants argue, plaintiffs' generic delay claims fail because the summary judgment facts present no triable issue of causation. More specifically, **[**156]** defendants contend that no reasonable jury could find or infer from the undisputed summary judgment facts that the EpiPen settlement caused any delay in the entry of Teva's competing generic EAI.

HN22[] The Sherman Act requires an antitrust plaintiff to show that its injury was caused "by reason of" the defendant's anticompetitive conduct. 15 U.S.C. § 15(a); *see also* Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1519 n.12 (10th Cir. 1984) ("Of course, the fact of injury and damages suffered *by reason of a violation of the antitrust laws* must also be shown for a private litigant to recover on a claim of monopolization." (emphasis added)). Thus, "to recover under the antitrust laws[,]" an antitrust plaintiff must "establish that defendant's unlawful conduct caused plaintiff injury in its business or property." Aspen Highlands, 738 F.2d at 1522-23; *see also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (explaining that an antitrust plaintiff "must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful").

HN23[] An antitrust plaintiff cannot shoulder its burden to prove an antitrust violation if the injury is "attributable to its lack of desire, its limited production capabilities, or to other factors independent of [the alleged] unlawful conduct[.]" Zenith Radio Corp. v. Hazeltine Rsch., Inc., 395 U.S. 100, 126-27, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969). But, at **[**157]** the same time, an antitrust plaintiff need not show that defendant's conduct was the exclusive cause of plaintiff's injury. Id. at 114 n.9 (A "plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury[.]"). Instead, it "is enough that the illegality is shown to be a *material cause* of the injury[.]" *Id.* (emphasis added); *see also* In re **[*983]** Actos End-Payor Antitrust Litig., 848 F.3d 89, 97 (2d Cir. 2017) ("An antitrust plaintiff must show that a defendant's anticompetitive act was a 'material' and 'but-for' cause of plaintiff's injury, although not necessarily the sole cause.").

HN24[] A "material cause" is "often interpreted as proximate cause" of an antitrust violation. In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-02503, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *13 (D. Mass. Jan. 25, 2018); *see also* In re Flonase Antitrust Litig., 798 F. Supp. 2d 619, 627 (E.D. Pa. 2011) ("An antitrust violation is a 'material cause' of an injury if it is a proximate cause of that injury." (citation omitted)). "The doctrine of proximate cause in the antitrust context considers whether the alleged injury is too remote to be fairly attributed to the asserted antitrust violation." In re Flonase Antitrust Litig., 798 F. Supp. 2d at 627.

As our Circuit has explained,**HN25**[] an antitrust plaintiff demonstrates "proximate cause" by showing "'there is a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence **[**158]** of damage.'" Motive Parts Warehouse v. Facet Enters., 774 F.2d 380, 389 (10th Cir. 1985) (quoting Reibert v. Atl. Richfield Co., 471 F.2d 727, 731 (10th Cir. 1973)). But, if "an independent cause fully accounts for the plaintiff's alleged injury[,]" then that intervening, independent cause "breaks the causal connection between the alleged antitrust violation and the plaintiff's injury." In re Flonase Antitrust Litig., 798 F. Supp. 2d at 627 (citation and internal quotation marks omitted). "'Proximate cause and intervening cause are usually issues for the jury to decide.'" Id. at 628 (quoting Wortley v. Camplin, 333 F.3d 284, 295 (1st Cir. 2003)); *see also* In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *13 ("[C]ausation is generally a question best left for the jury to decide.").

Defendants argue that the summary judgment facts here present no triable issue of causation. That is, defendants argue, plaintiffs haven't adduced any evidence from which a jury rationally could find or infer that, but for the Teva/EpiPen settlement, Teva would have launched its generic EAI before June 2015—the date the settlement agreement allowed Teva to launch its generic product. Instead, defendants contend, the undisputed facts establish, as a matter of law, that other, intervening causes prevented Teva from launching its product before the settlement's agreed-to generic entry date. Defendants assert three reasons why this is so: (a) Teva didn't have FDA approval of its generic EAI by that date, (b) Teva **[**159]** had difficulties developing its generic EAI, and (c) other EpiPen patents would have blocked Teva's entry into the market without a settlement. The court considers these three arguments in subsections i, ii, and iii, following.

i. Teva's FDA Approval

First, defendants assert that plaintiffs present no triable issue whether the Teva/EpiPen settlement delayed generic entry because it's undisputed that Teva didn't secure FDA approval to launch its product by the settlement's agreed-to entry date of June 22, 2015. It's undisputed that the Teva/EpiPen settlement agreement granted Teva a license to launch its EAI by June 22, 2015, subject to FDA approval. Doc. 2146-3 at 14-20 (Defs.' Ex. 136). Also, the summary judgment facts establish that Teva didn't secure FDA approval for its generic until August 2018—more than three years after the settlement's agreed-to generic entry date. Doc. 2147-5 at 2, 6 (Defs.' Ex. 160). So, defendants argue, the FDA's independent action **[*984]** of withholding approval of Teva's generic until 2018 was an intervening and independent cause that breaks any causal chain between the EpiPen settlement and Teva's generic entry.

For support, defendants cite the summary judgment **[**160]** facts showing that the FDA repeatedly expressed concerns about Teva's generic EAI by sending Teva deficiency letters. In one letter, dated May 17, 2011, the FDA told Teva that it must conduct a human factors study and the same letter recommended Teva submit a draft of its test protocol before implementing the study so that the FDA could review and provide feedback. Doc. 2145-5 at 2-3 (Defs.' Ex. 116). In January 2012, Teva sent its draft protocol and requested feedback within one month of the letter's date so that it could proceed with the study. Doc. 2146-12 at 2 (Defs.' Ex. 145). More than a year and a half later, the FDA still never had provided Teva any feedback, as requested. Doc. 2146-13 at 2 (Defs.' Ex. 146); Doc. 2146-14 at 1-2 (Defs.' Ex. 147). So, on August 29, 2013, Teva, without any feedback from the FDA on Teva's draft protocol, submitted its first human factors study to the FDA—in response to the deficiency letter the FDA had sent Teva on May 17, 2011. Doc. 2146-11 (Defs.' Ex. 144). And, in 2014, Teva completed a new human factors study. Doc. 2146-16 at 2 (Defs.' Ex. 149). Then, on February 23, 2016, the FDA issued a complete response letter denying Teva's ANDA application **[**161]** and citing "MAJOR" deficiencies with Teva's generic EAI, including, among other things, deficiencies with the human factors study. Doc. 2147-3 at 7, 11 (Defs.' Ex. 158). Teva never re-performed its human factors study. Doc. 2191-3 at 7-8 (Pls.' Ex. 25) (Peck Rebuttal Expert Report ¶ 14). But then, in August 2018, the FDA changed its position telling Teva that it had found the 2014 Teva human factors study adequate—the same study it had rejected in the 2016 complete response letter. Doc. 2147-4 at 2-3 (Defs.' Ex. 159). And, the very next day, the FDA approved Teva's ANDA. Doc. 2147-5 at 2 (Defs.' Ex. 160).

Defendants assert that these independent actions taken by the FDA—*i.e.*, first rejecting Teva's ANDA and then granting approval of its generic product in August 2018—qualify as intervening causes that "'cut[] off' the 'requisite chain of causation' and doom Plaintiffs' generic delay claims." Doc. 2142-1 at 72 (quoting *In re Wellbutrin XL Antitrust Litig., 133 F. Supp. 3d 734, 768 (E.D. Pa. 2015)*).

Plaintiffs disagree. Plaintiffs assert that, but for the EpiPen settlement, Teva would have entered the EAI market in either March 2014 or January 2015—months before the settlement's agreed-to licensing date. Doc. 2169 at 16, 55 (Pretrial Order ¶¶ 3.a.1.b., 5.a.B.). **[**162]** And, they cite several summary judgment facts from which, they contend, a reasonable jury could find that defendants' actions—through an allegedly unlawful reverse payment settlement with Teva—were the "but for" cause of Teva's delay in securing FDA approval of its generic, thereby resulting in an approval date beyond the settlement's agreed-to launch date of June 2015.

First, plaintiffs cite Teva's internal documents from late 2011 and early 2012 showing that it projected that it would launch its generic EAI by 2014. Doc. 2203-20 at 5 (Pls.' Ex. 317); Doc. 2203-21 at 3-5 (Pls.' Ex. 318). Defendants respond that these internal projections are nothing more than predictions made before Teva encountered various development issues with its product. So, defendant argue, plaintiffs can't rely on this evidence to avoid summary judgment because it's just speculative. *See* *Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1334 (10th Cir. 2017)* (explaining that, ***HN26***[] to avoid summary judgment, **[*985]** the non-moving party must adduce evidence that is "based on more than mere speculation, conjecture, or surmise" (citation and internal quotation marks omitted)). If these internal projections were the only evidence plaintiffs adduced to show that Teva could have launched its generic **[**163]** EAI on an earlier date, the court might side with defendants' argument. But, there's far more than just these projections.

Second, plaintiffs offer the analysis of their expert, Dr. Carl Peck, who reviewed Teva's communications with the FDA. Dr. Peck opines that Teva slowed its responsiveness to the FDA's requests during "the 2011-2014 time frame by not pursuing its application aggressively or responding to the FDA[.]" Doc. 2191-7 at 25 (Pls.' Ex. 30) (Peck Expert Report ¶ 56(c)). Based on his analysis of the communications, Dr. Peck concludes that "it is reasonable to expect that the FDA would have completed its review and approval of Teva's EAI application by 2014 . . . if not earlier—had Teva been responsive to the FDA's requests in prosecuting its application." *Id.* at 10 (P 21). Importantly, plaintiffs assert, the 2011-14 time period corresponds with the time when Pfizer and Teva commenced settlement negotiations and eventually agreed to resolve the EpiPen litigation through an agreement that, among other terms, granted Teva a license to launch its EAI by June 22, 2015. *See* Doc. 2146-3 at 14-20 (Defs.' Ex. 136) (binding term sheet executed on April 26, 2012); *see also id.* at 2-29 **[**164]** (final Settlement and License Agreement executed on July 20, 2012).

Indeed, the summary judgment facts establish that Teva initially responded to the FDA's requests for information within a few weeks or months. *See* 2203-7 at 2 (Pls.' Ex. 299) (Teva's May 22, 2009 response to FDA's May 1, 2009 deficiency letter); Doc. 2203-10 at 2 (Pls.' Ex. 302) (Teva's September 8, 2009 ANDA amendment responding to FDA's July 6, 2009 deficiency letter). But then, during the 2011-14 time frame, Teva took noticeably longer to respond to the FDA's requests. *See* Doc. 2203-13 at 2 (Pls.' Ex. 309) (Teva's July 31, 2013 letter responding more than three years later to FDA's March 29, 2010 deficiency letter); Doc. 2203-18 at 2 (Pls.' Ex. 314) (Teva's August 1, 2014 letter responding more than three years later to FDA's February 2, 2011 deficiency letter); Doc. 2146-19 at 2 (Defs.' Ex. 152) (Teva's December 30, 2014 amended ANDA submitted in response to the FDA's deficiency letter sent more than four years earlier on March, 2, 2010).

Plaintiffs argue that it's wrong for defendants to focus on the FDA's initial rejection and later acceptance of Teva's human factors study as an intervening cause that breaks the **[**165]** causal chain. As discussed, Teva submitted its first human factors study more than two years after the FDA had requested it. Doc. 2146-11 at 2-5 (Defs.' Ex. 144) (Teva's August 29, 2013 response to the FDA's May 17, 2011 deficiency letter). Defendants argue Teva was waiting to submit the study until after the FDA provided feedback on its draft protocol, and when Teva still hadn't received that feedback by August 2013, it submitted the human factors study anyway. Then, the FDA rejected the human factors study in 2016, but later accepted the same study in 2018 when it approved Teva's ANDA. But, as defendants concede, it wasn't just the deficient human factors study that the FDA identified in its February 23, 2016 denial of Teva's ANDA application as a deficiency with Teva's proposed generic EAI. The letter also identified "MAJOR" deficiencies with product quality, bioequivalence, microbiology, and labeling. Doc. 2147-3 at 11 (Defs.' Ex. 158). Plaintiffs argue, it wasn't until Teva cured those other deficiencies by 2018 that the FDA approved Teva's ANDA. As Dr. Peck opines, **[*986]** "Teva submitted an application that had a sufficient HFS in 2013 and 2014" but "the ANDA ultimately was not approved **[**166]** until 2018 because further review on other parts of the applications was required based on Teva's other submissions." Doc. 2191-3 at 9 (Pls.' Ex. 25) (Peck Rebuttal Expert Report ¶ 16).

Plaintiffs argue that a reasonable jury could find or infer from the summary judgment facts that Teva did not act diligently in responding to each of the deficiencies that the FDA identified which, in turn, delayed FDA approval until 2018. The court agrees. Ultimately, a jury might accredit defendants' position that the FDA's actions were an intervening cause that cuts off the causal chain between the EpiPen settlement and Teva's delayed generic entry.

But the court cannot find that the summary judgment facts require that finding as a matter of law. Instead, a reasonable jury also could find or infer from Teva's fluctuating responsiveness to the FDA's requests—and Dr. Peck's opinion that its responsiveness slowed between 2011-14, thereby delaying FDA approval—that the EpiPen settlement delayed Teva's efforts to secure FDA approval, which, in turn, delayed its launch of a generic EAI to compete with EpiPen.

Third, plaintiffs argue that a jury could infer that the EpiPen settlement delayed Teva's generic **[**167]** entry based on Dr. Peck's analysis comparing the "9 years and 9 months" it took Teva to secure FDA approval to the time it took other EAIs to achieve FDA approval. Doc. 2191-7 at 26-27 (Pls.' Ex. 30) (Peck Expert Report ¶ 58 & Table 2) (concluding that "none [of the other EAIs] have required the lengthy time for review and approval exhibited by the Teva generic EAI" but instead "most were approved in 2-3 years, while the longest review and approval time was 6.5 years from initial filing"). Also, Dr. Peck's analysis shows that Teva's approval time for its generic exceeded the approval times for other auto-injector products and other Teva injectable products. *See id.* at 27-28 (P 59 & Table 3) (concluding that approval time for other auto-injector products has ranged from six months to 69 months); *see also id.* at 29 (P 60 & Table 4) (concluding that other Teva injectable products "on average . . . were approved in under 30 months"). The court recognizes that defendants dispute that these other products are proper comparisons to the Teva generic. At trial, defendants can cross-examine Dr. Peck and attack his opinions with contrary evidence. And, in the end, the trier of fact might not **[**168]** find Dr. Peck's analysis credible or germane to the causation analysis. But, the court can't make that finding on summary judgment.

Fourth, plaintiffs assert that a reasonable jury could infer from the summary judgment facts that Teva knew the EpiPen settlement did not permit it to enter the market for more than three years after Teva had settled the litigation in 2012, which, in turn, reduced Teva's incentive to continue pursuing the ANDA actively. Defendants assert that—after the settlement—the ball was in Teva's court to secure FDA approval. And, to the extent Teva delayed its FDA approval efforts, defendants can't be held responsible for it. Also, defendants argue, it wasn't foreseeable to them that the EpiPen settlement would delay Teva's FDA approval until 2018. Again, a reasonable jury might agree with defendants' assessment of the summary judgment facts here. But, an equally reasonable jury might conclude that defendants' actions—by settling the EpiPen litigation and agreeing to a 2015 generic entry date—caused Teva to slow its efforts to secure FDA approval during the 2011-14 time frame which, in turn, delayed the FDA's approval until 2018. So, the court cannot find—as a matter **[**169]** of law—that either the FDA's actions or Teva's efforts to **[*987]** secure FDA approval serve as an intervening or unforeseeable cause that breaks the requisite chain of causation. *See In re Flonase Antitrust Litig., 798 F. Supp. 2d 619, 628 (E.D. Pa. 2011)* ("***HN27***[] Whether conduct constitutes intervening conduct that breaks the chain of causation and whether intervening conduct is a foreseeable consequence of a defendant's actions are questions of fact to be submitted to the jury" (citing *Marshall v. Mintz, 386 F.2d 415, 416 (5th Cir. 1967)*).

Last, plaintiffs contend that a reasonable jury could find that Mylan submitted a sham Citizen Petition to the FDA and such a jury also could infer that the sham Citizen Petition delayed Teva's FDA approval.[54] Defendants disagree. They contend that the filing of the Citizen Petition can't subject them to antitrust liability under the *Noerr-Pennington* doctrine. ***HN28***[] The *Noerr-Pennington* doctrine "exempts from antitrust liability any legitimate use of

[54] Defendants argue that plaintiffs' assertions about the Citizen Petition have no connection to the EpiPen settlement which, under plaintiffs' theory, produced the generic delay. Doc. 2142-1 at 74 n.438. So, defendants argue, the Citizen Petitions can't present a triable issue whether the settlement delayed generic entry. *Id.* But, defendants ignore that plaintiffs have alleged that defendants engaged in a "scheme . . . to stifle all generic competition in the EAI market." Doc. 2169 at 15 (Pretrial Order P 3.a.1.b.). And, they allege that defendants' scheme included both (1) entering unlawful reverse payment settlements, and (2) "filing a baseless Citizen Petition and a supplement mere weeks before the entry date agreed upon in the settlement." *Id.* at 15-17 (Pretrial Order ¶ 3.a.1.b.). Also, plaintiffs assert their argument about the Citizen Petition in response to defendants' contention that the FDA's actions constitute an intervening and independent cause of the generic delay cutting off any causal connection between the EpiPen settlement and the delayed generic entry. As discussed in the above-section, plaintiffs present a triable issue whether the Citizen Petition delayed Teva's FDA approval. So, because a reasonable jury could find from the summary judgment facts that defendants' actions caused delay in the FDA's approval, the court can't find as a matter of law that the FDA's approval—which didn't come until 2018—was an *independent* and intervening cause of the generic delay.

the political process by private individuals, even if their intent is to eliminate competition." Tal v. Hogan, 453 F.3d 1244, 1259 (10th Cir. 2006) (citation and internal quotations marks omitted). But *Noerr-Pennington* immunity does not apply to "sham" activities. Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993). Petitioning the government is a "sham" activity if: (1) it is "objectively baseless in the sense that no reasonable litigant could **[**170]** realistically expect success on the merits[,]" and (2) it "use[s] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id.* (citations and internal quotation marks omitted).

Defendants assert that the Citizen Petition wasn't objectively baseless because it suggested the FDA should require Teva to perform a human factors study—something that the FDA also required of Teva. *Compare* Doc. 2146-21 at 4 (Defs.' Ex. 154) (Mylan's Citizen Petition asking the FDA to require "at a minimum, very carefully designed human factors studies that would demonstrate the Teva product's safety and effectiveness and its comparability to the EpiPen® auto-injector"), *with* Doc. 2145-5 at 3 (Defs.' Ex. 116) (FDA letter to Teva asking it to "conduct a design validation (human factors) study"). But, plaintiffs argue, a reasonable jury could disagree with that conclusion because the FDA denied Mylan's Citizen Petition "without comment[.]" Doc. 2147-2 at 2 (Defs.' Ex. 157). Also, plaintiffs argue, a rational trier of fact could find or infer that the Mylan's Citizen Petition was objectively baseless because, as Dr. Peck opines, it **[*988]** "contained no new information **[**171]** for the FDA to consider" and didn't "raise novel concerns[.]" Doc. 2191-3 at 21 (Pls.' Ex. 25) (Peck Rebuttal Expert Report ¶ 44). Instead, Dr. Peck opines, the Citizen Petition "simply reiterated the same issues identified by the FDA in its responses to the King and Dey [Citizen Petitions] in 2009 and 2010, respectively." *Id.* Dr. Peck further opines that the Citizen Petition was one of several "inappropriate" actions taken by defendants that "occupied a great deal of time at the FDA[.]" Doc. 2191-7 at 34 (Pls.' Ex. 30) (Peck Expert Report ¶ 71). And, he describes the filing of the Citizen Petition as an "anticompetitive tactic[ ]" that "burden[ed] the agency, if not also delay[ed] approval." *Id.* (Peck Expert Report ¶ 72). Plaintiffs also assert that a reasonable jury could infer from the timing of the Citizen Petition that defendants intended for it to delay generic approval because Mylan submitted the Citizen Petition to the FDA on January 6, 2015, just six months before Teva was permitted to enter the EAI market under the EpiPen settlement agreement. The court agrees that these summary judgment facts together present a triable issue whether the Citizen Petition was objectively baseless, **[**172]** and thus a sham activity.[55]

Defendants also argue that the summary judgment facts establish that the Citizen Petition caused no delay in Teva's application. For support, they cite the FDA's Report to Congress for fiscal year 2018, arguing that it confirms that Mylan's Citizen Petition caused no delay in the FDA's approval of the Teva generic. The FDA's 2018 Report states, "No approvals for ANDAs . . . were delayed because of a [Citizen Petition] in this reporting period." Report to Congress: 11th Annual Report on Delays in Approvals of Applications Related to Citizen Petitions and Petitions for Stay of Agency Action for Fiscal Year 2018, at 1 (Feb. 11, 2020), available at https://www.fda.gov/media/135628/download. As discussed in the court's contemporaneously-filed Order ruling defendants' Motion to Exclude the Testimony and Report of Dr. Peck, the FDA's Report isn't clear whether this statement means no FDA approvals in 2018 (which would include the approval of Teva's generic EAI) were delayed because of a Citizen Petition, or whether it means that no Citizen Petitions filed in 2018 (which wouldn't include the

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[55] Defendants assert that, because the Citizen Petition's contents are undisputed, the question whether the Citizen Petition is objectively baseless is a question of law for the court to decide. Doc. 2226-1 at 26 & n.50. The court disagrees. **HN29**[] The question "[w]hether petitioning activity is a sham is generally [one] for the jury." In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 689 (E.D. Pa. 2014) (citing In re Flonase Antitrust Litig., 795 F. Supp. 2d 300, 310 (E.D. Pa. 2011)); *see also* Catch Curve, Inc. v. Venali, Inc., 519 F. Supp. 2d 1028, 1037 (C.D. Cal. 2007) ("'[W]hether something is a genuine effort to influence governmental action, or a mere sham, is a question of fact.'" (quoting Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1253 (9th Cir. 1982)). A court can rule the objectively baseless question as a matter of law where "there is no dispute over the predicate facts of the underlying . . . proceeding[.]" Pro. Real Est. Invs., Inc., 508 U.S. at 63. But, here, there is a dispute about the predicate facts of the underlying proceeding—namely, whether Mylan's Citizen Petition raised issues that the FDA already had received and rejected in other Citizen Petitions, whether it occupied the FDA's time thus delaying the approval process, and whether the timing of the filing in January 2015 supports a finding or inference that defendants submitted the Citizen Petition as a way to delay Teva's generic entry as the settlement's agreed-to entry date approached. The court can't make that determination as a matter of law on these facts. It's a jury question.

2015 Citizen Petition) delayed any FDA approval. Thus, the court **[**173]** can't find, as a matter of law, that the Report conclusively establishes that Mylan's Citizen **[*989]** Petition never delayed the FDA's approval of the Teva generic.

Also, defendants argue that no reasonable jury could find that the Citizen Petition delayed FDA approval when the FDA denied the Petition "without comment" in June 2015, Doc. 2147-2 at 2 (Defs.' Ex. 157), but then didn't approve the Teva generic until 2018. A reasonable jury might adopt the inference that this argument presupposes. But, a reasonable jury also might find Dr. Peck's opinions credible and agree with his conclusions that the Citizen Petition took time and resources from the FDA, thus burdening the agency and likely delaying approval. So, the court agrees with plaintiffs. Genuine issues of fact exist whether the filing of the Citizen Petition delayed Teva's FDA approval.

In sum, the court finds that plaintiffs have adduced sufficient evidence from which a reasonable jury could conclude that the EpiPen settlement delayed generic entry by slowing Teva's efforts to secure FDA approval before the settlement's agreed-to entry date of June 22, 2015. And, from those facts, a reasonable jury also could conclude that the FDA's **[**174]** actions in refusing to approve the Teva generic until 2018 aren't an intervening cause breaking the requisite chain of causation between the EpiPen settlement and delayed generic entry. *See* *In re Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d 231, 287-89 (D. Mass. 2014)*, *aff'd* 842 F.3d 34 (1st Cir. 2016) (denying summary judgment motion on causation grounds based on the argument that a pharmaceutical company's failure to achieve FDA approval for its generic was "the sole and direct cause of [the] failure to enter the generic Nexium market" because plaintiffs "marshaled sufficient evidence in the record to demonstrate genuine and material factual disputes" allowing "a reasonable juror to conclude that [pharmaceutical company] was well on its way to obtaining tentative approval" of its generic product but "since slowed its progress in response to the terms of its settlement"). *Cf.* *In re Flonase Antitrust Litig., 798 F. Supp. 2d at 629-33* (denying summary judgment against antitrust claims because, among other things, plaintiffs presented sufficient evidence to raise genuine issues of material fact whether the FDA's deficiency notices sent to a potential competing generic were "indeed proximately caused by, or was the foreseeable consequences of, [defendant's] alleged antitrust violations[,]" and thus not "an intervening cause of [the] delayed entry **[**175]** into the market that severs the causal chain beginning with [defendant's] conduct"). So, the court finds here that the summary judgment facts don't permit the court to conclude—as a matter of law—that Teva's failure to secure FDA approval until 2018 was an intervening cause breaking the chain of causation and warranting summary judgment against plaintiffs' antitrust claims premised on their generic delay theory.

ii. Teva's Challenges Developing the Product

Next, defendants assert that the summary judgment facts establish that Teva faced continuous setbacks in its efforts to develop its generic EAI. And, defendants argue, these development issues were another independent and intervening cause of the generic's delay that breaks any chain of causation linking the EpiPen settlement and any delayed generic entry.

For support, defendants rely on summary judgment facts showing that shortly after the settlement—in 2013—Teva discovered that its device had a tendency to fire when dropped but didn't indicate to end users that the device already had dispensed the epinephrine. Doc. 2146-15 at 2 (Defs.' Ex. 148). So, Teva had to redesign its device to correct the problem. *Id.* After **[*990]** making these changes, **[**176]** on December 30, 2014, Teva submitted an amended ANDA to the FDA that one Teva executive described as "basically . . . a completely new ANDA[.]" Doc. 2146-18 at 2 (Defs.' Ex. 151). Teva's submission explained that, among other changes, Teva had "changed the site of the drug product manufacture/testing . . . and device assembly[,]" "changed the formulation" of epinephrine, and "changed the device to improve the design to ensure the user will not be presented with a device that has delivered the drug product but has not engaged the safety guard." Doc. 2146-19 at 2 (Defs.' Ex. 152). After submitting the amended ANDA in December 2014, the agreed entry date of June 22, 2015 passed without the FDA acting on Teva's application. Then, in February 23, 2016, the FDA issued a complete response letter explaining that it couldn't approve Teva's ANDA application "in its present form" and citing "MAJOR" deficiencies with Teva's generic device. Doc. 2147-3 at 2, 11 (Defs.' Ex. 158). It took two and a half more years for Teva to correct those problems and finally achieve FDA approval in August 2018. Doc. 2147-4 at 2-3 (Defs.' Ex. 159). Defendants assert that these summary judgment facts establish that **[**177]** Teva's product development issues were the intervening cause of the failure to secure FDA approval until 2018. And thus, defendants contend, no causal connection exists between the EpiPen settlement and any delayed generic entry by Teva.

Plaintiffs disagree. Plaintiffs argue that a reasonable jury could infer from the summary judgment facts that the EpiPen settlement caused Teva to slow its efforts to develop its EAI product and correct product development issues which, in turn, produced a delay in Teva achieving FDA approval. Plaintiffs assert that a jury could infer that Teva—which, as defendants' expert testified, is a large, sophisticated pharmaceutical company "skilled in the art" of drug development—had the resources to develop its product much faster than it did. Doc. 2203-6 at 3-4 (Pls.' Ex. 298) (Weisman Dep. 42:24-45:6). Instead, plaintiffs argue, Teva internal documents support a finding or inference that the company didn't make the development of its product a priority during the 2011-13 time frame. Plaintiffs assert that Teva's development meetings were sparsely attended by team members. *See* Doc. 2204-6 at 2 (Pls.' Ex. 329) (May 1, 2012 meeting attended by three out of **[**178]** 18 team members); Doc. 2204-8 at 2 (Pls.' Ex. 331) (June 12, 2012 meeting attended by two out of 16 team members); Doc. 2204-14 at 2 (Pls.' Ex. 337) (November 13, 2012 meeting attended by four out of 16 team members); Doc. 2204-16 at 2 (Pls' Ex. 339) (January 9, 2013 meeting attended by 3 out of 16 team members). Also, plaintiffs argue, the meeting minutes show that Teva failed to take any action on a needle separation issue for at least seven months. *Compare* Doc. 2204-17 at 4 (Pls.' Ex. 340) (April 2012 minutes noting needle separation issue), *with* Doc. 2204-18 at 4 (Pls.' Ex. 341) (November 2012 meeting listing the issue still outstanding). Also, the minutes show that Teva failed to update its quality agreement with the device's manufacturer for two years. *Compare* Doc. 2204-19 at 5 (Pls.' Ex. 342) (March 2011 minutes describing efforts to update to the agreement), *with* Doc. 2204-20 at 5 (Pls.' Ex. 343) (April 2013 minutes showing that agreement updates still in process). But then, in May 2014, with about a year left before the June 2015 agreed-to entry date approached, Teva implemented a "Tiger Team" to work on its generic EAI and began allocating more resources to the project with **[**179]** additional employees. Doc. 2205-1 at 7 (Pls.' Ex. 344); Doc. 2205-2 at 2-3 (Pls.' Ex. 345); Doc. 2205-4 at 4, 7 (Pls.' Ex. 347). Plaintiffs assert that a reasonable jury could infer from these facts that Teva procrastinated in its effort to secure FDA **[*991]** approval until the settlement's agreed-upon date grew nearer. And, plaintiffs argue, a reasonable jury could find or infer that the EpiPen settlement caused that procrastination which, in turn, prevented Teva from securing FDA approval at an earlier date.

The court agrees with plaintiffs. A reasonable jury could infer from these facts that the EpiPen settlement caused Teva to delay its efforts to develop its product and that these delays were a foreseeable consequence of defendants entering a settlement agreement in 2012 that required Teva to wait until 2015 to launch its generic product. Equally, a jury might reach the opposite conclusion. As defendants argue, Teva's actions developing its product were entirely within Teva's control and defendants played no role in Teva's product development. So, a jury might conclude that any delay in the FDA approval process falls squarely on Teva, making Teva's actions (or inactions) an intervening **[**180]** cause that breaks the causal chain between defendants' settlement of the EpiPen litigation and Teva's generic entry date. But, on these summary judgment facts, the court can't make that finding as a matter of law. So, the court rejects defendants' argument that Teva's failure to develop its product was an intervening cause that precludes a finding that the EpiPen settlement caused Teva's delayed generic entry.

iii. Blocking By Other EpiPen Patents

Last, defendants argue—even if Teva had solved its product development issues and secured FDA approval before June 2015—Pfizer's other EpiPen patents provide another independent and intervening cause precluding a finding of causation between the EpiPen settlement and any delayed generic entry. Defendants contend that these EpiPen patents would have blocked Teva's launch of a generic product in the "but for" world where there was no settlement. Defendants correctly assert that "to withstand summary judgment," plaintiffs "must point to evidence affirmatively showing that [Teva] could have launched" its generic. *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class, 868 F.3d 132, 166 (3d Cir. 2017)*. "It is not enough" to show that Teva "wanted to launch its drug[.]" *Id. at 165*. ***HN30***[] Plaintiffs "must also show that the launch would have been legal" **[**181]** because "if the launch were stopped because it was illegal, then the [antitrust] injury (if it could still be called that) would be caused not by the settlement but by the patent laws prohibiting the launch." *Id.*; *see also* *In re Namenda Indirect Purchaser Antitrust Litig., No. 1:15-cv-6549 (CM) (RWL), 2021 U.S. Dist. LEXIS 110081, 2021 WL 2403727, at *26 (S.D.N.Y. June 11, 2021)* (explaining if generic drug manufacturer "had won the [patent] challenge, it could have launched its version of generic Namenda IR earlier than when generics launched in the real world[,]" but if the generic manufacturer "lost the patent challenge, then the date of its generic entry in the but-for world would have been the same as in the real world" which "mean[s] that [defendant's] actions did not depress competition").

It's undisputed that Pfizer owns four patents covering EpiPen devices that expire in 2025. Doc. 2169 at 4 (Pretrial Order ¶ 2.a.27.). Only two of those patents—the '012 and '432 Patents—were at issue in the Teva/EpiPen litigation. First Amended Complaint, *King Pharms., Inc. v. Teva Parenteral Meds., Inc.*, No. 1:09-cv-00652-GMS (D. Del. Nov. 11, 2010), ECF No. 37-1. Neither one of the other two patents—the '827 Patent nor the '035 Patent—was in dispute in the Teva/EpiPen litigation. Days 1-4 of Trial Transcript, *King Pharms., Inc. v. Teva Parenteral Meds., Inc.*, No. 1:09-cv-00652-GMS **[**182]** (D. Del. July 25, 2012), ECF Nos. 150-51, 153-54. But, with the EpiPen settlement, Teva secured a license to all issued patents and a covenant **[*992]** not to sue based on any current or future patents covering EpiPen devices (which would include the '035 and '827 Patents). Doc. 2146-3 at 3, 14-16 (Defs.' Ex. 136).

Defendants argue that, in a "but for" world with no settlement, Teva would have had to overcome the '827 and '035 Patents to launch its generic product. And, defendants assert, plaintiffs offer no evidence showing that Teva could have launched its generic product without infringing the blocking patents—the '827 and '035 Patents—had Teva not settled the EpiPen litigation. So, defendants contend, the summary judgment facts establish that the blocking patents are an independent and intervening cause of any alleged generic delay.

Plaintiffs respond with their own "but for" scenario. Plaintiffs argue that defendants' "but for" world wrongly assumes continued litigation instead of settlement. But, in plaintiffs' "but for" world, defendants and Teva would have settled the EpiPen litigation independently from the Nuvigil litigation and without joint delayed entry dates for both drug products. Plaintiffs support this theory with the opinion **[**183]** of their expert, Prof. Einer Elhauge. He opines that, had the parties not traded the EpiPen settlement for the Nuvigil settlement, the economically rational "but for" settlement of the EpiPen litigation would have allowed a March 14, 2014 entry date for Teva's generic EAI. Doc. 2192-6 at 9-10 (Pls.' Ex. 55) (Elhauge Reply Expert Report ¶ 3). And, plaintiffs assert, a reasonable jury could infer that the economically rational "but for" settlement would have granted Teva a covenant not to sue based on any current or future EpiPen patents—like the actual agreement did. So, plaintiffs contend, Teva could have launched its generic EAI in this "but for" world without infringing the blocking patents.

Defendants' Reply argues that the summary judgment record contains no evidence suggesting that the parties considered or even discussed an alternative generic entry date. And, defendants argue, Prof. Elhauge's opinion offers only speculation, which isn't evidence sufficient to preclude summary judgment. Doc. 2226-1 at 26 n.53 (quoting *Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 407 (3d Cir. 2016)* (concluding that Prof. Elhauge's "assumption cannot serve as a substitute for actual evidence at the summary judgment stage")). The court disagrees with defendants' **[**184]** proposition.

As the court has explained in its contemporaneously-filed Order denying defendants' Motion to Exclude the Testimony and Report of Prof. Elhauge, it finds Prof. Elhauge's reverse payment analysis sufficiently reliable and scientifically sound to qualify for admission as evidence. Prof. Elhauge has provided a rational basis for his analysis's assumptions based on his review of documentary and economic evidence. And, consistent with other courts who have considered Prof. Elhauge's proffered expert testimony in pay-for-delay cases, the court finds Prof. Elhauge's analysis qualifies as admissible expert opinion. *See, e.g.,* *In re Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 174 (S.D.N.Y. 2018)* (rejecting defendants' arguments that Prof. Elhauge's reverse payment opinions "are speculative, internally inconsistent, and contradicted by the evidence" because those challenges were "appropriate subjects for cross-examination"); *In re Androgel Antitrust Litig. (No. II), No. 1:09-MD-2084-TWT, 2018 U.S. Dist. LEXIS 99716, 2018 WL 2984873, at *17 (N.D. Ga. June 14, 2018)* (holding that any "criticism" defendants had about Prof. Elhauge's "methodologies or conclusions are best handled through cross-examination and the production of contrary evidence"); *United Food & Com. Workers Loc. 1776 & Participating **[*993]** Emp'rs Health & Welfare Fund v. Teikoku Pharma USA, 296 F. Supp. 3d 1142, 1186-88 (N.D. Cal. 2017)* (denying motion to exclude Prof. Elhauge's reverse payment opinions after finding that **[**185]** "both the components of his model (estimating parties' bargaining strengths and expectations of patent strength) and the assumptions that go with it (the parties' own pre-settlement forecasts) are consistent with accepted economic theory and well-established principles").

Defendants' attacks calling his analysis speculative are arguments that go to the credibility of Prof. Elhauge's opinion. On summary judgment, the court can't make this credibility determination or weigh Prof. Elhauge's opinion against other summary judgment facts. Instead, the court must consider the evidence in the light most favorable to plaintiffs, as the non-moving party. So, the court finds, Prof. Elhauge's opinion presents a triable issue of fact whether—in a "but for" world—Teva could have launched its generic product before the agreed-to generic entry date and without infringing the blocking patents (the '827 and '035 Patents). Thus, the court can't find—as a matter of law—that the blocking patents are an independent and intervening cause of any alleged generic delay that warrants summary judgment against plaintiffs' antitrust claims premised on a generic delay theory.

b. Independence of the EpiPen and Nuvigil Settlements

[**186] *Second*, defendants argue that plaintiffs' generic delay claims can't survive summary judgment because the undisputed summary judgment facts establish the EpiPen and Nuvigil settlements were independent and lawful settlements. Thus, defendants contend, the summary judgment facts present no triable issue whether defendants violated the antitrust laws by entering an unlawful pay-for-delay settlement agreement.

Defendants' argument here is two-fold. Defendants' first argument asserts that plaintiffs' antitrust claims are premised on a novel theory alleging that defendants traded the EpiPen settlement (with an agreed-to June 2015 date for Teva's generic EAI to enter the market) in exchange for the Nuvigil settlement (with an agreed 2016 date for Mylan to launch its generic Nuvigil product). It's undisputed that the EpiPen settlement agreement contained no monetary payment. Doc. 2146-3 at 3, 14-15 (Defs.' Ex. 136). Defendants argue, such an agreement is presumptively lawful under *FTC v. Actavis*. *570 U.S. 136, 158, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)* (explaining that the *Actavis* holding "does not prevent litigating parties from settling their lawsuit" because they may "settle in other ways, for example, by allowing the generic manufacturer to **[**187]** enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point").

But, plaintiffs respond by citing cases where courts have held that pay-for-delay settlements don't require a monetary payment in the actual settlement agreement when other evidence suggests that the parties to the litigation exchanged some form of consideration in separate, side agreements. *See, e.g., In re Lipitor Antitrust Litig., 868 F.3d 231, 258 (3d Cir. 2017)* (holding that settlement agreement was "properly subject to antitrust scrutiny" where plaintiffs alleged plausibly that, while pharmaceutical company Ranbaxy gave Pfizer $1 million, Pfizer's agreement to release its claims involving the drug Accupril was made "[i]n exchange for Ranbaxy's agreement to delay its launch of" another drug product, Lipitor, and "not in exchange for the $1 million" (internal quotation marks omitted)); *In re Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 198-99 (S.D.N.Y. 2018)* (finding genuine issue of **[*994]** fact existed whether an amendment to agreement involving the drug Lexapro was a "side-deal" and part of an agreement to settle the parties' patent dispute over separate drug Namenda); *In re Androgel Antitrust Litig. (No. II), No. 1:09-MD-2084-TWT, 2018 U.S. Dist. LEXIS 99716, 2018 WL 2984873, at *4, 10 (N.D. Ga. June 14, 2018)* (concluding that, where pharmaceutical companies entered **[**188]** settlement agreements to resolve patent infringement claims and, on the same day, also entered business promotion agreements with profit sharing provisions, plaintiffs' generic delay claims survived summary judgment because plaintiffs had offered "significant evidence from the negotiation of the [patent litigation] settlements to suggest that the services [contracted for in the business promotion agreements] were merely an afterthought to the Defendants, the proverbial lipstick on the pig that was the delay in generic entry[,]" and plaintiffs' experts would "testify that the side agreements did not make much business sense on their own"); *In re Opana ER Antitrust Litig., 162 F. Supp. 3d 704, 718 (N.D. Ill. 2016)* (rejecting defendants' attempt "to assess the components of the [patent litigation] settlement in piecemeal fashion" and instead finding that plaintiffs plausibly had alleged "when taken as a whole, the total payment" received under several, different agreements was "large and unjustified" and thus pleaded a plausible generic delay claim); [King Drug Co. of Florence, Inc. v. Cephalon, Inc., 88 F. Supp. 3d 402, 408-09, 418 (E.D. Pa. 2015)] (finding that the court should consider "the entirety of the reverse payment" made under multiple agreements between the settling parties and concluding that plaintiffs had "presented sufficient evidence to create **[**189]** a genuine dispute . . . whether the reverse payments exceeded litigation costs and were large enough to induce the Generic Defendants to drop their patent challenge and stay off of the market"); [In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 752 (E.D. Pa. 2014)] (declining defendants' invitation to "examin[e] each of the three settlement agreements in isolation" and, instead, concluding "the Licensing Agreement must be read in conjunction with the Co-Promotion and Manufacturing Agreements executed that same day" to determine whether plaintiffs plausibly had alleged an unlawful reverse payment settlement).

Defendants say that none of plaintiffs' cited cases apply here. Each case, they argue, still involved a monetary payment—either found in the actual settlement agreement or a side agreement. And, defendants assert, plaintiffs offer no cases where, as here, the alleged reverse payment settlement contains no monetary payment but, instead, is premised on the value offered by settling another and different lawsuit. This is a distinction that makes no difference. Here, like the scenarios in other lawsuits, plaintiffs allege that defendants settled the EpiPen case in exchange for the pecuniary value that the Nuvigil settlement offered Teva. Even though plaintiffs **[**190]** haven't provided a case where a court has permitted a generic delay claim premised on a theory that the parties traded settlements in two cases, it would make little sense for the court to preclude this theory simply because the value traded in the settlement didn't include a monetary payment. If the court were to reach that conclusion, the parties to an unlawful reverse payment settlement could avoid antitrust liability so long as they crafted their agreements as exchanging something of value that was delivered by something other than a monetary payment. Nothing in the case law or related antitrust literature embraces defendants' view that money—and money alone—can support reverse payment liabilities.

[*995] Also, and as plaintiffs argue, even defendants' expert recognizes that a reverse payment settlement involves the payment of "some form of compensation to the generic manufacturer" which "can be in the form of cash payments or through a payment associated with some other business transaction (e.g., a cross-licensing agreement) where the brand-name manufacturer might allegedly 'overpay' the generic manufacturer or the generic manufacturer might allegedly 'underpay' the brand-name manufacturer." **[**191]** Bret Dickey, Jonathan Orszag, & Laura Tyson, *An Economic Assessment of Patent Settlements in the Pharmaceutical Industry*, 19 Annals Health L. 367, 385 (2010). Again, plaintiffs allege here that the two settlements entered in "tandem" produced a reverse payment settlement where defendants overpaid Teva in the Nuvigil settlement. Doc. 2169 at 16 (Pretrial Order ¶ 3.a.1.b.) ("Neither settlement, viewed independently, was economically rational."). The court can find no reason to preclude plaintiffs' theory simply because the alleged overpayment was compensation in the form of the value that the Nuvigil settlement provided Teva—and not compensation in the form of money. The court rejects defendants' first argument seeking summary judgment based on the alleged independence of the EpiPen and Nuvigil settlements.

Defendants' second argument asserts that the summary judgment record contains no evidence from which a jury could infer that defendants agreed to trade the EpiPen settlement for the Nuvigil settlement. Plaintiffs disagree. Plaintiffs argue that they have adduced direct evidence of such an agreement. For support, plaintiffs cite two internal Teva documents discussing settlement of both the EpiPen and Nuvigil settlements. **[**192]** *See* Doc. 2201-13 at 2 (Pls.' Ex. 262) (stating that Teva had called Mylan's Deputy General Counsel and "relayed the following proposal: epipen in 2014 and nuvigil in 2018" and "also raised formoterol, which is another of [Mylan's] products [that Teva was] challenging with trial later this year, and threw out a 2018 date"); *see also* Doc. 2202-20 at 2 (Pls.' Ex. 278) (stating in first email that "Bill [Marth] got a call from Heather at Mylan" and asking what "exactly did we propose re epi and nuvigil?" and responding in another email with "2014 for epi and 2018 for nuvigil. No months specified"). While each communication references negotiations and proposed terms to settle the two separate lawsuits, nothing in them references—explicitly—an agreement to trade one settlement for the other. Instead, a factfinder would have to infer from these communications that the parties, by discussing the two settlements together, entered an agreement to trade one settlement for the other. Thus, these two documents don't capture direct evidence of an agreement. *See* [Llacua v. W. Range Assoc., 930 F.3d 1161, 1177 (10th Cir. 2019)] (explaining that***HN31***[] the district court "correctly defined direct evidence" of an antitrust conspiracy as "'evidence that is explicit and requires **[**193]** no inferences to establish the proposition or conclusion being asserted. With direct evidence the factfinder is not required to make inferences to establish facts.'" (quoting *Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1083 (10th Cir. 2006)*)).

But, plaintiffs also assert that they have adduced circumstantial evidence of an agreement to trade the two settlements. Our Circuit has explained, ***HN32***[] circumstantial evidence "must 'tend[ ] to exclude the possibility' of independent action." *Llacua, 930 F.3d at 1179* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). This standard requires an antitrust plaintiff to "show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed" plaintiff. **[*996]** *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

But, ***HN33***[] one cannot infer a conspiracy if "the defendants 'had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations.'" *Llacua, 930 F.3d at 1179-80* (quoting *Matsushita, 475 U.S. at 596*). And when considering "circumstantial evidence [that] is just 'as consistent with' unilateral action as with concerted action, it 'does not, standing alone, support an inference of antitrust conspiracy.'" *Id. at 1180* (quoting *Matsushita, 475 U.S. at 588* (further citations omitted)).

Defendants argue that plaintiffs haven't shouldered their burden here to adduce circumstantial evidence that "tend[s] **[**194]** to exclude the possibility" that the EpiPen and Nuvigil settlements were independent actions. *Twombly, 550 U.S. at 554*. Defendants assert that nothing in the language of the EpiPen or Nuvigil settlements connects one to the other. Defendants also cite deposition testimony from defendants' witnesses who testified that there never was any agreement to trade the EpiPen settlement for the Nuvigil settlement. Plaintiffs respond, arguing that the summary judgment record contains plenty of documents from which a jury could infer just the opposite of what defendants' witnesses testified.

To support their argument that they have adduced circumstantial evidence presenting a triable issue that the two settlements were connected to each other, plaintiffs cite the following summary judgment facts:

(1) the parties signed the two binding term sheets agreeing to settle the two lawsuits on the very same day—April 26, 2012; Doc. 2146-3 at 14-20 (Defs.' Ex. 136) (EpiPen settlement); Doc. 2147-11 at 2-18 (Defs.' Ex. 166) (Nuvigil settlement);

(2) internal Teva emails show that Mylan CEO Heather Bresch and Teva CEO Bill Marth negotiated simultaneously the EpiPen and Nuvigil settlements, even though Mylan wasn't a party to the EpiPen **[**195]** litigation; Doc. 2201-21 at 2 (Pls.' Ex. 255) (explaining that Mr. Marth had "talked to Heather . . . about settlement" of the EpiPen litigation and that "[s]he (Heather) wants to give us a 2018 entry date but would likely agree to 2017" and noting that it was "[j]ointly but not directly connected" to "the Nuvigil litigation" where Mr. Marth "offered a 2018 entry date"); Doc. 2202-20 at 2 (Pls.' Ex. 278) (stating "Bill [Marth] got a call from Heather at Mylan" and asking what "exactly did we propose re epi and nuvigil?"); Doc. 2202-9 at 2 (Pls.' Ex. 279) (sending the Nuvigil term sheet and discussing changes that were "agreed to between Heather and Mr. Marth");

(3) Heather Bresch told Pfizer employees that the EpiPen settlement would include an entry date of June 2015; Doc. 2205-8 at 2 (Pls.' Ex. 360);

(4) internal emails show that the parties discussed, negotiated, and resolved the two cases together; Doc. 2201-13 at 2 (Pls.' Ex. 262) (stating that Teva had called Mylan's Deputy General Counsel and "relayed the following proposal: epipen in 2014 and nuvigil in 2018"); Doc. 2202-13 at 2 (Pls.' Ex. 283) (noting that "the signed Nuvigil deal was" complete and "language w Pfizer on Epipen **[**196]** is done"); Doc. 2201-20 at 2 (Pls.' Ex. 269) (Mylan employees emailing with the subject line "Epipen—Teva/Potential **[*997]** Settlement" and attaching a "Nuvigil Settlement DRAFT");

(5) Mylan signed a covenant not to sue Teva in the EpiPen settlement even though Mylan wasn't the patent holder or a formal party to the litigation; Doc. 2146-3 at 28-29 (Defs.' Ex. 136);

(6) Mylan submitted both settlements to the FTC describing them as "potentially 'related'"; Doc. 2147-13 at 2 (Defs.' Ex. 168);

(7) Mylan's outside counsel emailed Mylan about the FTC letter and referred to the "Nuvigil and EpiPen settlement" using the singular noun "settlement" instead of referring to two, separate agreements; Doc. 2203-5 at 2 (Pls.' Ex. 294);[56] and

(8) Prof. Elhauge's economic analysis showing that each of the EpiPen and Nuvigil settlements, standing alone, were economically irrational for the generic entrant, and, taken together, the settlements produced greater profits than the parties could have achieved by not linking the settlements; Doc. 2193-4 at 43, 45-46, 51-55 (Pls.' Ex. 85) (Elhauge Expert Report ¶¶ 79, 85-86, 98-104 & Table 1); Doc. 2192-6 at 30-31, 36-37 (Pls.' Ex. 55) (Elhauge Reply Expert Report ¶¶ 44, **[**197]** 57).[57]

Defendants, of course, disagree. They repeatedly assert that these facts merely show that the parties negotiated the two **[*998]** settlements around the same time and coincidentally signed the two binding term sheets on the same day, but those facts don't exclude the possibility of independent action. And, they argue, the court should grant summary judgment like the Pennsylvania federal court did in *King Drug Co. of Florence, Inc. v. Cephalon, Inc., Nos. 2:06-cv-1797, 2:06-cv-1833, 2:06-cv-2768, 2014 U.S. Dist. LEXIS 84818, 2014 WL 2813312, *14 (E.D. Pa. June 23, 2014)*.

There, plaintiffs alleged that pharmaceutical company "Cephalon entered into four bilateral agreements to settle the then-pending patent infringement litigation against" four competing generic companies. *Id.* Plaintiffs alleged the four agreements were unlawful reverse payment settlements that violated the antitrust laws. *2014 U.S. Dist. LEXIS 84818, [WL] at *4*. The "agreements contained identical entry dates and contingent launch provisions, and also had substantially similar structures." *2014 U.S. Dist. LEXIS 84818, [WL] at *14*. But, the court found that summary judgment was warranted because "the circumstantial evidence" surrounding the four agreements didn't "support an inference of concerted, as opposed to independent, action." *Id.* Among other things, **[**198]** the court found that the summary judgment facts established that "the settlement agreements with the Generics were economically beneficial[,]" and there was "no comparable evidence that the Generic Defendants were dependent on the universal

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[56] Defendants respond to plaintiffs' citation to this summary judgment fact, arguing that it is a "typo in an email subject line" that is "not evidence." Doc. 2226-3 at 93. Assuming Mylan can adduce evidence to this effect, Mylan can argue that this email's subject line contains a simple typo. And a reasonable juror might accredit that inference. But, on this motion, the court must construe the evidence in plaintiffs' favor, and a reasonable trier of fact also might infer that it wasn't a typo and the author meant to refer to the two as one, single agreement that resolved both cases. The court must leave that determination to the jury. It's not a proper question for the court to resolve on summary judgment.

[57] Defendants assert that Prof. Elhauge's opinion doesn't preclude summary judgment because expert opinion cannot create a triable issue of fact about the existence of a conspiracy. For support, defendants cite a case that prohibited experts from opining on the "ultimate issue" whether a conspiracy existed because experts may not testify about legal conclusions. *See Hyland v. HomeServices of Am., Inc., 771 F.3d 310, 322 (6th Cir. 2014)* (affirming trial court's decision precluding expert from testifying "to their ultimate opinions that a price-fixing conspiracy existed"). And, they cite another case where the experts' opinions failed to support an inference of conspiracy because the opinions didn't exclude the possibility of independent action. *See* ***Dahl v. Bain Cap. Partners, LLC, 937 F. Supp. 2d 119, 137 n.17 (D. Mass. 2013)*** (holding that "experts' ultimate conclusions do not provide a permissible inference under the controlling case law").

Those cases don't apply here. Prof. Elhauge isn't offering an expert opinion on the ultimate legal issue whether a conspiracy existed. Instead, he is offering his opinion, as an expert in antitrust economics, whether the EpiPen and Nuvigil settlements made economic sense for the parties. That kind of evidence is proper expert opinion which the jury can consider and weigh to determine whether it supports the existence of an antitrust conspiracy and excludes the possibility that the two settlements were independent actions.

Also, defendants attack Prof. Elhauge's opinion because, they contend, his analysis shows that the Nuvigil settlement, standing alone, was profitable for Mylan. The court has addressed this argument comprehensively in its Order ruling defendants' Motion to Exclude Prof. Elhauge's expert opinions. As that Order explains, Prof. Elhauge provides a reliable basis for the opinions offered in his original Expert Report and Reply Report. And, any challenges that defendants assert against them go to the weight that the trier of fact should assign to those opinions.

agreement to make the settlements economically attractive." *2014 U.S. Dist. LEXIS 84818, [WL] at *12*. Instead, "the settlements seemed to offer the best of both worlds: an end to costly litigation, combined with lucrative business deals and an assurance that each Generic Defendant would not be disadvantaged regarding the entry of generic Provigil." *Id.*

Defendants assert that this case presents similar summary judgment facts. Defendants argue that this case's summary judgment record lacks any evidence that the agreements were dependent on one another. And, they contend, the summary judgment facts establish that the settlements made independent economic sense for all parties.

A reasonable trier of fact might agree with defendants' assessment of these facts. But, a reasonable jury also might reach the opposite conclusion, finding that the facts, taken together, "'tend[ ] to exclude the possibility' of independent action." *Llacua, 930 F.3d at 1179* (quoting *Twombly, 550 U.S. at 554*). A rationale trier of fact could infer as much from the **[**199]** communications among Mylan, Pfizer, and Teva which discussed the two settlements together and produced two binding term sheets signed the very same day—along with the fact that plaintiffs' expert opines that these settlements were not economically rational for the generic entrant (should the jury find this expert opinion credible). Thus, the court finds, the summary judgment facts here support an "inference of conspiracy" that "is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed" plaintiff. *Matsushita, 475 U.S. at 588*; *see also* *In re Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d 231, 256 (D. Mass. 2014)* (denying summary judgment where the summary judgment facts suggested that defendants "possessed strong motives to coordinate the actions they took[,]" and "[i]n conjunction with the interdependence of the agreements themselves, these factors are consistent with the existence of a single agreement, tend to exclude the possibility of independent action, and adequately support a reasonable inference of conspiracy"). And so, the court denies summary judgment based on defendants' argument that the EpiPen and Nuvigil settlements were independent from one another.

[*999] c. "Unexplained" Reverse Payment

Third, defendants argue that **[**200]** plaintiffs' antitrust claims can't survive summary judgment because the undisputed summary judgment facts present no triable issue whether defendants made any "unexplained" reverse payment to settle the EpiPen litigation that violated the antitrust laws. As the Supreme Court has articulated, "***HN34***[ ] a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects[.]" *FTC v. Actavis, 570 U.S. 136, 158, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*; *see also* *id. at 157* (recognizing that a reverse payment "(if otherwise unexplained) likely seeks to prevent the risk of competition"). Defendants make two arguments that plaintiffs can't satisfy *Actavis*'s requirement of proving an "unexplained" reverse payment settlement.

Defendants' first argument asserts that the summary judgment facts establish no "reverse payment" occurred here. Defendants argue that it's undisputed that neither the EpiPen nor Nuvigil settlement agreement contained any monetary payment to Teva. *See generally* Doc. 2146-3 (Defs.' Ex. 136) (EpiPen settlement) & Doc. 2147-11 (Defs.' Ex. 166) (Nuvigil settlement). So, they contend, defendants never made any "reverse payment." For reasons already discussed, *see supra* Part III.A.1.b., the court won't foreclose plaintiffs' **[**201]** generic delay theory simply because the "value" Teva allegedly derived from the settlements didn't include a monetary payment. As explained, plaintiffs have adduced sufficient evidence supporting a triable issue whether defendants made an unlawful reverse payment in the EpiPen settlement in the form of overpaying Teva for its settlement of the Nuvigil litigation.

Also, defendants argue, the summary judgment facts present no triable issue whether the Nuvigil settlement overcompensated Teva. They argue Teva had a strong position in the Nuvigil litigation, demonstrated by the fact that the other defendants in the Nuvigil MDL—in effect, Teva's co-defendants—lost at trial. Memorandum at 1, *In re: Armodafinil Patent Litig., 939 F. Supp. 2d 456 (D. Del. 2013)*, ECF No. 329 at 1. And, they assert, Mylan benefited from the Nuvigil settlement because it granted Mylan the license to enter the generic Nuvigil market in 2016—eight years before the Nuvigil patents expired. Doc. 2147-11 at 3-4, 6-7 (Defs.' Ex. 166) (Nuvigil settlement); Doc. 2147-16 at 3 (Defs.' Ex. 171) (Nuvigil patents' 2024 expiration dates). Thus, defendants assert, no reasonable factfinder could infer from these facts that **[**202]** the Nuvigil settlement overcompensated Teva and thus constitutes a "reverse payment."

Plaintiffs respond, arguing that this description of the summary judgment evidence is defendants' "preferred resolution of the facts"—but not what the court can consider on summary judgment. Doc. 2190-1 at 91. The court agrees.

Viewing the facts in plaintiffs' favor, a jury could infer from the analysis offered by plaintiffs' experts—should the jury find their opinions credible—that the Nuvigil settlement overcompensated Teva. Prof. Elhauge opines that the Nuvigil settlement produced a $467 million gain for Teva compared to a "but for" settlement and a $547 million gain compared to continued litigation. Doc. 2192-6 at 27-29 (Pls.' Ex. 55) (Elhauge Reply Expert Report ¶ 40 & Table 1). And, Prof. Torrance asserts that Teva had just a 20% (± 10%) chance of winning the Nuvigil case had it gone to final judgment. Doc. 2146-5 at 101 (Defs.' Ex. 138) (Torrance Expert Report ¶ 207) (opining that "a reasonable, competent, and experienced patent attorney would estimate a probability of about 80% ± 10% that Mylan would not have been liable for patent infringement"). Even though the **[*1000]** other MDL defendants (effectively, **[**203]** Teva's co defendants) lost to Teva at trial, Prof. Torrance opines that Teva likely would have lost on appeal to the Federal Circuit. *Id.* at 100 (¶ 204). Plaintiffs assert that a jury could infer that Teva also thought it may lose on appeal based on the fact that Teva settled with the MDL defendants while the Nuvigil lawsuit was on appeal. Doc. 2202-4 (Pls.' Ex. 274); Doc. 2202-5 (Pls.' Ex. 275); Doc. 2202-6 (Pls.' Ex. 276); Doc. 2202-7 (Pls.' Ex. 277). And, in three of the four settlements, Teva agreed to pay the settling defendants millions of dollars in legal fees. *See* Doc. 2202-4 at 6 (Pls.' Ex. 274); Doc. 2202-5 at 5 (Pls.' Ex. 275); Doc. 2202-6 at 6 (Pls.' Ex. 276).

A reasonable jury could infer from the expert opinion evidence that Teva didn't have a strong chance of prevailing in the Nuvigil litigation, and so, Mylan's agreement to delay entry into the generic Nuvigil market until 2016 represented valuable compensation amounting to a reverse payment settlement made in exchange for the EpiPen settlement. Thus, the court finds, a jury could find or infer that defendants made a reverse payment to Teva. Summary judgment isn't warranted on defendants' first argument.

Defendants' second **[**204]** argument asserts that the summary judgment facts present no genuine issue whether the EpiPen and Nuvigil settlements involved an "unexplained" reverse payment. Defendants argue that the EpiPen settlement provided value to Teva because it gave Teva a license to the EpiPen patents and allowed it to enter the generic EAI market by 2015. And, defendants contend, the Nuvigil settlement's value to Teva was avoiding litigation risk and saving millions of dollars in continued litigation costs. Plaintiffs respond, arguing that defendants' version of the facts isolates the two settlements without considering the summary judgment facts that—as already discussed—allow a reasonable jury to infer that the two settlements were dependent on one another. And, plaintiffs argue, a reasonable jury could infer from those facts that the EpiPen settlement involved an "unexplained" reverse payment settlement because, as plaintiffs' expert opines, neither settlement was economically rational for the generic entrant, and, taken together, the settlements produced greater profits than the parties could have achieved by not linking the settlements. Doc. 2193-4 at 43, 45-46, 51-55 (Pls.' Ex. 85) (Elhauge Expert **[**205]** Report ¶¶ 79, 85-86, 98-104 & Table 1); Doc. 2192-6 at 30-31, 36-37 (Pls.' Ex. 55) (Elhauge Reply Expert Report ¶¶ 44, 57). From these summary judgment facts, a jury could infer that the EpiPen settlement involved an "unexplained" reverse payment sufficient to support an antitrust violation based on a pay-for-delay settlement. So, the court denies summary judgment on defendants' argument that the summary judgment facts present no triable issue whether the EpiPen and Nuvigil settlements involved an "unexplained" reverse payment.

d. Procompetitive Effects of the Settlements

Fourth and *last*, defendants argue that summary judgment is warranted against plaintiffs' antitrust claims premised on a generic delay theory because the summary judgment facts establish that the EpiPen and Nuvigil settlements were procompetitive and thus didn't violate the antitrust laws. Defendants correctly explain that alleged reverse payment settlements are subject to a rule of reason analysis. *FTC v. Actavis, 570 U.S. 136, 159, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. Our Circuit has described ***HN35***[] the rule of reason as "call[ing] for a holistic assessment of the parties' evidence" to determine "whether a challenged practice restrains trade unreasonably" thus violating the Sherman Act. *Buccaneer Energy (USA) Inc. v. Gunnison* **[*1001]** *Energy Corp., 846 F.3d 1297, 1310 (10th Cir. 2017)*. **[**206]** Defendants assert that plaintiffs fail their summary judgment burden to adduce evidence presenting a triable issue whether the EpiPen and Nuvigil settlements had a "significant anticompetitive effect." *Id.* To the contrary, defendants contend, the EpiPen and Nuvigil settlements were procompetitive because they allowed generic manufacturers to enter the generic EAI and Nuvigil markets many years before the EpiPen and Nuvigil patents expired.

Plaintiffs respond, arguing that the rule of reason applies only to a single reverse-payment patent settlement, like the one at issue in *Actavis*. But here, where defendants and Teva allegedly entered reverse payment settlements agreeing not to compete in each other's markets, plaintiffs assert that defendants entered a horizontal market allocation agreement. This kind of arrangement is a per se violation of the antitrust laws. *See* *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S 332, 348, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)* (holding that agreements that "are horizontal and fix maximum prices" don't "escape *per se* condemnation" under the antitrust laws). The court need not decide which test applies to the alleged reverse payment settlements at issue here because plaintiffs' generic delay claim survives summary judgment whether it's a per se **[**207]** violation or subject to the rule of reason test.

As plaintiffs correctly assert, defendants' argument—*i.e.*, the settlements didn't have an anticompetitive effect—assumes that the procompetitive benefits of allowing generic entrants to enter the market many years earlier than the branded products' patents were set to expire are realized only by the reverse payment settlement. Plaintiffs contend, a no-payment settlement in a "but for" world would have accomplished the same pro-competitive benefits. And, they argue, generic entry would have occurred sooner because the settlements never would have included a "pay for delay." Indeed, the summary judgment facts support a reasonable inference that the parties to the EpiPen and Nuvigil settlements, by negotiating the two settlements together and agreeing to future generic entry dates for both products simultaneously, traded one settlement generic entry date for another. And, a jury could infer that these summary judgment facts "'tend[ ] to exclude the possibility' of independent action." *Llacua, 930 F.3d at 1179* (quoting *Twombly, 550 U.S. at 554*).

Also, defendants' argument that the settlements had procompetitive effects assumes that the generic entrants had a generic product that infringed **[**208]** the branded product, and thus the generic entrants would have lost their patent infringement lawsuits and thus couldn't have entered the market until the branded products' patents expired. Plaintiffs have adduced evidence from which a jury could infer that the generic entrants had a strong chance of prevailing at trial. Thus, a jury could find that the settlements didn't make economic sense from the perspective of the generic entrants. Like the facts presented in *In re Nameda Direct Purchaser Litigation*, the court cannot conclude on these summary judgment facts, as a matter of law, "[w]hether the settlement agreements were anticompetitive or procompetitive" because that determination "will depend on several complex factual questions that cannot be decided on summary judgment." *No. 15 Civ. 7488 (CM), 2017 U.S. Dist. LEXIS 83446, 2017 WL 4358244, at *19 (S.D.N.Y. May 23, 2017)*. So, the court declines to grant summary judgment based on the alleged procompetitive effects of the EpiPen and Nuvigil settlements.

e. Conclusion

For reasons discussed, the court declines to enter summary judgment against plaintiffs' antitrust claims premised on **[*1002]** their generic delay theory for any of the four arguments defendants assert seeking dismissal. Plaintiffs' generic delay claims thus survive summary judgment **[**209]** and will proceed to trial.

2. Rebate Agreements with Exclusivity Provisions

Next, defendants argue that the summary judgment facts fail to present a genuine issue whether defendants foreclosed branded competition through Mylan's use of exclusive rebate agreements. Defendants' argument here seeks summary judgment against plaintiffs' antitrust claims premised on a theory that defendants engaged in a scheme to block a competing EAI—Sanofi's Auvi-Q—from the market. Doc. 2169 at 17 (Pretrial Order ¶ 3.a.1.c.).

Plaintiffs allege that defendants violated the antitrust laws by conditioning rebates paid to PBMs on their agreement to block Auvi-Q (and other competing EAIs) from formulary placement. *Id.* And, they contend, defendants succeeded in their "exclusionary contracting strategy" by excluding Auvi-Q from PBM formulary coverage and by forcing Sanofi to decide not to return Auvi-Q to the market. *Id.* at 18.

Defendants offer two reasons why this antitrust theory fails on summary judgment. *First*, defendants argue, the undisputed facts present no triable issue whether Mylan's rebate agreements with PBMs were unlawful "exclusive dealing" contracts. *Second*, defendants contend, Mylan always offered **[**210]** prices for the EpiPen that were above cost. And, they say, that practice doesn't violate the antitrust laws because price discounts at above-costs prices are procompetitive. The court takes each argument, in turn.

a. Whether the Rebate Contracts are Unlawful Exclusive Dealing Contracts

Defendants argue that the summary judgment facts present no triable issue whether Mylan's rebate contracts are unlawful exclusive dealing contracts that subject them to liability under the antitrust laws.

HN36[] An exclusive dealing arrangement is "a contract between a manufacturer and a buyer that forbids the buyer from purchasing the contracted good from any other seller or that requires the buyer to take all of its needs in the contract good from that manufacturer." XI Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1800a, at 3 (4th ed. 2018); *see also* *Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369, 1374 (10th Cir. 1979)* (describing***HN37***[] an exclusive dealing arrangement as one that "entails a commitment by a buyer to deal only with a particular seller"). Such an agreement "need not specifically require the buyer to forgo other supply sources if the practical effect [of the agreement] is the same." *Perington Wholesale, 631 F.2d at 1374*; *see also* *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 326, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)* ("[E]ven though a contract does not contain specific agreements **[**211]** not to use the (goods) of a competitor, if the practical effect . . . is to prevent such use, it comes within" the prohibition against exclusivity (citation and internal quotation marks omitted)). "The antitrust vice of these arrangements is the foreclosure of part of the market in which the seller competes by taking away the freedom of the buyer to choose from the products of competing traders in the seller's market." *Perington Wholesale, 631 F.2d at 1374*; *see also* *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012)* ("The primary antitrust concern with exclusive dealing arrangements is that they may be used by a monopolist to strengthen its position, which may ultimately harm competition." (citation omitted)).

But, ***HN38***[] an exclusionary contract doesn't violate the antitrust laws simply because it **[*1003]** excludes competitors. Indeed, "[e]xclusive dealing agreements are often entered into for entirely procompetitive reasons, and generally pose little threat to competition." *ZF Meritor, 696 F.3d at 270* (citation omitted); *see also* *Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 76 (3d Cir. 2010)* ("'[I]t is widely recognized that in many circumstances [exclusive dealing arrangements] may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all.'" (quoting *E. Food Servs., Inc. v. Pontifical Cath. Univ. Servs. Ass'n, Inc., 357 F.3d 1, 8 (1st Cir. 2004)*)). On the other hand, "[e]xclusive **[**212]** dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods[.]" *ZF Meritor, 696 F.3d at 270* (citations and internal quotation marks omitted). Also, "[e]xclusive dealing arrangements are of special concern when imposed by a monopolist." *Id. at 271* (citing *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005)* ("Behavior that otherwise might comply with ***antitrust law*** may be impermissibly exclusionary when practiced by a monopolist.")).

So, ***HN39***[] because exclusive dealing arrangements "may actually enhance competition, . . . they are not deemed per se illegal." *Perington Wholesale, 631 F.2d at 1374* (citing *Tampa Elec., 365 U.S. at 333*). Instead, courts apply the rule of reason to determine the legality of exclusive dealing arrangements. *ZF Meritor, 696 F.3d at 271* (citing *Tampa Elec., 365 U.S. at 327*); *see also* *McWane, Inc. v. FTC, 783 F.3d 814, 835 (11th Cir. 2015)* (explaining that the Eleventh Circuit "has joined the consensus that exclusive dealing arrangements are reviewed under the rule of reason" (citation and internal quotation marks omitted)). Thus, to prevail, an exclusive dealing claim plaintiff must prove "it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." Tampa Elec., 365 U.S. at 327;[58] *see also* Perington Wholesale, 631 F.2d at 1374 (explaining that a plaintiff bringing an antitrust claim based on an exclusive dealing contract "must **[**213]** allege and prove that a particular arrangement unreasonably restricts the opportunities of the seller's competitors to market their product").

Here, defendants assert, Mylan's rebate contracts—ones that conditioned rebates to PBMs on excluding Auvi-Q from coverage—don't violate the antitrust laws because they didn't foreclose competition substantially in the EAI market. To decide this question, the Supreme Court has instructed lower courts "***HN41***[] [t]o determine substantiality **[*1004]** in a given case" by "weigh[ing] the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." Tampa Elec., 365 U.S. at 329.

When considering whether the specific contract at issue in *Tampa Electric* tended to foreclose a substantial volume of competition, the Supreme Court considered several factors. Id. at 334-35. They included whether the market includes a seller **[**214]** with a dominant position, whether the market has "myriad outlets with substantial sales volume," the prevalence of exclusive contracts in the industry, the duration of the contract, and any pro-competitive justifications for the contract. *Id.* More recently, the Third Circuit recognized that "***HN42***[] no set formula" exists "for evaluating the legality of an exclusive dealing agreement," but listed the factors courts consider when making this determination. ZF Meritor, 696 F.3d at 271-72. They include: (1) whether the defendant has "significant market power[;]" (2) whether there is substantial market foreclosure; (3) whether the contract's duration is "sufficient . . . to prevent meaningful competition by rivals[;]" (4) "an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects[;]" (5) whether defendant "engaged in coercive behavior[;]" (6) "the ability of customers to terminate the agreements[;]" and (7) the "use of exclusive dealing by competitors of the defendant[.]" *Id.* (citations omitted).

Other courts also have considered many of these same factors when called to decide if an exclusive dealing arrangement "substantially" forecloses competition and thus violates the antitrust **[**215]** laws. *See* Methodist Health Servs. Corp. v. OSF Healthcare Sys., 859 F.3d 408, 410-11 (7th Cir. 2017) (affirming summary judgment against exclusive dealing claim based on exclusivity contracts between a hospital and insurers where contracts at issue were only two or three years' duration, plaintiff also had entered exclusive dealing arrangements with insurers, and there was no evidence that the contracts had "a significant exclusionary effect"); McWane, Inc. v. FTC, 783 F.3d 814, 837-42 (11th Cir. 2015) (affirming FTC's order prohibiting exclusive dealing contracts after concluding that the evidence supported the FTC's finding that the contracts foreclosed competition, injured competition, and had no procompetitive justifications); NicSand, Inc. v. 3M Co., 507 F.3d 442, 454 (6th Cir. 2007) (affirming dismissal of exclusive dealing claim where all but one competitor used the same exclusive contracts and the contracts didn't create a barrier to market entry).

[58] *Tampa Electric* decided a Clayton Act claim and concluded that the contract at issue didn't "tend to foreclose a substantial volume of competition." 365 U.S. at 335. After reaching that conclusion, the Court found it "need not discuss the respondents' further contention that the contract also violates § 1 and § 2 of the Sherman Act, for if it does not fall within the broader proscription of § 3 of the Clayton Act it follows that it is not forbidden by those of the former." *Id.* (citation omitted). ***HN40***[] Although *Tampa Electric* involved a Clayton Act claim, courts also apply its analysis to exclusive dealing claims asserted under the Sherman Act because each statute "include[s] an anticompetitive conduct element, although each statute articulates that element in a slightly different way." ZF Meritor, 696 F.3d at 269 n.9; *see also* id. at 327 n.26 (Greenberg, J., dissenting) ("In substance, the *Tampa Electric* standard for Clayton Act Section 3 claims differs very marginally, if at all, from the fact-intensive rule-of-reason analysis that applies to this case under Section 1 of the Sherman Act."); Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr., 684 F.2d 1346, 1352 n.11 (7th Cir. 1982) (noting that *Tampa Electric* applies to Sherman Act cases even though it was decided under § 3 of the Clayton Act).

Defendants assert that the summary judgment facts here present no triable issue whether Mylan's rebate contracts substantially foreclosed competition. Specifically, they argue that five of the factors articulated by *ZF Meritor*[59] establish—as a matter of law—that Mylan's rebate contracts with PBMs don't violate the antitrust **[*1005]** laws. The court considers these five factors,[60] below, in the same order defendants present them in their papers.

i. Factor #5: Coercion

Defendants first argue that the summary judgment facts present no triable issue of coercion. As the Third Circuit has explained, "***HN43***[] [e]xclusive dealing will generally only be unlawful where the market is highly concentrated, the defendant possesses significant market power, *and there is some element of coercion present*." *ZF Meritor, 696 F.3d at 284* (emphasis added). Defendants assert there is no coercion here because the summary judgment record lacks any evidence that Mylan threatened to cut off its supply of EpiPens if a PBM refused to agree to exclude competing EAIs. The court agrees that the facts here differ markedly from those presented in cases where courts have found evidence of unlawful exclusive dealing based on a defendant's coercive conduct.

In those cases, defendants threatened to stop supplying their products which, in turn, gave customers no choice but to agree to exclusivity provisions because, otherwise, they wouldn't have access to defendants' products. *See, e.g., McWane, 783 F.3d at 834* (finding that threat to cut off rebates and supply to buyers unless they purchased all pipe fittings was unreasonable because it was "unilaterally **[**217]** imposed by fiat upon all [buyers]" and "resulted in no competition to become the exclusive supplier and no discount, rebate, or other consideration offered in exchange for exclusivity" (citation and internal quotation marks omitted)); *ZF Meritor, 696 F.3d at 285* (concluding "there was evidence [defendant] leveraged its position as a supplier of necessary products to coerce [buyers] into entering" exclusive contracts because "many of the terms of the [contracts] were unfavorable to the [buyers] and their customers, but [the buyers] agreed to such terms because without [defendant's products], the [buyers] would be unable to satisfy customer demand"); *Dentsply, 399 F.3d at 190, 196* (finding that defendant's practice of "threaten[ing] to sever access not only to its [artificial teeth], but to other dental products as well" if a tooth supplier offered competing products "impose[d] an 'all-or-nothing' choice on" suppliers and evidence that suppliers "have chosen not to drop [defendant's] teeth in favor of a rival's brand demonstrates that they have acceded to heavy economic pressure").

That's not what happened here. As defendants correctly assert, the summary judgment record contains no evidence of any threats by Mylan to cut off payors' access **[**218]** to EpiPen if they refused to enter exclusive agreements.[61] Instead, the summary **[*1006]** judgment facts show that PBMs and payors solicited rebate offers

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[59] The Tenth Circuit hasn't articulated a set of factors that a court should consider when analyzing an exclusive dealing arrangement, like the Third Circuit provided in ***[**216]*** *ZF Meritor*. But, the *ZF Meritor* factors include the same factors that the Supreme Court's *Tampa Electric* opinion instructed courts to consider and that other Circuit courts have considered in their analysis of exclusive dealing contracts. The court predicts that the Tenth Circuit, if presented with this question, would apply the *ZF Meritor* factors to Mylan's rebate contracts to determine whether they substantially foreclose competition. Thus, the court applies those factors in its analysis here.

[60] The five factors addressed by defendants' motion are Factors #2, #3, #5, #6, and #7 from *ZF Meritor*. The parties never address the remaining factors (#1 and #4) or how the summary judgment facts support or preclude a finding that the Mylan rebate contracts are unlawful exclusive dealing arrangements under these remaining factors. Several times, plaintiffs call Mylan a "monopolist" but never in the context of *ZF Meritor's* first factor—*i.e.*, whether the defendant has significant market power. But, even if the summary judgment facts establish that Mylan had significant market power, this factor "is not dispositive." *Eisai, Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168 (MLC), 2014 U.S. Dist. LEXIS 46791, 2014 WL 1343254, at *34 (D.N.J. Mar. 28, 2014)* (concluding that Sanofi's "significant market power" which was "81% to 92% during the relevant period" was "not dispositive" of the question whether the contracts at issue were unlawful exclusive dealing arrangements). So, the court finds the two remaining factors neutral to its analysis whether a reasonable jury could find or infer an unlawful exclusive dealing arrangement under the summary judgment facts here.

from both Mylan and Sanofi, giving them opportunity to compete through rebates or other discounts, and that some payors suggesting a willingness to exclude or place restrictions on one of the products. *See, e.g.*, Doc. 2159-3 at 3 (Defs.' Ex. 245) (discussing "CVS Caremark's plan to review the [EAI] class and choose an exclusive product"); Doc. 2159-13 at 5 (Defs.' Ex. 255) (explaining that OptumRx "intends to manage the products" in the EAI class "using a combination of tier placement and product exclusion"); Doc. 2159-9 at 2 (Defs.' Ex. 251) (asserting that Cigna was "looking for an offer for exclusive epinephrine positioning"). In response, Mylan often offered PBMs a menu of options from which a PBM's clients could choose and which offered higher rebates in exchange for more fulsome exclusive formulary positioning. *See e.g.*, Doc. 2152-1 at 4-5 (Defs.' Ex. 201); Doc. 2152-2 at 19-21 (Defs.' Ex. 202); Doc. 2152-5 at 4 (Defs.' Ex. 205). And, in the end, PBMs made different decisions about how they would cover EpiPen and Auvi-Q—some covered both **[**219]** EpiPen and Auvi-Q on the preferred brand tier; some covered EpiPen on the preferred tier, and Auvi-Q as non-preferred; some covered Auvi-Q on the preferred tier and EpiPen as non-preferred; some covered EpiPen and restricted Auvi-Q; and some restricted EpiPen in favor of Auvi-Q.

Plaintiffs respond that Mylan's increased rebates after Auvi-Q entered the market manifest coercion. Indeed, the summary judgment facts establish that, before 2013, Mylan typically offered rebates below 10 percent. *See* Doc. 2155-9 at 5 (Defs.' Ex. 224); *see also* Doc. 2197-7 at 3-4 (Pls.' Ex. 171) (Foster Dep. 212:17-213:8). But, as Auvi-Q prepared to launch, Mylan implemented a strategy offering PBMs larger rebates but conditioned them on agreements to restrict or exclude Auvi-Q from formulary coverage. Doc. 2197-17 at 4 (Pls.' Ex. 181) (Korczynski Dep. 254:3-10); Doc. 2197-19 at 2 (Pls.' Ex. 183); Doc. 2197-13 at 3 (Pls.' Ex. 177) (Willing Dep. 63:17-25); Doc. 2199-3 at 2-5 (Pls.' Ex. 209) (showing that by June 2015, Mylan's Pricing Committee had approved rebates in the range of 50% to 60% for the largest PBMs and up to 30% for specifically targeted managed care accounts **[**220]** conditioned on exclusive or preferred formulary coverage for EpiPen). As defendants correctly argue, the summary judgment facts establish that Auvi-Q's entry into the market gave PBMs leverage to seek higher rebate offers both from Mylan and Sanofi, and many times they solicited rebate offers conditioned on restrictions or exclusivity. And, when Sanofi responded by offering more aggressive rebates, it often succeeded in securing better formulary placement for Auvi-Q. *See* Doc. 2161-10 at 2 (Defs.' Ex. 283) (reversing exclusion with ESI); Doc. 2162-3 at 2 (Defs.' Ex. 291) (achieving co-preferred status on Aetna's value and premier formularies); Doc. 2162-5 at 2-28 (Defs.' Ex. 293) (improving coverage with CVS); Doc. 2162-6 at 2 (Defs.' Ex. 294) (same).

These undisputed facts suggest that the exclusive offers promoted competition in the EAI market—something the antitrust laws encourage. *See, e.g., NicSand, Inc. v. 3M Co., 507 F.3d 442, 454 (6th Cir. 2007)* **[*1007]** (finding that ***HN44***[] the court couldn't "ignore the demands of the marketplace in which these [exclusive agreements] arose" because "[i]f *retailers* have made supplier exclusivity a barrier to entry, one cannot bring an antitrust claim against a *supplier* for acquiescing to that requirement"); *Menasha Corp. v. News Am. Mktg. In-Store, Inc., 354 F.3d 661, 663 (7th Cir. 2004)* ("That **[**221]** retailers and manufacturers *like* exclusive deals implies that they serve [their] interests" and "[w]hen the consumers favor a product or practice, and only rivals squawk, the most natural inference is that the complained-of practice promotes rather than undermines competition, for what helps consumers often harms other producers[.]"). Thus, plaintiffs present no triable issue of coercion based on Mylan's increasing rebates after Auvi-Q entered the market.[62]

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[61] As discussed, *supra* note 44, plaintiffs' citations to two Mylan documents won't support a finding or inference that Mylan ever threatened to cut off EpiPen supply. Instead, the documents showed that Mylan threatened to withdraw discounts if payors restricted or excluded EpiPen—but not if payors refused to exclude Auvi-Q. *See* Doc. 2192-17 at 2-3 (Pls.' Ex. 68) (listing as a "talking point" for a meeting with MedImpact that "Mylan will terminate its current contract if MedImpact implements a step edit *against EpiPen*" (emphasis added)); Doc. 2192-18 at 2 (Pls.' Ex. 69) (informing OptumRx that "[i]f for some reason, [OptumRx/UnitedHealthcare] decides *to exclude EpiPen* in 2014, we will not pay any enhanced rebates in 2013" but never mentioning that Mylan would cut off EpiPen supply (emphasis added)).

[62] Plaintiffs also assert two arguments that PBMs had an incentive to agree to exclusivity restrictions in exchange for higher rebates. They base these arguments on (1) the collective effects that such agreements have on raising market-wide prices, thus producing greater profits for PBMs, and (2) the agreements' bundling of incontestable and contestable demand. Doc. 2190-1 at 98-99. But these arguments don't assert that *defendants* engaged in any coercive behavior by offering rebates conditioned on

To the contrary, defendants assert that it's not coercion to offer higher discounts in exchange for better formulary placement. To support this argument, they rely on Eisai, Inc. v. Sanofi Aventis U.S, LLC, 821 F.3d 394 (3d Cir. 2016). In *Eisai*, the distributor of anticoagulant drug Fragmin sued Sanofi—the seller of Lovenox, a competing anticoagulant drug. Id. at 399. During the relevant time frame, Lovenox held the largest share of the anticoagulant drug market with 81.5% to 92.3% market share. *Id.* Fragmin held the second largest market share with 4.3% to 8.2% of the market. *Id.* Plaintiff sued Sanofi for antitrust violations, arguing that its Lovenox contracts with hospitals were unlawful exclusive dealing arrangements. Id. at 399-400. Under Sanofi's contracts, hospitals "received price discounts based on the **[**222]** volume of Lovenox they purchased and their market-share calculation tied to their purchases of [other, competing] anticoagulant drugs." Id. at 400. The contracts provided that if the hospital's purchases of Lovenox were below 75% of its total purchases of anticoagulant drugs, then the hospital received a flat 1% discount for its Lovenox purchases. *Id.* But, if the hospital's total purchases of Lovenox increased above the 75% market share threshold, the contract required Sanofi to pay increasingly higher rebates based on a combination of the total volume purchased and the market share. *Id.* These loyalty discounts ranged from 9% to 30% of Lovenox's wholesale price. *Id.* The Sanofi contracts did not obligate the hospitals to purchase any certain quantities of Lovenox. *Id.* They simply provided that a hospital only could receive the flat 1% discount if its total purchases didn't surpass the 75% market share threshold. *Id.* Also, the contract included formulary access clauses. *Id.* These clauses, the Third Circuit held, didn't prevent hospitals from offering other anticoagulant drugs on their formularies. *Id.* But they did prohibit them from favoring other anticoagulant drugs over Lovenox on their formularies. **[**223]** *Id.* And, the penalty for non-compliance was that the hospital's discount dropped to the 1% discount level. *Id. Eisai* concluded that Sanofi never limited the hospitals' access to Lovenox. *Id.*

[*1008] Under these summary judgment facts, the Third Circuit concluded that plaintiff had failed "to demonstrate that hospitals were foreclosed from purchasing competing drugs as a result of Sanofi's conduct." Id. at 407. So, it affirmed the district court's decision granting summary judgment against plaintiff's antitrust claims. Id. at 399, 410. The Third Circuit noted that hospitals never risked penalties or supply shortages for terminating their rebate contracts or violating their terms. Id. at 406. Instead, not meeting the 75% market share threshold or not complying with the formulary access clause had just one consequence: the hospital received the base 1% discount instead of higher rebates. *Id.* The Third Circuit found that "the threat of a lost discount is a far cry from the anticompetitive conduct" that the Circuit had condemned in *ZF Meritor* and *Dentsply.* Id. at 407. And so, plaintiff had failed to identify any summary judgment evidence of harm to competition similar to that at issue in those other Third Circuit cases. *Id.*

Similarly, the rebate **[**224]** contracts here imposed no penalties or supply shortages against a payor who chose to cover Auvi-Q. Instead, like *Eisai*, the only consequence for payors who rejected Mylan's exclusive offers was losing access to greater discounts. Plaintiffs try to distinguish *Eisai*, arguing its discounts differ from Mylan's rebate contracts because the contracts at issue in *Eisai* didn't use rebates to secure exclusivity. That doesn't matter. The result is the same whether rebates are paid based on a high market share discount or exclusivity—*i.e.*, the contracts reward buyers for excluding rivals by giving them the highest discounts. In both instances, however, customers remain "free to switch to a different product in the marketplace" and if they "choose not to do so" because, for example, they want access to a higher discount, then "competition has not been thwarted." Id. at 403; *see also* Race Tires Am., 614 F.3d at 79 (finding that when tire suppliers offered exclusive contracts, "it is no more an act of coercion . . . than it is for such suppliers to offer the lowest tire prices").

The court thus holds that the summary judgment facts present no triable issue whether Mylan's exclusive rebate agreements coerced payors into accepting their **[**225]** terms. Like *Eisai*, Mylan motivated payors to agree to exclusivity by offering them higher discounts but they never "foreclosed [payors] from purchasing competing drugs . . . ." Eisai, 821 F.3d at 407.

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exclusivity. Instead, they simply assert incentives explaining why a PBM would agree to exclusivity in exchange for higher rebates. The court addresses plaintiffs' incontestable demand theory in greater detail when considering Factor #2 (substantial market foreclosure). But, these two arguments don't present a triable issue on the coercion factor.

ii. Factors #3 & #6: Contract Duration and Terminability

Defendants next assert that the summary judgment facts present no triable issue whether the duration and terminability of Mylan's rebate contracts foreclose competition. As courts and commentators have recognized, "**HN45**[] short-term" exclusive dealing arrangements "present little threat to competition." *ZF Meritor, 696 F.3d at 286*; *see also* *Omega Env't, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997)* (concluding "the short duration and easy terminability" of exclusivity agreements "negate[s] substantially their potential to foreclose competition"); XI Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1807b1, at 138 (4th ed. 2018) ("Discounts conditioned on exclusivity in relatively short-term contracts are rarely problematic."). This is so because while "a dominant firm's ongoing policy of offering discounts in exchange for exclusivity gives buyers incentives to stay with the same firm[,] any above-cost discount can be matched by an equally efficient firm." XI Areeda & Hovenkamp, ***Antitrust Law*** ¶ 1807b1, at 138. And, "[e]ven an exclusive-dealing **[**226]** contract covering a dominant share of a relevant market need have no adverse consequences if the contract is let out for frequent rebidding." XI Areeda & Hovenkamp, ***Antitrust Law*** ¶ 1802g2, at 101.

[*1009] Defendants assert that the summary judgment facts here establish that Mylan's rebate contracts were short-term and easily terminable. Thus, defendants argue, the rebate contracts never prevented payors from making formulary changes. The court agrees. The undisputed summary judgment facts show that many of Mylan's rebate agreements had terms of just two or three years. Doc. 2152-8 at 2, 9 (Defs.' Ex. 208) (two years); Doc. 2152-9 at 2 (Defs.' Ex. 209) (two years); Doc. 2152-10 at 2-3 (Defs.' Ex. 211) (two years); Doc. 2192-8 at 11 (Pls.' Ex. 57) (three years). And, PBMs typically renegotiated their rebate agreements at least annually. *See* Doc. 2150-16 at 6 (Defs.' Ex. 189) (Stein (Humana) Dep. 228:1-5); *see also* Doc. 2150-11 at 23-24 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 185:24-186:22).

Also, most of Mylan's rebate agreements with payors allowed either party to terminate the agreement without cause on 90 days' notice or less. *See, e.g.*, Doc. 2152-8 at 9 (Defs.' Ex. 208); Doc. 2152-12 at 5 (Defs.' **[**227]** Ex. 213); Doc. 2155-1 at 3 (Defs.' Ex. 215). And, Mylan's rebate agreements generally reserve to PBMs the right to alter their commercial formularies at any time. *See* Doc. 2155-2 at 4 (Defs.' Ex. 216); *see also* Doc. 2155-3 at 8 (Defs.' Ex. 217); Doc. 2155-4 at 8 (Defs.' Ex. 218); Doc. 2155-5 at 7 (Defs.' Ex. 219).

The summary judgment record also shows that payors actually invoked these terminability provisions, initiating rebate negotiations mid-contract. Doc. 2150-10 at 34-37 (Defs.' Ex. 183) (Anderson (CVS) Dep. 231:2-234:3) (describing how CVS asked Sanofi and Mylan for better rebate offers mid-contract term); Doc. 2152-11 at 3-4 (Defs.' Ex. 212) (Borneman Dep. 28:9-29:17) (testifying that Sanofi's rebate agreements typically "were annual contracts" and sometimes were renegotiated midterm). Indeed, it's undisputed that Sanofi renegotiated its 2013 and 2014 formulary coverage with payors, and in some cases, achieved better coverage for Auvi-Q when it made stronger rebate offers. As discussed above, Sanofi successfully reversed its exclusion from ESI's national formulary in 2015, achieved co-preferred status with Aetna on its value and premier formularies, and improved its coverage **[**228]** with CVS by securing co-preferred Tier 2 formulary coverage for Auvi-Q on CVS's Preferred Drug List and exclusive coverage on CVS's Value Based and Advanced Control Formularies. Doc. 2161-10 at 2 (Defs.' Ex. 283); Doc. 2162-3 at 2 (Defs.' Ex. 291); Doc. 2162-5 at 2-28 (Defs.' Ex. 293); Doc. 2162-6 at 2 (Defs.' Ex. 294).

Also, the undisputed facts show that Sanofi had the opportunity in 2014 to renegotiate with payors OptumRx/UnitedHealthcare and MedImpact for better coverage on their formularies for 2015. Doc. 2162-14 at 3 (Defs.' Ex. 302); Doc. 2163-2 at 3 (Defs.' Ex. 305). Both payors sought offers with increased discounts, but Sanofi, when it came to OptumRx/UnitedHealthcare, made an offer that was less competitive than Mylan's. Doc. 2162-15 at 5 (Defs.' Ex. 303); Doc. 2163-1 at 10 (Defs.' Ex. 304). And with MedImpact, Sanofi declined to make the offer MedImpact had requested. Doc. 2163-3 at 2 (Defs.' Ex. 306); Doc. 2163-4 at 2 (Defs.' Ex. 307).

Courts have found that exclusionary contracts of similar duration and terminability as the rebate agreements at issue here don't produce "a significant exclusionary effect." *Methodist Health Servs. Corp. v. OSF Healthcare Sys., 859 F.3d 408, 409-410 (7th Cir. 2017)* (finding **HN46**[] no exclusionary effects from contracts that expire "every **[**229]** year or two" thus "giving other [competitors], such as [plaintiff], a shot at obtaining the next contract by outbidding [defendant]"); *see also* Omega Env't, 127 F.3d at 1163-64 (concluding that the "the short duration [*i.e.*, one year terms] and easy **[*1010]** terminability of these agreements [*i.e.*, 60 days' written notice] negate substantially their potential to foreclose competition" because "a competing manufacturer need only offer a better product or a better deal to acquire their services"); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 237-38 (1st Cir. 1983) (affirming summary judgment against Sherman Act § 2 claim for "exclusionary" practices and finding that preclusive agreements that "lasted about two years" were reasonable). In fact, some courts have found that short-term exclusivity agreements "may actually encourage, rather than discourage, competition, because the incumbent and other, competing [sellers] have a strong incentive continually to improve the care and prices they offer in order to secure the exclusive positions." Balaklaw v. Lovell, 14 F.3d 793, 799 (2d Cir. 1994).

Plaintiffs disagree, citing several cases for the proposition that even contracts of short duration and easy terminability can restrain competition. Doc. 2190-1 at 100-01. The cited cases differ, though, because their facts presented questions whether the practical **[**230]** effect of the contracts rendered the duration and terminability of the agreement meaningless. For example, in *ZF Meritor*, the court found that the exclusive agreements at issue presented a threat to competition because they lasted for five years, effectively "lock[ing] up over 85% of the market[,]" and the agreements' termination provisions were "essentially meaningless" because defendant "had assured that there would be no other supplier that could fulfill the [buyers'] needs or offer a lower price." 696 F.3d at 287. Also, the record included evidence that "many of the terms of the [contracts] were unfavorable to the [buyers] and their customers, but that the [buyers] agreed to such terms because without [defendant's] transmissions, the [buyers] would be unable to satisfy customer demand." Id. at 285; *see also* McWane, Inc. v. FTC, 783 F.3d 814, 833-34 (11th Cir. 2015) (rejecting argument that short-term agreements were reasonable restraints on competition because the "practical effect" of exclusive dealing arrangement that required buyers to purchase all pipe fittings from defendant or lose rebates and access to defendants' supply "was to make it economically infeasible for distributors to . . . switch" to another competitor (citation and internal quotation marks **[**231]** omitted)); United States v. Dentsply, Int'l, Inc., 399 F.3d 181, 193-94 (3d Cir. 2005) (finding that "in spite of the legal ease with which the relationship can be terminated, the [buyers] have a strong economic incentive to continue" purchasing defendant's product because "the economic elements involved—the large share of the market held by [defendant] and its conduct excluding competing manufacturers—realistically make the arrangements" unlawful exclusionary contracts); Minn. Mining & Mfg. Co. v. Appleton Papers, Inc., 35 F. Supp. 2d 1138, 1144 (D. Minn. 1999) (holding that "genuine issues of fact [existed] whether [defendant's] agreements are actually terminable at will" because plaintiff had "produced evidence that [defendant's] sole-sourcing agreements often include incentives that have the practical effect of tying up [competition] over a period of several years").[63]

[*1011] In contrast here, the summary judgment facts present no triable issue whether the practical effects of Mylan's rebate agreements—despite their short duration and termination provisions—threatened competition. Just the opposite, the summary judgment facts establish that payors frequently renegotiated rebate contracts with manufacturers, invoked their early termination provisions, and made changes to formulary coverage and rebate percentages. Also, this summary judgment **[**232]** record includes no facts from which a jury could infer that the practical effects of the rebate agreements made it so payors "were not free to walk away from the agreements and purchase products from the supplier of their choice." ZF Meritor, 696 F.3d at 287 (citing Dentsply, 399 F.3d at 194). Instead, the summary judgment record provides several examples where payors renegotiated formulary coverage

[63] Plaintiffs also cite several Supreme Court cases purportedly "condemn[ing] exclusionary agreements even if they are terminable." Doc. 2190-1 at 100-01. But those cases just mention the contract terms in passing without significant analysis whether the terminability provisions produced an exclusionary effect, and the cases turned, instead, on other facts that produced a foreclosure of competition. *See* FTC v. Brown Shoe Co., 384 U.S. 316, 318-19, 86 S. Ct. 1501, 16 L. Ed. 2d 587 & n.2 (1966) (reciting a provision of the agreement that refused to grant certain benefits to shoe retailers who "are dropped or voluntarily withdraw from the" program but, in another part of the opinion, discussing the facts that supported the finding "that the franchise program effectively foreclosed Brown's competitors from selling to a substantial number of retail shoe dealers"); *see also* Standard Oil Co. v. United States, 337 U.S. 293, 296, 314, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949) (concluding that, although a requirements contract lasted only a year and was terminable with 30 days' notice, "the affected proportion of retail sales of petroleum products is substantial" and the contracts presented "a potential clog on competition" that "would impede a substantial amount of competitive activity").

with both Mylan and Sanofi in an effort to secure greater rebates for customers—*i.e.*, as ESI, Aetna, and CVS did with their 2015 formulary coverage decisions.

In sum, the court concludes that the duration and terminability of Mylan's rebate contracts at issue here present no triable issue whether these contract provisions produced significant exclusionary effects.

iii. Factor #7: Use of Exclusive Dealing Contracts by Competitors

Defendants argue that use of exclusive dealing contracts by competitors in the EAI industry precludes a jury from finding or inferring that Mylan's rebate contracts were unlawful exclusive dealing arrangements. Indeed, the undisputed facts overwhelmingly show that Mylan's competitor in the EAI market—Sanofi—made offers conditioning higher rebates on a payor's agreement to restrict or exclude EpiPen. Doc. 2161-7 at 2 **[**233]** (Defs.' Ex. 280) (Sanofi's CEO suggesting that Sanofi make "an offer that kicks [Mylan] off a formulary"); Doc. 2161-12 at 3 (Defs.' Ex. 285) (showing Sanofi achieved exclusive coverage with ESI formulary); Doc. 2161-13 at 2 (Defs.' Ex. 286) (showing Sanofi offered Aetna a 65% rebate for exclusivity for 2015); Doc. 2162-4 at 19-20 (Defs.' Ex. 292) (showing that Sanofi offered CVS higher rebates conditioned on exclusive formulary placement).

Also, the summary judgment facts establish that use of exclusive dealing contracts is common in the pharmaceutical industry. *See* Doc. 2150-9 at 33-37 (Defs.' Ex. 182) (Navarro Expert Report ¶¶ 58-60) (explaining that PBMs use "Utilization Management" techniques—such as copayments and tiering, step edits, prior authorization, and benefit exclusion—to incentivize the use of one drug over another); Doc. 2150-16 at 3 (Defs.' Ex. 189) (Stein (Humana) Dep. 210:1-8); Doc. 2150-11 at 28 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 197:7-18). And, PBMs use exclusive rebating practices as a way to negotiate lower prices from manufacturers by offering preferred formulary placement in exchange for greater rebates. Doc. 2150-16 at 3 (Defs.' Ex. 189) (Stein (Humana) **[**234]** Dep. 210:1-8); *see also* Doc. 2150-11 at 28 (Defs.' Ex. 184) (Kautzner (ESI) Dep. 197:7-18). Indeed, the summary judgment facts show some PBMs encouraged use of exclusive **[*1012]** dealing contracts specifically by soliciting Mylan and Sanofi for exclusive offers. Doc. 2159-3 at 3 (Defs.' Ex. 245) (discussing "CVS Caremark's plan to review the [EAI] class and choose an exclusive product"); Doc. 2159-11 at 2 (Defs.' Ex. 253) (noting in CVS's bid solicitation letter to Mylan the availability of "exclusion opportunities"); Doc. 2159-13 at 5 (Defs.' Ex. 255) (explaining that OptumRx "intends to manage the products" in the EAI class "using a combination of tier placement and product exclusion"); Doc. 2160-1 at 2 (Defs.' Ex. 257) (explaining MedImpact was "looking for a 1 of 1 offer for the" EAI class); Doc. 2159-9 at 2 (Defs.' Ex. 251) (asserting that Cigna was "looking for an offer for exclusive epinephrine positioning"). Based on these facts, defendants assert that Mylan's use of exclusive rebate contracts isn't "some anticompetitive scheme devised by Mylan; it is the way the entire pharmaceutical industry works." Doc. 2142-1 at 92.

Plaintiffs respond, arguing it's not proper to consider other drug **[**235]** markets, and instead, the court must confine its analysis to the EAI market. *Roxul USA, Inc. v. Armstrong World Indus., Inc., No. 17-1258, 2019 U.S. Dist. LEXIS 37926, 2019 WL 1109868, at *11 (D. Del. Mar. 8, 2019)* ("We are not similarly persuaded by the parties' reliance on guidance from other markets and involving other competitive strategies."). And, in the proper context of examining just the EAI market, plaintiffs contend, the undisputed facts show that Mylan didn't offer rebate contracts that conditioned higher rebates for EpiPen based on exclusivity until after Sanofi launched Auvi-Q. *Compare* Doc. 2155-9 at 5 (Defs.' Ex. 224) (showing that Mylan was offering up to 8% rebates in 2011), *with* Doc. 2199-3 at 2-5 (Pls.' Ex. 209) (showing that by June 2015, Mylan's Pricing Committee had approved rebates in the range of 50% to 60% for the largest PBMs and up to 30% for specifically targeted managed care accounts conditioned on exclusive or preferred formulary coverage for EpiPen). But, as defendants correctly argue, these facts actually demonstrate increased competition. As competitor Auvi-Q prepared to enter the market, Mylan recognized that it posed a threat to EpiPen; so, Mylan devised a contracting strategy that rewarded PBMs with higher rebates in exchange for their agreement to give EpiPen exclusive formulary **[**236]** placement over Auvi-Q.[64] *See* Doc. 2197-17 at 4 (Pls.' Ex.

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[64] Plaintiffs assert that Mylan's rebate contracts didn't actually represent price competition because it's undisputed that EpiPen prices rose during the relevant time period. And, plaintiffs contend, Mylan's rebating practices caused the price increase because

181) (Korczynski Dep. 254:3-10); Doc. 2197-19 at 2 (Pls.' Ex. 183); Doc. 2197-13 at 3 (Pls.' Ex. 177) (Willing Dep. 63:17-25).

In sum, the summary judgment facts present no question whether competitors in the industry used exclusive contracts. To the contrary, the summary judgment facts show that exclusive contracts are "a normal competitive tool within the [EAI drug] industry." *Concord Boat Corp. v.* ***[*1013]*** *Brunswick Corp., 207 F.3d 1039, 1062 (8th Cir. 2000)*.

iv. Factor #2: Substantial Market Foreclosure

Last, defendants argue that Mylan's exclusive rebate contracts didn't foreclose substantial market share. ***HN47***[] As already explained, an exclusive contract doesn't violate the antitrust laws unless it is "probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec., 365 U.S. at 327*. This type of foreclosure occurs when "'the opportunities for other traders to enter into or remain in [the] market [are] significantly limited'" by the exclusive dealing arrangements. *United States v. Microsoft Corp., 253 F.3d 34, 69, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (quoting *Tampa Elec., 365 U.S. at 328*).

HN48[] "Traditionally a foreclosure percentage of at least 40% has been a threshold for liability in exclusive dealing cases." *McWane, Inc. v. FTC, 783 F.3d 814, 837 (11th Cir. 2015)*; *see also* Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure,"* ***[**237]*** *and Consumer Harm*, 70 Antitrust L.J. 311, 362 (2002) ("The recent decisions uniformly favor defendants where foreclosure levels are 40 percent or less, and so it is fair to say that foreclosure in excess of that amount is a threshold requirement where foreclosure is the asserted basis of the antitrust violation."). But "some courts have found that a lesser degree of foreclosure is required when the defendant is a monopolist." *McWane, 783 F.3d at 837* (citing *Microsoft, 253 F.3d at 70*); *see also Microsoft, 253 F.3d at 70* (stating in *dicta* that "a monopolist's use of exclusive contracts . . . may give rise to a *§ 2* violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a *§ 1* violation"); Jacobson, *supra*, 70 Antitrust L.J. at 311-12, 362-63 (recognizing that "[c]ourts have found liability in some cases even when the amount of 'foreclosure' is zero" and "if price, output, quality, choice, or innovation have been harmed, the lack of percentage foreclosure is no defense").

Defendants argue that the summary judgment facts fail to support any triable issue of foreclosure. Defendants cite summary judgment evidence showing that Auvi-Q never was excluded from certain PBMs' formularies, including CVS, Prime, and Cigna, who covered Auvi-Q on Tier 2 or Tier 3 without restriction. **[**238]** Doc. 2150-10 at 9-13 (Defs.' Ex. 183) (Anderson (CVS) Dep. 112:12-116:23); Doc. 2150-15 at 16-17, 23-24 (Defs.' Ex. 188) (Hall (Prime) 110:22-111:9, 129:24-130:7); Doc. 2150-17 at 18-22 (Defs.' Ex. 190) (Kronberg (Cigna) Dep. 79:3-83:8). Also, defendants assert, rebate agreements gave payors the ability to switch their formularies to cover any combination of EpiPen and Auvi-Q at any time. *See, e.g.*, Doc. 2155-2 at 4 (Defs.' Ex. 216) (Mylan/ESI rebate agreement) ("Nothing in this Agreement shall be construed to limit the ability of ESI or any ESI Client to remove a Product from formulary."). And, the terminability provisions allowed competing drug providers to renegotiate their formulary placement at any time. So, defendants argue, these facts show that the exclusionary rebate contracts produced no substantial foreclosure.

Plaintiffs respond, citing their expert's analysis showing the percentage of Auvi-Q foreclosure to consumers—both insured and uninsured. Doc. 2192-6 at 90 (Pls.' Ex. 55) (Elhauge Reply Expert Report Fig. 104). Prof. Elhauge performed an analysis that shows, in 2013, about 80% of consumers had access to Auvi-Q. *Id.* In 2014, that

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it was the price increases that, in turn, allowed Mylan to offer higher rebates to payors. But this argument ignores summary judgment evidence showing that rebate contract negotiations consisted of more than negotiations over rebate percentages. They also included negotiations over contract terms governing WAC prices and price protection. *See* Doc. 2159-6 at 2 (Defs.' Ex. 248) (reporting that OptumRx asked whether Mylan was "interested in a guaranteed exclusive position for EpiPen in exchange for the addition of 10% price protection"); *see also* Doc. 2159-7 at 3 (Defs.' Ex. 249) (warning to Mylan by OptumRx that "EpiPen is at risk" if it didn't offer price protection because the PBM was "well aware of the price increases Mylan [had] taken"); Doc. 2193-1 at 4 (Defs.' Ex. 82) (showing Sanofi's offer to ESI of a 60.625% rebate with 10% price protection for exclusivity).

number fell to around 65%, but it grew **[**239]** again in 2015, to about 69%, meaning that Auvi-Q was foreclosed from about 31% of consumers. *Id.* Plaintiffs argue that Prof. Elhauge's foreclosure percentages support **[*1014]** a reasonable inference that Mylan's exclusive rebate contracts produced substantial market foreclosure. The court disagrees. These calculated foreclosure percentages alone don't suffice to create a triable issue of foreclosure when considered alongside the rest of the summary judgment evidence.

As discussed extensively above, the summary judgment facts show that Mylan's rebate contracts were short in duration and easily terminable. It's also undisputed that payors renegotiated contracts with Mylan, Sanofi, and other drug suppliers regularly, typically on an annual basis. As Professors Areeda and Hovenkamp explain,

> ***HN49***[] The relevant question [when evaluating foreclosure] is always what percentage of the market is effectively "unrestricted" during a specific time period. The unrestricted set includes (a) those dealers who are not bound by exclusive-dealing arrangements at all; plus (b) those dealers whose contracts will expire during that time period in any event; and (c) those dealers whose contracts have termination clauses **[**240]** permitting them to sever existing arrangements during that time period and who realistically can do so.

XI Areeda & Hovenkamp, ***Antitrust Law*** ¶ 1802g2, at 102.

Here, the summary judgment facts show that payors could invoke the contracts' termination provisions, and they actually renegotiated their rebate percentages often to secure better pricing from drug manufacturers in exchange for better formulary positions. And, the summary judgment facts establish that Sanofi did the same thing. Once Sanofi decided to pursue a more aggressive rebate strategy for 2015, it had success securing better formulary placement for Auvi-Q. This success tracks with Prof. Elhauge's analysis showing that Auvi-Q's foreclosure percentage steadily decreased in 2015, as Auvi-Q achieved better formulary coverage in response to its more aggressive rebating offers. This trend also shows that Sanofi's more aggressive rebating strategy—one that, like Mylan's, offered higher rebates in exchange for exclusivity—increased competition in the market. And, increased competition is encouraged by the antitrust laws. Indeed, the summary judgment facts show that both Sanofi and Mylan offered higher rebates to payors conditioned **[**241]** on restrictions or exclusivity. And, when Mylan and Sanofi did so, they had success in achieving better formulary placement for their competing EAI products. From these facts, no reasonable factfinder could find or infer that Auvi-Q was foreclosed from a substantial share of the market.

Under similar facts, courts have refused to find a triable issue of substantial foreclosure. *See, e.g.,* *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 997 (9th Cir. 2010)* (affirming summary judgment against Sherman Act claims because evidence showed that "[a]ny customer subject to one of [defendant's] market-share discount agreements could choose at anytime to forego the discount offered by [defendant] and purchase from a generic competitor[,]" so the "agreements at issue here did not fore-close [defendant's] customers from competition because a competing manufacturer needed only offer a better product or a better deal to acquire their business" (citations, internal quotation marks, and internal brackets omitted)); *Eisai Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168 (MLC), 2014 U.S. Dist. LEXIS 46791, 2014 WL 1343254, at *34-35 (D.N.J. Mar. 28, 2014)* (holding that Sanofi's market share discount contracts didn't foreclose competition in the market because the summary judgment evidence showed that the contracts "were terminable at any time by any party for any reason upon thirty days' written notice" **[**242]** and plaintiff's market **[*1015]** share grew during the relevant time period, which "indicate[d] that customers could walk away from the [Sanofi] discounts when they so desired, and they did").

Plaintiffs also assert that the EAI market's "concentrated channels of distribution and spillover effects" present a triable issue of substantial market foreclosure. Doc. 2190-1 at 96. It is undisputed that Mylan recognized the spillover effects that EpiPen's exclusionary contracts might produce. Doc. 2199-9 at 2 (Pls.' Ex. 215) (showing that Mylan trained its sales force to understand "the 'spill over' effect[,]" meaning that in territories where Mylan was preferred on a majority of plans, the sales force should "emphasize the preferred plans[.]"); *see also* Doc. 2197-7 at 5 (Pls.' Ex. 171) (Foster Dep. 278:1-9) (explaining that the "concept of spillover typically refers to when a doctor is used to writing [a] product" because the manufacturer has "strong formulary positions" and "then it tends to have a spillover effect, where the doctor just gets patterned into" prescribing the product).

Defendants respond to plaintiffs' "spillover" effects argument, asserting that plaintiffs provide no legal support for **[**243]** their theory that the court can consider "spillover" effects in the analysis whether substantial market foreclosure exists. And, defendants contend, evidence that some physicians preferred EpiPen doesn't permit plaintiffs to inflate their foreclosure percentages. That is especially true where, as here, plaintiffs never quantify the degree of this purported spillover into a market foreclosure percentage. And as the antitrust plaintiffs, they shoulder the burden of proof to marshal evidence supporting a genuine issue of foreclosure. Without any evidence showing the quantity of foreclosure attributable to any alleged "spillover" effect, the court can't find that a genuine issue about foreclosure exists on that basis.

In sum, the court holds that the summary judgment facts here present no triable issue whether Mylan's exclusive rebate contracts produced substantial market foreclosure.

v. Conclusion

After considering the *ZF Meritor* factors, the court finds that no reasonable jury could find or infer from the summary judgment facts that: (1) Mylan's exclusive rebate contracts coerced payors into accepting their terms; (2) the contracts' terms governing duration and terminability produced exclusionary **[**244]** effects; (3) competitors in the EAI industry didn't use exclusive rebate contracts, and instead, the use of exclusive rebate contracts was limited just to Mylan; or (4) the contracts produced substantial market foreclosure. Each of these factors favors a finding that the summary judgment facts present no triable issue that Mylan's rebate contracts foreclosed competitors from a substantial share of the market. Applying a rule of reason analysis, the summary judgment facts establish that Mylan's exclusive contracts were relatively short in duration and easily terminable, they were not the product of any unlawful coercion on Mylan's part, and they didn't foreclose Sanofi from competing in the EAI drug market. The court thus concludes under a rule of reason analysis that plaintiffs haven't shouldered their burden to present a triable issue whether Mylan's exclusive rebate contracts violated the Sherman Antitrust Act. So, the court grants summary judgment against plaintiffs' antitrust claims premised on their exclusive dealing theory.

b. Pricing Above Cost

Defendants assert a second argument supporting their summary judgment motion against plaintiffs' exclusive dealing claims. Defendants **[**245]** argue that the summary judgment facts establish that Mylan always offered prices for the EpiPen that **[*1016]** were above cost. And, that practice, defendants say, means they didn't violate the antitrust laws because price discounts at above-costs prices are procompetitive.

HN50[] The Supreme Court expressly has approved competition based on price, recognizing that "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition[.]" *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (citation and internal quotation marks omitted). The Supreme Court has noted "the exclusionary effect of prices above a relevant measure of cost . . . reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Id.* The Supreme Court thus has refused to "hold that the antitrust laws protect competitors from the loss of profits due to such price competition" because such a ruling "would, in effect, render illegal any decision by a firm to cut prices in order to increase market share." *Id.* (citation and **[**246]** internal quotation marks omitted). And, the "antitrust laws require no such perverse result." *Id.* (citation and internal quotation marks omitted).

Given this "economic reality," the Supreme Court has "established two prerequisites to recovery on claims of predatory pricing." *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 318, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)*. "'First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.'" *Id.* (quoting *Brooke Grp., 509 U.S. at 222*). And second, "a plaintiff must demonstrate that 'the competitor had . . . a dangerous probabilit[y] of recouping its investment in below-cost prices.'" *Id. at 318-19* (quoting *Brooke Grp., 509 U.S. at 224*).

This two-prong test "is known as the price-cost test." *Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 408 (3d Cir. 2016)*.

The Third Circuit addressed the question whether the price-cost test applies to an alleged anticompetitive rebate program in *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012)*.[65] *ZF Meritor* recognized that "**HN51**[] a plaintiff's characterization of its claim as an exclusive dealing claim does not take the price-cost test off the table." *Id. at 275*. Instead, the price-cost test still may apply because "contracts in which discounts are linked to purchase (volume or market share) targets are frequently challenged as *de facto* exclusive dealing arrangements on **[**247]** the grounds that the discounts induce customers to deal exclusively with the firm offering the rebates." *Id.* So, "when price is the clearly predominant mechanism of exclusion, the price-cost test tells us that, so long as the price is above-cost, the procompetitive justifications for, and the benefits of, lowering prices far outweigh any potential anticompetitive effects." *Id.*

But, *ZF Meritor* nonetheless refused to apply the price-cost test in that case because plaintiffs "did not rely solely on the exclusionary effect of [defendant's] prices" to support their exclusive dealing claim. *Id. at 277*. Instead, plaintiffs "highlighted a number of anticompetitive provisions" in **[*1017]** the exclusive dealing agreements, including plaintiffs' allegation that defendant "used its position as a supplier of necessary products to persuade [customers] to enter into agreements imposing *de facto* purchase requirements of roughly 90% for at least five years, and that [defendant] worked in concert with [customers] to block customer access to Plaintiffs' products, thereby ensuring that Plaintiffs would be unable to build enough market share to pose any threat to [defendant's] monopoly." *Id.* The Third Circuit thus **[**248]** concluded that "price itself was not the clearly predominant mechanism of exclusion," and so, the price-cost test did not apply to preclude plaintiffs' exclusive dealing claim in that case. *Id.*

Applying *ZF Meritor*, other courts also have refused to apply the price-cost test to exclusive dealing claims when price itself was not the clearly predominant mechanism of exclusion. *See, e.g., Dial Corp. v. News Corp., 165 F. Supp. 3d 25, 32 (S.D.N.Y. 2016)* (denying summary judgment against plaintiffs' exclusive dealing claim and holding that the price-cost test did not apply because price was not the "clearly predominant method of exclusion" but, instead, "the length of the exclusive contracts and their staggered terms may also foreclose competition"); *UniStrip Techs., LLC v. LifeScan, Inc., 153 F. Supp. 3d 728, 737-38 (E.D. Pa. 2015)* (holding that the price-cost test did not apply to plaintiff's exclusive dealing claim because plaintiff's Complaint never alleged that price was defendants' means of exclusion; instead, plaintiff based its exclusive dealing claim on defendants' allegedly anticompetitive predatory conduct through exclusive dealing arrangements preventing competitors from entering the market).

Here, defendants contend that the price-cost test applies because, unlike the facts at issue in *ZF Meritor*, this case's summary judgment **[**249]** facts establish that price was the clearly predominant mechanism of exclusion. And, defendants argue, the undisputed facts establish that Mylan priced EpiPen above cost. *See* Doc. 2163-5 at 9-10, 39-55 (Defs.' Ex. 308) (Willig Expert Report ¶¶ 14, 89-122) (concluding that "Mylan's prices, taking full account of rebates and price protection, were above an appropriate measure of its cost" in analysis of PBM contracts). Plaintiffs disagree. They assert that the price-cost test applies only when price is the predominant method of exclusion. But here, plaintiffs contend, their unlawful exclusive dealing claims are based on Mylan's rebating practices—not price—so their claims aren't subject to the price-cost test.

In the end, the court need not decide this issue. Confronted with a similar argument by a defendant seeking to apply the price-cost test to market share discount contracts it had offered customers, the Third Circuit declined to consider "when, if ever, the price-cost test applies to this type of claim." *Eisai, 821 F.3d at 409*. It instead considered whether the contracts at issue were unlawful exclusive dealing arrangements under a rule of reason analysis. *Id.* The Third Circuit "concluded that [plaintiff's] **[**250]** claims [were] not substantiated and that they

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[65] The parties do not cite and the court's own research has not located any case where the Tenth Circuit has considered whether the price-cost test applies to an exclusive dealing claim based on a discount or rebate program. The court predicts, if presented with the question, the Tenth Circuit would find *ZF Meritor*'s reasoning persuasive and apply it to the facts presented here.

fail[ed] a rule of reason analysis[.]" *Id.* As a consequence, the Third Circuit decided that it need not consider whether the price-cost test applied.[66] *Id.*

[*1018] Likewise, here, the court already has analyzed plaintiffs' exclusive dealing claims under a rule of reason analysis. That analysis has led the court to conclude that the summary judgment facts present no triable issue whether Mylan's rebate contracts violate the Sherman Antitrust Act. So, the court need not decide whether the price-cost test applies to preclude plaintiffs' antitrust claims. The court thus declines to decide whether summary judgment is warranted for this second reason—*i.e.*, whether the price-cost test applies to plaintiffs' antitrust claims and whether plaintiffs' claims fail under that test because Mylan never priced the EpiPen below its costs.

3. Antitrust Damages

Defendants next argue, if the court doesn't grant summary judgment against plaintiffs' antitrust claims, it should limit plaintiffs' antitrust damages. They provide four reasons.

First, defendants argue that certain state antitrust statutes have two or three year statutes of limitations that **[**251]** bar any of plaintiffs' claims premised on conduct falling outside the statute of limitations period. Plaintiffs first filed their state law antitrust claims on January 9, 2017. Amended Class Action Complaint, *Huston v. Mylan, N.V.*, No. 16-2796-JWL (D. Kan. Jan. 9, 2017), ECF No. 6. So, defendants argue, the court must preclude plaintiffs from recovering any damages incurred two years before that date—before January 9, 2015—under Alabama law. *See* *Ala. Code § 6-2-38(l)* (codifying two year statute of limitations for all "actions for any injury to the person or rights of another not arising in contract"). And, defendants argue, it must preclude plaintiffs from recovering any damages incurred three years before they filed their state law antitrust claims—before January 9, 2014—under Kansas, Mississippi, and Tennessee law.[67] *See* *Four B Corp. v. Daicel Chem. Indus., Ltd., 253 F. Supp. 2d 1147, 1156 (D. Kan. 2003)* (applying *Kan. Stat. Ann. § 60-512(2)*'s three-year limitation period to Kansas Restraint of Trade Act claims); *see also* *Miss. Code Ann. § 15-1-49* (providing three year statute of limitations for all "actions for which no other period of limitation is prescribed"); *State ex rel. Leech v. Levi Strauss & Co.*, No. 79-722-III, 1980 WL 4696, at *3 (Tenn. Ch. Sept. 25, 1980) (concluding private antitrust suit for injury or damage "sounds in tort" and "is subject to the three year statute of limitation in" *Tenn. Code Ann. § 28-3-105*).

Plaintiffs respond, invoking the doctrines **[**252]** of fraudulent concealment, equitable tolling, and the discovery rule. *See* *Aldrich v. McCulloch Props., Inc., 627 F.2d 1036, 1042 (10th Cir. 1980)* (explaining that facts supporting a finding or inference of "affirmative conduct to conceal the fraud" invokes "the doctrine of equitable tolling"); *see also* *Allred v. Chynoweth, 990 F.2d 527, 530 (10th Cir. 1993)* (discussing Utah's application of "the discovery rule to toll **[*1019]** the statute of limitations" and explaining that it "estop[s]" defendant "from relying on the statute of limitations as a defense to the action" when defendant "misleads the plaintiff or causes a delay in the bringing of a

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[66] At the district court level, however, the New Jersey federal court concluded "that price was the predominant mechanism of exclusion" of the market share discount contracts at issue, and "thus, the price-cost" test applied. *Eisai Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168 (MLC), 2014 U.S. Dist. LEXIS 46791, 2014 WL 1343254, at *30 (D.N.J. Mar. 28, 2014)* (citations and internal quotation marks omitted). The court explained that under the price-cost test, "so long as the price is above-cost, the procompetitive justifications for, and the benefits of, lowering prices far outweigh any potential anticompetitive effects." *Id.* (citations and internal quotation marks omitted). Because it was undisputed that defendant Sanofi never sold its drug below its costs to produce the product, the New Jersey district court held that plaintiff couldn't "recover under the antitrust laws, and summary judgment must be granted in favor of Sanofi." *Id.* The New Jersey court also applied a rule of reason analysis to the plaintiff's exclusive dealing claims and concluded the "result would be the same." *Id.; see also* *2014 U.S. Dist. LEXIS 46791, [WL] at *30-36*.

[67] These statute of limitations arguments are mooted by the courts' other conclusions about antitrust damages. As discussed, plaintiffs don't assert any damages claim based on their generic delay theory before March 14, 2014—the date when (according to plaintiffs' theory) Teva would have launched its generic EAI "but for" the alleged unlawful reverse payment settlement. And, the court dismisses plaintiffs' Tennessee state law claims because there is no properly named plaintiff who asserts claims under that state's laws.

cause of action" (citation and internal quotation marks omitted)). Plaintiffs argue that these doctrines toll the limitations periods through August 2016—when Congress announced its investigation of EpiPen pricing and thus putting plaintiffs on notice of defendants' alleged unlawful activity.

Defendants disagree that these doctrines save plaintiffs' claims from the statutes of limitations bar. Defendants assert that these doctrines don't apply here because plaintiffs can't show they diligently pursued their causes of action. *See* Crowe v. Servin, 723 F. App'x 595, 597 (10th Cir. 2018) ("A litigant seeking equitable tolling must show (1) that [s]he has been pursuing [her] rights diligently, and (2) that some extraordinary circumstances **[**253]** stood in [her] way." (citation and internal quotation marks omitted)); *In re Urethane Antitrust Litig., 913 F. Supp. 2d 1145, 1158 (D. Kan. 2012)* (explaining "doctrine of fraudulent concealment" requires showing "(1) the use of fraudulent means by the conspirators; (2) successful concealment from plaintiffs; and (3) that plaintiffs did not know or by the exercise of due diligence could not have known that they might have had a cause of action" (citation omitted)). For example, defendants assert that the April 2012 public announcement by Teva and Pfizer about the EpiPen patent litigation put plaintiffs on notice of their generic delay claims. And thus, they argue, the limitations clock began running in 2012.

Plaintiffs respond, arguing that the summary judgment facts present a triable issue whether they had the means to discover defendants' unlawful actions before 2016 and whether defendants concealed their actions by entering a reverse payment settlement and issuing misleading press releases. The court agrees with plaintiffs. It can't decide this issue on summary judgment. ***HN52***[] Whether plaintiffs diligently pursued their claims, thus permitting them to avail themselves of the various tolling doctrines, is a factual issue that the jury must decide at trial. *See* ***[**254]*** *Aldrich, 627 F.2d at 1042* ("The question of whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law."); *In re Urethane Antitrust Litig., 913 F. Supp. 2d at 1163* (holding that the "evidence [was] sufficient at least to create a fact question on the issue of fraudulent concealment," so defendant was "not entitled to summary judgment on its statute-of-limitations defense"). Thus, the court declines to limit plaintiffs' antitrust damages on statute of limitations grounds.

Second, defendants argue that the court should limit plaintiffs' generic delay claims to the period between March 14, 2014 to June 22, 2015. The beginning date is the "but for" generic entry date that plaintiffs' expert calculates as the generic entry date produced by an economically rational "but for" settlement in the EpiPen litigation. Plaintiffs respond that defendants' argument is "moot" because plaintiffs' expert doesn't calculate any damages before the March 24, 2014 "but for" generic entry date. Doc. 2190-1 at 106. Because plaintiffs have conceded that they don't offer any evidence of generic delay damages before March 14, 2014, the court grants summary judgment against any claim for generic **[**255]** delay damages before that date.

The end date of the permissible damages period, according to defendants, is June 22, 2015—*i.e.*, the license date that the EpiPen settlement agreement granted Teva. Defendants argue that plaintiffs can't recover any damages after that date because the summary judgment evidence **[*1020]** presents no triable issue whether defendants caused Teva's failure to launch by the settlement's agreed-to generic entry date. The court already addressed this argument in considerable detail when it discussed the causation requirement for plaintiffs' antitrust claims. As the court held, the summary judgment facts, construed in plaintiffs' favor, present a jury question whether defendants caused Teva to delay its efforts to develop its product and whether the delay was a foreseeable consequence of defendants entering a settlement agreement in 2012 that required Teva to wait until 2015 to launch its generic product. So, the court won't grant summary judgment limiting the end date of plaintiffs' damages period to the EpiPen settlement's agreed-to generic entry date.

Third, defendants assert that plaintiffs cannot recover any damages under California's Unfair Competition Law ("UCL"), **[**256]** *Cal. Bus. & Prof. Code §§ 17200-17210*. Defendants correctly argue that "***HN53***[] restitution is the only monetary remedy authorized" by that statute. *Clark v. Superior Ct., 50 Cal. 4th 605, 112 Cal. Rptr. 3d 876, 235 P.3d 171, 176 (Cal. 2010)*. But, defendants contend, plaintiffs never assert any claim for restitution in the Pretrial Order. *See generally* Doc. 2169 (Pretrial Order). Instead, plaintiffs assert that they "seek damages (trebled where appropriate), attorneys' fees, and costs;" and they contend they "are entitled to seek statutory damages, treble damages, and attorneys' fees and costs under various state antitrust laws." *Id.* at 52 (Pretrial Order ¶ 5.a.)

(citing California's Cartwright Act, Cal. Bus. & Prof. Code § 16750, but omitting reference to California's UCL, Cal. Bus. & Prof. Code § 17200).

Plaintiffs disagree, arguing that the Pretrial Order's assertion that plaintiffs are entitled to damages, generally, suffices to assert a restitution claim and put defendants on notice that plaintiffs are seeking restitution under California law for their claims based on alleged violations of California's UCL. They contend that restitution is a form of damages recoverable by class action plaintiffs. *See* Pulaski & Middleman, LLC v. Google, Inc., 802 F.3d 979, 986 (9th Cir. 2015) (explaining that "restitution is available on a classwide basis once the class representative makes the threshold showing of liability under the UCL"). But, **HN54**[] the case law is clear that restitution under **[**257]** the UCL does not include remedies at law (*i.e.*, actual damages); instead, it only provides for equitable remedies. *See* Adir Int'l, LLC v. Starr Indem. & Liab. Co., 994 F.3d 1032, 1043 (9th Cir. 2021) ("Equitable remedies (injunctive relief, restitution, and civil penalties) are the only remedies available under" the UCL (citing Cal. Bus. & Prof. Code §§ 17200-17210)); *see also* Woo v. Home Loan Grp., L.P., No. 07-CV-0202-H(POR), 2007 U.S. Dist. LEXIS 98521, 2007 WL 6624925, at *4 (S.D. Cal. July 27, 2007) (explaining "§ 17200 is an equitable action, and restitution is an equitable remedy" (citing Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163, 96 Cal. Rptr. 2d 518, 999 P.2d 706, 715 (Cal. 2000)); Cummings v. Connell, No. CIVS992176WBS DAD, 1999 U.S. Dist. LEXIS 21971, 1999 WL 1256772, at *5 n.4 (E.D. Cal. Dec. 20, 1999) ("Restitution is ordinarily a substitute for *rather than a form of damages*." (emphasis added)).

Here, the Pretrial Order asserts no claim for restitution or any other form of equitable relief. Instead, it "seek[s] damages (trebled where appropriate), attorneys' fees, and costs;" and it states explicitly that plaintiffs "do not seek any other forms of relief." Doc. 2169 at 52 (Pretrial Order ¶ 5.a.).

Our Circuit has instructed that "**HN55**[] a pretrial order should be liberally construed to cover any of the legal or factual theories that might be embraced by [its] **[*1021]** language." Koch v. Koch Indus., Inc., 203 F.3d 1202, 1220 (10th Cir. 2000) (citation and internal quotation marks omitted). But, "a district court may more strictly construe a pretrial order when that order has been refined over time, properly drawn, and drafted with substantial specificity." *Id.* (citations omitted). Here, the parties previously asserted **[**258]** that they engaged in "diligent efforts" to prepare the Pretrial Order, "meeting and conferring and exchanging drafts" of it in the days leading up to the court's deadline for submitting it. Doc. 2072 at 1. The parties asked the court for a four-day extension of time to submit their proposed Pretrial Order, which Judge James granted. *See id.; see also* Doc. 2073. The parties then submitted an 80-page proposed Pretrial Order to the court. It contained signature blocks for five lawyers from five different law firms who represent plaintiffs. Then, at the Final Pretrial Conference, six lawyers appeared on plaintiffs' behalf. Doc. 2169 at 1. After that conference, the court filed the 64-page operative Pretrial Order (Doc. 2169) that contains no claim by plaintiffs for restitution under California's UCL, Cal. Bus. & Prof. Code § 17200. Because plaintiffs didn't include a restitution claim in the Pretrial Order—one that was "refined over time, properly drawn, and drafted with substantial specificity"—the court grants summary judgment against any restitution claim under the UCL. Koch, 203 F.3d at 1220, 1222 (finding that the district court "did not abuse its discretion when it construed a properly drawn, refined, and specific pretrial order as excluding **[**259]** any accounting claims" not specified in the Pretrial Order); *see also* Sunderman v. Westar Energy, Inc., 520 F. Supp. 2d 1269, 1278 (D. Kan. 2007) ("**HN56**[] The pretrial order is the controlling document for trial. . . . Claims not included in the pretrial order are waived."); Lewis v. Glickman, No. 98-4154-SAC, 2000 U.S. Dist. LEXIS 23221, 2000 WL 1863407, at *1 (D. Kan. Nov. 1, 2000) ("The decision to exclude facts or issues as not found in the pretrial order is committed to the trial court's sound discretion." (citation omitted)).

Fourth, defendants argue that plaintiffs' claims asserted under Tennessee law fail for lack of subject matter jurisdiction. The only named plaintiff asserting state ***antitrust law*** violations under Tennessee law is April Sumner. Doc. 60 at 21 (Consolidated Class Action Compl. ¶ 54). But, defendants contend, Ms. Sumner is not a named plaintiff in any underlying case transferred to become part of this MDL. And thus, her participation in this case is "an end run around the proper procedural framework that governs MDL proceedings[.]" In re FCA US LLC Monostable Elec. Gearshift Litig., No. 16-md-02744, 2017 U.S. Dist. LEXIS 216672, 2017 WL 6402992, at *4 (E.D. Mich. Mar. 21, 2017), *reconsideration denied*, No. 16-md-02744, 2017 U.S. Dist. LEXIS 221143, 2017 WL 6402991 (E.D. Mich. Mar. 23, 2017). As the Michigan federal court explained, an MDL proceeding isn't "an environment that can spawn fresh actions by new plaintiffs" because that "is at odds with" the framework established by 28 U.S.C. § 1407. 2017 U.S. Dist. LEXIS 216672, [WL] at *3. In particular, "newly-named plaintiffs who have never filed any lawsuit anywhere, in any court," don't **[**260]** have a case in any "transferor court from which [the transferee court] could inherit its authority over their claims." *Id.* (citation and internal quotation marks omitted). So, defendants argue, the court must dismiss Ms. Sumner's claims for lack of subject matter jurisdiction. *See* In re Mortg. Elec. Registration Sys. (MERS) Litig., No. MD-09-02119-PHX-JAT, 2016 U.S. Dist. LEXIS 95898, 2016 WL 3931820, at *7 (D. Ariz. July 21, 2016) (holding that the court "must dismiss [newly-added MDL plaintiff's] claims for lack of subject-matter jurisdiction" because they "were not transferred to this court through proper MDL procedures but, rather, were simply added by fiat[,]" and thus, the claims "have no **[*1022]** home federal court to which this Court may eventually remand them" (citations and internal quotations omitted)); In re Packaged Ice Antitrust Litig., No. 08-MDL-1952, 2011 U.S. Dist. LEXIS 150426, 2011 WL 6178891, at *9 (E.D. Mich. Dec. 12, 2011) (dismissing newly named plaintiffs to consolidated amended complaint in an MDL proceeding because the amendment "ignored basic Article III principles and . . . bypassed the appropriate MDL process for consolidation of these plaintiffs' claims"); In re Farmers Ins. Exch. Claims Representatives' Overtime Pay Litig., MDL No. 33-1439, 2008 U.S. Dist. LEXIS 90136, 2008 WL 4763029, at *5 (D. Or. Oct. 28, 2008) (dismissing four state law claims because there is "no authority for this court, as an MDL transferee court, to exercise subject matter jurisdiction over state law claims not transferred by the MDL Panel").

Plaintiffs disagree. They argue that defendants waived this argument by conceding subject matter **[**261]** and personal jurisdiction in the Pretrial Order. Doc. 2169 at 2 (Pretrial Order ¶¶ 1.a. & 1.b.). But, "***HN57***[] subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." Arbaugh v. Y&H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) (citation and internal quotation marks omitted). Instead, the Federal Rules require that the court "must dismiss the action" if it "determines at any time that it lacks subject-matter jurisdiction[.]" Fed. R. Civ. P. 12(h)(3).

Plaintiffs also assert that they have a right to file their RICO claims directly in this court and assert state law antitrust claims as supplemental claims. The court disagrees. The cases plaintiffs cite to support this argument don't address the court's subject matter jurisdiction in an MDL proceeding, but instead address questions about personal jurisdiction. *See* Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1231 (10th Cir. 2006) (holding that ***HN58***[] 18 U.S.C. § 1965 establishes nationwide service of process for RICO claims); *see also* United States v. Botefuhr, 309 F.3d 1263, 1272 (10th Cir. 2002) (discussing the concept of "pendent personal jurisdiction" which "exists when a court possesses personal jurisdiction over a defendant for one claim" but "lacks an independent basis for personal jurisdiction over the defendant for another claim that arises out of the same nucleus of operative fact"). And, as Judge Vance has **[**262]** observed, "[s]upplemental jurisdiction presupposes the existence of a case, already properly before the court, to which the 'other claims' may be attached." Dorsey v. Mfrs. Life Ins. Co., No. Civ. A. 97-2389, 1997 U.S. Dist. LEXIS 18401, 1997 WL 703354, at *3 (E.D. La. Nov. 10, 1997) "In other words, supplemental jurisdiction does not create original jurisdiction, it merely sweeps 'other claims' under the federal court's jurisdictional rug." *Id.* Here, Ms. Sumner's claims don't properly "arise out of supplemental jurisdiction" because she "never filed a suit of [her] own nor had any suit pending[,]" thus the court can't "consolidate [her] suit with the multidistrict litigation" and "this transferee court 'does not have subject matter jurisdiction to adjudicate an action that is lacking in original federal jurisdiction.'" In re Mortg. Elec. Registration Sys. (MERS) Litig., 2016 U.S. Dist. LEXIS 95898, 2016 WL 3931820, at *8 (quoting Dorsey, 1997 U.S. Dist. LEXIS 18401, 1997 WL 703354, at *3).

Because April Sumner is not a named plaintiff in any underlying case transferred to this MDL, the court dismisses Ms. Sumner's claims because the court lacks subject matter jurisdiction over them. For the same reasons, it dismisses the claims asserted by Donna Anne Dvorak, Michael Gill, and Landon Ipson.[68] And, because it **[*1023]** dismisses Ms. Sumner's claims and no other plaintiff asserts claims for antitrust violations under Tennessee law, the court dismisses the Tennessee ***antitrust law*** **[**263]** claims without prejudice. *See* Doc. 1292 at 3 (dismissing plaintiffs' claims asserted under the West Virginia law because the Class Complaint no longer included any named plaintiff who resides in West Virginia).

[68] The dismissal of these other plaintiffs doesn't require the court to dismiss any pending claims. Other properly named plaintiffs assert the same claims that these plaintiffs have asserted.

4. Conclusion

For reasons explained, the court grants summary judgment against plaintiffs' antitrust claims and denies it in part. The court grants summary judgment against plaintiffs' claims premised on unlawful exclusive dealing. And, the court denies summary judgment against plaintiffs' claims premised on a generic delay claim.

Also, the court grants in part summary judgment against some of plaintiffs' damages claims. Specifically, the court grants summary judgment against: (1) any antitrust damages premised on a generic delay theory occurring before March 14, 2014; (2) any restitution claim under California's Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200-17210*; (3) plaintiffs' Tennessee ***antitrust law*** claims; and (4) any claims asserted by plaintiffs April Sumner, Donna Anne Dvorak, Michael Gill, and Landon Ipson. The court denies defendants' arguments seeking summary judgment against plaintiffs' antitrust damages claims in all other respects.

Now, the court turns to consider defendants' arguments against **[**264]** plaintiffs' RICO claims.

B. RICO Claims

Plaintiffs assert RICO claims under *18 U.S.C. § 1962(c)* & *(d)*. Doc. 2169 at 42, 44-45 (Pretrial Order ¶¶ 4.a., 4.d.). *Subsection 1962(c) of RICO* makes it:

> unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). ***HN59***[] *Subsection 1962(d)* makes it "unlawful for any person to conspire to violate" *subsection 1962(c)*. *Id.* *§ 1962(d)*. RICO provides a private civil cause of action for those who are injured by violations of *§ 1962* and allows recovery of treble damages, costs, and attorney's fees. *Id.* *§ 1964(c)*.

HN60[] To prove a violation of *§ 1962(c)*, a plaintiff must establish four elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *CGC Holding Co., LLC v. Hutchens, 974 F.3d 1201, 1210 (10th Cir. 2020)*. As our Circuit recently has explained:

> The word racketeering tends to evoke images of mobsters and organized criminals, and true enough, RICO—at least initially—"was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." But the plain language of RICO defines racketeering far more broadly in a way that allows **[**265]** the statute to "reach both legitimate and illegitimate" businesses. Indeed, among many other qualifying acts, RICO defines a racketeering activity as "any act which is indictable under" the federal statute outlawing wire fraud—a crime that any modern business could commit.

Id. at 1210-11 (first quoting *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*; then quoting *Sedima, 473 U.S. at 499*; then quoting *18 U.S.C. § 1961(1)(B)*). Also, the Supreme Court has instructed that "RICO is to be read broadly." *Sedima, 473 U.S. at 497*.

HN61[] "But proving a RICO violation requires more than racketeering activity alone." *CGC Holding Co., 974 F.3d at 1211*. To prevail on a RICO claim, a plaintiff **[*1024]** must establish: "(1) that the defendant violated *§ 1962*; (2) that the plaintiff's business or property was injured; and (3) that the defendant's violation is the cause of that injury." *Safe Sts. All. v. Hickenlooper, 859 F.3d 865, 881 (10th Cir. 2017)* (citations omitted).

Here, plaintiffs allege that defendants "joined together in an association-in-fact enterprise and used the interstate mails and wires in furtherance of" their scheme to raise EpiPen prices. Doc. 2169 at 9-10 (Pretrial Order ¶ 3.a.1.). Plaintiffs assert that defendants' scheme included: (1) withdrawing the EpiPen single pack from the EAI market and requiring customers to purchase EpiPens exclusively in the 2-Pak based on a false medical rationale; (2) stifling generic competition **[**266]** through pay-for-delay settlements; and (3) foreclosing branded competition from Auvi-Q by entering exclusive rebate contracts with payors. *Id.* at 9.

Plaintiffs allege that defendants made certain fraudulent statements or omissions through the mail and wires to further their pricing scheme including: (1) issuing a fraudulent press release on August 24, 2011, that announced Mylan no longer would sell individual EpiPens in the United States in an effort to align with medical guidelines; (2) issuing a press release in April 2012, announcing the settlement of the EpiPen patent litigation with Teva; and (3) using telephone calls and email to effectuate their exclusive rebate contracts. *Id.* at 13, 16, 18.

Defendants argue that plaintiffs' RICO claims fall short of presenting any genuine issues for trial for several reasons. They argue the court thus should grant summary judgment because the summary judgment facts present no triable issue whether: (1) defendants participated in the conduct of a RICO enterprise; (2) defendants committed any predicate acts sufficient to support a RICO claim; (3) any alleged predicate act caused plaintiffs any harm; (4) defendants conspired to violate RICO; (5) **[**267]** the statute of limitations bars plaintiffs' RICO claims; and (6) Heather Bresch—individually—is liable for violating RICO.

For reasons explained below, the court concludes that the summary judgment record presents no triable issue whether any of defendants' alleged predicate acts caused plaintiffs to sustain injury. So, plaintiffs' RICO claims fail the causation element. And, the court grants summary judgment against the RICO claims for this reason. The court explains how it reaches this conclusion, below.

1. Causation

Defendants assert that no genuine dispute exists whether any of the alleged RICO predicate acts caused plaintiffs any harm. Thus, defendants argue, plaintiffs cannot show they sustained injury "by reason of a violation of *section 1962*[,]" as *18 U.S.C. § 1964(c)* requires for a plaintiff to prevail on a RICO claim.

The Supreme Court has held that ***HN62***[] the RICO statute's "'by reason of'" requirement demands that a RICO plaintiff show "the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 265, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)* (quoting *18 U.S.C. § 1964(c)*); *see also Hemi Grp., LLC v. City of N.Y.C., 559 U.S. 1, 9, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010)* (explaining a RICO claim requires plaintiff "to show that a RICO predicate offense 'not only was a "but for" cause of his injury, but was the proximate **[**268]** cause as well'" (quoting *Holmes, 503 U.S. at 268*)). "Sufficiently establishing the element of causation—both actual and proximate—is crucial to proving any violation of RICO." *CGC Holding Co., LLC v. Broad & Cassel, 773 F.3d 1076, 1088 (10th **[*1025]** Cir. 2014)* (citing *Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 656-60, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008)*).

Defendants assert that plaintiffs can't present a triable issue about either "but for" causation or proximate causation. The court agrees with defendants on "but for" causation. As explained, no reasonable trier of fact could find or infer from the summary judgment facts that, "but for" defendants' alleged misstatements and omissions made in any of the underlying predicate acts, plaintiffs wouldn't have sustained any harm. The court explains why, below.

a. "But For" Causation

Defendants assert two separate and independent arguments supporting summary judgment against plaintiffs' RICO claims for failing to present summary judgment facts supporting a triable issue of "but for" causation. The court addresses the two distinct arguments, separately, below.

i. Plaintiffs' Alleged Harm is the Same Without the Alleged Predicate Acts

Defendants' first argument on the "but for" causation requirement asserts that plaintiffs can't present a triable issue of causation because the summary judgment record shows plaintiffs would have sustained **[**269]** the same harm if defendants never committed any of the alleged RICO predicate acts. For support, they cite the Fourth Circuit's opinion in *Walters v. McMahen, 684 F.3d 435 (4th Cir. 2012)*.

This case involved RICO claims asserted by a group of hourly-wage employees who alleged their employers' corporate managers and others had conspired to hire aliens not authorized to work in the United States so that the company could reduce labor costs. *Id. at 437*. ***HN63***[] When discussing the RICO causation requirement, the Fourth Circuit explained that the "compensable injury resulting from a violation of *18 U.S.C. § 1962(c)* necessarily is the harm *caused by the predicate acts*[.]" *Id. at 444* (emphasis added) (citing *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 457, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006)*). The *Walters* plaintiffs had alleged that defendants committed RICO predicate acts through "the fraudulent use of identification documents and the false attestations placed on the I-9 forms[.]" *Id.* But, the Fourth Circuit found, it wasn't these alleged RICO violations "that has caused the harm suffered by the plaintiffs" because "such actions [did] not directly impact the plaintiffs' wage levels." *Id.* And, the court explained, the lack of causation "becomes obvious by removing the false attestation acts[.]" *Id.* That is, if the employer "engaged in the hiring of unauthorized aliens **[**270]** without the hiring clerks' fraudulent completion of the I-9 forms, such as by paying the unauthorized employees in cash and not reporting their employment to the United States government, the alleged injury suffered by the plaintiffs *would be the same*[.]" *Id.* (emphasis added). Thus, the Fourth Circuit held, plaintiffs' RICO claims failed as a matter of law because there was "no direct relationship between the injury asserted and the predicate act alleged." *Id.* (citing *Hemi Grp., 559 U.S. at 9-10*).

Defendants argue the same reasoning applies here. They contend that plaintiffs would have sustained the same harm—*i.e.*, paying higher prices for EpiPen—even if defendants never made the alleged false and misleading statements or omissions in the underlying RICO predicate acts. Thus, defendants argue, the alleged RICO predicate acts can't supply the requisite "but for" cause of plaintiffs' purported injuries. Plaintiffs disagree for two reasons.

First, they assert that RICO doesn't require them to prove that the *predicate acts* caused their injuries. Instead, plaintiffs argue, they only need to present a **[*1026]** genuine issue whether defendants' fraudulent EpiPen *pricing scheme* caused their injuries. But plaintiffs' argument isn't **[**271]** faithful to binding precedent. Instead, the Supreme Court has made it clear that "***HN64***[] civil RICO" requires a plaintiff "to show that *a RICO predicate offense* not only was a 'but for' cause of his injury, but was the proximate cause as well." *Hemi Grp., 559 U.S. at 9* (emphasis added and citation and internal quotation marks omitted);[69] *Bridge, 553 U.S. at 658-59* (recognizing if the Cook County, Illinois Treasurer's Office "had not accepted petitioners' false attestations of compliance with the [County's] Single, Simultaneous Bidder Rule," prohibiting simultaneous bidding at public tax lien actions—*i.e.*, the alleged RICO predicate acts—"and as a result had not permitted petitioners to participate in the auction, respondents' injury would never have materialized"); *Anza, 547 U.S. at 457* ("The Court has indicated the compensable injury flowing from a violation of that [RICO] provision 'necessarily is the harm *caused by predicate acts* sufficiently related to constitute a pattern, *for the essence of the violation is the commission of those acts* in connection with the conduct of an enterprise.'" (emphasis added) (quoting *Sedima, 473 U.S. at 497*); *Holmes, 503 U.S. at 268* (explaining plaintiff must show "the defendant's [RICO] *violation* not only was a 'but for' cause of his injury, but was the proximate cause as **[**272]** well" (emphasis added)).

Plaintiffs urge the court to ignore these requirements for establishing "but for" causation. Instead, they contend, on summary judgment the court only "considers evidence of the entire 'fraudulent scheme'—not merely the use of the mails or wires, which don't have to be fraudulent and only have to further the scheme in some way." Doc. 2190-1 at 122. But, to support this argument, plaintiffs rely on cases discussing either RICO's predicate act requirement or the

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[69] Plaintiffs correctly assert that this language comes from *Hemi Group*'s plurality opinion. But, as the First Circuit has recognized, *Hemi Group* "produced a 4-1-3 decision with no majority on the *proximate cause question*." *In re Neurontin Mktg. & Sales Pracs. Litig., 712 F.3d 21, 38 n.12 (1st Cir. 2013)* (emphasis added). The *Hemi Group* plurality opinion's recitation of the "but for" causation standard is consistent with other governing Supreme Court precedent.

proximate cause requirement—not the "but for" causation requirement. *See* [Sorensen v. Polukoff, 784 F. App'x 572, 578 (10th Cir. 2019)] (explaining that**HN65**[] a RICO plaintiff, to allege a plausible predicate act, "need not allege that the mailings or the wire communications themselves were fraudulent[,]" instead, "he needs only allege that they were 'incident to an essential part' of a fraudulent scheme" (quoting [Bridge, 553 U.S. at 639])); [Safe Sts. All. v. Hickenlooper, 859 F.3d 865, 890-91 (10th Cir. 2017)] (discussing RICO proximate cause requirement and finding no "intermediary breaks the causal chain . . . between the enterprise's" actions and plaintiffs' "injury" because defendants'"criminal cultivation of marijuana"—the RICO predicate act—caused all "alleged injuries"); [Wallace v. Midwest Fin. & Mortg. Servs., Inc., 714 F.3d 414, 419-20 (6th Cir. 2013)] ("**HN66**[] A plaintiff need only show **[**273]** use of the mail in furtherance of a scheme to defraud and an injury *proximately caused* by that scheme. Thus, the appropriate inquiry in this case is not whether [plaintiff] actually relied on the allegedly inflated appraisal, but whether the fraudulent scheme furthered by that appraisal *proximately caused* his financial injuries." (emphasis added)); [In re Neurontin Mktg. & Sales Pracs. Litig., 712 F.3d 21, 37 (1st Cir. 2013)] (rejecting defendants' argument that "its supposed misrepresentations **[*1027]** went to prescribing doctors, and so the causal link to [plaintiff] must have been broken" because plaintiff satisfied "the proximate cause requirement" by coming forward with evidence that its "injury was a foreseeable and natural consequence of" defendants' actions (citation and internal quotation marks omitted)).[70]

Here, the alleged RICO predicate offenses are use of the mail and wires to further defendants' EpiPen pricing scheme and corrupting an official proceeding in a pattern of racketeering activity. Doc. 2169 at 42 (Pretrial Order ¶ 4.a.). Under the governing legal standard, plaintiffs must identify a genuine issue for trial whether defendants' use of the mail and wires to further the EpiPen pricing scheme or their corruption of an official proceeding **[**274]** was the "but for" cause of plaintiffs' injuries—*i.e.*, paying inflated prices for EpiPen. They haven't discharged this burden.

Second, plaintiffs assert, even under defendants' standard for proving "but for" RICO causation, the summary judgment facts here present a triable issue whether, "but for" defendants' false representations and omissions, plaintiffs would have sustained harm. They contend the alleged RICO predicate acts were "integral" to defendants' pricing scheme. But, they don't come forward with admissible evidence presenting a triable issue of that assertion. Instead, as the following paragraphs explain, plaintiffs have adduced no evidence capable of supporting a finding that defendants' use of the mail and wires or their alleged corruption of an official proceeding was the "but for" cause of plaintiffs' alleged injuries.

For plaintiffs' first RICO theory—the 2-Pak switch—the alleged predicate acts are defendants' use of the mail and wires to disseminate misleading information about the reasons for the withdrawal of single EpiPens and the switch to selling the EpiPen exclusively in a 2-Pak. Specifically, plaintiffs allege that defendants provided a false rationale for the **[**275]** decision—*i.e.*, citing the medical guidance—when the true reason for the switch was to increase EpiPen profits. But, plaintiffs premise none of their alleged damages on any of defendants' *alleged statements* about the 2-Pak switch. Instead, Prof. Rosenthal calculates plaintiffs' damages based on the increase in the number of EpiPens purchased by consumers. Doc. 2164-4 at 31-32 (Defs.' Ex. 325) (Rosenthal Expert Report ¶ 72) (calculating damages "due to the withdrawal of the single-pen **[*1028]** packaging" and not alleged misstatements about the 2-Pak switch). Defendants argue plaintiffs would have sustained these same damages if defendants

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[70] Plaintiffs also cite the court's Order granting in part the class certification motion, asserting that the court held "the plaintiff need not be the victim of the predicate acts" to prevail on a RICO claim. Doc. 2190-1 at 122 n.634. And, elsewhere, plaintiffs' Response asserts that the court's Order ruling the class certification motion explained "how Plaintiffs had demonstrated RICO causation on each of the three schemes to defraud" and made "a number of legal rulings that apply to the legal issues at summary judgment." Doc. 2190-1 at 120. The court disagrees with plaintiffs' application of the certification Order. As the court noted in that Order, the court was required to "'accept the substantive allegations of the complaint as true'" when determining "whether plaintiffs have met their burden of affirmatively demonstrating compliance with [Rule 23]'s requirements[.]" Doc. 2018-1 at 5 n.2 (quoting [Shook v. El Paso Cnty., 386 F.3d 963, 968 (10th Cir. 2004)]). And, the court's Order never considered the merits of the "but for" causation requirement necessary to support plaintiffs' RICO claims. *See generally id.* But now, because the case has arrived at the summary judgment stop of its progress to trial, the court can't just accept plaintiffs' allegations as true. Instead, plaintiffs bear a summary judgment burden to come forward with admissible proof of a genuine factual question whether plaintiffs would have sustained any injury "but for" defendants' alleged RICO predicate acts. Plaintiffs haven't made that showing.

never had issued any statements about the switch to the 2-Pak—*i.e.*, after the 2-Pak switch, class members still would have purchased the same number of pens because the elimination of the single pack—not defendants' statements—caused the alleged harm.

Plaintiffs respond, arguing that the 2-Pak press release—and the false medical rationale it allegedly provided—was essential to the EpiPen pricing scheme because it provided a "smokescreen" and avoided market "backlash" from the decision to remove single EpiPens from the market. Doc. 2190-1 at 122. Plaintiffs cite **[**276]** various Mylan documents to support this theory, but none of them can support a reasonable finding or inference that, "but for" Mylan's public statements about the 2-Pak, defendants would not have succeeded in implementing the EpiPen pricing scheme that produced plaintiffs' injuries. For instance, plaintiffs cite a statement from an internal Mylan document dated before Mylan's switch to the 2-Pak that referenced a desire to keep EpiPen revenue "'below the radar' for most managed care organizations[,]" but if "managed care organizations do raise concerns" about the 2-Pak switch, Mylan had reserved "1.5% of all revenue . . . as rebates[.]" Doc. 2143-25 at 16 (Defs.' Ex. 58). Also, plaintiffs cite an email sent several weeks after the 2-Pak switch stating that Mylan had implemented the 2-Pak switch without "ANY issues" and received "no backlash" from payors. Doc. 2196-2 at 2 (Pls.' Ex. 144). Neither of these statements connects Mylan's public statements about the 2-Pak switch to Mylan's purported success avoiding scrutiny or objection to the 2-Pak switch. This conclusion is bolstered by the fact—discussed more fully below—that plaintiffs haven't come forward with any evidence showing that **[**277]** *anyone* relied on defendants' alleged misstatements or omissions about the reasons for the 2-Pak switch and the medical justification that defendants used to support that decision. As defendants correctly argue, none of this evidence can support a reasonable finding or inference that the 2-Pak public statements were "integral" to defendants' pricing scheme. Thus, the undisputed summary judgment facts lead the court to conclude that no reasonable jury could find or infer that plaintiffs wouldn't have sustained their alleged injuries "but for" the public statements made about the reason for the 2-Pak switch.

For plaintiffs' second RICO theory—generic delay—defendants assert a similar argument. They correctly explain that plaintiffs don't seek any damages caused by any purported public misstatements about patent litigation settlements. Instead, Prof. Rosenthal calculates plaintiffs' damages based on the "but for" date that a generic competitor would have entered the market absent the pay-for-delay settlement. Doc. 2164-4 at 27-31 (Defs.' Ex. 325) (Rosenthal Expert Report ¶¶ 61-71). Defendants assert that plaintiffs would have sustained the same purported damages with or without defendants' **[**278]** press release announcing the EpiPen patent litigation settlement.[71] Thus, they contend, the alleged mail and wire fraud can't supply the requisite "but for" causation to support plaintiffs' RICO claims.

Again, plaintiffs disagree. And yet again, they argue the false press release about the EpiPen settlement was "integral" to defendants' fraudulent pricing scheme because it provided the "essential cover for **[*1029]** their scheme to stifle competition[.]" Doc. 2190-1 at 123. So, plaintiffs reason, a jury could infer that the press release was necessary to the scheme because Mylan and Pfizer devoted time and resources to crafting and disseminating it over the wires. This characterization stretches the summary judgment facts far too far. The summary judgment record simply doesn't include any facts from which a jury could find or infer that the press release provided necessary "cover" for defendants to proceed with their scheme to delay generic competition. This conclusion is supported by the fact—as later discussed—that the summary judgment record is devoid of evidence showing that anyone relied on the press release announcing the EpiPen patent settlement. In short, plaintiffs' "cover" argument is **[**279]** no more than an ipse dixit assertion by counsel that finds no foundation or footing in the facts. The summary judgment facts can't support a reasonable finding or inference that, "but for" the press release announcing the EpiPen patent settlement, plaintiffs wouldn't have sustained the damages incurred because of defendants' purportedly unlawful reverse payment settlement.

Defendants argue that plaintiffs' third RICO theory—the Auvi-Q foreclosure theory—fails for a more basic reason. They contend that plaintiffs have no RICO damages model tied to any alleged brand foreclosure, much less any damages model calculating any damages from defendants' statements about Mylan's rebating practices or other

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[71] Also, defendants note that no court ever has found a reverse payment settlement allegation sufficient to support a RICO claim.

branded competition. *See* Doc. 2164-4 at 3 (Defs.' Ex. 325) (Rosenthal Expert Report ¶ 1) (explaining that Prof. Rosenthal offers a RICO damages model for generic delay and 2-Pak damages but not Auvi-Q foreclosure); *see also* Doc. 2146-4 at 4 (Defs.' Ex. 137) (Elhauge Dep. 38:12-14) (testifying that Prof. Elhauge didn't "evaluate RICO damages"). Plaintiffs respond that Prof. Elhauge's analysis shows a cause-and-effect relationship between Mylan's use of exclusive rebate contracts and plaintiffs' **[**280]** injuries in the form of paying higher EpiPen prices. But, this argument ignores Prof. Elhauge's explicit testimony. He testified that he's not opining about RICO damages. Thus, plaintiffs haven't come forward with any evidence showing that defendants' alleged statements about Mylan's rebating practices caused plaintiffs to sustain RICO damages.[72]

In sum, the court holds the summary judgment facts present no triable issue whether defendants' alleged predicate RICO acts were the "but for" cause of plaintiffs' injuries. The court thus grants summary judgment against plaintiffs' RICO claims because plaintiffs haven't presented a triable issue of "but for" causation.

ii. No Triable Issue of Reliance

The court also grants summary judgment against plaintiffs' RICO claims for a second and independent reason. Defendants argue that the summary judgment record fails to support a finding or inference of reliance sufficient to satisfy the RICO causation element. As explained, below, the court agrees with them.

a. No Triable Issue Whether Anyone Relied on the Alleged Predicate Acts

Defendants assert that the summary judgment record is devoid of evidence showing that anyone relied on defendants' alleged **[**281]** misrepresentations in or omissions **[*1030]** from the RICO predicate acts. The Supreme Court has explained that ***HN67***[] a RICO plaintiff need not establish "first-party reliance" to satisfy the causation requirement. *Bridge, 553 U.S. at 657-58*. Nevertheless, "a RICO plaintiff who alleges injury 'by reason of' a pattern of mail fraud" likely can't "prevail without showing that *someone* relied on the defendant's misrepresentations." *Id. at 658*. The Supreme Court has observed that in "most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation." *Id.*; *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co. Ltd., 943 F.3d 1243, 1259 (9th Cir. 2019)* (explaining that RICO plaintiffs must prove, at a minimum, indirect reliance "because, logically, a plaintiff cannot even establish but-for causation if *no one* relied on the defendant's alleged misrepresentation").

Plaintiffs respond, arguing that *In re Neutrontin* and *In re Celexa & Lexapro* foreclose defendants' arguments about reliance. They assert both cases permit them to proceed on their RICO claims with evidence supporting an inference of reliance.

The faith plaintiffs attach to these two cases is misplaced. In both cases, plaintiffs came forward with evidence of first-party reliance by *someone*—even if it wasn't plaintiffs who had **[**282]** relied directly on the alleged misrepresentations. *See* *In re Neurontin Mktg. & Sales Pracs. Litig., 712 F.3d 21, 40-41 (1st Cir. 2013)* (holding plaintiff presented "ample evidence" of reliance where summary judgment facts showed plaintiff "received [defendant's] misrepresentations through [defendant's] contacts" with plaintiffs' Drug Information Service ("DIS") "which disseminated information throughout [plaintiff's] organization" and that plaintiffs' "physicians received and acted upon [defendant's] misrepresentations, both through information sent through the DIS and information provided to them at [defendant's] events"); *see also id.* at 31 (noting evidence that plaintiff's "physicians attended conferences where Neurontin was promoted for off-label uses, and after one such conference, in May 1999, new starts of Neurontin increased by 62%"); *see also* *Painters & Allied Trades Dist. Council 82 Health Care Fund, 915 F.3d 1, 13 (1st Cir. 2019)* (concluding that plaintiff presented sufficient evidence of RICO causation to survive

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[72] This theory also fails for other reasons the court already has addressed. Simply, the summary judgment facts don't present any triable issues whether Mylan's rebating practices unlawfully restrained competition. Thus, any alleged misrepresentations about Mylan's rebating practices didn't cause plaintiffs to sustain any damages.

summary judgment where defendant's off-label marketing to physicians caused, according to plaintiff's experts, "76% and 54% of all pediatric prescriptions of Celexa and Lexapro, respectively" and defendant's "sales representatives called or visited at least two physicians who subsequently ordered pediatric prescriptions of Celexa **[**283]** and Lexapro").

Here, in contrast, plaintiffs present no evidence that anyone—not plaintiffs, not physicians, not third-payor payors, nor anyone else in the supply chain—relied on defendants' alleged misstatements or omissions about the 2-Pak switch, the EpiPen patent litigation settlement, or Mylan's use of exclusive rebate contracts. Indeed, none of the named plaintiffs testified that he or she had read the August 2011 press release announcing the 2-Pak switch before becoming involved in this litigation. *See* Doc. 2142-1 at 34 & n.110 (Defs.' Mem.) (citing deposition testimony of 34 of the named plaintiffs). And, no named plaintiff testified that he or she had relied on any statements by defendants when purchasing EpiPen devices. *Id.* Thus, the undisputed summary judgment facts here differ materially from those in *In re Neutrontin* and *In re Celexa & Lexapro*. They present no triable issue whether anyone relied on defendants' alleged misstatements or omissions sufficient to support the "but for" causation element of their RICO claims.

[*1031] b. No Inference of Reliance

Plaintiffs assert that they still can prevail on proving RICO causation by showing an inference of causation with statistical aggregate **[**284]** data from their expert, Prof. Rosenthal. Defendants respond that no court ever has found that an inference of reliance suffices to prove, on the merits, that a defendants' alleged misrepresentations were the "but for" cause of classwide RICO injury. The court also has found no authority supporting plaintiffs' argument that an inference of reliance based on statistical evidence—alone—can prove at the merits stage the "but for" causation element of a RICO claim. Defendants thus assert that the law requires plaintiffs to show that someone in the causal chain relied on the statements asserted in the predicate acts. And, here, plaintiffs have adduced no evidence of any such reliance. So, the court can grant summary judgment for this reason as well.

But, even if plaintiffs could shoulder their burden to prove RICO causation in the form of an inference of reliance, the summary judgment facts here can't support such an inference. As defendants correctly explain, ***HN68***[] an inference of reliance "does not shift the burden of proof at trial on the element of RICO causation (or any other elements of the claim)—plaintiffs will still have to *prove* RICO causation by a preponderance of the evidence to win **[**285]** on the merits." *CGC Holding Co., LLC v. Broad & Cassel, 773 F.3d 1076, 1093 (10th Cir. 2014)*. Here, defendants assert the summary judgment facts rebut any inference of reliance. Thus, they argue, plaintiffs' RICO claims can't survive summary judgment.

For plaintiffs' 2-Pak theory, defendants assert that Prof. Rosenthal has determined that 62%-68% of patients were not "forced" to buy 2-Paks. Doc. 2166-17 at 15-16 (Defs.' Ex. 96) (Rosenthal Dep. 197:12-198:2). And, they cite the deposition testimony of the named plaintiffs where many testified that they had purchased 2-Paks or multiple single-packs before 2011. Doc. 2144-16 at 2-8 (Defs.' Ex. 102 (citing Defs.' Ex. 102-A)). Also, at least 11 named plaintiffs purchased multiple devices in a single transaction while the single-pack was available. *Id.* And, several named plaintiffs testified that they prefer to have more than one EpiPen device at any given time. *Id.* Defendants assert that this evidence forecloses a reasonable jury from inferring reliance.

Plaintiffs respond, arguing that the court should consider Prof. Rosenthal's analysis of the percentage of consumers injured by defendants' actions when *combining* injury caused by the 2-Pak switch *or* generic delay. Also, plaintiffs argue, the court credited Prof. **[**286]** Rosenthal's analysis at class certification and it should do the same here again. But, plaintiffs' argument misapprehends the difference separating certification proceedings from substantive decisions on the merits. They mistakenly equate the court's consideration of Prof. Rosenthal's opinion on class certification with the court's consideration of her opinion in light of the summary judgment record. The summary judgment facts establish that Prof. Rosenthal opines that 62%-68% of patients were not "forced" to buy 2-Paks. From this evidence and the deposition testimony of named plaintiffs, no reasonable jury could infer reliance on defendants' alleged misrepresentations about the switch to the 2-Pak.

For plaintiffs' generic delay theory, defendants argue that the summary judgment record can't support an inference of reliance when there is no evidence that plaintiffs sustained any injury from a press release about the EpiPen settlement with Teva. Also, they cite the named plaintiffs' deposition testimony where some plaintiffs testified they continued to purchase EpiPens **[*1032]** after filing this lawsuit. Doc. 2144-16 at 11-13 (Defs.' Ex. 102) (citing Defs.' Ex. 102-A). And, some named plaintiffs **[**287]** testified that they purchased EpiPen products even though a generic or other alternative was available for purchase. *Id.* Plaintiffs argue that this individual testimony presents a fact issue that the jury must weigh against common evidence of RICO causation, and the court can't grant summary judgment on this basis. The court disagrees.

The only common evidence of RICO causation for the generic delay theory that plaintiffs identify is Prof. Rosenthal's opinion that consumers sustained a "loss of choice." Prof. Rosenthal opines that each class member sustained classwide injury from defendants' alleged misconduct. Doc. 2191-18 at 52 (Pls.' Ex. 47) (Rosenthal Oct. 31, 2019 Expert Report ¶ 118). And, as part of this opinion, Prof. Rosenthal opines that each allegation of misconduct "deprived class members of choice[.]" *Id.* (¶ 119). She describes this "loss of choice" as "[l]osing the choice to purchase a single pen, a generic EpiPen, or another brand[.]" *Id.* But, she never quantifies how many class members sustained a "loss of choice." Indeed, those class members who chose to purchase branded EpiPen products over a generic sustained no loss of choice. And, plaintiffs concede that Prof. Rosenthal's **[**288]** "loss of choice" opinion is not a measure of damages. Doc. 2183-1 at 20. Thus, no reasonable jury could infer reliance on defendants' statements about the EpiPen patent settlement based simply on Prof. Rosenthal's abstract "loss of choice" opinion. Instead, viewing the summary judgment facts as a whole and in the light most favorable to plaintiffs, a reasonable jury can't infer reliance where the summary judgment record presents no evidence that any class member sustained damage from the press release about the EpiPen settlement. This is especially true because some class representatives testified that they continued to purchase EpiPens even though a generic product was available.

On the Auvi-Q foreclosure theory, defendants again argue that plaintiffs offer no expert damages analysis of their RICO damages for this foreclosure theory. And thus, they haven't come forward with any evidence supporting an inference of reliance under this RICO theory. For the same reasons discussed in the subsection above, the court finds that plaintiffs have failed to present a triable issue whether they sustained RICO damages based on the alleged Auvi-Q foreclosure theory. The summary judgment record thus **[**289]** lacks evidence permitting an inference of reliance to support plaintiffs' RICO claims under the Auvi-Q foreclosure theory.

In sum, the court concludes that the case law doesn't permit plaintiffs' RICO claims to survive summary judgment simply by coming forward with evidence supporting an inference of reliance when the record is devoid of any evidence showing that at least someone in the causal chain relied on the alleged misrepresentation. But, even if an inference of reliance presented a triable issue of RICO "but for" causation, plaintiffs haven't come forward with summary judgment evidence from which a reasonable fact finder could infer reliance. So, the court grants summary judgment against plaintiffs' RICO claims for this second and independent reason: plaintiffs have failed to present a triable issue of reliance as required to support a finding of RICO "but for" causation.

2. RICO Conspiracy Claim

Defendants argue that plaintiffs' RICO conspiracy theory claim fails as a matter of law because their substantive RICO claim under *§ 1962(c)* fails on summary judgment. They are correct. As our Circuit has explained, "***HN69***[] [b]y its terms, *§ 1962(d)* requires that a plaintiff must **[*1033]** first allege an independent violation **[**290]** of *subsections (a)*, *(b)*, or *(c)*, in order to plead a conspiracy claim under *subsection (d)*." *Tal v. Hogan, 453 F.3d 1244, 1270 (10th Cir. 2006)* (citation omitted). And, if "a plaintiff has no viable claim under *§ 1962(a)*, *(b)*, or *(c)*, then its *subsection (d)* conspiracy claim fails as a matter of law." *Id.* (citations omitted). As the court already has concluded, summary judgment is warranted against plaintiffs' *§ 1962(c)* claim. And, because the court has concluded plaintiffs have no viable *§ 1962(c)* RICO claim, plaintiffs' *§ 1962(d)* RICO conspiracy claim also fails as a matter of law. The court thus grants summary judgment against plaintiffs' RICO conspiracy claim.

3. Conclusion

For reasons explained, the court grants summary judgment against plaintiffs' RICO claims.

IV. Conclusion

For the above reasons, the court grants the Mylan defendants' motion for summary judgment in part and denies it in part. The court grants summary judgment against:

• plaintiffs' antitrust claims based on the theory that Mylan's exclusive rebate contracts are unlawful exclusive dealing arrangements because the summary judgment facts present no triable issue whether the contracts foreclose a substantial share of competition to violate the antitrust laws;

• any antitrust damages premised on a generic delay theory occurring before March 14, 2014 because **[**291]** plaintiffs have failed to adduce any summary judgment evidence supporting a triable issue of damages before that date;

• any restitution claim under California's Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200-17210*, because plaintiffs have not asserted a restitution claim in the Pretrial Order;

• plaintiffs' Tennessee ***antitrust law*** claims because the court lacks subject matter jurisdiction over them, and thus must dismiss them without prejudice;

• any claims asserted by plaintiffs April Sumner, Donna Anne Dvorak, Michael Gill, and Landon Ipson because these plaintiffs are not named plaintiffs in any underlying case transferred to this MDL; and

• plaintiffs' RICO claims.

The court denies the Mylan defendants' summary judgment motion in all other respects.

IT IS THEREFORE ORDERED BY THE COURT THAT the Mylan defendants' Motion for Summary Judgment (Doc. 2141) is granted in part and denied in part.

IT IS SO ORDERED.

Dated this 23rd day of June, 2021, at Kansas City, Kansas.

/s/ Daniel D. Crabtree

Daniel D. Crabtree

United States District Judge

Always Towing & Recovery, Inc. v. Milwaukee

United States Court of Appeals for the Seventh Circuit

April 21, 2021, Argued; June 24, 2021, Decided

No. 20-3261

Reporter
2 F.4th 695 *; 2021 U.S. App. LEXIS 18860 **

ALWAYS TOWING & RECOVERY, INC., et al., Plaintiffs-Appellants, v. CITY OF MILWAUKEE, et al., Defendants-Appellees.

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of Wisconsin. No. 2:20-cv-00919 — Nancy Joseph, Magistrate Judge.

Always Towing & Recovery, Inc. v. City of Milwaukee, 2020 U.S. Dist. LEXIS 195429, 2020 WL 6161306 (E.D. Wis., Oct. 21, 2020)

Core Terms

towing, bid, district court, Sherman Act, horizontal, rigging, price fixing, recycling, unreasonable restraint, plaintiffs', vertical, disposed, scrap, rule of reason, allegations, abandoned, antitrust, competitors, claim for relief, leave to amend, conspiracy, violations, futility, licenses, cases

LexisNexis® Headnotes

Governments > Local Governments > Property

Transportation Law > Private Vehicles > Towing

HN1[] **Local Governments, Property**

Wis. Stat. § 342.40(1m) defines abandoned vehicles and authorizes municipalities to designate vehicles as such. In addition to authorizing removal, Wisconsin law permits municipalities to dispose vehicles covered by the statute, for example, through sale or donation (subject to certain notification, impoundment, and procedural requirements). *§ 342.40(2)*, *(3)(c)* (authorizing sale or donation after procedures satisfied).

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

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

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN2[] Standards of Review, De Novo Review

In reviewing a motion to dismiss, courts of appeal accept all well-pleaded facts as true and draw reasonable inferences in plaintiffs' favor. A *Fed. R. Civ. P. 12(b)(6)* dismissal turns on a question of law, which courts review de novo.

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

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

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

HN3[] Standards of Review, Abuse of Discretion

Although generally, denials of leave to amend are reviewed for abuse of discretion, where the district court denies leave to amend on futility grounds, appellate courts review the underlying legal basis de novo.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN4[] Sherman Act, Claims

Sherman Act § 1 prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. The Sherman Act is designed to protect consumers from injury that results from diminished competition, and therefore a claim brought under the Act must allege both injury to the plaintiff and to the market. To state a claim for relief under *§ 1*, a plaintiff must show the following three prongs: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in a relevant market; and (3) an accompanying injury.

Antitrust & Trade Law > Sherman Act > Claims

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

Evidence > Inferences & Presumptions > Inferences

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

HN5[] Sherman Act, Claims

To survive a motion to dismiss, Twombly requires that the existence of an agreement that violates Sherman Act *§ 1* be pleaded plausibly through allegations of fact. Such allegations usually take one of two forms: (1) direct allegations of an agreement, like an admission by a defendant that the parties conspired; or (2) more often, circumstantial allegations of an agreement, which are claimed facts that collectively give rise to a plausible inference that an agreement existed. The task before any plaintiff is thus to find and produce evidence that reveals coordination or agreement.

Antitrust & Trade Law > Sherman Act > Claims

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

HN6[] Sherman Act, Claims

The inability to state a claim for relief on any one of the three Sherman Act *§ 1* prongs ends a court's inquiry on a motion to dismiss because a plaintiff must prove three elements to succeed under Sherman Act *§ 1*.

Antitrust & Trade Law > Sherman Act > Scope

Contracts Law > Defenses > Illegal Bargains

HN7[] Antitrust & Trade Law, Sherman Act

Every contract is a restraint of trade, and the Sherman Act was intended to prohibit only unreasonable restraints of trade. *Sherman Act § 1* is not interpreted to proscribe all contracts, only unreasonable restraints.

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

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

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

Courts draw on several analytical frameworks to assess whether a contract amounts to an unreasonable restraint of trade: among them, the per se, rule of reason, and quick look analyses. All of these methods of analysis are meant to answer the same question: whether or not the challenged restraint enhances competition.

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

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

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

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

HN9[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Courts may dispense with the rule of reason inquiry under Sherman Act *§ 1* if the restraint falls into a certain subset of agreements, known as per se violations. Per se violations are actions where the nature and necessary effects that result are so plainly anticompetitive that an in-depth analysis of their illegality is unnecessary. In those cases, an unreasonable restraint is conclusively presumed once the first is proved, because the probability that these practices are anticompetitive is so high.

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

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

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

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

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

HN10[] **Scope, Monopolization Offenses**

Both horizontal price fixing and bid rigging are presumptively unlawful under Sherman Act *§ 1*. Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are per se unlawful. Horizontal price fixing and output limitation are classic examples of behavior that is considered anticompetitive per se. Bid rigging is a form of horizontal price fixing.

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

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

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

HN11[] **Per Se Rule & Rule of Reason, Per Se Violations**

A Sherman Act combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price in the marketplace is illegal per se. While horizontal price fixing warrants a per se presumption of unreasonableness, that presumption does not attach to all forms of price fixing.

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

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

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

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

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

HN12[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

A per se rule of unlawfulness is inappropriate for judging vertical price restraints. Vertical price restraints are to be judged according to the rule of reason. Unlike horizontal agreements between competitors, vertical exclusive distributorships are presumptively legal. Courts are cautious about importing relaxed standards of proof from horizontal agreement cases into vertical agreement cases because to do so might harm competition and frustrate the very goals that ***antitrust law*** seeks to achieve.

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN13[] **Antitrust, Horizontal Mergers**

Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, while those imposed by agreement between firms at different levels of distribution have been denominated as vertical restraints.

Public Contracts Law > Bids & Formation > Competitive Proposals

HN14[] **Bids & Formation, Competitive Proposals**

Bid rigging is a form of price fixing in which bidders agree to eliminate competition among them, as by taking turns being the low bidder. Although the United States Court of Appeals for the Seventh Circuit has defined bid rigging loosely, most of its caselaw appears to treat bid rigging as a synonym for bid rotation.

Public Contracts Law > Bids & Formation > Competitive Proposals

HN15[] **Bids & Formation, Competitive Proposals**

In the criminal context, the United States Court of Appeals for the Seventh Circuit has rejected the argument that bid rigging includes all forms of collusion in a bidding process.

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

HN16[] **Per Se Rule & Rule of Reason, Per Se Violations**

A plaintiff's failure to state a per se illegal antitrust claim does not necessarily prove fatal to his case if he can state a claim under the rule of reason, or otherwise show the unreasonableness of the restraint.

Civil Procedure > Appeals > Appellate Briefs

HN17[] **Appeals, Appellate Briefs**

It is not the court's responsibility to research the law and construct the parties' arguments for them.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN18[] **Reviewability of Lower Court Decisions, Preservation for Review**

The absence of any supporting authority or development of an argument constitutes a waiver on appeal.

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

HN19[] **Amendment of Pleadings, Leave of Court**

Although *Fed. R. Civ. P. 15(a)(2)* directs courts to freely give leave to amend when justice so requires, courts may deny a proposed amended pleading if the amendment would be futile.

Counsel: Rodney Barnett, Petitioner, Pro se, Grady, AR.

For Dexter Payne, Director, Arkansas Department of Correction, Respondent: Joseph Karl Luebke, Assistant Attorney General, Pamela Rumpz, Assistant Attorney General, ATTORNEY GENERAL'S OFFICE, Little Rock, AR.

Judges: Before FLAUM, SCUDDER, and KIRSCH, Circuit Judges.

Opinion by: FLAUM

Opinion

[*700] FLAUM, *Circuit Judge*. This case is about the scrap metal recycling business—the collection and processing of ferrous (iron-based) and nonferrous metals. Plaintiffs-appellants, an assortment of companies that tow or recycle used cars, allege that defendants-appellees, the City of Milwaukee ("the City") and its subcontractor, engaged in anticompetitive behavior to self-allocate towing services and abandoned vehicles, a primary input in that industry.

Among other claims, plaintiffs allege that a contract the City entered into with one of the area's largest recycling providers, defendant-appellee Miller Compressing Co., violates *§ 1* of the *Sherman Act, 15 U.S.C. § 1 et seq.* Plaintiffs assert that the contract provided direct evidence of an agreement to restrain trade. We agree **[**2]** with the district court's judgment that plaintiffs failed to state a claim upon which relief could be granted because they did not plead an unreasonable restraint on trade, and we therefore now affirm.

I. Background

A. Factual Background

Always Towing & Recovery, Inc., Apys Cars, Inc., Brew City Towing, LLC, SP Towing, LLC, and Adams Recycling, LLC (collectively, "plaintiffs") are among the various players, both private and public, that tow, sell, and buy vehicles for scrap recycling in and around Milwaukee. The City undertakes various roles—regulating that process, as well as citing, towing, and disposing of abandoned and unlawfully parked vehicles.

Plaintiffs allege that the City, its various subdivisions, and a Milwaukee-area recycling provider called Miller Compressing conspired to improperly divert scrapped vehicles and allocate towing services through a decades-long exclusive contract. Plaintiffs further allege that the City and Miller Compressing reinforced their market positions through a conspiracy to regulate private tow truck companies along the way.

In light of these allegations, the intersection of laws governing the removal of unlawfully parked vehicles on the one hand and **[**3]** the ways in which the City and various players dispose of such vehicles on the other is therefore relevant to this case. We will thus proceed by briefly describing the regulatory backdrop and the City's enforcement actions against plaintiffs before turning to the City's disposal of vehicles and the contract central to this appeal.

Regarding the City's regulatory role, by plaintiffs' account, the City has not only enacted, but also enforced regulations to prevent plaintiff towing companies from performing private and public tows. Plaintiffs take issue with the City's enactment of various ordinances that govern the towing of unlawfully parked vehicles. For example, during the period relevant to this case, the Milwaukee Common Council approved a series of laws that require a City-issued license to tow vehicles from certain areas, that obligate towing companies to provide various notices, and that cap maximum charges imposed on vehicle owners who have illegally parked or abandoned their vehicles. *See generally* A Substitute Ordinance Relating to the Licensing and Regulation of Recycling, Salvaging and **[*701]** Towing Businesses and Activities, No. 141893 (codified as amended at Milwaukee, Wis., 1 **[**4]** Reg. Ordinances, ch. 93 *et seq.*, Recycling, Salvaging and Towing Regulations (2021)). In plaintiffs' view, the City has also enforced these laws to squeeze them out of the market. To illustrate these allegations, we note that plaintiffs challenge the City's denial (or nonrenewal) of licenses to three of the four plaintiff towing companies named in this case: Apys Cars, Inc., SP Towing, LLC, and Brew City Towing, LLC.

Regarding the City's disposal role, plaintiffs also call into question the City's approach to vehicle towing and its sale of statutorily defined "abandoned" vehicles. *See* *Wis. Stat. § 342.40(1m)* (defining abandoned vehicles and authorizing municipalities to designate as such). ***HN1***[] In addition to authorizing removal, Wisconsin law permits municipalities to dispose vehicles covered by the statute, for example, through sale or donation (subject to certain notification, impoundment, and procedural requirements). *See id.* *§ 342.40(2)*, *(3)(c)* (authorizing sale or donation after procedures satisfied). Plaintiffs' allegations focus on two aspects of the City's procedures. First, plaintiffs allege that the City improperly denied Apys Cars's bid for a subcontract to perform some of the City's tows from public property to a **[**5]** City-operated lot. However, plaintiffs also concede that the City informed Apys Cars that although it had submitted the lowest bid, further due diligence later revealed that Apys Cars lacked the financial wherewithal to carry out the contract.

Second, and at the heart of this appeal, plaintiffs claim the City improperly promised to sell a significant portion of its abandoned vehicle inventory to just one company: Miller Compressing. Plaintiffs allege that the Miller Compressing-City arrangement dates back to 1996 or 1997. The Complaint noted that Nick Adams, current owner of plaintiff Adams Recycling, witnessed the parties enter (some version of) this deal. Further, they allege that by 2003, the City entered a formal contract with Miller Compressing ("the 2003 Contract") that is intended to remain in effect through 2023.

The services, price, quantity, and duration of the 2003 Contract are also relevant. As to services, the City agreed to sell Miller Compressing a percentage of scrapped vehicles at a fixed cost and to pay Miller Compressing to evacuate fluid from cars and tow vehicles to Miller's facilities. As to price, Miller Compressing thus committed to purchase scrap vehicles at **[**6]** a set price (subject to certain price indexing) less costs for transporting and removing fluids and refrigerants from the vehicles. As to quantity, the City promised to provide Miller Compressing a certain percentage of its scrap vehicles for specific periods (at least 80% of those disposed in a calendar year, 75% of those disposed in a calendar month, and 80% of those disposed from January 1 through September 30 in a calendar year, in addition to 98% of health-nuisance tows disposed of in a year). Finally, regarding duration, the 2003 Contract lasted for seven years with the possibility of a three-year extension, and in 2009, the parties renewed their agreement through October 2023. Plaintiffs also allege that the City earned more than $5 million in revenue through this arrangement between 2004 and 2009 alone.

Beyond the exclusive terms of the 2003 Contract, plaintiffs claim the deal circumvents certain requirements the City faces in the sale of vehicles and procurement of towing services. For example, they contend that the City must auction its abandoned vehicle inventory through a public system called "J-BID" but that the 2003 Contract bypasses that process. Miller **[*702]** Compressing either **[**7]** does not bid on J-BID inventory or (if it does place bids) does not place the highest bids, but Miller nevertheless obtains the vehicles. Plaintiffs also allege that the City evaded the City's own generic procurement obligations by entering into the agreement with Miller Compressing without issuing a public solicitation for bids.

B. Procedural Background

Plaintiffs filed suit in federal district court against the City, the Milwaukee Department of Public Works, the Milwaukee City Tow Lot, and the Milwaukee Police Department (collectively, "City defendants"). Plaintiffs alleged that City defendants violated *§§ 1* and *2* of the *Sherman Act, 15 U.S.C. § 1 et seq.*, and the *Clayton Act, 15 U.S.C.*

§ 12 et seq., and committed tortious interference with contract under Wisconsin common law. The City moved to dismiss all counts of the complaint.

Plaintiffs then moved for and were granted leave to file the operative first amended complaint ("the Complaint"). In addition to the previously filed claims, the Complaint added Miller Compressing as a defendant and alleged that Miller Compressing entered into an agreement with the City in violation of § 1 of the Sherman Act. The Complaint also alleged two additional counts against City defendants and Miller Compressing for violations **[**8]** of the Federal Trade Commission Act, 15 U.S.C. § 45, and the Pollution Prevention Act, 42 U.S.C. § 13101. Finally, plaintiffs attached to the Complaint an unexecuted copy of the 2003 Contract.

City defendants and Miller Compressing each moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The district court granted both motions on all federal counts and released supplemental jurisdiction over the state law claims. Most relevant to this appeal, the district court premised its dismissal of plaintiffs' § 1 Sherman Act claim on the failure to allege a plausible antitrust agreement or conspiracy under the pleading standards articulated in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The district court then dismissed all the federal claims with prejudice because it reasoned that any further amendment would be futile.

Plaintiffs timely appealed.

II. Discussion

On appeal, plaintiffs assert that the Complaint stated a cognizable claim for relief under § 1 of the Sherman Act. ***HN2***[] In reviewing a motion to dismiss, we accept all well-pleaded facts as true and draw reasonable inferences in plaintiffs' favor. *See* Agnew v. NCAA, 683 F.3d 328, 334 (7th Cir. 2012). A Rule 12(b)(6) dismissal turns on a question of law, which we review de novo. *Id.*

Plaintiffs also assert in the alternative that the district court erred **[**9]** by dismissing their claims with prejudice. ***HN3***[] Although "[g]enerally, denials of leave to amend are reviewed for abuse of discretion," Int'l Union of Operating Eng'rs, Loc. 139 v. Daley, 983 F.3d 287, 294 (7th Cir. 2020) (quoting Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind., 786 F.3d 510, 524 (7th Cir. 2015)), the district court here denied leave to amend on futility grounds. Accordingly, we review the underlying legal basis de novo. *Id.* ("[R]eview of futility-based denials includes *de novo* review of the legal basis for the futility." (internal quotation marks and citation omitted)).

[*703] A. § 1 Sherman Act Claim

Plaintiffs primarily bring this suit under § 1 of the Sherman Act. ***HN4***[] Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *See* Agnew, 683 F.3d at 334 (alteration in original) (quoting 15 U.S.C. § 1). The Sherman Act is designed "to protect consumers from injury that results from diminished competition," and therefore a claim brought under the Act must allege both "injury to [the plaintiff]" and "to the market." Id. at 334-35 (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984)). To state a claim for relief under § 1, a plaintiff must show the following three prongs: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) an accompanying injury." Id. at 335 (alteration in original) (quoting Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)).

HN5[] To survive a motion **[**10]** to dismiss, *Twombly* requires that the existence of an agreement that violates § 1 of the Sherman Act "be pleaded plausible through allegations of fact." Alarm Detection Sys., Inc. v. Village of Schaumburg, 930 F.3d 812, 827 (7th Cir. 2019). "Such allegations usually take one of two forms: (1) direct allegations of an agreement, like an admission by a defendant that the parties conspired; or (2) more often, circumstantial allegations of an agreement, which are claimed facts that collectively give rise to a plausible inference that an agreement existed." *Id.* "The task before any plaintiff is thus to find and produce evidence that reveals coordination or agreement ... ." *Kleen Prods. LLC v. Ga.-Pac. LLC, 910 F.3d 927, 936 (7th Cir. 2018)*.

The district court here determined that the Complaint failed to state a claim for relief under *§ 1* of the Sherman Act. In reaching its conclusion, the district court relied on two reasons. First, the court focused on plaintiffs' allegations regarding the City's enactment of certain licensing requirements, notifications, and fees in 2015 and its subsequent denial of licenses to plaintiffs. The court concluded that plaintiffs had not plausibly linked the alleged circumstantial evidence to an agreement between the City and Miller Compressing to create an injurious regulatory scheme.

Second, the district court shifted **[**11]** to the 2003 Contract and reasoned that this agreement did not give rise to a plausible inference that City defendants and Miller Compressing conspired to control the recycling, towing, and salvaging market. The district court explained that, at most, one could infer from the 2003 Contract that the City violated its procurement obligations, rather than ***antitrust law*** but "[n]one of these alleged facts ... collectively give rise to a plausible inference that an agreement existed between the City and Miller Compressing to unlawfully control the recycling, towing, and salv[ag]ing marke[t] in Milwaukee."

On appeal, plaintiffs do not appear to challenge both the district court's bases for dismissing the *§ 1* claim.[1] Instead, they **[*704]** focus on the district court's conclusion regarding the 2003 Contract. In their view, the district court misapplied the *Twombly* standard to the 2003 Contract. The Complaint presented the 2003 Contract as *direct evidence* that Miller Compressing and City defendants entered a contract to restrain trade but that the district court treated the 2003 Contract as *circumstantial evidence*. Stated differently, plaintiffs assert that there is no need to draw any inferences from the **[**12]** contract to satisfy the Sherman Act framework: the contract itself is the unlawful agreement.

There is no question that plaintiffs alleged a contract between Miller Compressing and the City. However, plaintiffs have not carried their burden to show a "resultant unreasonable restraint of trade in [a] relevant market," *see Agnew, 683 F.3d at 335*, through the 2003 Contract. ***HN6***[] The inability to state a claim for relief on any one of the three prongs ends our inquiry because "a plaintiff must prove three elements to succeed under *§ 1* of the Sherman Act," and thus dismissal was appropriate. *Id.*

HN7[] "[E]very contract is a restraint of trade, and as [the Supreme Court] ha[s] repeatedly recognized, the Sherman Act was intended to prohibit *only* unreasonable restraints of trade." *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 98, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* (emphasis added); *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (explaining that the Court has never interpreted *§ 1* to proscribe all contracts, "only unreasonable restraints" (citation omitted)).

HN8[] We draw on several analytical frameworks to assess whether a contract amounts to an unreasonable restraint of trade: among them, the per se, rule of reason, and quick look analyses. *See Agnew, 683 F.3d at 335-37*. "All of these methods of analysis are meant to answer the same question: 'whether or not the challenged **[**13]**

[1] Plaintiffs do not clarify whether they intend to challenge the district court's first basis for concluding that the *§ 1* Sherman Act claim was not satisfied. As noted above, the district court's first reason was that plaintiffs' circumstantial evidence—for example, the enactment and enforcement of the towing licenses—did not raise a plausible inference that the City and Miller Compressing conspired to enact the City's regulatory scheme. However, plaintiffs do not develop any argument regarding that circumstantial evidence on appeal.

Even if plaintiffs had raised and developed the argument that this regulatory conduct constituted an agreement, the circumstantial evidence would not have been dispositive to this appeal. We agree with the district court's well-supported view that the regulatory conduct here is insufficient circumstantial evidence to plead a plausible agreement for *§ 1* of the Sherman Act. In this case, plaintiffs' allegations did not "tend[] to exclude the possibility' that the [City] acted independently" of Miller Compressing to enact ordinances and regulate plaintiffs. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

restraint enhances competition.'" *Id. at 335* (quoting *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*).

HN9[] We may dispense with the rule of reason inquiry if the restraint falls into a certain subset of agreements, known as "per se" violations. "*Per se* violations are actions where the nature and necessary effects that result are so plainly anticompetitive that an in-depth analysis of their illegality is unnecessary." *Tri-Gen Inc. v. Int'l Union of Operating Eng'rs, Loc. 150, 433 F.3d 1024, 1032 (7th Cir. 2006)*. In those cases, an unreasonable restraint "is conclusively presumed once the first is proved," *see Omnicare, Inc. v. UnitedHealth Grp., Inc., 629 F.3d 697, 705-06 (7th Cir. 2011)*, because "the probability that these practices are anticompetitive is so high," *NCAA, 468 U.S. at 100*.

HN10[] Both horizontal price fixing and bid rigging are presumptively unlawful under *§ 1* of the Sherman Act. *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* ("Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing **[*705]** agreements, fall into the category of arrangements that are *per se* unlawful."); *Agnew, 683 F.3d at 336* ("Horizontal price fixing and output limitation are classic examples of behavior that is considered anticompetitive per se."); *United States v. Fenzl, 670 F.3d 778, 780 (7th Cir. 2012)* (explaining that bid rigging is a form of horizontal price fixing).

On appeal, plaintiffs maintain that the 2003 Contract amounts to a per se unlawful agreement and therefore is an unreasonable restraint under *§ 1* of the Sherman Act. They advance several **[**14]** theories, among them that the contract represents (1) horizontal price fixing, and (2) bid rigging. As we will elaborate below, the 2003 Contract does not fall into either of these per se categories and plaintiffs have waived any arguments under the remaining analytical frameworks available to plead the 2003 Contract's unreasonableness (i.e., rule of reason, quick look). Therefore, plaintiffs fail to show an unreasonable restraint of trade to state a claim for relief under *§ 1* of the Sherman Act.

a. Horizontal Price Fixing

HN11[] We begin with price fixing. "A Sherman Act combination 'formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price' in the marketplace is illegal *per se*." *Tri-Gen, 433 F.3d at 1032* (quoting *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*). While horizontal price fixing warrants a per se presumption of unreasonableness, *see id*; *Texaco, 547 U.S. at 5*, that presumption does not attach to all forms of price fixing.

For example, as relevant here, the Supreme Court has held that certain vertical price restraints do not receive per se treatment. *See Leegin, 551 U.S. at 899, 907* (holding that "***HN12***[] a per se rule of unlawfulness" is inappropriate for "judg[ing] vertical price restraints" and overruling cases to the contrary). "Vertical price restraints **[**15]** are to be judged according to the rule of reason." *Id. at 907*; *see also Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 736 (7th Cir. 2004)* ("Unlike horizontal agreements between competitors, vertical exclusive distributorships (like in this case) are presumptively legal."). We are "cautious about importing relaxed standards of proof from horizontal agreement cases into vertical agreement cases" because "[t]o do so might harm competition and frustrate the very goals that ***antitrust law*** seeks to achieve." *Republic Tobacco Co., 381 F.3d at 737*. We accordingly must ask: Does the 2003 Contract constitute horizontal price fixing such that the per se presumption applies?

We conclude that the answer to that question is no: the multiyear contract between Miller Compressing and the City imposed a vertical restraint on competition, not a horizontal one. ***HN13***[] "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints," while "those imposed by agreement between firms at different levels of distribution [have been denominated] as vertical restraints." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. Through the 2003 Contract, Miller Compressing agreed to charge the City to transport and recycle the metal, and the City agreed to sell scrapped vehicles to Miller Compressing. Read in that light, the parties' **[**16]** relationship is not that of horizontal competitors but rather of a seller (the City sells Miller vehicles) and buyer/service provider (Miller Compressing delivers its purchases from the City tow lot to its facilities and performs evacuation); their contract thus represents a vertical **[*706]** restraint. *See Brillhart v. Mut. Med. Ins., Inc., 768 F.2d 196, 199 (7th Cir. 1985)* (observing that agreements "between ... the buyer ... and ... the sellers" are "really vertical, rather than horizontal"); *see also Valley Liquors, Inc. v. Renfield Imps., Ltd., 822 F.2d 656, 660 n.5 (7th Cir. 1987)* ("Alleged price fixing between a manufacturer and distributors, however, is more properly termed a 'vertical' conspiracy."). Accordingly, the arrangement between the City and Miller Compressing is not per se unreasonable on the basis of horizontal price fixing. *See Republic Tobacco Co., 381 F.3d at 737*.

b. Bid Rigging

Plaintiffs' second theory for why the 2003 Contract was per se unlawful—that the 2003 Contract between the City and Miller Compressing circumvented the J-BID system in a manner giving rise to bid rigging—also cannot rescue plaintiffs' case. ***HN14***[] "[B]id rigging" is "a form of price fixing in which bidders agree to eliminate competition among them, as by taking turns being the low bidder." *Fenzl, 670 F.3d at 780*. Although we have defined bid rigging loosely, most of our caselaw appears to treat bid rigging as **[**17]** "a synonym for bid rotation." *See United States v. Heffernan, 43 F.3d 1144, 1146 (7th Cir. 1994)* (interpreting U.S. Sentencing Guidelines' definition of bid rigging and collecting cases in the criminal antitrust context).

Plaintiffs here cannot establish a bid rigging claim for two reasons. First, defendants are not competitors for scrapped vehicles within the J-BID system: the City sells the vehicles, and Miller Compressing and others purchase them. Second, even if they were competitors, at most the City and Miller Compressing interfered with the bid process, rather than rotated the bids. Plaintiffs do not point to, nor could we locate, a case in the civil context that defines bid rigging so broadly. ***HN15***[] In the criminal context, however, we have rejected the argument that bid rigging "includes all forms of collusion in a bidding process." *See id.* Plaintiffs gesture toward a similar argument here; they allege that the City and Miller Compressing engaged in, as we framed it in *Heffernan*, "some ... kind of interference with the integrity of a bidding system," by permitting Miller Compressing to obtain vehicles without bidding. *See id.* (rejecting this broader definition). Given our circumscribed view and without the need to further define what does constitute **[**18]** bid rigging, it is clear this alleged interference with J-BID does not amount to a per se unreasonable trade restraint.

c. Waiver

In sum, plaintiffs have failed to show the 2003 Contract amounts to horizontal price fixing or bid rigging. Having determined that plaintiffs cannot demonstrate that the City and Miller Compressing's conduct is per se unlawful,[2] we would traditionally assess whether plaintiffs nonetheless state a legal claim under the rule of reason framework. ***HN16***[] As we have explained, "a plaintiff's failure to state a *per se* illegal antitrust claim does not necessarily prove fatal to his case if he can state a claim under the rule of reason," or otherwise show the unreasonableness of the restraint. *Carl Sandburg Vill. Condo.* ***[*707]*** *Ass'n No. 1 v. First Condo. Dev. Co., 758 F.2d 203, 210 (7th Cir. 1985)*.

However, plaintiffs have waived their rule of reason and other arguments. Plaintiffs at most make only brief reference to the unreasonableness of the 2003 Contract in their reply brief without citing any controlling authority. ***HN17***[] "It is not the court's responsibility to research the law and construct the parties' arguments for them." *Econ. Folding Box Corp. v. Anchor Frozen Foods Corp., 515 F.3d 718, 721 (7th Cir. 2008)*.

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[2] In passing, plaintiffs also refer to output limitations or market allocation as per se unlawful violations of *§ 1* of the Sherman Act. Even if those arguments were not waived, any agreement to allocate or restrain output is, again, the product of vertical agreement and therefore likely not presumptively unlawful under the Sherman Act. *See, e.g., Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (vertical nonprice restraints judged under rule of reason analysis).

Therefore, plaintiffs did not plead sufficient facts to support that the 2003 Contract is per se unlawful and have otherwise waived any argument **[**19]** that this agreement constituted an unreasonable restraint on trade. Accordingly, we hold that plaintiffs' pleadings fail to carry their burden. Plaintiffs cannot state a claim without satisfying all three prongs of the *§ 1* framework, so we need not proceed any further. *See Agnew, 683 F.3d at 335, 338 n.4*. Plaintiffs cannot state a claim for relief under *§ 1* of the Sherman Act and summary dismissal was appropriate.

B. Remaining Claims

We briefly address plaintiffs' remaining claims. The district court dismissed the other federal counts in the Complaint, which alleged that defendants violated *§ 5* of the *Federal Trade Commission Act* (*15 U.S.C. § 45*), *§ 1301* of the *Pollution Prevention Act* (*42 U.S.C. § 13101*), *§ 2* of the *Sherman Act* (*15 U.S.C. § 2*), and the Clayton Act (*15 U.S.C. § 12, et seq.*).

Plaintiffs have waived all these federal claims on appeal. Plaintiffs frame the issues before us with only sweeping references to "an antitrust claim" and "antitrust laws," and they do not develop any argument as to how the City and Miller Compressing's conduct amounted to a monopoly for purposes of claims brought under *§ 2* of the Sherman Act or the Clayton Act. Meanwhile, plaintiffs do not frame the issues in this case as involving Federal Trade Commission Act or Pollution Prevention Act claims (nor do they develop them in **[**20]** their briefing). ***HN18***[] "As we have repeatedly held, '[t]he absence of any supporting authority or development of an argument constitutes a waiver on appeal.'" *Silk v. Bd. of Trs., Moraine Valley Cmty. Coll., Dist. No. 524, 795 F.3d 698, 709 (7th Cir. 2015)* (alteration in original) (quoting *Kramer v. Banc of Am. Sec., LLC, 355 F.3d 961, 964 n.1 (7th Cir. 2004)*).

C. Leave to Amend

HN19[] Finally, plaintiffs assert that the district court erred by refusing to grant leave to amend. "Although *Federal Rule of Civil Procedure 15(a)(2)* directs courts to 'freely give leave [to amend] when justice so requires,' courts may deny a proposed amended pleading if the amendment would be futile." *Int'l Union of Operating Eng'rs, 983 F.3d at 296* (alteration in original).

In this case, plaintiffs have not carried their initial burden to state a claim for relief under *§ 1* of the Sherman Act. Plaintiffs have also already received an opportunity to remedy these deficiencies when the district court granted leave to amend the original complaint. That plaintiffs subsequently amended but nonetheless proved unable to adequately plead a claim "indicates the futility of granting further leave to amend." *See id.* Dismissal with prejudice was thus appropriate.

III. Conclusion

For the foregoing reasons, we AFFIRM the decision of the district court.

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House v. NCAA

United States District Court for the Northern District of California

June 24, 2021, Decided; June 24, 2021, Filed

Case Nos. 4:20-cv-03919 CW; 4:20-cv-04527 4:20-cv-03919CW

Reporter

545 F. Supp. 3d 804 *; 2021 U.S. Dist. LEXIS 154062 **; 2021 WL 3578572

GRANT HOUSE, et al., Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants.TYMIR OLIVER, Plaintiff, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants.

Prior History: House v. NCAA, 2021 U.S. Dist. LEXIS 206712 (N.D. Cal., Feb. 25, 2021)

Core Terms

student-athletes, sports, sub-class, athletes, relevant market, broadcasting, Licensing, compete, consumer demand, procompetitive, Damages, conferences, rights, in house, settlement, schools, anti trust law, injunctive relief, rule of reason, football, claim for damages, motion to dismiss, Plaintiffs', antitrust, subject to dismissal, goods and services, legal theory, allegations, bundle, limits

LexisNexis® Headnotes

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

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

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

A complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a). The plaintiff must proffer enough facts to state a claim to relief that is plausible on its face. On a motion under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

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

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

In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. The court's review is limited to the face of the complaint, materials incorporated into the complaint by reference, and facts of which the court may take judicial notice. However, the court need not accept legal conclusions, including threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.

Governments > Courts > Judicial Precedent

HN3[] Courts, Judicial Precedent

Stare decisis binds today's court to yesterday's decisions. Insofar as there may be factual differences between the current case and the prior case, courts must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis.

Contracts Law > Defenses > Illegal Bargains

HN4[] Defenses, Illegal Bargains

Antitrust decisions are particularly fact-bound. The Supreme Court has long emphasized that the Rule of Reason contemplates case-by-case adjudication. Continuing contracts in restraint of trade are typically subject to continuing reexamination, and even a judicial holding that a particular agreement is lawful does not immunize it from later suit or preclude its reexamination as circumstances change.

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

Civil Rights Law > Protection of Rights > Immunity From Liability > Private Parties

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN5[] Noerr-Pennington Doctrine, Right to Petition Immunity

Pursuant to the Noerr-Pennington doctrine, private actors are immune from antitrust liability for petitioning the government, even when the private actors' motives are anticompetitive.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

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

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN6[] Clayton Act, Claims

A plaintiff suing for violations of federal ***antitrust law*** may recover damages if it can show: (1) actual injury caused by the antitrust violation; (2) the directness or indirectness of the injury, taking into account possible duplicative recoveries, complex apportionment, and alternative or superior plaintiffs; and (3) injury of the kind that the antitrust laws were intended to prevent. Antitrust injury does not arise for purposes of § 4 of the Clayton Act until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct.

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

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

HN7[] **Standing, Requirements**

To establish that plaintiffs have not alleged antitrust injury, defendants must show that plaintiffs' injuries are not of the type that the antitrust laws were intended to prevent.

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

Evidence > Burdens of Proof > Allocation

HN8[] **Standing, Requirements**

A plaintiff can show that it was injured in fact by alleging that it was deprived of the opportunity to receive compensation it otherwise would have received but for the challenged conduct. To make this showing, a plaintiff need not establish that it has a legal entitlement to the compensation in question.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN9[] **Sherman Act, Claims**

To establish a section 1 violation under the Sherman Act, a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged. An essential element of a Section 1 violation under the rule of reason is injury to competition in the relevant market. A relevant market encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the 'area of effective competition where buyers can turn for alternative sources of supply. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand. Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim.

Labor & Employment Law > Discrimination > Actionable Discrimination

HN10[] Discrimination, Actionable Discrimination

(***Antitrust law*** addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN11[] Sherman Act, Claims

In an antitrust case under section 1 of the Sherman Act, 15 U.S.C.S. 1, to avoid dismissal at the pleading stage, plaintiffs are required to identify a relevant market and plead injury to competition within that market.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN12[] Class Actions, Compromise & Settlement

A settlement agreement may preclude a party from bringing a related claim in the future even though the claim was not presented and might not have been presentable in the class action, but only where the released claim is based on the identical factual predicate as that underlying the claims in the settled class action.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN13[] Preclusion of Judgments, Res Judicata

Res judicata bars a subsequent claim when there is: (i) an identity of claims between the prior and subsequent actions; (ii) a final judgment on the merits; and (iii) identity or privity between the parties.

Counsel: [1]** For Grant House, on behalf of themselves and all others similarly situated |, Sedona Prince, on behalf of themselves and all others similarly situated |, Plaintiff (4:20cv3919): David G. Feher, David L. Greenspan, Jeffrey L. Kessler, LEAD ATTORNEYS, PRO HAC VICE, Winston & Strawn LLP, New York, NY USA; Jeanifer Ellen Parsigian, LEAD ATTORNEY, Winston and Strawn LLP, San Francisco, CA USA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA USA; Adam I Dale, PRO HAC VICE, Winston Strawn LLP, New York, NY USA; Emilee Sisco, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA USA; Benjamin Jacob Siegel, Hagens Berman Sobol Shapiro LLP, Berkeley, CA USA.

For Tymir Oliver, Consol Plaintiff (4:20cv3919): Steve W. Berman, Emilee Sisco, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA USA; Eugene A. Spector, Jeffrey L. Kodroff, PRO HAC VICE, Spector Roseman & Kodroff, P.C., Philadelphia, PA USA; Benjamin Jacob Siegel, Hagens Berman Sobol Shapiro LLP, Berkeley, CA USA.

For National Collegiate Athletic Association, Defendant (4:20cv3919): Beth A. Wilkinson, Cali Cope-Kasten, Kieran Gavin Gostin, Rakesh Kilaru LEAD ATTORNEYS, Cali Cope-Kasten, WILKINSON **[**2]** STEKLOFF LLP, Washington, DC USA; Rahul Raghav Athrey Hari, WILKINSON STEKLOFF LLP, Los Angeles, CA USA.

For Pac-12 Conference, Defendant (4:20cv3919): Bart Harper Williams, Jennifer L. Jones, Kyle Alexander Casazza, Scott P. Cooper, Shawn Scott Ledingham, Jr., Proskauer Rose LLP, Los Angeles, CA USA; Rakesh Kilaru, WILKINSON STEKLOFF LLP, Washington, DC USA.

For The Big Ten Conference, Inc., Defendant (4:20cv3919): Britt Marie Miller, LEAD ATTORNEY, PRO HAC VICE, Mayer Brown LLP, Chicago, IL USA; Christopher John Kelly, LEAD ATTORNEY, Mayer Brown LLP, Palo Alto, CA USA; Matthew David Provance, PRO HAC VICE, Mayer Brown LLP, Chicago, IL USA; Rakesh Kilaru, WILKINSON STEKLOFF LLP, Washington, DC USA.

For The Big Twelve Conference, Inc., Defendant (4:20cv3919): Leane K Capps, LEAD ATTORNEY, PRO HAC VICE, Dallas, TX USA; Wesley Douglas Hurst, LEAD ATTORNEY, Polsinelli LLP, Los Angeles, CA USA; Amy Dawn Fitts, Kansas City, MO USA; Caitlin Jemilha Morgan, David Rockwell Bower, PRO HAC VICE, Polsinelli, PC, Dallas, TX USA; Rakesh Kilaru, WILKINSON STEKLOFF LLP, Washington, DC USA.

For Southeastern Conference, Defendant (4:20cv3919): Mark J. Seifert, LEAD ATTORNEY, Seifert Law Firm, San Francisco, **[**3]** CA USA; Amanda Pickens Nitto, Pearlynn G. Houck, Robert Walker Fuller, III, PRO HAC VICE, Robinson Bradshaw Hinson, Charlotte, NC USA; Lawrence C Moore, III, PRO HAC VICE, Robinson, Bradshaw and Hinson, P.A., Charlotte, NC USA; Rakesh Kilaru, WILKINSON STEKLOFF LLP, Washington, DC USA.

For Atlantic Coast Conference, Defendant (4:20cv3919): David Erik Albright, LEAD ATTORNEY, PRO HAC VICE, Fox Rothschild LLP, Greensboro, NC USA; Alex Hernaez Fox Rothschild LLP, San Francisco, CA USA; Gregory G. Holland, PRO HAC VICE, Fox Rothschild LLP, Greensboro, NC USA; Jonathan P Heyl, PRO HAC VICE, Fox Rothschild LLP, Charlotte, NC USA; Rakesh Kilaru, WILKINSON STEKLOFF LLP, Washington, DC USA.

For Tymir Oliver, Plaintiff (4:4:20cv4527): Steve W. Berman, Emilee Sisco, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA USA; Eugene A. Spector, Jeffrey L. Kodroff, PRO HAC VICE, Spector Roseman & Kodroff, P.C., Philadelphia, PA USA; Benjamin Jacob Siegel, Hagens Berman Sobol Shapiro LLP, Berkeley, CA USA.

For National Collegiate Athletic Association, Defendant (4:20cv4527): Beth A. Wilkinson, LEAD ATTORNEY, Rakesh Kilaru, WILKINSON STEKLOFF LLP, Washington, DC USA; Rahul Raghav Athrey Hari, WILKINSON **[**4]** STEKLOFF LLP, Los Angeles, CA USA.

For For Pac-12 Conference, Defendant (4:4:20cv4527): Bart Harper Williams, Jennifer L. Jones, Kyle Alexander Casazza, Scott P. Cooper, Shawn Scott Ledingham, Jr., Proskauer Rose LLP, Los Angeles, CA USA; Rakesh Kilaru, WILKINSON STEKLOFF LLP, Washington, DC USA.

For The Big Ten Conference, Inc., Defendant (4:4:20cv4527): Britt Marie Miller, LEAD ATTORNEY, PRO HAC VICE, Mayer Brown LLP, Chicago, IL USA; Christopher John Kelly, LEAD ATTORNEY, Mayer Brown LLP, Palo Alto, CA USA; Rakesh Kilaru, WILKINSON STEKLOFF LLP, Washington, DC USA.

For The Big Twelve Conference, Inc., Defendant (4:4:20cv4527): Leane K Capps, LEAD ATTORNEY, PRO HAC VICE, Dallas, TX USA; Wesley Douglas Hurst, LEAD ATTORNEY, Polsinelli LLP, Los Angeles, CA USA; Amy Dawn Fitts, Kansas City, MO USA; Caitlin Jemilha Morgan, David Rockwell Bower, PRO HAC VICE, Polsinelli, PC, Dallas, TX USA; Rakesh Kilaru, WILKINSON STEKLOFF LLP, Washington, DC USA.

For Southeastern Conference, Defendant (4:4:20cv4527): Mark J. Seifert, LEAD ATTORNEY, Seifert Law Firm, San Francisco, CA USA; Rakesh Kilaru, WILKINSON STEKLOFF LLP, Washington, DC USA; Robert Walker Fuller, III, PRO HAC VICE, Robinson Bradshaw **[**5]** Hinson, Charlotte, NC USA.

For Atlantic Coast Conference, Defendant (4:4:20cv4527): David Erik Albright, LEAD ATTORNEY, PRO HAC VICE, Fox Rothschild LLP, Greensboro, NC USA; Alex Hernaez Fox Rothschild LLP, San Francisco, CA USA; Gregory G. Holland, PRO HAC VICE, Fox Rothschild LLP, Greensboro, NC USA; Jonathan P Heyl, PRO HAC VICE, Fox Rothschild LLP, Charlotte, NC USA; Rakesh Kilaru, WILKINSON STEKLOFF LLP, Washington, DC USA.

Judges: CLAUDIA WILKEN, United States District Judge.

Opinion by: CLAUDIA WILKEN

Opinion

[*808] ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS

Now before the Court are Defendants'[1] motions to dismiss the complaint in two separate actions: (1) House v. National Collegiate Athletic Association, 4:20-cv-03919 (House); and (2) Oliver v. National Collegiate Athletic Association, 4:20-cv-04527 (Oliver). Plaintiffs[2] oppose the motions. For the reasons set forth below, the Court GRANTS Defendants' motion to dismiss Tymir Oliver's claims for injunctive relief, without leave to amend, and it otherwise DENIES the motions.

I. BACKGROUND

In House and Oliver, student-athletes[3] challenge a subset of NCAA rules that "prohibit student-athletes from receiving anything of value in exchange for **[**6]** the commercial use" of their names, images, and likenesses (NIL). House Compl. ¶¶ 5, 73-80, 267-89; Oliver Compl. ¶¶ 5, 55-62, 246-68. The challenged rules, among other things, prohibit student-athletes from endorsing any commercial product or service while they are in school, regardless of whether they receive any compensation for doing so (Division I Bylaw 12.5.2.1); prohibit student-athletes from receiving compensation for their NIL from outside employment (Division I Bylaws 12.4.1, 12.4.1.1, 12.4.2.3); and prohibit student-athletes from using their NIL to promote their own business ventures or engage in self-employment (Division I Bylaw 12.4.4). House Compl. ¶¶ 77-79; Oliver Compl. ¶¶ 59-61. The challenged rules also allegedly preclude student-athletes from benefitting financially from their social media posts, personal brands, viral videos depicting their athletic performances, apparel sponsorships, and other opportunities related to the use of their NIL. House Compl. ¶¶ 116-149; Oliver Compl. ¶¶ 98-130. The challenged rules also allegedly prohibit NCAA member conferences and schools from sharing the revenue they make from their broadcasting contracts with networks, marketing **[**7]** contracts with companies that make sports apparel, social medial sponsorships, and other commercial activities that involve the use of student-athletes' **[*809]** NIL. House Compl. ¶¶ 120-149, 237; Oliver Compl. ¶¶ 101-17, 216.

Plaintiffs aver that, absent the challenged rules, the NCAA and its member conferences and schools would allow student-athletes to take advantage of opportunities to profit from their NIL, and NCAA member conferences and schools would share with student-athletes the revenue they receive from third parties for the commercial use of student-athletes' NIL.

Plaintiffs define the relevant market as follows:

> The relevant market is the nationwide market for the labor of NCAA Division I college athletes. In this market, current and prospective athletes compete for roster spots on Division I athletic teams. NCAA Division I member

[1] Defendants are the National Collegiate Athletic Association (NCAA), Pac-12 Conference, The Big Ten Conference, The Big 12 Conference, Southeastern Conference, and Atlantic Coast Conference.

[2] The named plaintiffs in House are Sedona Price and Grant House, and the named plaintiff in Oliver is Tymir Oliver (collectively, Plaintiffs).

[3] Grant House is a current student-athlete at Arizona State University who competes in Division I swimming and diving. House Compl. ¶ 27. Sedona Price is a current student-athlete at the University of Oregon who competes in Division I women's basketball. Id. ¶ 39. Tymir Oliver is a student-athlete who competed in Division I football for the University of Illinois. Oliver Compl. ¶ 27. These athletes allege that they have not derived any personal profit from the use of their NIL in advertisements for their school teams, in their social media posts, or otherwise, as a result of the NCAA rules they challenge here.

> institutions compete to recruit and retain the best players by offering unique bundles of goods and services including scholarships to cover the cost of attendance, tutoring, and academic support services, as well as access to state-of-the-art athletic training facilities, premier coaching, medical treatment, and opportunities to compete at **[**8]** the highest level of college sports, often in front of large crowds and television audiences. In exchange, student-athletes must provide their athletic services and acquiesce in the use of their NILs by the NCAA and its members for commercial and promotional purposes. They also implicitly agree to pay any costs of attending college and participating in intercollegiate athletics that are not covered by their scholarships. . . . The NCAA and its members have the ability to control price and exclude competition in this market. All NCAA members have agreed to utilize and abide by the NCAA's bylaws, including the provisions detailed herein, which have been used by the NCAA and its members to fix the prices at which student-athletes are paid for their commercial licensing rights, including but not limited to individual and group licensing rights, and/or to foreclose student-athletes from exercising any such rights entirely. The NCAA and its members have the power to exclude from this market any member who is found to violate its rules. . . . Absent these nationwide restraints, Division I conferences and schools would compete amongst each other by allowing their athletes to take advantage **[**9]** of opportunities to utilize, license, and profit from their NILs in commercial business ventures and promotional activities and to share in the conferences' and schools' commercial benefits received from exploiting student-athletes' names, images, and likenesses. Conferences and schools would also compete for recruits by redirecting money that they currently spend on extravagant facilities and coaching salaries to marketing programs and educational resources designed to help their student-athletes develop and grow their personal brand value.

House Compl. ¶¶ 81-87; Oliver Compl. ¶¶ 63-70.

According to Plaintiffs, the rules they challenge cannot be justified on the basis that they are necessary to preserve consumer demand for college sports as a distinct product because any such procompetitive effect, to the extent that it exists, would fall outside of the scope of the relevant market and is therefore irrelevant to the Rule of Reason analysis. House Compl. ¶¶ 158-60, 179; Oliver Compl. ¶¶ 139-41, 160.

Alternatively, Plaintiffs allege that, to the extent that the preservation of consumer demand for college sports as a distinct product is deemed to be a procompetitive effect within the relevant **[**10]** market, the challenged rules are not necessary to **[*810]** achieve that effect because (1) the NCAA has granted more than 200 waivers since 2015 permitting student-athletes to use or profit from their NIL, and demand for college sports has not decreased as a result, House Compl. ¶¶ 224-27; Oliver Compl. ¶¶ 205-08; and (2) recent surveys suggest that consumer demand for college sports would not decrease if student-athletes were permitted to profit from their NIL, House Compl. ¶¶ 162-65; Oliver Compl. ¶¶ 143-46. Plaintiffs further aver that the NCAA recently changed its official policy on NIL compensation by supporting proposals that would permit student-athletes to receive NIL compensation to some degree. House Compl. ¶ 18; Oliver Compl. ¶ 18. According to Plaintiffs, these facts demonstrate that it is not the case, as Defendants represented in prior lawsuits, that permitting student-athletes to receive compensation for their NIL would irreparably damage demand for college sports. House Compl. ¶ 19; Oliver Compl. ¶ 19.

Plaintiffs allege that the challenged rules violate federal antitrust laws and the common law because they (1) fix at zero the amount that student-athletes may be paid for the **[**11]** licensing, use, and sale of their NIL; and (2) foreclose student-athletes from the market for licensing, use, and sale of their NIL. Plaintiffs assert claims for (1) conspiracy to fix prices in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*; (2) group boycott or refusal to deal in violation of *Section 1* of the Sherman Act; and (3) unjust enrichment. Plaintiffs assert these claims on their own behalf and on behalf of the following proposed class and sub-classes.

The "Declaratory and Injunctive Relief Class" is comprised of:

> All current and former student-athletes who compete on, or competed on, an NCAA Division I athletic team at any time between four (4) years prior to the filing of this Complaint and the date of judgment in this matter.

House Compl. ¶ 22 n.16; Oliver Compl. ¶ 22 n.16. Plaintiffs request an injunction permanently restraining Defendants from enforcing their alleged agreements to restrict the amount of NIL compensation that members of this proposed class can receive. Id.

The "Social Media Damages Sub-Class" is comprised of:

> All current and former student-athletes who compete on, or competed on, an NCAA Division I athletic team at a college or university that is a member of one of the Power Five **[**12]** Conferences, at any time between four (4) years prior to filing of this Complaint and the date of judgment in this matter.

House Compl. ¶ 23 n.17; Oliver Compl. ¶ 23 n.17. On behalf of this sub-class, Plaintiffs seek the social media earnings that members of this sub-class would have received absent Defendants' unlawful conduct. Id.

The "Group Licensing Damages Sub-Class" is comprised of:

> All current and former student-athletes who compete on, or competed on, an NCAA Division I men's or women's basketball team or an FBS football team, at a college or university that is a member of one the Power Five Conferences, at any time between four (4) years prior to the filing of this Complaint and the date of judgment in this matter.

House Compl. ¶ 23 n.18; Oliver Compl. ¶ 23 n.18. On behalf of this sub-class, Plaintiffs seek the share of game telecast group licensing revenue that members of this sub-class would have received absent Defendants' unlawful conduct. Id.

II. LEGAL STANDARD

HN1[] A complaint must contain a "short and plain statement of the claim showing **[*811]** that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*. The plaintiff must proffer "enough facts to state a claim to relief that is plausible on its face." **[**13]** *Ashcroft v. Iqbal, 556 U.S. 662, 697, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). On a motion under *Rule 12(b)(6)* for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Twombly, 550 U.S. at 555*. A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*.

HN2[] In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *Metzler Inv. GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049, 1061 (9th Cir. 2008)*. The court's review is limited to the face of the complaint, materials incorporated into the complaint by reference, and facts of which the court may take judicial notice. *Id. at 1061*. However, the court need not accept legal conclusions, including threadbare "recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 555*).

III. DISCUSSION

Defendants argue that the complaints in House and Oliver are subject to dismissal with prejudice because (1) the complaints are barred under the doctrine of stare decisis in light of *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015)* (O'Bannon II) and *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239 (9th Cir. 2020)*, aff'd sub nom. *Nat'l Collegiate Athletic Ass'n v. Alston, No. 20-512, 141 S. Ct. 2141, 2021 WL 2519036 (U.S. June 21, 2021)* (Alston II); (2) the claims **[**14]** of the "Group-Licensing Damages Sub-Class" fail as a matter of law because the members of that sub-class have no publicity rights in game broadcasts, and even if they did, Plaintiffs have not alleged injury to competition in the "Group Licensing Market" that was adjudicated in O'Bannon; and (3) the claims of named plaintiff Tymir Oliver fail as a matter of law because he lacks standing to seek injunctive relief as a former student-athlete, and because he released his damages claims in the Alston settlement.

The Court addresses each of these arguments in turn.

A. Stare Decisis

HN3[] "Stare decisis binds 'today's Court' to 'yesterday's decisions.'" *Alston II, 958 F.3d at 1253* (citation omitted). "'Insofar as there may be factual differences between the current case' and the prior case, courts 'must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis.'" Id. (citation omitted).

HN4[] "Antitrust decisions are particularly fact-bound. The Supreme Court has long emphasized that the Rule of Reason 'contemplate[s]' 'case-by-case adjudication.'" Id. (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*). "Continuing contracts in restraint of trade" are "typically subject to continuing **[**15]** reexamination," and "even a judicial holding that a particular agreement is lawful does not immunize it from later suit or preclude its reexamination as circumstances change." Phillip Areeda & Herbert **[*812]** Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application, ¶ 1205c3 (4th ed. 2018).

Defendants argue that stare decisis compels the dismissal of House and Oliver because the Ninth Circuit "validated" in both O'Bannon II and Alston II the NCAA rules limiting student-athlete compensation that Plaintiffs now challenge in House and Oliver. Defendants contend that the claims asserted in House and Oliver are identical to the ones litigated in O'Bannon II, and that the claims in House and Oliver were also encompassed by the Alston litigation because the plaintiffs in Alston challenged the NCAA's entire compensation framework. See Mot. at 3-4.

As an initial matter, the Court is not persuaded by Defendants' contention that the present actions are subject to dismissal on the ground that the Ninth Circuit validated certain NCAA rules limiting NIL compensation in O'Bannon II and Alston II. The Ninth Circuit made clear in both O'Bannon II and Alston II that any holdings in **[**16]** those cases with respect to whether certain NCAA limits on student-athlete compensation could be enjoined as anticompetitive were based on, and limited to, the record presented in those cases. See. e.g., *Alston II, 958 F.3d at 1264* ("[T]his analysis reflects the judgment that limits on cash compensation unrelated to education do not, on this record, constitute anticompetitive conduct and, thus, may not be enjoined.") (emphasis added). The Ninth Circuit thus left open the possibility for reaching a different conclusion in future litigation to the extent that the parties present a different record. Indeed, the court of appeals recognized in both O'Bannon II and Alston II that, because the analysis demanded by the Rule of Reason requires the evaluation of "dynamic market conditions and consumer preferences" and is "inherently fact-dependent," "courts must continue to subject NCAA rules, including those governing compensation, to antitrust scrutiny." *Id. at 1254* (citing *O'Bannon II, 802 F.3d at 1064* ("The amateurism rules' validity must be proved, not presumed.")).

Here, Plaintiffs' allegations, which the Court must construe in their favor at this juncture, raise the reasonable inference that material differences exist between Oliver and House, on the **[**17]** one hand, and O'Bannon and Alston, on the other hand, that distinguish the former from the latter on a principled basis.

First, some of the rules that Plaintiffs challenge in House and Oliver were not challenged in O'Bannon or Alston. These rules include those prohibiting student-athletes from endorsing any commercial product or service while they are in school, regardless of whether they receive any compensation for doing so (Division I Bylaw 12.5.2.1); and prohibiting student-athletes from using their NIL to promote their own business ventures or self-employment (Division I Bylaw 12.4.4).

Second, the claims in House and Oliver are predicated on a different legal theory than the claims in O'Bannon II and Alston II and will therefore involve different facts. Defendants justified the challenged rules in O'Bannon and Alston on the basis that the rules were necessary to preserve consumer demand for college sports as a distinct product and were thus procompetitive. In O'Bannon and Alston, the Ninth Circuit credited this argument and the evidence that Defendants submitted in support of it and affirmed this Court's holding that the challenged rules could not be invalidated despite their anticompetitive **[**18]** effects because of their role in preserving consumer demand for college sports as a distinct product. *O'Bannon II, 802 F.3d at 1058-59, 1072-74*; *Alston II, 958 F.3d at 1257-60*. By contrast, in House and Oliver, Plaintiffs allege that this procompetitive **[*813]** justification cannot save the rules challenged here from being invalidated because any procompetitive effect that the rules may have on consumer demand for college sports falls outside of the relevant market and any such effect is, therefore, irrelevant to the Rule of Reason analysis.

This legal theory is based on Judge Milan Smith's concurrence in Alston II. There, Judge Smith stated that the scope of the inquiry at step two of the Rule of Reason analysis ought to exclude the consideration of any procompetitive effects in collateral markets in the absence of evidence that such an effect has a corollary impact in the relevant market. *Alston II, 958 F.3d at 1271*. Judge Smith explained that, because consumer demand for college sports is collateral to the market for student-athletes' labor, the Ninth Circuit had erred in O'Bannon II and Alston II in crediting at step two any procompetitive effect of the challenged rules in those cases on the preservation of demand for college sports without requiring the NCAA to show that this effect **[**19]** had a corollary impact on the market for student-athletes' labor:

> At Step Two, the court did not limit its consideration to the procompetitive effects of the compensation limits in the market for Student-Athletes' athletic services. Rather, it found that certain of the compensation limits are procompetitive because they drive consumer demand for college sports by distinguishing collegiate from professional athletics. *Id. at 1083*. In other words, the court found that limiting Student-Athletes' pay in the market for their services was justified because that restraint drove demand for the distinct product of college sports in the consumer market for sports entertainment. The court did not require that the NCAA prove that this impact on consumer demand had a corollary procompetitive impact on the market for Student-Athletes' services, that it "increase[d] output" or "'widen[ed]' the choices 'available to athletes.'" *O'Bannon II, 802 F.3d at 1072* (quoting Board of Regents, 468 U.S. at 102). The court did not require that the NCAA prove its compensation rules, within the defined market, "increase competition in the economic sense of encouraging others to enter the market to offer the product at lower cost." Smith, 593 F.2d at 1186. It was enough for the NCAA to meet its Step Two burden **[**20]** that it could show (however feebly) a procompetitive effect in a collateral market. . . . Under the Rule of Reason analysis we affirm today, so long as the NCAA cites consumer demand for college sports, we allow it to artificially suppress competition for collegiate athletes' services by limiting their compensation. Instead of requiring the NCAA to explain how those limits promote schools' competition for athletes, we leave Student-Athletes with little recourse under the antitrust laws. Student-Athletes are thus denied the freedom to compete and, in turn, "of compensation they would receive in the absence of the restraints." *Id. at 1068*. Our Rule of Reason framework has shifted toward this cross-market analysis without direct consideration or a robust justification. . . . Lacking a robust justification, I fear that our cross-market Rule of Reason analysis frustrates the very purpose of the antitrust laws, in this case to the great detriment of Student-Athletes. I hope our court will reconsider this issue in a case that squarely raises it.

Id.

In their motion, Defendants do not discuss the fact that Plaintiffs' claims in House and Oliver are predicated on a legal **[*814]** theory addressed in Judge Smith's **[**21]** concurrence in Alston II. This legal theory would require Defendants to proffer facts that they did not have to proffer in O'Bannon and Alston, namely facts showing that any procompetitive effect of the challenged rules on consumer demand for college sports as a distinct product has a procompetitive impact on the relevant market alleged in House and Oliver, which is the market for student-athletes' labor and the right to use their NIL.

Third, Plaintiffs allege new factual matter that post-dates O'Bannon II and Alston II. This new factual matter raises the inference that, to the extent that the preservation of consumer demand for college sports as a distinct product is deemed to be a procompetitive effect within the relevant market, the challenged rules are not necessary to achieve that effect. Specifically, Plaintiffs allege that, since O'Bannon II and Alston II, Defendants have admitted that restrictions on student-athlete compensation should be loosened or eradicated[4], thereby contradicting their prior

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[4] Defendants argue that some of these statements were made in the context of their "lobbying efforts regarding potential legislative action," and for that reason, Plaintiffs cannot "impose antitrust liability on the NCAA" based on these statements in light of the Noerr-Pennington doctrine, see Mot. at 6; see also *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. ***HN5***[] Pursuant to the Noerr-Pennington doctrine, "private actors are immune from antitrust liability for petitioning the government, even when the private actors' motives are anticompetitive." *Sanders v. Brown, 504 F.3d 903, 912 (9th Cir. 2007)* (citations omitted). Plaintiffs argue that the Noerr-Pennington doctrine does not preclude them from seeking to

representations in both O'Bannon and Alston that such restrictions were absolutely necessary to preserve consumer demand for college sports. See, e.g., House Compl. ¶¶ 14, 208. Plaintiffs **[**22]** also allege that surveys conducted since O'Bannon II and Alston II show that consumers of college sports support eliminating the limitations on student-athletes' ability to capitalize on their own NIL or would not stop consuming college sports if student-athletes were allowed to receive compensation for the use of their NIL. Id. ¶¶ 163-65. Plaintiffs further aver that, since O'Bannon II and Alston II, Defendants have granted hundreds of waivers to student-athletes to profit from or use their NIL in contravention of the rules challenged here, and consumer demand for college sports has not decreased. See id. ¶¶ 224-27 (alleging that student-athlete was granted a waiver to participate in television show Dancing with the Stars and to accept as much as $325,000 if she won). Additionally, Plaintiffs allege that new and potentially highly lucrative opportunities for capitalizing on student-athletes' NIL have emerged since O'Bannon II and Alston II, with social media being one of them. Id. ¶¶ 134-36, 229.

Fourth, because of the distinct factual and legal differences that exist between House and Oliver **[**23]** and O'Bannon and Alston, Plaintiffs here have proposed less restrictive alternatives that were not considered **[*815]** in the prior cases. One proposed less restrictive alternative here is to require the NCAA to permit its members to allow student-athletes to receive compensation from third parties for the use of their NIL. See House Compl. ¶¶ 21, 91, 175, 275.

In light of the foregoing, the Court concludes that material differences distinguish House and Oliver from *O'Bannon II* and *Alston II* on a principled basis. Accordingly, House and Oliver are not subject to dismissal on the basis of stare decisis.

B. Group-Licensing Damages Sub-Class

Defendants argue that the claims of the "Group Licensing Damages Sub-Class" are subject to dismissal for two reasons. First, Defendants argue that the proposed members of the sub-class have no publicity rights in broadcasts of football or basketball games, which precludes them from alleging the requisite injury to their "business or property" under the Clayton Act, *15 U.S.C. § 15(a)*. Second, Defendants contend that, even if the sub-class members had such rights, Plaintiffs cannot establish injury to competition because they have not alleged the same "Group Licensing Market" that **[**24]** was adjudicated in O'Bannon. Defendants argue that, because Plaintiffs' request for a share of broadcasting revenue here is "in all material respects identical" to the request for a share of broadcasting revenue in O'Bannon, Plaintiffs must allege injury to competition "in the relevant market for that claim," which Defendants contend is, and can only be, the "Group Licensing Market" defined and adjudicated in O'Bannon. See Reply at 4-5.

Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a).

HN6[] A plaintiff suing for violations of federal ***antitrust law*** may recover damages if it can show: (1) actual injury caused by the antitrust violation; (2) the directness or indirectness of the injury, taking into account possible duplicative recoveries, complex apportionment, and alternative or superior plaintiffs; and **[**25]** (3) injury of the kind that the antitrust laws were intended to prevent. See *Associated Gen. Contractors v. Cal. State Council of*

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use the statements as party admissions to show that Defendants agree that the amateur nature of college sports would not be altered if certain NIL rights are granted to student-athletes. The Court finds that Defendants have not shown that the Noerr-Pennington doctrine precludes Plaintiffs from using the statements in question as party admissions to support their claims in this action, which arise from Defendants' alleged price-fixing by way of certain NCAA rules and not from Defendants' petitioning activities. Accordingly, the Noerr-Pennington doctrine does not preclude the Court from considering the statements in question as allegations of party admissions in the context of resolving the present motion to dismiss.

Carpenters, 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983). "Antitrust injury does not arise for purposes of § 4 of the Clayton Act . . . until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct[.]" Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990) (citation omitted).

Defendants argue that, as a matter of law, Plaintiffs cannot establish that the members of the proposed "Group Licensing Damages Sub-Class" suffered antitrust injury because Plaintiffs must, but cannot, show that the members of the sub-class have rights of publicity in the use of their NIL "in live game broadcasts and archival game footage." Mot. at 7.

HN7[] To establish that Plaintiffs have not alleged "antitrust injury," Defendants must show that Plaintiffs' injuries are not of the type that the antitrust laws were intended to prevent. See Associated Gen. Contractors, 459 U.S. at 534; see also O'Bannon II, 802 F.3d at 1067 ("Although the NCAA purports to be making an antitrust-injury argument, it is mistaken. The NCAA has not contended that **[*816]** the plaintiffs' injuries are not "of the type the antitrust laws were intended to prevent."). Defendants have made no such showing.

Defendants argue that, because the members of the sub-class purportedly have no legal entitlement to broadcasting revenue **[**26]** by way of publicity rights in broadcasts, the members of the sub-class have suffered no injury, as the challenged rules do not deprive them of compensation that they would otherwise receive. This argument is not one about antitrust injury, but rather one about injury in fact. See O'Bannon II, 802 F.3d at 1067 (holding that "the NCAA has made a garden-variety standing argument" by contending that "the plaintiffs have not been injured in fact by the compensation rules because those rules do not deprive them of any NIL compensation they would otherwise receive").

HN8[] A plaintiff can show that it was injured in fact by alleging that it was deprived of the opportunity to receive compensation it otherwise would have received but for the challenged conduct. To make this showing, a plaintiff need not establish that it has a legal entitlement to the compensation in question. See id. at 1069 ("That the NCAA's rules deny the plaintiffs all opportunity to receive this compensation is sufficient to endow them with standing to bring this lawsuit.") (citing 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3531.4 (3d ed. 1998) ("[L]oss of an opportunity may constitute injury, even though it is not certain that any **[**27]** benefit would have been realized if the opportunity had been accorded.") (collecting cases)).

Here, Plaintiffs allege that, absent the challenged rules, "Division I conferences and schools would compete amongst each other by allowing their athletes to . . . share in the conferences' and schools' commercial benefits received from exploiting student-athletes names, images, and likenesses," which include broadcasting revenue. Oliver Compl. ¶¶ 63-70. These allegations are sufficient to raise the reasonable inference that competition among schools and conferences would increase in the absence of the challenged rules, and that this increased competition would incentivize schools and conferences to share their broadcasting and other commercial revenue with student-athletes even if the student-athletes lacked publicity rights in broadcasts. These allegations are sufficient to claim injury in fact at this juncture.

Defendants have not shown that a different conclusion is warranted. Defendants' reliance on non-binding authorities that suggest that student-athletes may not have a legal entitlement to broadcasts under the laws of some states is misplaced. See, e.g., Marshall v. ESPN Inc., 111 F. Supp. 3d 815, 826-27 (M.D. Tenn. 2015), aff'd sub nom. Marshall v. ESPN, 668 F. App'x 155 (6th Cir. 2016) (dismissing **[**28]** student-athletes' claims predicated on violations of their right of publicity under Tennessee law on the ground that "Tennessee recognizes no right of publicity in sports broadcasts"). Defendants cite these non-binding authorities to support the proposition that student-athletes cannot establish injury in fact because they do not have publicity rights in broadcasts. But, as discussed above, a plaintiff is not required to establish that it has a legal entitlement to the compensation in question to show that it was injured in fact by a restraint that prevented it from receiving the compensation. A plaintiff can establish injury in fact in this context merely by showing that the restraint deprived it of the opportunity to receive the compensation. Plaintiffs here have satisfied this standard; they have alleged facts from which the fact-finder could infer that, but for the challenged rules, schools and conferences would be willing to share their broadcasting revenue with the members of the sub-class even if **[*817]** they had no publicity rights in broadcasts, to the extent that doing so would help the schools and conferences compete with other schools and conferences for recruits. Accordingly, **[**29]** the claims of the sub-class are not subject to dismissal on the ground that Plaintiffs failed to plead injury in fact.

Defendants also argue that the claims of the sub-class at issue are subject to dismissal because Plaintiffs have not alleged facts showing that the challenged rules harm competition in the "Group Licensing Market" that was adjudicated in O'Bannon. Mot. at 11-12. This argument is premised on the theory that, because Plaintiffs here seek a share of broadcasting revenue just like the plaintiffs in O'Bannon sought a share of broadcasting revenue, then Plaintiffs are required to allege and rely on the same relevant market for group licenses adjudicated in O'Bannon, as the request for a share of broadcasting revenue in both actions is essentially "identical." See Reply at 4-5.

HN9[] "To establish a *section 1* violation under the Sherman Act, a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is **[**30]** engaged[.]" *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988)* (citations omitted). "An essential element of a *Section 1* violation under the rule of reason is injury to competition in the relevant market." *All. Shippers, Inc. v. S. Pac. Transp. Co., 858 F.2d 567, 570 (9th Cir. 1988)* (citation omitted). A "relevant market"

> encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the "'area of effective competition' . . . where buyers can turn for alternative sources of supply." The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand.

Tanaka v. Univ. of S. California, 252 F.3d 1059, 1063 (9th Cir. 2001) (citations and internal quotation marks omitted). "Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." Id. (citation omitted).

Here, Plaintiffs have adequately pleaded a relevant market, as well as injury to competition in that market. Plaintiffs allege that the relevant market is the nationwide market for the labor of Division I college athletes, wherein Division I members compete with each other to purchase through bundles of goods and services student-athletes' labor and the right to use their NIL. Plaintiffs further allege that, because Division I members have overwhelming market power as a result of the absence **[**31]** of reasonable substitutes for the opportunities offered by Division I members, the challenged rules allow Division I members to suppress competition that would otherwise exist among them by artificially fixing the price of the bundle of goods and services offered to student-athletes. In the absence of the challenged rules, Plaintiffs allege, competition among Division I members would increase, resulting in an increase in the price of the bundle of goods and services that Division I members would offer to student-athletes. Plaintiffs allege that one of the ways in which Division I members could increase the price of the bundle of goods and services in the absence of the challenged rules would be to offer student-athletes a share of the revenue that Division I members derive from the licensing or commercializing of student-athletes' NIL. See House Compl. ¶¶ 81-87; Oliver Compl. ¶¶ 63-70.

[*818] The injury to competition that Plaintiffs allege here is the artificial suppression of the price of the bundle of goods and services that student-athletes can receive in exchange for their labor and the right to use their NIL within the nationwide labor market just described. ***HN10***[] This alleged injury is cognizable **[**32]** and sufficient to survive the present motion to dismiss. See *Atl. Richfield, 495 U.S. at 341* (noting that "price competition" in the relevant market is "in the interest of competition"); *United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013)* ("***Antitrust law*** addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there.") (citation and internal quotation marks omitted).

Defendants contend that Plaintiffs are required to plead the same relevant market that formed the basis of some of the plaintiffs' claims in O'Bannon, and that their failure to do so means that Plaintiffs have not alleged injury to competition in a relevant market. Defendants, however, have cited no authority to support the proposition that Plaintiffs in House and Oliver are required to adopt the same market definition that another set of plaintiffs relied upon in a different case. ***HN11***[] To avoid dismissal at the pleading stage, Plaintiffs are required to "identify a relevant market" and plead injury to competition within that market. *Tanaka, 252 F.3d at 1063* (emphasis added). For the reasons discussed above, they have done so here. Plaintiffs are not required to do more.

This conclusion is not altered **[**33]** by the fact that the Court ruled after a bench trial in O'Bannon that the plaintiffs in that case had failed to show that the rules challenged there had harmed competition in a sub-market for group licenses. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 996-97 (N.D. Cal. 2014)*, aff'd in part, vacated in part, *802 F.3d 1049 (9th Cir. 2015)* (holding that the plaintiffs "failed to show that the challenged NCAA rules harm competition" in the sub-market for group licenses in which "television networks compete for the rights to telecast live FBS football and Division I basketball games" and could purchase the rights from Division I members or from student-athletes in the absence of the challenged rules). Defendants have not shown that the Court's post-trial analysis of the evidence presented in another case with respect to a market different from the one that Plaintiffs allege here is relevant to its determination of the present motions.

Accordingly, the Court denies Defendants' motion to dismiss the claims of the "Group Licensing Damages Sub-Class."

C. Tymir Oliver's Claims

Defendants argue that the claims of named plaintiff Tymir Oliver must be dismissed because (1) he lacks standing to seek injunctive relief, as he is a former student-athlete; and (2) he lacks standing to seek damages **[**34]** because he was a member of the Division I FBS Football Settlement Class in Alston and released his claims for damages as part of that settlement.

Plaintiffs concede that Tymir Oliver lacks standing to seek injunctive relief. See Opp'n at 2 ("Defendants are right that as a former student-athlete he cannot seek injunctive relief"). In light of this concession, the Court grants Defendants' motion to dismiss Tymir Oliver's claims for injunctive relief, without leave to amend.

The Court now turns to the question of whether Tymir Oliver's claims for damages were released in the Alston settlement. The Court granted final approval to the settlement of the damages claims in Alston on December 6, 2017. Order and Final Judgment, Docket No. 746 at 2, Case No. **[*819]** 14-md-02541. It is undisputed that Tymir Oliver was a member of the Division I FBS Football Class as defined in the Alston settlement agreement, which included:

> All current and former NCAA Division I Football Bowl Subdivision ("FBS") football student-athletes who, at any time from March 5, 2010 through the date of Preliminary Approval of this Settlement [March 21, 2017], received from an NCAA member institution for at least one academic term **[**35]** . . . a Full Athletics Grant-In-Aid."

Id.; see also Oliver Compl. ¶¶ 27, 29 (alleging that Tymir Oliver was a "Division I student-athlete who competed for the University of Illinois men's football team" beginning in 2016 and that he received a full scholarship from the University of Illinois).

As part of the Alston settlement, the members of the Division I FBS Football Class released the following claims:

> [A]ny and all past, present and future claims, demands, rights, actions, suits, or causes of action, for monetary damages of any kind (including but not limited to actual damages, statutory damages, and exemplary or punitive damages), whether class, individual or otherwise in nature, known or unknown, foreseen or unforeseen, suspected or unsuspected, asserted or unasserted, contingent or non-contingent, under the laws of any jurisdiction, which Releasors or any of them, whether directly, representatively, derivatively, or in any other capacity, ever had, now have or hereafter can, shall or may have, arising out of or relating in any way to any of the legal, factual, or other allegations made in Plaintiffs' Actions, or any legal theories that could have been raised on the allegations **[**36]** in Plaintiffs' Actions. The Released Claims do not include claims solely for prospective injunctive relief and certain other claims expressly excluded from the release as set forth in the Settlement Agreement.

Order and Final Judgment at 11-12 (footnote omitted).

HN12[] "A settlement agreement may preclude a party from bringing a related claim in the future 'even though the claim was not presented and might not have been presentable in the class action,' but only where the released claim is 'based on the identical factual predicate as that underlying the claims in the settled class action.'" See *Hesse v. Sprint Corp., 598 F.3d 581, 590-91 (9th Cir. 2010)* (emphasis added).

Tymir Oliver's damages claims here are not based on the identical factual predicate as the damages claims in Alston. As discussed above, his claims are materially distinguishable from those in Alston because they are based on (1) challenges to some rules that were not challenged in Alston; (2) a legal theory that was not raised in Alston, which requires different facts from those litigated in Alston; and (3) new facts that post-date Alston. Accordingly, the Court cannot conclude at this juncture that Tymir Oliver's claims for damages were released via the Alston settlement.[5] The Court, **[**37]** therefore, denies Defendants' **[*820]** motion to dismiss Tymir Oliver's claims for damages.

CONCLUSION

For the foregoing reasons, the Court GRANTS, without leave to amend, Defendants' motion to dismiss Tymir Oliver's claims for injunctive relief. The Court otherwise DENIES Defendants' motions to dismiss.

IT IS SO ORDERED.

Dated: June 24, 2021

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge

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[5] In a footnote, Defendants argue in passing that Tymir Oliver's claims are barred by res judicata. **HN13**[] Res judicata bars a subsequent claim when there is: (i) an identity of claims between the prior and subsequent actions; (ii) a final judgment on the merits; and (iii) identity or privity between the parties. *Media Rights Techs., Inc. v. Microsoft Corp., 922 F.3d 1014, 1020-21 (9th Cir. 2019)* (internal citation omitted). In light of the distinct factual allegations and legal theories upon which Tymir Oliver's claims are predicated, as discussed above, the Court cannot conclude at this juncture that there is an identity of claims between the claims he asserts here and those in Alston. Accordingly, the Court cannot conclude at this stage that Tymir Oliver's claims are barred by res judicata.

Miami Prods. & Chem. Co. v. Olin Corp.

United States District Court for the Western District of New York

June 24, 2021, Decided; June 24, 2021, Filed

1:19-CV-00385 EAW; 1:19-CV-00975 EAW; 1:19-CV-00990 EAW

Reporter

546 F. Supp. 3d 223 *; 2021 U.S. Dist. LEXIS 118138 **

MIAMI PRODUCTS & CHEMICAL CO., On Behalf of Itself and All Others Similarly Situated, et al., Plaintiffs, v. OLIN CORPORATION, et al., Defendants.THE TRIPP PLATING WORKS, INC., On Behalf of Itself and All Others Similarly Situated, et al., Plaintiffs, v. OLIN CORPORATION, et al., Defendants.PRECIOUS PLATE, INC., On Behalf of Itself and All Others Similarly Situated, et al., Plaintiffs, v. OLIN CORPORATION, et al., Defendants.

Prior History: *Miami Prods. & Chem. Co. v. Olin Corp., 2021 U.S. Dist. LEXIS 118137 (W.D.N.Y., June 24, 2021)*

Core Terms

Purchaser, Indirect, consumer protection, consumer, caustic soda, deceptive, misrepresentation, unjust enrichment, antitrust claim, class action, Defendants', allegations, asserted claim, antitrust, agrees, state law, notice, injunctive relief, attorney general, quotation, intrastate, cases, damages, courts, motion to dismiss, anti trust law, federal court, conspiracy, purposes, resident

LexisNexis® Headnotes

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

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

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

In considering a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint. A court should consider the motion by accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff. To withstand dismissal, a claimant must set forth enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

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

HN2[] Motions to Dismiss, Failure to State Claim

While a complaint attacked by a Fed. R. Civ. P. 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. To state a plausible claim, the complaint's factual allegations must be enough to raise a right to relief above the speculative level.

Civil Procedure > ... > Voluntary Dismissals > Court Order > Dismissal With Prejudice

Civil Procedure > ... > Voluntary Dismissals > Court Order > Motions for Dismissal

Civil Procedure > ... > Voluntary Dismissals > Notice of Dismissal > Dismissal Without Prejudice

Civil Procedure > ... > Voluntary Dismissals > Court Order > Dismissal Without Prejudice

HN3[] Court Order, Dismissal With Prejudice

Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), a plaintiff may voluntarily dismiss a claim without prejudice before an opposing party serves either an answer or a motion for summary judgment.

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

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

HN4[] Trade Practices & Unfair Competition, State Regulation

The Montana Unfair Trade Practices and Consumer Protection Act, Mont. Code § 30-14-101 et seq. (MUTPCPA) enables a consumer to bring an action for damages, Mont. Stat. § 30-14-133(1), and defines consumer as a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes, § 30-14-102(1). The purchase of goods entirely for business purposes does not come within the statutory definition of a purchase or lease of goods primarily for personal, family or household purposes.

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

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Unfair Trade Practices Acts

HN5[] Deceptive & Unfair Trade Practices, State Regulation

The Utah Consumer Sales Practices Act (UCSPA), Utah Code Ann. § 13-11-4 similarly affords a cause of action only to a consumer. Utah Code Ann. § 13-11-19. The UCSPA further defines a consumer transaction as a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance) to, or apparently to, a person for: (i) primarily personal, family, or household purposes; or (ii) purposes that relate to a business opportunity that requires the person described in Utah Code Ann. § 13-11-3(2)(a) to perform personal services on a continuing basis and in which the person described in Utah Code Ann. § 13-11-3(2)(a) has not been previously engaged. Utah Code Ann. § 13-11-3(2)(a).

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

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

HN6[] Trade Practices & Unfair Competition, State Regulation

It is unlawful under the Oregon Unfair Trade Practices Act (OUTPA), Or. Rev. Stat. § 646.605 et seq. to make false or misleading representations of fact concerning the offering price of real estate, goods, or services. Or. Rev. Stat. § 646.608(1)(s); Or. Rev. Stat. § 646.638. The OUTPA further defines real estate, goods or services to mean those that are or may be obtained primarily for personal, family or household purposes, or that are or may be obtained for any purposes as a result of a telephone solicitation. § 646.605(6)(a).

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Constitutional Law > Supremacy Clause > Federal Preemption

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

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

HN7[] Remedies, Damages

Direct purchasers may sue antitrust violators, but also ruled that indirect purchasers may not sue. State laws allowing for recovery by indirect purchasers are not preempted by federal law. In other words, the federal indirect-purchaser rule does not prevent indirect purchasers from recovering damages under state antitrust laws where the state laws otherwise allow it.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

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

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

HN8[] Standing, Clayton Act

Any state that has not expressly passed Illinois Brick Co. v. Illinois repealer legislation or interpreted its law in such a way as to override the rule of Illinois Brick is presumed to have decided to follow federal law, including the Illinois Brick limitation on indirect purchaser claims.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

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

HN9[] Remedies, Damages

However, Alaska has not passed a statute repealing Illinois Brick more generally, and as such, no court has construed Alaska's consumer protection statute, Alaska Stat. Ann. § 45.50.531(a), to permit claims based on alleged antitrust and monopolization conduct by indirect purchasers. To the contrary, the courts that have considered the matter have concluded that Alaska's consumer protection statute precludes plaintiffs from bringing claims as indirect purchasers even under a non-antitrust unfair practices theory. The court therefore declines to read the Alaska consumer protection statute to permit indirect purchaser standing, since no court has affirmatively found to the contrary, and since, under the current status of the law in Alaska, only the attorney general may sue for money damages on behalf of indirect purchasers as a result of antitrust violations.

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

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN10[] Purchasers, Indirect Purchasers

Consistent with New Jersey's status as a state that follows Illinois Brick, the New Jersey Consumer Fraud Act, N.J. Stat. Ann. § 56.8-1 et seq. does not allow for a cause of action based on an anticompetitive scheme in violation of the Antitrust Act without any allegation of a direct or indirect statement or communication with any plaintiff. Consumer fraud claims may create precisely the risk of multiple recoveries, which Illinois Brick Co. v. Illinois (and parallel New Jersey decisions) seek to avoid.

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

HN11[] Deceptive & Unfair Trade Practices, State Regulation

The Arizona Consumer Fraud Act (ACFA) prohibits persons from engaging in any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely on such concealment, suppression or omission in connection with the sale or advertisement of consumer goods or services. Ariz. Rev. Stat. § 44-1522(A). The elements of a private cause of action under the Arizona Consumer Fraud Act are a false promise or misrepresentation made in connection with the sale or advertisement of merchandise and the hearer's consequent and proximate injury. Under the ACFA, an affirmative misrepresentation causes injury where the consumer actually relies on the statement, although the consumer's reliance does not need to be justifiable.

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

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

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

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN12[] State Regulation, Claims

The language of the California's Unfair Competition Law, Cal. Bus. & Prof. Code (CUCL), §§ 17200 et seq. imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the CUCL's fraud prong.

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

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Torts > Business Torts > Unfair Business Practices > Elements

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

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

HN13[] **State Regulation, Claims**

A claim under North Carolina's unfair or deceptive trade practices act, N.C. Gen. Stat. § 75-1.1, stemming from an alleged misrepresentation does indeed require a plaintiff to demonstrate reliance on the misrepresentation in order to show the necessary proximate cause. N.C. Gen. Stat. § 75-1.1 claims founded on fraud distill to analogous elements: detrimental reliance on deceptive information.

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

HN14[] **Deceptive & Unfair Trade Practices, State Regulation**

The Supreme Court of Appeals of West Virginia has construed the West Virginia Consumer Credit and Protection Act, W.V. Stat. §§ 46a-1-101 et seq. (WVCCPA), and held that when consumers allege that a purchase was made because of an express or affirmative misrepresentation, the causal connection between the deceptive conduct and the loss would necessarily include proof of reliance on those overt representations and that where concealment, suppression or omission is alleged, and proving reliance is an impossibility, the causal connection between the deceptive act and the ascertainable loss is established by presentation of facts showing that the deceptive conduct was the proximate cause of the loss. In other words, the facts have to establish that but for the deceptive conduct or practice a reasonable consumer would not have purchased the product and incurred the ascertainable loss.

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

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

Under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 IL Stat. §§ 505/1 et seq., proof of actual deception of a plaintiff is required, but such deception need not be direct between the defendant and the plaintiff. Instead, it is sufficient if the defendant deceives a third party, if the deception is made with the intention that it reach the plaintiff and influence his action and that it does reach him and that he does rely upon it, to his damage.

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

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

A consumer may suffer actual damages from the defendant's deceptive statements if the consumer purchased a product as a result of the defendant's deception of another.

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

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

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

To state a valid claim under the New Hampshire Consumer Protection Act, N.H. Rev. Stat. § 358-A:2, a plaintiff must demonstrate that the defendant engaged in an unfair method of competition or an unfair or deceptive act or practice in the conduct of any trade or commerce within this state. For purposes of the statute, a misrepresentation is made within-this-state when New Hampshire is the locus of the offending conduct, or, put differently, whenever a person receives a misrepresentation in the State of New Hampshire.

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

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

HN18[] **Deceptive & Unfair Trade Practices, State Regulation**

A consumer protection claim based on a state statute that extends well beyond common-law fraud to cover a broad range of deceptive practices and does not require proof of the same essential elements (such as reliance) as common-law fraud is not subject to the pleading-with-particularity requirements of Fed. R. Civ. P. 9(b), but need only meet the notice-pleading requirements of Fed. R. Civ. P. 8(a).

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

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

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

With respect to the Colorado Consumer Protection Act, Colo. Rev. Stat. §§ 6-1-101 et seq., one element of a claim thereunder is that a defendant's conduct significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property. To determine whether a challenged practice significantly impacts the public, Colorado courts consider: (1) the number of consumers directly affected by the challenged practice; (2) the relative sophistication and bargaining power of the consumers affected by the challenged practice; and (3) evidence that the challenged practice has previously impacted other consumers or has the significant potential to do so in the future.

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

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

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

HN20[] **Private Actions, Private Attorneys General**

An individual may seek damages under the Minnesota Uniform Deceptive Trade Practices Act (MUDTPA), Minn. Stat. §§ 325D.43-.48 pursuant to Minnesota's private attorney general statute, Minn. Stat. § 8.31, so long as the cause of action benefits the public.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN21[] **Conspiracy to Monopolize, State Regulation**

In considering whether the challenged conduct standard has been met in analogous cases, federal courts have distinguished between pleadings in which a plaintiff has alleged intrastate conduct along with conduct throughout the United States, and pleadings that do not contain specific allegations of intrastate conduct along with allegations of conduct throughout the United States. In the latter type of cases, courts have held allegations under state antitrust statutes insufficient where the complaint alleges only that the conspiracy affects interstate commerce without describing the effects in a particular state or in discretely identifiable states.

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

HN22[] **Complaints, Requirements for Complaint**

The antitrust laws of Arizona, Nevada, and Utah require a plaintiff to serve a copy of their complaint on the respective attorneys general of those states. Ariz. Rev. Stat. § 44-1415(A), (D); Nev. Rev. Stat. § 598A.210(3); Utah Code Ann. § 76-10-3109(9).

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN23[] **Remedies, Damages**

The Illinois Antitrust Act (the IAA) provides that no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under the IAA, with the sole exception of this State's Attorney General. 740 Ill. Comp. Stat. 10/7(2).

Governments > Courts > Judicial Precedent

HN24[] **Courts, Judicial Precedent**

When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN25[] **Remedies, Damages**

The Illinois Antitrust Act's class action bar does not limit the substantive rights of an injured party in an individual action.

Antitrust & Trade Law > Consumer Protection

Governments > Courts > Rule Application & Interpretation

HN26[] **Antitrust & Trade Law, Consumer Protection**

The Illinois Antitrust Act's limitation is not contained in a generally applicable procedural rule but, rather, in the same paragraph of the same statute that creates the underlying substantive right.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN27[] **Purchasers, Direct Purchasers**

Under Montana law, lawsuits by indirect purchasers are barred pursuant to Illinois Brick Co. v. Illinois.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN28[] **Remedies, Damages**

Under the Utah Antitrust Act the UAA, a person who is a citizen of this state or a resident of this state can bring a claim. Utah Code Ann. § 76-10-3109(1)(a). The majority of courts that have been presented with this statute require at least one Utah citizen or resident be a named plaintiff. However, some courts have found that a class representative that is not a Utah citizen or resident may bring claims on behalf of absent class members who are citizens or residents of Utah.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN29[] **Remedies, Damages**

In the absence of any controlling authority, the Court adopts the majority approach and concludes that, to state a claim under the Utah Antitrust Act, there must be a named plaintiff who is a Utah citizen or resident. It is well-established that a member of a putative class is not a party to a lawsuit. A plaintiff is a party to the lawsuit.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN30[] **Types of Contracts, Quasi Contracts**

State law requirements under unjust enrichment law vary widely.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Applicability

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN31[] **Federal Common Law, Applicability**

Unjust enrichment is not a catch-all claim existing within the narrow scope of federal common law, and cobbling together the elements of a claim of unjust enrichment from the laws of the fifty states is no different from applying federal common law.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN32[] **Purchasers, Indirect Purchasers**

To give just one example of why the Indirect Purchaser Plaintiffs' failure to specifically address the factual requirements of an unjust enrichment claim under the various asserted laws matters, under New York law, a plaintiff claiming unjust enrichment must establish that the relationship between the parties is not too attenuated, meaning that the relationship must be one that could have caused reliance or inducement.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN33[] **Clayton Act, Claims**

In order to seek injunctive relief under § 16 of the Clayton Act, 5 U.S.C.S. § 26, a private plaintiff must allege threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN34[] **Amendment of Pleadings, Leave of Court**

The Court should freely give leave when justice so requires. Fed. R.Civ. P. 15(a)(2).

Counsel: [1]** For Miami Products & Chemical Co., on behalf of Itself and All Others Similarly Situated, Plaintiff (1:19cv385): Marco Cercone, LEAD ATTORNEY, Rupp, Baase, Pfalzgraf & Cunningham, LLC, Buffalo, NY USA; Pamela A. Markert, LEAD ATTORNEY, PRO HAC VICE, Solomon B. Cera, PRO HAC VICE, Cera LLP, San Francisco, CA USA; C. Andrew Dirksen, PRO HAC VICE, Cera LLP, Boston, MA USA; Joseph Michael Vanek, PRO HAC VICE, Sperling & Slater, P.C., Chicago, IL USA.

For Amrex Chemical Co., Inc., on behalf of itself and all others similarly situated, Plaintiff (1:19cv385): Arthur N. Bailey, LEAD ATTORNEY, Rupp Baase Pfalzgraf Cunningham LLC, Jamestown, NY USA; Elana Katcher, Jeffrey P. Campisi, Matthew P. McCahill, Robert N. Kaplan, LEAD ATTORNEYSSS, Kaplan Fox & Kilsheimer LLP, New York, NY USA; Gary L. Specks, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer, Wheeling, IL USA; Marco Cercone, LEAD ATTORNEY, Rupp, Baase, Pfalzgraf & Cunningham, LLC, Buffalo, NY USA; Pamela A. Markert, LEAD ATTORNEY, PRO HAC VICE, Cera LLP, San Francisco, CA USA; R. Anthony Rupp , III, LEAD ATTORNEY, Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC, Buffalo, NY USA; Joseph Michael Vanek, PRO HAC VICE, Sperling & Slater, **[**2]** P.C., Chicago, IL USA.

For Finch Paper, Llc, on behalf of itself and all others similarly situated, Plaintiff (1:19cv385): Arthur N. Bailey, LEAD ATTORNEY, Rupp Baase Pfalzgraf Cunningham LLC, Jamestown, NY USA; Candice J. Enders, Eric L. Cramer, Ruthanne Gordon, LEAD ATTORNEYSS, Berger Montague PC, Philadelphia, PA USA; Marco Cercone, LEAD ATTORNEY, Rupp, Baase, Pfalzgraf & Cunningham, LLC, Buffalo, NY USA; Pamela A. Markert, LEAD ATTORNEY, PRO HAC VICE, Cera LLP, San Francisco, CA USA; R. Anthony Rupp , III, LEAD ATTORNEY, Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC, Buffalo, NY USA; Joseph Michael Vanek, PRO HAC VICE, Sperling & Slater, P.C., Chicago, IL USA.

For Main Pool And Chemical Co., Inc., on behalf of itself and all others similarly situated, Plaintiff (1:19cv385): Marco Cercone, LEAD ATTORNEY, Rupp, Baase, Pfalzgraf & Cunningham, LLC, Buffalo, NY USA; Pamela A. Markert, LEAD ATTORNEY, PRO HAC VICE, Cera LLP, San Francisco, CA USA; R. Anthony Rupp , III, LEAD ATTORNEY, Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC, Buffalo, NY USA; Amanda Klevorn, Burns Charest LLP, New Orleans, LA USA; Joseph E. Mariotti, Shawn P. Quinnan, Caputo & Mariotti, P.C., Moosic, PA USA; **[**3]** Joseph Michael Vanek, PRO HAC VICE, Sperling & Slater, P.C., Chicago, IL USA; Linda P. Nussbaum, PRO HAC VICE, Nussbaum Law Group, P.C., New York, NY USA; Mallory Biblo, Warren T. Burns, Burns Charest LLP, Dallas, TX USA; Marc H. Edelson, Edelson & Associates, LLC, Newtown, PA USA.

For Midwest Renewable Energy, Llc, on behalf of itself and all others similarly situated, Plaintiff (1:19cv385): Arthur N. Bailey, LEAD ATTORNEY, Rupp Baase Pfalzgraf Cunningham LLC, Jamestown, NY USA; Douglas A. Abrahams, Joseph C. Kohn, William E. Hoese, LEAD ATTORNEYSS, PRO HAC VICE, Robert J. LaRocca, LEAD ATTORNEY, Kohn Swift & Graf P.C., Philadelphia, PA USA; Joshua H. Grabar, LEAD ATTORNEY, PRO HAC VICE, Grabar Law Office, Philadelphia, PA USA; Marco Cercone, LEAD ATTORNEY, Rupp, Baase, Pfalzgraf & Cunningham, LLC, Buffalo, NY USA; Pamela A. Markert, LEAD ATTORNEY, PRO HAC VICE, Cera LLP, San Francisco, CA USA; R. Anthony Rupp , III, LEAD ATTORNEY, Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC, Buffalo, NY USA; Joseph Michael Vanek, PRO HAC VICE, Sperling & Slater, P.C., Chicago, IL USA.

For Perry's Ice Cream Company, Inc., on behalf of itself and all others similarly situated, Plaintiff (1:19cv385): **[**4]** Arthur N. Bailey, LEAD ATTORNEY, Rupp Baase Pfalzgraf Cunningham LLC, Jamestown, NY USA; Marco Cercone, LEAD ATTORNEY, Rupp, Baase, Pfalzgraf & Cunningham, LLC, Buffalo, NY USA; Pamela A. Markert, LEAD ATTORNEY, PRO HAC VICE, Cera LLP, San Francisco, CA USA; Joseph Michael Vanek, PRO HAC VICE, Sperling & Slater, P.C., Chicago, IL USA; R. Anthony Rupp , III, Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC, Buffalo, NY USA; Vincent J. Esades, PRO HAC VICE, Heins Mills & Olson, PLC, Minneapolis, MN USA.

For Vandemark Chemical, Inc., Plaintiff (1:19cv385): Marco Cercone, LEAD ATTORNEY, Rupp, Baase, Pfalzgraf & Cunningham, LLC, Buffalo, NY USA; Pamela A. Markert, LEAD ATTORNEY, PRO HAC VICE, Cera LLP, San Francisco, CA USA; Joseph Michael Vanek, PRO HAC VICE, Sperling & Slater, P.C., Chicago, IL USA.

For Olin Corporation, K.A.Steel Chemicals, Inc., Defendants (1:19cv385): Stephen A. Sharkey, LEAD ATTORNEY, Bond, Schoeneck & King, PLLC, Buffalo, NY USA; Caroline Lytton Jones, Jeffrey Stephen Oliver, Joseph Allen Ostoyich, Paul Christopher Cuomo, William Connor Lavery, PRO HAC VICE, Baker Botts LLP, Washington, DC USA.

For Occidental Petroleum Corporation, Occidental Chemical Corporation, Defendants **[**5]** (1:19cv385): Brian P. Crosby, Melissa M. Morton, LEAD ATTORNEYS, Gibson, McAskill & Crosby, LLP, Buffalo, NY USA; Steven E Bizar, LEAD ATTORNEY, George G. Gordon, John P. McClam, Julia E. Chapman, PRO HAC VICE, Dechert LLP, Philadelphia, PA USA; Timothy J. Graber, LEAD ATTORNEY, Gibson, McAskill & Crosby, Buffalo, NY USA.

For Westlake Chemical Corporation, Defendant (1:19cv385): James T. Southwick, LEAD ATTORNEY, Abigail C. Noebels, Burton Solomon DeWitt, William R.H. Merrill, PRO HAC VICE, Susman Godfrey L.L.P., Houston, TX USA; Terrance P. Flynn, LEAD ATTORNEY, Harris Beach LLP, Buffalo, NY USA.

For Shin-Etsu Chemical Co. Ltd., Defendant (1:19cv385): Daniel S Bitton, LEAD ATTORNEY, Axinn, Veltrop & Harkrider LLP, San Fransisco, CA USA; John D. Briggs, Steven C. Lavender, LEAD ATTORNEYS, Axinn, Veltrop & Harkrider LLP, Washington, DC USA.

For Shintech Incorporated, Defendant (1:19cv385): Daniel S Bitton, LEAD ATTORNEY, Axinn, Veltrop & Harkrider LLP, San Fransisco, CA USA; John D. Briggs, Steven C. Lavender, LEAD ATTORNEYS, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Washington, DC USA; Randall David White, LEAD ATTORNEY, Connors LLP, Buffalo, NY USA; Caitlin M Higgins, U.S. Attorney's **[**6]** Office, Buffalo, NY USA.

For Formosa Plastics Corporation, Formosa Plastics Corporation, U.S.A., Defendants (1:19cv385): Alan M. Unger, John Joseph Lavelle, Peter J Mardian, Tom A. Paskowitz, LEAD ATTORNEYSSS, Sidley Austin LLP, New York, NY USA.

For The Tripp Plating Works, Inc., Plaintiff (1:19cv975): Barbara J. Hart, LEAD ATTORNEY, Grant & Eisenhofer, P.A., New York, NY USA; Chad B. Holtzman, LEAD ATTORNEY, Grant & Eisenhofer, P.A., Wilmington, DE USA; Christina R. McPhaul, LEAD ATTORNEY, PRO HAC VICE, Lowey Dannenberg, P.C., White Plains, NY USA; Craig Maider, LEAD ATTORNEY, Lowey Dannenberg, P.C., White Plains, NY USA; Ryan L. Gellman, LEAD ATTORNEY, Colucci & Gallaher, P.C., Buffalo, NY USA.

For Occidental Chemical Corporation, doing business as | OxyChem | (1:19cv975, 1:19cv990), Defendant: Brian P. Crosby, Melissa M. Morton, , LEAD ATTORNEYS, Gibson, McAskill & Crosby, LLP, Buffalo, NY USA; Timothy J. Graber, LEAD ATTORNEY, Gibson, McAskill & Crosby, Buffalo, NY USA.

For Formosa Plastics Corporation, U.S.A. (1:19cv975, 1:19cv990), Defendant: Alan M. Unger, Peter J Mardian, Tom A. Paskowitz, LEAD ATTORNEYS, Sidley Austin LLP, New York, NY USA.

For Precious Plate, Inc., on Behalf **[**7]** of Itself and All Others Similarly Situated |, Plaintiff (1:19cv990): Kenneth A. Wexler, LEAD ATTORNEY, Justin N. Boley, PRO HAC VICE, Wexler Wallace LLP, Chicago, IL USA; Ryan L. Gellman, Colucci & Gallaher, P.C., Buffalo, NY USA.

Judges: ELIZABETH A. WOLFORD, United States District Judge.

Opinion by: ELIZABETH A. WOLFORD

Opinion

[*231] DECISION AND ORDER

INTRODUCTION

Plaintiffs The Tripp Plating Works, Inc. ("Tripp") and Precious Plate, Inc. ("Precious Plate") (collectively the "Indirect Purchaser Plaintiffs") bring these putative class actions against defendants Olin Corporation, K.A. Steel Chemicals, Inc., Occidental Chemical Corporation, Westlake Chemical Corporation, Shintech Incorporated, and Formosa Plastics Corporation, U.S.A. (collectively, "Defendants"), alleging **[*232]** an anticompetitive conspiracy by Defendants to fix the price of caustic soda in the United States. (Dkt. 129)[1].

[1] Unless otherwise noted, all docket references herein refer to Civil Action No. 19-cv-00385 (the "Lead Action").

Presently before the Court is a motion filed by Defendants seeking dismissal of the following claims asserted by the Indirect Purchaser Plaintiffs: (1) consumer protection claims asserted under the laws of various states, as set forth more specifically below; (2) antitrust claims asserted under the laws of various states, as set forth more specifically **[**8]** below; and (3) unjust enrichment claims asserted under the laws of various states, as set forth more specifically below. (Dkt. 174)[2]. For the reasons that follow, Defendants' motion is granted in part and denied in part.

BACKGROUND

I. Factual Background

As noted above, the instant actions relate to a purported anticompetitive conspiracy by Defendants to fix the price of caustic soda in the United States. (Dkt. 129). The details of the alleged conspiracy are set forth at length in this Court's Decision and Order dated March 27, 2020, resolving several prior motions to dismiss (Dkt. 119), familiarity with which is assumed for purposes of this Decision and Order. The Indirect Purchaser Plaintiffs are New York corporations that "indirectly purchased Caustic Soda manufactured by one or more of the Defendants" during the relevant time period. (Dkt. 129 at ¶¶ 18-19).

II. Procedural Background

The Lead Action was filed on March 22, 2019 (Dkt. 1), and reassigned to the undersigned on May 8, 2019 (Dkt. 40). The Lead Action and various related putative class actions brought by direct purchasers of caustic soda were referred for the handling of non-dispositive pretrial matters to United States Magistrate **[**9]** Judge Michael J. Roemer (Dkt. 42), who entered a scheduling and case management order on May 17, 2019, consolidating the cases for pretrial purposes (Dkt. 49).

Tripp commenced its putative class action on July 25, 2019. (Civil Action No. 19-cv-00785 (the "Tripp Action"), Dkt. 1). Precious Plate commenced its putative class action on July 29, 2019. (Civil Action No. 19-cv-00990 (the "Precious Plate Action"), Dkt. 1). Both matters were referred to Judge Roemer for the handling of non-dispositive pretrial matters. (Tripp Action, Dkt. 8; Precious Plate Action, Dkt. 6). On September 19, 2019, Judge Roemer entered a Case Management Order (Tripp Action, Dkt. 11; Precious Plate Action, Dkt. 10) consolidating the Tripp Action and the Precious Plate Action into the Lead Action.

The Indirect Purchaser Plaintiffs filed a consolidated class action complaint on April 16, 2020. (Dkt. 129) (the "indirect purchaser complaint"). Defendants filed the instant motion to dismiss on May 28, 2020. (Dkt. 174). The Indirect Purchaser Plaintiffs filed their response on July 13, 2020 (Dkt. 195), and Defendants filed their reply on August 12, 2020 (Dkt. 202).

[*233] DISCUSSION

I. Legal Standard

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[2] Defendants Shin-Etsu Chemical Co. Ltd. and Formosa Plastics Corporation have individually filed renewed motions to dismiss for lack of personal jurisdiction (Dkt. 230; Dkt. 288), which the Court grants in a separate Decision and Order filed contemporaneously herewith. Accordingly, all claims asserted against these defendants are dismissed without prejudice, and this Decision and Order does not consider the merits of the claims asserted against them.

HN1[] "In considering a motion to **[**10]** dismiss for failure to state a claim pursuant to *Rule 12(b)(6)*, a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010)*. A court should consider the motion by "accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff." *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt., 843 F.3d 561, 566 (2d Cir. 2016)*. To withstand dismissal, a claimant must set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Turkmen v. Ashcroft, 589 F.3d 542, 546 (2d Cir. 2009)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*).

HN2[] "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (internal quotations and citations omitted). "To state a plausible claim, the complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level.'" *Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 218 (2d Cir. 2014)* (quoting *Twombly, 550 U.S. at 555*).

II. [11] The Indirect Purchaser Plaintiffs' Claims**

The indirect purchaser complaint sets forth the following claims: (1) violations of *§ 1 of the Sherman Act*, *15 U.S.C. § 1*; (2) "restraint of trade" in violation of the laws of Arizona, California, Connecticut, the District of Columbia, Illinois, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin; (3) "unfair and deceptive trade practices" in violation of the laws of Alaska, Arkansas, Arizona, California, Colorado, Delaware, the District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming; and (4) unjust enrichment "under the law of the District of Columbia and the laws of all states and territories in the United States, except Ohio and Indiana." (Dkt. **[**12]** 129 at 51-63). In addition to other forms of relief, the Indirect Purchaser Plaintiffs seek an injunction pursuant to *§ 16 of the Clayton Act*, *15 U.S.C. § 26*. (*Id.* at 6).

In their motion papers, Defendants seek dismissal of thirty-eight of the Indirect Purchaser Plaintiffs' state consumer protection claims, twenty-one of the Indirect Purchaser Plaintiffs' state law antitrust claims, all of the Indirect Purchaser Plaintiffs' unjust enrichment claims, and the Indirect Purchaser Plaintiffs' request for injunctive relief under *§ 16* of the Clayton Act. (Dkt. 174-1). However, in their further **[*234]** briefing, the parties narrowed their disputes regarding the state consumer protection claims. Specifically, in their opposition papers, the Indirect Purchaser Plaintiffs voluntarily withdrew their consumer protection claims asserted under the laws of Arkansas, Delaware, the District of Columbia, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Pennsylvania, Rhode Island, South Carolina, Virginia, Wisconsin, and Wyoming. (Dkt. 195 at 29 n. 12)[3]. In their reply papers, Defendants then indicated that they are no longer seeking dismissal of the Indirect Purchaser Plaintiffs' consumer **[**13]** protection claims asserted under the laws of Florida, Nebraska, New Mexico, New York, South Dakota, and Vermont. (Dkt. 202 at 12 n.2). The Court thus limits its consideration of the consumer

[3] In their reply papers, Defendants suggest that the Court should dismiss these withdrawn claims with prejudice. (Dkt. 202 at 12). The Court rejects this contention. **HN3**[] Pursuant to *Federal Rule of Civil Procedure 41(a)(1)(A)(i)*, a plaintiff may voluntarily dismiss a claim without prejudice before an opposing party serves either an answer or a motion for summary judgment. While the Indirect Purchaser Plaintiffs did not file a notice of dismissal as contemplated by *Rule 41*, they could have done so, and the Court finds no reason to punish the Indirect Purchaser Plaintiffs for their attempt to narrow the dispute by entering a dismissal with prejudice of the claims they have voluntarily withdrawn with prejudice.

protection claims to those arising under the laws of Alaska, Arizona, California, Colorado, Illinois, Minnesota, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Oregon, Utah, and West Virginia.

A. State Law Consumer Protection Claims

For the reasons discussed below, the Court finds that the Indirect Purchaser Plaintiffs' consumer protection claims asserted under the laws of Alaska, Arizona, California, Illinois, Montana, New Hampshire, New Jersey, North Carolina, Oregon, Utah, and West Virginia are subject to dismissal. The claims asserted under the laws of Colorado, Minnesota, and North Dakota will be permitted to proceed.

1. Status as Consumers under Montana and Utah Law

Defendants seek dismissal of the Indirect Purchaser Plaintiffs' claims under the *Montana Unfair Trade Practices and Consumer Protection Act, Mont. Code § 30-14-101 et seq.* (the "MUTPCPA"), and the *Utah Consumer Sales Practices Act, Utah Code § 13-11-4* (the "UCSPA"), on the basis that these statutes only protect "consumers." The Court agrees that dismissal of these claims is required.

HN4[] "The MUTPCPA **[**14]** enables a 'consumer' to bring an action for damages, *Mont. Stat. § 30-14-133(1)*, and defines 'consumer' as 'a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes,' *id*. *§ 30-14-102(1)*." *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, No. 15 CIV. 6549 (CM), 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *46 (S.D.N.Y. Dec. 26, 2018)*. The Supreme Court of Montana has held that the purchase of goods "entirely for business purposes" does not "not come within the statutory definition of a purchase or lease of goods primarily for personal, family or household purposes." *Doll v. Major Muffler Centers, Inc., 208 Mont. 401, 410, 687 P.2d 48 (1984)*; *see also* *Sergeants Benevolent Ass'n, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *46* (dismissing claims under the MUTPCPA because the plaintiff was not a "consumer" within the meaning of the MUTPCPA); *In re Lidoderm Antitrust Litig., 103 F. Supp. 3d 1155, 1165 (N.D. Cal. 2015)* (dismissing **[*235]** claims under the MUTPCPA brought by indirect purchaser of Lidoderm patches because "[t]he statute excludes persons who buy goods for resale"). Here, the Indirect Purchaser Plaintiffs do not allege that they purchased caustic soda "primarily for personal, family, or household purposes." To the contrary, they allege that they (and the other members of the putative classes) purchased caustic soda from Defendants for "non-residential use." (Dkt. 129 at ¶ 9). The Court accordingly agrees with Defendants that the Indirect Purchaser Plaintiffs have not alleged a viable claim under the MUTPCPA.

HN5[] The **[**15]** UCSPA similarly "affords a cause of action only to a 'consumer.'" *Icon Health & Fitness, Inc. v. ConsumerAffairs.com, No. 1:16-CV-00168-DBP, 2018 U.S. Dist. LEXIS 37517, 2018 WL 1183372, at *5 (D. Utah Mar. 6, 2018)* (quoting *Utah Code § 13-11-19*). The UCSPA further defines a "consumer transaction" as:

> [A] sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance) to, or apparently to, a person for: (i) primarily personal, family, or household purposes; or (ii) purposes that relate to a business opportunity that requires . . . the person described in *Subsection (2)(a)* to perform personal services on a continuing basis and in which the person described in *Subsection (2)(a)* has not been previously engaged.

Utah Code § 13-11-3(2)(a). As previously noted, the Indirect Purchaser Plaintiffs do not claim to have purchased caustic soda for "primarily personal, family, or household purposes," nor are there any facts in the indirect purchaser complaint to support the conclusion that the sales of caustic soda at issue were made "apparently to" a person for such purposes—to the contrary, the indirect purchaser complaint indicates that caustic soda is a "commodity chemical" that is sold and used for industrial purposes. **[**16]** (Dkt. 129 at ¶ 2). The Indirect Purchaser Plaintiffs further do not claim to have entered into an agreement to perform personal services for Defendants. These facts fail to plausibly allege a violation of the UCSPA.

2. Definition of "Good or Service" Under Oregon Law

Defendants' argument regarding the *Oregon Unfair Trade Practices Act, Or. Rev. Stat. § 646.605 et seq.* (the "OUTPA") is also related to the purposes for which the purchases were made. As relevant here, ***HN6***[] it is unlawful under the OUTPA to make "false or misleading representations of fact concerning the offering price of . . . real estate, goods, or services." *Or. Rev. Stat. § 646.608(1)(s)*; *see also* *Or. Rev. Stat. § 646.638*. The OUTPA further defines "real estate, goods or services" to mean "those that are or may be obtained primarily for personal, family or household purposes, or that are or may be obtained for any purposes as a result of a telephone solicitation." *Id.* *§ 646.605(6)(a)*.

As Defendants correctly point out, there is nothing in the indirect purchaser complaint suggesting that the Indirect Purchaser Plaintiffs or the members of the putative class obtained caustic soda "primarily for personal, family or household purposes." To the contrary, as already noted by the Court, there is an express allegation that the caustic **[**17]** soda at issue was obtained for "non-residential use." (Dkt. 129 at ¶ 9). There is further no indication that the sales of caustic soda were the result of a "telephone solicitation," which the OUTPA defines as "solicitation where a person, in the course of the person's business, vocation or occupation, uses a telephone or an automatic dialing-announcing device to initiate telephonic contact **[*236]** with a potential customer[.]" *Or. Rev. Stat. § 656.605(7)*. Accordingly, dismissal of the Indirect Purchaser Plaintiffs' claims under the OUTPA is warranted. *See* *F.D.S. Marine, LLC v. Shaver Transp. Co., No. 00-1245-ST, 2001 U.S. Dist. LEXIS 7787, 2001 WL 34045718, at *1 (D. Or. May 25, 2001)* (dismissing claims under the OUTPA because the services and goods at issue were "not generally and customarily used for personal, family, or household uses").

3. *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, and Consumer Protection Claims Under Alaska and New Jersey Law

The Court turns next to Defendants' arguments regarding the interaction between the Supreme Court's ruling in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, and the Indirect Purchaser Plaintiffs' claims brought under the consumer protection laws of Alaska and New Jersey. A brief discussion of the ruling in *Illinois Brick* and how it interacts with state law is thus necessary.

In *Illinois Brick*, the Supreme Court "held that ***HN7***[] direct purchasers may sue antitrust violators, but also ruled that **[**18]** indirect purchasers may not sue." *Apple Inc. v. Pepper, U.S. , 139 S. Ct. 1514, 1519, 203 L. Ed. 2d 802 (2019)*. The Supreme Court subsequently ruled in *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*, that state laws allowing for recovery by indirect purchasers are not preempted by federal law. *Id. at 105-06*. In other words, the federal "'indirect-purchaser rule' does not prevent indirect purchasers from recovering damages under state antitrust laws where the state laws otherwise allow it." *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 248 (D. Conn. 2015)*. Some states have opted to follow the rule set down in *Illinois Brick*, while others have passed laws expressly allowing for recovery by indirect purchasers. ***HN8***[] "[A]ny state that has not expressly passed *Illinois Brick* repealer legislation or interpreted its law in such a way as to override the rule of *Illinois Brick* is presumed to have decided to follow federal law, including the *Illinois Brick* limitation on indirect purchaser claims." *In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 413 (S.D.N.Y. 2011)*.

As another federal district court recently explained, Alaska has passed a statute that partially repeals *Illinois Brick*—*Alaska Stat. § 45.50.577(i)*, which allows the Alaska attorney general to "bring an antitrust claim for damages on behalf of indirect purchasers under Alaska's Restraint of Trade Act." *In re Humira (Adalimumab) Antitrust Litig., 465 F. Supp. 3d 811, 849 (N.D. Ill. 2020)*. ***HN9***[] However, Alaska has not passed a statute repealing *Illinois Brick* more generally, and as such, "no court has construed Alaska's **[**19]** consumer protection statute (*Alaska Stat. Ann. § 45.50.531(a)*) to permit claims based on alleged antitrust and monopolization conduct by indirect purchasers." *In re Lidoderm Antitrust Litig., 103 F. Supp. 3d 1155, 1163 (N.D. Cal. 2015)*. To the contrary, the courts that have considered the matter have concluded that Alaska's consumer protection statute "precludes plaintiffs from bringing claims as indirect purchasers even under a non-antitrust unfair practices theory." *In re Humira, 465 F. Supp. 3d at 849*; *see also* *In re Lidoderm, 103 F. Supp. 3d at 1163* (dismissing claims by indirect purchasers under the Alaska consumer protection statute "in light of the clear intent of the Alaska antitrust statute reserving to the Alaska Attorney General the ability to seek damages on behalf of indirect purchasers"); *In re Dynamic Random Access Memory (Dram) Antitrust Litig.,* ***[*237]*** *516 F. Supp. 2d 1072, 1108 (N.D. Cal. 2007)* ("[T]he court therefore declines to read the [Alaska consumer protection statute] to permit indirect purchaser standing, since no court has affirmatively found to the contrary, and since, under the current status of the law in Alaska, only the attorney general may sue for money damages on behalf of indirect purchasers as a result of antitrust violations."). The Court agrees with the analysis of the other courts who have considered this issue and accordingly dismisses the Indirect Purchaser Plaintiffs' consumer protection claims under the laws of Alaska.

As to New **[**20]** Jersey, that state "follow[s] federal ***antitrust law*** in interpreting [its] own antitrust statute, *see* *N.J.S.A. 56:9-18*, and under *Illinois Brick* . . . indirect purchasers . . . have no standing to assert a private right of action under the *New Jersey Antitrust Act*." *Wilson v. Gen. Motors Corp., 190 N.J. 336, 339, 921 A.2d 414 (2007)* (quotations and citations omitted). ***HN10***[] The Supreme Court of New Jersey has further held that, consistent with New Jersey's status as a state that follows *Illinois Brick*, the New Jersey Consumer Fraud Act, N.J.S.A. 56.8-1 *et seq.* (the "NJCFA"), does not allow for a cause of action based on "an anticompetitive scheme in violation of the Antitrust Act without any allegation of a direct or indirect statement or communication with any plaintiff." *Id. at 341*; *see also* *In re Relafen Antitrust Litig., 225 F.R.D. 14, 27 (D. Mass. 2004)* (noting that "consumer fraud claims may create precisely the risk of 'multiple recoveries,' which *Illinois Brick* (and parallel New Jersey decisions) seek to avoid").

Defendants argue that the Indirect Purchaser Plaintiffs have not alleged "communications with, or directed to, consumers," *Wilson, 190 N.J. at 341*, and so cannot maintain a claim under the NJCFA. The Court agrees. The only "communications" that the Indirect Purchaser Plaintiffs identify in opposition to Defendants' motion are information provided by Defendants to IHS Markit, an "industry analyst and consultant." **[**21]** (Dkt. 129 at 38-39). This information was then allegedly used by IHS Markit in its management of a caustic soda pricing index. (*Id.*). However, there is no allegation or suggestion in the indirect purchaser complaint that the information provided to IHS Markit was subsequently communicated to any consumer. To the contrary, the Indirect Purchaser Plaintiffs expressly allege that "[f]or purposes of calculating the indexed price [of caustic soda], IHS Markit operates confidentially and non-publicly[.]" (*Id.* at 39). On these facts, no reasonable trier of fact could conclude that Defendants had engaged in communications, whether direct or indirect with a consumer, including the Indirect Purchaser Plaintiffs. Accordingly, the Supreme Court of New Jersey's opinion in *Wilson* bars the Indirect Purchaser Plaintiffs' claims under the NJCFA.

4. Necessity of Pleading Reliance or Deception

The Court turns next to Defendants' arguments that the Indirect Purchaser Plaintiffs have not pled viable claims under the consumer protection laws of Arizona, California, North Carolina, and West Virginia because they have not alleged that they relied on any misrepresentation by Defendants. The Court notes as an **[**22]** initial matter that the Indirect Purchaser Plaintiffs concede that they have not pled reliance (*see* Dkt. 195 at 39 ("Plaintiffs here do not allege that Defendants' misrepresentation induced Plaintiffs to buy caustic soda.")). As such, the issue before the Court is whether these states' consumer protection laws require reliance as an element of a claim.

[*238] ***HN11***[] The *Arizona Consumer Fraud Act* (the "ACFA") "prohibits persons from engaging in 'any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely on such concealment, suppression or omission' in connection with the sale or advertisement of consumer goods or services." *Cheatham v. ADT Corp., 161 F. Supp. 3d 815, 826 (D. Ariz. 2016)* (quoting *Ariz. Rev. Stat. § 44-1522(A)*). "The elements of a private cause of action under the Arizona Consumer Fraud Act are a false promise or misrepresentation made in connection with the sale or advertisement of merchandise and the hearer's consequent and proximate injury." *Naiman v. Alle Processing Corp., No. CV20-0963-PHX-DGC, 2020 U.S. Dist. LEXIS 218549, 2020 WL 6869412, at *5 (D. Ariz. Nov. 23, 2020)* (citation omitted). Under the ACFA, "[a]n affirmative misrepresentation causes injury where the consumer actually relies on the statement, although the consumer's reliance does not need to be justifiable." *In re Arizona Theranos, Inc., Litig., 256 F. Supp. 3d 1009, 1023 (D. Ariz. 2017)* (quotation **[**23]** omitted and emphasis added). Because proximate injury is an element of an ACFA claim, and because actual reliance is required to establish proximate injury, the Court agrees with Defendants that the ACFA claims must be dismissed.

The Court also agrees that the Indirect Purchaser Plaintiffs' claims under *California's Unfair Competition Law, Cal. Bus. & Prof. Code, §§ 17200 et seq.* (the "CUCL"), fail as a matter of law. ***HN12***[] The Supreme Court of California has held that the language of the CUCL "imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the [CUCL's] fraud prong." *In re Tobacco II Cases, 46 Cal. 4th 298, 326, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)*. While it is true, as the Indirect Purchaser Plaintiffs point out, that the *In re Tobacco II* court also held that "a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material," *id. at 327*, any such presumption has been rebutted in this case because, as noted above, the Indirect Purchaser Plaintiffs concede that they did not rely on any misrepresentations by the Defendants in deciding to purchase caustic soda. (Dkt. 195 at 39-40 ("Plaintiffs here do not allege that Defendants' misrepresentation induced Plaintiffs to buy caustic soda. . . . Caustic soda is a **[**24]** commodity used in Plaintiffs' respective businesses—they have been buying caustic soda long before Defendants began making their misrepresentations.")). On these admitted facts, the Indirect Purchaser Plaintiffs cannot maintain a claim under the CUCL.

Similarly, the Supreme Court of North Carolina has held that ***HN13***[] a claim under North Carolina's unfair or deceptive trade practices act, *N.C. Gen. Stat. § 75-1.1*, "stemming from an alleged misrepresentation does indeed require a plaintiff to demonstrate reliance on the misrepresentation in order to show the necessary proximate cause." *Bumpers v. Cmty. Bank of N. Virginia, 367 N.C. 81, 88, 747 S.E.2d 220 (2013)*; *see also* *Topshelf Mgmt., Inc. v. Campbell-Ewald Co., 117 F. Supp. 3d 722, 730 (M.D.N.C. 2015)* ("*Section 75-1.1* claims founded on fraud distill to analogous elements: detrimental reliance on deceptive information."). The Indirect Purchaser Plaintiffs' concession that they did not rely on the purported misrepresentations by Defendants is thus fatal to their consumer protection claims asserted under North Carolina law.

The Court also agrees with Defendants with respect to the Indirect Purchaser **[*239]** Plaintiffs' West Virginia consumer protection claims. ***HN14***[] The Supreme Court of Appeals of West Virginia has construed the *West Virginia Consumer Credit and Protection Act, W.V. Stat. §§ 46a-1-101 et seq.* (the "WVCCPA"), and held that:

> When consumers allege that a purchase was made because of an express or affirmative misrepresentation, **[**25]** the causal connection between the deceptive conduct and the loss would necessarily include proof of reliance on those overt representations . . . [and that] where concealment, suppression or omission is alleged, and proving reliance is an impossibility, the causal connection between the deceptive act and the ascertainable loss is established by presentation of facts showing that the deceptive conduct was the proximate cause of the loss. In other words, the facts have to establish that 'but for' the deceptive conduct or practice a reasonable consumer would not have purchased the product and incurred the ascertainable loss.

White v. Wyeth, 227 W. Va. 131, 140, 705 S.E.2d 828 (2010). Here, the Indirect Purchaser Plaintiffs premise their consumer protection claims on express misrepresentations by Defendants (*see* Dkt. 195 at 39-40), and so they are required to demonstrate reliance. Moreover, even if the Indirect Purchaser Plaintiffs were premising their WVCCPA claims on an alleged omission or concealment by Defendants, they have not alleged facts suggesting that the claimed deception was a "but for" reason for a reasonable consumer to purchase the product—to the contrary, the Indirect Purchaser Plaintiffs have affirmatively alleged that the demand **[**26]** for caustic soda is "relatively inelastic" and that there are no viable substitutes for caustic soda in the various industries in which it is used. (*Id.* at 46). The Court accordingly finds that the Indirect Purchaser Plaintiffs' WVCCPA claims are subject to dismissal.

Defendants have made a related but distinct argument regarding the Indirect Purchaser Plaintiffs' claims under the *Illinois Consumer Fraud and Deceptive Business Practices Act, 815 IL Stat. §§ 505/1 et seq.* (the "ICFDBPA"). Specifically, Defendants contend that the Indirect Purchaser Plaintiffs have not alleged deception, as required to state a claim under the ICFDBPA. ***HN15***[] The Supreme Court of Illinois has explained that under the ICFDBPA, "proof of actual deception of a plaintiff is required," but such deception need not "be direct between the defendant and the plaintiff." *Shannon v. Boise Cascade Corp., 208 Ill. 2d 517, 525, 805 N.E.2d 213, 281 Ill. Dec. 845 (2004)*. Instead, it is sufficient if the defendant deceives a third party, if the deception is "made with the intention that it reach the plaintiff and influence his action and that it does reach him and that he does rely upon it, to his damage." *Id. at 526* (citation omitted and emphasis added).

The Court agrees that, under the standard set by the Supreme Court of Illinois in *Shannon*, the Indirect Purchaser Plaintiffs have not stated a viable claim under the **[**27]** ICFDBPA. As another federal district court has explained, the *Shannon* holding means that ***HN16***[] "a consumer may suffer actual damages from [the defendant's deceptive statements] if the consumer purchased a product as a result of the [defendant's] deception of another." *In re Bextra & Celebrex Mktg., Sales Pracs. & Prod. Liab. Litig., No. MDL 05-01699 CRB, 2007 U.S. Dist. LEXIS 49717, 2007 WL 2028408, at *3 (N.D. Cal. July 10, 2007)* (emphasis added). Again, the Indirect Purchaser Plaintiffs have conceded that they did not purchase caustic soda as a result of Defendants' claimed misrepresentations, and so they cannot satisfy the requirements of a claim under the ICFDBPA. *See* **[*240]** *Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill. 2d 100, 199, 835 N.E.2d 801, 296 Ill. Dec. 448 (2005)* ("[I]n a case alleging deception under the [ICFDBPA], it is not possible for a plaintiff to establish proximate causation unless the plaintiff can show that he or she was, in some manner, deceived by the misrepresentation." (quotation omitted)).

5. Failure to Allege Intrastate Effects as Required by New Hampshire Law

HN17[] To state a valid claim under the *New Hampshire Consumer Protection Act, N.H. Rev. Stat. § 358-A:2* (the "NHCPA"), a plaintiff must demonstrate that the defendant engaged in an unfair method of competition or an unfair or deceptive act or practice in the conduct of any trade or commerce within this state." *Ortiz v. Sig Sauer, Inc., 448 F. Supp. 3d 89, 107 (D.N.H. 2020)* (quotations omitted). "For purposes of the statute, a misrepresentation is made 'within-this-state' **[**28]** when New Hampshire is the locus of the offending conduct, or, put differently, whenever a person receives a misrepresentation in the State of New Hampshire." *Id.* (quotation omitted). The Court agrees with Defendants that the Indirect Purchaser Plaintiffs have failed to alleged conduct within New Hampshire within the context of a claim under the NHCPA. *Precourt v. Fairbank Reconstruction Corp., 856 F. Supp. 2d 327 (D.N.H. 2012)*, is instructive. There, the plaintiff sought to assert a claim under the NHCPA based on the allegation that the defendant falsely "represented that its beef trim was fit for human consumption when shipping that beef to a New York company that was known to distribute its own products, incorporating [the defendant's] beef, within the State of New Hampshire." *Id. at 344*. The court dismissed the NHCPA claim, explaining that relevant case law provides "no support for the proposition that a seller may be liable for a misrepresentation about the quality of its goods not just in the place where that seller's buyer receives the misrepresentation but, also, in any location to which that buyer may later send the goods it received in conjunction with the initial seller's misrepresentation." *Id.*

In this case, as discussed above, the alleged misrepresentations **[**29]** were made to IHS Markit. The indirect purchaser complaint does not allege that any of these misrepresentations were made or received in New Hampshire. The fact that the Indirect Purchaser Plaintiffs (or members of the putative classes) may have subsequently purchased caustic soda in New Hampshire at allegedly inflated prices simply does not bring the claimed conduct within the ambit of the NHCPA. The Indirect Purchaser Plaintiffs' NHCPA claims must be dismissed.

6. Consumer Protection Claims Under Colorado, Minnesota, and North Dakota Law

In their opening memorandum of law, Defendants make the following arguments: (1) the Indirect Purchaser Plaintiffs have failed to comply with *Federal Rule of Civil Procedure 9(b)* in pleading their consumer protection claims under the laws of Colorado, Minnesota, and North Dakota; (2) the Indirect Purchaser Plaintiffs' claims under the *Colorado Consumer Protection Act, C.R.S. §§ 6-1-101 et seq.* (the "CCPA"), fail because they have not alleged unlawful conduct directed at consumers or significantly affecting the consuming public; and (3) the Indirect

Purchaser Plaintiffs have not alleged deceptive or fraudulent conduct as required under the consumer protection laws of Minnesota and North Dakota. The Court rejects these arguments, for the reasons **[**30]** discussed below.

[*241] The Court turns first to Defendants' argument regarding *Rule 9(b)*. The Second Circuit has held that ***HN18***[] a consumer protection claim based on a state statute that "extends well beyond common-law fraud to cover a broad range of deceptive practices" and "does not require proof of the same essential elements (such as reliance) as common-law fraud . . . is not subject to the pleading-with-particularity requirements of *Rule 9(b)*, but need only meet the . . . notice-pleading requirements of *Rule 8(a)*." *Pelman ex rel. Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005)* (citations omitted and reversing district court's dismissal of claims under New York's consumer protection law for failure to comply with *Rule 9(b)*). The consumer protection laws of Colorado, Minnesota, and North Dakota all fall within this category, and so the Indirect Purchaser Plaintiffs were not required to comply with *Rule 9(b)* in asserting their claims under these statutes. *See, e.g., Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc., 62 P.3d 142, 148 (Colo. 2003)* (Supreme Court of Colorado holding that reliance is not required under the CCPA; it is sufficient that "the false representation had the capacity or tendency to deceive, even if it did not"); *Ford Motor Credit Co. v. Majors, No. A04-1468, 2005 Minn. App. LEXIS 448, 2005 WL 1021551, at *3 (Minn. Ct. App. May 3, 2005)* (the *Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43-.48* (the "MUDTPA") "define[s] violations based on conduct by the defendant and do[es] not require reliance by the plaintiff"); *State ex rel. Spaeth v. Eddy Furniture Co., 386 N.W.2d 901, 903 (N.D. 1986)* (Supreme Court **[**31]** of North Dakota distinguishing between common law fraud and claims under the North Dakota consumer fraud statute).

Defendants' arguments specific to the laws of Colorado, Minnesota, and North Dakota fare no better. ***HN19***[] With respect to the CCPA, as Defendants note, one element of a claim thereunder is that a defendant's conduct "significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property." *R.W. Beck, Inc. v. E3 Consulting, LLC, 577 F.3d 1133, 1149 (10th Cir. 2009)* (quoting *Rhino Linings, 62 P.3d at 146-47*). "To determine whether a challenged practice significantly impacts the public, Colorado courts consider (1) the number of consumers directly affected by the challenged practice, (2) the relative sophistication and bargaining power of the consumers affected by the challenged practice, and (3) evidence that the challenged practice has previously impacted other consumers or has the significant potential to do so in the future." *Id.* (quotations omitted). In seeking dismissal of the Indirect Purchaser Plaintiffs' claims under the CCPA, Defendants have addressed none of these factors, and the Court does not find this fact-intensive inquiry appropriate for resolution on a motion to dismiss.

The Court further finds that the Indirect Purchaser Plaintiffs **[**32]** have adequately alleged deceptive conduct under the consumer protection laws of Minnesota and North Dakota. Defendants have made no meaningful argument in this regard, but have simply cited the relevant statutes and asserted without additional elaboration that the indirect purchaser complaint "fails to identify any conduct by Defendants that would meet the pleading requirements for unconscionable, deceptive, or fraudulent conduct[.]" (Dkt. 174-1 at 30). The Court disagrees. The indirect purchaser complaint alleges a great deal of deceptive conduct by Defendants, including the provision of false information to IHS Markit for the express purpose of manipulating the indexed price of caustic soda. Accepting these allegations as true, as it must at **[*242]** this stage of the proceedings, the Court finds no basis to dismiss the Indirect Purchaser Plaintiffs' Minnesota and North Dakota consumer protection claims. *See Dahl v. R.J. Reynolds Tobacco Co., 742 N.W.2d 186, 196 (Minn. Ct. App. 2007)* (the MUDTPA "provide[s] claims that are distinct from the common-law duty not to defraud" and "imposes broad duties not to deceive consumers"); *Ackre v. Chapman & Chapman, P.C., 2010 ND 167, 788 N.W.2d 344, 353 (N.D. 2010)* (whether or not an act is deceptive and therefore unlawful under the North Dakota consumer fraud statute is "generally a question of fact"). **[**33]**

The Court notes that Defendants have also argued that the Indirect Purchaser Plaintiffs cannot seek damages under the MUDTPA and cannot seek restitution under the CCPA. ***HN20***[] Defendants are incorrect with respect to the MUDTPA—an individual may seek damages under the MUDTPA pursuant to Minnesota's private attorney general statute, *Minn. Stat. § 8.31*, so long as the "cause of action benefits the public." *Tatone v. SunTrust Mortg., Inc., 857 F. Supp. 2d 821, 836 (D. Minn. 2012)* (citation omitted); *see also Weller v. Accredited Home Lenders, Inc., No. CIV. 08-2798 JRTSRN, 2009 U.S. Dist. LEXIS 26651, 2009 WL 928522, at *4 (D. Minn. Mar. 31, 2009)*. The

Indirect Purchaser Plaintiffs' allegations, accepted as true, support a plausible inference of benefit to the public in the event they are successful, because anticompetitive price fixing presents a public harm.

As to Defendants' contention that the CCPA does not allow for restitution, the basis for this position is unclear. Defendants cite *Colo. Rev. Stat. § 6-1-113(2)* (*see* Dkt. 174-1 at 42), but that statutory subsection states that it applies "[e]xcept in a class action." These actions are, of course, putative class actions. Because Defendants have failed to provide any further elaboration on this argument, the Court must reject it at this stage of the proceedings.

For all these reasons, the Court grants Defendants' motion to dismiss with respect to the consumer protection claims brought under the laws **[**34]** of Alaska, Arizona, California, Illinois, Montana, New Hampshire, New Jersey, North Carolina, Oregon, Utah, and West Virginia, and denies it with respect to the consumer protection claims brought under the laws of Colorado, Minnesota, and North Dakota.

B. State Law Antitrust Claims

The Court turns next to the Indirect Purchaser Plaintiffs' state law antitrust claims. Defendants seek dismissal of the antitrust claims brought under the laws of Arizona, Connecticut, the District of Columbia, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Utah, and West Virginia. (Dkt. 174-1 at 42). For the reasons discussed below, the Court grants the motion to dismiss with respect to the antitrust claims asserted under the laws of Arizona, Connecticut, the District of Columbia, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, Utah, and West Virginia. The Indirect Purchaser Plaintiffs' Illinois, Kansas, Nevada, and Tennessee antitrust claims will be allowed to proceed.

1. Failure to Allege a Substantial [35] Effect on Intrastate Commerce**

Defendants argue that the Indirect Purchaser Plaintiffs have failed to state a viable claim under the antitrust laws of Arizona, Connecticut, the District of Columbia, Kansas, Maine, Maryland, **[*243]** Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, and West Virginia, because they have not alleged a substantial effect on intrastate commerce as required by those states' statutes. The Indirect Purchaser Plaintiffs do not contest that, in the relevant jurisdictions, an antitrust suit may be maintained only where the alleged anticompetitive conduct has had meaningful in-state effects. Instead, they argue that their allegation of a broad, nationwide price-fixing scheme is sufficient to support the inference of substantial impacts in every state.

As the Indirect Purchaser Plaintiffs concede in their opposition to Defendants' motion to dismiss, their factual allegations must support the inference that "the challenged conduct—though it may have originated out-of-state—likely [a]ffected commerce in-state, such as by causing residents to pay artificially inflated prices." (Dkt. 195 at 23). ***HN21***[] In considering **[**36]** whether this standard has been met in analogous cases, federal courts have distinguished between pleadings in which a plaintiff has alleged "intrastate conduct along with conduct throughout the United States," and pleadings that "do[] not contain specific allegations of 'intrastate' conduct along with allegations of conduct 'throughout the United States.'" *In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 408 (S.D.N.Y. 2011)* (citations omitted). In the latter type of cases, "courts have held allegations under state antitrust statutes insufficient where the complaint alleges only that the conspiracy affects interstate commerce without describing the effects in a particular state or in discretely identifiable states." *Jones v. Micron Tech. Inc., 400 F. Supp. 3d 897, 924 (N.D. Cal. 2019)* (dismissing claims asserted "under the antitrust statutes of Kansas, Michigan, Mississippi, New York, North Carolina, South Dakota, Tennessee, West Virginia, Wisconsin, and the District of Columbia" because the plaintiff alleged only a "national conspiracy" that resulted in inflated prices for the defendant's product throughout the United States); *see also* *In re Cast Iron Soil Pipe And Fittings Antitrust Litig., No. 1:14-MD-2508, 2015 U.S. Dist. LEXIS 121620, 2015 WL 5166014, at *26 (E.D. Tenn. June 24, 2015)* ("The Indirect Plaintiffs have not alleged any facts specific to the District of Columbia and fail to address how Defendants' actions have in any way affected intrastate commerce in **[**37]** the District of Columbia. Similar to the Consumer

Plaintiffs, these allegations are not sufficient to establish a connection within the District of Columbia. As the Downstream Purchasers' allegations under the states of Mississippi, Nevada, New York, North Carolina, South Dakota, Tennessee, Wisconsin, and West Virginia are similarly conclusory without addressing any connection between the individual state and the wrongful conduct, these allegations are also insufficient.").

Here, the Court finds that the Indirect Purchaser Plaintiffs have sufficiently alleged intrastate effects as to the following contested jurisdictions: Kansas, Nevada, and Tennessee. With respect to these three states, the Indirect Purchaser Plaintiffs have specifically alleged that one or more Defendants made sales of caustic soda therein. (Dkt. 129 at 10-11); *see* *In re Digital Music Antitrust Litigation, 812 F. Supp. 2d at 407* (allegations that the defendants "produced, licensed, distributed and/or sold Internet Music in . . . the listed states" sufficient to plead "intrastate conduct or substantial effects in the state" (internal quotation marks omitted)).

However, the Court agrees with Defendants that the Indirect Purchaser Plaintiffs have not adequately alleged intrastate **[**38]** effects in Arizona, Connecticut, the District **[*244]** of Columbia, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, and West Virginia. The indirect purchaser complaint contains no specific allegations of sales of caustic soda in these states. Further, contrary to the Indirect Purchaser Plaintiffs' contentions, their factual allegations do not reasonably support the inference of impacts in every state. While it is true that the Indirect Purchaser Plaintiffs estimate that Defendants "produce at least 90% of the domestic supply of Caustic Soda" (Dkt. 129 at 17), they also allege that caustic soda is a "commodity chemical" used for industrial purposes (*id.* at 4) and that Defendants "have historically sold and currently sell" only to "hundreds of purchasers in the United States and elsewhere" (Dkt. 48). In other words, this is not a case involving a high-volume consumer good with many thousands of purchasers, such that a factfinder could reasonably assume that sales had been made in every state. *See* *In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 816 (N.D. Ill. 2017)* ("In light of the obvious fact that Broilers are purchased in substantial numbers throughout the United States, these allegations **[**39]** plausibly establish "substantial" intrastate effects. . . ."). On these allegations, the Indirect Purchaser Plaintiffs cannot maintain their antitrust claims under the laws of Arizona, Connecticut, the District of Columbia, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, and West Virginia.

2. Failure to Give Notice to Attorneys General of Arizona, Nevada, and Utah

HN22[] The antitrust laws of Arizona, Nevada, and Utah require a plaintiff to serve a copy of their complaint on the respective attorneys general of those states. *See* *Ariz. Rev. Stat. § 44-1415(A)*, *(D)*; *Nev. Rev. Stat. § 598A.210(3)*; *Utah Code § 76-10-3109(9)*. Defendants contend that the Indirect Purchaser Plaintiff failed to provide the requisite notice, and so their antitrust claims based on these states' laws must therefore be dismissed. In opposition, Plaintiffs contend that (1) these state law notice requirements do not apply in federal court and (2) in any event, "[c]ontemporaneously with the filing of their individual complaints, and approximately eight months before they filed the operative Complaint, [the Indirect Purchaser] Plaintiffs sent notice letters to the attorney general of each state, thus substantively complying with the **[**40]** state statutes." (Dkt. 195 at 19). The Indirect Purchaser Plaintiffs have submitted the attorney declaration of Ryan Gellman confirming their assertion that they provided the requisite notice. (Dkt. 195-1) (the "Gellman Declaration"). In reply, Defendants urge the Court to disregard the Gellman Declaration, arguing that "[the Indirect Purchaser] Plaintiffs may not amend their Complaint by way of declaration or new assertions of fact in an opposition, and the Court generally may not consider documents outside of the Complaint." (Dkt. 202 at ¶ 25).

In light of the fact that the Indirect Purchaser Plaintiffs have in fact provided notice of their complaints to the attorneys general of Arizona, Nevada, and Utah, the Court will not dismiss the Indirect Purchaser Plaintiffs' claims on this basis, and thus need not and does not decide whether the state law notice requirements apply in federal court. Defendants' arguments regarding the amendment of pleadings and the documents the Court may consider on a *Rule 12(b)(6)* motion miss the mark. Defendants have cited no cases supporting the conclusion that a plaintiff is required to affirmatively plead compliance with these statutory notice requirements to state **[**41]** a **[*245]** plausible claim. To the contrary, the relevant statutory language is inconsistent with the imposition of such a pleading requirement, as all three statutes provide for notice to the attorney general simultaneous with or after the filing of the complaint. *See* Ariz. Rev. Stat. § 44-1415(A), (D); Nev. Rev. Stat. § 598A.210(3); Utah Code § 76-10-3109(9). It would be nonsensical to require a plaintiff to plead in a complaint that had not yet been filed that he had already provided a copy of that same document to the relevant attorney general at the same time or after it was filed. *See* Staley v. Gilead Scis., Inc., 446 F. Supp. 3d 578, 623 (N.D. Cal. 2020) (denying motion to dismiss state law antitrust claims for failure to comply with notice requirements because the plaintiffs had actually provided the requisite notice and were not required to plead the same to state a claim); In re Generic Pharms. Pricing Antitrust Litig., 368 F. Supp. 3d 814, 835 (E.D. Pa. 2019) ("Regardless of whether the relevant notice provisions are substantive or procedural, they do not alter the substantive elements of Plaintiffs' claims and are not a pleading requirement for the Complaints.").

3. Illinois' Bar on Indirect Purchaser Class Actions

HN23[] The Illinois Antitrust Act (the "IAA") provides that "no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole **[**42]** exception of this State's Attorney General." 740 Ill. Comp. Stat. 10/7(2). Defendants seek dismissal of the Indirect Purchasers Plaintiffs' IAA claims on this basis, while the Indirect Purchaser Plaintiffs argue that this state law requirement is procedural and does not apply in federal court pursuant to Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010).

In *Shady Grove*, the Supreme Court "considered whether a New York law prohibiting class actions in any suit seeking penalties or statutory minimum damages precluded a federal court from exercising diversity jurisdiction over a class action." In re Digital Music Antitrust Litig., 812 F. Supp. 2d at 414. "A majority of the Court agreed that state class action provisions directly conflict with Rule 23, but the Court split on when Rule 23 preempts a conflicting state class action provision." Greene v. Gerber Prods. Co., 262 F. Supp. 3d 38, 59 (E.D.N.Y. 2017). The plurality opinion, authored by Justice Scalia, "found that Rule 23 preempts all state class action provisions," while Justice Stevens "concurred in the narrow holding that Rule 23 and [the relevant New York law] conflict, but agreed with the four-Justice dissent that there are some state procedural rules that federal courts must apply in diversity cases because they function as part of the State's definition of substantive rights and remedies." *Id.* (quotation omitted).

HN24[] "When a fragmented Court decides a case **[**43]** and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003) (quoting Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977)). Accordingly, while "[t]he Second Circuit has not directly addressed whether Justice Stevens' opinion [in *Shady Grove*] controls, . . . the majority of district and circuit courts that have [considered the issue have] found Justice Stevens' concurring opinion controls because it provides the 'narrowest grounds' or the 'common denominator' of the majority position." Greene, 262 F. Supp. 3d at 59 (collecting cases). Here, both sides have **[*246]** applied Justice Stevens' concurrence in considering whether the IAA's limitation on class actions by indirect purchasers applies, and the Court does the same.

"Courts in this circuit have split as to whether the indirect purchaser class action bar in the IAA is procedural or substantive, under Justice Stevens' concurrence in *Shady Grove*." Sergeants Benevolent Ass'n, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *32. Having reviewed cases from both within and outside this Circuit, the Court is persuaded that the IAA's indirect class action bar is procedural. As the Court in *Sergeants Benevolent Ass'n* explained, ***HN25***[] the IAA's class action **[**44]** bar "does not limit the substantive rights of an injured party in an individual action" and "were the IAA to prohibit class actions altogether, the statute would read no differently than the New York class actions bar at issue in *Shady Grove*[.]" 2018 U.S. Dist. LEXIS 220574, [WL] at *32-33; *see also* In re Propranolol Antitrust Litig., 249 F. Supp. 3d 712, 728 (S.D.N.Y. 2017) ("[T]he Court is persuaded that this state procedural rule does not control in federal court, where Rule 23 sets the only relevant requirements to file a class action."); In re Aggrenox Antitrust Litig., No. 3:14-MD-2516 (SRU), 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at *6 (D. Conn. Aug. 9, 2016) ("I cannot square Shady Grove's allowance of a Rule 23 class action despite New York's class-action bar with the *dis* allowance of a *Rule 23* class action in the case of Illinois's class-action bar simply on the basis that Illinois's bar is narrower. It is narrower because its application is limited to indirect-purchaser antitrust claims, and that does tie it more specifically to particular substantive rights; but if New York's state-law bar is not a procedural rule that alters the scope of a substantive right or remedy, then the narrower scope of Illinois's state-law bar does not make it one that does." (emphasis in original)); *but see* *In re Digital Music Litig, 812 F. Supp. 2d at 416* ("Unlike the New York law at issue in *Shady Grove*, ***HN26***[] [the IAA's] limitation is not contained in a generally applicable procedural rule but, rather, in **[**45]** the same paragraph of the same statute that creates the underlying substantive right."); *In re Lipitor Antitrust Litig., 336 F. Supp. 3d 395, 417 (D. N.J. 2018)* (collecting cases holding that the IAA "is distinguishable from the New York law in *Shady Grove* and that it prohibits indirect purchaser class actions" even in federal court). The Court accordingly will not dismiss the Indirect Purchaser Plaintiffs' IAA claims on this basis.

4. Montana's Status as an *Illinois Brick* State

Defendants seek dismissal of the Indirect Purchaser Plaintiffs' claims under Montana's ***antitrust law***, contending that Montana follows *Illinois Brick*. The Court agrees. The Supreme Court of Montana has held that the relevant Montana statute was "modeled after the Sherman Act" and that Montana courts would accordingly give "due weight to the federal courts' interpretation of this type of alleged antitrust violation." *Smith v. Video Lottery Consultants, Inc., 260 Mont. 54, 58, 858 P.2d 11 (1993)*. Further, Montana has not passed an *Illinois Brick* repealer statue. ***HN27***[] Thus, under Montana law, "lawsuits by indirect purchasers are barred pursuant to *Illinois Brick*. . . ." *In re Static Random Access Memory (SRAM) Antitrust Litig., No. 07-MD-01819 CW, 2010 U.S. Dist. LEXIS 131002, 2010 WL 5094289, at *4 (N.D. Cal. Dec. 8, 2010)*; *see also* *In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F.Supp.2d 1179, 1187 (N.D. Cal. 2009)*; *cf.* *Sergeants Benevolent Ass'n, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *57* (dismissing unjust enrichment claim under Montana law on the basis that Montana is an *Illinois Brick* state). The Court grants the motion to dismiss with respect to the Montana antitrust **[**46]** claims.

[*247] 5. Lack of a Plaintiff from Utah

HN28[] "Under the Utah Antitrust Act [the "UAA"], 'a person who is a citizen of this state or a resident of this state' can bring a claim." *In re Effexor Antitrust Litig., 357 F. Supp. 3d 363, 393 (D.N.J. 2018)* (quoting *Utah Code § 76-10-3109(1)(a)* and original alteration omitted). "The majority of courts that have been presented with this statute require at least one Utah citizen or resident be a named plaintiff." *Id.* However, some courts have found that "a class representative that is not a Utah citizen or resident may bring claims on behalf of absent class members who are citizens or residents of Utah." *In re Zetia (Ezetimibe) Antitrust Litig., 400 F. Supp. 3d 418, 435 (E.D. Va. 2019)*.

HN29[] In the absence of any controlling authority, the Court adopts the majority approach and concludes that, to state a claim under the UAA, there must be a named plaintiff who is a Utah citizen or resident. It is well-established that a member of a putative class is not a party to a lawsuit, *see* *In re Oxford Health Plans, Inc. Sec. Litig., 244 F. Supp. 2d 247, 251 (S.D.N.Y. 2003)* ("A 'plaintiff' is a party to the lawsuit. Absent class members whose interests are represented by a Plaintiff are not parties to the lawsuit." (collecting cases)), and the plain language of the UAA states that a Utah citizen or resident must "bring" the action, *Utah Code § 76-10-3109(1)(a)*, not merely be benefited thereby. Accordingly, the Court dismisses the Indirect Purchaser Plaintiffs' **[**47]** claims under the UAA, as it is conceded that no named Plaintiff is a citizen or resident of Utah.

In sum, and for the foregoing reasons, the Court dismisses the antitrust claims asserted under the laws of Arizona, Connecticut, the District of Columbia, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, Utah, and West Virginia. The antitrust claims asserted under the laws of Illinois, Kansas, Nevada, and Tennessee will be permitted to proceed.

C. Unjust Enrichment Claims

Defendants seek dismissal of all the unjust enrichment claims asserted by the Indirect Purchaser Plaintiffs, for a variety of reasons. (*See* Dkt. 174-1 at 46-47). The Court need not and does not reach the majority of these arguments because it agrees with Defendants that the Indirect Purchaser Plaintiffs' conclusory allegations of unjust enrichment do not comply with the relevant pleading standards.

The Court finds the decision in *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224 (D. Conn. 2015)* instructive. As the court in *In re Aggrenox* explained, the indirect purchaser plaintiffs in that case, like the Indirect Purchaser Plaintiffs here, had "pleaded federal antitrust claims and the factual foundation **[**48]** for them," and then "merely allege[d] that those claims are also actionable . . . as unjust enrichment." *Id. at 255*. This sort of generic pleading does not satisfy *Federal Rule of Civil Procedure 8*, as interpreted by the Supreme Court in *Twombly* and *Iqbal. Id.* ("The indirect purchasers . . . have *listed* claims under very many state laws, but they have not truly pleaded claims under those laws sufficient to show their entitlement to recovery under them, as required by *Rule 8*. (emphasis in original)). The Indirect Purchaser Plaintiffs "cannot simply enumerate a long list of state-law claims for states where they might otherwise have no available antitrust recovery and rely on the defendants and the court to sort out whether or how those laws can act as surrogates for ***antitrust law***." *Id. at 255-56*. Indeed, ***HN30***[] "[s]tate law requirements under unjust enrichment law vary widely," *In re Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 667* ***[*248]*** *(E.D. Mich. 2011)*, and the undifferentiated unjust enrichment claims set forth in the indirect purchaser complaint provide neither Defendants nor the Court with sufficient information to assess their adequacy *See also In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 167 (E.D. Pa. 2009)* (***HN31***[] "Unjust enrichment is not a catch-all claim existing within the narrow scope of federal common law," and "cobbling together the elements of a claim of unjust enrichment from the **[**49]** laws of the fifty states is no different from applying federal common law.").

HN32[] To give just one example of why the Indirect Purchaser Plaintiffs' failure to specifically address the factual requirements of an unjust enrichment claim under the various asserted laws matters, under New York law, a plaintiff claiming unjust enrichment must establish that the relationship between the parties is not "too attenuated," *Choi v. Tower Rsch. Cap. LLC, 890 F.3d 60, 69 (2d Cir. 2018)* (citation omitted), meaning that "[t]he relationship must be one that could have caused reliance or inducement." *Crescimanni v. Trovato, 162 A.D.3d 849, 851, 80 N.Y.S.3d 89 (2d Dep't 2018)*. The indirect purchaser complaint contains no factual allegations addressing this requirement of New York law, instead addressing only the generic elements of an unjust enrichment claim. This is the type of formulaic, conclusory pleading that *Twombly* and *Iqbal* are meant to eliminate. The Court accordingly agrees with Defendants that the Indirect Purchaser Plaintiffs' unjust enrichment claims should be dismissed.

D. Clayton Act Claim for Injunctive Relief

The Court turns finally to the viability of the Indirect Purchaser Plaintiffs' claim for injunctive relief under *§ 16* of the Clayton Act, 5 U.S.C. § 26. Relying on *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6 (1st Cir. 2008)* and *In re Nifedipine Antitrust Litig., 335 F. Supp. 2d 6 (D.D.C. 2004)*, Defendants argue that injunctive relief under the Clayton Act **[**50]** is not available because "Plaintiffs fail to plead any facts suggesting they face a real and immediate threat of continuing harm justifying the injunctive relief they seek." (Dkt. 174-1 at 57-58). The Court disagrees.

HN33[] "In order to seek injunctive relief under *§ 16*, a private plaintiff must allege threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (quotation omitted). Here, the Indirect Purchaser Plaintiffs have alleged that Defendants are engaged in an ongoing anticompetitive conspiracy that continues to result in artificially inflated prices for caustic soda. This is sufficient to allow the Indirect Purchaser Plaintiffs to proceed on their request for injunctive relief under *§ 16*. *See In re Generic Pharms. Pricing Antitrust Litig., 338 F. Supp. 3d 404, 457 (E.D. Pa. 2018)* (allowing indirect purchasers to bring claims for injunctive relief under *§ 16* where they alleged an ongoing conspiracy that increased the price of certain generic drugs); *In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d at 813* (allowing indirect purchasers to bring claims for injunctive relief under *§ 16* where they alleged price-fixing conspiracy related to broiler chickens).

The cases on which Defendants rely are distinguishable. In *In re New Motor Vehicles Canadian Exp. Antitrust* ***[**51]*** *Litig.*, the First Circuit explained that the wrongdoing alleged by the plaintiffs relied on the existence of a "'perfect storm' that allegedly precipitated massive arbitrage opportunities **[*249]** for selling Canadian cars in the United States" and that said "perfect storm" had "ceased long ago." *522 F.3d at 14*. Further, the plaintiffs had failed to "demonstrate whether or when prevailing conditions—primarily, exchange rates between Canada and the United States—might reasonably be expected once again to resemble those during the class period." *Id.* By contrast, in this case, there is no indication that there were external factors that combined to create a unique price-fixing opportunity, nor any reason to think that Defendants could not continue to engage in the misconduct alleged in the indirect purchaser complaint under present market conditions.

Similarly, in *In re Nifedipine Antitrust Litig.*, there existed a Federal Trade Commission consent order that had "disbanded the Distribution Agreement between the defendants and required the companies to take various steps to introduce competition to the market[.]" *335 F. Supp. 2d at 16*. The existence of this consent order eliminated any "real and immediate threat of future injury," **[**52]** and so the court dismissed the *§ 16* claim for injunctive relief. *Id.* Again, there are no comparable facts here, and so the opinion in *In re Nifedipine Antitrust Litig.* is inapposite. The Court finds no basis, at this stage of the proceedings, to dismiss the claim for injunctive relief under *§ 16* of the Clayton Act.

III. Leave to Amend

In their opposition papers, the Indirect Purchaser Plaintiffs state as follows:

> Should the Court grant any part of Defendants' partial motion to dismiss, the "usual practice" in the Second Circuit is to permit leave to replead to correct pleading deficiencies. *See* *Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991)*; *Frederick v. New York, 232 F. Supp. 3d 326, 335 (W.D.N.Y. 2017)* (Wolford, J.). ***HN34***[] The Court should "freely give leave when justice so requires." *Fed. R.Civ. P. 15(a)(2)*.

(Dkt. 195 at 17). To the extent this paragraph was intended to be a request for leave to amend, it "is not a proper motion for leave to amend, and fails to comply with the Local Rules of Civil Procedure with respect to the process for seeking to amend a pleading." *Wi3, Inc. v. Actiontec Elecs., Inc., 71 F. Supp. 3d 358, 363 (W.D.N.Y. 2014)* (explaining that, among other things, this District's Local Rules require the party seeking to amend a pleading to "identify the proposed amendments through the use of a word processing redline function or other similar markings" (quotations omitted)). The Court **[**53]** therefore exercises its discretion to deny this "cursory or boilerplate request[] . . ., made solely in a memorandum in opposition to a motion to dismiss." *Malin v. XL Capital, Ltd., 312 F. App'x 400, 402 (2d Cir. 2009)*.

However, the Court does believe that certain of the claims discussed above could potentially be appropriately pled. Specifically, the Court finds that the dismissal of the unjust enrichment claims and the antitrust claims under the laws of Arizona, Connecticut, the District of Columbia, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, and West Virginia should be without prejudice to filing a proper motion for leave to amend.[4] Further, while **[*250]** the deadline for filing motions for leave to amend expired on March 31, 2021 (*see* Dkt. 256), the Court finds that good cause exists to make an exception to that deadline for the filing of such a motion. To the extent the Indirect Purchaser Plaintiffs wish to seek leave to amend the identified claims, they may file a motion seeking such relief within 45 days of the date of this Decision and Order, as set forth below.

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[4] As discussed above, the Indirect Purchaser Plaintiffs have agreed to withdraw their consumer protection claims asserted under the laws of Arkansas, Delaware, the District of Columbia, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Pennsylvania, Rhode Island, South Carolina, Virginia, Wisconsin, and Wyoming. (*See* Dkt. 195 at 29 n. 12). While the dismissal of these claims is without prejudice, the Court's extension of the deadline for filing a motion for leave to amend does not apply to these claims.

CONCLUSION

For the reasons set forth above, the Court grants in part and denies in part Defendants' motion **[**54]** (Dkt. 174) for partial dismissal of the indirect purchaser complaint (Dkt. 129). Specifically, the Court rules as follows: (1) the Indirect Purchaser Plaintiffs' consumer protection claims asserted under the laws of Arkansas, Delaware, the District of Columbia, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Pennsylvania, Rhode Island, South Carolina, Virginia, Wisconsin, and Wyoming are withdrawn without prejudice; (2) the Indirect Purchaser Plaintiffs' consumer protection claims asserted under the laws of Alaska, Arizona, California, Illinois, Montana, New Hampshire, New Jersey, North Carolina, Oregon, Utah, and West Virginia are dismissed with prejudice; (3) the Indirect Purchaser Plaintiffs' ***antitrust law*** claims asserted under the laws of Arizona, Connecticut, the District of Columbia, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, and West Virginia are dismissed without prejudice; (4) the Indirect Purchaser Plaintiffs' antitrust claims asserted under the laws of Montana and Utah are dismissed with prejudice; and (5) the Indirect Purchaser Plaintiffs' **[**55]** unjust enrichment claims are dismissed without prejudice. Defendants' motion to dismiss the indirect purchaser complaint is denied in all other respects.

The Indirect Purchaser Plaintiffs may file a motion to amend the unjust enrichment claims and the antitrust claims under the laws of Arizona, Connecticut, the District of Columbia, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, and West Virginia within 45 days of the date of this Decision and Order, consistent with their obligations under *Federal Rule of Civil Procedure 11*. In the event the Indirect Purchaser Plaintiffs file such a motion, the Court will set a briefing schedule and any obligation on the part of the Defendants to answer the indirect purchaser complaint will be stayed. However, in the event that no motion for leave to amend is filed, Defendants shall answer the indirect purchaser complaint within 60 days of the date of this Decision and Order.

SO ORDERED.

/s/ Elizabeth A. Wolford

ELIZABETH A. WOLFORD

United States District Judge

Dated: June 24, 2021

Rochester, New York

FTC v. Facebook, Inc.

United States District Court for the District of Columbia

June 28, 2021, Decided; June 28, 2021, Filed

Civil Action No. 20-3590 (JEB)

Reporter

560 F. Supp. 3d 1 *; 2021 U.S. Dist. LEXIS 119540 **; 2021 WL 2643627

FEDERAL TRADE COMMISSION, Plaintiff, v. FACEBOOK, INC., Defendant.

Subsequent History: Related proceeding at, Dismissed by, Without prejudice *New York v. Facebook, Inc., 549 F. Supp. 3d 6, 2021 U.S. Dist. LEXIS 127227, 2021 WL 2643724 (D.D.C., June 28, 2021)*

Motion denied by *FTC v. Facebook, Inc., 581 F. Supp. 3d 34, 2022 U.S. Dist. LEXIS 5415 (D.D.C., Jan. 11, 2022)*

Motion denied by *FTC v. Meta Platforms, Inc., 2022 U.S. Dist. LEXIS 160487, 2022 WL 4078930 (D.D.C., Sept. 6, 2022)*

Motion granted by, in part, Motion denied by, in part *FTC v. Meta Platforms, Inc., 2023 U.S. Dist. LEXIS 72917, 2023 WL 3092651 (D.D.C., Apr. 26, 2023)*

Request granted *New York v. Meta Platforms, Inc., 2023 U.S. App. LEXIS 19229 (D.C. Cir., July 26, 2023)*

Core Terms

users, competitors, allegations, rivals, network, monopolist, policies, acquisition, violating, Platform, monopoly, Redacted, market power, market share, advertising, monopoly power, injunction, antitrust, refusals, anti trust law, developers, consumers, features, conditions, friends, sharing, anticompetitive, functionality, messaging, pleaded

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

HN1[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

Section 13(b) of the Federal Trade Commission (FTC) Act authorizes FTC to seek an injunction against an entity that is violating or is about to violate the antitrust laws, including Section 2 of the Sherman Act. 15 U.S.C.S. § 53(b).

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] Motions to Dismiss, Failure to State Claim

In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged. Although detailed factual allegations are not necessary to withstand a Rule 12(b)(6) motion, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face, — that is, the facts alleged in the complaint must be enough to raise a right to relief above the speculative level. The Court need not accept as true, then, a legal conclusion couched as a factual allegation, nor inferences unsupported by the facts set out in the complaint. And it may consider not only the facts alleged in the complaint, but also any documents either attached to or incorporated in the complaint, and matters of which courts may take judicial notice.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN3[] Actual Monopolization, Claims

The offense of monopoly maintenance under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. This second element is usually referred to by the shorthand of anticompetitive or exclusionary conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Evidence > Types of Evidence > Circumstantial Evidence

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN4[] Actual Monopolization, Claims

Monopoly power is the power to control prices or exclude competition, such that a firm is a monopolist if it can profitably raise prices substantially above the competitive level. Where a plaintiff can provide direct proof that a firm has in fact profitably done so, the existence of monopoly power is clear. Because such proof is rare, however, plaintiffs and courts usually search for indirect or circumstantial evidence of monopoly power by inferring it from a firm's possession of a dominant share of a relevant market. Because market power is meaningful only if it is durable, a plaintiff proceeding by the indirect method of providing a relevant market and share thereof must also show that there are barriers to entry into that market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN5[] **Attempts to Monopolize, Elements**

With respect to indirect proof of market power, that framework first requires the plaintiff to establish the relevant market in which the defendant firm allegedly has monopoly power. It then demands that a plaintiff establish that the defendant has a dominant share of that market protected by entry barriers.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN6[] **Relevant Market, Geographic Market Definition**

Although the definition of a relevant antitrust market is typically a factual rather than a legal inquiry, certain legal principles nevertheless govern. An antitrust market includes two components: the product market and the geographic market.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN7[] **Relevant Market, Geographic Market Definition**

A relevant product market is a term of art in antitrust analysis, and is defined as all products reasonably interchangeable by consumers for the same purposes. Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the analysis of market power (which simply means the power to do just that) must use, as its denominator, all products roughly equivalent to another for the use to which they are put. In other words, courts look at whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other. At bottom, products that are sufficiently interchangeable compete with each other in the relevant legal sense.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN8[] **Relevant Market, Product Market Definition**

Cross-elasticity of demand is a measure of the degree to which the rise in the price of one good would tend to create a greater demand for other like goods. It is thus one measure of reasonable interchangeability. At the motion to dismiss stage, the FTC may permissibly plead that certain factors of both the service at issue and its potential substitutes — e.g., their price, use, and qualities — render them not reasonably interchangeable in the eyes of users.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN9[] **Relevant Market, Product Market Definition**

The market definition analysis looks to both whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN10[] **Actual Monopolization, Monopoly Power**

In antitrust cases, while courts typically evaluate market definition and market share separately, the two inquiries ultimately come together to produce the conclusion that matters: the defendant's market power. That point can be lost if courts compartmentalize the two issues and examine the sufficiency of a plaintiff's market-share showings without looking back to how convincingly, or how tenuously, the market has been defined.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN11[] **Actual Monopolization, Monopoly Power**

The existence of market power is at the heart of any monopolization claim. As the Supreme Court explained in Twombly, itself an antitrust case, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN12[] **Actual Monopolization, Monopoly Power**

The central principle that governs refusal-to-deal claims is that, as a general matter, a monopolist has the right to refuse to deal with other firms, which includes the right to refuse to cooperate with rivals. That is because monopolists are both expected and permitted to compete like any other firm, and part of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal. This general no-duty-to-deal rule holds even where a monopolist refuses to deal with its competitor merely in order to limit entry, — in other words, because it wants to prevent that rival from competing with it.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN13[] **Scope, Monopolization Offenses**

The rule declaring unilateral refusals to deal essentially per se lawful, or presumptively legal, rests on three overriding considerations of antitrust policy. First, and most importantly, firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Second, compelled sharing puts federal courts in the role of central planners, requiring them to pick and choose the applicable terms and conditions of the forced sharing they would order despite their being ill-equipped to assume this role. Finally, compelled sharing may actually provide opportunities for collusion between the monopolist and its rival or rivals. Collusion is the supreme evil of antitrust, and itself quite injurious to consumers and the competitive process alike.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN14[] **Anticompetitive & Predatory Practices, Predatory Pricing**

The general no-duty-to-deal rule does have a narrow-eyed needle of an exception, traceable to the Supreme Court's decision in Aspen Skiing. As the case has come to be understood, Aspen Skiing ran afoul of the Sherman Act — despite the general no-duty-to-deal rule — because it acted in a predatory fashion, which is to say it deliberately harmed itself (and consumers) in order to harm its competitor more.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal

HN15[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Courts have accordingly coalesced around a three-part test for unlawful refusals to deal, drawn from Aspen Skiing's particular facts and aimed at sniffing out predation while avoiding over-inclusiveness. First, there must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival with which the monopolist later refuses to deal. Second, the refusal to deal must involve products that the defendant already sells in the existing market to other similarly situated customers. Third, and most importantly, the monopolist's discontinuation of the preexisting course of dealing must suggest a willingness to forsake short-term profits to achieve an anti-competitive end, rather than to advance a valid business purpose.

Antitrust & Trade Law > Sherman Act > Claims

HN16[] **Sherman Act, Claims**

A monopolist has no duty to deal with its competitors, and a refusal to do so is generally lawful even if it is motivated by a desire to limit entry by new firms or impede the growth of existing ones. It follows that a firm's merely announcing its choice not to deal with competitors, whatever the motivation for doing so, cannot violate Section 2 of the Sherman Act.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal

HN17[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

To be actionable, an unlawful refusal-to-deal scheme would have to be made up of refusals that were themselves independent violations of the Aspen Skiing test.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN18[] Scope, Monopolization Offenses

To be actionable, a refusal to deal scheme of monopoly maintenance must involve specific instances in which that policy was enforced (i) against a rival with which the monopolist had a previous course of dealing; (ii) while the monopolist kept dealing with others in the market; (iii) at a short-term profit loss, with no conceivable rationale other than driving a competitor out of business in the long run.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN19[] Sherman Act, Claims

15 U.S.C.S. § 53(b) allows the FTC to bring suit in a district court of the United States to enjoin allegedly unlawful conduct only where it has reason to believe that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the FTC. 15 U.S.C.S. § 53(b). Section 2 of the Sherman Act is such a provision. Given § 53(b)'s requirement that the defendant is violating or is about to violate (not has violated) the antitrust laws, it contemplates relief that is prospective, not retrospective. Section 53(b) therefore does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant is committing or is about to commit another violation.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN20[] Remedies, Injunctions

The Department of Justice has broad authority to seek injunctive relief in antitrust cases. 15 U.S.C.S. §§ 4, 25. And the FTC itself, "ever since its creation in 1914, has been authorized to enforce the law through its own administrative proceedings under Section 5(b) of the FTC Act. Section 5(b) allows the agency to conduct such a proceeding against person who has been or is violating the antitrust laws. 15 U.S.C.S. § 45(b). If it goes that route and prevails, the agency can then seek a court's help in enforcing its orders, including via monetary penalties, 15 U.S.C.S. § 57b, mandatory injunctions, and such other further and equitable relief as the court deems appropriate. § 45(l). Thus, if the FTC wants to address a past violation — where an entity has been violating the law — it must use Section 5(b). 15 U.S.C.S. § 45(b). Section 13(b), by contrast, mainly exists to address a specific problem, namely, that of stopping seemingly unfair practices (including antitrust violations) that are ongoing or about to occur from taking place until the Commission can complete an adjudication.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN21[] **Remedies, Injunctions**

With respect to 15 U.S.C.S. § 43(b), whatever the law tells the agency about what it must believe before it may file suit, for the agency to actually succeed, it must convince the court to agree with it that a violation is either ongoing or about to occur and that an injunction is warranted. It follows that the Fed. R. Civ. P. 8 requirement that the FTC must state a claim to the relief that it seeks that is plausible on its face requires the agency to make a plausible showing that the defendant is violating or is about to violate the antitrust laws.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN22[] **Actual Monopolization, Claims**

To the extent any scholarly commentary uses the term "conditional dealing," the phrase generally refers to actions such as tying or exclusive dealing. The key fact distinguishing such conduct from a standard refusal to deal is that it is not unilateral, but instead involves some assay by the monopolist into the marketplace that interferes with the relationship between rivals and third parties. Tying, for instance, occurs when a firm requires third parties to purchase a bundle of goods rather than just the ones they really want, thereby leveraging the monopolist's power in the "tying" product market to harm its competitors (who lose access to customers) in the "tied" product market. Exclusive dealing is similar: it refers to a monopolist's conditioning the sale of a product on the buyer's agreement not to deal with its competitors.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN23[] **Clayton Act, Claims**

The Supreme Court has clearly stated that the term "acquisition" as used in Section 7 of the Clayton Act — which prohibits purchases the effect of which may be substantially to lessen competition, or to tend to create a monopoly, 15 U.S.C.S. § 18 — does not refer to a discrete transaction but rather a status which continues until the transaction is undone. In other words, acquisition means both the purchase of rights in another company and the retention of those rights, such that Section 7's ban against certain acquisitions includes a ban against holding certain assets, not just obtaining them in the first place. The rule under Section 7 of the Clayton Act is that so long as an acquiring company continues to hold acquired assets, the Government may at any time argue that such company is violating Section 7.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > Defenses

HN24[] **Clayton Act, Claims**

Just as the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may tend to create a monopoly, in violation of Clayton Act Section 7's proscription against transactions having that effect, so too it should be able to proceed against an acquisition whenever a threat of Sherman Act Section 2's prohibited effects is evident, — namely, that the acquisition is tending to destroy competition itself via means other than competition on the merits. It is well established that mergers may constitute one such means.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

HN25[] **Remedies, Injunctions**

An injunction under Section 13(b) of the FTC Act, 15 U.S.C.S. § 53(b), is a theoretically available remedy in a Sherman Act Section 2 challenge to long-ago mergers so long as the defendant still holds the purchased assets or stock.

Counsel: **[**1]** For FEDERAL TRADE COMMISSION, Plaintiff: Daniel John Matheson, LEAD ATTORNEY, FEDERAL TRADE COMMISSION, Bureau of Competition, Washington, DC; David E. Owyang, Eric Cochran, Gary Mitchell London, Jr, Henry J. Hauser, Krisha A. Cerilli, Maria M. DiMoscato, Mark Silvia, Michael Mikawa, Michael H Smith, Noel Miller, Owen T. Masters, Patricia Galvan, Rebecca Weinstein, Robert E. Zuver, Jr., Sylvia Zhang, FEDERAL TRADE COMMISSION, Washington, DC.

For FACEBOOK INC., Defendant: Mark Charles Hansen, LEAD ATTORNEY, KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, PLLC, Washington, DC; Aaron Martin Panner, Geoffrey M. Klineberg, Kevin J. Miller, Leslie V. Pope, Silvija A. Strikis, KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C., Washington, DC; Kevin Huff, KELLOGG HANSEN TODD FIGEL & FREDERICK, Washington, DC.

Judges: JAMES E. BOASBERG, United States District Judge.

Opinion by: JAMES E. BOASBERG

Opinion

[*4] **MEMORANDUM OPINION**

At the time of the last great antitrust battle in our courthouse — between the United States and Microsoft — Mark Zuckerberg was still in high school. Only after his arrival at Harvard did he launch "The Facebook" from his dorm room. Nearly twenty years later, both federal and state regulators contend, in two separate **[**2]** actions before this Court, that Facebook is now the one violating the antitrust laws. The company, they allege, has long had a monopoly in the market for what they call "Personal Social Networking Services." And it has allegedly maintained that monopoly, in violation of *Section 2* of the *Sherman Act*, through two different kinds of actions: first, by acquiring firms that it believed were well positioned to erode its monopoly — most notably, Instagram and WhatsApp; and second, by adopting policies preventing interoperability between Facebook and certain other apps that it saw as threats, thereby impeding their growth into viable competitors. Both suits seek equitable relief from this conduct, including forced "divestiture or reconstruction of businesses" as well as orders not to undertake similar conduct in the future. See ECF No. 3 (Redacted Compl.) at 51-52. (The Court here cites a copy of the FTC's Complaint that has minor redactions to protect confidential business information, and it mentions certain redacted facts only with the parties' permission.)

Facebook now separately moves to dismiss both the State action and the FTC action. This Opinion resolves its Motion as to the FTC's Complaint, **[**3]** and the Court analyzes the States' largely parallel claims in its separate Opinion in No. 20-3589. Although the Court does not agree with all of Facebook's contentions here, it ultimately concurs that the agency's Complaint is legally insufficient and must therefore be dismissed. The FTC has failed to plead enough facts to plausibly establish a necessary element of all of its *Section 2* claims — namely, that Facebook has monopoly power in the market for Personal Social Networking (PSN) Services. The Complaint contains nothing on that score save the naked allegation that the company has had and still has a "dominant share of th[at] market (in excess of 60%)." Redacted Compl., ¶ 64. Such an unsupported assertion might (barely) suffice in a *Section 2* case involving a more traditional goods market, in which the Court could reasonably infer that market share was measured by revenue, units sold, or some other typical metric. But this case involves no ordinary or intuitive market. Rather, PSN services are free to use, and the exact metes and bounds of what even constitutes a PSN service — *i.e.*, which features of a company's mobile app or website are included in that definition and which are excluded — are hardly **[**4]** crystal clear. In this unusual context, the FTC's inability to offer any indication of the metric(s) or method(s) it used to calculate Facebook's market share renders its vague "60%-plus" assertion too speculative and conclusory to go forward. Because this defect could conceivably be overcome by re-pleading, however, the Court will dismiss only the Complaint, not the case, and will do so without prejudice to allow Plaintiff to file an **[*5]** amended Complaint. See *Ciralsky v. CIA., 355 F.3d 661, 666-67, 359 U.S. App. D.C. 366 (D.C. Cir. 2004)*.

To guide the parties in the event amendment occurs, this Opinion also explains two further conclusions of law. First, even if the FTC had sufficiently pleaded market power, its challenge to Facebook's policy of refusing interoperability permissions with competing apps fails to state a claim for injunctive relief. As explained herein (and in the Court's separate Opinion in the States' case), there is nothing unlawful about having such a policy in general. While it is possible that Facebook's implementation of that policy as to certain specific competitor apps may have violated *Section 2*, such finding would not change the outcome here: all such revocations of access occurred in 2013, seven years before this suit was filed, and the FTC lacks **[**5]** statutory authority to seek an injunction "based on [such] long-past conduct." *FTC v. Shire ViroPharma, Inc., 917 F.3d 147, 156 (3d Cir. 2019)*. Regardless of whether the FTC can amend its Complaint to plausibly allege market power and advance this litigation, then, the conduct it has alleged regarding Facebook's interoperability policies cannot form the basis for *Section 2* liability. Second, the agency is on firmer ground in scrutinizing the acquisitions of Instagram and WhatsApp, as the Court rejects Facebook's argument that the FTC lacks authority to seek injunctive relief against those purchases. Whether other issues arise in a subsequent phase of litigation is dependent on how the Government wishes to proceed.

Table of Contents

I. Background

A. Social Networking

At the dawn of our century, in the much earlier days of the internet, a number of websites began to offer what came to be known as "social networking" services. See Redacted Compl., ¶ 38. Friendster and Myspace, both launched in 2002, were among the earliest. Id. Although the precise definition of a "Personal Social Networking Service" is disputed (as that is the market in which Facebook has its alleged monopoly), it can be summarized here as one that enables users to virtually connect with others in their network and to digitally share their views and experiences by **[*6]** posting about them in a shared, virtual social space. Id., ¶ 40. For example, users might view and interact with a letter-to-the-editor-style post on politics by a neighbor, pictures from a friend's recent party, or a birth announcement for a newborn cousin. Id.

Perhaps because humans are naturally social, this new way of interacting became hugely popular. Although Myspace and Friendster had an early lead, by 2009 they had been surpassed by a new competitor. Id., ¶¶ 38, 41. Created at Harvard in 2004, "The Facebook," as it was initially called, was a social-networking service initially limited **[**7]** to college students. Id., ¶ 41. Within a few years, it had expanded to the general public (and dropped "The" from its name). Id. By at least 2011, it was the dominant player in personal social networking. Id., ¶ 62. Today, the FTC alleges, its flagship product, Facebook Blue, has hundreds of millions of users in the United States. Id., ¶ 3. The following details of Facebook's conduct are drawn from the FTC's Complaint, as the Court must consider its allegations true at this stage. The allegations are quite similar, though not identical, to those made by the States in the parallel case and recounted in the Court's companion Opinion.

B. Facebook Blue

Facebook Blue is what its millions of users think of when they think of "Facebook." Generally speaking, using Facebook Blue entails interacting with user-created content — *i.e.*, content created or shared by one's Facebook "friends," id., ¶¶ 40, 89 — or creating content oneself by posting. That is not all that users see or do, however. They may also, for instance, encounter "publisher-created content like news articles . . . and advertisements" in their "news feed." Id., ¶ 54; see also id., ¶¶ 44, 134. Such content can come in text, photo, **[**8]** or video form. Id., ¶ 54. In addition, Facebook users can play games or use other applications built either by Facebook or by third parties. Id., ¶¶ 97, 129. Facebook also offers other services beyond Facebook Blue to its users, such as Facebook Messenger, a free mobile-messaging service. Id., ¶¶ 37, 115.

Unlike most businesses, Facebook charges users no fee; instead, it makes money by selling advertising. Id., ¶¶ 43-51. By leveraging "the vast quantity of user data [it] collects," the company "allows advertisers to target different campaigns and messages to different groups of users." Id., ¶ 44; see also id., ¶ 4. Under this business model, as the Complaint puts it, Facebook "refrain[s] from charging a monetary price . . . to users, relying instead on monetizing user data and engagement through advertising." Id., ¶ 42. Put differently, users exchange their time, attention, and personal data, rather than money, for access to Facebook. That approach has been highly profitable: in 2019, for instance, global advertisers paid Facebook nearly $70 billion, and it made profits of more than $18 billion. Id., ¶¶ 4, 44. To be clear, although Facebook's data-collection and -use practices have **[**9]** been subject to increasing scrutiny, they are not the subject of this action.

C. Alleged Monopoly Maintenance

Instead, this suit alleges that Facebook has violated and is violating the antitrust laws, the focus of which, generally speaking, is to promote and ensure competition. After rising to become the "dominant personal social networking provider in the United States" around 2011, id., ¶ 62, Facebook allegedly made a fateful strategic pivot: rather than competing to provide the best product, it would instead protect its monopoly by leveraging its power to foreclose and forestall the rise of new competitors. Id., ¶¶ 5, 9. In particular, the **[*7]** company's executives saw a substantial threat to Facebook's dominance in the advent of mobile devices — first and foremost, smartphones — capable of accessing the internet. Id., ¶ 70. Although Facebook had mobile functionality, it had been built with websites and desktop or laptop computers in mind and thus "offered a relatively poor experience for mobile users" compared to newer competitors. Id.; see also id., ¶¶ 78-79. Zuckerberg and other Facebook executives fretted over the possibility that other apps might create attractive mobile-native features **[**10]** and then leverage those features into exponential user growth, end-running Facebook's established position. Id., ¶¶ 107-112. Even if such an app was not already providing social-network-like functionality, once it had a big enough base of users, it would still pose a potential threat to Facebook Blue. Id. Facebook executives feared fast-growing mobile-messaging services in particular, nervous that such apps could easily morph into direct competitors by adding social features.

In response to these perceived threats, the company allegedly used its monopoly power to eliminate or destroy competitors in order to maintain its market dominance. Id., ¶¶ 5-9. The FTC claims that this exclusionary conduct had "three main elements." Id., ¶¶ 9, 71. First (and second), Facebook reached deep into its very deep pockets to acquire Instagram and WhatsApp, two promising potential competitors, thereby preventing their emergence as serious rivals. Id., ¶ 71. (Attempts to purchase other competitors such as Snapchat and Twitter were rebuffed. Id., ¶ 73.) Third, it adopted and then enforced policies that blocked rival apps from interconnecting their product with Facebook Blue, thereby both (i) blunting the **[**11]** growth of potential competitors that might have used that interoperability to attract new users, and (ii) deterring other developers from building new apps or features or functionalities that might compete with Facebook, lest they lose access as well. Id., ¶¶ 23-26.

1. *Instagram*

Begin with Insta, as those in the know — *viz.*, our children — refer to it. Launched in late 2010, Instagram was an innovative photo-editing and -sharing app designed for the era of smartphones with built-in cameras. Id., ¶¶ 79-80. Plaintiff alleges that Instagram's photo-sharing app also qualifies as a PSN service, meaning that it was a direct competitor to Facebook Blue. Id., ¶ 63. From the get-go, Instagram's user base grew explosively, eventually attracting the attention of Facebook executives who feared that their own photo-sharing features paled in comparison. Id., ¶¶ 81-85. That disparity gave Instagram a chance to reach a large enough scale to be threatening as a new, mobile- and photo-first social network — whether the firm got there on its own or if, as worried Facebook, it were purchased by a large company like Google or Apple. Id., ¶ 86. After about eighteen months of watching Instagram's rise, Zuckerberg **[**12]** and his team eventually shifted from trying (and failing) to compete to instead trying to buy. Aiming to both neutralize Instagram as a competitor and "integrate" the "mechanics" of its popular photo-sharing features with Facebook Blue in order to forestall the growth of future Instagrams, id., ¶ 91, Zuckerberg offered to purchase the company for $1 billion in April 2012. Id., ¶ 95. Instagram's founders agreed. Id.

As required by the *Hart-Scott-Rodino Act, 15 U.S.C. § 18a*, the FTC reviewed the acquisition prior to closing to assess whether it posed anticompetitive concerns. Whereas most mergers are cleared quickly, in this instance the review took over four months. During that scrutiny, the agency took the rare step of "requir[ing] **[*8]** the submission [by the parties] of additional information or documentary material relevant to the proposed acquisition." *15 U.S.C. § 18a(e)(1)(A)*. Eventually, however, Facebook and Instagram satisfied the agency's concerns, and in August (over four months after the merger was announced), the Commission voted 5-0 to allow it to proceed without any challenge or conditions. See FTC, FTCCloses its Investigation into Facebook's Proposed Acquisition of Instagram Photo Sharing Program (Aug. 22, 2012), **[**13]** https://bit.ly/3bDa2mp. Although the FTC conveniently omits any mention of this review in its Complaint, the Court may take judicial notice of that public agency action. See *Pharm. Rsch. & Manufacturers of Am. v. U.S. Dep't of Health & Hum. Servs., 43 F. Supp. 3d 28, 33 (D.D.C. 2014)*; *Herron v. Fannie Mae, No. 10-943, 2012 U.S. Dist. LEXIS 206057, 2012 WL 13042852, at *1 (D.D.C. Mar. 28, 2012)*.

With Instagram safely in the fold, Facebook scaled back and eventually shut down its own mobile photo-sharing app. See Redacted Compl., ¶ 98. Internal emails cited by the Complaint reveal that it also fretted less about competition from other similar apps, since its ownership of Instagram meant it now "effectively dominate[d] photo sharing." Id., ¶ 99. As time went on, Facebook also limited Facebook Blue's promotion of the technically separate Instagram app and website, allegedly to avoid Instagram's "cannibalizing" user engagement on its flagship service. Id., ¶¶ 102-04. All this post-acquisition conduct, the FTC claims, confirms that Facebook's executives saw, and continue to see, Instagram as a significant competitive threat in the social-networking arena. Id., ¶ 102.

2. *WhatsApp*

The other high-profile acquisition Plaintiff focuses on here involves not a competitor in the PSN market, like Instagram, but a company that might quickly become one. As noted above, Facebook's executives saw mobile-native apps in **[**14]** general as a threat. They were particularly concerned with internet-based, so-called "over-the-top mobile messaging services" such as WhatsApp. Id., ¶ 107. Since 2011, OTT messaging services have grown astronomically in use while SMS or MMS messaging (the kind of classic texting that relies on cellular networks rather than internet) has stagnated. Id. Even though mobile messaging services did not directly compete with Facebook Blue (as they are not PSN services), Facebook feared that such apps might well become competitors in the future; given the ubiquity of text messaging in modern life, a widely adopted messaging app could leverage its network effects to transition into a "mobile-first social network" by adding functions such as "gaming platforms, profiles, and news feeds." Id., ¶ 111; see id., ¶¶ 108-112.

Facebook executives saw WhatsApp as the most potent threat among mobile-messaging services. Id., ¶ 113. Launched in 2009, it had approximately 450 million active users worldwide five years later and was growing exponentially thanks to its superior product. Id., ¶¶ 113-18. Zuckerberg and his team hoped that their Facebook

Messenger app, released in 2011, would compete. Id., ¶¶ 115-16. **[**15]** But as WhatsApp continued to thrive and expand, Facebook instead resolved to try to buy it. Id., ¶ 120. After being initially rebuffed in late 2012, id., ¶ 121, that tactic found success in February 2014, when the two companies agreed on a purchase price of $19 billion. Id. The transaction was also subject to Hart-Scott-Rodino Act pre-merger review, see *15 U.S.C. § 18a*, but the FTC, once again, did not block it.

Since acquiring WhatsApp, the agency alleges, Facebook has "kept [it] cabined to providing mobile messaging services rather than allowing" it to grow into a standalone **[*9]** PSN service. See Redacted Compl., ¶ 126. As with Instagram, Facebook has also limited its promotion of WhatsApp on its other services in the United States. Id. It follows, Plaintiff further claims, that "Facebook's monopolization" via both its WhatsApp and Instagram acquisitions "is ongoing," as it both "continues to hold and operate [the two companies], which neutralizes their direct competitive threats to Facebook," and "continues to keep them positioned to provide a protective 'moat' around its [PSN] monopoly." Id., ¶ 76.

3. *Interoperability Permissions*

a. Facebook Platform

Not long after it expanded to the general public, Facebook **[**16]** released "Facebook Platform," a set of tools that allowed software developers to create interoperability between their products and Facebook Blue. Id., ¶ 129. As initially launched, Platform "encouraged software developers to build an entire ecosystem of apps and tools" that would be displayed and used within the Facebook website itself. Id. Such apps "rang[ed] games and page design tools to video-sharing tools and e-marketing apps." Id. (The States' Complaint in the parallel case refers to these apps as "canvas" apps. See No. 20-3589, ECF No. 4 (State Redacted Compl.), ¶ 190.) Such apps would make money by allowing users to purchase virtual goods or items within the app on a "freemium" model or via ad sales.

Three years later, in 2010, Facebook added new functionalities to Platform that expanded its reach off the Facebook site itself. These tools — called application programming interfaces or APIs — created mechanisms for sharing data between Facebook and other, freestanding third-party apps. See Redacted Compl., ¶ 130. One important API that Facebook offered to developers was the "Find Friends" API, id., which enabled third-party apps to allow Facebook account holders to find and **[**17]** connect with Facebook friends within their separate apps, or to invite Facebook friends to join that app. Id. For instance, when first starting to use an independent chess app — *i.e.*, an app used separately as opposed to on the Facebook site itself — a user with a Facebook account could nonetheless search within the app for other Facebook friends already using it, or invite them to join via Facebook, all without leaving the app. Another API allowed Facebook users to sign into third-party websites or apps using their Facebook log-in credentials. Id., ¶¶ 144, 154.

Facebook went even further in that direction later in the year when it launched its Open Graph API. Id., ¶ 131. Open Graph allowed third-party apps and websites to essentially integrate pieces of Facebook within their own service; for instance, apps could install the famous "Like" button, which, if clicked, would share a user's "like" on the user's Facebook profile. Id. Users could do this without even navigating away from the third-party service. Id., ¶¶ 131, 134. A user reading an article on WashingtonPost.com, for instance, could now like an article directly on-site and further choose to post a link of the article to the **[**18]** user's Facebook profile. This sort of integration was, unsurprisingly, massively popular among app developers. "By July 2012, Open Graph was being used to share nearly one billion pieces of social data each day to Facebook Blue, giving Facebook substantially greater and richer information about its users and their online activities." Id., ¶ 132.

According to Plaintiff, Facebook benefited significantly from its Platform program and open APIs. The company garnered goodwill and continued to increase its growth and user engagement. Id., ¶¶ 133-34. It also obtained access to a massive new trove of off-site user data. Id., ¶ 134. **[*10]** Third-party app developers likewise gained, improving the quality of users' experience by integrating social functionality and benefiting from Facebook's sizeable network of highly engaged users. Id., ¶¶ 132-33. Users, too, presumably enjoyed the increased efficiency and convenience.

b. Conditioning Access

Nonetheless, Facebook eventually began to use the power of its Platform tools over the growth trajectory of nascent apps to "deter and suppress competitive threats to its personal social networking monopoly." Id., ¶ 136. Specifically, the FTC alleges, the company **[**19]** adopted policies under which its APIs would be "available to developers only on the condition that their apps" did not compete with Facebook Blue (or Facebook Messenger). Id. The company then enforced those policies against "apps that violated the[] conditions by cutting off their use of commercially significant APIs." Id.

Facebook announced the first iteration of these policies in July 2011, alerting developers that going forward, "Apps on Facebook [could] not integrate, link to, promote, distribute, or redirect to any app on any other competing social platform." Id., ¶ 139. This policy, by its terms, applied only to "[a]pps on Facebook" — *i.e*, the "canvas" apps described above that could only be accessed and used on the Facebook website itself. Id. Put differently, this initial policy did not affect the sort of freestanding, independent apps discussed above, such as our chess app or the Washington Post app. It was not until later that Facebook "imposed several other policies restricting" freestanding apps' "use of Facebook Platform, including [the] APIs" just discussed. Id., ¶ 141. The first of those additional policies, announced in 2012, prohibited developers from "us[ing] Facebook **[**20]** Platform to export [Facebook] user data into a competing social network without our permission." Id., ¶ 142. The next year, Facebook went further by instructing developers that their apps could "not use Facebook Platform to promote, or to export user data to, a product or service that replicates a core Facebook product or service without our permission." Id., ¶ 143.

Armed with these policies, Facebook then enforced them by cutting off API access to certain apps. As Plaintiff describes it, those cutoffs were "generally directed against apps in three groups." Id., ¶ 152. First, Facebook terminated the API access of promising apps that were directly competing with Facebook Blue by providing Personal Social Networking Services, such as Path, a feed-based sharing app that limited the number of friends a user could have to encourage more intimate sharing. Id., ¶ 153. Second, Facebook targeted "promising apps with some social functionality" but which were not yet full-fledged competitors to Facebook Blue. Id., ¶ 154. As examples, the Complaint provides Vine, a video-sharing app owned by Twitter to which Facebook shut down API access in January 2013, and Circle, a "local social network" that **[**21]** had its permissions revoked in December of that year. Id., ¶¶ 154-55. Last, "Facebook blocked mobile messaging apps from using commercially significant APIs"; at one point, in August 2013, it "undertook an enforcement strike against a number" of such apps "simultaneously." Id., ¶ 156.

Each of these revocations of access, the FTC alleges, significantly "hindered the ability of [the targeted] businesses to grow and threaten Facebook's personal social networking monopoly." Id., ¶ 157. During the period in which Circle had Facebook API access, for example, it was growing at a rate of 600,000-800,000 users per day; after losing its Facebook interconnections (particularly the Find Friends tool), however, its "daily new users dropped . . . to **[*11]** nearly zero." Id., ¶ 154. Facebook's actions also allegedly "alerted other apps that they would lose access . . . if they, too, posed a threat to Facebook's . . . monopoly," thereby deterring other apps from adding features or functionality that would attract the company's ire. Id., ¶ 158.

There is an important coda to this story, however: Facebook "removed its 'core functionality' restrictions" in December 2018. Id., ¶ 148 (emphasis added). Although the **[**22]** company has not reinstated the policies (or, according to the Complaint, revoked any apps' API access) since that time, the FTC alleges that Facebook "is likely to reinstitute such policies if [public] scrutiny passes." Id., ¶¶ 149, 172.

D. Procedural History

The FTC filed this action on December 9, 2020, asserting that the above conduct amounts to one count of monopoly maintenance under *Section 2* of the *Sherman Act*. Id., ¶¶ 169-73. Unlike the States, the agency does not also allege a violation of *Section 7* of the *Clayton Act*, which prohibits acquisitions that will substantially decrease competition. ***HN1***[] Plaintiff brings this suit under *Section 13(b) of the FTC Act*, which authorizes it to seek an injunction against an entity that "is violating" or "is about to violate" the antitrust laws, including *Section 2*. See *15 U.S.C. § 53(b)*. It hopes to procure an injunction aimed at preventing such conduct in the future as well as an order mandating "divestiture of assets, divestiture or reconstruction of businesses (including, but not limited to, Instagram and/or WhatsApp), and such other relief sufficient to restore the competition that would exist absent the conduct alleged in the Complaint." Redacted Compl. at 51.

This case was initially **[**23]** assigned to Judge Christopher R. Cooper of this district. As noted above, however, a number of State Plaintiffs filed a very similar suit against Facebook just before this action was filed. That case, No. 20-3589, was assigned to this Court. Pursuant to Local Rule 40.5(c)(2), which governs related cases, Judge Cooper was required to reassign this action to this Court because it presides over the earlier-filed State case. See No. 20-3590, Minute Order of Jan. 12, 2021.

Facebook has now moved to dismiss both actions. See ECF No. 56 (MTD FTC); No. 20-3589, ECF No. 114 (MTD States). While the cases could be consolidated, the Court believes that clarity will be enhanced by resolving the two Motions to Dismiss in separate, contemporaneously issued Opinions. As explained in its separate Opinion, it will grant the Motion to Dismiss the States' entire case. See Mem. Op., No. 20-3589. By contrast, the Court here will dismiss only the Complaint, not the case, leaving the agency the chance to replead if it believes it can successfully remedy the infirmities described below.

II. Legal Standard

Facebook moves to dismiss this action under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim upon which relief can be granted. See MTD FTC at 1. **[**24]** ***HN2***[] In evaluating such Motion to Dismiss, the Court must "treat the complaint's factual allegations as true . . . and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113, 342 U.S. App. D.C. 268 (D.C. Cir. 2000)* (quoting *Schuler v. United States, 617 F.2d 605, 608, 199 U.S. App. D.C. 23 (D.C. Cir. 1979)*). Although "detailed factual allegations" are not necessary to withstand a *Rule 12(b)(6)* motion, *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" **[*12]** *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*) — that is, the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. The Court need not accept as true, then, "a legal conclusion couched as a factual allegation," *Trudeau v. FTC, 456 F.3d 178, 193, 372 U.S. App. D.C. 335 (D.C. Cir. 2006)* (quoting *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*), nor "inferences . . . unsupported by the facts set out in the complaint." Id. (quoting *Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276, 305 U.S. App. D.C. 60 (D.C. Cir. 1994)*). And it may consider not only "the facts alleged in the complaint," but also "any documents either attached to or incorporated in the complaint[,] and matters of which [courts] may take judicial notice." *Equal Emp't Opportunity Comm'n v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624, 326 U.S. App. D.C. 67 (D.C. Cir. 1997)*.

III. Analysis

HN3[] The offense of monopoly maintenance under *Section 2* of the *Sherman Act* "has two elements: '(1) the possession of monopoly power in the relevant market and (2) the willful . . . maintenance of that power as distinguished from **[**25]** growth or development as a consequence of a superior product, business acumen, or historic accident.'" *United States v. Microsoft Corp., 253 F.3d 34, 50, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*). This second element is usually referred to by the shorthand of "anticompetitive" or "exclusionary conduct." *Id. at 58*. Facebook, in seeking dismissal, contends that the Complaint does not allege facts establishing either element. The Court agrees that the first — the possession of monopoly power in the market for Personal Social Networking Services (as defined by the agency) — is not adequately pleaded here. No more is needed to conclude that the Complaint must be dismissed.

To promote clarity and efficiency going forward in the event Plaintiff amends its Complaint, however, the Court will also address two other issues in this Opinion. Both pertain to *Section 13(b) of the FTC Act*, which the agency relies on to seek an injunction here, and which authorizes such relief only where the defendant "is violating, or is about to violate," the antitrust laws. See *15 U.S.C. § 53(b)*. First, to the extent that Facebook's Platform-related conduct is actionable, it occurred nearly eight years ago, rendering an injunction under *Section 13(b)* unavailable as a matter of law. Second, and on the other hand, *Section 13(b)* does allow the FTC **[**26]** to challenge Facebook's acquisitions of Instagram and WhatsApp, contrary to the company's contention otherwise.

A. Monopoly Power

Begin with the linchpin of this Opinion: whether the FTC has plausibly alleged, as it must, that Facebook exercises monopoly power. ***HN4***[] As explained by the Circuit in Microsoft, monopoly power is the "the power to control prices or exclude competition," such that a firm is a monopolist "if it can profitably raise prices substantially above the competitive level." *253 F.3d at 51* (citations omitted). Where a plaintiff can provide direct proof that a "firm has in fact profitably done so, the existence of monopoly power is clear." Id. Because such proof is rare, however, plaintiffs and courts usually search for indirect or "circumstantial evidence" of monopoly power by inferring it from "a firm's possession of a dominant share of a relevant market." Id.; see also *Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000)* (noting that market power can be proven **[*13]** "through direct evidence of anticompetitive effects" or, "more conventional[ly]," "by proving relevant product and geographic markets and by showing that the defendant's share exceeds [some] threshold"); S. *Pac. Commc'ns Co. v. Am. Tel. & Tel. Co., 740 F.2d 980, 1000, 238 U.S. App. D.C. 309 (D.C. Cir. 1984)* ("[C]ourts frequently approach the problem of measuring market power by **[**27]** defining the relevant product and geographic market and computing the defendant's market share. Monopoly power is then ordinarily inferred from a predominant share of the market."). Because "[m]arket power is meaningful only if it is durable," a plaintiff proceeding by the indirect method of providing a relevant market and share thereof must also show that there are "barriers to entry" into that market. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 762 F.3d 1114, 1123-25 (10th Cir. 2014)*; *Microsoft, 253 F.3d at 51* (explaining that defendant's "share of a relevant market" must be "protected by entry barriers," defined as "factors . . . that prevent new rivals from timely responding to an increase in price above the competitive level").

Although the FTC briefly suggests in its Opposition that it can offer direct proof of market power, see ECF No. 59 (FTC Opp.) at 8, it spends nearly its entire brief arguing why it has sufficiently pleaded indirect proof — *viz.*, that Facebook has a dominant share of a relevant product and geographic market (the United States market for Personal Social Networking Services) protected by entry barriers. Id. at 8-19. Because the agency thus makes no real direct-proof argument, the Court will analyze the Complaint's market-power allegations using the indirect framework. **[**28]** Again, that framework first requires the plaintiff to "establish[] the relevant market" in which the defendant firm allegedly has monopoly power. *Sky Angel U.S., LLC v. Nat'l Cable Satellite Corp., 947 F. Supp. 2d 88, 102 (D.D.C. 2013)* (quoting *Neumann v. Reinforced Earth Co., 786 F.2d 424, 429, 252 U.S. App. D.C. 11 (D.C. Cir. 1986)*). ***HN5***[] It then demands that a plaintiff establish that the defendant has a dominant share of that market protected by entry barriers. Id.; see, e.g., *FTC v. AbbVie Inc., 976 F.3d 327, 373-74 (3d Cir. 2020)* (above 60% market share sufficient); *Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1206 (9th Cir. 1997)* ("Courts generally require a 65% market share to establish a prima facie case of market power."). As the Court explains below, it is the market-share step that trips up the FTC here.

1. *Market Definition*

a. Legal Framework

HN6[] Although the definition of a relevant antitrust market is typically a "factual" rather than a "legal" inquiry, certain "legal principles" nevertheless govern. *Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038, 1045 (9th Cir. 2008)*. An antitrust market includes "two components: the product market and the geographic market." *Sky Angel, 947 F. Supp. 2d at 102*. Because the parties do not dispute here that the geographic market — that is, "the terrain in which competition takes place," *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1071 (10th Cir. 2013)* — is the United States, see FTC Opp. at 10, the only issue is the "[t]he outer boundaries of [the relevant] product market" in which Facebook operates. *Sky Angel, 947 F. Supp. 2d at 102* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*).

HN7[] "A 'relevant product market' is a term of art in antitrust analysis," United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 50 (D.D.C. 2011), and is defined as "all **[**29]** products reasonably interchangeable by consumers for the same purposes." Microsoft, 253 F.3d at 52. "Because the ability of **[*14]** consumers to turn to other suppliers restrains a firm from raising prices above the competitive level," id. at 51, the analysis of market power (which simply means the power to do just that) must use, as its denominator, all products "roughly equivalent to another for the use to which [they are] put." Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 437 (3d Cir. 1997) (citation omitted). "In other words, courts look at whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other." H&R Block, 833 F. Supp. 2d at 51 (citation omitted). At bottom, products that are sufficiently interchangeable compete with each other in the relevant legal sense. See Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1120 (9th Cir. 2018).

Unsurprisingly, many "case[s] hing[e]" on this fight over what is included in this denominator. See, e.g., FTC v. Staples, Inc., 970 F. Supp. 1066, 1073 (D.D.C. 1997) (considering whether product market includes only "consumable office supplies" such as paper, pens, and post-it notes, or instead all office products, including computers, office furniture, and fax machines); H&R Block, 833 F. Supp. 2d at 50 (considering whether product market includes only "digital do-it-yourself tax preparation products" or instead includes "all tax preparation methods," **[**30]** including professional assistance and do-it-yourself using pen and paper); FTC v. Swedish Match, 131 F. Supp. 2d 151, 156 (D.D.C. 2000) (considering whether product market includes only loose-leaf chewing tobacco or instead also includes moist snuff).

b. Market-Definition Allegations

The market-definition inquiry in this case is somewhat unusual because, unlike familiar consumer goods like tobacco or office supplies, there is no obvious or universally agreed-upon definition of just what a personal social networking service is. As a result, to discharge its "burden to define the relevant market," Gross v. Wright, 185 F. Supp. 3d 39, 50 (D.D.C. 2016) (citation omitted), the FTC must do two things here. First, it must provide a definition of PSN services (which, obviously, would include at least Facebook Blue). Second, it must further explain whether and why other, non-PSN services available to the public either are or are not reasonably interchangeable substitutes with PSN services. Ultimately, that analysis should demonstrate that Facebook holds a dominant share of a market that includes such substitutes, if any.

On the first point, the agency explains that PSN services are "online services that enable and are used by people to maintain personal relationships and share experiences with friends, family, **[**31]** and other personal connections in a shared social space." Redacted Compl., ¶ 52. Such services are allegedly defined, and distinguished, by their having "[t]hree key elements." Id. "First, [they] are built on a social graph that maps the connections between users and their friends, family, and other personal connections." Id., ¶ 53. "Second, [they] include features that many users regularly employ to interact with personal connections and share their personal experiences in a shared [virtual] social space, including in a one-to-many 'broadcast' format." Id., ¶ 54. And "[t]hird, [they] include features that allow users to find and connect with other users, to make it easier for each user to build and expand their set of personal connections. The social graph also supports this feature by informing [the user] which [new] connections" might be available based on her existing network. Id., ¶ 55.

Having defined PSN services, Plaintiff then alleges that there are in fact no "other types of internet services" that are "adequate **[*15]** substitutes." Id., ¶ 57. It buttresses that conclusion by explaining why four different kinds of arguably comparable online services are not "reasonably interchangeable" **[**32]** with PSN services. Id., ¶ 58. First, "specialized social networking services" that "focus on professional . . . connections" (*e.g.*, LinkedIn) are not substitutes because they are designed for and used primarily by professionals for sharing professional content. Id., ¶ 58. They therefore would not be used, as PSN services are, to "maintain personal relationships and share experiences with friends, family, and other personal connections." Id., ¶ 52. The same is true, alleges the FTC, for "interest-based" social-networking services such as Strava (which relates to physical exercise). Id., ¶ 58. The agency also pleads that PSN services are not reasonably interchangeable with services that allow for consuming and sharing video or audio content, such as YouTube, Spotify, Netflix, or Hulu. Id., ¶ 59. That is because users of such services mostly consume such content passively or share content created by others (rather than content they have created), and such sharing, where it occurs, is not to the user's network of personal connections but rather to a general and wide audience of unknown users. Id. In such a setting, users do not usually "communicate with friends, family, and other personal **[**33]** connections," which is the hallmark of a PSN service. Id. Finally, Plaintiff explains that "mobile messaging services" cannot be substituted for PSN services because the former (i) lack a "shared social space" for interaction and (ii) do not employ a social graph to facilitate users' finding and "friending" other users they may know. Id., ¶ 60. Zuckerberg himself has colorfully explained one key difference in use that allegedly flows from these disparate features: a PSN service is "the digital equivalent of a town square," whereas a mobile messaging service is "the digital equivalent of [a] living room." Id.

According to the FTC, then, the relevant market here thus includes PSN services — such as Facebook Blue, Instagram, and Path, id., ¶¶ 63, 153 — and no other kinds of services.

c. Analysis

On this issue, Facebook contends that, for a number of reasons, Plaintiff's allegations regarding market definition fall short of the pleading-stage requirement that such "alleged product market . . . be plausible." *Sky Angel, 947 F. Supp. 2d at 103* (quoting *Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001)*). While there are certainly bones that one could pick with the FTC's market-definition allegations, the Court does not find them fatally devoid of meat.

First, Facebook contends **[**34]** that the FTC's Complaint contains an internal contradiction: its market definition appears to exclude services like Circle and Vine, yet one of the core allegations in this case is that Facebook's revocation of API permissions from those apps was anticompetitive. See MTD FTC at 14-15. Both cannot be true, Defendant insists. As the FTC explains in response, though, the D.C. Circuit rejected exactly this argument in *Microsoft*. There, Microsoft argued that the district court had been wrong to exclude "middleware" software from the relevant product market for computer operating systems because much of the Government's *Section 2* case turned on "Microsoft's attempts to suppress middleware's threat to its operating system monopoly." *253 F.3d at 54*. The Circuit explained that "no contradiction exist[ed]," as middleware was still a "nascent" threat even though it was not yet competing directly in Microsoft's operating-system market, and "[n]othing in *§ 2* of the *Sherman Act* limits its prohibition to actions taken against **[*16]** threats that are already well-developed enough to serve as present substitutes." Id. So too here: actions taken against Vine and Circle may have been anticompetitive even though those firms were not **[**35]** Facebook Blue's competitors in a properly drawn product market.

Second, Defendant maintains, the FTC has neglected to allege any facts regarding the "cross-elasticity of demand between [PSN services] and [potential] substitutes for it." *Sky Angel, 947 F. Supp. 2d at 103* (citation omitted); see MTD FTC at 11-12. ***HN8***[] Cross-elasticity of demand is a measure of the degree to which "the rise in the price of [one] good] . . . would tend to create a greater demand for other like goods." *Queen City Pizza, 124 F.3d at 437-38* & n.6. It is thus one "measure of reasonable interchangeability." *Id. at 438 n.6*. There is no authority, however, supporting Facebook's argument that Plaintiff must plead specific facts regarding the price or non-price terms under which PSN-service users would switch (if ever) to alternatives. Instead, at this stage the FTC may permissibly plead that certain "factors" of both the service at issue and its potential substitutes — *e.g.*, their "price, use[,] and qualities" — render them not "reasonably interchangeable" in the eyes of users. *Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991)*; see, e.g., *RealPage, Inc. v. Yardi Sys., Inc., 852 F. Supp. 2d 1215, 1225 (C.D. Cal. 2012)* (denying motion to dismiss where complaint explained in qualitative terms why certain "conceivably interchangeable substitutes" were not "specialized to the needs" of defendant's customers); *CollegeNet, Inc. v. Common Application, Inc., 355 F. Supp. 3d 926, 958 (D. Or. 2018)* (same where complaint **[**36]** alleged that product's "distinct features" made it such that customers "would not turn to [alternatives] in response to" price increase); see also Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** vol. IIB, ¶ 531f, at 252 & n.24 (4th ed. 2014) (suggesting only that "some detail about lack of interchangeability should be given" in complaint). That is what the agency has done here, albeit in a somewhat lean fashion. See Redacted Compl., ¶¶ 58-60.

Defendant next directly takes aim at the FTC's allegation that users of PSN services would not switch, if prodded by a price increase or quality decrease in a PSN service, to other means of communicating and sharing with their personal connections that lack a "connection-finder" built on the user's social graph (the third leg of the agency's definition of a PSN). See MTD FTC at 17-19; see also ECF No. 62 (Reply FTC) at 7. That is implausible, Facebook contends, because it is "obvious that people" also know how to "connect and share with family and friends . . . via many [other] technologies," such as "email, messaging, photo-sharing, and video-chats." MTD FTCat 18 (internal quotation marks omitted). This argument asks the Court to engage **[**37]** in the sort of "deeply fact-intensive inquiry" that is improper at this stage. *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 443-44 (4th Cir. 2011)* (quoting *Todd, 275 F.3d at 200*). Although open to dispute, the agency's allegation that users view services with and without a social-graph-based connection-finder as fundamentally different and non-interchangeable is "at least . . . theoretically rational," *Bayer Schering Pharma AG v. Sandoz, Inc., 813 F. Supp. 2d 569, 577 (S.D.N.Y. 2011)* (citation omitted), and thus hardly "facially unsustainable," *RealPage, 852 F. Supp. 2d at 1224*, or "untenable on its face." *Suture Exp., Inc. v. Cardinal Health 200, LLC, 963 F. Supp. 2d 1212, 1222 (D. Kan. 2013)*. This is therefore not one of the "relatively rare" cases of a "glaring deficienc[y]" in the market-definition pleadings that renders dismissal **[*17]** at the 12(b)(6) stage appropriate. *Kolon Indus., 537 F.3d at 444*.

Facebook's final fruitless market-definition argument is that the Complaint impermissibly distinguishes PSN services from other possible substitutes based on their "primar[y] uses." MTD FTC at 19. The company asserts that the question is whether other services "can perform the same function[s]" as PSN services, not whether they are primarily used that way. Id. (quoting and adding emphasis to *Cupp v. Alberto-Culver USA, Inc., 310 F. Supp. 2d 963, 970 (W.D. Tenn. 2004)*). That misstates the law. ***HN9***[] The analysis looks to both "whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other." *H&R Block, 833 F. Supp. 2d at 51* (emphasis **[**38]** added); see also *United States v. Aetna Inc., 240 F. Supp. 3d 1, 19 (D.D.C. 2017)* (asking "whether there are other products offered to consumers which are similar in character or use, and how far buyers will go to substitute one commodity for another") (emphasis added). It is for this reason that pen-and-paper do-it-yourself tax prep and assisted tax prep could be outside the market for digital do-it-yourself tax-prep services despite both providing the same basic function, *H&R Block, 833 F. Supp. 2d at 54*, and that Medicare Advantage plans and Original Medicare plans could constitute distinct product markets despite both being capable of providing healthcare insurance to seniors. *Aetna, 240 F. Supp. 3d at 19, 41*. All Plaintiff must do at this stage is provide a "plausible explanation as to why" users would not switch, even if they technically could, from PSN services to other services if prompted by a price hike. *Todd, 275 F.3d at 200*; cf. *Concord Assocs., L.P. v. Ent. Properties Tr., 817 F.3d 46, 54 (2d Cir. 2016)* (requiring "a plausible basis for explaining why [a proffered distinction] makes the difference" to consumers). While the agency certainly could have provided more on that front, the fact that other services are not primarily used for the sort of personal sharing that is the hallmark of a PSN service seems a plausible reason why little switching would occur. Whether due to network effects or **[**39]** the norms around what sort of content is generally posted on different platforms, it is not a stretch to imagine that users are reluctant to share a highly personal milestone on LinkedIn or post a video of their child's first steps to YouTube.

2. *Market Share*

Although the Court therefore finds that the Complaint's allegations do enough to make out a plausible market for PSN services, that hardly ends the analysis. ***HN10***[] After all, while courts typically evaluate market definition and market share separately, the two inquiries ultimately come together to produce the conclusion that matters: the defendant's market power. See *Cupp, 310 F. Supp. 2d at 971, 975*. That point can be lost if courts "compartmentalize the two issues" and examine the sufficiency of a plaintiff's market-share showings without looking back to how convincingly, or "how tenuously," the market has been defined. See Areeda & Hovenkamp, ¶ 531, at 257. Particularly where "the market is idiosyncratically drawn," the treatise authors explain, findings or allegations as to a "particular 'market share' carr[y] much less meaning." Id.

This case, at least as pleaded by the FTC, exemplifies that principle. Although the Court, as just explained, finds the contours of **[**40]** the asserted product market plausible, the Complaint is undoubtedly light on specific factual allegations regarding consumer-switching preferences. Given that thin showing, and the fact that the PSN-services product market is somewhat "idiosyncratically drawn" to begin **[*18]** with, the Court must demand something more robust from Plaintiff's market-share allegations. As it happens, however, those allegations are even more tentative: the FTC alleges only that Facebook has "maintained a dominant share of the U.S. personal social networking market (in excess of 60%)" since 2011, see Redacted Compl., ¶ 64, and that "no other social network of comparable scale exists in the United States." Id., ¶ 3. That is it. These allegations — which do not even provide an estimated actual figure or range for Facebook's market share at any point over the past ten years — ultimately fall short of plausibly establishing that Facebook holds market power. Given that finding, the court need not address the issue of whether the FTC has sufficiently alleged entry barriers.

Off the bat, there is ample authority that the FTC's bare assertions would be too conclusory to plausibly establish market power in any context. **[**41]** See *Synthes, Inc. v. Emerge Med., Inc., No. 11-1566, 2012 U.S. Dist. LEXIS 140251, 2012 WL 4473228, at *11 (E.D. Pa. Sept. 28, 2012)* (allegation that defendant "is a monopoly . . . with over 50% market share" was a "threadbare recital unsupported by factual allegations [that] the Court need not accept . . . as true"); *Syncsort Inc. v. Sequential Software, Inc., 50 F. Supp. 2d 318, 330 (D.N.J. 1999)* ("Here, [plaintiff] recited in conclusory fashion that [defendant] 'controls the majority of the [relevant] market.' . . . [T]his single statement of market power in the pleadings . . . is an insufficient allegation of the possession of monopoly power."); *Korea Kumho Petrochemical v. Flexsys Am. LP, No. 07-1057, 2008 U.S. Dist. LEXIS 68559, 2008 WL 686834, at *9 (N.D. Cal. Mar. 11, 2008)* (holding that "[a]lthough [p]laintiff need not necessarily quantify [defendant's] market share with precision," allegation that defendant "domina[ted] . . . the [relevant] market" fell short of requirement to "assert some facts in support of its assertions of market power"); *EuroTec Vertical Flight Sols., LLC. v. Safran Helicopter Engines S.A.A., No. 15-3454, 2019 U.S. Dist. LEXIS 129084, 2019 WL 3503240, at *3 (N.D. Tex. Aug. 1, 2019)* (noting that bare allegation of "market share of over 50 percent" was "conclusory"); *Sherwin-Williams Co. v. Dynamic Auto Images, Inc., No. 16-1792, 2017 U.S. Dist. LEXIS 174303, 2017 WL 3081822, at *7 (C.D. Cal. Mar. 10, 2017)* ("[Claimants'] allegation that [firm] maintains a 'a stranglehold in the automotive paint industry' is . . . conclusory" and thus "lacks sufficient detail for the Court to plausibly infer . . . sufficient market power."). It is hard to imagine a market-share allegation that is much more conclusory than the FTC's here.

Even accepting that merely alleging market share "in excess of 60%" **[**42]** might sometimes be acceptable, it cannot suffice in this context, where Plaintiff does not even allege what it is measuring. Indeed, in its Opposition the FTC expressly contends that it need not "specify which . . . metrics . . . [or] 'method' [it] used to calculate Facebook's [market] share." FTC Opp. at 18. In a case involving a more typical goods market, perhaps the Court might be able to reasonably infer how Plaintiff arrived at its calculations — *e.g.*, by proportion of total revenue or of units sold. See U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines § 5.2 (2010) (suggesting these to be the typical methods). As the above market-definition analysis underscores, however, the market at issue here is unusual in a number of ways, including that the products therein are not sold for a price, meaning that PSN services earn no direct revenue from users. The Court is thus unable to understand exactly what the agency's "60%-plus" figure is even referring to, let alone able to infer the underlying facts that might substantiate it.

[*19] Rather than undergirding any inference of market power, Plaintiff's allegations make it even less clear what the agency might be measuring. The overall **[**43]** revenues earned by PSN services cannot be the right metric for measuring market share here, as those revenues are all earned in a separate market — *viz.*, the market for advertising. See Redacted Compl., ¶ 164; see also, e.g., id., ¶ 101 (noting that prior to its acquisition, in addition to competing in the PSN services market, "Instagram also planned and expected to be an important advertising competitor" to Facebook). Percent of "daily users [or] monthly users" of PSN services — metrics the Complaint mentions offhandedly, see Redacted Compl., ¶¶ 3, 97 — are not much better, as they might significantly overstate or understate any one firm's market share depending on the various proportions of users who have accounts on multiple services, not to mention how often users visit each service and for how long.

What about the share of total time spent by users on PSN services? Plaintiff says nothing about that metric in its Complaint. And although it seems tenable at first glance, that metric may also be of limited utility. That is because at least some of the features offered by a Facebook or Instagram or Path are not, seemingly, part of those firms' PSN-services offerings as defined by the **[**44]** FTC; time spent on those apps or websites, accordingly, is not necessarily time spent on a PSN service. The Commission, for instance, expressly alleges that social-networking services based on "interest-based . . . connections" such as Strava are not, by its definition, PSN services. Id., ¶ 58. That definition of what is in the market, perhaps counterintuitively to Facebook users, would mean that time a user spends engaging with specific interest-based Facebook pages or groups may not qualify as time spent on a PSN service. The same problem arises when a user "passive[ly] consum[es]" "online video" on a PSN service. Id., ¶ 59. To the extent that, say, Instagram users spend their time on the site or app watching a comedy routine posted by the official page of a famous comedian, are they spending time on a PSN service? If not, as the Complaint suggests is the case, id., then time spent "on Facebook" or "on Instagram" bears an uncertain relationship to the actual metric that would be relevant: time spent using their PSN services in particular. Put another way, the uncertainty left open by the Complaint as to exactly which features of Facebook, Instagram, *et al.* do and do not constitute **[**45]** part of their PSN services, while not necessarily rendering the alleged PSN-services market implausible, compounds the trouble created by the FTC's vaguer-still allegations regarding Facebook's share of that market.

Nor do the difficulties stop there. Readers may well have noticed that the discussion to this point has consistently referred to Instagram and Facebook as examples of PSN services. That is because, outside of Path, Myspace, and Friendster, all of which seem to be long defunct or quite small, see id., ¶¶ 38, 41, 153, Plaintiff's Complaint does not identify any other providers of PSN services. Yet the FTC is apparently unwilling to allege that Facebook has ever (pre- or post-Instagram acquisition) had something like 85% or even 75% market share; instead it hedges by offering only that the number is somewhere north of 60%. The question naturally arises: which firms make up the remaining 30-40%? Cf. *Cupp, 310 F. Supp. 2d at 971* ("Without a[n] . . . accounting of the brands and suppliers to be included in the relevant market, the Court cannot determine [its] boundaries . . . . [and] is thus unable to assess Defendants' market power."); *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 437 [*20] (6th Cir. 2008)* ("Without an explanation of the other insurance companies involved, **[**46]** and their products and services, the court cannot determine the boundaries of the relevant product market and must dismiss the case for failure to state a claim."). Although Plaintiff is correct that it is not required to identify every alleged competitor in its pleadings, its choice to identify essentially none is striking. Especially when combined with its refusal to offer any clue as to how it calculated its noncommittal market-share number, the Court cannot see how the Commission has "nudged [its market power] claims across the line from conceivable to plausible." *Twombly, 550 U.S. at 570*. Its "complaint must [therefore] be dismissed." Id.

The Court's decision here does not rest on some pleading technicality or arcane feature of ***antitrust law***. ***HN11***[] Rather, the existence of market power is at the heart of any monopolization claim. As the Supreme Court explained in *Twombly*, itself an antitrust case, "[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id. at 558* (citations omitted). Here, this Court must exercise that power. The FTC's Complaint says almost nothing concrete on the key question of how much power Facebook **[**47]** actually had, and still has, in a properly defined antitrust product market. It is almost as if the agency expects the Court to simply nod to the conventional wisdom that Facebook is a monopolist. After all, no one who hears the title of the 2010 film "The Social Network" wonders which company it is about. Yet, whatever it may mean to the public, "monopoly power" is a term of art under federal law with a precise economic meaning: the power to profitably raise prices or exclude competition in a properly defined market. To merely allege that a defendant firm has somewhere over 60% share of an unusual, nonintuitive product market — the confines of which are only somewhat fleshed out and the players within which remain almost entirely unspecified — is not enough. The FTC has therefore fallen short of its pleading burden.

That said, because it believes that the agency may be able to "cure [these] deficiencies" by repleading, *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*, the Court will dismiss without prejudice only the Complaint, not the entire case, leaving Plaintiff "free to amend [its] pleading and continue the litigation." *Ciralsky, 355 F.3d at 666* (citation omitted) (explaining that dismissal without prejudice of the complaint, as opposed to the case **[**48]**, is not final). Whether and how the agency chooses to do so is up to it.

* * *

While the court could end here, it believes it profitable to provide some guidance to the parties should the case proceed. It thus offers some further legal analysis on two issues raised by the FTC's allegations. For ease of organization, that discussion will "analyze the various" components of the agency's *Section 2* claim — namely, the Platform-policies component and the acquisitions component — "individually," even though Plaintiff technically frames its challenge as an attack on Facebook's overall course of anticompetitive conduct. See *City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 928-29 (2d Cir. 1981)*. It begins by explaining why, in accord with its analysis in the parallel State case, even assuming that the FTC can establish market power here, its allegations as to Facebook's Platform-related conduct cannot be a basis for injunctive relief under *Section 13(b)*. It then offers the agency some consolation: assuming again that market power can be demonstrated, **[*21]** *Section 13(b)* does, *pace* Facebook, allow the FTC to seek injunctive relief based on the Instagram and WhatsApp acquisitions.

B. Platform Policies

By way of refresher, Plaintiff alleges that Facebook adopted and enforced a number **[**49]** of anticompetitive policies governing the use of its APIs. Most prominently, in 2013 it announced a policy of refusing to allow third-party, freestanding apps (like the chess app or the Washington Post app discussed above) to access those APIs if they "replicate[d] [Facebook's] core functionality" — *i.e.*, if they competed with Facebook Blue. See Redacted Compl., ¶¶ 136, 143. Facebook then enforced that policy against a number of freestanding apps, revoking API permissions after having previously offering them access. Id., ¶¶ 152-56. The FTC, like the States in the parallel action, see Mem. Op., No. 20-3589 at 22, contends that these actions represent unlawful "conditional dealing" or unlawful "refusal[s] to deal" with apps that had their API access revoked or blocked. See FTC Opp. at 31, 33.

This Court, however, agrees with Facebook's bottom-line contention that neither theory offers a viable basis for an injunction under *Section 13(b) of the FTC Act*. That result follows from three conclusions. First, under current antitrust doctrine, Facebook's general policy of refusing to provide API access to its competitors does not itself violate *Section 2*. Second, although specific instances in which **[**50]** Facebook revoked a competitor's API permissions (after previously providing it access) might have violated *Section 2*, the last alleged instance occurred in 2013, so there is no way in which Facebook "is violating" or "is about to violate" the antitrust laws, which is a necessary condition for an injunction under *Section 13(b)*. See *15 U.S.C. § 53(b)*. Third, and more prosaically, Plaintiff has failed to plead facts to support a "conditional dealing" theory. The Court looks at the first two together and then moves to the third.

For those who will consider this Opinion alongside the Court's companion Opinion in the State case, the following "legal framework" section is the same in both. The analysis that follows diverges somewhat given the different legal regimes governing suits by States and suits by the FTC, although the outcome is similar.

1. *Refusal to Deal*

a. Legal Framework

HN12[] The central principle that governs refusal-to-deal claims is that, as a general matter, a monopolist has "the right to refuse to deal with other firms," which includes the right to "refus[e] to cooperate with rivals." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*). That is because "[m]onopolists are both expected and permitted to compete like any other firm," and "[p]art of **[**51]** competing like everyone else is the ability to make decisions about with whom and on what terms one will deal." *Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 454 (7th Cir. 2020)* (citations omitted). This general no-duty-to-deal rule holds even where a monopolist refuses to deal with its competitor merely "in order to limit entry," *Trinko, 540 U.S. at 407* — in other words, because it wants to prevent that rival from competing with it. See, e.g., *Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375-76 (7th Cir. 1986)* ("Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors" and thus no duty "to extend a helping hand to new **[*22]** entrants [or] help [rivals] survive or expand . . . ."); *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th Cir. 2013)* ("Even a monopolist generally has no duty to share . . . its intellectual or physical property with a rival."); *FTC v. Qualcomm Inc., 969 F.3d 974, 993 (9th Cir. 2020)* ("As the Supreme Court has repeatedly emphasized, there is no duty to deal under the terms and conditions preferred by a competitor's rivals.") (quoting *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 457, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*); *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1184 (9th Cir. 2016)* (rejecting argument that refusal to deal is unlawful because it was motivated by "intent to foreclose competition").

These decisions, to be clear, "are not premised on the view that [monopolist refusals to deal] are incapable of harming competition"; obviously, "refusals to aid new entrants can indeed" have that effect. See Daniel A. Crane, Does Monopoly **[**52]** Broth Make Bad Soup?, 76 Antitrust L.J. 663, 669 (2010). ***HN13***[] Rather, the rule declaring unilateral refusals to deal essentially "per se lawful," id. at 666, or "presumptive[ly] legal[]," *Novell, 731*

F.3d at 1073, rests on three overriding considerations of antitrust policy. First, and most importantly, "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Trinko, 540 U.S. at 407-08*. Put another way, already large and successful firms "might be deterred from investing, innovating, or expanding . . . with the knowledge [that] anything [they] creat[e] [they] could be forced to share," while "smaller [competitors] might be [similarly] deterred, knowing [they] could just demand the right to piggyback on [their] larger rival." *Novell, 731 F.3d 1073*. That equilibrium would hinder, rather than advance, consumer welfare. See *Olympia Equip. Leasing, 797 F.2d at 379* ("Consumers would be worse off if a firm with monopoly power had a duty to extend positive assistance to new entrants, or having extended it voluntarily a duty **[**53]** to continue it indefinitely."). Second, "compelled sharing puts federal courts in the role of central planners," requiring them to pick and choose the applicable terms and conditions of the forced sharing they would order "despite their being ill-equipped to assume this role." *Aerotec, 836 F.3d at 1183*. Finally, "compelled sharing may actually provide opportunities for collusion" between the monopolist and its rival or rivals. Id. Collusion is "the supreme evil of antitrust," *Trinko, 540 U.S. at 408*, and itself quite "injuri[ous] to consumers and the competitive process alike." *Novell, 731 F.3d at 1073*.

HN14[] Nevertheless, the general no-duty-to-deal rule does have a "narrow-eyed needle" of an exception, *id., at 1074*, traceable to the Supreme Court's decision in *Aspen Skiing*. In that case, the defendant owned three of the four ski resorts in the Aspen, Colorado, market (making it a monopolist), and it had long operated a joint venture with the fourth (a rival mountain) that provided a ticket good for all four. See *472 U.S. at 588-92*. That joint ticket was profitable for both parties and made customers happy. *Id. at 610*. The defendant Aspen Skiing, however, eventually terminated the joint ticket. Plaintiff Highlands "tried a variety of increasingly desperate measures to re-create the joint ticket," **[**54]** including eventually "offering to buy the defendant's tickets at retail price." *Trinko, 540 U.S. at 408-09*. Aspen Skiing refused to **[*23]** even accept those tickets at its resorts. According to the Court, based on these facts, the jury (which had found liability) could have reasonably concluded that Aspen Skiing "was not motivated by efficiency concerns and . . . was [instead] willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *472 U.S. at 610-11*. That, the Court held, was sufficient for *Section 2* liability.

As the case has come to be understood, Aspen Skiing ran afoul of the *Sherman Act* — despite the general no-duty-to-deal rule — because it acted in a predatory fashion, which is to say it deliberately harmed itself (and consumers) in order to harm its competitor more. Consider the analogy of a predatory pricing scheme, in which a firm prices its goods below its costs and below its rivals' costs with the goal of driving those rivals out of the market and leaving it standing alone; such a scheme works where the predatory firm takes advantage of its greater ability to withstand the losses caused by its below-cost pricing. See *Novell, 731 F.3d at 1075* (drawing this comparison); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (explaining **[**55]** predatory-pricing doctrine). Aspen Skiing was doing something very similar. By terminating a profitable and customer-pleasing joint venture, and refusing to even recreate it by accepting vouchers bought at retail price, it was enduring short-term pain with the exclusive goal of driving its rival (which could not stand that pain) out of the market. The defendant thus lost the usual protection of the general no-duty-to-deal rule, since it had used its general right to choose with whom it deals "as part of a larger anticompetitive enterprise" — *i.e.*, an enterprise aimed at "harming competition," and therefore consumers, "by entrenching a dominant firm and enabling it to extract monopoly rents once the competitor is killed off." *Viamedia, 951 F.3d at 462* (quoting *Novell, 731 F.3d at 1075*) (cleaned up); see also Areeda & Hovenkamp vol. IIIB, ¶ 772d3, at 235.

The "larger anticompetitive enterprise" that characterizes an *Aspen Skiing* violation, crucially, cannot simply be an intent to harm — or, the flip side of the same coin, to avoid helping — a rival or rivals. "In concentrated markets the intent to maintain or improve one's own market position always entails the knowledge that rivals must suffer," and if ***antitrust law*** were to condemn **[**56]** every action taken by a monopolist with the "effect or purpose of limiting competition with itself," there would be little left to the rule that monopolists have no duty to aid their competitors. See Areeda & Hovenkamp, ¶ 772c2, at 220-21. That is why the Supreme Court has described *Aspen Skiing* as "at or near the outer boundary of *§ 2* liability," *Trinko, 540 U.S. at 399*, and "refused to extend liability to various other refusal to deal scenarios." *Novell, 731 F.3d at 1074*; but see *Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of Rhode Island, 311 F. Supp. 3d 468, 483 (D.R.I. 2018)* (arguing that Trinko should not be read as "pulling back the reins on refusal-to-deal claims"). And that is why the touchstone for liability is the sort of predatory design described above: "where the only conceivable rationale or purpose" for the refusal to deal is "to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition." *Aerotec, 836 F.3d at 1184* (citation omitted).

Courts have accordingly coalesced around a three-part test for unlawful refusals to deal, drawn from Aspen Skiing's particular facts and aimed at sniffing out **[*24]** predation while avoiding over-inclusiveness. ***HN15***[] First, "there must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival" with which the monopolist later **[**57]** refuses to deal. *Novell, 731 F.3d at 1074*; *Qualcomm, 969 F.3d at 993*. It was the absence of this preexisting relationship that doomed the plaintiffs in Trinko, as the Court upheld the dismissal of their Aspen Skiing claim at the pleading stage on that basis, despite their allegations that Verizon's refusal to deal with rivals was intended to, and did, blunt their growth. See *540 U.S. at 404-05, 407, 409*. Second, "the refusal to deal [must] involve[] products that the defendant already sells in the existing market to other similarly situated customers." *Qualcomm, 969 F.3d at 994*; see Areeda & Hovenkamp, ¶ 773d3, at 233 (defendant must be "selling [the] particular product or service to others but refu[sing] to sell that same product or service to" the rival) (citing *Trinko, 540 U.S. at 410*). Third, and most importantly, "the monopolist's discontinuation of the preexisting course of dealing must suggest a willingness to forsake short-term profits to achieve an anti-competitive end," *Novell, 731 F.3d at 1075*; see *Qualcomm, 969 F.3d at 993*, rather than to advance a valid business purpose. See also *Covad Commc' ns Co. v. Bell Atl. Corp., 398 F.3d 666, 675, 365 U.S. App. D.C. 78 (D.C. Cir. 2005)* (to prevail on refusal-to-deal claim, plaintiff "will have to prove [that defendant's] refusal to deal caused [defendant] short-term economic loss"). The cases, and the leading treatise, offer a demanding gloss on this prong of the test: *Qualcomm* requires the predatory motivation to be "the only conceivable **[**58]** rationale or purpose" for the otherwise inexplicable profit sacrifice, see *969 F.3d at 993*; Novell asks whether the cessation of dealing was "irrational but for its tendency to harm competition," *731 F.3d at 1076*; and Areeda & Hovenkamp look for "an unexplained, apparently irrational change in an established course of dealing." Areeda & Hovenkamp, ¶ 772d3, at 233.

b. Application

i. Facebook Policies

Applying these principles, it is clear off the bat that Facebook's adoption of a policy of not offering API access to competitors did not, standing alone, violate *Section 2*. ***HN16***[] As set out above, a monopolist has no duty to deal with its competitors, and a refusal to do so is generally lawful even if it is motivated, as Verizon's was in Trinko, by a desire "to limit entry" by new firms or impede the growth of existing ones. See *540 U.S. at 407*. It follows that a firm's merely announcing its choice not to deal with competitors, whatever the motivation for doing so, cannot violate *Section 2*. The FTC's core argument for why the policies themselves are unlawful — that their promulgation was intended to, and did, "change[] the incentives of third-party apps that relied upon the Facebook ecosystem [and thus] deterr[ed] them from including features and functionalities that might compete with Facebook," **[**59]** Redacted Compl., ¶ 25; see also id., ¶¶ 77, 137 — misses the boat. The central teaching of the cases discussed above is that Facebook had no antitrust duty to avoid creating that deterrent. See, e.g., *Olympia Equipment Leasing, 797 F.2d at 375* ("Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors . . . by . . . pulling its competitive punches.").

Facebook's general policy of withholding API access from competitors, moreover, was plainly lawful to the extent it covered rivals with which it had no previous, voluntary course of dealing. (Other rivals are addressed in Section B.1.b.ii., **[*25]** *infra*.) Such prior history of dealing, recall, is a necessary element of an *Aspen Skiing* claim. That is yet another reason why the mere act of announcing or maintaining a general no-dealing-with-competitors policy cannot, in and of itself, violate *Section 2*; rather, the analysis must focus on particular acts. See Areeda & Hovenkamp, ¶ 773e, at 273 (explaining that *Aspen Skiing* violations are "visible and idiosyncratic event[s]"). Consider an example from the Complaint: citing its policies, in early 2013 Facebook blocked the API access of Vine, a new app it viewed as a competitor, mere hours after its launch. **[**60]** See Redacted Compl., ¶ 155. That decision was plainly lawful, per Trinko, because it was prospective: Facebook had not previously allowed Vine to access its APIs. Although the company was enforcing its "replicating core functionality" general policy against Vine, that fact makes no difference to the *Aspen Skiing* analysis; rather, whether the specific refusal to deal with Vine contravened Section 2 depends on the details of the refusal itself.

To be clear, it is possible that were a monopolist to embark on a concerted scheme of serial refusals to deal with rivals, that scheme or "course of conduct" could amount to a separate and independent violation of the *Sherman Act*. See *Microsoft., 253 F.3d at 78* (noting course-of-conduct theory without passing on its validity). Even if such a claim were cognizable, however, simply maintaining a policy of refusing to deal with rivals would not be enough. ***HN17***[] Rather, to be actionable, an unlawful refusal-to-deal scheme would have to be made up of refusals that were themselves independent violations of the *Aspen Skiing* test. See *Simon & Simon, PC v. Align Tech., Inc., No. 19-506, 2020 U.S. Dist. LEXIS 72499, 2020 WL 1975139, at *8 (D. Del. Apr. 24, 2020)* ("Plaintiff's characterization of [the defendant's] otherwise non-actionable refusals to deal as a 'scheme' do[es] not save its claims."); *Eatoni Ergonomics, Inc. v. Rsch. In Motion Corp., 826 F. Supp. 2d 705, 709-10 (S.D.N.Y. 2011)* ("[Plaintiff] **[**61]** does not, and cannot, cite any authority for the proposition that a series of unilateral acts that do not violate the antitrust laws may be aggregated into an unlawful 'course of conduct.'"), aff'd, *486 F. App'x 186 (2d Cir. 2012)*; *Masimo Corp. v. Tyco Health Care Grp., L.P., No. 02-4770, 2004 U.S. Dist. LEXIS 26916, 2004 WL 5907538, at *5-6 (C.D. Cal. June 10, 2004)* (explaining that a course-of-conduct liability theory cannot "allow for clearly legal acts to be thrown into the mix to bolster a plaintiff's antitrust case"). Otherwise, as several scholars have persuasively explained, monopolists might face liability for refusals to deal that are categorically protected from scrutiny for the policy reasons explained above. See Crane, 76 Antitrust L.J. at 666-69; Douglas H. Ginsburg & Koren Wong-Ervin, Challenging Consummated Mergers Under Section 2 (George Mason Univ. L. & Econ. Paper No. 20-14, May 2020), https://bit.ly/3wPRpnx. The FTC, therefore, cannot get anywhere by reframing Facebook's adoption of a policy of refusing to deal with all competitors as the execution of an unlawful scheme of monopoly maintenance. ***HN18***[] Rather, to be actionable, such a scheme must involve specific instances in which that policy was enforced (i) against a rival with which the monopolist had a previous course of dealing; (ii) while the monopolist kept dealing with others in the market; (iii) at a **[**62]** short-term profit loss, with no conceivable rationale other than driving a competitor out of business in the long run.

ii. Specific Refusals

The FTC, to be sure, has alleged several specific refusals to deal that in fact may meet those requirements. All such pleaded instances, however, took place in 2013. See Redacted Compl., ¶¶ 153-56. That fact is fatal to the agency's claim for injunctive **[*26]** relief under *Section 13(b)* here, regardless of whether those specific refusals to deal ran afoul of *Aspen Skiing*, because it means that no actionable violation is either ongoing or about to occur.

HN19[] *Section 13(b)* allows the FTC to "bring suit in a district court of the United States to enjoin" allegedly unlawful conduct only where it has "reason to believe . . . that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC]." *15 U.S.C. § 53(b)*. All agree that *Section 2* of the *Sherman Act* is such a provision. As the Supreme Court has recently explained, given that provision's requirement that the defendant "'is violating' or 'is about to violate' (not 'has violated')" the antitrust laws, it contemplates "relief that is prospective, not retrospective." *AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1348, 209 L. Ed. 2d 361 (2021)*; see also *FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 774 (7th Cir. 2019)* **[**63]** ("*Section 13(b)* serves a . . . forward-facing role: enjoining ongoing and imminent future violations."); *FTC v. Evans Prod. Co., 775 F.2d 1084, 1087 (9th Cir. 1985)* (holding that *Section 13(b)* "contemplate[s] ongoing or future violations" and thus "an injunction will issue only if the wrongs are ongoing or likely to recur"). As one court has put it, *Section 13(b)* therefore "does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant 'is' committing or 'is about to' commit another violation." *Shire ViroPharma, 917 F.3d at 156*.

This constraint on Section 13(b)'s scope does not, it is worth noting, leave antitrust violations beyond the reach of the federal civil authorities. ***HN20***[] For one thing, the Department of Justice has broad authority to seek injunctive relief in antitrust cases. See *15 U.S.C. §§ 4*, *25*. And as to the FTC itself, "ever since [its] creation in 1914, it has been authorized to enforce the [law] through its own administrative proceedings" under Section 5(b) of the FTC Act. *AMG Cap. Mgmt., 141 S. Ct. at 1346*. *Section 5(b)* allows the agency to conduct such a proceeding against "person [who] has been or is" violating the antitrust laws. See *15 U.S.C. § 45(b)* (emphasis added). If it goes that route and prevails, the agency can then seek a court's help in enforcing its orders, including via monetary penalties, 15 U.S.C. § 57b, "mandatory injunctions[,] and such other further and equitable relief as [the court] deem[s] appropriate." Id. § 45(l). Thus, as Shire ViroPharma explained, "[i]f the FTC wants to [address] a past violation — where an entity 'has been' violating the law — it must use Section 5(b)." 917 F.3d at 159 (quoting 15 U.S.C. § 45(b)). Section 13(b), by contrast, mainly exists to "address[] a specific **[**64]** problem, namely, that of stopping seemingly unfair practices" (including antitrust violations) that are ongoing or about to occur "from taking place" until the Commission can complete an adjudication. AMG Cap. Mgmt., 141 S. Ct. at 1348.

Here, given the Court's conclusions above, the FTC cannot use 13(b) to challenge Facebook's Platform-related conduct because it has not pleaded that any actual Section 2 violation is ongoing or about to occur. The closest the agency comes is its allegation that, "[h]aving suspended its anticompetitive platform policies [in December 2018] in response to anticipated public scrutiny, Facebook is likely to reinstitute such policies if such scrutiny passes." Redacted Compl., ¶ 149 (emphasis added). Even if the mere resumption of Facebook's no-dealing-with-competitors policies were itself unlawful — which, as just explained at length, it is not — that conditional and conclusory allegation would be insufficient to establish **[*27]** the requisite imminence. See, e.g., Shire ViroPharma, 917 F.3d at 153, 160 (finding allegation that "[a]bsent an injunction, there is a cognizable danger that [defendant] will engage in similar conduct" because it had the "incentive and opportunity" to do so "woefully inadequate to state a claim under Section 13(b)"). There **[**65]** are no facts alleged, moreover, suggesting that the antitrust "scrutiny" the company is facing is "about to" pass or indeed will pass at any time in the foreseeable future. Indeed, a quick glance at any newspaper yields the contrary conclusion.

The more fundamental problem, of course, is that Facebook would not only have to imminently reinstate its policies, but it would also have to imminently take the kind of further action that might come within Aspen Skiing: target its competitors with which it had a previous, voluntary course of dealing for API revocation in a manner that suggests predatory, short-term-profit-sacrificing behavior. The FTC has certainly not alleged that that specific sort of conduct is "about to" occur. Nor could it since, according to the Complaint, Facebook has not actually taken such an action in nearly eight years. See Shire ViroPharma, 917 F.3d at 160 (finding inadequate allegation that defendant would likely resume conduct where "complaint contain[ed] no allegations that [it] had engaged in [that behavior] in the five-year gap between the 2012 cessation . . . and the 2017 lawsuit"); cf. FTC v. AdvoCare Int'l, L.P., No. 19-715, 2020 U.S. Dist. LEXIS 213865, 2020 WL 6741968, at *5-6 (E.D. Tex. Nov. 16, 2020) (finding it "implausible" that defendant's twenty-year scheme of "past misconduct," which ended one year **[**66]** earlier, would recur and thus justify Section 13(b) injunction because the "channel[s] of misconduct [were] either permanently defunct . . . or reformed, lawful, and monitored for compliance").

The agency counters with an argument that is surprising in its breadth. Because the statute says that it may "bring suit" for an injunction "[w]henever [it] has reason to believe . . . that any person . . . is violating, or is about to violate" the antitrust laws, see 15 U.S.C. § 53(b), the FTC contends that the law "confers discretion" on it to decide if such "reason to believe" exists. See FTC Opp. at 41. The upshot, per the agency, is that its "'reason to believe' determination [cannot] be reviewed" on a motion to dismiss. Id. at 39.

The Court finds this position wanting. The agency's argument focuses on the statutory trigger for when it may "bring suit . . . to enjoin" antitrust violations. The question, however, is whether Section 13(b) empowers the agency, as opposed to a court, to decide whether the conditions for an injunction are actually met such that a decree should indeed issue. ***HN21***[] Whatever the law tells the agency about what it must believe before it may file suit, for the agency to actually succeed, **[**67]** it must convince the court to agree with it that a violation is either ongoing or about to occur and that an injunction is warranted. See Evans Products, 775 F.2d at 1087 ("[A]n injunction will issue [under Section 13(b)] only if the wrongs are ongoing or likely to recur."). It follows that the Rule 8 requirement that the FTC must "state a claim to [the relief that it seeks] that is plausible on its face" requires the agency to make a plausible showing that the defendant "is violating" or "is about to violate" the antitrust laws. Nothing in the text of the statute suggests otherwise. See Advocare, 2020 U.S. Dist. LEXIS 213865, 2020 WL 6741968, at *4 (agreeing with this approach); Shire ViroPharma, 917 F.3d at 159 n.17 (declining to address argument that FTC has "unreviewable discretion to file suit" because it was not raised below, but expressing view that it is "unpersuasive").

[*28] Even accepting the FTC's argument, the two cases it cites — only one of which really embraces its "internal standard argument," *FTC v. Hornbeam Special Situations, LLC, 391 F. Supp. 3d 1218, 1223 (N.D. Ga. 2019)* — still appear to have required the agency to "set[] forth at least some facts to support a reasonable inference that the [unlawful] behavior will reoccur in the future in the absence of . . . injunctive relief." Id.; see also *FTC v. Vyera Pharms., LLC, 479 F. Supp. 3d 31, 44 (S.D.N.Y. 2020)* (noting several facts alleged that supported a "'reason to believe' that the defendants [were **[**68]** then] engaging in violations"). Here, for the reasons given above, the Court would find that Plaintiff's Complaint does not clear even that somewhat lower bar.

In sum, then, while it is possible that Facebook's alleged scheme of revoking API access from competitor apps could form the basis of a plausible refusal-to-deal claim under *Aspen Skiing*, the Court need not address that question. Even assuming the answer is yes, injunctive relief is not available now for such a claim as a matter of law.

2. *Conditional Dealing*

Plaintiff gets no further by maintaining that Facebook's policies also violated antitrust rules against what they call "conditional dealing." FTC Opp. at 31. As an initial matter, the FTC is wrong to argue that a monopolist violates that so-called doctrine whenever it "induce[s] . . . trading partners or other firms not to compete with it . . . by conditioning access to some resource of the monopolist." Id. The main case they cite for that proposition, *Lorain Journal Co. v. United States, 342 U.S. 143, 149, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*, says nothing of the sort. That is unsurprising, as such a broadly formulated rule would cover refusals to deal with competitors, thus contradicting the cases discussed above — such refusals can always be reframed as offers **[**69]** to deal only on the condition that the third party refrains from competing. See, e.g., Herbert Hovenkamp, FRAND and Antitrust, *105 Cornell L. Rev. 1683, 1697 (2020)* (defining "simple refusal[s] to deal" covered by Trinko rule to include "refusal[s] . . . conditioned on a firm's status that cannot readily be changed," such as where a firm "agree[s] to sell to [non]competitors but not []competitors").

HN22[] To the extent any scholarly commentary uses the term "conditional dealing," rather, the phrase generally refers to actions such as "tying" or "exclusive dealing." *Id. at 1697, 1708*. The key fact distinguishing such conduct from a standard refusal to deal is that it is not "unilateral," but instead "involves some assay by the monopolist into the marketplace" that interferes with the relationship between rivals and third parties. *Novell, 731 F.3d at 1072*. Tying, for instance, occurs when a firm "require[s] third parties to purchase a bundle of goods rather than just the ones they really want," id., thereby leveraging the monopolist's power in the "tying" product market to harm its competitors (who lose access to customers) in the "tied" product market. See *Microsoft, 253 F.3d at 84*. "Exclusive dealing" is similar: it refers to a monopolist's conditioning the sale of a product on the buyer's **[**70]** agreement not to deal with its competitors. *Id. at 70-71*. Again, these "conditional dealing" schemes are thus categorically different from unilateral conduct that involves only the monopolist's competitors, such as its refusal to deal with them. The distinction is critical, as ***antitrust law*** is far more tolerant of unilateral behavior. See *Novell, 731 F.3d at 1072-73* (citing cases) ("Put simply if perhaps a little too simply, today a monopolist is much more likely to be held liable for failing to leave its rivals alone than for **[*29]** failing to come to their aid."); Hovenkamp, *105 Cornell L. Rev. at 1697*.

That brings us back to *Lorain Journal*, which, as it happens, involved a "a very special form of exclusive dealing, namely, a refusal to sell to end-user customers who purchase[d] from the monopolist's competitor[]." Kenneth L. Glazer & Abbott B. Lipsky, Jr., Unilateral Refusals to Deal Under Section 2 of the *Sherman Act*, 63 Antitrust L.J. 749, 800 n.75 (1995). There, the Journal, a local newspaper, had a "commanding" position in the advertising market of the city of Lorain, Ohio. See *342 U.S. at 146*. After a new radio station entered that market, the paper began to refuse to sell advertising space "in the Journal [to] any Lorain County advertiser who advertised or who [the paper] believed to be about to advertise" **[**71]** with the radio station. *Id. at 148*. The paper's bet was that many advertisers could not afford to lose out on the chance to advertise with it, and it was right; the scheme caused most firms to avoid advertising on the radio station, restoring the Journal to its local monopoly. *Id. at 148-49*. On those facts, the Court found a violation of *Section 2* of the *Sherman Act*. *Id. at 152-53*. The key point for our purposes is that the Journal did not simply refuse to deal with the competitor radio station — *e.g.*, it did not merely refuse to print advertisements for the station itself in its pages. The Journal instead refused to deal with any and all customers unless those customers agreed not to deal with the competitor station, thereby interfering with its rival's ability to compete on the merits.

For "Facebook's conditioning of access to its Platform [to be] unlawful under *Lorain Journal*" (or exclusive-dealing doctrine generally), as Plaintiff argues that it is, see FTC Opp. at 34, the agency would thus have to allege that Facebook conditioned access to its Platform APIs on app developers' agreeing not to deal with other social-networking services. And, indeed, the FTC 's Opposition suggests that Facebook did just that. See FTC Opp. at **[**72]** 32 ("Facebook . . . grant[ed] third parties full access to its Platform only on the condition that they not threaten its monopoly by [*inter alia*] connecting with or promoting other PSN providers."); id. at 31 ("Facebook conditioned access to its Platform on trading partners not competing with it or assisting competitors.") (emphasis added). If Facebook's policies had in fact interfered in that way with the ability of competing social-networking services to deal with app developers, that could plausibly have violated Section 2; such conduct might well have had a "significant effect in preserving [Facebook's] monopoly" by keeping user engagement with competing social-networking services "below the critical level necessary for any rival to pose a real threat to [its] market share." *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 191 (3d Cir. 2005)* (finding *Section 2* liability based on exclusive dealing); see also *Microsoft, 253 F.3d at 69-70* (same).

Plaintiff, however, has not sufficiently pleaded the sort of conduct just described. It is true that Facebook's 2011 policy prohibited "Apps on Facebook" from "integrat[ing], link[ing] to, promot[ing], distribut[ing], or redirect[ing] to any app on any other competing social platform." Redacted Compl., ¶ 139. But, as discussed above, that policy **[**73]** applied only to apps designed for use within the Facebook website, not freestanding, separate apps like our chess app or Washington Post app. The policy, moreover, does not appear to have prevented an app developer from building a version of its app that could be accessed and used within the website of another PSN service. For instance, the developer who built a personality-test app **[*30]** for Facebook could build the same app for Google+ without running afoul of the policy, cf. id., ¶ 140; its terms simply prohibited the Facebook version of the app from linking or redirecting to the Google+ version. The 2011 policy was thus a far cry from a policy that told app developers that they could only access Facebook's platform if they promised to only build their app for Facebook. By rough analogy, it is as if the Lorain Journal, rather than refusing to carry advertisements from any business that also advertised with the competing radio station, instead merely required that advertisements appearing in its paper had to avoid mentioning the radio station. Such a focused prohibition on the use of a monopolist's own facilities obviously could not have "significantly limited" the "opportunities for [competitors] **[**74]** to enter into or remain in [the] market" for personal-social-networking services, as is required for *Section 2* liability. *Microsoft, 253 F.3d at 69*.

The 2012 and 2013 policies mentioned in the Complaint similarly did not much limit the opportunities for Facebook competitors to deal with third-party app developers. The 2012 policy allegedly prohibited freestanding apps (*i.e.*, not "Apps on Facebook") from "us[ing] Facebook Platform [APIs] to export [Facebook] user data into a competing social network." Redacted Compl., ¶ 142. The 2013 policy went further, instructing that freestanding apps could not use Facebook's APIs "to promote, or to export [Facebook] user data to, a product or service that replicates a core Facebook product or service." Id., ¶ 143. By their terms, neither of these policies imposed anything approaching a blanket prohibition on freestanding apps' linking to or creating interoperability with Facebook competitors. It is not as if, say, Facebook instructed the Washington Post that its app could only allow a user to sign in with Facebook credentials (as opposed to, say, Google credentials), or only add a Facebook "Like" button and not a "share" button from Path or Circle. Nor did Facebook require the app **[**75]** to refrain from allowing users to search for their contacts from other social-networking services, as they did for their Facebook friends using the Find Friends API. Perhaps the FTC means to hang its hat on a very capacious reading of the policy's prohibition on using Facebook Platform to "promote" competitors, but reading that term to prohibit the sort of dealings just described is implausible at best. That is especially true given that the Complaint alleges no specific instances of Facebook's enforcing its policies to prevent dealing between rivals and other freestanding apps, even as it is replete with allegations regarding Defendant's enforcement of its "no dealing with competitors" policies. See id., ¶¶ 153-58. Plaintiff's "conditional dealing" theory of a *Section 2* violation, accordingly, is not viable here given the conduct that it has alleged.

In summary, the Court concludes — and advises the parties going forward — that in its view, Facebook's "imposition and enforcement of anticompetitive conditions on access to [its] APIs," id., ¶ 71, as that conduct has been pleaded, either does not amount to exclusionary conduct violating *Section 2* of the *Sherman Act* or, to the extent that it might, cannot **[**76]** be the basis for an injunction under *Section 13(b)* of the FTC Act.

C. Challenging Acquisitions under Section 13(b)

Before closing, the Court addresses one further issue raised by Facebook in its Motion to Dismiss: whether, even assuming market power can be established, *Section 13(b)* allows the FTC to attack Facebook's acquisitions of Instagram and WhatsApp. See MTD FTC at 39. Facebook argues that because those acquisitions **[*31]** happened all the way back in 2012 and 2014, respectively, Plaintiff's challenges do not contend that the company "is violating" or "is about to violate" *Section 2*. See *15 U.S.C. § 53(b)*. In other words, Defendant maintains that the FTC's assault on its mergers is aimed at the sort of "long-past conduct" that cannot form the basis of an injunction under *Section 13(b)*. *Shire ViroPharma, 917 F.3d at 156*. (Following the lead of the parties and the cases, the Court uses the terms "acquisition" and "merger" interchangeably for purposes of this analysis.)

While Facebook's argument has some intuitive appeal, it runs into contrary precedent. ***HN23***[] The Supreme Court has clearly stated that the term "acquisition" as used in *Section 7* of the *Clayton Act* — which prohibits purchases "the effect of [which] may be substantially to lessen competition, or **[**77]** to tend to create a monopoly," *15 U.S.C. § 18* — does not refer to "a discrete transaction but [rather] a status which continues until the transaction is undone." *United States v. ITT Cont'l Baking Co., 420 U.S. 223, 241-42, 95 S. Ct. 926, 43 L. Ed. 2d 148 (1975)*. In other words, "acquisition . . . mean[s] both the purchase of rights in another company and the retention of those rights," such that *Section 7*'s "ban against [certain] acquisitions . . . include[s] a ban against holding certain assets," not just "obtaining" them in the first place. Id. (emphasis added); see also *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1050 (8th Cir. 2000)* ("*Clayton Act* claims are not limited to challenging the initial acquisition of stocks or assets . . . since holding as well as obtaining assets is potentially violative of *section 7*.") (citation omitted). As ITT Continental Baking explained, that understanding is the necessary upshot of the Court's earlier decision in *United States v. E.I. du Pont, 353 U.S. 586, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)*, which held that the United States could seek divestiture in 1949 of stock that du Pont had first acquired, and was still holding, in 1919. The rule under *Section 7* is thus that so long as an acquiring company continues to hold acquired assets, the Government may "at any time" argue that such company is violating *Section 7*. *Du Pont, 353 U.S. at 597*. In such a case, it would follow that the company "is violating . . . [a] provision of law enforced by the [Commission]" **[**78]** and thus comes within the ambit of *Section 13(b)*. See *15 U.S.C. § 53(b)*.

Because the FTC's challenges to Facebook's acquisitions here arise under *Section 2* of the Sherman Act, not *Section 7* of the Clayton Act, the question becomes whether that same principle applies to claims brought under *Section 2*. The Court sees no reason why not, nor does Facebook offer one. ***HN24***[] Just as "the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may . . . tend to create a monopoly," in violation of *Section 7*'s proscription against transactions having that effect, du *Pont, 353 U.S. at 597*, so too it should be able to proceed against an acquisition whenever "a threat of [*Section 2*'s] prohibited effects is evident," *id. at 598* — namely, that the acquisition is "tend[ing] to destroy competition itself" via "means other than competition on the merits." *Microsoft, 253 F.3d at 58, 62* (citation omitted). It is well established that mergers may constitute one such "means." See *Grinnell, 384 U.S. at 576* (finding *Section 2* violation based in part on a number of acquisitions of competitors); *BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr., 176 F. Supp. 3d 606, 622 (W.D. La. 2016)* ("[A]cquisitions of viable competitors alone may establish the anticompetitive conduct element of a *section 2* claim."); *Behrend v. Comcast Corp.,* ***[*32]*** *No. 03-6604, 2012 U.S. Dist. LEXIS 51889, 2012 WL 1231794, at *20 (E.D. Pa. Apr. 12, 2012)* (same); see also Areeda & Hovenkamp vol. III, ¶ 701a, at 201 (noting "overlap between Sherman Act **[**79]** and *Clayton Act* treatment of mergers," including in "case of mergers as unlawful monopolistic acts by firms with significant market power").

The Court will not speculate further as to how, if at all, the *Section 2* analysis of a claim involving a long-ago merger might differ from that regarding a more recent (or even forthcoming) purchase, including on the issue of remedy. Cf. Areeda & Hovenkamp vol. II, ¶ 320g, at 375 (suggesting that "the considerations underlying the laches doctrine might well be applied against the government" in long-delayed challenges "possibly by adjustment in certain burdens of proof or the remedy"); *United States v. Pullman Co., 50 F. Supp. 123, 127 (E.D. Pa. 1943)* ("While the doctrine of laches does not apply against the United States, we should approach the question of equitable relief with great hesitancy in a case where the last operative act was nearly half a century old."). Facebook has made a number of arguments on this score that need not be addressed now. ***HN25***[] At this point, the Court simply holds that, contrary to the company's main contention, an injunction under *Section 13(b)* is a theoretically available remedy in a *Section 2* challenge to long-ago mergers so long as the defendant still holds the purchased assets or stock, as is the case **[**80]** here.

IV. Conclusion

For the foregoing reasons, the Court will grant Facebook's Motion to Dismiss, but it will dismiss without prejudice only the Complaint, not the case. The Court will also grant leave to amend and order Plaintiff to file any amended Complaint within thirty days. A contemporaneous Order so stating shall issue this day.

Date: June 28, 2021

/s/ James E. Boasberg

JAMES E. BOASBERG

United States District Judge

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

[*none] **ORDER**

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Facebook's Motion to Dismiss is GRANTED;
2. Plaintiff's Complaint is DISMISSED WITHOUT PREJUDICE; and
3. Plaintiff shall file any amended Complaint by July 29, 2021.

/s/ *James E. Boasberg*

JAMES E. BOASBERG

United States District Judge

Date: June 28, 2021

New York v. Facebook, Inc.

United States District Court for the District of Columbia

June 28, 2021, Decided; June 28, 2021, Filed

Civil Action No. 20-3589 (JEB)

Reporter

549 F. Supp. 3d 6 *; 2021 U.S. Dist. LEXIS 127227 **; 2021 WL 2643724

STATE OF NEW YORK, et al., Plaintiffs, v. FACEBOOK, INC., Defendant.

Subsequent History: Affirmed by New York v. Meta Platforms, Inc., 2023 U.S. App. LEXIS 10264 (D.C. Cir., Apr. 27, 2023)

Prior History: FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627 (D.D.C., June 28, 2021)

Core Terms

acquisitions, competitors, users, laches, merger, rivals, monopolist, Redacted, monopoly, injunctive relief, antitrust, Platform, policies, network, anticompetitive, refusals, Plaintiffs', cases, challenges, injunction, advertising, divestiture, integrate, effects, equitable relief, conditions, developers, announced, suits, anti trust law

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

In evaluating a motion to dismiss, the court must treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged. Although detailed factual allegations are not necessary to withstand a Fed. R. Civ. P. 12(b)(6) motion, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face — that is, the facts alleged in the complaint must be enough to raise a right to relief above the speculative level. The court need not accept as true, then, a legal conclusion couched as a factual allegation, nor inferences unsupported by the facts set out in the complaint. And it may consider not only the facts alleged in the complaint, but also any documents either attached to or incorporated in the complaint, and matters of which courts may take judicial notice.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Public Enforcement, State Civil Actions**

The doctrine of parens patriae standing allows a state to bring suit on behalf of its citizens. To do so, a state must assert an injury to what has been characterized as a quasi-sovereign interest, which refers to an interest the State has in the well-being of its populace that is sufficiently concrete to create an actual controversy between the State and the defendant. Although the concept of a quasi-sovereign interest is fairly vague, it includes a state's interest in the continuing prosperity of its economy, such that states have standing to challenge actions whose clear and direct effects would be the substantial disruption of their internal economies. To ensure that such injury to the state's economy is sufficiently severe and generalized, it must stand apart from the interests of particular private parties — in other words, the controversy must in substance implicate the state's interest in economic supervision, and not merely affect the fortunes of a limited class of her citizens. To ensure the requisite breadth of injury, some substantial proportion of the population of the State must be adversely affected by the challenged behavior.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN3[] **Actual Monopolization, Claims**

Section 2 of the Sherman Act prohibits monopoly maintenance, an offense that has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. This second element of a Section 2 violation is usually referred to by the shorthand of "anticompetitive" or "exclusionary" conduct.

Antitrust & Trade Law > Sherman Act > Defenses

HN4[] **Sherman Act, Defenses**

The central principle that governs antitrust refusal-to-deal claims is that, as a general matter, a monopolist has the right to refuse to deal with other firms, which includes the right to refuse to cooperate with rivals. The general no-duty-to-deal rule holds even where a monopolist refuses to deal with its competitor merely in order to limit entry — in other words, because it wants to prevent that rival from competing with it. There is no duty to deal under the terms and conditions preferred by a competitor's rivals.

Torts > ... > Types of Premises > Recreational Facilities > Sports Facilities

HN5[] **Recreational Facilities, Sports Facilities**

Courts have coalesced around a three-part test for unlawful refusals to deal, drawn from Aspen Skiing's particular facts and aimed at sniffing out predation while avoiding over-inclusiveness. First, there must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival with which the monopolist later refuses to deal.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN6[] **Robinson-Patman Act, Claims**

Second, the refusal to deal must involve products that the defendant already sells in the existing market to other similarly situated customers. Third, and most importantly, the monopolist's discontinuation of the preexisting course of dealing must suggest a willingness to forsake short-term profits to achieve an anti-competitive end, rather than to advance a valid business purpose. To prevail on refusal-to-deal claim, a plaintiff will have to prove that the defendant's refusal to deal caused the defendant short-term economic loss. Qualcomm requires the predatory motivation to be the only conceivable rationale or purpose for the otherwise inexplicable profit sacrifice; Novell asks whether the cessation of dealing was irrational but for its tendency to harm competition; and Areeda & Hovenkamp look for an unexplained, apparently irrational change in an established course of dealing.

Antitrust & Trade Law > Sherman Act > Claims

HN7[] **Sherman Act, Claims**

A monopolist has no duty to deal with its competitors, and a refusal to do so is generally lawful even if it is motivated by a desire to limit entry by new firms or impede the growth of existing ones. It follows that a firm's merely announcing its choice not to deal with competitors, whatever the motivation for doing so, cannot violate Section 2 of the Sherman Act.

Torts > ... > Types of Premises > Recreational Facilities > Sports Facilities

HN8[] **Recreational Facilities, Sports Facilities**

Simply maintaining a policy of refusing to deal with rivals would not be enough to violate the Sherman Act. Rather, to be actionable, an unlawful refusal-to-deal scheme would have to be made up of refusals that were themselves independent violations of the Aspen Skiing test.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN9[] **Scope, Monopolization Offenses**

To violate the Sherman Act, a scheme must involve specific instances in which that policy was enforced (i) against a rival with which the monopolist had a previous course of dealing; (ii) while the monopolist kept dealing with others in the market; (iii) at a short-term profit loss, with no conceivable rationale other than driving a competitor out of business in the long run.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN10[] **Remedies, Injunctions**

Section 16 authorizes injunctive relief against threatened loss or damage by a violation of the antitrust laws when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. 15 U.S.C.S. § 26. As it has been interpreted, that provision authorizes the usual equitable practice under which courts may enter two different kinds of injunctions: (i) those that attempt to foreclose a future harmful act, known as preventive injunctions; and (ii) those aimed at preventing the future harmful effects of past acts, known as reparative injunctions.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN11[] **Standing, Requirements**

As to a preventive injunction, the key requirement is that the movant must demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

Evidence > Burdens of Proof > Allocation

HN12[] **Burdens of Proof, Allocation**

It is the plaintiffs' burden to substantiate the claim for injunctive relief in an antitrust case by providing proof, or well-pleaded allegations, that the harm is likely to occur again.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN13[] **Injunctions, Permanent Injunctions**

The key feature of a reparative injunction is that it requires the defendant to restore the plaintiff to a preexisting condition to which the plaintiff was entitled.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN14[] **Remedies, Damages**

As a general rule, past wrongs are not enough for the grant of an injunction. An injunction would be an inappropriate remedy for unlawful conduct that substantially foreclosed competition in the relevant antitrust markets but terminated two years before the government filed its action. The usual remedy in such cases is damages.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN15[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

To the extent any scholarly commentary uses the term "conditional dealing", the phrase generally refers to actions such as tying or exclusive dealing. The key fact distinguishing such conduct from a standard refusal to deal is that it is not unilateral, but instead involves some assay by the monopolist into the marketplace that interferes with the relationship between rivals and third parties. Exclusive dealing is similar: it refers to a monopolist's conditioning the sale of a product on the buyer's agreement not to deal with its competitors.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

HN16[] **Actual Monopolization, Claims**

Whether a monopolist's conduct is condemned as exclusionary depends on the effect of that conduct, not upon the intent behind it.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Trademark Law > ... > Defenses > Defenses to Incontestability > Laches

HN17[] **Affirmative Defenses, Laches**

The equitable doctrine of laches bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant.

Antitrust & Trade Law > Clayton Act > Defenses

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > Scope

HN18[] **Clayton Act, Defenses**

Although what constitutes an unreasonable delay in filing suit is generally a fact-intensive question, in the context of injunctive actions under section 16 of the Clayton Act, many courts have held that the Clayton Act's four-year statute of limitation on damages actions should be used as a guideline for computing the laches period. The doctrine of laches is premised upon the same principles that underlie statutes of limitation: the desire to avoid unfairness that can result from the prosecution of stale claims.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN19[] **Standing, Clayton Act**

Regardless of whether a Section 16 of the Clayton Act plaintiff seeks damages or an injunction, it must file its lawsuit within four years from the accrual of the claim. Generally, a Section 7 of the Clayton Act action challenging the initial acquisition of another company's stocks or assets accrues at the time of the merger or acquisition, giving the plaintiff four years from that time to sue.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Governments > Legislation > Statute of Limitations > Time Limitations

Evidence > Inferences & Presumptions > Presumptions > Creation

HN20[] **Actual Monopolization, Claims**

In an antitrust action, the bare fact of delay beyond the analogous four-year statute of limitations creates a rebuttable presumption of prejudice. When the suit is filed after the statutory period, injury i.e., prejudice is presumed.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN21[] **Clayton Act, Claims**

The principle that laches does not ordinarily apply to government suits to enforce sovereign rights, allows the United States to seek an injunction for violation of its antitrust laws at any time, 15 U.S.C.S. §§ 4, 15, but does not offer the states the same leeway. Laches can bar a belated attack against a merger under Section 16 Clayton Act even if it would not be too late for the federal Government to vindicate the public interest under § 15 of the Clayton Act.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN22[] **Standing, Requirements**

The parens patriae doctrine supplies a theory of U.S. Const. art. III injury — namely, that the state itself has a cognizable interest in the continuing prosperity of its economy. But the fact that severe and generalized economic injury to a state's citizens also concretely injures the state for Article III purposes says nothing about the nature of the states' roles in the antitrust enforcement regime Congress has established. That regime, while allowing the private-injunction action to supplement government enforcement, primarily charges the United States with the duty of protecting the public interest under these laws.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN23[] **Remedies, Damages**

The general rule is that courts measure the reasonableness of a private antitrust plaintiff's delay in suing for divestiture relative to the announcement of the transaction and its subsequent consummation.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Trademark Law > ... > Defenses > Defenses to Incontestability > Laches

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Clayton Act > Scope

HN24[] **Clayton Act, Claims**

Post-acquisition increases in prices or decreases in output are mere inertial consequences that one naturally expects to flow from an anticompetitive merger, and such consequences, the law is clear, do not restart the statute of limitations in a Section 7 of the Clayton Act, 15 U.S.C.S. § 18, action. This approach allows the statute of limitations to have effect and discourages private parties from sleeping on their rights. If it were otherwise, there would in effect be no statute of limitations and no laches defense to a claim for equitable relief, since a Section 7 challenge to the holding or use of assets could be brought at any time. Where the complained of new use of an acquired asset, moreover, was, in fact, suspected and complained about prior to and at the time of the merger, it is especially improper to measure delay from some later point in time.

Civil Procedure > Preliminary Considerations > Equity > Relief

HN25[] **Equity, Relief**

Although in an antitrust case, divestiture is a form of equitable relief, it is not generally thought of as prospective but rather retroactive in character, as it is aimed at unwinding a transaction. The fact that challenged acquisitions allegedly continue to cause ongoing harm does not affect that characterization; on the contrary, where a plaintiff's complaint is that it is experiencing continuing, present adverse effects of past action, a reparative or backward-looking decree such as a divestiture order is the appropriate remedy.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN26[] **Actual Monopolization, Claims**

A maintenance offense under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > Sherman Act > Claims

HN27[] **Clayton Act, Claims**

In the context of a damages action, there is no reason to treat the same conduct differently in sister statutes i.e., Section 2 and Section 7 that are designed to promote the same legislative objective. There is nothing in 15 U.S.C.S. § 15b that suggests it should be applied one way for merger-acquisition claims under the Sherman Act but differently for merger-acquisition claims under the Clayton Act.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Governments > Legislation > Statute of Limitations > Time Limitations

HN28[] **Standing, Requirements**

In general, the four-year limitation for private antitrust actions is long enough to enable potential plaintiffs to observe the actual effects of a possible antitrust violation and to calculate its potential effects.

Antitrust & Trade Law > Sherman Act > Claims

HN29[] **Sherman Act, Claims**

Under one theory of Section 2 of the Sherman Act liability, often referred to as a course of conduct or monopoly broth theory, a plaintiff can allege a series of actions that when taken together make out antitrust liability even though some of the individual actions, when viewed independently, are not all actionable.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN30[] **Scope, Monopolization Offenses**

A monopolist's refusal to deal with its competitors can harm competition, especially if the monopolist has substantial control over a facility or input that is valuable to its rivals.

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN31[] **Private Actions, Sherman Act**

If a unilateral refusal, or refusals, is to be part of such larger antitrust scheme, it must in itself be unlawful.

Counsel: **[**1]** For STATE OF NEW YORK, Plaintiff: Christopher Michael D'Angelo, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/NY, Ste 23rd Floor, New York, NY; Kevin C. Wallace, LEAD ATTORNEY, Amber Wessels-Yen, Elinor R. Hoffmann, Nathaniel Kosslyn, Zachary William Biesanz, ATTORNEY GENERAL'S OFFICE/NY, New York, NY; Beatriz Marques, OFFICE OF THE ATTORNEY GENERAL/NY, Antitrust Bureau, New York City, NY; Benjamin Julian Cole, ATTORNEY GENERAL'S OFFICE FOR THE STATE OF NEW YORK, New York, NY.

For DISTRICT OF COLUMBIA, Plaintiff: Arthur Thomas Durst, LEAD ATTORNEY, Joshua Elijah Morris, OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA, Washington, DC; Catherine Anne Jackson, DC OAG, Washington, DC.

For STATE OF CALIFORNIA, Plaintiff: Mina Noroozkhani, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/CA, Los Angeles, CA; Nicole S. Gordon, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/CA, State of California, San Francisco, CA; Paula L. Blizzard, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/CA, San Francisco, CA; Nell Moley, CALIFORNIA OFFICE OF THE ATTORNEY GENERAL, San Francisco, CA.

For STATE OF COLORADO, Plaintiff: Jeffrey Hirsh Blattner, LEAD ATTORNEY, COLORADO DEPARTMENT OF LAW, Consumer Protection **[**2]** Section, Antitrust Unit, Ralph L. Carr Colorado Judicial Center, Denver, CO; Diane Rebecca Hazel, OFFICE OF THE ATTORNEY GENERAL/CO, Ste 7th Floor, Denver, CO; Steven M. Kaufmann, STATE OF COLORADO DEPARTMENT OF LAW, Ralph L. Carr Colorado Judicial Center, Ste 7th Floor, Denver, CO.

For STATE OF FLORIDA, Plaintiff: Nick Niemiec, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/FL, Antitrust Division, PL-01 The Capitol, Tallahassee, FL; R. S. Palmer, LEAD ATTORNEY, FL ATTORNEY GENERAL, Pl-01 The Capitol, Tallahassee, FL; Colin G. Fraser, FLORIDA OFFICE OF THE ATTORNEY GENERAL, The Capitol PL-01, Tallahassee, FL; Lee Istrail, OFFICE OF THE ATTORNEY GENERAL/FL, The Capitol, Pl-01, Tallahassee, FL.

For STATE OF IOWA, Plaintiff: Bryce A Pashler, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/IA, Consumer Protection Division, Des Moines, IA; Thomas J. Miller, LEAD ATTORNEY, IOWA DEPARTMENT OF JUSTICE, Administrative Services, Des Moines, IA.

For STATE OF NEBRASKA, Plaintiff: Meghan Elizabeth Stoppel, LEAD ATTORNEY, OFFICE OF THE NEBRASKA ATTORNEY GENERAL, Consumer Protection Division, Lincoln, NE.

For STATE OF NORTH CAROLINA, Plaintiff: Daniel Wilkes, LEAD ATTORNEY, NC DEPARTMENT OF JUSTICE, Raleigh, **[**3]** NC; Jessica Vance Sutton, LEAD ATTORNEY, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, NC.

For STATE OF OHIO, Plaintiff: Beth Ann Finnerty, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/OH, Antitrust, Columbus, OH; James Curtis Roberts, Jennifer L. Pratt, LEAD ATTORNEYS, OHIO ATTORNEY GENERAL, Columbus, OH.

For STATE OF TENNESSEE, Plaintiff: J. David McDowell, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL & REPORTER- TN, Nashville, TN; Jamison Tate Ball, OFFICE OF THE ATTORNEY GENERAL/TN, Nashville, TN.

For STATE OF ARKANSAS, Plaintiff: Johnathan R Carter, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/AR, Little Rock, AR.

For STATE OF CONNECTICUT, Plaintiff: Nicole Demers, LEAD ATTORNEY, STATE OF CONNECTICUT OFFICE OF THE ATTORNEY GENERAL, Ste 5000, Hartford, CT.

For STATE OF DELAWARE, Plaintiff: Michael Andrew Undorf, LEAD ATTORNEY, DELAWARE DEPARTMENT OF JUSTICE, Fraud and Consumer Protection Division, Wilmington, DE.

For STATE OF HAWAII, Plaintiff: Rodney I. Kimura, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/HI, Honolulu, HI.

For STATE OF IDAHO, Plaintiff: Brett Talmage DeLange, David Bruce Young, LEAD ATTORNEYS, OFFICE OF THE IDAHO ATTORNEY GENERAL, Consumer Protection Division, Boise, **[**4]** ID.

For STATE OF ILLINOIS, Plaintiff: Blake L. Harrop, LEAD ATTORNEY, Joseph Chervin, ILLINOIS ATTORNEY GENERAL'S OFFICE, Chicago, IL; Erin L. Shencopp, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/IL, Chicago, IL.

For STATE OF INDIANA, Plaintiff: Betsy Mae DeNardi, LEAD ATTORNEY, INDIANA STATE ATTORNEY GENERAL'S OFFICE, Consumer Protection Division, Fifth Floor, Indianapolis, IN; Matthew Alan Michaloski, LEAD ATTORNEY, OFFICE THE ATTORNEY GENERAL/IN, Indianapolis, IN; Scott Leroy Barnhart, LEAD ATTORNEY, OFFICE OF THE INDIANA ATTORNEY GENERAL, Indiana, IGCS 5th Floor, Indianapolis, Ste IGCS 5th Floor, Indianapolis, IN.

For STATE OF KANSAS, Plaintiff: Lynette R. Bakker, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/KS, Ste 2nd Floor, Topeka, KS.

For COMMONWEALTH OF KENTUCKY, Plaintiff: John Christian Lewis, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/KY, Office of Consumer Protection, Frankfort, KY; Jonathan Edward Farmer, OFFICE OF THE ATTORNEY GENERAL/KY, Frankfort, KY.

For STATE OF LOUISIANA, Plaintiff: Stacie L. Deblieux, LEAD ATTORNEY, LOUISIANA DEPARTMENT OF JUSTICE, Baton Rouge, LA.

For STATE OF MAINE, Plaintiff: Christina M. Moylan, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/ME, **[**5]** Augusta, ME.

For STATE OF MARYLAND, Plaintiff: Schonette Walker, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/MD, Baltimore, MD; Gary Honick, OFFICE OF THE MARYLAND ATTORNEY GENERAL, Antitrust, Baltimore, MD.

For COMMONWEALTH OF MASSACHUSETTS, Plaintiff: Michael Bruce MacKenzie, LEAD ATTORNEY, ATTORNEY GENERAL, MASSACHUSEETTS, Boston, MA; Daniel H. Leff, OFFICE OF ATTORNEY GENERAL/MA, Boston, MA; William Thorn Matlack, OFFICE OF THE ATTORNEY GENERAL/MA, Boston, MA.

For STATE OF MICHIGAN, Plaintiff: Wisam Naoum, LEAD ATTORNEY, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Lansing, MI.

For STATE OF MINNESOTA, Plaintiff: James William Canaday, LEAD ATTORNEY, OFFICE OF THE MINNESOTA ATTORNEY GENERAL, St. Paul, MN.

For STATE OF MISSISSIPPI, Plaintiff: Elisabeth Hart Pepper Martin, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/MS, Consumer Protection, Jackson, MS.

For STATE OF MISSOURI, Plaintiff: Kimberley G. Biagioli, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/MO, Consumer Protection Division, Kansas City, MO.

For STATE OF MONTANA, Plaintiff: Mark W Mattioli, LEAD ATTORNEY, MONTANA DEPARTMENT OF JUSTICE, Office of Consumer Protection, Helena, MT.

For STATE OF NEVADA, Plaintiff: Lucas J Tucker, **[**6]** LEAD ATTORNEY, NEVADA ATTORNEY GENERAL'S OFFICE, Bureau of Consumer Protection, Las Vegas, NV; Marie W.L. Martin, LEAD ATTORNEY, NEVADA OFFICE OF THE ATTORNEY GENERAL, Bureau of Consumer Protection, Carson City, NV; Michelle Christine Newman, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL, NV, Carson City, NV.

For STATE OF NEW HAMPSHIRE, Plaintiff: John Garrigan, LEAD ATTORNEY, OFFICE OF ATTORNEY GENERAL/NH, Concord, NH.

For STATE OF NEW JERSEY, Plaintiff: Bryan Steven Sanchez, LEAD ATTORNEY, NJ OFFICE OF THE ATTORNEY GENERAL, Consumer Fraud Prosecution, Ste 5th Fl, Newark, NJ; Isabella R. Pitt, LEAD ATTORNEY, OFFICE OF THE NEW JERSEY ATTORNEY GENERAL, Newark, NJ; Yale A. Leber, NEW JERSEY OFFICE OF ATTORNEY GENERAL, Consumer Fraud Prosecution, Newark, NJ.

For STATE OF NORTH DAKOTA, Plaintiff: Elin S. Alm, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/ND, Consumer Protection & Antitrust Division, Bismarck, ND; Parrell D. Grossman, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL, Consumer Protection and Antitrust Division, Gateway Professional Center, Bismarck, ND.

For STATE OF OKLAHOMA, Plaintiff: Caleb J. Smith, LEAD ATTORNEY, OFFICE OF THE OKLAHOMA ATTORNEY GENERAL, Oklahoma City, OK.

For **[**7]** STATE OF OREGON, Plaintiff: Cheryl Hiemstra, OREGON DEPARTMENT OF JUSTICE, Civil Recovery Section, Salem, OR; Tim D. Nord, OREGON DEPARTMENT OF JUSTICE, Civil Enforcement Division, Salem, OR.

For COMMONWEALTH OF PENNSYLVANIA, Plaintiff: Abigail Wood, LEAD ATTORNEY, OFFICE OF ATTORNEY GENERAL/PA, Philadelphia, PA; Jennifer Jane Kirk, PA OFFICE OF THE ATTORNEY GENERAL, Strawberry Square, Harrisburg, PA; Tracy Wright Wertz, PENNSYLVANIA OFFICE OF ATTORNEY GENERAL, Antitrust Section, Strawberry Square, Harrisburg, PA.

For STATE OF RHODE ISLAND, Plaintiff: Stephen Nicholas Provazza, LEAD ATTORNEY, RHODE ISLAND OFFICE OF THE ATTORNEY GENERAL, Civil Division, Providence, RI.

For STATE OF TEXAS, Plaintiff: Bret Fulkerson, LEAD ATTORNEY, TEXAS ATTORNEY GENERAL, Austin, TX.

For STATE OF UTAH, Plaintiff: Tara Pincock, ATTORNEY GENERAL'S OFFICE, Utah, Salt Lake City, UT.

For STATE OF VERMONT, Plaintiff: Ryan G. Kriger, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/VT, Montpelier, VT.

For STATE OF WASHINGTON, Plaintiff: Amy Hanson, LEAD ATTORNEY, WASHINGTON STATE ATTORNEY GENERAL, Seattle, WA.

For STATE OF WEST VIRGINIA, Plaintiff: Douglas Lee Davis, LEAD ATTORNEY, OFFICE OF ATTORNEY GENERAL, STATE OF **[**8]** WEST VIRGINIA, Charleston, WV; Tanya Lynn Godfrey, OFFICE OF THE ATTORNEY GENERAL/WV, Charleston, WV.

For STATE OF WISCONSIN, Plaintiff: Shannon Ashley Conlin, LEAD ATTORNEY, WISCONSIN DEPARTMENT OF JUSTICE, Madison, WI.

For STATE OF WYOMING, Plaintiff: Amy Pauli, LEAD ATTORNEY, WYOMING ATTORNEY GENERAL, Cheyenne, WY; Benjamin Mark Burningham, LEAD ATTORNEY, WYOMING ATTORNEY GENERAL'S OFFICE, Cheyenne, WY.

For STATE OF ARIZONA, Plaintiff: Dana Vogel, LEAD ATTORNEY, Phoenix, AZ.

For COMMONWEALTH OF VIRGINIA, Plaintiff: Sarah Oxenham Allen, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/VA, Antitrust Unit/Consumer Protection Section, Richmond, VA; Tyler Timothy Henry, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL/VA, Richmond, VA.

For FACEBOOK, INC., Defendant: Leslie V. Pope, PRO HAC VICE, Mark Charles Hansen, LEAD ATTORNEY, Aaron Martin Panner, Geoffrey M. Klineberg, Kevin J. Miller, Silvija A. Strikis, KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, PLLC, Washington, DC; Kevin Huff, PRO HAC VICE, KELLOGG HANSEN TODD FIGEL & FREDERICK,, Ste 400, Washington, DC.

Judges: JAMES E. BOASBERG, United States District Judge.

Opinion by: JAMES E. BOASBERG

Opinion

[*13] **MEMORANDUM OPINION**

As the pillars of our national economy have shifted **[**9]** from the concrete to the virtual, so too have the targets of government antitrust actions. Where railroads and oil companies were alleged to be early violators, over the past decades, providers of telecommunications (AT&T) and computer operating systems (Microsoft) have been the defendants. In the internet age, not surprisingly, Facebook finds itself in the spotlight, as both federal and state regulators contend, in two separate actions before this Court, that it is now the one violating the antitrust laws. The company, they allege, has long had a monopoly in the market for what they call "Personal Social Networking Services." And it has allegedly maintained that monopoly, in violation of *Section 2 of the Sherman Act*, through two different kinds of actions: first, by acquiring firms that it believed were well positioned to erode its dominance — most notably, Instagram and WhatsApp; and second, by adopting policies preventing interoperability between Facebook and certain other apps that it saw as threats, thereby impeding their growth into viable competitors. The State Plaintiffs in this action further contend that Facebook's purchases of Instagram and WhatsApp violated *Section 7 of the Clayton Act*, **[**10]** which prohibits acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly." *15 U.S.C. § 18*. Both suits seek equitable remedies for these alleged antitrust violations, including forced "divestiture or reconstruction of illegally acquired businesses and/or divestiture of Facebook assets or business lines." ECF No. 4 (Redacted Compl.) at 75. (The Court cites a version of the States' Complaint that has minor redactions to protect confidential business information, and it mentions certain redacted facts only with the parties' permission.)

Facebook now separately moves to dismiss both actions. This Opinion resolves its Motion as to the States' Complaint, and the Court analyzes the Federal Trade Commission's largely parallel claims in its separate Opinion in No. 20-3590. Although the Court does not agree with all of Defendant's contentions here, it ultimately concurs with Facebook's bottom-line conclusion: none of the States' claims may go forward. That is so for two main reasons.

First, the States' *Section 2* and *Section 7* attacks on Facebook's acquisitions are barred by the doctrine of laches, which precludes relief for those who sleep on their rights. Although Defendant **[**11]** purchased Instagram in 2012 and WhatsApp in 2014, Plaintiffs' suit — which seeks, in the main, to have Facebook divest one or both companies — was not filed until December 2020. The Court is aware of no case, and Plaintiffs provide none, where such a long delay in seeking such a consequential **[*14]** remedy has been countenanced in a case brought by a plaintiff other than the federal government, against which laches does not apply and to which the federal antitrust laws grant unique authority as sovereign law enforcer. If laches is to mean anything, it must apply on these facts, even in a suit brought by states.

Second, the States' *Section 2* challenge to Facebook's policy of preventing interoperability with competing apps fails to state a claim under current ***antitrust law***, as there is nothing unlawful about having such a policy. While it is possible that Facebook's implementation of that policy as to certain specific competitor apps may have violated *Section 2*, the Court does not reach that question because all such revocations of access occurred over five years before the filing of the Complaint. Such long-past violations cannot furnish a basis for the injunctive relief that Plaintiffs seek here.

The Court, **[**12]** consequently, will grant Facebook's Motion and dismiss the case.

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I. Background

A. Social Networking

At the dawn of our century, in the much earlier days of the internet, a number of websites began to offer services that, in hindsight, were precursors to the sort that Facebook provides. Those websites provided users a platform for creating a unique webpage, personalized with photos and messages, that could then be used to interact with the pages of other "friends." See Redacted Compl., ¶ 58. Interactions were initially limited to email, using services such as America Online (AOL). Id., ¶¶ 58-59. **[**13]** Eventually, new online services emerged that allowed users to organize their profiles into a specific network and communicate with that network, such as Classmates.com and SixDegrees.com. Id., ¶ 59. Friendster and Myspace, both launched in 2002, built further on this trend, offering the first of what came to be known as "social networking" services. Id., ¶ 60. Although the precise definition of a "Personal Social Networking Service" (the main market in which Facebook allegedly operates) is disputed, it can be summarized here as one that enables users to **[*15]** virtually connect with others in their network and to digitally share their views and experiences by posting about them in a shared, virtual social space. Id., ¶¶ 1, 28, 70. For example, users might view and interact with a letter-to-the-editor-style post on politics by a neighbor, pictures from a friend's recent party, or a birth announcement for a newborn cousin. Id., ¶¶ 1, 70.

Perhaps because humans are naturally social, this new way of interacting became hugely popular. In 2006, Myspace, at one point the leading social network, "overtook Google as the most-visited website in the world." Id., ¶ 60. By 2008, however, it had been surpassed **[**14]** by a new competitor: Facebook. Id., ¶ 66. Launched in 2004 by then-undergraduate Mark Zuckerberg from his Harvard dorm room, "The Facebook," as it was initially called, was a social-networking service initially limited to Harvard students. Id., ¶ 61. Encouraged by its success on campus, Zuckerberg and some fellow students expanded the product to other universities, where it proved similarly popular. Id., ¶¶ 62-63. That growth led Facebook to expand beyond colleges, first to high schools and then to the larger adult population. Id., ¶¶ 64-66. By 2008, it had 120 million active users globally. Id., ¶ 66. Three years later, it had 156 million active users in the United States alone, with each user averaging over seven hours per month. Id. The following details of Facebook's conduct are drawn from the States' Complaint, as the Court must consider its allegations true at this stage. The allegations are quite similar, though not identical, to those made by the FTC in the parallel case and recounted in the Court's companion Opinion.

B. Facebook Blue

Facebook's "core" social-network product is known as "Facebook Blue." Id., ¶ 71. This is what its millions of users think of when they think of **[**15]** "Facebook." Generally speaking, using Facebook Blue entails interacting with "user-created content," — *i.e.*, content created or shared by one's Facebook "friends," id., ¶ 30 — or creating content oneself by posting. That is not all that users see or do, however. Users, for instance, also encounter "publisher-created content like news articles . . . and advertisements," id., "interspers[ed]" in their "news feed." Id., ¶¶ 30, 49, 54. Such content can come in text, photo, or video form. Id., ¶ 49. In addition, Facebook users can play games or use other applications built either by Facebook or by third parties. Id., ¶¶ 80, 152, 190. Facebook also offers other services beyond Facebook Blue to its users, such as Facebook Messenger, a free mobile-messaging and voice-calling service. Id., ¶¶ 71, 159, 209.

Unlike most businesses, Facebook charges users no fee; instead, it makes money by selling advertising. Id., ¶¶ 2-3. By leveraging the "vast trove of data it has collected on users, their friends, and their interests," the company is able to offer advertisers a "highly targeted" set of potential customers distilled from its "massive network of users." Id., ¶¶ 3, 51. Under this business model, **[**16]** as the States' Complaint puts it, "Users do not pay a cash price to use Facebook"; instead, "they exchange their time, attention, and personal data for access to Facebook's services." Id., ¶¶ 2, 46. That approach has been highly profitable: in 2019, for instance, advertisers paid Facebook nearly $30 billion. Id., ¶ 48. To be clear, although Facebook's data-collection and-use practices have been subject to increasing scrutiny, they are not the subject of this action.

C. Alleged Monopoly Maintenance

Instead, this suit alleges that Facebook has violated and is violating the antitrust **[*16]** laws, the focus of which, generally speaking, is to promote and ensure competition. According to Plaintiffs, Facebook Blue's meteoric rise was a positive example of what happens when firms compete to provide the best product to consumers. Because its social-networking service provided more "innovative features," "a higher-quality user experience, and better privacy protections" than anyone else, id., ¶ 73, at least as early as 2011, it had become the dominant personal social networking service" in this country, giving Facebook "monopoly power" in that market. Id., ¶¶ 4, 11, 68.

Around that time, however, Facebook **[**17]** allegedly made a fateful pivot: rather than continuing to focus on providing the best product, it became concerned with protecting its monopoly by leveraging its dominance to foreclose and forestall the rise of new competitors. Id., ¶¶ 98-99. In particular, the company's executives saw a "unique threat[] to Facebook's dominance" in the advent of mobile devices — first and foremost, smartphones — capable of accessing the internet. Id., ¶¶ 100-01. Although Facebook had mobile functionality, it had been built with websites and desktop or laptop computers in mind. Other firms' offerings, by contrast, were "built to look and function well on a mobile device in the first instance." Id., ¶ 100. Zuckerberg and other Facebook executives fretted over the possibility that other apps might create attractive mobile-native features and then leverage those features into exponential user growth, end-running Facebook's established position. Id., ¶¶ 101-02. Even if such an app was not already providing social-network-like functionality, once it had a big enough base of users, it would still pose a potential threat to Facebook Blue. Id. Facebook executives feared fast-growing mobile-messaging services **[**18]** in particular, nervous that such apps could rather easily "morph[]" into direct competitors by adding social features. Id., ¶ 103.

What Facebook did in response to these perceived threats is the basis for these antitrust suits against it. The company allegedly used its monopoly power to eliminate or destroy competitors in order to maintain its market dominance. Id., ¶ 104. Plaintiffs allege that, beginning around 2011, "Facebook used two primary tactics to achieve" that result. Id. First, it reached deep into its very deep pockets to acquire competitors and potential competitors, preventing their emergence as serious rivals. Id. Second, it adopted and then enforced policies that blocked rival apps from interconnecting their product with Facebook Blue, thereby both (i) blunting the growth of apps that had previously depended on that interoperability to attract new users, and (ii) warning all other developers not to compete with Facebook, lest they lose access as well. Id.; see also id., ¶¶ 186-87.

Acquisitions

On the acquisitions front, "Facebook acquired dozens of companies" from 2012 to 2020, and it "pursued many more acquisitions that did not come to fruition." Id., ¶ 105. Among those **[**19]** "dozens" were many minor companies; the Complaint briefly mentions Glancee and EyeGroove, firms Facebook purchased in 2012 and 2016, respectively. Id., ¶ 184. Rather than catalog each acquisition (some of which, presumably, posed no threat to competition), Plaintiffs focus almost exclusively on several key examples that purportedly illustrate Facebook's allegedly anticompetitive approach: its purchases of Instagram (2012) and WhatsApp (2014), and its ultimately unsuccessful attempts to buy Snapchat (2012-13). Id., ¶¶ 107-80.

Begin with Insta, as those in the know — *viz*., our children — refer to it. Launched in late 2010, Instagram was an **[*17]** innovative photo-editing and-sharing app designed for the era of smartphones with built-in cameras. Id., ¶¶ 107, 109. The company grew explosively, eventually attracting the attention of Facebook executives who feared that their own photo-sharing features paled in comparison. Id., ¶¶ 111, 113. That disparity gave Instagram a chance to grow to a large enough scale to be threatening, making it a "powerful competitive threat to Facebook's . . . monopoly." Id., ¶ 128. Aiming to "neutralize" that competition, and to "integrate" the "mechanics" of Instagram's **[**20]** popular photo-sharing features with Facebook Blue in order to forestall the growth of future Instagrams, id., ¶ 115, Zuckerberg offered to buy the company for $1 billion in April 2012. Id., ¶ 119. Instagram agreed.

As required by the Hart-Scott-Rodino Act, *15 U.S.C. § 18a*, the FTC reviewed the acquisition prior to closing to assess whether it posed anticompetitive concerns. Whereas most mergers are cleared quickly, in this instance the review took over four months. During that scrutiny, the agency took the rare step of "requir[ing] the submission [by the parties] of additional information or documentary material relevant to the proposed acquisition." *15 U.S.C. § 18a(e)(1)(A)*. Eventually, however, Facebook and Instagram satisfied the agency's concerns, and in August (over four months after the merger was announced), the Commission voted 5-0 to allow it to proceed without any challenge or conditions. See FTC, FTC Closes Its Investigation into Facebook's Proposed Acquisition of Instagram Photo Sharing Program (Aug. 22, 2012), https://bit.ly/3bDa2mp. Although Plaintiffs do not mention that prolonged FTC review in their Complaint, the Court may take judicial notice of that agency action. See *Pharm. Rsch. & Manufacturers of Am. v. U.S. Dep't of Health & Hum. Servs., 43 F. Supp. 3d 28, 33 (D.D.C. 2014)*; *Herron v. Fannie Mae, No. 10-943, 2016 U.S. Dist. LEXIS 3332, 2012 WL 13042852, at *1 (D.D.C. Mar. 28, 2012)*.

Zuckerberg, Plaintiffs allege, **[**21]** had similar designs in offering to buy Snapchat in October 2013. Id., ¶¶ 131, 134. That app also involved photo-sharing, with the twist that images would usually be sent one-to-one or one-to-small-group, rather than to a user's entire network, and would automatically delete after being viewed for only a few seconds. Id., ¶ 130. Impressed by the app's engagement and user growth, Facebook offered to purchase it for $4 billion — mainly, allege Plaintiffs, to "keep[] [it] out of the hands of any firm with the resources to transform [it] into a major competitive threat." Id., ¶ 134. Snapchat's founder, however, steadfastly refused the overtures. Id., ¶ 135.

Facebook had better luck the next year with WhatsApp. As noted above, the company's executives saw mobile-messaging apps like WhatsApp as their "biggest competitive threat," even though they did not directly compete with Facebook Blue in the Personal Social Networking Services market. Id., ¶ 153. The fear instead was that such apps might well "morph" into competitors in the future; given the ubiquity of text messaging in modern life, a widely adopted messaging app could leverage its network effects to transition into a highly competitive **[**22]** "mobile-first social network" by adding functions such as "gaming platforms, profiles, and news feeds." Id., ¶¶ 152-53, 160. WhatsApp was the most potent threat, according to Facebook executives, because it was the "category leader" among mobile messengers, with over 400 million active users and a superior product. Id., ¶¶ 154-55. Zuckerberg in particular "believe[d] that WhatsApp had the potential to enter Facebook's core market and erode its monopoly power," and he thus resolved to try to buy it to prevent that from happening. Id., ¶ 161. In **[*18]** February 2014, after negotiating specific terms regarding WhatsApp's continued independence, user privacy, and freedom from ads, he succeeded, as the two companies agreed on a purchase price of around $19 billion. Id., ¶¶ 165-66. That transaction was also subject to Hart-Scott-Rodino Act pre-merger review, see *15 U.S.C. § 18a*, but the FTC, once again, did not block it.

Interoperability Permissions

a. Facebook Platform

Shortly after expanding beyond colleges and high schools, Facebook developed Facebook Platform, a set of tools designed to enable developers of other mobile or web apps to interoperate with Facebook's site and data. See Redacted Compl., ¶ 80. The **[**23]** goal was to make Facebook the "platform" for all social interactions on the internet, thereby creating a better, more engaging product and driving even more users to its site. Id. The first iteration of Facebook Platform, circa 2007, allowed developers to build what Facebook called "canvas" apps displayed within the Facebook website itself. Id., ¶ 190. As an example, a user scrolling through Facebook could come upon a personality-test app, take the test, and then share her results and invite Facebook friends to take the test as well, all without ever navigating off the Facebook site. Id. Facebook made these third-party apps available to users "on a level playing field with applications built by Facebook." Id., ¶ 189. App developers took advantage, scrambling to create these canvas apps in order to gain access to its growing network of users. Id., ¶¶ 80, 189-94. Such apps would make money by allowing users to purchase virtual goods or items within the app on a "freemium" model or via ad sales.

Facebook soon expanded Platform, deploying a suite of tools that expanded its reach off the Facebook site itself. These tools — called application programming interfaces or APIs — created mechanisms **[**24]** for sharing data between Facebook and other services. Id., ¶ 80. The States provide several examples of APIs that Facebook opened to developers. One is the "Find Friends" API, id., ¶ 190, which enabled freestanding apps to allow Facebook account holders to find and connect with Facebook friends within that separate app, or to invite Facebook friends to join that app. Id., ¶¶ 207, 210, 214-15, 217. For instance, when first starting to use an independent chess app — *i.e.*, an app used separately as opposed to on the Facebook site itself — a user with a Facebook account could nonetheless search within the app for other Facebook friends already using it, or invite them to join via Facebook, all without leaving the app. Another API Facebook created was Facebook Connect, which allowed Facebook users to sign into third-party websites or apps using their Facebook log-in credentials. Id., ¶ 81.

Facebook went even further in that direction in 2010 when it launched its Open Graph API. Open Graph allowed third-party apps and websites to essentially integrate pieces of Facebook within their own service; for instance, apps could install the famous "Like" button, which, if clicked, would share a user's **[**25]** "like" on the user's Facebook profile. Id., ¶ 82. Users could do this without even navigating away from the third-party service. Id., ¶¶ 191-93. "[A] user reading an article on ESPN.com," for instance, "could now like an article on ESPN's site, and choose to post a link of the article to the user's Facebook profile directly from the ESPN.com website." Id., ¶ 193. App developers could also host Facebook comment sections, facilitating further engagement with their content. Id.,

¶ 194. This was, unsurprisingly, a massively popular tool among app developers. By May 2013, over 10 million apps and websites had used the Open Graph API to **[*19]** integrate with Facebook, and Facebook "integrations quickly became common across the internet." Id.

According to Plaintiffs, Facebook benefited significantly from its Platform program and open APIs. The company garnered goodwill and positive media coverage, continued to increase its growth and user engagement, and earned substantial sums from its requirement that partner third-party apps share revenues from in-app purchases. Id., ¶¶ 195-96. Third-party app developers likewise gained, improving the quality of users' experience by integrating social functionality **[**26]** and benefiting from Facebook's sizeable network of highly engaged users. Id., ¶ 197. Users, too, enjoyed the increased efficiency and convenience. Id., ¶ 198.

b. Conditioning Access

Nonetheless, the States allege, Facebook eventually "turned to Platform as a tool to monitor, leverage," and — most crucially here — "harm (via rescinding API access [to]) apps that Facebook viewed as actual or potential competitive threats." Id., ¶ 200. In 2011, it announced a company policy that allegedly "aimed at forbidding 'competing social platforms,' and any apps that linked or integrated with competing social platforms, from accessing its APIs." Id., ¶ 199. In 2013, Facebook announced an even broader policy of withholding API access from apps that competed by "replicat[ing] [Facebook's] core functionality," even if they were not full social networks. Id., ¶ 201.

To the extent the States allege that Facebook's 2011 policy actually prohibited — as opposed to merely "aim[ed] at" prohibiting, as is the precise wording of the allegation — freestanding third-party apps from accessing its APIs merely because those apps also "linked to or integrated with" other social-networking services, the Court does not **[**27]** accept that characterization because it is inconsistent with the text of the 2011 policy, which the FTC quotes in its simultaneously filed Complaint in the related case. See *Vanover v. Hantman, 77 F. Supp. 2d 91, 98 (D.D.C. 1999)* (court may consider material outside the pleadings where it is "referred to in the complaint and is central to plaintiff's claim"). As set out in the FTC's Complaint, the 2011 policy covered only "Apps on Facebook" — *i.e.*, the sort of "canvas apps" described above — rather than freestanding third-party apps or sites such as ESPN.com. See No. 20-3590, ECF No. 3 (Redacted FTC Compl.), ¶ 139 (quoting 2011 policy as stating that "Apps on Facebook may not integrate, link to, promote, distribute, or redirect to any app on any other competing social platform"). The 2011 policy, then, limited what apps hosted and used on Facebook's own site could do; it did not purport to restrict freestanding apps and sites from linking to or integrating with other social networks.

At any rate, armed with its policies, Facebook "began to selectively enforce" them "to cut off API access to companies Facebook worried might one day threaten its monopoly." Redacted Compl., ¶ 202. Plaintiffs allege that in cutting off access, Facebook intended **[**28]** to, and did, "devastat[e]" the targeted apps by suddenly depriving them of a "critical piece of infrastructure" on which they had relied for growth and engagement — namely, Facebook's user data and network. Id. The Complaint provides seven discrete examples of competitive or potentially competitive apps that Facebook targeted for API revocation from 2013 to 2015. Each, after promising early growth, faltered shortly after losing its access. Id., ¶¶ 207-12 (Voxer), 213-14 (Vine), 215-16 (MessageMe), 217-18 (Path), 219-21 (Circle), 222-24 (Tsū), 225-29 (Phhhoto). Around the same **[*20]** time, Facebook announced yet another new policy, requiring all developers to seek permission before being granted API access, even if they previously had it. Id., ¶ 203. Facebook then denied such requests from "apps it classified as competitors or potential competitors." Id.

According to the States, Facebook's policies and enforcement decisions helped "ensur[e] that would-be competitors could not gain or maintain a foothold in the Personal Social Networking Services market." Id., ¶ 230. What is more, Plaintiffs allege, Facebook's actions deterred other firms (and their venture-capital backers) from even thinking **[**29]** about challenging Facebook Blue. Id. The effect was to "maintain and enhance Facebook's monopoly power." Id., ¶ 231.

Although the story laid out in the Complaint ends there, the States' brief in opposition to the present Motion to Dismiss provides an important coda. According to that brief, and a Facebook press release the States append as an exhibit to their Opposition, see ECF No. 121-7, in 2018, Facebook terminated all of its policies regarding competitor API access. See ECF No. 122 (States Opp.) at 13. Facebook does not dispute that contention, see ECF No. 123 (Reply States) at 24, and the FTC's Complaint in the parallel action makes the same allegation. See Redacted FTC Compl., ¶¶ 148-49. The Court accordingly takes judicial notice of the fact that Facebook retracted its API policies in 2018. See *Bowden v. United States, 106 F.3d 433, 437, 323 U.S. App. D.C. 164 (D.C. Cir. 1997)* (considering "the pleadings and undisputed documents in the record" while considering motion to dismiss); *Webster v. Spencer, No. 17-1472, 2020 U.S. Dist. LEXIS 77047, 2020 WL 2104231, at *5 (D.D.C. May 1, 2020)* (citing similar cases). That revocation holds legal relevance, as readers with sufficient stamina will discover.

D. Procedural History

Plaintiffs — 46 States, the District of Columbia, and the Territory of Guam — filed this action on December 9, 2020. See Redacted Compl. at 5 n.1. **[**30]** Their Complaint alleges three counts. First, they claim, Facebook has violated, and is violating, *Section 2 of the Sherman Act*'s prohibition on monopoly maintenance via the two forms of exclusionary conduct described above: acquiring nascent and potential competitors, and anticompetitively conditioning access to its APIs. Id., ¶¶ 256-62. Second, Facebook violated *Section 7 of the Clayton Act* by acquiring Instagram, thereby "substantially . . . lessen[ing] competition [and] tend[ing] to create a monopoly," *15 U.S.C. § 18*, and it continues to violate that statute by holding and using Instagram assets. Id., ¶¶ 263-67. Third and finally, Facebook similarly violated and continues to violate *Section 7* by acquiring and holding WhatsApp. Id., ¶¶ 268-72. Plaintiffs seek equitable relief for these violations, including an injunction prohibiting similar conduct in the future and the divestiture of unlawfully held assets, id., ¶¶ 277(2), (8), pursuant to *Section 16 of the Clayton Act*. See *15 U.S.C. § 26* (authorizing suits by "[a]ny person . . . for injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws").

As noted, the Federal Trade Commission filed a very similar suit against Facebook on the same day as the State Plaintiffs, **[**31]** pursuing similar injunctive relief. That action was assigned to Judge Christopher R. Cooper of this district. Pursuant to Local Rule 40.5(c)(2), which governs related cases, he was required to reassign the FTC action to this Court, which presides over the earlier-filed State case. See No. 20-3590, Minute Order of Jan. 12, 2021.

Facebook has now moved to dismiss both actions. See ECF No. 114 (MTD **[*21]** States); No. 20-3590, ECF No. 56-1 (MTD FTC). While the cases could be consolidated, the Court believes that clarity will be enhanced by resolving the two Motions to Dismiss in separate, contemporaneously issued Opinions. As noted above and explained hereafter, it will grant the Motion to Dismiss the States' case. By contrast, the Court will dismiss only the Complaint, not the case, in the FTC action, thus permitting the Government leave to amend. An explanation of why may be found in the companion Opinion. See Mem. Op., No. 20-3590.

II. Legal Standard

Facebook moves to dismiss this action under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim upon which relief can be granted. See MTD States at 1. ***HN1***[] In evaluating such Motion to Dismiss, the Court must "treat the complaint's factual allegations as true . . . and must grant plaintiff 'the **[**32]** benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113, 342 U.S. App. D.C. 268 (D.C. Cir. 2000)* (quoting *Schuler v. United States, 617 F.2d 605, 608, 199 U.S. App. D.C. 23 (D.C. Cir. 1979)*). Although "detailed factual allegations" are not necessary to withstand a *Rule 12(b)(6)* motion, *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*) — that is, the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. The Court need not accept as true, then, "a legal conclusion couched as a factual allegation," *Trudeau v. FTC, 456 F.3d 178, 193, 372 U.S. App. D.C. 335 (D.C. Cir. 2006)* (quoting *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*), nor "inferences . . . unsupported by the facts set out in the complaint." Id. (quoting *Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994)*). And it may consider not only "the facts alleged in the complaint," but also "any documents either attached to or incorporated in the complaint[,] and matters of which [courts] may take judicial notice." *Equal Emp't Opportunity Comm'n v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624, 326 U.S. App. D.C. 67 (D.C. Cir. 1997)*.

III. Analysis

Facebook proffers multiple bases for dismissal here, both jurisdictional and on the merits. The Court begins by considering its argument that Plaintiffs here lack Article III standing to sue. Such position gains no purchase. But that is the only place the States prevail, for the Court concurs with Facebook that their *Section 2* challenges to its API dealings fail as a matter **[**33]** of law. It also concludes that their *Section 2* and *Section 7* claims as to Facebook's acquisitions, which took place at least six years prior to the filing of the Complaint, are barred by the doctrine of laches. Dismissal of the entire case is thus warranted.

A. Standing

Plaintiffs bring this action under *Section 16 of the Clayton Act*, which provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*. In order to meet Article III's requirement that they articulate an injury-in-fact that they have suffered, Plaintiffs sue in their "capacity as *parens patriae*." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 594, **[*22]** 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)*; see States Opp. at 5.

HN2[] "The doctrine of *parens patriae* standing allows [a] state[] to bring suit on behalf of [its] citizens." *New York v. Microsoft Corp., 209 F. Supp. 2d 132, 149 (D.D.C. 2002)*. To do so, a state must "assert an injury to what has been characterized as a 'quasi-sovereign interest,'" *Alfred L. Snapp, 458 U.S. at 601*, which refers to an "interest[] the State has in the well-being of its populace" that is "sufficiently concrete to create an actual controversy between the State and the defendant." *Id. at 602*. Although the concept of a "quasi-sovereign interest" is fairly "vague[]," id., it includes a state's "interest in the **[**34]** continuing prosperity of [its] econom[y]," such that states have "standing to challenge actions whose clear and direct effects would be the substantial disruption of the[ir] internal econom[ies]." *Pennsylvania v. Kleppe, 533 F.2d 668, 674, 174 U.S. App. D.C. 441 (D.C. Cir. 1976)* (citing cases); *Alfred L. Snapp, 458 U.S. at 607* ("[A] State has a quasi-sovereign interest in the health and well-being — both physical and economic — of its residents in general."). To ensure that such "[i]njury to the state's economy is . . . sufficiently severe and generalized," *Kleppe, 533 F.2d at 675*, it must stand "apart from the interests of particular private parties," *Alfred L. Snapp, 458 U.S. at 607* — in other words, "the controversy must in substance implicate the state's interest in economic supervision, and not merely affect the fortunes of a limited class of her citizens." *Kleppe, 533 F.2d at 674*. To ensure the requisite breadth of injury, some "substantial" "proportion of the population of the State . . . must be adversely affected by the challenged behavior." *Alfred L. Snapp, 458 U.S. at 607*; see also *New York v. Microsoft, 209 F. Supp. 2d at 152* (asking whether "the direct impact of the alleged wrong [is] felt by a substantial majority . . . of the state's citizens, so that the suit can be said to be for the benefit of the public").

Applying these principles in the antitrust context, the Supreme Court long ago held that a State had *parens patriae* standing **[**35]** to seek an injunction against a price-fixing conspiracy under *Section 16* of the Clayton Act. *Georgia v. Penn. R. Co., 324 U.S. 439, 451, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)*. In that case, the State of Georgia alleged that its "economy . . . and the welfare of [its] citizens [had] seriously suffered as the result of this alleged conspiracy," *id. at 450*, and the Court agreed that antitrust violations "may affect the prosperity and welfare of a State as profoundly as [the] diversion of waters from the rivers." Id.; see also *id. at 451* (State suffered injury to "interest apart from that of particular individuals who may be affected" because the conspiracy, if proven, "limit[ed] the opportunities of her people, shackle[d] her industries, retard[ed] her development, and relegate[d] her to an inferior economic position."). Citing that decision, the lower courts have consistently held that states have *parens patriae* standing to seek injunctions under *Section 16* against antitrust violations the effects of which are widely felt within their borders. See, e.g., *New York v. Microsoft Corp., 209 F. Supp. 2d at 150-52* ("significant[] hamper[ing] [of] competition" by a monopolist is enough); *In re Ins. Antitrust Litig., 938 F.2d 919, 927 (9th Cir. 1991)* ("The state's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining **[**36]** . . . an injunction."); *Pennsylvania v. Russell Stover Candies, Inc., No. 93-1972, 1993 U.S. Dist. LEXIS 6024, 1993 WL 145264, at *8 (E.D. Pa. May 6, 1993)* ("[A] state may . . . seek injunctive relief for **[*23]** harm to its general economy that is caused by a violation of federal ***antitrust law***.").

Under these cases, Plaintiffs here have properly pleaded sufficient injury to their quasi-sovereign interests in the economic well-being of their states. Their Complaint alleges that Facebook has prevented, through anticompetitive means, the emergence of viable competitors to its monopoly in Personal Social Networking Services. As a result, millions of Plaintiffs' citizens have experienced "reductions in the quality and variety of privacy options and content available to them" in that market, see Redacted Compl., ¶¶ 8, 247-50 — which is to say that, on the States' theory, millions have experienced a rise in the effective price of using Facebook. Id., ¶ 46 (users "exchange their time, attention, and personal data for access to Facebook's services"). In addition, small and medium businesses reliant on "Social Advertising" have lacked lower-priced and higher-quality alternatives to Facebook, id., ¶¶ 52, 252, and the States' economies in general have suffered from suppressed innovation and investment in the social-networking space. **[**37]** Id., ¶¶ 8, 230, 246. Although these allegations are a shade vague, the Court finds them enough to at least satisfy the pleading requirements for *parens patriae* standing in the context of asserted antitrust violations.

Facebook attempts to distinguish Georgia v. Pennsylvania Railroad and New York v. Microsoft based on the size of the harms caused by the antitrust violations in those cases: a price-fixing conspiracy amongst twenty railroads and unlawful maintenance of Microsoft's monopoly in personal-computer operating systems, respectively. See MTD States at 5. Rather than undermining Plaintiffs' position, New York v. Microsoft supports their standing to bring this action. There, the court held that Microsoft's conduct had caused the requisite "significant adverse effect on competition within the [plaintiff] state[s]," such that "the suit c[ould] be said to be for the benefit of the public" because "millions of citizens of, and hundreds, if not thousands, of enterprises in each of the [states] utilize[d] PCs running on Microsoft software." *209 F. Supp. 2d at 151-52* (citation omitted and cleaned up). Here, the State Plaintiffs have similarly alleged that tens, if not hundreds, of millions of their citizens consistently **[**38]** use Facebook Blue, and that U.S. advertisers paid over $30 billion to access those users in 2019 alone. See Redacted Compl., ¶¶ 1, 48, 68-70. The Court thus fails to see how, at this stage especially, it could find that Facebook's alleged squelching of competition lacked "sufficiently severe and generalized" consequences for Plaintiffs' economies; the damage to their quasi-sovereign "interest[s] in economic supervision" would seem, at the very least, comparable to the harm caused by Microsoft. *Kleppe, 533 F.2d at 674*. To the extent Defendant rejoins that social-networking services are essentially whimsical enterprises, such that suppressed competition in that market cannot as a matter of law have a sizeable effect on the overall economic well-being of a state, see Reply States at 5-6, the sheer size of the related advertising market alone plausibly suggests otherwise.

Plaintiffs, accordingly, have established their standing to sue *parens patriae* at this stage.

B. Platform Policies

Moving now to the merits, the Court starts with the States' challenges to Facebook's Platform-related conduct under *Section 2 of the Sherman Act*. ***HN3***[] That Section prohibits monopoly maintenance, an offense that "has two elements: (1) the possession **[**39]** of monopoly power in the relevant market and (2) the willful . . . maintenance **[*24]** of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Microsoft Corp., 253 F.3d 34, 50, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*). This second element of a *Section 2* violation is usually referred to by the shorthand of "anticompetitive" or "exclusionary conduct." *Id. at 58*.

By way of refresher, Plaintiffs allege that Facebook adopted and enforced a number of anticompetitive policies governing the use of its APIs. Most prominently, in 2013 it announced a policy of refusing to allow third-party, freestanding apps (like the chess app or the ESPN app discussed above) to access those APIs if they "replicate[d] [Facebook's] core functionality" — *i.e.*, if they competed with Facebook Blue. See Redacted Compl., ¶ 201. The States allege that, from 2013 to 2015, Facebook enforced that policy against a number of freestanding apps to which it had previously offered API access. See id., ¶¶ 207-12 (Voxer), 215-16 (MessageMe), 217-18 (Path), 219-21 (Circle), 222-24 (Tsū), 225-29 (Phhhoto). Facebook also allegedly enforced the policies "proactively" against newly launched apps that it feared could become a threat, id., **[**40]** ¶ 203, such as Vine. Id., ¶¶ 213-14. The

States contend that these actions represent unlawful "conditional dealing" or unlawful "refusal[s] to deal" with apps that had their API access revoked or blocked. See States Opp. at 34-35.

This Court, however, agrees with Facebook that both theories hold no water as a matter of law. That result follows from three conclusions. First, under current antitrust doctrine, Facebook's general policy of refusing to provide API access to its competitors does not itself violate *Section 2*. Second, although specific instances in which Facebook revoked a competitor's API permissions (after previously providing it access) might have violated *Section 2*, the last alleged instance occurred in 2015, and there is therefore no current or impending violation of law for the Court to enjoin here. Third, and more prosaically, Plaintiffs have failed to plead facts to support a "conditional dealing" theory. The Court looks at the first two together and then moves to the third.

For those who will consider this Opinion alongside the Court's companion Opinion in the FTC case, the following "legal framework" section is the same in both. The analysis that follows diverges somewhat given the **[**41]** different legal regimes governing suits by States and suits by the FTC, although the outcome is similar.

1. *Refusal to Deal*

a. Legal Framework

HN4[] The central principle that governs refusal-to-deal claims is that, as a general matter, a monopolist has "the right to refuse to deal with other firms," which includes the right to "refus[e] to cooperate with rivals." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*). That is because "[m]onopolists are both expected and permitted to compete like any other firm," and "[p]art of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal." *Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 454 (7th Cir. 2020)* (citations omitted). This general no-duty-to-deal rule holds even where a monopolist refuses to deal with its competitor merely "in order to limit entry," *Trinko, 540 U.S. at 407* — in other words, because it wants to prevent that rival from competing with it. See, e.g., **[*25]** *Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375-76 (7th Cir. 1986)* ("Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors" and thus no duty "to extend a helping hand to new entrants . . . [or] help [rivals] . . . survive or expand . . . ."); *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th Cir. 2013)* ("Even a monopolist generally has no duty to share . . . its intellectual or physical property with a rival."); *Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 993 (9th Cir. 2020)* ("As the Supreme Court **[**42]** has repeatedly emphasized, there is no duty to deal under the terms and conditions preferred by a competitor's rivals.") (quoting *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 457, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*); *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1184 (9th Cir. 2016)* (rejecting argument that refusal to deal is unlawful because it was motivated by "intent to foreclose competition").

These decisions, to be clear, "are not premised on the view that [monopolist refusals to deal] are incapable of harming competition"; obviously, "refusals to aid new entrants can indeed" have that effect. See Daniel A. Crane, Does Monopoly Broth Make Bad Soup?, 76 Antitrust L.J. 663, 669 (2010). Rather, the rule declaring unilateral refusals to deal essentially "per se lawful," id. at 666, or "presumptive[ly] legal[]," *Novell, 731 F.3d at 1073*, rests on three overriding considerations of antitrust policy. First, and most importantly, "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Trinko, 540 U.S. at 407-08*. Put another way, already large and successful firms "might be deterred from investing, innovating, **[**43]** or expanding . . . with the knowledge [that] anything [they] creat[e] [they] could be forced to share," while "smaller [competitors] might be [similarly] deterred, knowing [they] could just demand the right to piggyback on [their] larger rival." *Novell, 731 F.3d 1073*. That equilibrium would hinder, rather than advance, consumer welfare. See *Olympia Equip. Leasing, 797 F.2d at 379* ("Consumers would be worse off if a firm with monopoly power had a duty to extend positive assistance to new entrants, or having extended it voluntarily a duty to continue it indefinitely."). Second, "compelled sharing puts federal courts in the role of central planners," requiring them to pick and choose the applicable terms and conditions of the forced sharing they would order "despite their being ill-equipped to assume this role." Aerotec, 836 F.3d at 1183. Finally, "compelled sharing may actually provide opportunities for collusion" between the monopolist and its rival or rivals. Id. Collusion is "the supreme evil of antitrust," Trinko, 540 U.S. at 408, and itself quite "injuri[ous] to consumers and the competitive process alike." Novell, 731 F.3d at 1073.

Nevertheless, the general no-duty-to-deal rule does have a "narrow-eyed needle" of an exception, id. at 1074, traceable to the Supreme Court's decision in Aspen Skiing. In that case, the defendant **[**44]** owned three of the four ski resorts in the Aspen, Colorado, market (making it a monopolist), and it had long operated a joint venture with the fourth (a rival mountain) that provided a ticket good for all four. See 472 U.S. at 588-92. That joint ticket was profitable for both parties and made customers happy. Id. at 610. The defendant Aspen Skiing, **[*26]** however, eventually terminated the joint ticket. Plaintiff Highlands "tried a variety of increasingly desperate measures to re-create the joint ticket," including eventually "offering to buy the defendant's tickets at retail price." Trinko, 540 U.S. at 408-09. Aspen Skiing refused to even accept those tickets at its resorts. According to the Court, based on these facts, the jury (which had found liability) could have reasonably concluded that Aspen Skiing "was not motivated by efficiency concerns and . . . was [instead] willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." 472 U.S. at 610-11. That, the Court held, was sufficient for Section 2 liability.

As the case has come to be understood, Aspen Skiing ran afoul of the Sherman Act — despite the general no-duty-to-deal rule — because it acted in a predatory fashion, which is to say it deliberately **[**45]** harmed itself (and consumers) in order to harm its competitor more. Consider the analogy of a predatory pricing scheme, in which a firm prices its goods below its costs and below its rivals' costs with the goal of driving those rivals out of the market and leaving it standing alone; such a scheme works where the predatory firm takes advantage of its greater ability to withstand the losses caused by its below-cost pricing. See Novell, 731 F.3d at 1075 (drawing this comparison); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993) (explaining predatory-pricing doctrine). Aspen Skiing was doing something very similar. By terminating a profitable and customer-pleasing joint venture, and refusing to even recreate it by accepting vouchers bought at retail price, it was enduring short-term pain with the exclusive goal of driving its rival (which could not stand that pain) out of the market. The defendant thus lost the usual protection of the general no-duty-to-deal rule, since it had used its general right to choose with whom it deals "as part of a larger anticompetitive enterprise" — *i.e.*, an enterprise aimed at "harming competition," and therefore consumers, "by entrenching a dominant firm and enabling it to extract monopoly rents once the competitor is killed **[**46]** off." Viamedia, 951 F.3d at 462 (quoting Novell, 731 F.3d at 1075) (cleaned up); see also Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** vol. IIIB, ¶ 772d3, at 235 (4th ed. 2014).

The "larger anticompetitive enterprise" that characterizes an Aspen Skiing violation, crucially, cannot simply be an intent to harm — or, the flip side of the same coin, to avoid helping — a rival or rivals. "In concentrated markets the intent to maintain or improve one's own market position always entails the knowledge that rivals must suffer," and if ***antitrust law*** were to condemn every action taken by a monopolist with the "effect or purpose of limiting competition with itself," there would be little left to the rule that monopolists have no duty to aid their competitors. See Areeda & Hovenkamp, ¶ 772c2, at 220-21. That is why the Supreme Court has described Aspen Skiing as "at or near the outer boundary of § 2 liability," Trinko, 540 U.S. at 409, and "refused to extend liability to various other refusal to deal scenarios." Novell, 731 F.3d at 1074; but see Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of Rhode Island, 311 F. Supp. 3d 468, 483 (D.R.I. 2018) (arguing that Trinko should not be read as "pull[ing] back the reins on refusal-to-deal claims"). And that is why the touchstone for liability is the sort of predatory design described above: "where the only conceivable rationale or purpose" **[**47]** for the refusal to deal is "to sacrifice short-term benefits in order to obtain higher **[*27]** profits in the long run from the exclusion of competition." Aerotec, 836 F.3d at 1184 (citation omitted).

HN5[] Courts have accordingly coalesced around a three-part test for unlawful refusals to deal, drawn from Aspen Skiing's particular facts and aimed at sniffing out predation while avoiding over-inclusiveness. First, "there must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival" with which the monopolist later refuses to deal. Novell, 731 F.3d at 1074; Qualcomm, 969 F.3d at 993. It was the absence of this preexisting relationship that doomed the plaintiffs in Trinko, as the Court upheld the dismissal of their Aspen Skiing claim at the pleading stage on that basis, despite their allegations that Verizon's refusal to deal with rivals was intended to, and did, blunt their growth. See 540 U.S. at 404-05, 407, 409. ***HN6***[] Second, "the refusal to deal [must] involve[] products that the defendant already sells in the existing market to other similarly situated customers." *Qualcomm, 969 F.3d at 994*; see Areeda & Hovenkamp, ¶ 773d3, at 233 (defendant must be "selling [the] particular product or service to others but refu[sing] to sell that same product or service to" the rival) (citing *Trinko, 540 U.S. at 410*). Third, and most importantly, "[t]he **[**48]** monopolist's discontinuation of the preexisting course of dealing must suggest a willingness to forsake short-term profits to achieve an anti-competitive end," *Novell, 731 F.3d at 1075* (citation omitted); see *Qualcomm, 969 F.3d at 993*, rather than to advance a valid business purpose. See also *Covad Commc'ns Co. v. Bell Atl. Corp., 398 F.3d 666, 675 (D.C. Cir. 2005)* (to prevail on refusal-to-deal claim, plaintiff "will have to prove [that defendant's] refusal to deal caused [defendant] short-term economic loss"). The cases, and the leading treatise, offer a demanding gloss on this prong of the test: *Qualcomm* requires the predatory motivation to be "the only conceivable rationale or purpose" for the otherwise inexplicable profit sacrifice, see *969 F.3d at 993*; Novell asks whether the cessation of dealing was "irrational but for its tendency to harm competition," *731 F.3d at 1076*; and Areeda & Hovenkamp look for "an unexplained, apparently irrational change in an established course of dealing." Areeda & Hovenkamp, ¶ 772d3, at 233.

b. Application

i. Facebook Policies

Applying these principles, it is clear off the bat that Facebook's adoption of a policy of not offering API access to competitors did not, standing alone, violate *Section 2*. ***HN7***[] As set out above, a monopolist has no duty to deal with its competitors, and a refusal to do so is generally lawful even if it is motivated, as Verizon's **[**49]** was in Trinko, by a desire "to limit entry" by new firms or impede the growth of existing ones. See *540 U.S. at 408*. It follows that a firm's merely announcing its choice not to deal with competitors, whatever the motivation for doing so, cannot violate *Section 2*. Plaintiffs' core argument for why the policies themselves are unlawful — that their promulgation was intended to, and did, "deter[] apps with established user networks from . . . developing social features that would have threatened Facebook," States Opp. at 35 — misses the boat. The central teaching of the cases discussed above is that Facebook had no antitrust duty to avoid creating that deterrent. See, e.g., *Olympia Equipment Leasing, 797 F.2d at 375* ("Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors . . . by . . . pulling its competitive punches.").

[*28] Facebook's general policy of withholding API access from competitors, moreover, was plainly lawful to the extent it covered rivals with which it had no previous, voluntary course of dealing. (Other rivals are addressed in Section B.1.b.ii., *infra*.) Such prior history of dealing, after all, is a necessary element of an *Aspen Skiing* claim. That is yet another reason why the mere act of announcing **[**50]** or maintaining a general no-dealing-with-competitors policy cannot, in and of itself, violate *Section 2*; rather, the analysis must focus on particular acts. See Areeda & Hovenkamp, ¶ 773e, at 273 (explaining that Aspen Skiing violations are "visible and idiosyncratic event[s]"). Consider an example from Plaintiffs' Complaint: citing its policies, in early 2013 Facebook blocked the API access of Vine, a new app it viewed as a competitor, mere hours after its launch. See Redacted Compl., ¶¶ 213-14. That decision was plainly lawful, per *Trinko*, because it was prospective: Facebook had not previously allowed Vine to access its APIs. Although the company was enforcing its "replicating core functionality" policy against Vine, that fact makes no difference to the Aspen Skiing analysis; rather, whether the specific refusal to deal with Vine contravened Section 2 depends on the details of the refusal itself.

To be clear, it is possible that were a monopolist to embark on a concerted scheme of serial refusals to deal with rivals, that scheme or "course of conduct" could amount to a separate and independent violation of the Sherman Act. See *United States v. Microsoft Corp., 253 F.3d 34, 78, 346 U.S. App. D.C. 330* (noting course-of-conduct theory without passing on its validity); **[**51]** *infra* at 62-63 (further discussing theory). Even if such a claim were cognizable, however, simply maintaining a policy of refusing to deal with rivals would not be enough. ***HN8***[] Rather, to be actionable, an unlawful refusal-to-deal scheme would have to be made up of refusals that were themselves independent violations of the Aspen Skiing test. See *Simon & Simon, PC v. Align Tech., Inc., No. 19-506, 2020 U.S. Dist. LEXIS 72499, 2020 WL 1975139, at *7-8 (D. Del. Apr. 24, 2020)* ("Plaintiff's characterization of [the defendant's] otherwise non-actionable refusals to deal as a 'scheme' do[es] not save its claims."); *Eatoni Ergonomics, Inc. v. Rsch. In Motion Corp., 826 F. Supp. 2d 705, 709-10 (S.D.N.Y. 2011)* ("[Plaintiff] does not, and cannot, cite any authority for the proposition that a series of unilateral acts that do not violate the antitrust laws may be aggregated into an unlawful 'course of conduct.'"), aff'd, *486 F. App'x 186 (2d Cir. 2012)*; *Masimo Corp. v. Tyco Health Care Grp., L.P., No. 02-4770, 2004 U.S. Dist. LEXIS 26916, 2004 WL 5907538, at *5-6 (C.D. Cal. June 10, 2004)* (explaining that a course-of-conduct liability theory cannot "allow for clearly legal acts to be thrown into the mix to bolster a plaintiff's antitrust case"). Otherwise, as several scholars have persuasively explained, monopolists might face liability for refusals to deal that are categorically protected from scrutiny for the policy reasons explained above. See Crane, 76 Antitrust L.J. at 666-69; Douglas H. Ginsburg & Koren Wong-Ervin, Challenging Consummated Mergers Under Section 2 (George Mason Univ. L. & Econ. Paper **[**52]** No. 20-14, May 2020), https://bit.ly/3wPRpnx; see also *infra* at 64. The States, therefore, cannot get anywhere by reframing Facebook's adoption of a policy of refusing to deal with all competitors as the execution of an unlawful scheme of monopoly maintenance. ***HN9***[] Rather, such a scheme must involve specific instances in which that policy was enforced (i) against a rival with which the monopolist had a previous course of dealing; (ii) while the monopolist kept dealing with others in the market; (iii) at a short-term profit loss, with no conceivable rationale **[*29]** other than driving a competitor out of business in the long run.

ii. Specific Refusals

Plaintiffs rejoin that they have alleged a number of specific refusals to deal that in fact meet those requirements. See States Opp. at 38. All such pleaded instances, however, took place from 2013 to 2015, with the latest — revocation of Ts?'s API access — happening in September 2015. See Redacted Compl., ¶¶ 222-24. Even assuming that those specific refusals to deal ran afoul of *Aspen Skiing*, the five-year delay that preceded the States' Complaint is fatal to their claim for equitable relief under *Section 16 of the Clayton Act*.

HN10[] *Section 16*, as noted above, authorizes "injunctive **[**53]** relief" "against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." *15 U.S.C. § 26*. As it has been interpreted, that provision authorizes the usual equitable practice under which courts may enter two different kinds of injunctions: (i) those that "attempt[] to foreclose a future harmful act," known as "preventive" injunctions; and (ii) those aimed at "prevent[ing] the future harmful effects of past acts," known as "reparative" injunctions. See *Lampkin v. Dist. of Columbia, 886 F. Supp. 56, 62 (D.D.C. 1995)* (citing Dan B. Dobbs, Law of Remedies 164 (2d ed. 1993)); see also *California v. Am. Stores Co., 495 U.S. 271, 282, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)* (interpreting *Section 16* to authorize divestiture, a reparative remedy, so long as the "harm to . . . consumers persists" from, and therefore is still "threatened" by, the unlawful merger). The States here seek both kinds of relief as remedies for Facebook's alleged refusal-to-deal violations. On the preventive front, they request that "Facebook be enjoined and restrained from continuing to engage in any anticompetitive conduct and from adopting in the future any practice, plan, program, or device having a similar purpose **[**54]** or effect." Redacted Compl., ¶ 277(2). On the reparative front, they seek "such other and further equitable relief as this Court may deem appropriate to restore competitive conditions and lost competition" caused by Facebook's past Platform-related conduct. Id., ¶ 277(8).

Given that the only alleged conduct here that might have violated *Section 2* took place from 2013 to 2015, however, the States cannot plausibly meet the requirements for either form of relief. See *Gov't of Puerto Rico v. Carpenter Co., 442 F. Supp. 3d 464, 474 (D.P.R. 2020)* (granting motion to dismiss where government plaintiff had "failed to plausibly establish that injunctive relief should be granted" under *Section 16* because "it [was] apparent from the face of the Complaint that the last injurious act in the [alleged price-fixing] scheme befell almost ten years ago") (emphasis omitted).

HN11[] Start with the preventive injunction, the key requirement for which is familiar: the States must "demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Rsch., Inc., 395 U.S. 100, 130, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; see also *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 14 (1st Cir. 2008)* ("*Section 16* . . . dovetails with Article III's requirement that in order to obtain forward-looking relief, a plaintiff must face a threat of injury that is both real and immediate, not **[**55]** conjectural or hypothetical.") (cleaned up and citation omitted); City of Los Angeles v. Lyons, 461 U.S. 95, 103, 111, [*30] 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983) (explaining that this element of "whether the complaint states a sound basis for equitable relief" essentially overlaps with Article III standing inquiry).

Facebook's ostensible scheme of revoking rivals' API access in a manner that violated Aspen Skiing is not ongoing or "contemporary," however, since the last revocation alleged occurred in 2015 and the policies themselves were suspended in 2018. See *supra* at 15. Nor is there any reason to think, given those facts, that such a scheme is "likely to . . . recur." Zenith Radio, 395 U.S. at 130; see Duty Free Americas, Inc. v. Estee Lauder Companies, Inc., 797 F.3d 1248, 1270-72 (11th Cir. 2015) (affirming dismissal of Section 16 claim for injunctive relief based on alleged antitrust violations that occurred four years before case was filed and were unlikely to affect plaintiff again). Plaintiffs suggest that Facebook's 2018 suspension of its API policies does not "establish that [it] stopped" targeting competitors for predatory API withdrawals. See States Opp. at 13. **HN12**[] That gets it backwards: it is the States' burden to "substantiate the claim" for injunctive relief by "provid[ing] proof," or here well-pleaded allegations, "that the harm . . . is likely to occur again." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674, 244 U.S. App. D.C. 349 (D.C. Cir. 1985). Yet based on the facts they have **[**56]** pleaded, and the judicially noticeable fact that Facebook discontinued the relevant Platform policies over two years ago, the States have alleged no "more than a mere possibility . . . that the injury will occur" again. See 11A Charles Alan Wright & Arthur R. Miller, Fed. Prac. and Proc. § 2942 (3d ed.).

A reparative injunction is also clearly unavailable based on the facts alleged. To be sure, Plaintiffs have pleaded the existence of "an ongoing injury" — *i.e.*, "continuing, present adverse effects," In re Nifedipine Antitrust Litig., 335 F. Supp. 2d 6, 18 (D.D.C. 2004) (quoting O'Shea v. Littleton, 414 U.S. 488, 495-96, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)) — from the alleged 2013-15 scheme of unlawful revocations of API access to competitor apps. To wit, that scheme allegedly blunted the growth of existing competitors to Facebook Blue, deterred other potential competitors from entering Facebook's market, and even "discouraged outside investment" in new firms, see Redacted Compl., ¶¶ 187, 211, 246, and the resulting loss in competition allegedly caused a number of harms to the States' economic well-being that are still ongoing. Id., ¶¶ 248-54.

The problem is that there is nothing the Court could order Facebook to do that would remedy that specific injury. **HN13**[] The key feature of a reparative injunction is that "it requires the defendant **[**57]** to restore the plaintiff to a preexisting condition to which [the] plaintiff was entitled." Lampkin, 886 F. Supp. at 62. A divestiture order can do that; it can "restore competitive conditions," Redacted Compl., ¶ 277(8), by unwinding a specific transaction that should never have occurred. But here, the Court cannot put the States back in their rightful position. It cannot turn back the clock to 2013, 2014, or 2015 and order Facebook to provide API access to Voxer, MessageMe, Path, or any other potential competitor (many of which are now defunct, per the Complaint), or somehow otherwise undo or ameliorate the destruction of competition that the States allege occurred. Id., ¶¶ 216, 224, 229. Accordingly, "[a]n order enjoining [Facebook] . . . would have no remedial effect whatsoever on the continuing . . . [injury] [the States] expect to experience due to the past injury they allege." In re G-Fees Antitrust Litig., 584 F. Supp. 2d 26, 35 (D.D.C. 2008) (dismissing antitrust "claim for injunctive relief . . . **[*31]** for failure to state a claim"); see also In re Nifedipine, 335 F. Supp. 2d at 19 & n.25 (noting that "the plaintiffs would also lack standing to seek an injunction" based on past conduct where the "relief they seek would not be reasonably likely to redress th[at] injury").

The foregoing analysis, it is worth emphasizing, **[**58]** simply reflects the hornbook principle that, **HN14**[] "[a]s a general rule, past wrongs are not enough for the grant of an injunction." Qualcomm, 969 F.3d at 1005 (citation omitted) (holding that injunction would be inappropriate remedy for unlawful conduct that "substantially foreclosed competition in the relevant antitrust markets" but terminated "two years before the FTC filed its action"). The usual remedy in such cases is damages, see Lyons, 461 U.S. at 109, which Plaintiffs have not sought here and would likely be time barred in any event. See 15 U.S.C. § 15c (authorizing State attorneys general to sue *parens patriae* for damages caused to their citizens by antitrust violations); id. § 15b (imposing a four-year statute of limitations on such actions). Indeed, as is discussed at length below, courts frequently apply the doctrine of laches to bar equitable relief where the comparable limitations period has run. See Carpenter, 442 F. Supp. 3d at 474-75 (finding both that Puerto Rico had "failed to plausibly establish that injunctive relief should be granted" given the delay in suit and that, by the same token, "the laches doctrine applies"). Although the Court here does not apply laches to the States' challenge to Facebook's Platform-related conduct (nor does Facebook ask it to), the doctrine's **[**59]** likely applicability confirms the correctness of the Court's conclusion that equitable relief is unavailable as to events that occurred over five years ago.

In sum, then, while it is possible that Facebook's alleged scheme of serially revoking API access from competitor apps could form the basis of a plausible refusal-to-deal claim under *Aspen Skiing*, the Court need not address that question. Even assuming the answer is yes, injunctive relief is not available now for such a claim as a matter of law.

2. *Conditional Dealing*

Plaintiffs get no further by maintaining that Facebook's policies also violated antitrust rules against what they call "conditional dealing." See States Opp. at 35. As an initial matter, the States are wrong to argue that a monopolist violates that so-called doctrine "when it requires third parties seeking to obtain its products or services to refrain from taking some action that would tend to foster competition on the merits." Id. They cite only *Lorain Journal Co. v. United States, 342 U.S. 143, 149, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*, for that proposition, and yet Lorain says nothing of the sort. That is unsurprising, as such a broadly formulated rule would cover refusals to deal with competitors, thus contradicting the cases discussed above — after all, **[**60]** such refusals can always be reframed as offers to deal only on the condition that the third party refrains from competing. See, e.g., Herbert Hovenkamp, FRAND and Antitrust, *105 Cornell L. Rev. 1683, 1697 (2020)* (defining "simple refusal[s] to deal" covered by Trinko rule to include "refusal[s] conditioned on a firm's status that cannot readily be changed," such as where a firm "agree[s] to sell to [non]competitors but not []competitors").

HN15[] To the extent any scholarly commentary uses the term "conditional dealing," rather, the phrase generally refers to actions such as "tying" or "exclusive dealing." *Id. at 1697, 1708*. The key fact distinguishing such conduct from a standard refusal to deal is that it is not "unilateral," but instead "involves some assay **[*32]** by the monopolist into the marketplace" that interferes with the relationship between rivals and third parties. *Novell, 731 F.3d at 1072*. Tying, for instance, occurs when a firm "require[s] third parties to purchase a bundle of goods rather than just the ones they really want," id., thereby leveraging the monopolist's power in the "tying" product market to harm its competitors (who lose access to customers) in the "tied" product market. See *Microsoft, 253 F.3d at 84*. "Exclusive dealing" is similar: it refers to a monopolist's conditioning **[**61]** the sale of a product on the buyer's agreement not to deal with its competitors. *Id. at 69-70*. Again, these "conditional dealing" schemes are thus categorically different from unilateral conduct that involves only the monopolist's competitors, such as its refusal to deal with them. The distinction is critical, as ***antitrust law*** is far more tolerant of unilateral behavior. See *Novell, 731 F.3d at 1072-73* (citing cases) ("Put simply if perhaps a little too simply, today a monopolist is much more likely to be held liable for failing to leave its rivals alone than for failing to come to their aid."); Hovenkamp, *105 Cornell L. Rev. at 1697*.

That brings us back to *Lorain Journal*, which, as it happens, involved a "a very special form of exclusive dealing, namely, a refusal to sell to end-user customers who purchase[d] from the monopolist's competitor[]." Kenneth L. Glazer & Abbott B. Lipsky, Jr., Unilateral Refusals to Deal Under Section 2 of the Sherman Act, 63 Antitrust L.J. 749, 800 n.75 (1995). There, the Journal, a local newspaper, had a "commanding" position in the advertising market of the city of Lorain, Ohio. See *342 U.S. at 145*. After a new radio station entered that market, the paper began to refuse to sell advertising space "in the Journal [to] any Lorain County advertiser who advertised or who **[**62]** [the paper] believed to be about to advertise" with the radio station. *Id. at 148*. The paper's bet was that many advertisers could not afford to lose out on the chance to advertise with it, and it was right; the scheme caused most firms to avoid advertising on the radio station, restoring the Journal to its local monopoly. *Id. at 148-49*. On those facts, the Court found a violation of *Section 2 of the Sherman Act*. *Id. at 152-53*. The key point for our purposes is that the Journal did not simply refuse to deal with the competitor radio station — *e.g.*, it did not merely refuse to print advertisements for the station itself in its pages. The Journal instead refused to deal with any and all customers unless those customers agreed not to deal with the competitor station, thereby interfering with its rival's ability to compete on the merits.

For the *Lorain Journal* principle (or exclusive-dealing doctrine generally) to apply to this case, as Plaintiffs argue it does, they would thus have to allege that Facebook conditioned access to its Platform APIs on app developers agreeing not to deal with other social-networking services. And, indeed, the States' Opposition suggests that Facebook did just that. See States Opp. at 35 ("Facebook . . **[**63]** . adopt[ed] policies prohibiting app developers from promoting competing social networks."); id. ("These policies deterred apps from . . . working with other [social] networks . . . ."). If Facebook had in fact interfered in that way with the ability of competing social-networking services to make agreements with app developers, it could plausibly have violated *Section 2*; such conduct might well have had a "significant effect in preserving [Facebook's] monopoly" by keeping user engagement with competing social-networking services "below the critical level necessary for any rival to pose a real threat to [its] market share." *United States v. Dentsply Int'l, **[*33]** Inc., 399 F.3d 181, 191 (3d Cir. 2005)* (finding *Section 2* liability based on exclusive dealing); see also *Microsoft, 253 F.3d at 69-70* (same).

Plaintiffs, however, have not sufficiently pleaded the sort of conduct just described. As discussed above, see *supra* at 13-14, the only claim to this effect in their Complaint is their allegation that, "[i]n 2011, Facebook adopted a policy aimed at forbidding . . . any apps that linked or integrated with competing social platforms . . . from accessing its APIs." Redacted Compl., ¶ 199. The precise allegation here, however, appears to be that this 2011 policy was "aimed at" forbidding third-party apps from **[**64]** using Facebook's APIs if they "linked or integrated with" other social-networking services, not that the policy actually did condition API access on refraining from such dealings. The Complaint, moreover, pleads no facts as to how or whether that aim was achieved — in other words, there is no indication of what the policy actually said or did, or how it was implemented to have the effect of discouraging third-party apps from dealing with rivals. ***HN16***[] As the D.C. Circuit has cogently explained, whether a "monopolist's conduct . . . is . . . condemned as exclusionary" depends on "the effect of that conduct, not upon the intent behind it." *Microsoft, 253 F.3d at 59*.

The Court here is not relying on a technical pleading defect. On the contrary, even if the States had alleged that the 2011 policy in fact had this prohibition (and thus presumably caused the worrisome effect), the Court would disregard that allegation as inconsistent with the actual text of the 2011 policy. See *supra* at 13-14; *Vanover, 77 F. Supp. 2d at 98* (court may consider material outside pleadings where it is "referred to in the complaint and is central to plaintiff's claim"). As the full text reveals, the policy stated only that "Apps on Facebook may not integrate, link to, **[**65]** promote, distribute, or redirect to any app on any other competing social platform." Redacted FTC Compl., ¶ 139. By "Apps on Facebook," it is clear that the policy was referring to the "canvas apps" that Facebook allowed developers to create for use within the Facebook site itself — *e.g.*, the personality-test app — rather than freestanding apps such as the ESPN app, which a user would access and use separately. See *supra* at 11. The upshot is that while the 2011 policy prohibited apps built to be used on Facebook from providing a link to a different social-networking platform, like Circle or Path, it did not prevent freestanding apps from linking to or interoperating with competitor social-media services. It did not, for instance, provide that the ESPN app could only allow a user to sign in with Facebook credentials (as opposed to, say, Google credentials), or only add a Facebook "Like" button and not a "share" button from Path or Circle. Nor did it require the ESPN app to refrain from allowing users to search for their contacts on other apps, as they did for their Facebook friends using the Find Friends API.

Properly understood, then, the 2011 policy's conditions did not violate *Section 2 of the Sherman Act* **[**66]** . Nor do Plaintiffs so argue. The policy simply regulated the acceptable features of apps specifically built to be used on Facebook itself; it does not appear to have prevented an app developer from building a separate version of its app that could be accessed and used within the website of another PSN service. For instance, the developer who built a personality-test app for Facebook could build the same app for Google+ without running afoul of the policy; its terms merely prohibited the Facebook version of the app from linking or redirecting to the Google+ version. The 2011 policy was thus a far cry from a policy that told app developers that **[*34]** they could only access Facebook's platform if they promised to only build their app for Facebook. By rough analogy, it is as if the Lorain Journal, rather than refusing to carry advertisements from any business that also advertised with the competing radio station, instead merely required that advertisements appearing in its paper had to avoid mentioning the radio station. Such a focused prohibition on the use of a monopolist's own facilities obviously could not have "significantly limited" the "opportunities for [competitors] **[**67]** to enter into or remain in [the] market" for personal-social-networking services, as is required for *Section 2* liability. *Microsoft, 253 F.3d at 69*. As such, the States' "conditional dealing" theory of a *Section 2* violation fails to state a claim as a matter of law.

* * *

For the foregoing reasons, the Court agrees with Facebook that none of Plaintiffs' Section 2 challenges to its Platform-related policies and conduct survives the instant Motion.

C. Acquisitions

Facebook next argues that the States' challenges to its acquisitions must similarly be dismissed under the doctrine of laches. Correct again. **HN17**[] That equitable doctrine "bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant." *Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121 (2002)*. The States filed this action in December 2020, seeking injunctive relief under *Section 16 of the Clayton Act* from the allegedly harmful effects of Facebook's anticompetitive acquisitions. But their main targets, the Instagram and WhatsApp mergers, both of which they challenge under *Section 7 of the Clayton Act* and *Section 2 of the Sherman Act*, took place in 2012 and 2014, respectively. See Redacted Compl., ¶¶ 119, 166. Begging the reader's indulgence for another lengthy exposition, the Court will now explain why that delay **[**68]** dooms the States' challenges here.

1. *Legal Framework*

HN18[] Although what constitutes an "unreasonable delay" in filing suit is generally a fact-intensive question, in the context of injunctive actions under *Section 16*, many courts have held that the Clayton Act's "four-year statute of limitation" on damages actions should be "used as a 'guideline'" for "computing the laches period." *Oliver v. SD-3C LLC, 751 F.3d 1081, 1085 (9th Cir. 2014)* (quoting *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp., 518 F.2d 913, 928 (9th Cir. 1975)*, disapproved of on other grounds by *California v. Am. Stores Co., 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)*); see also *Carpenter, 442 F. Supp. 3d at 474*; *Duty Free Americas, Inc. v. Estee Lauder Companies, Inc., No. 12-60741, 2014 U.S. Dist. LEXIS 43673, 2014 WL 1329359, at *14 (S.D. Fla. Mar. 31, 2014)*; Areeda & Hovenkamp vol. II, ¶ 320g, at 373 & n.199 (citing more decisions holding "the four-year statutory limitation period for damage actions . . . determinative of the equity result as well"). As these courts explain, "The doctrine of laches is premised upon the same principles that underlie statutes of limitation: the desire to avoid unfairness that can result from the prosecution of stale claims." *Midwestern Mach. Co. v. Nw. Airlines, Inc., 392 F.3d 265, 277 (8th Cir. 2004)* (citation omitted); see also *IT&T, 518 F.2d at 928*; ("[W]e think that a basic linkage is present [between the Clayton Act's separate causes of action for damages and injunctions] because of the fact that the two categories of relief serve as tools of enforcement and remedy for the same set of substantive rights.").

[*35] **HN19**[] The starting presumption, then, is that regardless of whether a *Section 16* plaintiff **[**69]** seeks damages or an injunction, it must file its lawsuit within four years from "the accrual of the claim." *Menominee Indian Tribe of Wisconsin v. United States, 614 F.3d 519, 531, 392 U.S. App. D.C. 202 (D.C. Cir. 2010)* (cleaned up) (citing *Gull Airborne, 694 F.2d at 843*); accord *Oliver, 751 F.3d at 1086* (looking to when "cause of action in antitrust accrues" because "in applying laches, we look to the same legal rules that animate the four-year statute of limitations under *section 4B [of the Clayton Act*]."). Generally, "[a] *Section 7* action challenging the initial acquisition of another company's stocks or assets accrues at the time of the merger or acquisition," *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1050 (8th Cir. 2000)*, giving the plaintiff four years from that time to sue. See also *Z Techs. Corp. v. Lubrizol Corp., 753 F.3d 594, 604 (6th Cir. 2014)* (same); Areeda & Hovenkamp, ¶ 320c5, at 349-350 (agreeing with this rule on policy grounds). The Court largely focuses on *Section 7* in this section and then examines the distinct *Section 2* component of Plaintiffs' attacks on Facebook's acquisitions in section III.C.1.d, *infra*. Following the lead of the parties and the cases, it uses the terms "acquisition" and "merger" interchangeably for purposes of this analysis.

This presumptive four-year laches period is particularly appropriate for challenges to acquisitions. The "traditional[]" remedy in such cases, which Plaintiffs seek here, see Redacted Compl. ¶ 277(8), is divestiture of the acquired assets and/or **[**70]** stock. See *Am. Stores, 495 U.S. at 281* (quoting *United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 329-331, 81 S. Ct. 1243, 6 L. Ed. 2d 318 (1961)*). Such a remedy, if ordered well after the merger has closed, will usually prejudice the defendant by inflicting substantial "hardship and competitive disadvantage," especially where its "business operations [have been] combined" with those of the acquired company. *Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1235 (8th Cir. 2010)* (holding divestiture remedy unavailable as a matter of law because of plaintiff's "inexcusable delay[]" in bringing suit); see also *Midwestern Mach., 392 F.3d at 277* (applying laches based on "substantial[] prejudice[]" to firm's shareholders "who invested [having] no reason to believe that a merger occurring more than seven years earlier could be the basis for suit"). For that reason, "where the equity relief" sought in a merger challenge "is retroactive in character, such as divestiture of illegally acquired assets," Areeda and Hovenkamp argue that the four-year time limit "should be absolute." Areeda & Hovenkamp ¶ 320g, at 374. Indeed, as they note, courts frequently find a divestiture remedy clearly unfair and unwarranted after delays in filing much shorter than four years — sometimes only months or even days after the merger's announcement. Id. ¶ 320g, 373 & n.198; see, e.g., *Ginsburg, 623 F.3d at 1235* (suit filed only two months after merger announcement **[**71]** and before closing); *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp., 116 F. Supp. 2d 1159, 1173 (C.D. Cal. 2000)* (delay of six months after merger announcement); *Taleff v. Sw. Airlines Co., 828 F. Supp. 2d 1118, 1124 (N.D. Cal. 2011)* (suit filed one day after closing).

2. *Application*

Given these precedents, the Court concludes that Plaintiffs' challenges to Facebook's 2012 and 2014 acquisitions are barred by laches. Going by the four-year "guideline" alone, *Oliver, 751 F.3d at 1085*, which is generous compared to the decisions set out above, and which prominent authorities argue "should be absolute," Areeda & Hovenkamp ¶ 320g, at 374, the **[*36]** States missed their window to sue by years. In the case of the Instagram acquisition, "the comparable statute of limitations time period ha[d] run . . . twice over" by the time they filed. *Midwestern Mach., 392 F.3d at 277* (applying laches). The Court is aware of no case, and the States provide none, in which a plaintiff other than the United States (against which laches does not apply), whether a state or a private party, was awarded equitable relief after such long post-acquisition delays in filing suit. Having thus "slumbered on [their] rights, [Plaintiffs'] equitable claims are now barred." Id.

That result is confirmed by applying the standard laches elements. Cf. *Steves & Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690, 716 (4th Cir. 2021)* (suggesting that a "singular focus on the date that a merger is consummated" is not appropriate). **[**72]** In brief, "Plaintiffs' years-long delay in bringing th[is] action was inexcusable as each challenged act was highly publicized," and "Facebook [would be] prejudiced by the unreasonable delay." *Reveal Chat Holdco, LLC v. Facebook, Inc., 471 F. Supp. 3d 981, 990 (N.D. Cal. 2020)* (discussing, *inter alia*, Instagram and WhatsApp acquisitions).

First, the States' long delays were unreasonable and unjustified as a matter of law. Both acquisitions were, per Plaintiffs' allegations, publicly announced, and the States were thus aware or certainly should have been aware of them from those points onward. See Redacted Compl., ¶¶ 124, 166, 199. The Complaint itself makes clear that concerns as to the effects of both on competition were apparent at the time. Plaintiffs allege that Facebook was "the dominant player" in Personal Social Networking Services "[a]t least as early as 2011," before either acquisition. Id., ¶ 68. Their position in this case, furthermore, is that "when the acquiring firm is a dominant firm or monopolist, competitive harm" from the acquisition of even a "potential competit[or] can be predicted with considerably more confidence[,] . . . . indicat[ing] a harsh rule against such mergers." States Opp. at 16 (quoting Areeda & Hovenkamp vol. V, ¶ 1122, at 59); see **[**73]** also Areeda & Hovenkamp vol. IV, ¶ 912a, at 91-92 (arguing that acquisition of a "nascent rival" "bears a very strong presumption of illegality" because it "eliminates an important route by which competition could have increased in the immediate future").

As to each acquisition, moreover, either judicially noticeable facts or the Complaint's allegations provide objective confirmation of contemporaneous antitrust concerns. After Facebook announced its plans to purchase Instagram in April 2012, see Redacted Compl., ¶ 124, the FTC conducted a highly publicized, four-month-long "investigation to determine whether the proposed acquisition . . . [would] violate *Section 7 of the Clayton Act*." Letter from April J. Tabor, Acting Secretary, Federal Trade Commission, to Thomas O. Barnett, Covington & Burling LLP (Aug. 22, 2012), https://bit.ly/3xaY3op. Although the agency ultimately allowed the merger to proceed with no action, the States' choice not to assert their own concerns at that time, let alone at any time in the next eight years, "bear[s] upon the issue of laches." *Am. Stores, 495 U.S. at 297* (Kennedy, J., concurring). As to WhatsApp, according to the Complaint itself, "some analysts recognized" "at the time" that "the **[**74]** only rationale for Facebook's $19 billion purchase price was the elimination of a potential competitor poised to mount a major challenge to Facebook's monopoly." Redacted Compl., ¶ 170. That perfectly summarizes Plaintiffs' exact theory of the case against the WhatsApp acquisition, see id., ¶¶ 179-80, 270, yet, again, it took them six years to come to court. **[*37]** Plaintiffs' Opposition, furthermore, does not argue or even suggest that the States were somehow not "able to pursue [their] claim[s]" at that time. Cf. *JELD-WEN, 988 F.3d at 718* (citations omitted).

Second, prejudice to Facebook, were equitable relief to be awarded now, is also apparent. ***HN20***[] As an initial matter, "[t]he bare fact of delay" beyond the analogous four-year statute of limitations "creates a rebuttable presumption of prejudice." *IT&T, 518 F.2d at 926* (citing *Gillons v. Shell Co. of Calif., 86 F.2d 600, 608 (9th Cir. 1936)* ("When the suit is filed after the statutory period, injury [*i.e.*, prejudice] is presumed.")); *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1057 (5th Cir. 1982)* (same; citing cases). The facts alleged in the Complaint, moreover, confirm the existence of economic prejudice here. According to the States, for the last five-plus years Facebook has made business decisions and allocated firm resources based on holding Instagram and WhatsApp, and it has also integrated their offerings **[**75]** to some extent into its core business. See Redacted Compl., ¶ 115 (quoting Zuckerberg email explaining plan to "integrate [Instagram's] products with ours"); id., ¶ 124 (Facebook "scale[d] back" or "cancel[ed]" a number of projects, including its "Mobile photos app," after buying Instagram); id., ¶ 127 (Facebook matched user accounts on Facebook Blue and Instagram to better target and serve ads); id., ¶¶ 176-78, 180 (Facebook has "take[n] active steps to utilize WhatsApp data in efforts to promote its core platform," including "combin[ing] user data across the services"). Although short of full business integration, Defendant's "expanded use of and investment in" the acquired assets "establishes economic prejudice resulting from [Plaintiffs'] [d]elay." *Pro-Football, Inc. v. Harjo, 567 F. Supp. 2d 46, 59, 62 (D.D.C. 2008)* (holding that laches barred cancellation action against trademark where "[e]conomic prejudice ar[ose] from investment in and development of the trademark") (citation omitted), aff'd in relevant part, *565 F.3d 880, 884, 385 U.S. App. D.C. 417 (D.C. Cir. 2009)* (agreeing that sufficient "evidence of prejudice . . . may arise from mere proof of continued investment in the late-attacked mark"); see also *Garabet, 116 F. Supp. 2d at 1173* (finding "serious prejudice and hardship" would be caused by divestiture given investment "spent **[**76]** on integrating the [merged] companies" and restructuring defendants' workforces).

Equitable relief would similarly prejudice Facebook's shareholders, see Redacted Compl., ¶ 99 (noting Facebook's 2012 IPO), especially those who invested within the last several years, by which point the WhatsApp and Instagram acquisitions had become old news. See *Midwestern Mach., 392 F.3d at 277*; cf. *Fed. Home Loan Bank Bd. v. Elliott, 386 F.2d 42, 54 (9th Cir. 1967)* (applying laches in non-antitrust suit seeking post-merger divestiture because of prejudice to "the rights of the shareholders . . . as of the day of the filing of the merger . . . to enjoy the benefits of the merger" and "prejudice [to] the rights of . . . shareholders who became such after the merger"). What is more, even if the existence of prejudice were debatable under the applicable precedents, "a lesser showing of prejudice is required" for laches in this case than in the above-cited cases, simply due to the sheer length of the delay. See *Harjo, 565 F.3d at 884-85* (eight-year delay) (citing *Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 843, 224 U.S. App. D.C. 272 (D.C. Cir. 1982)*); cf. *JELD-WEN, 988 F.3d at 729* (Rushing, J., concurring) ("The passage of time exacerbates th[e] complexities" that would be caused by divestiture "[a]fter a merger closes," "not only for the combined entity but also for nonparties who will be affected by a court order dividing the company."). **[**77]** Prejudice **[*38]** sufficient to trigger the rule of laches is manifest here.

3. Counterarguments

The States, unsurprisingly, object to the foregoing analysis on a number of grounds. The Court marches through each, but ultimately sticks to its guns.

a. Applicability of Laches

Plaintiffs first maintain that the usual laches framework does not properly govern in cases brought by states suing *parens patriae* and in the public interest. See States Opp. at 10-12. They cite no authority for that contention; they instead simply point out that most of the cases cited above were suits brought by private litigants — only *Carpenter* (which held that laches did apply) involved a government plaintiff, the territory of Puerto Rico. See *442 F. Supp. 3d at 464*. The dearth of cases (other than *Carpenter*) applying laches to bar merger challenges by states, however, does not somehow establish that states are immune from the doctrine. It instead seems to reflect the fact that there are very few cases like the present one, in which state plaintiffs delayed years and years in seeking equitable relief from an allegedly unlawful acquisition.

At any rate, to the extent that the question of laches' applicability to *Section 16* suits by state plaintiffs is **[**78]** open, *Carpenter* had the correct answer. The only other case that is close to being on point, *California v. American Stores Co., 495 U.S. at 271*, also supports the applicability of laches to state merger challenges. There, California sued in its capacity as *parens patriae* under *Section 16* to unwind the merger of two supermarket chains, claiming that it violated *Section 7*. *Id. at 274-75*; see *California v. American Stores Co., 872 F.2d 837, 839 (9th Cir. 1989)*. The case eventually reached the Supreme Court, which held (reversing the lower court) that divestiture was an available remedy in suits brought under *Section 16*. *Am. Stores, 495 U.S. at 278*. Throughout its opinion, the Court repeatedly referred to the suit as a "private action under *§ 16* of the Clayton Act," id. (emphasis added); see also *id. at 281, 284-85*, and emphasized that despite its holding, "equitable defenses such as laches . . . may protect consummated transactions from belated attacks by private parties" under *Section 16*. *Id. at 296*. Justice Kennedy wrote separately to emphasize his view that, given California's delay in suing while the FTC negotiated a pre-merger settlement with the defendant (the State waited to file until one day after the FTC approved the merger under the negotiated conditions), the lower courts should consider on remand whether "the bar of laches" in fact applied. *Id. at 298* (Kennedy, J., concurring). It is difficult to come away **[**79]** from these opinions with the impression that any Justice thought that *parens patriae* suits under *Section 16* are immune from a laches defense. See *New York. v. Kraft Gen. Foods, Inc., 862 F. Supp. 1030, 1033 (S.D.N.Y. 1993)* (citing American Stores for the proposition that "the State of New York[,] [though] a governmental actor, . . . is considered a private party when seeking an injunction pursuant to the Clayton Act"), aff'd sub nom. *State of N.Y. v. Kraft Gen. Foods, 14 F.3d 590 (2d Cir. 1993)*.

That approach makes sense given the history and purpose of *Section 16*. For the first two decades of its existence, the *Sherman Act* was interpreted not to provide for suits by either states or private parties. See *Paine Lumber Co. v. Neal, 244 U.S. 459, 471, 37 S. Ct. 718, 61 L. Ed. 1256 (1917)* (citing *Minnesota v. Northern Sec. Co., 194 U.S. 48, 24 S. Ct. 598, 48 L. Ed. 870 (1904)*, for proposition that "a private person cannot maintain a suit for an injunction under" **[*39]** the *Sherman Act*); *Georgia v. Evans, 316 U.S. 159, 162, 62 S. Ct. 972, 86 L. Ed. 1346 (1942)* ("[A]n amendment was necessary to permit suit for an injunction [for *Sherman Act* violations] by others than the United States."). Enacted in 1914, the *Clayton Act* "filled [that] gap . . . by authorizing equitable relief in private actions" under *Section 16*. *American Stores, 495 U.S. at 287*. Congress, however, specifically rejected an amendment that would have authorized "the attorney general of any State [to] bring suit in the name of the United States to enforce any of the antitrust laws." 51 Cong. Rec. S14519-27 (daily ed. Sept. 1, 1914); see *Evans, 316 U.S. at 162 n.1* (noting this history). **[**80]**

In expanding the universe of antitrust enforcers beyond the United States itself, Congress thus drew no distinction between states and private litigants: both simply came within the statute's authorization of "[a]ny person" to "sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*; see *Evans, 316 U.S. at 161* (holding that states qualify as "person[s]" under that provision); see also *Georgia v. Penn. R. Co., 324 U.S. at 447*. As such, the Congressional judgment was that states, like private parties, are entitled to relief under *Section 16* "under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity," *15 U.S.C. § 26* — "conditions and principles" that have always included the bar of laches against plaintiffs whose unreasonable delay prejudices the defendant.

This Court, then, agrees entirely with the position previously articulated by the United States in follow-on litigation to the *Microsoft* case:

> Although the States have traditionally played a significant role in American antitrust activity, they do not stand on equal footing with the United States as enforcers of the federal antitrust laws. The States possess important authority **[**81]** to seek both monetary and injunctive relief. In pursuing injunctive relief, however, the States appear before the Court as private parties, not as sovereign law enforcers. . . . [T]he relief they may seek is [therefore] subject to the limits Congress and the courts have imposed.

Mem. Amicus Curiae of the United States at 4, New York v. Microsoft Corp., No. 98-1233 (D.D.C. Apr. 15, 2002), https://bit.ly/3fJDlVw. ***HN21***[] Consistent with this view, the principle that laches does not ordinarily apply to "government suits to enforce sovereign rights," *United States v. Admin. Enterprises, Inc., 46 F.3d 670, 673 (7th Cir. 1995)* (citation omitted), allows the United States to seek an injunction for violation of its antitrust laws at any time, see *15 U.S.C. §§ 4*, 15; see, e.g., *du Pont, 366 U.S. at 318*, but does not offer the states the same leeway. As American Stores explained, laches can bar a "belated attack" against a merger under *Section 16* even if "it would not be too late for the [federal] Government to vindicate the public interest" "under *§ 15*" of the Clayton Act. See *495 U.S. at 295-96*.

The fact that the States "bring this *parens patriae* suit in the public interest," States Opp. at 10, does not counsel a different result. ***HN22***[] The *parens patriae* doctrine supplies a theory of Article III injury — namely, that "the state itself" has a cognizable "interest **[**82]** in the continuing prosperity of [its] econom[y]." *Kleppe, 533 F.2d at 673-74*. But the fact that "severe and generalized" economic injury to a state's citizens also concretely injures the state for Article III purposes, *id. at 675*, says nothing about the nature of the states' roles in **[*40]** the antitrust enforcement regime Congress has established. As the Supreme Court has explained, that regime, "while allowing "[t]he private-injunction action . . . [to] supplement[] [G]overnment enforcement," "primarily charge[s]" the United States "with the duty of protecting the public interest under these laws." *United States v. Borden Co., 347 U.S. 514, 518, 74 S. Ct. 703, 98 L. Ed. 903 (1954)* (emphasis added). Categorically excusing the states from laches would be inconsistent with that principle. The States' argument here also proves too much: if the fact that a suit would advance the public interest were enough to preclude a laches defense under *Section 16*, then laches would not apply even to suits by private entities. Congress, after all, authorized such suits precisely because they also "further the overriding public policy in favor of competition." *Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*, overruled by *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*; *Am. Stores, 495 U.S. at 284* ("Private enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition.").

Although the doctrine **[**83]** of laches therefore applies to *parens patriae* suits such as this one, the Court does not mean to suggest that the presence of state plaintiffs has zero effect on the analysis. Laches is an equitable doctrine, and in the balancing of the equities, it is of course relevant that this suit is brought not by a competitor hoping to "seriously interfere with a rival's business operations," but rather by many of the states of the Union. *IT&T, 518 F.2d at 926*. Even giving the States' interests significantly more weight than a private actor's would receive, however, does not lead to a different result. Plaintiffs waited six and eight years, compared to the four-year guideline statute of limitations, to challenge two highly publicized acquisitions — one of an existing nascent competitor, one of a potential future competitor — by a firm that they allege was already a "dominant" monopolist. See Redacted Compl., ¶ 68. To hold that laches did not apply in those circumstances would essentially declare the States immune from the doctrine for all practical purposes. While many might welcome such a regime as a matter of policy, it is not the system we have.

b. Ongoing Violation

The States next posit that even if laches applies, **[**84]** their "Complaint is timely," despite the long delays between the mergers at issue and their filing, "because the[y] allege ongoing conduct" by Facebook. See States Opp. at 12-13. They appear to contend, albeit not with perfect clarity, both that (i) the Instagram and WhatsApp acquisitions themselves are "ongoing" because Facebook still holds the purchased assets; and that (ii) Facebook has recently taken other actions that open the acquisitions to renewed challenge.

HN23[] As noted above, the general rule is that courts "measure[] the reasonableness of a private plaintiff's delay in suing for divestiture relative to the announcement of the transaction and its subsequent consummation." *JELD-WEN, 988 F.3d at 729* (Rushing, J., concurring) (citing cases). There are a number of exceptions to that rule, but before turning to the one the States seem to raise here, it is important to note what they do not argue. Plaintiffs do not contend, in opposing Facebook's Motion to Dismiss on the ground of laches, that "they lacked notice of the threatened injury [to their citizens' economic well-being] on which [their] divestiture claim is based" at the time the acquisitions were announced or consummated. Cf. *JELD-WEN, **[*41]** 988 F.3d at 717-18* (majority) (reasoning **[**85]** that "unreasonable delay does not include any period of time before [the plaintiff] . . . . learned that the merger" threatened plaintiff injury) (cleaned up). Put differently, they do not argue that it was "uncertain or speculative whether [Facebook's] antitrust violation[s] [would] injure[] [them] at the time of the violation," such that the laches period did not "begin[] until the date that [antitrust injury] first . . . became ascertainable." Oliver, 751 F.3d at 1086 (cleaned up and citation omitted); cf. In re Evanston Nw. Healthcare, No. 07-4446, 2008 U.S. Dist. LEXIS 42437, 2008 WL 2229488, at *4 (N.D. Ill. May 29, 2008) (denying motion to dismiss where "the plaintiffs dispute[d] [the defendant's] assertion that they either knew or should have known of their potential injury at the time the merger was consummated"). Along the same lines, there is no argument that the acquisitions at issue did not violate Section 7 or Section 2 until sometime after the merger closed; on the contrary, Plaintiffs' explicit theory is that both mergers were unlawful from the outset. See States Opp. at 17 ("The States allege that Facebook was a monopolist at the time it acquired Instagram and WhatsApp and that both acquisitions substantially reduced competition and further entrenched the company's monopoly position."); id. at 23 ("The States have pleaded that **[**86]** the acquisitions were illegal both then and now."). Nor do the States maintain that they "had good reason for not" suing earlier, such that their lengthy delay, even if measured from the time of the mergers, "was [nonetheless] reasonable." Menominee Indian Tribe, 614 F.3d at 531-32; see Reply States at 12 (correctly noting "States' failure to explain, justify, or even address their multi-year delay in challeng[ing] the[] acquisitions" in their briefing).

Instead, the States cite language from the Supreme Court that, in their minds, authorizes them to bring a Section 7 claim "at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce." United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957). The States contend that they may avail themselves of this rule and seek equitable relief now, no matter what has come before, because "time has made clear the [more recent] continuing anticompetitive effects of the Instagram and WhatsApp acquisitions." States Opp. at 13 (citing allegations in the Complaint of recent "proliferation of . . . objectionable content on Facebook" and "degrad[ation] of [WhatsApp's] privacy features," Redacted Compl., ¶¶ 180, 254).

The States misapprehend **[**87]** du Pont's import here. In that case, the United States — against which, recall, laches does not apply — brought a Section 7 challenge, in 1949, to the defendant's 1919 acquisition of a 23% share of General Motors stock. See 353 U.S. at 587. The Court found it proven that du Pont had long used, and was continuing to use, that "stock interest" to "entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics." Id. at 606. That relationship was not initially an antitrust concern, as GM was a relatively small buyer in that market at the time of du Pont's stock purchase. Id. at 599. By the time of suit, however, General Motors sold roughly half of all cars in the United States, id. at 596, giving du Pont a "commanding position" in the automobile finishes and fabrics market by virtue of its stock interest in GM, rather than competitive merit. Id. at 605; see Midwestern Mach., 392 F.3d at 273 ("In du Pont, there was no violation until **[*42]** decades later when GM became a successful and dominant firm."). In those circumstances, the Court allowed the United States to sue for divestiture, holding that "the plain language of § 7 contemplates an action at any time the [purchased] stock is used to bring about . . . the substantial lessening of competition," **[**88]** "which may be at or any time after the acquisition, depending upon the circumstances of the particular case." Du Pont, 353 U.S. at 597; see also United States v. ITT Cont'l Baking Co., 420 U.S. 223, 242, 95 S. Ct. 926, 43 L. Ed. 2d 148 (1975). ("[T]here can be a [Section 7] violation at some time later even if there was clearly no violation — no realistic threat of restraint of commerce or creation of a monopoly — at the time of the initial acts of acquisition."); Concord Boat, 207 F.3d at 1050 ("Clayton Act claims are not limited to challenging the initial acquisition of stocks or assets . . . since holding as well as obtaining assets is potentially violative of section 7.").

Du Pont and ITT, however, neither hold nor imply that the limitations or laches period for challenging a merger is forever tolled. The cases merely clarify that a violation of Section 7 — *i.e.*, "a reasonable probability that the acquisition is likely to result in the condemned restraints," du Pont, 353 U.S. at 607 — can arise (and persist) not only at the time of the merger, but also at any time afterward so long as the acquired assets are still held. That is a principle of substantive liability; it says nothing about when a plaintiff's cause of action accrues, or, by the same token, when it becomes time barred (or when delay becomes unreasonable). Areeda & Hovenkamp helpfully analogize to the doctrine of **[**89]** adverse possession: "The fact that each day of [a trespasser's] occupancy constitutes a trespass, and thus a violation, does not operate so as to toll the statute of limitations," which accrues when the injury is first actionable. See Areeda & Hovenkamp, ¶ 320c5, at 352. At some point, a trespasser's violation of the law, despite being ongoing, is immunized from suit. By the same token, even if Facebook's continued holding of Instagram and WhatsApp violates *Section 7* in some sense at this very moment, that does not make a present challenge timely. Such a result would write the statute of limitations for *Section 7* damages actions out of the Clayton Act and similarly eliminate the laches defense that Congress expected to govern *Section 16*'s cause of action for injunctive relief. See *Midwestern Mach., 392 F.3d at 273* ("[T]he statute of limitations must begin to run at some point in order for the time bar to have any effect and to give repose to merged firms."); *id. at 277* (same for laches); *Z Techs., 753 F.3d at 605* (recognizing practical need to avoid "effectively undermin[ing] merger-acquisition agreements and subject[ing] them to continual challenge"); *Complete Ent. Res. LLC v. Live Nation Ent., Inc., No. 15-9814, 2016 U.S. Dist. LEXIS 86407, 2016 WL 3457177, at *1 (C.D. Cal. May 11, 2016)* ("It cannot be the case that if a merger leads to monopoly power then anything anticompetitive that the newfound monopolist **[**90]** does . . . allow[s] the merger to be challenged indefinitely."); Areeda & Hovenkamp, ¶ 320c5, at 352-57.

Some courts suggest that du Pont's logic may "allow[] the Clayton Act statute of limitations to be restarted 'if [acquired] assets are used in a different manner from the way that they were used when the initial acquisition occurred, and that new use injures the plaintiff." *Complete Ent. Res., 2016 U.S. Dist. LEXIS 86407 2016 WL 3457177, at *2* (quoting *Midwestern Mach., 392 F.3d at 273*). Presumably the same principle would apply to laches. Plaintiffs, to be clear, do not mention or invoke this "hold and use" doctrine **[*43]** by name, but their argument as to why Facebook's recent conduct reopens the Instagram and WhatsApp acquisitions to challenge would seem to fit the bill. See States Opp. at 12-15. In any event, to the extent that the hold-and-use theory is even viable, see *Complete Ent. Res., 2016 U.S. Dist. LEXIS 86407, 2016 WL 3457177, at *2* (noting "skeptic[ism] of the legitimacy" of the doctrine), it does not help the States here.

For one thing, the conduct to which the States point — that Facebook has recently rolled back WhatsApp privacy protections, allowed "misinformation and violent or otherwise objectionable content" to proliferate on its platforms, and removed popular Instagram features, see Redacted Compl., ¶¶ 125-26, 176-180, 254 — does not qualify **[**91]** as the sort of "different uses of [the acquired] assets" that satisfy the hold-and-use doctrine as it has been articulated. *Midwestern Mach., 392 F.3d at 272*. On Plaintiffs' theory of the case, these are essentially price increases (as users pay for Facebook by allowing it to harvest their data) or reductions in product quality. ***HN24***[] Post-acquisition increases in prices or decreases in output, though, "are mere inertial consequences that one naturally expects to flow from" an anticompetitive merger, *Z Techs., 753 F.3d at 601-02* (citation omitted), and such consequences, the law is clear, "do not restart the statute of limitations" in a *Section 7* action. *Concord Boat, 207 F.3d at 1052* (quoting *DXS, Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462, 467-68 (6th Cir. 1996)*). This approach "allows the statute of limitations to have effect and discourages private parties from sleeping on their rights." *Midwestern Mach., 392 F.3d at 271* (citing *Pace Indus. v. Three Phoenix Co., 813 F.2d 234, 236-37 (9th Cir. 1987)*). If it were otherwise, again, "there would in effect be no statute of limitations" and no laches defense to a claim for equitable relief, "since a *Section 7* challenge to the holding or use of assets could be brought at any time." *Concord Boat, 207 F.3d at 1052*.

"[W]here the complained of 'new use'" of an acquired asset, moreover, "was, in fact, suspected and complained about prior to [and at the time of] the merger," it is especially improper to measure delay from some later point in time. *Complete Ent. Res., 2016 U.S. Dist. LEXIS 86407, 2016 WL 3457177, at *2*. That **[**92]** is the case here — according to the States' Complaint, both the FTC and European regulators were specifically concerned that Facebook would decrease WhatsApp users' privacy after the merger in the ways that Plaintiffs allege eventually occurred. See Redacted Compl., ¶¶ 176-77. There would thus be little sense in allowing the States to sue now because those earlier concerns, which they chose not to raise in a lawsuit, ended up being prescient.

c. Prospective Relief

The States next argue that because they have alleged "ongoing harm flowing from" the damage to competition caused by the WhatsApp and Instagram acquisitions, that renders the relief they seek "prospective," and "laches generally does not apply to bar claims for prospective injunctive relief." States Opp. at 14 (quoting *Gaudreau v. Am. Promotional Events, Inc., 511 F. Supp. 2d 152, 159 (D.D.C. 2007)*). As to the remedy of divestiture, that argument makes little sense; indeed, it would mean that all of the cases applying laches in merger challenges were wrongly decided. See *Reveal Chat, 471 F. Supp. 3d at 990-91* (applying laches to plaintiffs' *Section 7* claims against Facebook's Instagram and WhatsApp acquisitions, and rejecting argument that doctrine did not apply because plaintiffs alleged "ongoing conduct and harm," including recent actions further **[**93]** integrating the acquired companies). ***HN25***[] Although divestiture is a form of equitable relief, it is not generally thought of as **[*44]** "prospective" but rather "retroactive in character," as it is aimed at "unwind[ing] a transaction." *In re: Am. Express Anti-Steering Rules Antitrust Litig., No. 08-2315, 2016 U.S. Dist. LEXIS 3332, 2016 WL 748089, at *15 (E.D.N.Y. Jan. 7, 2016)* (quoting Areeda & Hovenkamp, ¶ 320, at 374). The fact that the challenged acquisitions allegedly continue to cause "ongoing harm" does not affect that characterization; on the contrary, where a plaintiff's complaint is that it is experiencing "continuing, present adverse effects" of past action, a reparative or backward-looking decree such as a divestiture order is the appropriate remedy. See *In re New Motor Vehicles, 522 F.3d at 14* (quoting *O'Shea v. Littleton, 414 U.S. 488, 496, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)*); see also *supra* at 31 (discussing reparative and preventive injunctions).

The States also point out that their Complaint seeks other truly prospective relief, see States Opp. at 14 — *i.e.*, that "Facebook be enjoined and restrained from continuing to engage in any anticompetitive conduct," "from making further acquisitions valued at or in excess of $10 million without advance notification to Plaintiff States," and "from making further acquisitions" without providing their Hart-Scott-Rodino Act pre-merger clearance filings to Plaintiff States in addition to the FTC. **[**94]** See Redacted Compl., ¶¶ 277(2)-(4). None of that sort of relief, however, would "restore [the] competition" allegedly lost as a result of Facebook's Instagram and WhatsApp purchases, as is required of a remedy for a *Section 7* violation. See *du Pont, 366 U.S. at 326* ("[C]ourts are . . . required . . . to decree relief effective to redress the violations . . . ."). Instead, these preventive measures would be aimed at forestalling future anticompetitive acquisitions. If such relief were to be granted here, it could only be for the States' separate claim of monopoly maintenance under *Section 2* of the Sherman Act (to which this Opinion now turns), which focuses not only on the Instagram and WhatsApp acquisitions themselves but also on additional conduct.

d. Course of Conduct

For sake of clarity, the analysis to this point has focused on Plaintiffs' *Section 7* challenges to Facebook's acquisitions, as the *Clayton Act* is the usual mechanism by which mergers are challenged. In addition to invoking that Section, though, Plaintiffs also allege one count of monopoly maintenance under *Section 2 of the Sherman Act*. ***HN26***[] Such a maintenance offense has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful . . . maintenance **[**95]** of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Microsoft, 253 F.3d at 50* (citation omitted). As to the second prong (which is all the Court addresses in this Opinion), the States argue that Facebook's "'buy or bury' strategy — whether viewed in the aggregate or by components — constitutes" such willful maintenance. See States Opp. at 32; see also id. at 33 (challenging "two-pronged" scheme "[w]hether viewed separately or together"). Plaintiffs' theories of why Facebook's acquisitions are also subject to a *Section 2* challenge, in addition to *Section 7* attack, can thus be separated into three basic buckets, which are described from narrowest to broadest. First, both the Instagram and WhatsApp acquisitions independently violated *Section 2*, just as they did *Section 7*. Id. at 33-34. Second, Facebook pursued a "broader acquisition strategy that served to entrench [its] monopoly" and that, in and of itself, violated *Section 2*. Id. at 42-44; see also id. at 32-33 ("Instagram and WhatsApp are the most prominent, but not the only, examples of th[is] prong of [its unlawful] course of conduct."). Third, Facebook's **[*45]** overall course of conduct, in the form of its "buy or bury" **[**96]** scheme evaluated "as a whole," separately and independently violated *Section 2*. Id. at 32-33.

Upon closer examination, each bucket has a fatal leak; that is, each theory of a *Section 2* violation runs into timeliness issues related to those that plagued Plaintiffs' *Section 7* counts. As to the first bucket — *i.e.*, the challenges to the Instagram and WhatsApp acquisitions standing alone — the straightforward answer is that the label does not change the result: the same laches analysis applies regardless of whether a particular merger is assailed on *Section 2* or *Section 7* grounds. ***HN27***[] As the Sixth Circuit has persuasively explained, in the context of a damages action:

> There is no reason to treat the same conduct differently in sister statutes [*i.e.*, *Section 2* and *Section 7*] that are designed to promote the same legislative objective. Moreover, the same statute — *15 U.S.C. § 15b* — provides the statute of limitations for each. There is nothing in *15 U.S.C. § 15b* that suggests it should be applied one way for merger-acquisition claims under the *Sherman Act* but differently for merger-acquisition claims under the *Clayton Act*.

Z Techs., 753 F.3d at 603. Equivalent logic applies to the States' claims for injunctive relief here, as *Section 16* (rather than 15b) provides the cause of action for, and imposes the same equitable limitations **[**97]** on, both *Section 2* and *Section 7* claims.

As to the second bucket, characterizing Plaintiffs' *Section 2* claim as a challenge to Facebook's larger scheme of serial anticompetitive acquisitions does not help them. The latest-in-time acquisition their Complaint mentions and characterizes as anticompetitive is the purchase of Eyegroove, "an app that allowed users to create and share music videos with augmented reality effects," which "Facebook decided to acquire . . . in 2016 upon learning that Twitter and Snapchat were interested." Redacted Compl., ¶ 184. The Complaint does not specify when in 2016 Facebook purchased that firm, but even assuming that it was in late December, four years still elapsed between the Eyegroove acquisition and the filing of this lawsuit. ***HN28***[] In general, and as set out above, "[t]he four-year limitation . . . for private antitrust actions . . . is long enough to enable potential plaintiffs to observe the actual effects of a possible antitrust violation and to calculate its potential effects." *Concord Boat, 207 F.3d at 1052* (quoting *IT&T, 518 F.2d at 929*). And courts consistently reject claims for retrospective equitable relief after far, far shorter delays. The Court can therefore see no reason in law or practice why the Eyegroove tail should **[**98]** wag the Instagram and WhatsApp dogs — why one small acquisition in 2016 (which merited one sentence in Plaintiffs' Complaint) should, four-plus years later, reopen the window to challenge a series of allegedly much more consequential acquisitions that all took place from 2012 to 2014. At the risk of repetition, there would be little left to the "especially important" principle that antitrust challenges to mergers "be timely made," for the benefit of both the public and the merged firms, see Areeda & Hovenkamp, ¶ 320, at 326, if such a maneuver were countenanced.

To the extent, moreover, that the States seek prospective injunctive relief based on Facebook's alleged scheme of anticompetitive acquisitions, they allege no present or recent unlawful conduct to enjoin, nor do they plausibly plead an impending threat of future anticompetitive acquisitions. See States Opp. at 43 (last listed "example[] that reflect[s] Facebook's evolving pattern of buying companies for anticompetitive reasons" is Eyegroove in 2016); *supra* at 32-33 **[*46]** (applying same principle in context of States' challenges to Platform policies). That is fatal to the States' requests for injunctive relief that would only prevent **[**99]** future injury — *e.g.*, an order compelling Facebook to notify Plaintiffs and provide them Hart-Scott-Rodino filings for any future acquisition over $10 million.

In the final bucket, Plaintiffs argue that their *Section 2* claim broadly asserts an overall course of monopoly-maintaining conduct that includes both Facebook's acquisitions and its API-related actions, the latter of which ceased only in 2018 with the suspension of the Platform policies. See States Opp. at 13. This "buy or bury scheme," Plaintiffs argue, is in itself timely challenged under *Section 2* here because, at worst, it terminated only two years prior to their filing this suit, within the presumptive laches period. Id.

As explained above, however, the last instance of Platform conduct that may be actionable under current refusal-to-deal doctrine occurred in late 2015; merely having the policy on the books of forbidding API access to competitors was, in itself, perfectly lawful behavior. To the extent Facebook's alleged "buy or bury" scheme is actionable, then, it can only be based on conduct that is alleged to have last occurred in 2015 (in the case of the Platform-related actions) and 2016 (in the case of Facebook's acquisitions, the last **[**100]** one of which was Eyegroove). As explained already, a challenge to either of those two prongs of conduct does not state a claim for reparative (backward-looking) relief, nor is there a plausibly pleaded risk that such scheme will imminently recur, as is necessary for preventive (forward-looking) injunctive relief. Combining the two prongs into one overall scheme changes nothing.

It is true, as the States point out, that some "[c]ourts do not require that every single action in an anticompetitive scheme be, on its own, anticompetitive" before that scheme may be separately assailed as a violation of *Section 2*. See States Opp. at 33 (quoting *In re Intuniv Antitrust Litig., 496 F. Supp. 3d 639, 680 (D. Mass. 2020)*). ***HN29***[]

Under that theory of Section 2 liability, often referred to as a "course of conduct" or "monopoly broth" theory, "a plaintiff can allege a series of actions that when taken together make out antitrust liability even though some of the individual actions, when viewed independently, are not all actionable." *Intuniv, 496 F. Supp. 3d at 680*. Facebook's "buy or bury" scheme, Plaintiffs might argue, can thus be challenged as a separate violation of Section 2 even if it is made up of some lawful conduct. If that is so, even if Facebook's merely having its API policies on the books did not violate Section 2, as the Court **[**101]** concluded above, such conduct could still be part of an unlawful scheme of monopoly maintenance that was ongoing until 2018, making the States' challenge timelier.

In *Microsoft*, the D.C. Circuit pointedly declined to address whether a defendant can violate Section 2 through a course of conduct involving lawful behavior. See *253 F.3d at 78*. Even assuming the answer is yes, however, this Court believes that the doctrine does not help Plaintiffs in these circumstances. Specifically, it does not allow unilateral refusals to deal that are lawful (such as Facebook's mere adoption of a policy of not offering API access to competitors) to be considered as part of a "monopoly broth" or "course of conduct" that violates Section 2.

Here is why: the decisions that do allow for "course of conduct" Section 2 liability, which is itself controversial, usually explain that the doctrine is necessary in **[*47]** cases involving individual acts that are lawful in themselves only because, when evaluated in a vacuum, those acts lack the requisite substantial effect on competition. In such situations, these decisions explain, it is proper to "consider the[] overall combined effect" of all the acts alleged, even if some would be lawful if assessed separately, **[**102]** because competition can die from a thousand paper cuts just as easily as from one large blow. *City of Anaheim v. S. California Edison Co., 955 F.2d 1373, 1376 (9th Cir. 1992)*; see *Microsoft, 253 F.3d at 78* (explaining theory as proposing that "a monopolist's unilateral campaign of acts intended to exclude a rival that in the aggregate has the requisite impact warrants liability even if the acts viewed individually would be lawful for want of a significant effect upon competition") (cleaned up); *Abbott Labs. v. Teva Pharm. USA, Inc., 432 F. Supp. 2d 408, 428 (D. Del. 2006)* ("Plaintiffs are entitled to claim that individual acts are antitrust violations, as well as claiming that those acts as a group have an anticompetitive effect even if the acts taken separately do not."); *LePage's Inc. v. 3M, 324 F.3d 141, 162 (3d Cir. 2003)* (explaining that "[t]he effect of [the defendant's] conduct in strengthening its monopoly position by destroying competition . . . is most apparent when [its] activities are considered as a whole."). On this view, it would be appropriate and indeed necessary to aggregate the effects of various, say, exclusive-dealing or bundling arrangements that on their own did not foreclose enough of the market to affect competition but, when evaluated together, did have that forbidden effect. See, e.g., *LePage's, 324 F.3d at 162*; *Tele Atlas N.V. v. NAVTEQ Corp., 2008 U.S. Dist. LEXIS 145998, 2008 WL 4911230, at *3-4 (N.D. Cal. Nov. 13, 2008)* (allowing jury to consider tying alongside exclusive dealing even though court had already held that **[**103]** tying conduct was not unlawful because defendant lacked market power in the tying market).

Unilateral refusals to deal (at least those that do not meet the *Aspen Skiing* elements) do not fit this paradigm. As discussed above, they are not held to be lawful because of an insignificant effect on competition. ***HN30***[] Quite the contrary: a monopolist's refusal to deal with its competitors can harm competition, especially if the monopolist has substantial control over a facility or input that is valuable to its rivals. Such refusals are instead tolerated by ***antitrust law*** despite those negative effects, on the theory that the effects of the law's intervention to compel dealing would be even worse. See *supra* at 24-25; see also Thibault Schrepel, The "Enhanced No Economic Sense" Test: Experimenting with Predatory Innovation, 7 NYU J. Intell. Prop. & Ent. L. 30, 41 (2018). They are thus not the sort of lawful conduct that the monopoly-broth theory is designed to account for and, to the extent that theory is viable, should be excluded from its reach. See Crane, 76 Antitrust L.J. at 669 (arguing for this approach); Ginsburg & Wong-Ervin, *supra*, at 8-9 (same); Schrepel, 7 NYU J. Intell. Prop. & Ent. L. at 40-41 (noting "real danger" in applying monopoly-broth theory to unilateral refusals to deal); cf. *Free FreeHand Corp. v. Adobe Sys. Inc., 852 F. Supp. 2d 1171, 1184 (N.D. Cal. 2012)* (declining **[**104]** to consider as part of monopoly-broth theory defendant's choice not to "license its technology" to competitors because it "ha[d] no duty to" do so). Any other result would recreate the negative policy consequences that the no-duty-to-deal rule is meant to avoid. It would be far too easy for plaintiffs to advance their otherwise nonviable claims against unilateral refusals to deal — which, as Trinko makes clear, are lawful even if the monopolist intends to, and does, hinder its competitors in so refusing — by **[*48]** simply repackaging such refusals as part of a larger scheme by the defendant that was intended to, and did in fact, harm competition. That result is avoided by holding that lawful unilateral refusals to deal cannot be combined with other conduct, lawful or unlawful, into an overall scheme of monopoly acquisition or maintenance that can be separately challenged. ***HN31***[] If a unilateral refusal (or refusals) is to be part of such larger scheme, it must in itself be unlawful.

The upshot is that Facebook's retention of its API policies cannot, as a matter of law, constitute part of any actionable scheme of monopoly maintenance under *Section 2 of the Sherman Act*. As a result, that the company retained **[**105]** those policies into 2018 does not furnish a basis for the States to challenge its much earlier actions.

e. Procedural Posture

Down to their last card, Plaintiffs maintain that dismissing a claim based on laches at the *Rule 12(b)(6)* stage is generally improper because laches is an affirmative defense, as to which the defendant, here Facebook, bears the burden of proof. See States Opp. at 9-10, 15. The very case they cite for the proposition that "[l]aches is a fact-intensive defense poorly suited to a motion to dismiss," however, goes on to explain that dismissal is nonetheless proper if "(1) an unreasonable delay appears on the face of the pleading; [and] (2) no sufficient excuse for delay appears or is pleaded." *Kemp v. Eiland, 139 F. Supp. 3d 329, 350 (D.D.C. 2015)* (quoting *Arclar Co. v. Gates, 17 F. Supp. 2d 818, 823 (S.D. Ill. 1998)*); see also *Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 190 (2d Cir. 2019)* (affirming lower court's non-laches-based dismissal on laches grounds where "delay [was] unreasonable" "and the prejudice to the [defendant] [was] evident on the face of [the] complaint"); *Reveal Chat, 471 F. Supp. 3d at 990-91* (dismissing similar *Section 2* and *7* claims against Facebook based on laches). As explained at length above, both unreasonable delay and prejudice are manifest on the face of the States' Complaint here.

The Court is aware that the D.C. Circuit has echoed the warning that a "complaint seldom **[**106]** will disclose undisputed facts clearly establishing the [laches] defense." *Menominee Indian Tribe, 614 F.3d at 532* (quoting Wright & Miller § 1277). "Seldom," though, does not mean "never." Just as "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed," so too must it retain the power to avoid "sending the parties into discovery when there is no reasonable likelihood," based on "the events related in the complaint," that Plaintiffs will ultimately be entitled to the injunctive relief they seek. *Bell Atlantic Corp v. Twombly, 550 U.S. 544, 558, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citations omitted). Had the States responded to the substantial timeliness arguments that Facebook put forward in its Motion to Dismiss — which rest entirely, and properly, on facts that are either pleaded or properly judicially noticed — by raising (or even hinting at) a factual dispute as to when their claims first accrued, or a reasonable justification for their long delays in filing, the outcome here might well be different. They did not do so. The only argument Plaintiffs make as to why the laches elements are not met here is their half-hearted contention that Facebook was not prejudiced but rather "benefitted from the States **[**107]** not filing sooner," since it has been and remains a very profitable company. See States Opp. at 15 (emphasis added). That is small beer indeed.

* * *

[*49] Ultimately, this antitrust action is premised on public, high-profile conduct nearly all of which occurred over six years ago — before the launch of the Apple Watch or Alexa or Periscope, when Kevin Durant still played for the Oklahoma City Thunder, and when Ebola was the virus dominating headlines. The Complaint's allegations themselves make clear that the States could easily have brought suit then, just as they make clear that any equitable relief this Court could or would order now would greatly prejudice both Facebook and third parties. The system of antitrust enforcement that Congress has established does not exempt Plaintiffs here from "the consequences of [their] choice" to do nothing over the last half decade. See *Am. Stores, 495 U.S. at 298* (Kennedy, J., concurring). The Court accordingly finds that, as a matter of law, their challenges to Facebook's acquisitions — whether they are targeted independently or as part of a larger scheme of anticompetitive behavior — are barred by the doctrine of laches or otherwise furnish no basis for the injunctive relief **[**108]** sought.

IV. Conclusion

For the foregoing reasons, the Court will grant Facebook's Motion to Dismiss this case in its entirety. A separate Order so stating will issue this day.

Date: June 28, 2021

/s/ James E. Boasberg

JAMES E. BOASBERG

United States District Judge

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

[*none] ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Facebook's Motion to Dismiss is GRANTED; and

2. The case is DISMISSED WITHOUT PREJUDICE.

/s/ *James E. Boasberg*

JAMES E. BOASBERG

United States District Judge

Date: June 28, 2021

Multiple Energy Techs., LLC v. Under Armour, Inc.

United States District Court for the Western District of Pennsylvania

June 29, 2021, Decided; June 29, 2021, Filed

2:20-CV-664-NR

Reporter
2021 U.S. Dist. LEXIS 120744 *; 2021 WL 2661827

MULTIPLE ENERGY TECHNOLOGIES, LLC, Plaintiff, v. UNDER ARMOUR, INC., Defendant.

Prior History: *Multiple Energy Techs., LLC v. Under Armour, Inc., 2021 U.S. Dist. LEXIS 39280, 2021 WL 807722 (W.D. Pa., Mar. 3, 2021)*

Core Terms

products, clothing, consumers, bioceramics, interchangeable, antitrust, relevant market, amended complaint, allegations, elasticity, t-shirt, amend, logo

Counsel: **[*1]** For ERIC G. SOLLER, Special Master: Eric G. Soller, LEAD ATTORNEY, Pietragallo Gordon Alfano Bosick & Raspanti, LLP, Pittsburgh, PA.

For MULTIPLE ENERGY TECHNOLOGIES, LLC, Plaintiff: Nicole Sullivan, Thomas Butler, White and Williams, LLP, New York, NY; Thomas B. Fiddler, LEAD ATTORNEY, White and Williams LLP, Philadelphia, PA.

For UNDER ARMOUR, INC, Defendant: Carolyn Owens Boucek, United States District Court for the Western District of Pen, Pittsburgh, PA; Kevin P. Allen, Eckert Seamans Cherin & Mellot, Pittsburgh, PA; Michael P. Pest, Eckert Seamans Cherin & Mellott, LLC, Pittsburgh, PA.

Judges: J. Nicholas Ranjan, United States District Judge.

Opinion by: J. Nicholas Ranjan

Opinion

MEMORANDUM ORDER

J. Nicholas Ranjan, United States District Judge

Defendant Under Armour, Inc. moves to dismiss Plaintiff Multiple Energy Technologies, LLC's second amended complaint in this antitrust case. ECF 64. The Court previously dismissed MET's antitrust claim based on its failure to allege that it was a "direct competitor" of Under Armour, as well as its failure to adequately define the relevant market for antitrust purposes. ECF 54; ECF 55. MET then amended its complaint, and Under Armour responded by filing the pending motion **[*2]** to dismiss.

This time around, Under Armour renews only one of its arguments. ECF 65, pp. 9-15. That is, Under Armour says that MET has once again failed to adequately define the market in which Under Armour allegedly engaged in anticompetitive behavior. *Id.* Applying the familiar standard of *Rule 12(b)(6)*, the Court will grant the motion, and once again dismiss MET's complaint. That said, for the reasons discussed below, the Court also finds that granting leave to amend is not yet futile, and so will provide MET with one last chance to amend its complaint.

Much like its first amended complaint, MET's second amended complaint defines the relevant market as consisting of all "clothing containing recovery enhancing bioceramics," or "CCREB." ECF 58, ¶ 8. More specifically, MET adds that the CCREB market "consists of clothing such as activewear, tank tops or sleeveless shirts, t-shirts, long sleeve shirts, shorts, pants, leggings, joggers, sweatpants, sleeves, pajamas[,] and sleepwear." *Id.* at ¶ 14. According to MET, this clothing is "distinct and separate from other kinds of clothing," in that it is advertised by sellers and bought by consumers for its alleged "muscle recovery and performance" benefits. **[*3]** *Id.* at ¶ 15. As a result, CCREB "are consistently priced higher than traditional clothing that do not contain bioceramics," and "consumers who seek to purchase CCREB do not consider traditional clothing that does not contain bioceramics to be reasonably interchangeable." *Id.* at ¶¶ 17, 18.

When the Court dismissed MET's last complaint, it explained that MET's allegations had left it "unclear what clothing or type of clothing" was part of the market and, also, that MET had pled "nothing about the cross-elasticity of demand of the products in the relevant market[.]" *Multiple Energy Techs., LLC v. Under Armour, Inc., No. 20-664, 2021 U.S. Dist. LEXIS 39280, 2021 WL 807722, at *2 (W.D. Pa. Mar. 3, 2021)* (Ranjan, J.). Under Armour now argues that these same flaws remain. According to Under Armour, the products MET has identified as part of the market are not "reasonably interchangeable." ECF 72, pp. 6-11. What's more, Under Armour suggests that MET has still alleged nothing about the "elasticity" of products *within* the market—*i.e.*, that an increase in the price for one CCREB product necessarily increases demand for other like products in that market. *Id.*

The Court agrees that MET's allegations still fall short. MET's burden at this stage is to plausibly plead that *high* elasticity exists between all products *within* the alleged **[*4]** market—not just that CCREB has *low* elasticity with clothing products that *do not* incorporate bioceramics. In ***antitrust law***, "[t]he relevant product market is defined as those commodities reasonably interchangeable by consumers for the same purposes." *Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991)* (cleaned up). Thus, products in an antitrust product market are "characterized by a cross-elasticity of demand," meaning "the rise in the price of a good *within a relevant product market* would tend to create a greater demand for *other like goods in that market*." *Id.* (cleaned up) (emphasis added).

Put another way, the relevant question here is whether MET has plausibly pled that consumers consider all the products in the alleged market to be "reasonably interchangeable" with the other products in that market. *Id.* As a result, MET misses the mark when it alleges and argues only that consumers do not consider CCREB to be interchangeable with non-CCREB clothing, and fails to also allege that consumers *do* consider products within the CCREB market to be interchangeable with each other. MET also remains vague about what products are in the market—alleging only that the market consists of clothing "such as" the list of examples provided. ECF 58, **[*5]** ¶ 14.[1]

To survive dismissal, then, MET needed to do two things: First, it needed to say what products are in the market, with enough specificity to put Under Armour on notice of at least the rough bounds of the market.[2] Second, and more importantly, it needed to allege that consumers consider the products in the market to be "reasonably interchangeable" *with the other products in the market*. That is what the Court meant, in its first opinion, when it said that MET had pled nothing about "cross-elasticity of demand" in the CCREB market. *Multiple Energy Techs., LLC,*

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[1] MET has alleged with some precision that Under Armour "is responsible for over 60% of sales in the market for CCREB in the United States[.]" ECF 58, ¶ 20. The Court sees no reason why MET should not be able to specify the types of clothing it considered when calculating or estimating this number. If discovery reveals that other types of clothing belong in the CCREB market, MET can always seek leave to amend its complaint to include them.

[2] This does not mean MET needs to provide excessive detail about the products in the market. It only needs to clearly identify what categories of clothing the market contains, rather than obscuring the market by providing only examples of types of clothing the market "includes."

No. 20-664, 2021 U.S. Dist. LEXIS 39280, 2021 WL 807722, at *2. Because MET did neither of these things, dismissal is once again required.

The tougher question is whether MET deserves another chance to amend. MET's previous failure to correct the same deficiencies favors dismissal. But after careful consideration, the Court finds that, for three reasons, allowing MET to amend again would not yet be futile.

First, the Court is mindful that the bar MET must clear is not a high one. In most antitrust cases, "proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers." Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997) (citation omitted); Premier Comp Sols. LLC v. UPMC, 163 F. Supp. 3d 268, 278 (W.D. Pa. 2016) (Cercone, J.) ("Definition of the relevant product market often requires **[*6]** a deeply fact-intensive inquiry, and courts are hesitant to grant motions to dismiss for failure to plead a relevant market definition." (cleaned up)). Thus, MET does not have to define the market with precision just yet—it only has to plead "enough factual matter (taken as true) to suggest that" it is "plausible" that the identified products comprise a single market. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Second, it is notable that MET's failure to correct its complaint seems to stem mostly from its misunderstanding of the appropriate legal standard. MET's briefing suggests that it believes the "cross-elasticity" requirement is satisfied by allegations that consumers do not consider products within the market to be interchangeable with products outside the market, rather than by allegations that all the products *within* the market are reasonably interchangeable. The Court has now clarified that standard and what it expects MET to allege.

Third, and most importantly, the Court will allow amendment because MET's arguments allude to a possible definition of the relevant market that could be enough to survive dismissal. MET's "theory of the case" seems to be that consumers who purchase products in the CCREB market are driven **[*7]** chiefly by the bioceramics contained within the clothing, rather than by the secondary consideration of what type of clothing contains those bioceramics. *See, e.g.*, ECF 58, ¶¶ 8, 15-18, 74; *see also* ECF 71, p. 12 (arguing that the "most critical component of the products in this market" is "the recovery enhancing bioceramics that are infused into these products").

If that is true, it is at least plausible that a consumer who wants to buy a bioceramic t-shirt, but finds them out-of-stock or overpriced, is more likely to purchase another type of bioceramic clothing (*e.g.*, a headband or a tank-top) than to purchase a t-shirt that lacks bioceramics. *Cf.* Am. Needle, Inc. v. New Orleans Louisiana Saints, 385 F. Supp. 2d 687, 694 (N.D. Ill. 2005) ("[A] significant segment of the market for NFL-branded headwear and apparel is purchasing the team logo. If a store sold out of hats carrying the Chicago Bears logo, these individuals would not necessarily find caps carrying logos for Spongebob, the University of Michigan, or even the Chicago Bulls to be reasonable substitutes. More likely, they would purchase a different item of apparel, such as a T-shirt or sweatshirt, or even a non-apparel item like a mug or key chain that carries the Bears logo. The product for these consumers is the **[*8]** trademarked logo.").

Put another way, the price and demand of bioceramic t-shirts could, in fact, be highly elastic with the price and demand of bioceramic wristbands, tank-tops, and all other types of CCREB clothing. "A cluster of products," such as these, "can comprise a relevant product market if the cluster is itself an object of consumer demand." Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC, 950 F.3d 911, 918 (7th Cir. 2020) (cleaned up); *see also* Weiss v. York Hosp., 745 F.2d 786, 826 (3d Cir. 1984) ("Where, however, several goods or services are generally offered by the same providers, it is not unreasonable for a jury to conclude that the market for antitrust purposes includes all of those goods or services." (citations omitted)).[3]

[3] For this same reason, the Court is not convinced by Under Armour's apparent contention that, to satisfy the "reasonable interchangeability" requirement, the relevant market must be subdivided to account for every consumer trait, such as gender or age, or for all product traits, such as clothing types or sizes. *See, e.g.*, ECF 72, pp. 7-8; ECF 65, p. 2. Instead, the pertinent question is whether the products in the market share the important traits that drive consumers to shop only within the alleged market, rather than considering products outside of it to be reasonable substitutes. *See, e.g.,* Am. Needle, Inc., 385 F. Supp. 2d

Of course, that may or may not be true of the products here. MET has not yet even alleged it. But for now, it seems possible, based on its arguments to date, that MET can, if given another chance, allege a cluster of CCREB items that are "reasonably interchangeable" with one another, despite differences such as clothing type, so that grouping those products in a single market merely "reflects commercial realities." *United States v. Grinnell Corp., 384 U.S. 563, 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

While the Court will once again grant Under Armour's motion to dismiss, it will also give MET leave to amend its complaint one last time, if it has **[*9]** a factual basis to do so. As noted above, to survive dismissal, MET must identify all the clothing types that it believes to comprise the relevant market, and then allege that all those products are highly elastic with all other clothing within that market.

CONCLUSION

For all the reasons discussed above, Under Armour's motion to dismiss the second amended complaint is **GRANTED**. MET must file any amended complaint by **July 9, 2021**.

DATE: June 29, 2021

/s/ *J. Nicholas Ranjan*

United States District Judge

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at 694; *Dang v. San Francisco Forty Niners, 964 F. Supp. 2d 1097, 1107 (N.D. Cal. 2013)* (concluding that plaintiff had adequately pled antitrust market consisting of all "apparel" bearing NFL-related logos, because "a reason why the apparel products at issue may be deemed valuable and relevant to consumers is in their bearing of NFL-related logos and trademarks.").

[Tyler Techs., Inc. v. Lexur Enters. Inc.](#)

United States District Court for the Southern District of Indiana, New Albany Division

June 29, 2021, Decided; June 29, 2021, Filed

Case No. 4:20-cv-00173-TWP-DML

Reporter
2021 U.S. Dist. LEXIS 120935 *; 2021 WL 2661751

TYLER TECHNOLOGIES, INC., Plaintiff, v. LEXUR ENTERPRISES INC., ROBERT FRY, and JOHN DOES 1-100, Defendants.

Core Terms

bids, Antitrust, contracts, competitors, allegations, tortious interference, Defendants', rebid, collusion, civil conspiracy, Sherman Act, rigging, bidder, motion to dismiss, terminated, business relationship, defendant's conduct, bidding process, anti trust law, anticompetitive, colluded, prices, pled, absence of justification, conspiracy, quotation, brings, harmed, wrongful means, out-of-cycle

Counsel: **[*1]** For TYLER TECHNOLOGIES, INC., Plaintiff: Ann O. McCready, Vivek Randle Hadley, TAFT STETTINIUS & HOLLISTER LLP (Indianapolis), Indianapolis, IN; Jennifer J. Nagle, Michael R. Creta, PRO HAC VICE, K&L GATES LLP, Boston, MA.

For LEXUR ENTERPRISES INC., Defendant: A. Richard M. Blaiklock, Aaron D. Grant, John Carl Trimble, LEWIS WAGNER, LLP, Indianapolis, IN.

For ROBERT FRY, Defendant: Chelsea R. Stanley, Douglas B. Bates, STITES & HARBISON, PLLC (Jeffersonville), Jeffersonville, IN.

JOHN DOES 1-100, Defendant, Pro se.

Judges: Hon. Tanya Walton Pratt, Chief United States District Judge.

Opinion by: Tanya Walton Pratt

Opinion

ENTRY ON DEFENDANTS' MOTIONS TO DISMISS

This matter is before the Court on separate Motions to Dismiss filed pursuant to *Federal Rule of Civil Procedure 12(b)(6)* by Defendants Lexur Enterprises Inc. ("Lexur") (Filing No. 29), and Robert Fry ("Fry") (Filing No. 31), (collectively, "Defendants"). This case was initiated by Plaintiff Tyler Technologies, Inc. ("Tyler") against Defendants "for (1) violation of the *Sherman Antitrust Act, 15 U.S.C. § 1, et seq.*, (2) violation of the *Indiana Antitrust Act, Ind. Code § 24-1-2-1, et seq.*, (3) tortious interference with contract, (4) tortious interference with business relationships, and (5) civil conspiracy." (Filing No. 1 at 1).[1] Defendants have separately moved to dismiss, arguing that all claims **[*2]** against them, as alleged, fail (Filing No. 29; Filing No. 31).[2] For the following reasons, the Defendants Motions are **granted**.

I. BACKGROUND

The following facts are not necessarily objectively true, but, as required when reviewing a motion to dismiss, the Court accepts as true all factual allegations in the Complaint and draws all inferences in favor of Tyler as the non-moving party. *See Bielanski v. County of Kane, 550 F.3d 632, 633 (7th Cir. 2008)*. Though the Complaint goes into much greater detail, the following factual background suffices to provide adequate context for purposes of this Entry.

Pursuant to Indiana law, county assessors must physically inspect and reassess the value of all real property over the course of four years (Filing No. 1 at 8). To achieve this task, assessors regularly contract with private enterprises to provide necessary support and advice with these socalled "cyclical reassessments." *Id.* As part of this process, assessors must advertise for bids, which usually occurs in the year before the start of a new cycle. *Id.* Consistent with this practice, Tyler—"the largest software company in the nation that focuses solely on providing integrated software and technology services to the public sector"—bid in 2017 for **[*3]** contracts with Dearborn, Floyd, Jackson, Jefferson, Ripley, and Switzerland Counties (the "Counties") to provide reassessment support starting in 2018. *Id.* at 5, 6, 8. Lexur—"a regional competitor" with work "limited almost exclusively to Ohio"—was one of Tyler's rivals for the contracts. *Id.* at 6, 8-9. Ultimately, Tyler won the contracts with their terms running from May 1, 2018, through April 30, 2022. *Id.* at 8-9.

Davis and Thornsberry were both long-time Tyler employees who, in their respective roles, served as liaisons between the company and the Counties. *Id.* at 9-10. Starting in May 2020, however, Davis and Thornsberry worked in conjunction with Lexur and Fry (Lexur's President and Chief Financial Officer) to covertly create a scheme to (1) convince the Counties to reopen a bidding process "mid-cycle" (that is, before the four-year cycle concluded in 2022), (2) leave other competitors (including Tyler) in the dark about the process (rendering them unable to meaningfully submit bids), (3) guarantee that Lexur was awarded the contracts (by submitting bids that were lower than Tyler's previous successful proposals), (4) coordinate the termination of Tyler's contracts with the Counties, **[*4]** and (5) solicit other Tyler employees to work for Lexur on the newly-awarded contracts. *Id.* at 6, 12-18.[3]

Specifically, the Complaint alleges that Defendants directly solicited the assessors to pledge to rebidding the contracts, terminating Tyler, and hiring Lexur (Filing No. 1 at 12). In fact, Defendants drafted a calendar that outlined the plan, providing a day-by-day contour of the scheme. *Id.* at 13-14. As shown by this agenda, the rebidding process was to be advertised the week preceding the Fourth of July holiday weekend in 2020. *Id.* The

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[1] Tyler also brought claims against Jimmy Davis ("Davis") and Joe Thornsberry ("Thornsberry"), who "both were active Tyler employees" until July 2020. (Filing No. 1 at 1-3, 6, 26-33.) These claims, however, have since been dismissed with prejudice by stipulation (*see* Filing No. 63 (dismissing claims against Thornsberry); Filing No. 67 (dismissing claims against Davis)).

[2] Though Lexur and Fry moved to dismiss the claims against them independently, because Fry adopted Lexur's lead and reply arguments in their entirety (*see* Filing No. 32; Filing No. 65), the Court will refer to the arguments made in Lexur's briefing as "Defendants'". For its part, Tyler responded with an "omnibus Opposition" brief (*see* Filing No. 58).

[3] The Complaint also alleges that various "other individuals or entities encouraged, assisted, or supported Defendants in their anti-competitive scheme to restrict bidding on public works contracts and to tortiously interfere with Tyler's contractual and business relationships." (Filing No. 1 at 7.) The Complaint, however, fails to outline the involvement of these John Doe Defendants in any meaningful way. Defendants suggest that these John Does "are not parties unknown to Tyler"; instead, "they are the counties themselves and certain unnamed county employees." (Filing No. 30 at 2 n.1.) Defendants opine that Tyler does not want to, however, "put itself in the awkward position of naming its own customers as Defendants." *Id.* The Court will not speculate as to these unnamed defendants' identities.

Counties were then to close the bidding windows either immediately or just before the next scheduled county commissioner meetings where Lexur (the only bidder) would be approved to replace Tyler. *Id.* Finally, the Counties would immediately halt all activities of Tyler with certain staff resigning from Tyler and transitioning to Lexur. *Id.*

Defendants themselves drafted the termination notices the Counties were to send to Tyler and organized the timing of the terminations, while, of course, knowing about the pre-existing contracts. *Id.* at 13, 20-22. Defendants also prepared the rebid notices, working with the Counties to make sure that the planned **[*5]** timeline came to fruition. *Id.* at 16-18. Despite Davis and Thornsberry working for the company at the time, Tyler, and no other competitors, were privy to this out-of-cycle rebid process with Davis even directly denying having knowledge of the Counties (for which he was responsible) planning to rebid. *Id.* at 18. None of the Counties directly told Tyler about the rebidding, and Tyler only learned about the request for bids by coincidence, leaving Tyler with neither sufficient time nor context to submit a bid. *Id.* In fact, by the time Tyler learned about the rebidding, the windows had already closed in two Counties. *Id.* In the end, with the plan followed dutifully, Lexur was the sole bidder in the rebid process. *Id.* at 19.[4] And on schedule, Davis resigned from Tyler on July 6, 2020. *Id.* Ultimately, on August 10, 2020, and under various theories, Tyler sued Defendants, who, for their part, move to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a defendant to move to dismiss a complaint that has failed to "state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. When deciding a motion to dismiss under *Rule 12(b)(6)*, the Court accepts as true all factual allegations in the complaint and draws all inferences **[*6]** in favor of the plaintiff. *Bielanski, 550 F.3d at 633*. Courts, however, "are not obliged to accept as true legal conclusions or unsupported conclusions of fact." *Hickey v. O'Bannon, 287 F.3d 656, 658 (7th Cir. 2002)*.

The complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. In *Bell Atlantic Corp. v. Twombly*, the Supreme Court explained that the complaint must allege facts that are "enough to raise a right to relief above the speculative level." *550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Although "detailed factual allegations" are not required, mere "labels," "conclusions," or "formulaic recitation[s] of the elements of a cause of action" are insufficient. *Id.*; *see also Bissessur v. Ind. Univ. Bd. of Trs., 581 F.3d 599, 603 (7th Cir. 2009)* ("it is not enough to give a threadbare recitation of the elements of a claim without factual support"). The allegations must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly, 550 U.S. at 555*. Stated differently, the complaint must include "enough facts to state a claim to relief that is plausible on its face." *Hecker v. Deere & Co., 556 F.3d 575, 580 (7th Cir. 2009)* (citation and quotation marks omitted). To be facially plausible, the complaint must allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*).

III. DISCUSSION

Tyler brings five **[*7]** claims against Defendants: (1) Sherman Antitrust Act violations, (2) Indiana Antitrust Act violations, (3) tortious interference with a contract, (4) tortious interference with a business relationship, and (5) civil conspiracy. As Defendants largely attack each claim successively, the Court will discuss the Counts in turn.

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[4] Tyler asserts in its response brief that "[e]very single one of the Counties targeted by the Defendants has ultimately reconsidered the path," either reopening the bidding process or declining or rescinding a contract with Lexur (Filing No. 58 at 5). The Court, however, will not consider these facts when ruling on this Motion to Dismiss. *See Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984)* (noting that "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss" and that "consideration of a motion to dismiss is limited to the pleadings") (citations omitted).

A. <u>Sherman Act violations</u>

In Count I, Tyler brings a claim for violation of the *Sherman Antitrust Act (the "Sherman Act")*, alleging that "Defendants restrained competition for public works contracts by reducing the number of potential bidders and rigging the result of the bidding process." (Filing No. 1 at 26.) Defendants maintain that Tyler has failed to "allege an anti-trust injury necessary to state a claim under *Section 1 of the Sherman Act.*" (Filing No. 30 at 4.) To demonstrate an antitrust injury, a plaintiff must show "that its injury is 'of the type the antitrust laws were intended to prevent.'" *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc., 937 F.3d 1056, 1065 (7th Cir. 2019)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*). It does not suffice "to allege that the injury is merely causally linked to the alleged anticompetitive behavior"; instead, a plaintiff "must also demonstrate that its injury 'is attributable to an anti-competitive aspect of the practice under scrutiny.'" *Id.* (quoting *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*).

Defendants argue **[*8]** that "[a]ccording to Tyler's own allegations, Lexur's alleged actions resulted in the six counties at issue receiving bids from Lexur that were *lower* than Tyler's bids." (Filing No. 30 at 6 (emphasis in original).) Because "no antitrust injury exists" when "an alleged conspiracy results in lower prices to consumers," the claim should be dismissed. *Id.* (citing *James Cape & Sons Co. v. PCC Constr. Co., 453 F.3d 396, 399 (7th Cir. 2006)*). Defendants additionally note that Tyler also alleges that "Lexur's activities resulted in a new entrant to the Indiana real estate assessment market," which, in fact, "suggests a pro-competitive result." *Id.* (citing *Chicago Studio Rental, Inc. v. Illinois Dept. of Commerce, 940 F.3d 971, 978 (7th Cir. 2019)*). In sum, "Tyler has only pleaded injuries to itself rather than an anticompetitive injury to the market," and "any alleged conspiracy by the Defendants resulted in the entry of a new competitor into the Indiana market and lower bids being made for cyclical reassessment contracts." *Id.* at 7.

Tyler responds that it has "sufficiently alleged an antitrust injury under the Sherman Act." (Filing No. 58 at 7.) Tyler maintains that its Complaint is "replete" with allegations of injury to competition, demonstrating that Defendants "colluded to ensure that neither Tyler nor any other competitor would have a full and fair **[*9]** opportunity to bid competitively against Lexur, that Lexur would be the only bidder for the rebid contracts, and that Lexur would be awarded the rebid contracts no matter what." *Id.* at 8. Indeed, "page after page of detailed facts" supports its allegations. *Id.* For example, Tyler argues that "Defendants' contrived timing for the Counties' issuance of the rebids . . . takes center stage in the Complaint." *Id.* Because of this timing, "Lexur was in fact the only 'bidder' in response to the Counties' rebids." *Id.* at 9. These facts, as argued by Tyler, "more than plausibly support" the Sherman Act claims when the conduct "harmed competition in a real and alarming way." *Id.* And though Lexur's solitary bids were, of course, "the lowest," this was "by design" and "chilled competition by eliminating the possibility for competitors to compete." *Id.* In sum, Defendants' conduct "all but guaranteed that the Counties and taxpayers would not receive the lowest price" when all competitors were "entirely suppressed" from submitting rival bids. *Id.* As for the contention that Lexur's conduct increased competition by introducing itself as a "new competitor" in the market, Lexur had previously "competed **[*10]** with Tyler for the Contracts in 2017." *Id.* at 9-10. In any event, Tyler contends that the claim also survives "because bid-rigging is considered a *per se* violation of the Sherman Act." *Id.* at 11. Pointing to *U.S. v. Azzarelli Construction Company*, Tyler maintains that it has alleged this type of practice, which, because of its "'pernicious effect on competition and lack of any redeeming virtue,'" is "'conclusively presumed to be unreasonable and therefore illegal.'" *Id.* at 11 (quoting *612 F.2d 292, 294 (7th Cir. 1979)*).

Defendants reply that Tyler tries to "create new ***antitrust law***" when it argues that "Lexur's alleged actions harmed the bidding process and resulted in bids that may have been higher than hypothetical bids that could have been made absent the alleged procedural malfeasance." (Filing No. 64 at 2 (emphases removed).) Defendants contend that Tyler "does not provide any factual allegations that support a finding that consumers—rather than Tyler itself—were harmed by Lexur's alleged conduct." *Id.* at 3 (emphasis removed). Though Tyler may have been harmed by Lexur's alleged conduct, "***antitrust law*** is not intended to protect Tyler's interests in maintaining its uncompetitive prices with the Counties; ***antitrust*** **[*11]** ***law*** actually discourages such claims." *Id.* (citing *United States Gypsum Co. v. Indiana Gas Co., Inc., 350 F.3d 623, 627 (7th Cir. 2003)*; *Chicago Studio, 940 F.3d at 978*). In short, Tyler "cannot escape" that it has pled that "Lexur's bids were lower than the bids received by the Counties in previous bidding cycles." *Id.* at 4. Regarding "Tyler's post-hoc effort to claim it has pled bid rigging," Defendants maintain that this practice requires "an agreement among competitors to fix prices submitted to a buyer or to divvy up work among themselves." *Id.* at 4-5 (citing *U.S. v. Heffernan, 43 F.3d 1144, 1149 (7th Cir. 1994)*; *In re Insurance Brokerage Antitrust Litigation, 618 F.3d 300, 336 (3rd Cir. 2010)*; 1 CALLMANN ON UNFAIR COMP., TR.&MONO. § 4.34 (4th ed.)) (emphasis removed). Because Tyler does not allege "that Lexur colluded with other competitors to allow Lexur to obtain the bids from the Counties," Defendants argue that "there is no *per se* wrongful conduct." *Id.* at 6. Defendant contend that Tyler's reliance on *Azzarelli* is misplaced because the alleged conduct in that case "involved an agreement among competitors to allocate bidding for projects among themselves." *612 F.2d at 297*.

The Court agrees with Defendants: Tyler has not pled sufficient facts to demonstrate that consumers were harmed by Lexur's alleged conduct, the type of injury that falls behind the Sherman Act's shield. To show antitrust injury, a plaintiff must prove that its loss **[*12]** flows from an anticompetitive *effect* of the defendant's behavior since it betrays the Sherman Act's purpose to award damages for losses stemming from acts that do not hurt competition. *Atlantic Richfield, 495 U.S. at 334*. In other words, when an injury flows from aspects of a defendant's conduct that are beneficial or neutral to competition—even if the defendant's conduct is illegal *per se*—there is no antitrust injury. *See id.* By way of example, if a defendant acquired market power through a series of illegal mergers, and then *lowered* prices to enhance its market share, a competitor who lost profits would not be able to establish antitrust injury. *See generally* *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.") (quotation omitted). Here, there is no doubt that prices went down; Tyler admits as much in its Complaint (and briefing). Because Tyler's alleged injury does not flow from conduct that was harmful to competition, it has not pled an injury as contemplated by the Sherman Act.

As for bid rigging, that practice is "a form of price fixing in which *bidders agree* to eliminate competition among them, as by taking turns **[*13]** being the low bidder." *United States v. Fenzl, 670 F.3d 778, 780 (7th Cir. 2012)* (citations omitted) (emphasis added).[5] Clearly, this type of *per se* violation of the Sherman Act requires some agreement among competitors to manipulate a market. Tyler has alleged no such thing, and instead simply proclaims in its Complaint that "*Defendants* restrained competition for public works contracts by reducing the number of potential bidders and rigging the result of the bidding process." (Filing No. 1 at 26, 27-28 (emphasis added).) Notably absent from this allegation is *any* remark of a competitor conspiring with Defendants let alone any discussion of the collusive conduct in which they purportedly engaged. *See* *Fenzl, 670 F.3d at 780*. There is no mention in the Complaint of a competitor of Lexur aside from Tyler, which, of course, claims to be the victim of—not a participant in—the supposed bid rigging. And, in fact, Tyler admits that no other competitor joined with Lexur in the supposed scheme, writing in its response brief that Defendants "colluded to ensure that neither Tyler *nor any other competitor* would have a full and fair opportunity to bid competitively against Lexur." (Filing No. 58 at 8 (emphasis added).) Because Tyler has failed to allege that Lexur "agreed" **[*14]** with any other competitor to rig bids, it has not pled this *per se* violation of the Sherman Act.

Because Tyler has not sufficiently pled an antitrust injury under the Sherman Act, the Court **grants** Defendants' Motions as they pertain to Count I.

B. Indiana Antitrust Act violations

In Count II, Tyler brings a claim for a violation of *Indiana Code § 24-1-2-3*, the *Indiana Antitrust Act* (Filing No. 1 at 27). Specifically, Tyler alleges the Defendants violated this Act by "encouraging, assisting, and supporting a

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[5] *See also* "Bid Rigging," AN FTC GUIDE TO ANTITRUST LAWS, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/bid-rigging (last visited May 27, 2021) ("Bid rigging can take many forms, but one frequent form is when competitors agree in advance which firm will win the bid. For instance, competitors may agree to take turns being the low bidder, or sit out of a bidding round, or provide unacceptable bids to cover up a bid-rigging scheme. Other bid-rigging agreements involve subcontracting part of the main contract to the losing bidders, or forming a joint venture to submit a single bid.").

conspiracy for the Counties to issue out-of-cycle requests for bids with an unusually short turnaround time and minimal notice designed to eliminate competition, to terminate the Counties' 2017 Tyler Contracts, and to award the cyclical reassessment contracts to Lexur as the sole bidder." *Id.* Defendants argue that because the "Indiana Antitrust Act is patterned after the Sherman Antitrust Act"—and the same "standards are applied"—this claim should be dismissed for the same reason as above: there is no "'antitrust injury or competitive harm.'" (Filing No. 30 at 7-8 (quoting *Diech-Kiebler v. Bank One*, No. 404-cv-00005, 2005 WL 2428210 at *6 (S.D. Ind. Sept. 30, 2005)).)

Tyler responds that not only does the claim survive for the reasons **[*15]** described in the prior subsection but also because "Defendants improperly conflate the Indiana Antitrust Act with the federal Sherman Act." (Filing No. 58 at 12.) Notably, the Indiana Antitrust Act, unlike the Sherman Act, specifically provides that "'[a] person who engages in any scheme, contract, or combination to restrain or restrict bidding for the letting of any contract for private or public work, or restricts free competition for the letting of any contract for private or public work, commits a Class A misdemeanor.'" *Id.* (quoting *Ind. Code § 24-1-2-3*). As the Indiana Antitrust Act provides a private right of action to enforce this provision, *see* *Ind. Code § 24-1-2-7(a)*, Tyler maintains that plaintiffs have an additional means of relief not available under the Sherman Act (Filing No. 58 at 12). As for cognizable injury under *Indiana Code § 24-1-2-3*, the Indiana Court of Appeals has "expressly held that plaintiff's own damages (time and cost wasted on a bid where the process was rigged) were sufficient to sustain [a] claim." *Id.* at 13 (quoting *City of Auburn Through Bd. Of Public Works and Safety v. Mavis, 468 N.E.2d 584, 585 (Ind. Ct. App. 1984)*). "Here," Tyler concludes, harm exceeds this metric when injuries include "significant costs to investigate Defendants' conduct and to inform the Counties of the circumstances, the initial loss of the **[*16]** Contracts for certain of the Counties, and the cost to formally protest the bid process and secure reinstatement of the Contracts, among other injuries detailed in the Complaint." *Id.*

Defendants reply that the Indiana Antitrust Act requires the same type of "antitrust injury" as federal ***antitrust law*** and that "the specific Indiana statute cited by Tyler requires a showing of collusion between multiple parties." (Filing No. 64 at 7.) First, a plaintiff must generally allege under the Indiana Antitrust Act an "'antitrust injury' that 'naturally flows from what makes the defendant's acts unlawful.'" *Id.* at 7-8 (quoting *City of Auburn, 468 N.E.2d at 585*). In any event, the damages alleged in *City of Auburn*—the case on which Tyler relies—were "incurred in preparing a bid that was never going to be successful," whereas here, "Tyler seeks to recover for damages it incurred only *after* it lost the contracts." *Id.* at 8 (emphasis in original). Because "Tyler would have incurred the same costs if it lost the contracts with the Counties regardless of the legality or illegality of the Defendants' conduct," its alleged damages "are not 'the type of injury which naturally flows from what makes the defendant's acts unlawful.'" *Id.* **[*17]** at 8-9 (quoting *City of Auburn, 468 N.E.2d at 586*). By way of comparison, Defendants point to *Thompson v. Vigo County Board of County Commissioners*, where the Indiana Court of Appeals held that there was no antitrust injury when a plaintiff, like Tyler, "'did not even expend the effort to prepare a bid.'" *Id.* at 9 (quoting *876 N.E.2d 1150, 1156 (Ind. Ct. App. 2007)*). Defendants note that the *Thompson* panel reasoned that "'it would be difficult to prove, let alone, speculate, that [plaintiff] would have been the successful bidder but for the purported collusion.'" *Id.* (quoting *876 N.E.2d at 1155*).

As for *Indiana Code § 24-1-2-3*, Defendants note that this provision of the Indiana Antitrust Act requires a plaintiff to "show that two or more parties colluded together to engage in a 'scheme, contract, or combination' to restrict bidding." *Id.* at 10 (quoting *Shook Heavy and Environmental Const. Group, a Div. of Shook, Inc. v. City of Kokomo, 632 N.E.2d 355, 359 (Ind. 1994)*). And "[m]ultiple individuals representing the same entity cannot 'collude' together for the purposes of satisfying the statutory 'collusion or fraud' requirement." *Id.* at 11 (citing *Fuller v. Town of Vevay ex rel. Vevay Town Council, 713 N.E.2d 318, 322 (Ind. Ct. App. 1999)*). Here, Tyler has not alleged "that Lexur coordinated with any other competitors or entities to enact this 'conspiracy.'" *Id.*

The Court agrees with Defendants: Tyler has not alleged sufficient injury under the Indiana Antitrust Act to state a claim. When plaintiffs proceed through the private right of action contained in the Indiana Antitrust Act, they must show an -

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations **[*18]** . . . would be likely to cause.

Alva Elec., Inc. v. Evansville-Vanderburgh Sch. Corp., 7 N.E.3d 263, 269 (Ind. 2014) (quoting *Brunswick, 429 U.S. at 489*). In fact, "Indiana precedent reflects that when an antitrust action is brought privately actual injury to the plaintiff must be demonstrated." *Id. at 270*. As held in *Thompson*, a plaintiff who "did not even expend the effort to prepare a bid" does not suffer an injury that "'naturally flow[s]' from the collusion," even assuming such collusion occurred. *876 N.E.2d at 1156*. It would, of course, as Defendants noted, "be difficult to prove, let alone, speculate, that [a plaintiff] would have been the successful bidder but for the purported collusion" in this instance. *Id. at 1155*. Here, Tyler's alleged injury—that it *potentially* would have won the bids *if* it had enjoyed the chance to prepare one—is too speculative to meet this essential element under the Indiana Antitrust Act. *See Alva Elec., 7 N.E.3d at 270* (citing *Thompson, 876 N.E.2d at 1156*) (holding that "without evidence of injury, [plaintiffs] are not entitled to relief").

Regarding *Indiana Code § 24-1-2-3*, this provision requires collusion between distinct entities. *See Gariup Constr. Co. v. Carras-Szany-Kuhn & Assocs., P.C., 945 N.E.2d 227, 240 (Ind. Ct. App. 2011)* (affirming summary judgment of *Indiana Code § 24-1-2-3* claim when "none of the facts of this case, taken alone or as a whole, raises a genuine issue of material fact from which a factfinder *could reasonably infer collusion*") (emphasis added); *Skyline Roofing & Sheet Metal Co. v. Ziolkowski Constr., Inc., 957 N.E.2d 176, 187-88 (Ind. Ct. App. 2011)* (responding to **[*19]** argument that "'[t]here must be some combination or collusive activity between two or more distinct entities before there can be a violation of antitrust laws'" by noting that plaintiff "alleged collusion between three entirely distinct entities"). Here, as described in the subsection above, Tyler has not alleged that Defendants colluded with any others and instead merely alleges that they "colluded" among themselves (*see* Filing No. 1 at 28 (noting in the Complaint that Tyler has been harmed "[a]s a direct and proximate result of Defendants' collusion"). This does not suffice to state a claim under *Indiana Code § 24-1-2-3*. *See Fuller, 713 N.E.2d at 322* ("It is clear then that the [defendant] cannot scheme, contract or combine with itself in violation of *Indiana Code Section 24-1-2-3*."); *Tilbury v. City of Fort Wayne, 471 N.E.2d 1183, 1186 (Ind. Ct. App. 1984)* (same).

Because Tyler has not sufficiently pled a violation of the Indiana Antitrust Act, the Court **grants** Defendants' Motions as they pertain to Count II.

C. Tortious interference with a contract

In Count III, Tyler brings a claim for tortious interference with a contract (Filing No. 1 at 28-29). To state a claim for tortious interference with a contract, a plaintiff must allege (1) the existence of a valid and enforceable contract, (2) the defendant's knowledge of the existence **[*20]** of the contract, (3) the defendant's intentional inducement of the breach of contract, (4) an absence of justification for the defendant's conduct, and (5) damage resulting from the defendant's wrongful inducement of the breach. *Nat'l City Bank, Indiana v. Shortridge, 689 N.E.2d 1248, 1252 (Ind. 1997)*, *supplemented on other grounds sub nom. Nat'l City Bank, Ind. v. Shortridge, 691 N.E.2d 1210 (Ind. 1998)* (citing *Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1235 (Ind. 1994)*; *Daly v. Nau, 167 Ind. App. 541, 549 n.6, 339 N.E.2d 71, 76 n.6 (1975)*).

The fourth prong of this test is at issue here: "absence of justification." Deceptively plain, Indiana appellate courts have struggled to delineate a canonical definition of this phrase. On one hand (and as advanced by Defendants (*see* Filing No. 30 at 8-9)), some panels of the Indiana Court of Appeals have held that this prong is established only if "the breach is malicious and exclusively directed to the injury and damage of another." *Miller v. Cent. Indiana Cmty. Found., Inc., 11 N.E.3d 944, 961 (Ind. Ct. App. 2014)* (quotation omitted), *trans. denied*; *see also Mourning v. Allison Transmission, Inc., 72 N.E.3d 482, 488 (Ind. Ct. App. 2017)*; *Duty v. Boys & Girls Club of Porter Cty., 23 N.E.3d 768, 775 (Ind. Ct. App. 2014)*. The Indiana Supreme Court, however, "summarily affirm[ed]" the language of one panel that recognized that the higher court, as noted by Tyler (*see* Filing No. 58 at 14), did not "discuss or even suggest that a malicious standard . . . was the appropriate standard with which to analyze the absence of justification." *Coca-Cola Co. v. Babyback's Int'l, Inc., 841 N.E.2d 557, 560 (Ind. 2006)*; *Coca-Cola Co. v. Babyback's Int'l, Inc., 806 N.E.2d 37, 51 (Ind. Ct. App. 2004)*, *rev'd on other grounds*; *see also Ind. App. R. 58(A)(2)* (instructing that portions of Court of Appeals' opinions that are "summarily **[*21]** affirmed . . . shall be considered as Court of

Appeals' authority"). In fact, the last time the Supreme Court directly considered how to determine whether conduct was justified in this context, it weighed

(a) the nature of the defendant's conduct;
(b) the defendant's motive;
(c) the interests of the plaintiff with which the defendant's conduct interferes;
(d) the interests sought to be advanced by the defendant;
(e) the social interests in protecting the freedom of action of the defendant and the contractual interests of the plaintiff;

(f) the proximity or remoteness of the defendant's conduct to the interference; and

(g) the relations between the parties.

Winkler, 638 N.E.2d at 1235 (citing *Restatement (Second) of Torts § 767* (1977)). Conspicuously absent from *Winkler* is any mention of malice;[6] instead, the Court noted that "the overriding question is whether the defendants' conduct has been fair and reasonable under the circumstances." *Id.* (citing *Restatement (Second) of Torts § 767 cmt. j*).

With a split in Court of Appeals precedent, this Court proceeds under the test endorsed by Indiana's court of last resort in *Winkler. See Beanstalk Grp., Inc. v. AM Gen. Corp., 283 F.3d 856, 863 (7th Cir. 2002)* (Indiana law does not require "that the interference be 'malicious'; it's enough if it's intentional and unjustified. The word 'malicious' does appear in **[*22]** a few cases, but it is apparent that the 'malice' to which it refers . . . is intentionality rather than ill will.") (citations omitted). Even under this framework, however, Defendants contend that the Complaint merely alleges that Lexur's conduct furthered its "intent to enter the Indiana real estate assessment market and compete with Tyler." (Filing No. 30 at 9.) Because "courts have held that competition is a legitimate interest that establishes justification for purposes of a tortious interference claim," *id.* (citing *Konecranes, Inc. v. Davis, No. 1:12-cv-01700-JMS-MJD, 2013 U.S. Dist. LEXIS 52815, 2013 WL 1566326, at *3 (S.D. Ind. 2013)*), Defendants argue that Tyler's allegations "cannot form the basis of a tortious interference claim," *id.* at 10.

Tyler responds that "competition is only proper justification when 'the actor does not employ wrongful means' and 'does not create or continue an unlawful restraint on trade.'" (Filing No. 58 at 14 (quoting *Restatement (Second) of Torts § 768* (1979); *see also Harvest Life Ins. Co. v. Getche, 701 N.E.2d 871, 877 (Ind. Ct. App. 1988)* (adopting *§ 768*).) Here, "Defendants employed wrongful means by orchestrating and implementing a scheme to rig the bidding process for various public works contracts, resulting in an unlawful restraint on trade." *Id.* At this motionto-dismiss stage, Tyler maintains, the Court must accept **[*23]** "that defendants acted with intent to eliminate competition so that they could induce the breach of Tyler's contracts and line their own pockets"; but the question of "[w]hether defendants acted with a legitimate business purpose . . . is a factual inquiry" suited for a different time. *Id.* at 15. In any event, "Defendants' interest in 'competing' for the Counties' contracts would not in any way explain why they participated in the process of terminating Tyler and deliberately sought to have Tyler terminated immediately," Tyler adds. *Id.* at 16. As for precedent cited by Defendants, those cases involved conduct that was "in the spirit of competition," which is "the complete opposite" here: "Defendants worked to manipulate the bidding process, eliminate competition and competitors (not just Tyler, but all competitors), and ensure that Lexur's bid and price would win no matter what, even if lower and/or better bids might have been forthcoming in a normal, competitive process." *Id.* at 17 (citing *Konecranes, 2013 U.S. Dist. LEXIS 52815, 2013 WL 1566326, at *3*).

In reply, Defendants contend that because "Lexur's conduct does not constitute 'bid rigging,' 'price fixing,' or any other *per se* anticompetitive conduct," Tyler "cannot rely upon allegations **[*24]** of that conduct to sustain its tortious interference claims." (Filing No. 64 at 12 (citing *Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 796 N.E.2d 286, 291 (Ind. 2003)*).) Moreover, while Tyler seemingly implies "that the fact that the Counties terminated

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[6] Notably, the *Winkler* court eschewed endorsing the statement from the affirmed Court of Appeals decision that "[t]o satisfy this element of the tort, the breach must be malicious and exclusively directed to the injury and damage of another." *Winkler v. V.G. Reed & Sons, Inc., 619 N.E.2d 597, 600 (Ind. Ct. App. 1993)*, *aff'd*, *638 N.E.2d 1228 (Ind. 1994)*.

their contracts with Tyler and offered out-of-cycle bids is somehow wrongful conduct attributable to Lexur," the Complaint never alleges any facts illustrating how Defendants engaged in "improper conduct." *Id.* Instead of baldly proclaiming that Lexur "acted wrongfully," Defendants argue that "Tyler must allege how that conduct is somehow 'wrongful' such as making misrepresentations, applying unfair economic pressure, or threatened litigation which induced the Counties to breach their contracts." *Id.* at 13 (citing *Winkler, 638 N.E.2d at 1235*). Again, all the Complaint alleges, Defendants continue, is that "Lexur acted with the intent to obtain contracts with the Counties," but "pursuing one's own business interest is not 'without justification.'" *Id.* (citing *Konecranes, 2013 U.S. Dist. LEXIS 52815, 2013 WL 1566326, at *3*). Unlike the cases it cites, Tyler "has not alleged any wrongful means other than the alleged 'unlawful restraint on trade' which fails as a matter of law." *Id.* at 13-14 (citing *Howmedica Osteonics Corp. v. DJO Global, Inc., 2018 U.S. Dist. LEXIS 227687, 2018 WL 3130969, at *4 (S.D. Ind. Mar. 15, 2018)* (allowing claim to proceed when complaint alleged that business interests were advanced using fraudulent **[*25]** misrepresentations, which had been specifically identified by the Restatement as an example of "wrongful means")).

Considering the parties' arguments, the *Winkler* framework, and the pertinent provisions of the Restatement, the Court concludes that Defendants' conduct was—as the Complaint itself alleges—justified because it was animated by a legitimate business purpose: to increase Lexur's business. Though Tyler alleges that Defendants tortiously interfered with the contracts by "encouraging, assisting, and supporting a conspiracy for the Counties to issue out-of-cycle requests for bids with an unusually short turnaround time and minimal notice," (Filing No. 1 at 29), it is unclear what specific wrongful conduct they performed to "manipulate" the Counties to issue the "out-of-cycle requests," (*see* Filing No. 58 at 5, 17). In other words, the Complaint does not allege through what wrongful means Defendants—who, according to the Complaint, had been mainly constrained to doing business in Ohio (*see* Filing No. 1 at 6)—triggered the Counties into opening the rebid processes. *Cf. Winkler, 638 N.E.2d at 1235-36* ("We begin our analysis with the observation that Winkler makes no contention that defendants' conduct was *malum* ***[*26]*** *in se*. . . . Winkler also does not suggest that defendants' motive was a willful or spiteful intent to injure him. . . . Winkler gives, and we perceive, no reasons why his contract interests should receive greater protection in tort law than the business interests sought to be advanced by defendants here."); *Restatement (Second) of Torts § 768 cmt. e* ("[P]hysical violence, fraud, civil suits and criminal prosecutions, are all wrongful in the situation covered by this Section. On the other hand, the actor may use persuasion and he may exert limited economic pressure.").

Instead, Tyler merely maintains that Defendants "employed wrongful means by orchestrating and implementing a scheme to rig the bidding process for various public works contracts, resulting in an unlawful restraint on trade." (Filing No. 58 at 14.) But, as discussed above, Defendants did not rig bids, and the Court "will not invent legal arguments" for *Tyler, Cty. of McHenry v. Ins. Co. of the W., 438 F.3d 813, 818 (7th Cir. 2006)* (quotation omitted), that advance alternative modes of wrongful conduct in which Defendants may have engaged, *see also, e.g., C.R. England v. Swift Transportation Co., 2019 UT 8, 437 P.3d 343, 346, 353 (Utah 2019)* (rejecting, following "a review of the caselaw from other jurisdictions," "that inducement of a breach of an existing contract constitutes improper means" in tortious interference claims). **[*27]** All told, because Tyler has failed to sufficiently allege "an absence of justification for the defendant's conduct," the Court **grants** Defendants' Motions to Dismiss as they relate to Count III.

D. Tortious interference with a business relationship

In Count IV, Tyler brings a claim for tortious interference with a business relationship (Filing No. 1 at 29-30). Similar to tortious interference with a contract, a claim for tortious interference with a business relationship requires a plaintiff to plead "(1) the existence of a valid relationship; (2) the defendant's knowledge of the existence of the relationship; (3) the defendant's intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from defendant's wrongful interference with the relationship."*McCollough v. Noblesville Sch., 63 N.E.3d 334, 344 (Ind. Ct. App. 2016)* (citations omitted). But, different from above, this claim also "requires some independent illegal action." *Brazauskas, 796 N.E.2d at 291* (citing *Watson Rural Water Co., Inc. v. Ind. Cities Water Corp., 540 N.E.2d 131 (Ind. Ct. App. 1989)*).

Defendants argue that not only does this claim fail because of the presence of justification for their conduct but also because there was no requisite independent illegal action. Yet the Court need not reach this second argument because this claim falters for the same reason **[*28]** as outlined above: Tyler's failure to allege the absence of justification. The Court, then, **grants** Defendants' Motions to Dismiss as they relate to Count IV.

E. Civil conspiracy

Finally, Tyler brings a claim against Defendants for civil conspiracy (Count VI) (Filing No. 1 at 32). "A civil conspiracy is a combination of two or more persons who engage in a concerted action to accomplish an unlawful purpose or to accomplish some lawful purpose by unlawful means." *Hall v. Shaw, 147 N.E.3d 394, 407 (Ind. Ct. App. 2020)* (quotations omitted). But civil conspiracy is not a freestanding claim; instead, it is "just another way of asserting a concerted action in the commission of a tort." *Id.* In short, "[c]ivil conspiracy must be alleged with an underlying tort." *Bd. of Trustees of Purdue Univ. v. Eisenstein, 87 N.E.3d 481, 498 (Ind. Ct. App. 2017)* (quotation omitted). Tyler alleges that Defendants "intentionally engaged in concerted action to violate federal and Indiana anti-trust laws and to tortiously interfere with Tyler's contractual and business relationships." (Filing No. 1 at 32.)

Defendants argue that because "Tyler's civil conspiracy claim relies upon Lexur's alleged violation of federal and state antitrust laws, as well as its tortious interference claims"—and those claims fail—Tyler "has no basis upon which to make its civil **[*29]** conspiracy claim." (Filing No. 30 at 12-13.) In response, Tyler maintains that "[j]ust as [its] tort claims survive these Motions, so too does its civil conspiracy claim." (Filing No. 58 at 19.) In reply, Defendants rejoin that "[b]ecause Tyler's claims for tortious interference with contract and tortious interference with business relationships both fail, so [must] Tyler's civil conspiracy claim." (Filing No. 64 at 14.) At this stage of the litigation, the life of Tyler's civil conspiracy claim rises and falls with the continued viability of its underlying tort claims. Because no underlying tort claim survives the Motions to Dismiss, the Court **grants** Defendants' Motions as they pertain to Count VI.

IV. CONCLUSION

For the reasons outlined above, the Court **GRANTS** the Defendants' Motions to Dismiss (Filing No. 29; Filing No. 31). Tyler's claims are **dismissed without prejudice**.[7] Tyler shall have **fourteen (14) days** from the date of this Entry to file an amended complaint, if such a filing is not an exercise in futility. If nothing is filed by that date, final judgment will issue.

SO ORDERED.

Date: 6/29/2021

/s/ Tanya Walton Pratt

Hon. Tanya Walton Pratt, Chief Judge

United States District Court **[*30]**

Southern District of Indiana

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[7] "When a complaint fails to state a claim, the plaintiff ordinarily should receive at least one opportunity to amend it, unless an amendment would be futile." *Olrich v. Kenosha Cty., 825 F. App'x 397, 400 (7th Cir. 2020)* (citing *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind., 786 F.3d 510, 520 (7th Cir. 2015)*).

In re Zantac (Ranitidine) Prods. Liab. Litig.

United States District Court for the Southern District of Florida

June 30, 2021, Decided; June 30, 2021, Entered on Docket

MDL NO. 2924; 20-MD-2924

Reporter

546 F. Supp. 3d 1216 *; 2021 U.S. Dist. LEXIS 122580 **

IN RE: ZANTAC (RANITIDINE) PRODUCTS LIABILITY LITIGATION

Prior History: *In re Zantac (Ranitidine) Prods. Liab. Litig., 437 F. Supp. 3d 1368, 2020 U.S. Dist. LEXIS 19881, 2020 WL 582134 (J.P.M.L., Feb. 6, 2020)*

Core Terms

purchaser, indirect, antitrust, consumer, motion to dismiss, ranitidine, Defendants', products, anti trust law, manufacturers, proximate causation, courts, retailer, prescription, bright-line, violator, damages, cases, standing to sue, lack standing, racketeering, Pretrial, lawsuits, blocks, suits

Counsel: **[**1]** For Zantac (Ranitidine) Products Liability Litigation, In Re: Carmen Sessions Scott, Motley Rice LLC, Mt. Pleasant, SC; Emily Ward Roark, Bryant Law Center, PSC, Paducah, KY; J Christopher Elliott, Denver, CO; Lauren S. Miller, Cory Watson, P.C., Birmingham, AL; Michael L. McGlamry, Pope McGlamry P.C., Atlanta, GA; Robert Cecil Gilbert, Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Miami, FL; Rosemarie Riddell Bogdan, Martin, Harding & Mazzotti, LLP, Albany, NY; Steven B. Rotman, Hausfeld, LLP, Boston, MA; Zachary Scott Bower, Carella Byrne Cecchi Olstein Brody & Agnello, Roseland, NJ.

For Ivan Safra, Plaintiff: Ashton Rose Smith, LEAD ATTORNEY, Jennifer A. Moore, Moore Law Group, PLLC, Louisville, KY.

For Judy Brooks, Plaintiff: Ricardo M. Martinez-Cid, Podhurst Orseck, P.A., SunTrust International Center, Miami, FL.

For MSP Recovery Claims, Series LLC, Plaintiff: Jorge Alejandro Mestre, LEAD ATTORNEY, Rivero Mestre LLP, Miami, FL.

For Robert Baker, Michael Carroll, MICHAEL KONN, SANDRA PAYNE, GREGORY VAVRA, Thomas Wells, Plaintiffs: Brian P. Kelley, Joyce Chambers Reichard, Matthew A. McMonagle, LEAD ATTORNEYS, Kelley & Ferraro, LLP, Cleveland, OH; James Louis Ferraro, Jr., The Ferraro **[**2]** Law Firm, Miami, FL.

For Angela Williams, Plaintiff: Adam Pulaski, LEAD ATTORNEY, Pulaski Kherkher, PLLC, Houston, TX; J. Robert Bell, III, Osborne, Associates Law Firm, P.A., Boca Raton, FL; Joseph Anthony Osborne, Osborne & Francis, Boca Raton, FL.

For SHERRI PELLEGRENE, Plaintiff: Mikal C. Watts, LEAD ATTORNEY, Watts Guerra LLP, Four Dominion Drive, San Antonio, TX.

For SHRIECE FRANKS, Plaintiff: Justin R. Parafinczuk, LEAD ATTORNEY, Koch & Trushin, P.A., Fort Lauderdale, FL.

For EDWARD L BROWN, Plaintiff: James Louis Ferraro, Jr.

For Walter Jones, Plaintiff: Scott A. Love, LEAD ATTORNEY, Clark Love & Hutson PLLC, Houston, TX.

For GLORIA WILSON, Plaintiff: Marcus John Susen, LEAD ATTORNEY, Parafinczuk Wolf Susen, Fort Lauderdale, FL.

For Randall D. Hollingsworth, Jr., Plaintiff: Frank Woodson, LEAD ATTORNEY, Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., Montgomery, AL.

For Danny McAnally, Plaintiff: Martin Daniel Crump, LEAD ATTORNEY, Davis & Crump, P.C., Gulfport, MS.

For Doug Barnette, Plaintiff: Steven Robert Maher, LEAD ATTORNEY, Maher Guiley & Maher PA, Winter Park, FL.

For Kristian W Rasmussen, Plaintiff: B Kristian W. Rasmussen, Cory, Watson, Crowder & DeGaris, P.C., Birmingham, **[**3]** AL.

For Judy S Brooks, Plaintiff: Tracy A. Finken, Anapol Weiss, Philadelphia, PA.

For Nancy E. Lopez Flores, Joseph Galimidi, Consol Plaintiffs: Michael Abraham Citron, LEAD ATTORNEY, MAC Legal, PA, Hollywood, United Sta, Hollywood, FL; Yitzhak Shmuel Levin, LEAD ATTORNEY, Citron Levin, PLLC, Hollywood, FL; Yechezkel Rodal, Rodal Law, P.A., Ft. Lauderdale, FL.

For Steven Kerzer, Consol Plaintiff: Bryan Frederick Aylstock, Robert Jason Richards, LEAD ATTORNEYS, Aylstock Witkin Kreis & Overholtz PLLC, Pensacola, FL; Curtis Bradley Miner, LEAD ATTORNEY, Colson Hicks Eidson, PH, Coral Gables, FL; Francisco Raul Maderal, Jr., Lewis S. Eidson, Roberto Martinez, LEAD ATTORNEYS, Colson Hicks Eidson, Penthouse, Coral Gables, FL.

For Keith Sobieszczyk, Consol Plaintiff: David M. Hundley, LEAD ATTORNEY, Christopher L. Coffin, Pendley, Baudin & Coffin, LLP, New Orleans, LA.

For MARY SANTORELLA, LISA PRISINZANO, KASSIE BENSON, Consol Plaintiffs: Chirali V. Patel, Mark M. Makhail, LEAD ATTORNEYS, Carella Byrne Cecchi Olstein Brody & AQnello, P.C., Roseland, NJ; James E. Cecchi, PRO HAC VICE, Donald A. Ecklund, LEAD ATTORNEY, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, NJ; Lindsey **[**4]** H. Taylor, LEAD ATTORNEY, Carella Byrne Bain Gilfillan Cecchi Stewart & Olstein, Roseland, NY; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro, LLP, Seattle, WA.

For Michael Burke, STEPHANIE FRASIER, Richard Harris, MICHAEL DELUCCIA, SCOTT MOSER, George Cravens, RONALD MARANTO, JARQUISHA HARRIS, KILEEN GROMELSKI, VENUS SYKES, DONALD BOLAND, Consol Plaintiffs: Chirali V. Patel, Mark M. Makhail, LEAD ATTORNEYS, Carella Byrne Cecchi Olstein Brody & AQnello, P.C., Roseland, NJ; Christopher M. Barrett, LEAD ATTORNEY, Izard, Kindall & Raabe, LLPCT, West Hartford, CT; Craig A. Raabe, LEAD ATTORNEY, Izard, Kindall & Raabe LLP, West Hartford, CT; James E. Cecchi, PRO HAC VICE, Donald A. Ecklund, LEAD ATTORNEY, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, NJ; Lindsey H. Taylor, LEAD ATTORNEY, Carella Byrne Bain Gilfillan Cecchi Stewart & Olstein, Roseland, NY; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro, LLP, Seattle, WA.

For Jonathan Dimesky, Mohamed Haridi, Consol Plaintiffs: Christopher M. Barrett, LEAD ATTORNEY, Izard, Kindall & Raabe, LLPCT, West Hartford, CT; Craig A. Raabe, LEAD ATTORNEY, Izard, Kindall & Raabe LLP, West Hartford, CT; Seth **[**5]** R. Klein, LEAD ATTORNEY, Izard Kindall & Raabe, Hartford, CT; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro, LLP, Seattle, WA.

For THE ESTATE OF CHRIS SYKES, By and through Venus Sykes, PAUL BURPULIS, Consol Plaintiffs: Chirali V. Patel, Mark M. Makhail, LEAD ATTORNEYS, Carella Byrne Cecchi Olstein Brody & AQnello, P.C., Roseland, NJ; James E. Cecchi, PRO HAC VICE, Donald A. Ecklund, LEAD ATTORNEY, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, NJ.

For Walter H. Hansen, Consol Plaintiff: Michael L. Baum, LEAD ATTORNEY, Baum, Hedlund, Aristei & Goldman, Los Angeles, CA; Pedram Esfandiary, LEAD ATTORNEY, Baum, Hedlund, Aristei & Goldman, P.C., Los Angeles, CA; Robert Brent Wisner, LEAD ATTORNEY, Baum Helund Aristei & Goldman PC, Los Angeles, CA; Timothy A. Loranger, LEAD ATTORNEY, Baum Hedlund, Los Angeles, CA.

For Patrick A De Luca, Consol Plaintiff: Kevin P. Fitzpatrick, LEAD ATTORNEY, Marschhausen & Fitzpatrick, P.C., Hicksville, NY.

For Joseph John Balistreri, Consol Plaintiff: Bijan Esfandiari, Nicole K.H. Maldonado, Pedram Esfandiary, LEAD ATTORNEYS, Baum, Hedlund, Aristei & Goldman, P.C., Los Angeles, CA; Michael L. Baum, LEAD ATTORNEY, Baum, Hedlund, **[**6]** Aristei & Goldman, Los Angeles, CA; Robert Brent Wisner, LEAD ATTORNEY, Baum Helund Aristei & Goldman PC, Los Angeles, CA.

For Mark Allan Blake, Consol Plaintiff: Robert Brent Wisner, LEAD ATTORNEY, Baum Helund Aristei & Goldman PC, Los Angeles, CA.

For Justin Rowe, Consol Plaintiff: Jason A. Zweig, Zoran Tasic, LEAD ATTORNEYS, Hagens Berman Sobol Shapiro, LLP, Chicago, IL; Shana E. Scarlett, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro, LLP, Seattle, WA; Ricardo M. Martinez-Cid, Podhurst Orseck, P.A., SunTrust International Center, Miami, FL.

For julio c Bernardo, Consol Plaintiff: Theodore Jon Leopold, LEAD ATTORNEY, Cohen Milstein Sellers & Toll, PLLC, Palm Beach Gardens, FL.

For Tim Rosenauer, Consol Plaintiff: Bradford B. Lear, Todd C. Werts, LEAD ATTORNEYS, Lear Werts LLP, Columbia, MO.

For Gary C. Will, Consol Plaintiff: Brian P. Kelley, Joyce Chambers Reichard, Matthew A. McMonagle, LEAD ATTORNEYS, Kelley & Ferraro, LLP, Cleveland, OH; James Louis Ferraro, Jr., The Ferraro Law Firm, Miami, FL.

For SHRIECE FRANKS, Consol Plaintiff: Justin R. Parafinczuk, LEAD ATTORNEY, Koch & Trushin, P.A., Fort Lauderdale, **[**7]** FL; Marcus John Susen, LEAD ATTORNEY, Parafinczuk Wolf Susen, Fort Lauderdale, FL.

For Joel Bofshever, Consol Plaintiff: Bruce Don Burtoff, LEAD ATTORNEY, The Miller Firm, Alexandria, VA.

For Angela Williams, Consol Plaintiff: Joseph Anthony Osborne, LEAD ATTORNEY, Osborne & Francis, Boca Raton, FL.

For Judy S Brooks, Consol Plaintiff: Lea Pilar Bucciero, Ricardo M. Martinez-Cid, LEAD ATTORNEYS, Podhurst Orseck, P.A., SunTrust International Center, Miami, FL; Thomas R. Anapol, LEAD ATTORNEY, Tracy A. Finken, Anapol Weiss, Philadelphia, PA.

For Bruce A Brooks, Consol Plaintiff: Lea Pilar Bucciero, Ricardo M. Martinez-Cid, LEAD ATTORNEYS, Podhurst Orseck, P.A., SunTrust International Center, Miami, FL.

For Carmen Colon, Consol Plaintiff: Jacob Marc Polakoff, LEAD ATTORNEY, Berger Montague PC, Philadelphia, PA; MITCHELL MARK BREIT, LEAD ATTORNEY, SIMMONS HANLY CONROY, LLC, NEW YORK, NY; William E. Hoese, Kohn Swift & Graf PC, Philadelphia, PA.

For FRANCIS NEARY, Consol Plaintiff: Lee Albert, LEAD ATTORNEY, PRO HAC VICE, Glancy Prongay & Murray LLP, New York, NY.

For Suzanne Finer, Consol Plaintiff: Roopal Premchand Luhana, Steven Daniel Cohn, LEAD ATTORNEYS, Chaffin Luhana LLP, New York, NY. **[**8]**

For Kerri L. Brest-Landry, Consol Plaintiff: Aimee Hall Wagstaff, LEAD ATTORNEY, Andrus Wagstaff, PC, Lakewood, CO; Pedram Esfandiary, LEAD ATTORNEY, Baum, Hedlund, Aristei & Goldman, P.C., Los Angeles, CA; Robert Brent Wisner, LEAD ATTORNEY, Baum Helund Aristei & Goldman PC, Los Angeles, CA.

For Edith Massiah, Consol Plaintiff: Christopher Marlborough, LEAD ATTORNEY, The Marlborough Law Firm, P.C., New York, NY.

For Francisco Maderal, Consol Plaintiff: Frank Woodson, LEAD ATTORNEY, Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., Montgomery, AL.

For PHILLIP MCDONALD, Consol Plaintiff: Daniel A. Nigh, LEAD ATTORNEY, Levin, Papantonio, Thomas, Mitchell, Raferty & Proctor, PA, Pensacola, FL.

For Robert Baker, Consol Plaintiff: Brian R. Herberth, Joyce Chambers Reichard, LEAD ATTORNEYS, Kelley & Ferraro, LLP, Cleveland, OH.

For Vanessa Epting, Consol Plaintiff: Raymond C. Silverman, LEAD ATTORNEY, Melanie H. Muhlstock, Parker Waichman, Port Washington, NY.

For Je Yon Jung, Consol Plaintiff: Je Yon Jung, May Lightfoot, PLLC, Washington, DC.

For Christopher Wamble, Consol Plaintiff: Ashton Rose Smith, Jennifer A. Moore, LEAD ATTORNEYS, Moore Law Group, PLLC, Louisville, KY; Christopher C. Oxx, **[**9]** LEAD ATTORNEY, Parker Waichmann LLP, Port Washington, NY; Harrison M. Biggs, LEAD ATTORNEY, Parker Waichman LLP, Port Washington, NY; Melanie H. Muhlstock, Raymond C. Silverman, LEAD ATTORNEYS, Parker Waichman, Port Washington, NY.

For Herbert Souza, Consol Plaintiff: Allan Kanner, LEAD ATTORNEY, PRO HAC VICE, Kanner & Whiteley, LLC, New Orleans, LA; Annemieke M. Tennis, Conlee S. Whiteley, Layne C. Hilton, LEAD ATTORNEYS, Kanner and Whiteley LLC, New Orleans, LA; Behram V. Parekh, LEAD ATTORNEY, Kirtland and Packard LLP, Redondo Beach, CA; David J. Stanoch, LEAD ATTORNEY, Ruben Honik, Golomb & Honik, P.C., Philadelphia, PA; Marlene J. Goldenberg, LEAD ATTORNEY, GoldenbergLaw, PLLC, Minneapolis, MN.

For Jennifer Bond, Consol Plaintiff: Stephen Herbert Galebach, LEAD ATTORNEY, Galebach Law Office, Medford, MA; Ruben Honik, Golomb & Honik PC, Philadelphia, PA.

For Lauren S. Miller, Consol Plaintiff: Lauren S. Miller, Cory Watson, P.C., Birmingham, AL.

For Douglas A. Dellaccio, Consol Plaintiff: Douglas A. Dellaccio, Jr., Cory Watson, P.C., Birmingham, AL.

Adam William Krause, Consol Plaintiff, Pro se, Kansas City, MO.

For Scott P Schlesinger, Attorney, Consol Plaintiff: Scott P. Schlesinger, **[**10]** LEAD ATTORNEY, Sheldon J. Schlesinger PA, Fort Lauderdale, FL.

For Ashley C Keller, Consol Plaintiff: Ashley Conrad Keller, LEAD ATTORNEY, Keller Lenkner LLC, Chicago, IL.

For Steven Babin, Consol Plaintiff: Steven Charles Babin, Babin Law, LLC, Columbus, OH.

For Fernando Zaragoza, Consol Plaintiff: Christopher M. Barrett, LEAD ATTORNEY, Izard, Kindall & Raabe, LLPCT, West Hartford, CT; Craig A. Raabe, LEAD ATTORNEY, Izard, Kindall & Raabe LLP, West Hartford, CT.

For Laura Tedford, Consol Plaintiff: Robert C. Hilliard, LEAD ATTORNEY, Hilliard Martinez Gonzales, LLP, Corpus Christi, TX.

For Sara Souza, Consol Plaintiff: Allan Kanner, Conlee S. Whiteley, LEAD ATTORNEYS, PRO HAC VICE, Kanner & Whiteley, LLC, New Orleans, LA; Annemieke M. Tennis, Layne C. Hilton, LEAD ATTORNEYS, Kanner and Whiteley LLC, New Orleans, LA; Behram V. Parekh, LEAD ATTORNEY, Kirtland and Packard LLP, Redondo Beach, CA; David J. Stanoch, LEAD ATTORNEY, Golomb & Honik, P.C., Philadelphia, PA; Marlene J. Goldenberg, LEAD ATTORNEY, GoldenbergLaw, PLLC, Minneapolis, MN; Ruben Honik, LEAD ATTORNEY, PRO HAC VICE, Golomb & Honik PC, Philadelphia, PA.

For Denise Guy, Consol Plaintiff: James X. Bormes, LEAD ATTORNEY, Law Office **[**11]** of James X. Bormes, Chicago, IL; Kasif Khowaja, LEAD ATTORNEY, The Khowaja Law, LLC, Chicago, IL.

For Barry Fletcher, Consol Plaintiff: Diane Marger Moore, LEAD ATTORNEY, Baum, Hedlund, Aristei & Goldman, Los Angeles, CA; Jennifer A. Moore, LEAD ATTORNEY, Moore Law Group, PLLC, Louisville, KY; Robert Brent Wisner, LEAD ATTORNEY, Baum Helund Aristei & Goldman PC, Los Angeles, CA.

For Michael Karpal, Consol Plaintiff: Christopher R. LoPalo, LEAD ATTORNEY, Napoli Shkolnik PLLC, Melville, NY.

For David McAnally, Consol Plaintiff: Trevor Bruce Rockstad, LEAD ATTORNEY, Davis & Crump, Gulfport, MS.

For EDNA MITCHELL, Consol Plaintiff: Jeffrey Louis Haberman, LEAD ATTORNEY, Schlesinger Law Offices, Fort Lauderdale, FL.

For Douglas Edgar Barnette, Consol Plaintiff: Steven Robert Maher, LEAD ATTORNEY, Maher Guiley & Maher PA, Winter Park, FL.

For Vicki Sherbet, Consol Plaintiff: Ashton Rose Smith, Jennifer A. Moore, LEAD ATTORNEYS, Moore Law Group, PLLC, Louisville, KY; Erin K. Copeland, LEAD ATTORNEY, Fibich Leebron Copeland & Briggs, Houston, TX.

For Curtis Allen, Consol Plaintiff: Andrew Scott Herring, LEAD ATTORNEY, Birmingham, AL.

For Shannon Cook, Consol Plaintiff: Steven L. Nicholas, LEAD ATTORNEY, **[**12]** Cunningham Bounds, LLC, Mobile, AL.

For Glenmark Pharmaceuticals, Inc. USA, Defendant: Philip E. Rothschild, Holland & Knight, Fort Lauderdale, FL.

For Marlene Goldenberg, Defendant: Marlene J. Goldenberg, GoldenbergLaw, PLLC, Minneapolis, MN.

For Apotex Corp., Defendant: Nicole Rory Topper, Blank Rome LLP, Ft. Lauderdale, FL.

For Michael McCandless, Defendant: Andrew Scott Herring, LEAD ATTORNEY, Birmingham, AL; Douglas A. Dellaccio, Jr., LEAD ATTORNEY; Lauren S. Miller, LEAD ATTORNEY, Cory Watson, P.C., Birmingham, AL.

For Sanofi US Services Inc., Consol Defendant: Amanda Laufer Camelotto, LEAD ATTORNEY, DLA Piper LLP, Short Hills, NJ; Anand Agneshwar, LEAD ATTORNEY, Arnold & Porter Kay Schler LLP, New York, NY; Christopher George Oprison, LEAD ATTORNEY, DLA Piper LLP (US), Miami, FL; Christopher M. Strongosky, LEAD ATTORNEY, DLA Piper LLP (US), New York, NY; Daniel S. Pariser, Elliott C. Mogul, Paige H. Sharpe, LEAD ATTORNEYS, Arnold & Porter Kaye Scholer LLP, Washington, DC; Joanne M. O'Connor, LEAD ATTORNEY, Jones Foster Johnston & Stubbs, West Palm Beach, FL; Leeanne Sara Mancari, LEAD ATTORNEY, DLA Piper US LLPNY, New York, NY; Oluoma Nkechinyere Kas-Osoka, LEAD ATTORNEY, Arnold **[**13]** & Porter Kaye Scholer LLP, Three Embarcadero Center, San Francisco, CA; Sharon D. Mayo, LEAD ATTORNEY, Arnold & Porter LLP, San Francisco, CA; Veronica Louise De Zayas, LEAD ATTORNEY, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL.

For Sanofi-Aventis U.S. LLC, Consol Defendant: Amanda Laufer Camelotto, LEAD ATTORNEY, DLA Piper LLP, Short Hills, NJ; Anand Agneshwar, LEAD ATTORNEY, Arnold & Porter Kay Schler LLP, New York, NY; Christopher George Oprison, LEAD ATTORNEY, DLA Piper LLP (US), Miami, FL; Christopher M. Young, LEAD ATTORNEY, DLA Piper LLP (US), San Diego, CA; Daniel S. Pariser, Elliott C. Mogul, Paige H. Sharpe, LEAD ATTORNEYS, Arnold & Porter Kaye Scholer LLP, Washington, DC; Joanne M. O'Connor, LEAD ATTORNEY, Jones Foster Johnston & Stubbs, West Palm Beach, FL; Leeanne Sara Mancari, LEAD ATTORNEY, DLA Piper US LLPNY, New York, NY; Christopher M. Strongosky, DLA Piper LLP (US), New York, NY; Ilana Eisenstein, DLA Piper LLP (US), Philadelphia, PA; Loren H. Brown, DLA Piper US LLP (NY), New York, NY; Matthew Aaron Holian, DLA Piper LLP, Boston, MA.

For Sanofi S.A., Consol Defendant: Christopher George Oprison, LEAD ATTORNEY, DLA Piper LLP (US), Miami, FL. **[**14]**

For Chattem, Inc., Consol Defendant: Amanda Laufer Camelotto, LEAD ATTORNEY, DLA Piper LLP, Short Hills, NJ; Christopher George Oprison, LEAD ATTORNEY, DLA Piper LLP (US), Miami, FL; Christopher M. Young, LEAD ATTORNEY, DLA Piper LLP (US), San Diego, CA; Joanne M. O'Connor, LEAD ATTORNEY, Jones Foster Johnston & Stubbs, West Palm Beach, FL; Leeanne Sara Mancari, LEAD ATTORNEY, DLA Piper US LLPNY, New York, NY; Mark Alan Sentenac, LEAD ATTORNEY, King & Spalding LLP, Atlanta, GA; Oluoma Nkechinyere Kas-Osoka, LEAD ATTORNEY, Arnold & Porter Kaye Scholer LLP, Three Embarcadero Center, San Francisco, CA; Sharon D. Mayo, LEAD ATTORNEY, Arnold & Porter LLP, San Francisco, CA; Veronica Louise De Zayas, Veronica Louise De Zayas, LEAD ATTORNEYS, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL; Christopher M. Strongosky, DLA Piper LLP (US), New York, NY; Ilana Eisenstein, DLA Piper LLP (US), Philadelphia, PA; Loren H. Brown, DLA Piper US LLP (NY), New York, NY; Matthew Aaron Holian, DLA Piper LLP, Boston, MA; Sarah A. Westby, LEAD ATTORNEY, Shipman & Goodwin LLP, Hartford, CT; Stephen J. Krigbaum, LEAD ATTORNEY, Carlton Fields, West Palm Beach, FL; Will W. Sachse, Dechert **[**15]** LLP, Cira Centre, Philadelphia, PA.

For GlaxoSmithKline, LLC, Consol Defendant: Veronica Louise De Zayas, Veronica Louise De Zayas, LEAD ATTORNEYS, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL; Christopher M. Strongosky, DLA Piper LLP (US), New York, NY; Ilana Eisenstein, DLA Piper LLP (US), Philadelphia, PA; Loren H. Brown, DLA

Piper US LLP (NY), New York, NY; Matthew Aaron Holian, DLA Piper LLP, Boston, MA; Sarah A. Westby, LEAD ATTORNEY, Shipman & Goodwin LLP, Hartford, CT; Stephen J. Krigbaum, LEAD ATTORNEY, Carlton Fields, West Palm Beach, FL; Will W. Sachse, Dechert LLP, Cira Centre, Philadelphia, PA.

For GlaxoSmithkline, PLC, Consol Defendant: Francisco Armada, Mark Francis Raymond, LEAD ATTORNEYS, Nelson Mullins Broad and Cassel, Miami, FL.

For Publix Super Markets, Inc., Consol Defendant: Christopher George Oprison, LEAD ATTORNEY, DLA Piper LLP (US), Miami, FL; William Hammond, LEAD ATTORNEY, Publix Super Markets, Inc., Lakeland, FL.

For Sanofi US Services, Inc., Consol Defendant: Christopher M. Young, LEAD ATTORNEY, DLA Piper LLP (US), San Diego, CA; Christopher M. Strongosky, DLA Piper LLP (US), New York, NY; Ilana Eisenstein, DLA Piper LLP (US), Philadelphia, **[**16]** PA; Loren H. Brown, DLA Piper US LLP (NY), New York, NY; Matthew Aaron Holian, DLA Piper LLP, Boston, MA.

For Pfizer Inc., Consol Defendant: Haley L. Wasserman, LEAD ATTORNEY, Williams & Connolly, Washington, DC; Jay Brian Shapiro; Veronica Louise De Zayas, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL.

For Sanofi U.S. Services Inc., Consol Defendant: Oluoma Nkechinyere Kas-Osoka, LEAD ATTORNEY, Arnold & Porter Kaye Scholer LLP, Three Embarcadero Center, San Francisco, CA.

For Dr. Reddy's Laboratories, Inc., Consol Defendant: Booker T. Coleman, Jr., LEAD ATTORNEY, Ulmer & Berne LLP, Chicago, IL.

For Sanofi-Aventis US Services, Consol Defendant: Christopher M. Young, LEAD ATTORNEY, DLA Piper LLP (US), San Diego, CA.

Judges: ROBIN L. ROSENBERG, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE BRUCE E. REINHART.

Opinion by: ROBIN L. ROSENBERG

Opinion

[*1217] **ORDER GRANTING BRAND MANUFACTURER DEFENDANTS' MOTION TO DISMISS RICO CLAIM IN CONSOLIDATED AMENDED CONSUMER ECONOMIC LOSS CLASS ACTION COMPLAINT**

This matter is before the Court on Brand Manufacturer Defendants'[1] ("Defendants") **[*1218]** Motion to Dismiss RICO Claim in Consolidated Amended Consumer Economic Loss Class Action Complaint ("Motion to Dismiss"). DE 3115. **[**17]** The Court held a hearing on the Motion to Dismiss on June 3, 2021 (the "Hearing"). The Court has carefully considered the Motion to Dismiss, Plaintiffs' Opposition thereto [DE 3327], Defendants' Reply [DE 3425], the arguments that the parties made during the Hearing, and the record and is otherwise fully advised in the premises. For the reasons set forth below, the Defendants' Motion to Dismiss is **GRANTED** and Count I of the Amended Consumer Economic Loss Class Action Complaint ("ELC") is **DISMISSED WITH PREJUDICE**.

I. Factual Background[2]

[1] The Brand Manufacturer Defendants include Defendants Boehringer Ingelheim Pharmaceuticals, Inc. ("BI"); Chattem, Inc., Sanofi US Services Inc., and Sanofi-Aventis U.S. LLC (collectively, "Sanofi"); Pfizer Inc. ("Pfizer"); and GlaxoSmithKline LLC ("GSK").

This case concerns the pharmaceutical product Zantac and its generic forms, which are widely sold as heartburn and gastric treatments. The molecule in question—ranitidine—is the active ingredient in both Zantac and its generic forms.

Zantac has been sold since the early 1980s, first by prescription and later as an over-the-counter ("OTC") medication. In 1983, the U.S. Food and Drug Administration ("FDA") approved the sale of prescription Zantac. AMPIC ¶ 240. GSK first developed and patented Zantac. *Id.* ¶ 239. Zantac was a blockbuster—the first prescription drug in history to reach $1 billion in sales. *Id.* ¶ 240.

GSK entered into a joint venture with Warner-Lambert **[**18]** in 1993 to develop an OTC form of Zantac. *Id.* ¶ 233. Beginning in 1995, the FDA approved the sale of various forms of OTC Zantac. *Id.* ¶¶ 233, 237. The joint venture between GSK and Warner-Lambert ended in 1998, with Warner-Lambert retaining control over the sale of OTC Zantac in the United States and GSK retaining control over the sale of prescription Zantac in the United States. *Id.* ¶ 243. Pfizer acquired Warner-Lambert in 2000 and took control of the sale of OTC Zantac in the United States. *Id.* ¶ 245. The right to sell OTC Zantac in the United States later passed to BI and then to Sanofi. *Id.* ¶¶ 249-50, 253-55. When the patents on prescription and OTC Zantac expired, numerous generic drug manufacturers began to produce generic ranitidine products in prescription and OTC forms. *Id.* ¶¶ 260-62.

Scientific studies have demonstrated that ranitidine can transform into a cancer-causing molecule called N-nitrosodimethylamine ("NDMA"), which is part of a carcinogenic group of compounds called N-nitrosamines. *Id.* ¶¶ 348, 359, 365, 367. Studies have shown that these compounds increase the risk of cancer in humans and animals. *Id.* ¶¶ 398-404. The FDA, the Environmental Protection Agency, and **[**19]** the International Agency for Research on Cancer consider NDMA to be a probable human carcinogen. *Id.* ¶¶ 275, 279. The FDA has set the acceptable daily intake level for NDMA at 96 nanograms. *Id.* ¶¶ 302.

Valisure LLC and ValisureRX LLC, a pharmacy and testing laboratory, filed a Citizen Petition on September 9, 2019, calling **[*1219]** for the recall of all ranitidine products due to high levels of NDMA in the products. *Id.* ¶ 322. The FDA issued a statement on September 13 warning that some ranitidine products may contain NDMA. *Id.* ¶ 323. On November 1, the FDA announced that testing had revealed the presence of NDMA in ranitidine products. *Id.* ¶ 333. The FDA recommended that drug manufacturers recall ranitidine products with NDMA levels above the acceptable daily intake level. *Id.* Five months later, on April 1, 2020, the FDA requested the voluntary withdrawal of all ranitidine products from the market. *Id.* ¶ 338.

II. Procedural Background

After the discovery that ranitidine products may contain NDMA, plaintiffs across the country began initiating lawsuits related to their purchase and/or use of the products. On February 6, 2020, the United States Judicial Panel on Multidistrict Litigation created **[**20]** this multi-district litigation ("MDL") pursuant to *28 U.S.C. § 1407* for all pretrial purposes and ordered federal lawsuits for personal injury and economic damages from the purchase and/or use of ranitidine products to be transferred to the undersigned. DE 1. Since that time, approximately 1,400 plaintiffs have filed lawsuits in, or had their lawsuits transferred to, the United States District Court for the Southern District of Florida. In addition, this Court has created a Census Registry where tens of thousands of claimants who have not filed lawsuits have registered their claims. *See* DE 547.

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[2] A court must accept a plaintiff's factual allegations as true at the motion-to-dismiss stage. *West v. Warden, 869 F.3d 1289, 1296 (11th Cir. 2017)* ("When considering a motion to dismiss, we accept as true the facts as set forth in the complaint and draw all reasonable inferences in the plaintiff's favor.") (quotation marks omitted). Plaintiffs have set forth their factual allegations in three "master" complaints: the Amended Master Personal Injury Complaint ("AMPIC"); the Consolidated Amended Consumer Economic Loss Class Action Complaint; and the Consolidated Medical Monitoring Class Action Complaint ("MMC") (collectively, the "Master Complaints"). DE 2759, 2835, 2832-1. Unless otherwise noted, all citations will be made to the redacted versions of the Master Complaints.

Plaintiffs filed their first Master Complaints on June 22, 2020. DE 887, 888, 889. In those Master Complaints, Plaintiffs contended that the ranitidine molecule is unstable, breaks down into NDMA, and has caused thousands of consumers of ranitidine products to develop various forms of cancer. DE 887 ¶¶ 1, 6, 19. They alleged that "a single pill of ranitidine can contain quantities of NDMA that are hundreds of times higher" than the FDA's allowable limit. *Id.* ¶ 4. The Plaintiffs pursued federal claims and state claims under the laws of all 50 U.S. states, Puerto Rico, and the District of Columbia. *See generally* ***[**21]*** DE 889.

The Court has entered numerous Pretrial Orders to assist in the management of this MDL. In Pretrial Order # 36, the Court set a schedule for the filing and briefing of the first round of motions to dismiss under *Rule 12* directed to the Master Complaints. DE 1346. The various defendants filed motions to dismiss.

Following an amendment to Pretrial Order # 36, Plaintiffs filed the AMPIC on February 8, 2021. DE 2759. After the Court granted a two-week extension of time [DE 2720], Plaintiffs filed the MMC [DE 2832-1] and the ELC [DE 2835] on February 22, 2021. In Pretrial Order # 61, the Court set a schedule for the filing and briefing of the second round of motions to dismiss under *Rule 12* directed to the Master Complaints. DE 2968. The Defendants filed the Motion to Dismiss addressed herein pursuant to that schedule.

III. The Economic Loss Class Action Complaint

One hundred and eighty named Plaintiffs bring the ELC on behalf of themselves and all others similarly situated. Each Plaintiff asserts that he or she purchased and/or used a ranitidine product during an approximate timeframe. The Plaintiffs bring the complaint in their individual capacities and on behalf of numerous classes pursuant to **[**22]** *Rule 23*. Among the various classes is one nationwide class: the "RICO Class," comprised of one hundred and six named Plaintiffs (hereafter referred to as "Plaintiffs") who purchased Defendants' OTC Zantac. ELC ¶ 708.

Plaintiffs assert Count I of the ELC against Defendants for alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962(c)*, **[*1220]** *(d)*. *Id.* ¶¶ 485, 720. At the Hearing, Plaintiffs clarified that they are pursuing two claims within Count I. Hearing Tr. at 121. One claim is for violating *18 U.S.C. § 1962(c)*, which makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *Id.* The second claim is for violating *18 U.S.C. § 1962(d)*, which makes it unlawful to conspire to violate *§ 1962(c)*. *Id.*

Plaintiffs allege that Defendants were aware of the risks associated with ranitidine consumption. ELC ¶ 529. Rather than remove OTC Zantac from store shelves or warn the public about its safety risks, Defendants formed an enterprise to deliberately and unlawfully misrepresent and conceal the safety risks. *Id.* ¶¶ 501, **[**23]** 528-68, 569-606, 733-34. Defendants' motivation was to increase their "revenues and profits from the OTC Zantac and minimize their losses from the manufacture and the sale of all their Ranitidine-Containing Products." *Id.* ¶ 734. Defendants carried out their scheme through "thousands" of fraudulent interstate mail and wire communications during a decades-long marketing and promotional campaign to mislead the public [*id.* ¶¶ 615-17, 627, 629-48], through misleading communications with federal regulators [*id.* ¶¶ 552, 574, 582, 584, 589], and through efforts to manipulate key opinion leaders and industry groups regarding the science and safety of ranitidine products [*id.* ¶¶ 675-96]. Plaintiffs purchased OTC Zantac because of these misrepresentations and omissions regarding its safety. *Id.* ¶¶ 773, 790. Had Plaintiffs known that OTC Zantac was unreasonably dangerous, they would not have purchased the drugs, much less at the price they paid. *Id.* ¶¶ 779-80.

IV. Summary of the Parties' Arguments and the Court's Rulings

Defendants filed the instant Motion to Dismiss seeking the dismissal with prejudice of Plaintiffs' RICO claim in Count I of the ELC. DE 3115 at 6.[3] Defendants make three primary **[**24]** arguments in support of dismissal. First, Plaintiffs lack statutory standing to assert a RICO claim for three reasons: Plaintiffs did not purchase OTC Zantac directly from any Defendant and therefore cannot sue them under the indirect purchaser rule; Plaintiffs have not alleged a cognizable injury; and Plaintiffs have not plausibly alleged proximate causation. *Id.* at 12, 14-15. Second, Plaintiffs failed to allege an "association-in-fact enterprise," a basic element of a civil RICO claim, because they did not plausibly allege a common, criminal purpose or relationships amongst Defendants. *Id.* at 17-18. And third, Plaintiffs failed to allege that Defendants committed a pattern of racketeering activity. *Id.* at 25.

Plaintiffs respond that they have standing to sue Defendants under RICO because the indirect purchaser rule does not apply to RICO claims; they have alleged a cognizable injury in that they spent money on a worthless product; and, they have plausibly alleged proximate causation. DE 3327 at 11-18. Next, Plaintiffs have pled an "association-in-fact enterprise" because they allege that Defendants' common purpose was fraudulent in nature and that the dependent relationships between **[**25]** Defendants ensured a common purpose. *Id.* at 19-24. Finally, Plaintiffs have pled a pattern **[*1221]** of racketeering by means of wire and mail fraud that spanned more than two decades. *Id.* at 25.

The Court concludes that the indirect purchaser rule applies to RICO claims and the facts of this case. The indirect purchaser rule is a limitation on statutory standing that authorizes suits by direct purchasers, but bars suits by indirect purchasers. The indirect purchaser rule bars Plaintiffs' RICO claim because they did not purchase OTC Zantac directly from Defendants. Plaintiffs therefore do not have statutory standing to sue Defendants under RICO. The Court does not reach the merits of Defendants' other arguments in the Motion to Dismiss.

Therefore, the Court grants Defendants' Motion to Dismiss. Plaintiffs' RICO claim in Count I of the ELC is dismissed with prejudice.

V. Standard of Review

The inquiry when determining if a plaintiff has statutory standing is whether the plaintiff has a cause of action under the statute. *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*. A court may grant a motion to dismiss a pleading if the pleading fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. A *Rule 12(b)(6)* motion to dismiss should be granted only when the **[**26]** pleading fails to contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. The pleading must contain more than labels, conclusions, a formulaic recitation of the elements of a cause of action, and naked assertions devoid of further factual enhancement. *Id.* The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*; *see also Iqbal, 556 U.S. at 678* (explaining that the plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully").

VI. Analysis of the Defendants' Motion to Dismiss

The Motion to Dismiss raises several separate legal issues, however, the applicability of the indirect purchaser rule is dispositive in this case. The Court first explains in greater depth the parties' arguments relating to the indirect purchaser rule, and then reviews the relevant law governing the indirect purchaser rule before providing its analysis and conclusion.

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[3] Unless noted otherwise, all page number references herein are to the page numbers generated by CM/ECF in the header of each document.

A. Arguments

Defendants argue that the indirect purchaser rule bars Plaintiffs' **[**27]** RICO claims. DE 3115 at 12. This rule of statutory standing originated in the antitrust context. *Id.* at 9. The rule prohibits a product consumer from suing a defendant such as manufacturers from whom the consumer did not directly purchase the product. *Id.* The indirect purchaser rule is a simple, bright-line rule. DE 3425 at 8 (citing *Apple Inc. v. Pepper, 139 S. Ct. 1514, 1521, 203 L. Ed. 2d 802 (2019)*). The Supreme Court and the Eleventh Circuit have explained that Congress modeled RICO's civil-action provision, *18 U.S.C. § 1964(c)*, on the civil-action provision of federal ***antitrust law***. DE 3115 at 9-10 (citing *Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)* and *Corcel Corp. v. Ferguson Enterprises, Inc., 551 F. App'x 571, 576 (11th Cir. 2014)*). It follows that limits on antitrust standing, like the indirect purchaser **[*1222]** rule, apply in the RICO context as well. *Id.* at 10. Because Plaintiffs did not purchase OTC Zantac directly from Defendants, the indirect purchaser rule bars the RICO claim. *Id.* at 12.

Plaintiffs respond that the indirect purchaser rule does not apply outside of the antitrust context. DE 3327 at 13. Plaintiffs argue that Supreme Court and Eleventh Circuit precedent do not support applying the rule in the RICO context; in fact, precedent requires the opposite. *Id.* at 13-14. The Eleventh Circuit has held that plaintiffs bringing RICO claims have standing as long as they show that their **[**28]** injuries were proximately caused by the RICO violation. *Id.* at 14 (citing *Corcel, 551 F. App'x at 576*). Because Plaintiffs have plausibly pled proximate causation, they have standing to sue Defendants under RICO. *Id.* Even if the indirect purchaser rule were to apply in the RICO context, the rule cannot apply in this case. *Id.* This is because Plaintiffs are "direct victims and targets of" Defendants' fraudulent scheme and suffered "the first—and perhaps only—injury by purchasing a drug with a material, undisclosed safety risk." *Id.* at 14-15. Any intermediaries, such as the retailers from whom Plaintiffs did directly purchase OTC Zantac, only benefitted from the demand for the drug. *Id.* at 15. These intermediaries would likely lack standing to sue under RICO because the fraudulent scheme did not target them, and the indirect purchaser rule cannot apply if no one would have standing to sue. *Id.* 15 n.4. Consequently, the indirect purchaser rule does not bar Plaintiffs' RICO claim. *Id.* at 16.

B. Law on the Indirect Purchaser Rule

In *Illinois Brick Co. v. Illinois, 431 U.S. 720, 737, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, the Supreme Court interpreted federal ***antitrust law*** to contain a statutory standing principle called the indirect purchaser rule. In that case, the Illinois Brick Company manufactured **[**29]** and distributed concrete blocks and sold those blocks to masonry contractors, who sold masonry structures to general contractors, who sold their services for construction projects to the State of Illinois, the ultimate consumer of the blocks. *Id. at 726*. The State sued Illinois Brick, alleging that Illinois Brick had engaged in a conspiracy to fix the price of the blocks, leading to an overcharge that flowed down the distribution chain to the ultimate consumer, the State. *Id. at 727*.

The Supreme Court ruled that the State did not have standing to bring an antitrust action against Illinois Brick because the State had not purchased the blocks directly from Illinois Brick. *Id. at 737*. The Court held that plaintiffs who are two or more steps removed from the antitrust violator in a distribution chain have no statutory standing. *Id. Illinois Brick* "established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers." *Apple, 139 S. Ct. at 1520* (emphasis in original). "For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule **[**30]** of *Illinois Brick*." *Id. at 1521*.

The Supreme Court created the indirect purchaser rule to prevent the transformation of "treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Illinois Brick, 431 U.S. at 740*; *see 15 U.S.C. § 15(a)* (providing that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by **[*1223]** him sustained"). The rationales for barring indirect purchaser suits are: "(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants." *Apple, 139 S. Ct. at 1521, 1524*.

The Supreme Court has emphasized, however, that "the bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* 'apply with equal force' in every individual case." *Id.* (quoting *Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 216, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*). In cases where some or all of these rationales do not apply to the facts of a particular case, the Court has warned against engaging in "an unwarranted and counterproductive exercise to litigate a series of exceptions" to **[**31]** the indirect purchaser rule. *UtiliCorp, 497 U.S. at 208* (rejecting a proposal to create an exception to *Illinois Brick* where it was relatively simple to trace the pass-on of an alleged overcharge to indirect purchasers and where intermediaries passed on most or all of the overcharge to the ultimate consumer).

In *Holmes v. Securities Investor Protection Corp.*, the Supreme Court noted that it had "repeatedly observed, that Congress modeled *§ 1964(c)* on the civil-action provision of the federal antitrust laws." *503 U.S. at 267-68*; *see 18 U.S.C. § 1964(c)* (providing that "[a]ny person injured in his business or property by reason of a [RICO] violation . . . may sue therefor . . . and shall recover three fold the damages he sustains"). The Court stated that it could "fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used" in federal antitrust legislation. *Holmes, 503 U.S. at 268*. Because Congress "used the same words," in the RICO statute as it used in ***antitrust law***, the Court could "only assume that [Congress] intended them to have the same meaning that courts had already given them." *Id.* (holding that proximate causation is a requirement of RICO claims as it is of antitrust claims).

Turning **[**32]** to whether the indirect purchaser rule applies in the RICO context, the majority of federal courts to address the issue have applied the rule to RICO claims. These courts rely on the language of *Holmes* and include the Third, Sixth, and Seventh Circuits. *See Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 616 (6th Cir. 2004)*; *McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 855 (3d Cir. 1996)*; *see Carter v. Berger, 777 F.2d 1173, 1177 (7th Cir. 1985)*. In *McCarthy*, the Third Circuit held that "the precepts taught by *Illinois Brick* and *Utilicorp* apply to RICO claims, thereby denying RICO standing to indirect victims." *80 F.3d at 855* ("Indeed, plaintiffs have conceded that, if they lacked antitrust standing, they also lacked RICO standing."). In *Trollinger*, the Sixth Circuit held that "indirect purchasers lack standing under RICO and the antitrust laws to sue for overcharges passed on to them by middlemen." *370 F.3d at 616*. And in *Carter*, the Seventh Circuit held that, because the indirect purchaser rule promotes the enforcement of antitrust and RICO laws, it "therefore applies to RICO, too." *777 F.2d at 1177*. *See also Hu v. BMW of N. Am., LLC, No. CV184363KMJBC, 2021 U.S. Dist. LEXIS 19412, 2021 WL 346974, at *4 (D.N.J. Feb. 2, 2021)*; *Gamboa v. Ford Motor Co.*, No. 18-10106, 2020 WL 7047612, at *6 (E.D. Mich. Nov. 30, 2020); *Rickman v. BMW of N. Am., No. CV 18-4363(KM) (JBC), 2020 U.S. Dist. LEXIS 111739, 2020 WL 3468250, at *8 (D.N.J. June 25, 2020)*; *Minnesota by Ellison v. Sanofi-Aventis U.S. LLC, No. 318CV14999BRMLHG, 2020 U.S. Dist. LEXIS 82957, 2020 WL 2394155, at *8 (D.N.J. Mar. 31, 2020)*; *Albers v. Mercedes-Benz USA, LLC, No. CV 16-881(KM)(ESK), 2020 U.S. Dist. LEXIS 52321, 2020 WL 1466359, at *7* ***[*1224]*** *(D.N.J. Mar. 25, 2020)*; *MSP Recovery Claims, Series, LLC v. Sanofi Aventis U.S. LLC, No. 3:18-CV-2211-BRM-LHG, 2019 U.S. Dist. LEXIS 54086, 2019 WL 1418129, at *13 (D.N.J. Mar. 29, 2019)*; *In re Insulin Pricing Litig., No. 3:17-CV-0699-BRM-LHG, 2019 U.S. Dist. LEXIS 25185, 2019 WL 643709, at *8 (D.N.J. Feb. 15, 2019)*.

Even within Circuits that have not addressed this issue, several federal district courts have held that the indirect purchaser rule applies in the RICO context. These district courts include one within the Southern District of Florida. *See, e.g., In re Takata Airbag Prods. Liab. Litig., No. 14-24009-CV, 2019 U.S. Dist. LEXIS 25185, 2021 WL 908552, at *12 (S.D. Fla. Mar. 9, 2021)* (holding that the indirect purchaser rule **[**33]** applies in the RICO context as well"); *Harris Cnty., Tex. v. Eli Lilly & Co., No. CV H-19-4994, 2020 U.S. Dist. LEXIS 179199, 2020 WL 5803483, at *12 (S.D. Tex. Sept. 29, 2020)* (declining "to follow the minority rule" and holding "that indirect purchasers lack standing under RICO").

Other federal district courts have held that the indirect purchaser rule does not apply to federal RICO claims. These courts have reached this decision within circuits that have yet to provide guidance on the rule's application to federal RICO claims. *See, e.g., In re: EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., 336*

F. Supp. 3d 1256, 1325 (D. Kan. 2018) (declining to apply the indirect purchaser rule to a RICO claim in the absence of supporting Tenth Circuit authority and instead holding that RICO standing requires only a showing of proximate causation); *GolTV, Inc. v. Fox Sports Latin Am., Ltd., No. 16-24431-CIV, 2018 U.S. Dist. LEXIS 29836, 2018 WL 1393790, at *19 (S.D. Fla. Jan. 26, 2018)* (noting the parties' failure to cite to any Eleventh Circuit authority applying the indirect purchaser rule and holding that the Eleventh Circuit's standard for RICO standing is no more than proximate causation).

C. Analysis and Conclusion

1. The Applicability of the Indirect Purchaser Rule in the RICO Context

The Court must first decide whether the indirect purchaser rule applies in the RICO context. The Court looks to the Supreme Court's decision in *Holmes* which held that, because RICO's civil-suit provision was modeled on federal ***antitrust law***, antitrust standing principles like **[**34]** proximate causation apply equally to RICO claims. *503 U.S. at 267-68*. This Court recently concluded, "[i]t logically follows that the limits the Supreme Court has placed on anti-trust standing, namely the [in]direct purchaser rule, would apply in the RICO context as well." *In re Takata, 524 F. Supp. 3d 1266, 2021 U.S. Dist. LEXIS 44464, 2021 WL 908552, at *12*.

Plaintiffs, relying on *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498-99, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*, argue that, despite the Supreme Court's holding in *Holmes*, the indirect purchaser rule does not apply to RICO claims. Specifically, Plaintiffs argue that *Sedima* represents the Supreme Court's unwillingness to interpret RICO statutory standing requirements identically to those under ***antitrust law***. DE 3327 at 13-14. In *Sedima*, the Supreme Court rejected the Second Circuit's conclusion that "just as an antitrust plaintiff must allege an 'antitrust injury,' so a RICO plaintiff must allege a 'racketeering injury.'" *Id. at 485*. The Court held that it did not perceive a distinct "racketeering injury" requirement from the text of the RICO statute. *Id.* However, as the Seventh Circuit explained in *Carter*, "*Sedima* held that the 'antitrust injury' rule of antitrust does not apply to RICO, but this is so because 'RICO injury' would be an unintelligible requirement, not because there is no parallel between the two statutes." *Carter, 777 F.2d at 1176* **[*1225]** (citation **[**35]** omitted). Additionally, the plaintiff in *Sedima* was not an indirect purchaser, and the case "does not at all mention the indirect purchaser rule," nor does it provide any "analysis tending to suggest a preference that such rule not be applied in the RICO context." *In re Insulin Pricing Litig., 2019 U.S. Dist. LEXIS 25185, 2019 WL 643709, at *11*. Thus, Plaintiffs' reliance on *Sedima* is inapposite.

So too is their reliance on Eleventh Circuit authority. Plaintiffs rely primarily upon *Grogan v. Platt, 835 F.2d 844, 847-48 (11th Cir. 1988)* to demonstrate that the Eleventh Circuit would refrain from applying the indirect purchaser in the RICO context. In *Grogan*, the court did acknowledge "the perils in relying too closely on the analogy of the antitrust laws" to RICO. *Id. at 847-88*. However, the court was faced with the question of whether the plain language of the RICO statute authorizes recovery of a particular category of damages, not whether the indirect purchaser rule applies to RICO. *Id.*

Plaintiffs rely upon *Corcel, 551 F. App'x at 576*, and *Bivens Gardens Office Building, Inc. v. Barnett Banks of Florida, Inc., 140 F.3d 898, 906 (11th Cir. 1998)*, to argue that proximate causation is all that is required in the Eleventh Circuit to establish RICO standing. DE 3327 at 14. However, as in *Grogan*, these cases did not involve indirect purchaser plaintiffs and did not mention the indirect purchaser rule. And while these cases held that a RICO plaintiff must demonstrate **[**36]** that his or her injuries were proximately caused by the RICO violation, proximate causation and the indirect purchaser rule, while related, are "two analytically distinct aspects" of standing. *McCarthy, 80 F.3d at 851*. Because the Supreme Court's message in *Holmes* was clear, the Court is persuaded to join the prevailing view that the indirect purchaser rule applies to RICO claims.

2. The Applicability of the Indirect Purchaser Rule to Plaintiffs' RICO Claim

The Court next turns to the question of whether Plaintiffs are indirect purchasers, as contemplated by *Illinois Brick*. The bright-line indirect purchaser rule leaves no question that they are. Plaintiffs do not allege that they purchased OTC Zantac directly from any Defendant. Instead, Plaintiffs conceded at the Hearing that OTC Zantac was sold by Defendants to various distributors, then sold to retailers, and then sold to consumers. *See* Hearing Tr. at 125. Thus, Plaintiffs were not the first, nor even the second, purchasers in the OTC Zantac distribution chain. They were, by definition, indirect purchasers who lack standing to sue Defendants under RICO. *See* *McCarthy, 80 F.3d at 848, 855* (explaining that "only the purchaser immediately downstream" has standing to assert RICO claims **[**37]** for payment of "excessive prices").

A case from the District of New Jersey is most analogous to this case. *See* *Rickman, 2020 U.S. Dist. LEXIS 111739, 2020 WL 3468250, at *1*. In *Rickman*, class plaintiffs asserted that the automaker BMW colluded with several other defendants to market cars as "clean diesel," when they knew that the cars discharged emissions at impermissible levels and concealed the true level of emissions through deceptive technology. *Id.* The plaintiffs alleged that the defendants misled them by making affirmative misrepresentations and by failing to disclose material information and that, but for the defendants' conduct, the plaintiffs either would not have bought the cars or would have paid less for them. *Id. at *7*. The plaintiffs did not allege that they bought cars directly from BMW or the other defendants; rather, the plaintiffs bought them from dealers, from private parties, or at auctions. *Id. at *9*. The **[*1226]** court held that the plaintiffs did not have standing to sue under RICO when they did not purchase their cars directly from the defendants. *Id.* ("The Third Circuit and courts in this District have repeatedly held that such indirect purchasers lack standing to assert RICO claims."). Here, Plaintiffs similarly purchased OTC Zantac from various **[**38]** retailers, not directly from Defendants. Thus, Plaintiffs, like the *Rickman* plaintiffs, are barred from suing Defendants.

Plaintiffs argue that they "are not 'indirect purchasers' as understood by *Illinois Brick* because they are the direct victims and targets of Defendants' fraud" and "any intermediaries purely *benefitted* from the increased demand for OTC Zantac." *Id.* at 14-15 (emphasis in original). Plaintiffs further argue that they "suffered the first—and perhaps only—injury by purchasing a drug with a material, undisclosed safety risk." *Id.* at 15. Faced with identical arguments in *Warren General Hospital v. Amgen Inc., 643 F.3d 77, 92 (3d Cir. 2011)*, the Third Circuit noted that *Illinois Brick* and its progeny:

> [D]id not resolve what party was a direct purchaser by calculating exactly where the harm lay. In fact, the [Supreme] Court's discussion in those cases of the policy rationales underpinning the rule manifests the Court's intent to *avoid* linking direct purchaser status to injury calculations in determinations. In *UtiliCorp*, the consumer plaintiffs also argued that the public utility (the direct purchaser) had not been harmed by the antitrust defendant's actions, and that consumers had borne the full brunt of the injuries, thus justifying an exception **[**39]** to the *Illinois Brick* rule. The Court highlighted the need to apply the rule consistently: "[T]he process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the [indirect purchaser] rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same massive evidence and complicated theories into treble-damages proceedings, albeit at a somewhat higher level of generality.

643 F.3d 77, 92 (3d Cir. 2011) (quoting *UtiliCorp, 497 U.S. at 216-17*).

The Court agrees with the Third Circuit's interpretation of *Illinois Brick* and *UtiliCorp*: there are no "direct-harm" or "first victim" exceptions to the indirect purchaser rule. *Id.*; *see also* *Hu, 2021 U.S. Dist. LEXIS 19412, 2021 WL 346974, at *4* (holding that there is no direct-harm exception to the indirect purchaser rule). Accordingly, the Plaintiffs' assertion that they are not true indirect purchasers is unpersuasive. The bright-line indirect purchaser rule, as articulated in *Illinois Brick* and reiterated in *UtiliCorp* and *Apple*, is an unsurmountable hurdle for Plaintiffs. As the Supreme Court explained, the rule is simple and straightforward. *See* *Apple, 139 S. Ct. at 1521* ("[I]f manufacturer **[**40]** A sells to retailer B, and retailer B sells to consumer C, then C may not sue A.").

Additionally, the Supreme Court has noted that "the bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* 'apply with equal force' in every individual case" as it is unwise to "engage in 'an unwarranted and counterproductive exercise to litigate a series of exceptions.'" *Id. at 1524* (quoting *UtiliCorp, 497 U.S. at 216-17*). Because the rationales underpinning the indirect purchaser rule are not dispositive, the Court need not discuss them here in order to apply the indirect purchaser rule to Plaintiffs' RICO claim.

[*1227] In sum, the Court's examination of the Supreme Court's rulings in cases such as *Illinois Brick, UtiliCorp*, and *Apple*, and of other caselaw applying those rulings, leads it to the conclusion that the indirect purchaser rule applies in the RICO context and in this case. Because Plaintiffs did not purchase OTC Zantac directly from Defendants, Plaintiffs' RICO claim fails for lack of statutory standing.

VII. Conclusion

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that Brand-Name Manufacturer Defendants' Motion to Dismiss [DE 3115] is **GRANTED**. Count I of the Consolidated **[**41]** Amended Consumer Economic Loss Class Action Complaint [DE 2835] is **DISMISSED WITH PREJUDICE**.

DONE and ORDERED in Chambers, West Palm Beach, Florida, this 30th day of June, 2021.

/s/ Robin L. Rosenberg

ROBIN L. ROSENBERG

UNITED STATES DISTRICT JUDGE

In re Google Assistant Privacy Litig.

United States District Court for the Northern District of California, San Jose Division

July 1, 2021, Decided; July 1, 2021, Filed

Case No. 19-cv-04286-BLF

Reporter

546 F. Supp. 3d 945 *; 2021 U.S. Dist. LEXIS 123837 **

IN RE GOOGLE ASSISTANT PRIVACY LITIGATION

Prior History: *In re Google Assistant Privacy Litig., 457 F. Supp. 3d 797, 2020 U.S. Dist. LEXIS 80971, 2020 WL 2219022 (N.D. Cal., May 6, 2020)*

Core Terms

Plaintiffs', recordings, motion to dismiss, conversation, allegations, advertising, Privacy, targeted, intercepted, private conversation, users, unfair, Wiretap, damages, AMEND, judicial notice, third party, communications, personal information, consumers, breached, Enabled, economic injury, circumstances, reasonable expectation of privacy, activation, disclosure, pleadings, profits, disclosing

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

A *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint. A claim will normally survive a motion to dismiss if it offers a short and plain statement showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. This statement must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a mere possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Evidence > Inferences & Presumptions > Inferences

HN2[] **Motions to Dismiss, Failure to State Claim**

When considering a *Fed. R. Civ. P. 12(b)(6)* motion, the court must accept as true all factual allegations in the complaint as well as all reasonable inferences that may be drawn from such allegations. Such allegations must be construed in the light most favorable to the nonmoving party. Fraud allegations elicit a more demanding standard.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

HN3[] **Motions to Dismiss, Failure to State Claim**

Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged. Like the basic notice pleading demands of *Fed. R. Civ. P. 8*, a driving concern of *Fed. R. Civ. P. 9(b)* is that defendants be given fair notice of the charges against them. *Rule 9(b)* demands that allegations of fraud be specific enough to give defendants notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong. *Rule 9(b)* requires particularity so that the defendant can prepare an adequate answer. This heightened-pleading standard can apply even to claims that do not innately require proof of fraud. If such a claim nonetheless avers fraudulent conduct, then at least those averments must satisfy *Rule 9(b)*; and, if a claim rests entirely on a unified course of fraudulent conduct, then the pleading of that claim as a whole must satisfy the particularity requirement of *Rule 9(b)*. Finally, a motion to dismiss a complaint or claim grounded in fraud under *Rule 9(b)* for failure to plead with particularity is the functional equivalent of a motion to dismiss under *Rule 12(b)(6)* for failure to state a claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN4[] **Motions to Dismiss, Failure to State Claim**

A court's review on a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss is limited to the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice. Moreover, in evaluating the complaint, the court must accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party. At the same time, a court need not accept as true allegations that contradict matters properly subject to judicial notice or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Public Records

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN5[] **Motions to Dismiss, Failure to State Claim**

There are two doctrines that permit district courts to consider material outside the pleadings without converting a motion to dismiss into a motion for summary judgment: judicial notice under *Fed. R. Evid. 201* and incorporation by reference. The judicial notice doctrine permits a court to take judicial notice of matters that are not subject to reasonable dispute. *Fed. R. Evid. 201(b)*. A fact is not subject to reasonable dispute if it is generally known, or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *Fed. R. Evid. 201(b)(1)-(2)*. However, just because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth. For instance, though public records are generally subject to judicial notice, a court may not take judicial notice of disputed facts within public records.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN6[] **Motions to Dismiss, Failure to State Claim**

Incorporation-by-reference is a judicially created doctrine that treats certain documents as though they are part of the complaint itself. This doctrine permits a court to consider a document if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim. A court generally may assume an incorporated document's contents are true for purposes of a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*. Because all inferences must still be drawn in the nonmoving party's favor, however, it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint.

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

Evidence > Judicial Notice > Adjudicative Facts > Public Records

HN7[] **Adjudicative Facts, Judicial Records**

Courts may properly take judicial notice of other court filings and matters of public record.

Business & Corporate Compliance > ... > Computer & Internet Law > Privacy & Security > State Regulation

Torts > ... > Invasion of Privacy > Intrusions > Elements

Communications Law > Federal Acts > Wiretap Acts

HN8[] **Privacy & Security, State Regulation**

To state a claim under the Wiretap Act, *18 U.S.C.S. § 2510 et seq.*, or the California Invasion of Privacy Act, *Cal. Penal Code § 632*, or for intrusion upon seclusion or invasion of privacy, plaintiffs must allege facts showing that they had a reasonable expectation of privacy in the oral communications that they allege were recorded without their consent.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Evidence > Inferences & Presumptions > Inferences

HN9[] **Motions to Dismiss, Failure to State Claim**

At the motion to dismiss phase, the complaint is construed in a light most favorable to the plaintiff, and all reasonable inferences are to be drawn in favor of the plaintiff.

Communications Law > Federal Acts > Wiretap Acts

Computer & Internet Law > Privacy & Security > Electronic Communications Privacy Act

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > Elements

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > Wiretapping

HN10[] **Federal Acts, Wiretap Acts**

The Wiretap Act, *18 U.S.C.S. § 2510 et seq.*, is designed to prohibit all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in investigation of specified types of major crimes. *18 U.S.C.S. § 2511(1)(a)* makes it unlawful for a person to intentionally intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication. *18 U.S.C.S. § 2511(1)(a)*. The Wiretap Act also imposes liability on any person who intentionally discloses to any other person the contents of any wire, oral, or electronic communication, or intentionally uses the contents of any wire, oral or electronic communication while knowing or having reason to know that the information was obtained through the unlawful interception, *§ 2511(1)(c)-(d)*.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Stored Communications Act

Civil Rights Law > Protection of Rights > Privacy Rights > Electronic Communications

Computer & Internet Law > Privacy & Security > Electronic Communications Privacy Act

HN11[] **Federal Acts, Stored Communications Act**

Just as trespass protects those who rent space from a commercial storage facility to hold sensitive documents, the *Stored Communications Act, 18 U.S.C.S. § 2702 et seq.*, protects users whose electronic communications are in electronic storage with an ISP or other electronic communications facility. An ECS provider shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; if it does so, it is liable for unlawful disclosure of customer communications under *§ 2702(a)*. *18 U.S.C.S. § 2702(a)(1)*.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN12[] **Breach of Contract Actions, Elements of Contract Claims**

In order to plead a claim for breach of contract, plaintiffs must allege: (1) the existence of a contract with defendants, (2) their performance under that contract, (3) defendants breached that contract, and (4) they suffered damages.

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > Benefit of the Bargain

Contracts Law > ... > Damages > Measurement of Damages > Reliance Damages

HN13[] **Foreseeable Damages, Benefit of the Bargain**

Also known as expectation damages, a benefit of the bargain measure of damages is intended to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract.

Civil Procedure > Remedies > Damages > Compensatory Damages

HN14[] **Damages, Compensatory Damages**

Generally, a plaintiff may seek damages for the detriment caused by the breach.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Securities Law > ... > Securities Exchange Act of 1934 Actions > Insider Trading > Disgorgement of Profits

Securities Law > Civil Liability Considerations > Remedies > Equitable Relief

HN15[] **Equitable Relief, Quantum Meruit**

Under California law, a defendant's unjust enrichment can satisfy the damages' element of a breach of contract claim, such that disgorgement is a proper remedy. The Ninth Circuit has further held that California law recognizes a right to disgorgement of profits resulting from unjust enrichment, even where an individual has not suffered a corresponding loss. To plead a theory of disgorgement, plaintiffs must show that they retain a stake in the profits garnered.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Securities Law > Postoffering & Secondary Distributions > Securities Exchange Act of 1934 Actions > Heightened Pleading Requirements

HN16[] **Heightened Pleading Requirements, Fraud Claims**

Fraud allegations must be pled with particularity. *Fed. R. Civ. P. 9(b)*. To satisfy *Rule 9(b)*, a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN17[] **Actual Fraud, Elements**

Indispensable elements of a fraud claim include a false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Torts > Business Torts > Unfair Business Practices > Elements

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN18[] State Regulation, Claims

California's Unfair Competition Law (UCL) prohibits any unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising. *Cal. Bus. & Prof. Code § 17200*. The California Supreme Court has clarified that the UCL, because it is written in the disjunctive, prohibits three separate types of unfair competition: (1) unlawful acts or practices, (2) unfair acts of practices, and (3) fraudulent acts or practices. To plead a UCL claim, a plaintiff's allegations must show that a defendant's conduct violates one of these three prongs. In addition, because a UCL claim may only be brought by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition, *Cal. Bus. & Prof. Code § 17204*, a plaintiff must demonstrate some form of economic injury. This requirement is sometimes referred to as UCL standing.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN19[] Trade Practices & Unfair Competition, State Regulation

Under California law, an Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, plaintiff must (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim. There are innumerable ways in which economic injury may be shown; for instance: A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. Certainly, overpayment is an economic injury under the UCL.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Contracts Law > Remedies > Restitution

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN20[] State Regulation, Claims

The California Supreme Court has defined an order for restitution as one compelling an Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken. In other words, restitution under the UCL must restore the status quo by returning to the plaintiff funds taken from him or benefits in which the plaintiff has an ownership interest.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN21[] **Trade Practices & Unfair Competition, State Regulation**

The requirement that the Unfair Competition Law injury be economic renders standing under *Cal. Bus. & Prof. Code § 17204* substantially narrower than federal standing under U.S. Const. art. III, which may be predicated on a broader range of injuries.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Torts > Business Torts > Unfair Business Practices > Elements

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN22[] **State Regulation, Claims**

The unlawful prong of the Unfair Competition Law (UCL) borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. In other words, to be unlawful under the UCL, defendants' conduct must violate another borrowed law. Virtually any state, federal or local law can serve as the predicate for an action under *Cal. Bus. & Prof. Code § 17200*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Torts > Business Torts > Unfair Business Practices > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN23[] **Trade Practices & Unfair Competition, State Regulation**

The Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, does not define the term unfair. The California Supreme Court has appeared to confine "unfair" to conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. It further required that 'any finding of unfairness to competitors under *§ 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. The Court explained that the prior definitions were too amorphous and provided too little guidance to courts and businesses. However, the Court expressly limited its decision, stating that nothing it said relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as fraudulent or unlawful business practices or unfair, deceptive, untrue or misleading advertising.

Civil Procedure > ... > Federal Declaratory Judgments > Discretionary Jurisdiction > Factors

HN24[] **Discretionary Jurisdiction, Factors**

Declaratory relief is appropriate when (1) the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) it will terminate and afford relief from the uncertainty giving rise to the proceeding. A claim for declaratory relief is unnecessary where an adequate remedy exists under some other cause of action.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN25[] **Reviewability of Lower Court Decisions, Preservation for Review**

Arguments raised only in footnotes, or only on reply, are generally deemed waived.

Counsel: **[**1]** For Asif Kumandan, Plaintiff: Eric Somers, LEAD ATTORNEY, Lexington Law Group, San Francisco, CA; Vincent Briganti, LEAD ATTORNEY, Andrea Farah, Henry J Kusjanovic, PRO HAC VICE, Christian Levis, Lowey Dannenberg, P.C., White Plains, NY; Erin Green Comite, Scott & Scott, LLP, Colchester, CT; John T. Jasnoch, ScottScott Attorneys at Law LLP, San Diego, CA; Joseph P. Guglielmo, ScottScott, Attorneys at Law, LLP, New York, NY; Mark N. Todzo, Lexington Law Group, LLP, San Francisco, CA.

For Melissa Spurr, Plaintiff: Eric Somers, LEAD ATTORNEY, Lexington Law Group, San Francisco, CA; Mark N. Todzo, LEAD ATTORNEY, Lexington Law Group, LLP, San Francisco, CA; Vincent Briganti, LEAD ATTORNEY, Andrea Farah, Henry J Kusjanovic, PRO HAC VICE, Christian Levis, Lowey Dannenberg, P.C., White Plains, NY; Erin Green Comite, Scott & Scott, LLP, Colchester, CT; John T. Jasnoch, ScottScott Attorneys at Law LLP, San Diego, CA; Joseph P. Guglielmo, ScottScott, Attorneys at Law, LLP, New York, NY.

For B. S., a minor, individually and on behalf of all others similarly situated, Plaintiff: Mark N. Todzo, LEAD ATTORNEY, Lexington Law Group, LLP, San Francisco, CA; Vincent Briganti, LEAD ATTORNEY, Andrea Farah, **[**2]** Peter A. Barile, III, Lowey Dannenberg, P.C., White Plains, NY; Erin Green Comite, Scott & Scott, LLP, Colchester, CT; John T. Jasnoch, ScottScott Attorneys at Law LLP, San Diego, CA.

For Lourdes Galvan, Eleeanna Galvan, Plaintiffs: Mark N. Todzo, LEAD ATTORNEY, Lexington Law Group, LLP, San Francisco, CA; Vincent Briganti, LEAD ATTORNEY, PRO HAC VICE, Andrea Farah, Christian Levis, Lowey Dannenberg, P.C., White Plains, NY; John T. Jasnoch, ScottScott Attorneys at Law LLP, San Diego, CA.

For Edward Brekhus, Plaintiff: Hayley A Reynolds, Gutride Safier LLP, San Francisco, San Francisco, CA; Mark N. Todzo, Lexington Law Group, LLP, San Francisco, CA.

For Jon Hernandez, Plaintiff: Seth Adam Safier, LEAD ATTORNEY, Gutride Safier LLP, San Francisco, CA; Hayley A Reynolds, Gutride Safier LLP, San Francisco, San Francisco, CA; Mark N. Todzo, Lexington Law Group, LLP, San Francisco, CA.

For Google LLC, Defendant: Bobbie Jean Wilson, LEAD ATTORNEY, Mara Boundy, Sunita Bali, Perkins Coie LLP, San Francisco, CA.

For Alphabet Inc., Defendant: Bobbie Jean Wilson, LEAD ATTORNEY, Sunita Bali, Perkins Coie LLP, San Francisco, CA.

Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

[*953] ORDER [3] ON DEFENDANTS' MOTION TO DISMISS THE THIRD CONSOLIDATED AMENDED COMPLAINT**

[Re: ECF 120]

The instant litigation comprises three separately-filed cases that the Court has consolidated. *See* ECF 42; ECF 109. The cases generally allege that Defendants Google LLC and Alphabet, Inc. (collectively, "Google") unlawfully intercepted, recorded, disclosed, and used the private conversations of thousands of users of the Google Assistant software. Presently before the Court is Defendants' motion to dismiss the entire consolidated suit. ECF 120. Having considered the parties' arguments and the applicable law, the Court GRANTS IN PART and DENIES IN PART the motion to dismiss.

I. BACKGROUND

This is a putative consumer class action concerning the Google Assistant, a virtual assistant software developed by Defendants Google LLC and Alphabet, Inc. for use on various Google Assistant Enabled Devices ("GAEDs") manufactured by Defendants and by third parties. Specifically, the operative Third Consolidated Amended Class Action Complaint ("3AC"), which was filed on November 9, 2020, ECF 118, contains the following allegations:

The Google Assistant is a voice-activated software, which means that users can ask questions **[**4]** of and give instructions to the Google Assistant using their voices. 3AC ¶¶ 2-4, 79. This software comes preloaded onto certain devices, such as the Google Home, the Google Pixel smartphones, and third party-manufactured smartphones that use the Google Android operating system; it can also be installed on a range of devices. *Id.* Because the Google Assistant is voice-activated, it is constantly listening for "hotwords"—i.e., "Okay Google" or "Hey Google." *Id.* ¶ 80. It does this by recording and analyzing short snippets of audio, which are stored locally in the Google Assistant Enabled Device's random-access memory ("RAM"); these snippets are continuously overwritten, however, if no hotwords are detected. *Id.* ¶ 81. When the hotwords are detected, the Google Assistant switches into "active listening" mode, meaning that it begins recording and analyzing audio in order to carry out the user's command. *Id.* ¶ 82. The Google Assistant can also be manually activated by pressing a button on the device. *Id.*

Plaintiffs allege that Defendants keep and use the audio recordings for two purposes other than carrying out the user's command: (1) to target personalized advertising to users, and (2) to **[**5]** improve the voice recognition capabilities of the Google Assistant. 3AC ¶¶ 83, 113. Sometimes, the Google Assistant may be triggered into active listening mode when the Google Assistant misperceives other words as the hotwords. This is known as a "false accept." *Id.* ¶ 244. Plaintiffs believe that in such situations, Defendants do not destroy the audio recordings, but rather continue to use them for personalized advertising and to analyze the accuracy of the Google Assistant—just as Defendants would do with authorized recordings. *Id.* ¶¶ 83, 105-113. As evidence, Plaintiffs point to the investigation carried out by VRT NWS, in which VRT NWS reviewed "more than a thousand" audio recordings and "identified 153 conversations" that were recorded due to false accepts. *Id.* ¶ 104.

This suit is based on Defendants' use of audio recordings in "false accept" situations. 3AC ¶ 1, 6-8, 244. In Plaintiffs' view, such use is an invasion of privacy, especially because many of the recorded conversations take place in individuals' homes. *Id.* ¶¶ 85-88; *see also* ¶¶ 18-75. Plaintiffs also believe that this practice contravenes the **[*954]** privacy assurances that Defendants make to users in their Privacy Policy. **[**6]** *Id.* ¶ 90. Plaintiffs are particularly troubled by the fact that some of the recordings include the conversations of children because they do not believe that these children can consent to being recorded. *Id.* ¶ 115.

Based on the foregoing, Plaintiffs have sued Google LLC and its parent company Alphabet Inc. under various state and federal laws. There are 10 claims in the 3AC: (1) violation of the federal *Wiretap Act, 18 U.S.C. §§ 2510 et* seq.; (2) violation of the federal Stored Communications Act ("SCA"), 18 U.S.C. §§ 2702 et seq.; (3) violation of the *California Invasion of Privacy Act ("CIPA"), Cal. Penal Code § 632*; (4) intrusion upon seclusion under California common law; (5) invasion of privacy, in violation of Article I, Section 1 of the California Constitution; (6) breach of contract under California common law; (7) violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 et seq.; (8) violation of the California Consumers Legal Remedies Act (the "CLRA"), Cal. Civ. Code §1750, et seq.; (9) fraud, deceit, and/or misrepresentation under California common law; and (10) request for declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq. 3AC ¶¶ 148-288.

These claims are brought by seven Named Plaintiffs:

• Melissa Spurr is a resident of Union County, New York. 3AC ¶ 18. She alleges that she owned at least three Google Home devices during the Class Period. *Id.* ¶ 20.

• B.S. is a minor member of Plaintiff Spurr's household; as such, she **[**7]** has allegedly interacted with Plaintiff Spurr's Google Home device during the Class Period. 3AC ¶¶ 19-20. She brings suit by and through her legal guardian, Plaintiff Spurr. *Id.*

• Lourdes Galvan is a resident of Los Angeles County, California. 3AC ¶ 27. She alleges that she interacted with a Google Assistant-enabled Samsung Galaxy Tab and a Google Assistant-enabled Samsung smartphone during the Class Period. *Id.* ¶ 29.

• E.G., is a member of Plaintiff Galvan's household; she was a minor during a portion of the Class Period but now brings suit on her own. 3AC ¶¶ 28-29. Like Plaintiff Galvan, E.G. alleges that she owned and interacted with a Google Assistant-enabled Samsung Galaxy Tab and a Google Assistant-enabled Samsung smartphone during the Class Period. *Id.* ¶ 29.

• Asif Kumandan is a resident of Kings County, New York. 3AC ¶ 38. He alleges that he owned a Google Assistant-enabled Google Pixel smartphone during the Class Period. *Id.* ¶ 39.

• Edward Brekhus is a resident of Marin County, California. 3AC ¶ 45. He alleges that he owned a Google Assistant-enabled Google Home Mini device during the Class Period. *Id.* ¶ 46. Brekhus obtained the device pursuant to a Spotify promotion. *Id.*

• Jon **[**8]** Hernandez is a resident of Los Angeles County, California. 3AC ¶ 61. Hernandez alleges that he purchased a Google Home Mini device during the Class Period. *Id.* ¶ 62. He further alleges that he owned two other GAEDs during the Class Period. *Id.* ¶ 67.

Defendants now move to dismiss the 3AC pursuant to Fed. R. Civ. P. 12(b)(6). Mot. at 1, ECF 120. The motion has been fully briefed and was heard on May 6, 2021. See Opp., ECF 124; Reply, ECF 129; ECF 134 (minute entry for hearing).

[*955] II. LEGAL STANDARD

HN1[] A Rule 12(b)(6) motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). A claim will normally survive a motion to dismiss if it offers a "short and plain statement ... showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a)(2). This statement "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a mere possibility that a defendant has acted **[**9]** unlawfully." *Id.* (quoting Twombly, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.''" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 557*).

HN2[] When considering a *Rule 12(b)(6)* motion, the court must accept as true all factual allegations in the complaint as well as all reasonable inferences that may be drawn from such allegations. *LSO, Ltd. v. Stroh, 205 F.3d 1146, 1150 n. 2 (9th Cir. 2000)*. Such allegations must be construed in the light most favorable to the nonmoving party. *Shwarz, 234 F.3d at 435*.

Fraud allegations elicit a more demanding standard. *Rule 9(b)* provides: "In alleging fraud ..., a party must state with particularity the circumstances constituting fraud.... ***HN3***[] Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*. This means that "[a]verments of fraud must be accompanied by the 'who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba—Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)*. Like the basic "notice pleading" demands of *Rule 8*, a driving concern of *Rule 9(b)* is that defendants be given fair notice of the charges against them. *See, e.g., In re Lui, 646 Fed. Appx. 571, 573 (9th Cir. 2016)* ("*Rule 9(b)* demands that allegations of fraud be specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge and not **[**10]** just deny that they have done anything wrong.") (quotation omitted*); Odom v. Microsoft Corp., 486 F.3d 541, 553 (9th Cir. 2007)* (*Rule 9(b)* requires particularity "so that the defendant can prepare an adequate answer"). This heightened-pleading standard can apply even to claims that do not innately require proof of fraud. *E.g., Vess, 317 F.3d at 1103-05*.

If such a claim nonetheless avers fraudulent conduct, then at least those averments must satisfy *Rule 9(b)*; and, if a claim rests "entirely" on a "unified course of fraudulent conduct," then "the pleading of that claim as a whole must satisfy the particularity requirement of *Rule 9(b)*." *Id. at 1103-04*. Finally, "[a] motion to dismiss a complaint or claim 'grounded in fraud' under *Rule 9(b)* for failure to plead with particularity is the functional equivalent of a motion to dismiss under *Rule 12(b)(6)* for failure to state a claim." *Id. at 1107*.

HN4[] A court's review on a *12(b)(6)* motion to dismiss "is limited to the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." **[*956]** *Cedar Point Nursery v. Shiroma, 923 F.3d 524, 530 (9th Cir. 2019)* (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*). Moreover, in evaluating the complaint, the court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. At the same time, a court need not accept as true "allegations that **[**11]** contradict matters properly subject to judicial notice" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (internal quotation marks and citations omitted).

III. REQUEST FOR JUDICIAL NOTICE AND INCORPORATION BY REFERENCE

Defendants have submitted five exhibits that they ask the Court to review in ruling on their motion to dismiss. *See* Mot. 2-3; Bali Decl., ECF 121 ¶¶ 2-7, Exhs. A-F. Defendants believe these exhibits are either incorporated by reference in the 3AC or subject to judicial notice. Plaintiffs do not oppose this request.

HN5[] There are two doctrines that permit district courts to consider material outside the pleadings without converting a motion to dismiss into a motion for summary judgment: judicial notice under *Federal Rule of Evidence 201* and incorporation by reference. *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018)*, *cert. denied sub nom. Hagan v. Khoja, 139 S. Ct. 2615, 204 L. Ed. 2d 264 (2019)*. The judicial notice doctrine permits a court to take judicial notice of matters that are "not subject to reasonable dispute." *Fed. R. Evid. 201(b)*. A fact is "not subject to reasonable dispute" if it is "generally known," or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)(1)-(2)*. However, "[j]ust because the document itself is **[**12]** susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja, 899 F.3d at 999*. For instance, though public records are generally subject to judicial notice, a court may not take judicial notice of disputed facts within public records. *Id.*

HN6[] "[I]ncorporation-by-reference is a judicially created doctrine that treats certain documents as though they are part of the complaint itself." *Khoja, 899 F.3d at 1002*. This doctrine permits a court to consider a document "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*. A court generally "may assume an incorporated document's contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*." *Khoja, 899 F.3d at 1003* (internal quotations omitted). Because all inferences must still be drawn in the nonmoving party's favor, however, "it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint." *Id.*

Exhibit A is a copy of the current version of the Google Terms of Service, effective as of March 31, 2020. Bali Decl. ¶ 2. Exhibit B is a copy of the Google Privacy Policy, effective as of December 19, 2019. **[**13]** *Id.* ¶ 3. Exhibit C is a copy of the Google Terms of Service, effective as of October 25, 2017. *Id.* ¶ 4. Exhibit D is a copy of the Google Terms of Service, effective as of April 14, 2014. *Id.* ¶ 5. These documents "form the basis" for Plaintiffs' claims for breach of contract as they contain the contract terms that were allegedly **[*957]** breached. *See* 3AC ¶¶ 237, 242. Defendants' request to incorporate by reference Exhibits A-D is GRANTED. *See* *Ritchie, 342 F.3d at 908*; *accord* *Bass v. Facebook, Inc., 394 F. Supp. 3d 1024, 1037 n.1 (N.D. Cal. 2019)* (granting Facebook's request to incorporate by reference the Terms of Service because the consolidated complaint relied upon them to allege the breach of contract claims and statutory claims).

Defendants also ask the Court to consider Exhibit E—a true and correct copy of the "Transcript of Proceedings Before the Honorable Beth Freeman United States District Judge" from the April, 9 2020 hearing on Google's Motion to Dismiss Plaintiffs' Consolidated Amended Class Action Complaint. Mot. at 2-3; Bali Decl. ¶ 6. ***HN7***[] Courts may properly take judicial notice of other court filings and matters of public record. *Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006)*. Defendants' request for judicial notice of Exhibit E is GRANTED.

Lastly, Exhibit F purports to be a copy of the "Manage audio recordings in your **[**14]** Web & App Activity" webpage from Google's Help Center. Bali Decl. ¶ 7. This document is not incorporated by reference by the 3AC; rather, Defendants ask the Court take judicial notice of it because it appears on a publicly accessible website. Mot. at 3 (citing *Fed. R. Evid. 201(b)*). The existence of this document is a judicially noticeable fact, and therefore the Court GRANTS Defendants' unopposed request. *See, e.g.,* *Opperman v. Path, Inc., 84 F. Supp. 3d 962, 976 (N.D. Cal. 2015)* (collecting cases in which courts have taken judicial notice of publicly available policies and agreements). The Court notes, however, that this notice does not establish that the document is valid or otherwise binding on the Plaintiffs. *See* *Datel Holdings Ltd. v. Microsoft Corp., 712 F. Supp. 2d 974, 984 (N.D. Cal. 2010)*.

IV. DISCUSSION

The Court made extensive findings regarding the legal viability of Plaintiffs' previous complaint when considering Defendants' previous motion to dismiss. *See* Order on Motion to Dismiss, ECF 80. The Court addressed each element of each claim in detail. *See generally id*; *see also* Defendants' Motion to Dismiss Consolidated Amended Class Action Complaint, ECF 56 at iii (attacking Plaintiffs' claims in turn). Defendants adopt a more particularized approach in the instant motion. *See* Mot. at i-ii. The Court addresses each argument raised by **[**15]** Defendants in turn.

A. Counts 1, 3, 4, and 5 and the Reasonable Expectation of Privacy

Plaintiffs bring claims 1, 3, 4, and 5 for violation of the Wiretap Act, violation of *CIPA § 632*, intrusion upon seclusion under California common law, and invasion of privacy in violation of the California Constitution. According to Defendants, Plaintiffs Galvan, E.G., and Kumandan's privacy claims fail because they have not alleged that Google intercepted their private communications. Mot. at 6-10.

HN8[] To state a claim under the Wiretap Act or *CIPA § 632* or for intrusion upon seclusion or invasion of privacy, Plaintiffs must allege facts showing that they had a reasonable expectation of privacy in the oral communications that they allege were recorded without their consent. *See* Order on Motion to Dismiss at 11 (must allege "reasonable expectation of privacy" in oral communications to state a claim under the Wiretap Act) (quoting *United States v. McIntyre, 582 F.2d 1221, 1223 (9th Cir. 1978)*); *id.* at 28 (to state a *CIPA Section 632* claim, plaintiffs must allege "confidential communications," which requires a "reasonable expectation of privacy") (citing *Kearney v. Salomon Smith Barney, Inc., 39 Cal.4th 95, 117, n.7,* **[*958]** *45 Cal. Rptr. 3d 730, 137 P.3d 914 (2006)*); *id.* at 31 (the intrusion must have occurred "under circumstances that would give rise to a reasonable expectation of privacy" to state a claim for **[**16]** intrusion upon seclusion or invasion of privacy); *see also Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 285, 288, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 (2009)*.

Defendants argue that the 3AC does not allege facts showing that Plaintiffs frequently had oral communications near their devices under circumstances giving rise to a reasonable expectation of privacy. Mot. at 7-10. The Court addressed this argument in part in its order on Defendants' previous motion to dismiss. This Court concluded that the Named Plaintiffs' allegations were "too vague" to infer that Plaintiffs' respective GAEDs intercepted their private conversations. Order on Motion to Dismiss at 11. Although this Court rejected Defendants' suggestion that Plaintiffs were required to identify specific communications that Plaintiffs reasonably believed to be private and that were wrongly recorded, it nonetheless found that Plaintiffs failed to allege that they had a reasonable expectation of privacy in the intercepted communications. *Id.* In support of this conclusion, the Court pointed to the lack of "facts regarding the participants in the conversations, the locations of the conversations, or examples of content from the conversations." *Id.* at 12. The Court highlighted that lack of detail was "especially glaring" for Plaintiffs **[**17]** who interacted with smartphones because "smartphones are by their nature mobile and are frequently used in public places." *Id.* The 3AC includes extensive amendments about the Named Plaintiffs' usage of their GAEDs. 3AC ¶¶ 18-75

In light of these amendments, the Court is satisfied that Plaintiffs allege sufficient facts to show that they frequently had oral communications near their devices under circumstances giving rise to a reasonable expectation of privacy. Plaintiffs Galvan and E.G., who are members of the same household, allege that they own a Samsung smartphone and a Galaxy Tab device. 3AC ¶ 29. Plaintiffs Galvan and E.G. allegedly charge these devices in their living or dining room during the day and in the bedroom at night. *Id.* ¶ 31. They further allege that they have private conversations with family members "in their home, bedroom, and car" in the presences of the GAEDs. *Id.* ¶¶ 30-31. For example, on September 17, 2018, the Galvan family had a "private disciplinary conversation" "concerning personal responsibility. This confidential conversation was recorded without a hot word." *Id.* ¶ 32; *see also id.* ¶ 33 (conversation about Galvan parents' childhood in the inner city). Similarly, **[**18]** Plaintiff Kumandan alleges that he "frequently carried his Google Pixel smartphone on his person, including to areas within his home where he has a reasonable expectation of privacy." *Id.* ¶ 39. Kumandan alleges that his GAED recorded a conversation between him and his wife about BBQ sauce at their joint residence "where they have expectation of privacy." *Id.* ¶ 40; *see also id.* ¶ 42 (On July 6, 2019, "Google recorded Plaintiff Kumandan's interaction with his family member and/or a friend which took place in privacy and to the exclusion of all other persons where Plaintiff Kumandan had a reasonable expectation of privacy"). Contrary to Defendants' assertion to the contrary, Mot. at 8, these allegations properly detail the circumstances under which Plaintiffs' private conversations occurred. Plaintiffs Galvan, E.G., and Kumandan all allege that the GAEDs intercepted conversations between family members that occurred inside their respective homes. Such interceptions occurred "surreptitiously" without Plaintiffs uttering a hot word or manually activating the devices. *Id.* ¶¶ 32, 43. While Defendants seem to take issue with the fact that Plaintiffs' decline to go **[*959]** into more granular detail **[**19]** about the content of their conversations, this demand has already been rejected by the Court, Order on Motion to Dismiss at 11, and undermines the alleged private nature of the conversations. In sum, the Court finds that Plaintiffs had a subjective expectation that these conversations were not being overheard or recorded and that this expectation was objectively reasonable. *McIntyre, 582 F.2d at 1223*.

Defendants further argue that Plaintiffs fail to allege facts showing that false accepts routinely occur. Mot. at 10. As an initial matter, Plaintiffs need not plead this allegation in light of amendments to the 3AC. In the Court's previous Order, it held Plaintiffs must allege that "they frequently have oral communications near their respective Google Assistant Enabled Devices under circumstances giving rise to a reasonable expectation of privacy" coupled with an allegation that "false accepts routinely occur" to support an inference that their private conversations were intercepted. Order on Motion to Dismiss at 12; *see also id.* ("At the motion hearing, Defendants represented that through their accounts, users can view all their past conversations with the Google Assistant, including false accepts. If that is **[**20]** the case, Plaintiffs are advised to avail themselves of that information."). This holding was made in context of the previous complaint, in which the Plaintiffs failed to identify *any* conversations that Defendants surreptitiously recorded. Plaintiffs have now rectified this problem and have identified multiple conversations that Defendants recorded even where Plaintiffs did not utter a hot word or manually activate the devices. *See generally* 3AC ¶¶ 18-75.

The Court declines to heed Defendants' objection for a second reason. Defendants object that the allegations in the complaint do not establish that false accepts occur frequently and that "[t]he relevant inquiry is how frequently the Assistant records communications which are not intended for it, and Plaintiffs' own allegations show that this figure is low." Mot. at 10. But this inquiry is more properly considered at the summary judgment phase. ***HN9***[] At the motion to dismiss phase, the complaint is construed in a light most favorable to the plaintiff, *Everest & Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir.1994)*, and all reasonable inferences are to be drawn in favor of the plaintiff, *Jacobson v. Hughes Aircraft, 105 F.3d 1288, 1296 (9th Cir.1997)*. In the 3AC, Plaintiffs Galvan, E.G., and Kumandan allege that they often engaged in private conversations near their **[**21]** GAEDs and identified specific occurrences of private conversations that were allegedly intercepted. 3AC ¶¶ 27-44. Plaintiffs further allege that "[o]f the 11 recorded conversations reflected in the Google account connected to Plaintiff Galvan's smart phone, all 11 were non-consensually recorded by Google and the Google Assistant Enabled Device" and "[o]f the seven recorded conversations that Plaintiff Kumandan's Google account currently reflects, five, or 71%, were non-consensually recorded by Google and Google Assistant Enabled Device." *Id.* ¶¶ 36, 44. Drawing all reasonable inferences in favor of the Plaintiffs, the 3AC adequately alleges that false accepts routinely occur.

The Court DENIES Defendants' Motion to Dismiss based on a failure to allege that Google intercepted Plaintiffs' private communications

B. Count 1 and Unlawful Disclosure or Use

HN10[] The Wiretap Act "is designed to prohibit 'all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in investigation of specified types of **[*960]** major crimes.'" *Greenfield v. Kootenai County, 752 F.2d 1387, 1388 (9th Cir. 1985)* (quoting S. Rep. No. 1097, 90th Cong., 2d Sess.). In Count 1 of the 3AC, Plaintiffs allege that the Defendants violated *18 U.S.C. § 2511(1)(a)* of the **[**22]** Wiretap Act, which makes it unlawful for a person to "intentionally intercept[], endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." *Id. § 2511(1)(a)*; *see* 3AC ¶¶ 160-162. The Wiretap Act also imposes liability on any person who "intentionally discloses" to "any other person the contents of any wire, oral, or electronic communication," or "intentionally uses" the "contents of any wire, oral or electronic communication" while "knowing or having reason to know that the information was obtained through the [unlawful] interception," *id. § 2511(1)(c)-(d)*; Plaintiffs allege that Defendants also violate these provisions. *See* 3AC ¶¶ 163-168.

Defendants now argue that Plaintiffs' theory that Google is liable under *§ 2511(1)(c)-(d)* for disclosing and using unlawfully intercepted oral communications to target personalized advertising to them fails as a matter of law. Mot. at 11-13. Defendants contend that (1) "the only Plaintiffs who allege that they were targeted with personalized advertisements are Kumandan, Galvan, and E.G.", (2) "'liability for disclosure or use is contingent on the original interception being unlawful'"; and (3) "there are no allegations **[**23]** that Google *disclosed* Plaintiffs' communications to a third party for the purpose of targeting advertisements." Mot. at 11 (quoting Order on Motion to Dismiss at 15) (emphasis in original).

First, the Court agrees with Defendants that the Plaintiffs' allegations of targeted advertising are limited to Plaintiffs Galvan, E.G., and Kumandan. In the 3AC, Galvan and E.G. allege the following facts regarding Google's use of private conversations for targeted advertising:

> Several times, topics of Plaintiff Galvan's and Plaintiff E.G.'s private conversations were used to target advertisements to them. In one such instance, Plaintiff E.G. was doing research on Los Angeles gangs and was having a conversation regarding these gangs during her parents' childhood (who both grew up in the inner city). Following this conversation, Plaintiff E.G. receive targeted advertising in the form of suggested videos by YouTube, a Google-owned company.

3AC ¶ 33. Kumandan alleges:

> On at least one occasion, the subject matter of a conversation between Plaintiff Kumandan and his wife were used to target advertisements to Plaintiff Kumandan. In one such instance, Plaintiff Kumandan was speaking to his wife about BBQ **[**24]** sauces. Plaintiff Kumandan did not search for or otherwise interact with Google regarding the same subject matter. Following this conversation, Plaintiff Kumandan received targeted advertisement where an ad for a BBQ sauce was displayed on Plaintiff Kumandan's Instagram page. This conversation took place in Plaintiff and his spouse's joint residence where they have expectation of privacy

Id. ¶ 40. Plaintiffs do not argue otherwise. *See* Opp. at 10. Accordingly, the Court DISMISSES WITHOUT LEAVE TO AMEND any Wiretap Act claim based on targeted advertising by Plaintiffs Spurr, B.S., Brekhus, and Hernandez.

Defendants next argue that Plaintiffs' Wiretap Act claim must be dismissed because Plaintiffs Galvan, E.G., and Kumandan fail to plead facts showing that the alleged interception was unlawful. Mot. at 11-12; *see* *Noel v. Hall, 568 F.3d 743, 751 (9th Cir. 2009)*; *18 U.S.C. § 2511(1)(c)*, *(d)* (prohibiting the use or disclosure of the **[*961]** contents of any wire communications "obtained through the interception of a wire . . . communication in violation of this subsection"). But, as explained in Section III.A, Plaintiffs Galvan, E.G., and Kumandan successfully alleged that Defendants intercepted a "wire, oral, or electronic communication." *18 U.S.C. § 2511(1)(a)*. And the Court has previously **[**25]** held that Plaintiffs successfully alleged that such interception was intentional. Order on Motion to Dismiss at 9-10.

Defendants' final argument is that there are no allegations that Google disclosed any recordings to any third party. This argument speaks solely to the viability of Plaintiffs' claims under *18 U.S.C. § 2511(c)*. *See* Mot. at 11 ("there are no allegations that Google *disclosed* Plaintiffs' communications to a third party for the purpose of targeting advertisements" (emphasis in original)). Plaintiffs Galvan and E.G. allege that, for the purposes of targeted advertising, Defendants disclosed the contents of E.G.'s conversations to YouTube:

> Several times, topics of Plaintiff Galvan's and Plaintiff E.G.'s private conversations were used to target advertisements to them. In one such instance, Plaintiff E.G. was doing research on Los Angeles gangs and was having a conversation regarding these gangs during her parents' childhood (who both grew up in the inner city). Following this conversation, Plaintiff E.G. received targeted advertising in the form of suggested videos by YouTube, a Google-owned company. The video concerned an individual whose name was specifically mentioned in the conversation. **[**26]** Plaintiffs Galvan and E.G. have recognized that other ads have been targeted to them following their private conversations in their home.

3AC ¶ 33. According to Defendants, these allegations fail as a matter of law because "E.G. does not allege that Google disclosed the conversation to any third party, as YouTube is not a third party, but rather 'a Google-owned company.'" Mot. at 12 (quoting 3AC ¶ 33, citing Bali Decl., Exh. B at 19, 35). In response, Plaintiffs argue that whether YouTube is a third party entity is a factual question that requires interrogation into the nature of the relationship between Defendants and YouTube. While the relationship between a defendant and a third party entity often may require a factual interrogation in some circumstances, there are no allegations in the current pleading to suggest that YouTube is a third party. This is true even when construing Plaintiffs' allegations in a light most favorable to their claims. Indeed, the pleading itself states that YouTube is a Google-owned company. 3AC ¶ 33. Accordingly, the Court DISMISSES WITHOUT LEAVE TO AMEND Galvan and E.G.'s Wiretap Act claim to the extent it is predicated on unlawful disclosure for the purpose **[**27]** of targeted advertising.

Meanwhile, Kumandan alleges that, for the purposes of targeted advertising, Defendants disclosed the contents of his conversation to Instagram:

> On at least one occasion, the subject matter of a conversation between Plaintiff Kumandan and his wife were used to target advertisements to Plaintiff Kumandan. In one such instance, Plaintiff Kumandan was speaking to his wife about BBQ sauces. Plaintiff Kumandan did not search for or otherwise interact with Google regarding the same subject matter. Following this conversation, Plaintiff Kumandan received targeted advertisement where an ad for a BBQ sauce was displayed on Plaintiff Kumandan's Instagram page.

3AC ¶ 40. Defendants take an everything-but-the-kitchen-sink approach to Kumandan's pleading, arguing that there is no allegation that this conversation occurred near Kumandan's GAED, no allegation **[*962]** as to the temporal gap between the conversation recording and the targeted advertising, and no allegation that Google disclosed Kumandan's conversation to Instagram. Mot. at 11.

None of these arguments carry the day. First, the Court has already found that Kumandan properly alleged that the conversation occurred near his **[**28]** Google Pixel. Second, the Court is unaware of any authority suggesting that Kumandan needs to specify the exact time period between his alleged conversation and the targeted Instagram advertisement. Viewing the pleadings in the light most favorable to Plaintiffs, the Court finds it sufficient that Kumandan pled that the targeted advertisement occurred after the identified intercepted conversation. Finally, the Court rejects Defendants' argument that Plaintiffs must allege the specific mechanics behind Google's alleged disclosure to Instagram. *See* Mot. at 11 ("there are no facts at all connecting the advertisement that was displayed on Instagram to Google or the Assistant, and [Plaintiffs'] attempt to draw such a connection is pure speculation"). While Google suggests that Kumandan's pleadings are wholly speculative, the Court finds it eminently plausible that Google disclosed Kumandan's intercepted conversations to Instagram, thus enabling Instagram to provide Kumandan with targeted advertisements.

Finally, Defendants argues that "to the extent Plaintiffs contend that Google *used* Kumandan's and/or E.G.'s conversations to target advertisements, such use is expressly permitted under the **[**29]** Privacy Policy and thus not actionable." Mot. at 12 (emphasis in original). The Privacy Policy, of which the Court has taken judicial notice, contains a section entitled "Information we collect as you use our services." Bali Decl., Exh. B at 29. That section states, "We collect information about your activity in our services, which we us to do things like recommend a YouTube video you might like." *Id.*; *see also id.* at 23 (Google "collect[s] information about your activity in our services, which we use to do things like recommend a YouTube video you might like.").

In the Court's previous order, it found that Google's Privacy Policy was too vague to conclusively establish consent to *disclosure* of the recordings. *See* Order on Motion to Dismiss at 21-22. The Court now finds that Google's Privacy Policy is too vague to conclusively establish consent to *use* of the recordings. The question before the Court is whether the Privacy Policy adequately indicated to users that Defendants would use recordings made absent manual activation or the utterance of a hot word, such that users could fairly be said to have "agreed" to these disclosures. *In re Facebook, Inc., Consumer Privacy User Profile Litig., 402 F. Supp. 3d 767, 789 (N.D. Cal. 2019)*. The Court considers this question "objectively, from **[**30]** the perspective of a reasonable . . . user." *Id.* The Court find that while Google's Privacy Policy does disclose that it will collect and use information for targeted advertising, it does not sufficiently apprise users that it will use recordings made in the absence of manual activation or a hot word utterance. *See* *In re Facebook, Inc., Consumer Privacy User Profile Litigation, 402 F. Supp. 3d at 792* ("Although Facebook points to a section in its Data Use Policy entitled 'Service Providers' which says 'we give your information to the people and companies that help us provide, understand, and improve the services we offer,' that statement does not come close to disclosing the massive information-sharing program with business partners that the plaintiffs allege in the complaint."). As such, it cannot serve as a valid consent.

C. Count 2: Stored Communications Act

Count 2 alleges violations of the *Stored Communications Act ("SCA")*. **[*963]** As the Ninth Circuit has explained, the SCA is modeled off the common law of trespass. *Theofel v. Farey-Jones, 359 F.3d 1066, 1072-73 (9th Cir. 2004)*. ***HN11***[] "Just as trespass protects those who rent space from a commercial storage facility to hold sensitive documents, the Act protects users whose electronic communications are in electronic storage with an ISP or other electronic communications facility." *Id.* (internal **[**31]** quotations and citations omitted). An ECS provider "shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service"; if it does so, it is liable for unlawful disclosure of customer communications under *§ 2702(a)*. *18 U.S.C. § 2702(a)(1)*. Defendants now argue that, as with Plaintiffs' Wiretap Act claims, "there are no factual allegations supporting any contention that Google disclosed information to third parties for the purpose of targeted advertising." Mot. at 12. Accordingly, Defendants request that the Court dismiss Plaintiffs' unlawful disclosure claim under *18 U.S.C. § 2702(a)(1)* based on targeted advertising.

The Court has dismissed Plaintiffs Spurr, B.S., Galvan, E.G., Brekhus, and Hernandez's Wiretap Act claims under *18 U.S.C. § 2511(1)(c)* based on a theory of targeted advertising. *See* Section III.B. Accordingly, the Court DISMISSES WITHOUT LEAVE TO AMEND any SCA claim based on targeting advertising by Plaintiffs Spurr, B.S., Galvan, E.G., Brekhus, and Hernandez.

D. Count 6: Common Law Breach of Contract

Count 6 is a claim for breach of contract based on Defendants' Terms of Service ("TOS") and the Privacy Policy contained therein. 3AC ¶¶ 181-196. ***HN12***[] In order to plead a claim for breach of **[**32]** contract, Plaintiffs must allege: (1) the existence of a contract with Defendants, (2) their performance under that contract, (3) Defendants breached that contract, and (4) they suffered damages. *In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 2020 WL 1807978, at *14* (citing *Oasis West Realty, LLC v. Goldman, 51 Cal. 4th 811, 821, 124 Cal. Rptr. 3d 256, 250 P.3d 1115 (2011)*). Defendants move to dismiss on the grounds that Plaintiffs fail to (1) plead how any website is incorporated into the Terms of Service ("TOS"), (2) identify any conduct by Google that is in breach of any contractual term, or (3) identify any damages suffered by Plaintiffs. *See* Mot. at 13-18.

i. Specific Contractual Provisions: FAQ in the Nest Help Center

In the Court's order considering Defendants' previous motion to dismiss, it found that Plaintiffs adequately identified certain provisions of Google's Privacy Policy. Order on Motion to Dismiss at 33-34. This Court found, however, that certain identified provisions of the Privacy Policy could not form the basis for a breach of contract claim because the operative complaint made no reference to such provisions. *Id.* at 34 ("The Consolidated FAC makes no reference to this provision, which means the Court cannot consider it to be alleged for purposes of the instant motion."). Finally, the Court concluded that Plaintiffs were unable to **[**33]** base their contract claim on provisions from "different websites, including the 'Google Nest Help Center' and the 'Google Safety Center'" because the websites were not binding on the parties. *Id.* at 34-35 ("But this vague statement is hardly sufficient to establish that the particular websites cited by Plaintiffs are part of the TOS or otherwise are binding upon the parties.").

Defendants now argue that the FAQ in the Nest Help Center is not incorporated into Google's Terms of Service, and therefore cannot be the basis for a breach of contract claim. Mot. at 13-14. Plaintiffs **[*964]** respond that "[c]ontrary to Google's argument, the allegations regarding Google's breach are not premised on the FAQs referenced in the [3]AC. Rather, the citation to the FAQs is simply included to aid the interpretation of the potentially ambiguous term 'use audio features' in the context of GAEDs." Opp. at 12. Accordingly, the Court DISMISSES Plaintiffs' breach of contract claim to the extent that it is premised on the FAQ in the Nest Help Center.

ii. Breach

The Court now turns to whether Plaintiffs have alleged that Defendants breached the terms of the Privacy Policy. Plaintiffs allege that they entered into a **[**34]** valid contract with Google, "which Google breached in three separate and distinct ways: (1) by recording Plaintiffs' private conversations when they are not using their Google Assistant Enabled Devices; (2) by disclosing to third parties Plaintiffs' private conversations without their consent; and (3) by changing the way Defendants collected and used information without Plaintiffs' knowledge or consent."

3AC ¶ 236. According to Defendants, Plaintiffs have failed to plausibly plead facts to support their claims. Mot. at 14-16.

Plaintiffs adequately allege the first two identified theories of breach, but miss the mark on the third. Plaintiffs' first theory—that Google breached the Privacy Policy by recording Plaintiffs' private conversations when they are not using their GAEDs—is predicated on the following Privacy Policy provision:

> **Your activity**
> We collect information about your activity in our services, which we use to do things like recommend a YouTube video you might like. The activity information we collect may include:
> ...
> • Voice and audio information when you use audio features.

Bali Decl., Exh. B at 21; TAC ¶ 242. Defendants claim that Plaintiffs have failed to allege a breach of **[**35]** this provision because it "does not say that Google will collect audio information only when the user utters a hotword or manually activates the device. . . . audio features are being used when the Assistant is activated; there is nothing in this provision limiting the meaning of 'use' to only *intentional* uses.'" Mot. at 14-15 (emphasis added). In other words, Defendants ask the Court to find as a matter of law that this provision is broad enough to permit Google to record conversations even where a hotword on manual activation does not occur.

The Court declines to do so. At the motion to dismiss stage, the Court must draw all reasonable inferences in favor of Plaintiffs. *See* *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 945 (9th Cir. 2014)*. Under this standard, the Court cannot conclude that the Privacy Policy provision's reference to the "*use* [of GAED] audio features" applies to scenarios in which the Plaintiffs do not affirmatively use GAED audio features, but the GAED nonetheless records audio. TAC ¶ 242 (emphasis added); *see also* Transcript ("Tr.") at 7:3-10 ("[THE COURT:] In my view the Plaintiffs have [it] right that audio features are used when the consumer chooses to use them, not when the device mistakenly or otherwise picks up unintended **[**36]** conversations. And so I think it is at least a reasonable inference that the phrase 'when audio features are used' really is limited to when there is a decision to manually engage or to state a hotword."). And while Defendants stress that "the Nest FAQ make clear that Google Home records conversations when a hotword is 'detected' not when it is spoken," Mot. at 15, they simultaneously argue that the Nest FAQ is not incorporated into the Privacy Policy and is **[*965]** thus not a proper basis of Plaintiffs' breach of contract claim, Mot. at 13-14.

Plaintiffs' second theory—that Google breached the Privacy Policy by disclosing to third parties Plaintiffs' private conversations without their consent—is predicated on the following Privacy Policy provision:

> **When Google shares your information**
> We do not share personal information with companies, organizations, or individuals outside of Google except in the following cases:
>
> **With your consent**
>
> We'll share personal information outside of Google when we have your consent. For example, if you use Google Home to make a reservation through a booking service, we'll get your permission before sharing your name or phone number with the restaurant. We'll ask for your **[**37]** explicit consent to share any sensitive personal information.
>
> **With domain administrators**
> . . .
>
> **For external processing**
> We provide personal information to our affiliates and other trusted businesses or person to process it for us, based on our instructions and in compliance with our Privacy Policy and any other appropriate confidentiality and security measures.

> **For legal reasons**
>
> . . .

Bali Decl., Exh. B at 29; TAC ¶¶ 245, 251. Defendants contend that they have not breached this provision solely because "this Court already found that the Privacy Policy permits disclosure 'for external processing' without consent." Mot. at 16 (citing Order on Motion to Dismiss at 35). But the Court's determination was driven by its finding that the operative complaint did "not adequately plead that Plaintiffs' 'personal information' has been shared. The vague and conclusory allegation that Plaintiffs 'private conversations' were recorded and disclosed does not suffice." Order on Motion to Dismiss at 35. As the Court explained at length above, this deficiency has now been rectified. And the parties do not dispute that Plaintiffs have not consented to the disclosure of their personal information. Mot. at 16; Opp. **[**38]** at 15. This theory of breach may thus proceed.

Plaintiffs' third theory—that Google breached the Privacy Policy by changing the way Defendants collected and used information without Plaintiffs' knowledge or consent—is predicated on the following Privacy Policy provision:

> The information Google collects, and how that information is used, depends on how you use our services and how you manage your privacy controls.

Bali Decl., Exh. B at 29; TAC ¶¶ 252. According to Plaintiffs Brekhus and Hernandez, Defendants breached this provision because

> [Google] changed the method that [it] collected information and changed the way the information was used without regard to how Plaintiffs and the Purchaser Subclass used the services or managed their privacy controls, without notice to or consent by Plaintiffs. As alleged herein, Google changed the method of collecting information from being based on actions by the user, such as manual activation or using "hot words," to being based on sounds not made by the user necessarily, but by other items in the home such as smoke alarms, glass breaking, or other noises.

TAC ¶¶ 253. But nothing in the identified contract provision suggests that Google is contractually **[**39]** prohibited from making changes to how it collects or uses consumer information. Tr. at 7:14-16 ("[THE COURT:] I haven't actually seen anything in the pleading that would tell me that Google promised not to do that."), 38:22-25 ("[THE COURT:] You have pointed to **[*966]** nothing in the documents -- in the contracts that tells me that Google promised to never update and -- or to say: We promise we will never do a software update you don't like."), 40:12-13 ("[THE COURT:] You are basically suing on a bug that was unintentional, claiming it to be a breach of contract."). And Plaintiffs do not point this Court to a *single* instance where another court has allowed a similar theory of breach to proceed. *See* Opp. at 16-17. Accordingly, the Court DISMISSES the third theory of Plaintiffs' contract claim WITHOUT LEAVE TO AMEND.

iii. Damages

Plaintiffs proffer three damages theories: (1) benefit of the bargain, (2) "harm to [Plaintiffs'] "privacy interests," and (3) "disgorgement of profits made by Google as a result of its breach of contract." 3AC ¶¶ 254-256; *see* Opp. at 17-18. Defendants believe all of these theories to be flawed. *See* Mot. at 17-18.

The first theory is benefit of the bargain damages: "the **[**40]** services Plaintiffs . . . received in exchange for the purchase price of Google Assistant Enabled Devices were worth less than the services they paid for because Plaintiffs' information was recorded without their consent and divulged to third parties." 3AC ¶ 254. ***HN13***[] Also known as expectation damages, a benefit of the bargain measure of damages is intended "to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract." *Coughlin v. Blair, 41 Cal. 2d 587, 262 P.2d 305, 314 (Cal. 1953)*; *see also Twin City Fire Ins. Co. v. Philadelphia Life Ins. Co., 795 F.2d 1417, 1425 (9th Cir. 1986)*.

Courts have approved damages based on benefit of the bargain in several technology cases involving privacy. For instance, in *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, Plaintiff Mortensen alleged that he paid "$19.95 each year since December 2007 for Yahoo's premium email service" but did not acquire the full value of Yahoo's service because it was not secure. *313 F. Supp. 3d 1113, 1130 (N.D. Cal. 2018)*. There, Plaintiff Mortensen plausibly lost the benefit of the bargain in that he received a less valuable email service than the one he paid for. *See id.* Similarly, in *In re Anthem, Inc. Data Breach Litig.*, plaintiffs paid premiums to defendants for health insurance plans. *No. 15-MD-02617-LHK, 2016 U.S. Dist. LEXIS 70594, 2016 WL 3029783, at *7-*8 (N.D. Cal. May 27, 2016)*. When the **[**41]** defendants experienced various breaches of its database containing individuals' health record information, the plaintiffs alleged, *inter alia*, that the defendants had breached their privacy policies. *2016 U.S. Dist. LEXIS 70594, [WL] at *9*. The Court allowed the plaintiff to pursue a theory of benefit of the bargain losses on the theory that some portion of their premiums went toward paying for robust security measures, which they allegedly did not receive. *2016 U.S. Dist. LEXIS 70594, [WL] at *13*.

The Court previously found that Plaintiffs failed to allege that they have paid anything to Defendants for the GAEDs:

> Not only does the Consolidated FAC say nothing about any fee or premium paid, it appears that the Google Assistant is available free of charge for use on Google Assistant Enabled Devices. *See* Consol. FAC ¶ 21. As a result, it cannot be said that Plaintiffs received less than what they paid for—they appeared to have paid nothing. *See* *In re LinkedIn User Privacy Litig., 932 F. Supp. 2d 1089, 1093 (N.D. Cal. 2013)* (rejecting plaintiffs' benefit of the bargain theory because "the FAC fails to allege that Plaintiffs actually provided consideration for the security services which they claim were not provided"). The Court **[*967]** therefore does not believe that benefit of the bargain is a viable damages theory.

Order on Motion to Dismiss at 37. **[**42]**

Defendants argue that Plaintiffs B.S., Galvan, E.G., and Brekhus "fail to allege that they paid Google anything for the Assistant, much less any privacy protective features." Mot. at 17. And the allegations in the 3AC of Plaintiffs Kumandan, Spurr, and Hernandez, Defendants contend, do not rectify the problem the Court previously identified because while they "allege that they 'purchased Google Manufactured Devices,'" they "fail to allege that they paid a premium for a certain level of privacy protection they did not receive." Mot. at 17 (quoting 3AC ¶ 238).

The Court easily concludes that Plaintiffs Kumandan, Spurr, and Hernandez have adequately pled expectation damages. The 3AC explicitly alleges that "Plaintiffs Kumandan, Spurr, Hernandez and Google Manufactured Device Subclass Members would not have purchased, or would not have paid as high a price, for the Google Assistant Enabled Devices if they had known that Google would breach the TOS and Privacy Policy by recording and revealing Plaintiffs private conversations." 3AC ¶ 254.

The same cannot be said for the remaining Plaintiffs. There is no allegation even supporting an inference that B.S. even owned a GAED. *See* 3AC ¶ 20 ("Plaintiff **[**43]** Spurr owned at least three Google Home devices during the Class Period."). And Brekhus explicitly alleges that he obtained his GAED for free via a promotion with third-party company Spotify. 3AC ¶ 46. That Brekhus "*would not have paid for Spotify* or ordered the Google Home device . . . had he known that any of Google's representations were false," has no bearing on the benefit of Brekhus' bargain *with Defendants*. 3AC ¶ 55 (emphasis added). Finally, while Plaintiffs Galvan and E.G. allege that they owned a Samsung smart phone and a Galaxy Tab during the Class Period, 3AC ¶ 29, the Court cannot infer from this information that they purchased the devices from Google (as opposed to some other entity). Accordingly, the Court GRANTS Defendants' motion on this ground as to Galvan, E.G., B.S. and Brekhus and DENIES Defendants' motion on this ground as to Kumandan, Spurr, and Hernandez.

Plaintiffs' second theory of damages—harm to their privacy interests—is adequately pled. ***HN14***[] Generally, a plaintiff may seek damages for "the detriment caused by the breach." *Stephens v. City of Vista, 994 F.2d 650, 657 (9th Cir. 1993)* (citing *Cal. Civ. Code § 3300*). In this case, the detriment Plaintiffs say they suffered was an invasion of their privacy. Plaintiffs are entitled to seek compensatory **[**44]** damages or perhaps nominal damages for such harm. *See* *In re Facebook, Inc., Consumer Privacy User Profile Litig., 402 F. Supp. 3d at 802*; *Cal. Civ. Code § 3360*. As discussed a length above, Plaintiffs have amended their complaint to sufficiently allege an invasion of their privacy, and the 3AC plausibly alleges that Plaintiffs' own private conversations were intercepted. Accordingly, the Court DENIES Defendants' motion on this ground.

Plaintiffs' third theory of damages is that Plaintiffs are entitled to "disgorgement of the profits Google has obtained as a result of the improved functionality of Google Assistant resulting from its sharing of private conversations in breach of its contract with Plaintiff[s] and Class Members." 3AC ¶ 256. ***HN15***[] The Ninth Circuit has said that "under California law, a defendant's unjust enrichment can satisfy the 'damages' element of a breach of contract claim, such that disgorgement is a proper remedy." *Foster Poultry Farms, Inc. v. SunTrust Bank, 377 Fed. App'x 665, 669 (9th Cir. 2010)* (citing *Ajaxo Inc. v.* ***[*968]*** *E*Trade Group, Inc., 135 Cal. App 4th 21, 56-57, 37 Cal. Rptr. 3d 221 (2005)*). The Ninth Circuit has further held that "California law recognizes a right to disgorgement of profits resulting from unjust enrichment, even where an individual has not suffered a corresponding loss." *In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 2020 WL 1807978, at *5-*6*.

To plead a theory of disgorgement, Plaintiffs must show "that they retain a stake in the profits garnered." *956 F.3d 589, Id. at *6*. The Court previously concluded that

> **[**45]** Plaintiffs attempt to plead that they are entitled to the "substantial profits" that Defendants' have earned using their "personal information" because Defendants' use was unauthorized. Consol. FAC ¶¶ 199-200. But Plaintiffs have not adequately alleged that their unspecified "personal information" has financial value or that Defendants have profited from the information. Although courts have found that individuals' browsing history may plausibly carry financial value, *In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 2020 WL 1807978, at *6*., Plaintiffs have not pleaded any description of the "personal information" that Defendants' allegedly used. Without such facts, Plaintiffs' assertion that Defendants garnered "substantial profits" from the information is purely conclusory. *See, e.g., Varga v. Wells Fargo Bank, N.A., 796 Fed. App'x 430, 431 (9th Cir. 2020)* ("Varga's conclusory assertion that she was 'deprived of the contractual and consumer protections and benefits' of the notice provision is insufficient to plausibly allege" damages.). The Court finds that Plaintiffs have plausibly demonstrated that any profits were unjustly earned by virtue of Defendants' use being allegedly unauthorized. *In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 2020 WL 1807978, at *6*.

Order on Motion to Dismiss at 38.

To rectify these defects, the 3AC alleges that "[t]he unlawfully-obtained private conversations have financial value, in that they enabled Google to improve the functionality of the Google Assistant and to better target advertisements to Google users, thereby increasing Google's revenue." 3AC ¶ 256. While Defendants argue that this allegation is pure speculation, Mot. at 18, Plaintiffs have offered at least one example of the financial value of their intercepted personal information. Plaintiff Kumandan pled that he had a conversation inside his home with his wife about BBQ sauce, and that, later, he received a targeted Instagram advertisement for BBQ sauce. 3AC ¶ 40. Plaintiff **[**46]** also allege that "[i]mproving the functionality of Google Assistant is necessary to allow Google to continue to compete with the increasingly crowded virtual assistant market and to buttress the price of the Google Manufactured Devices."). *Id.* ¶ 10. Drawing all inferences in favor of Plaintiffs, the Court finds it plausible that Google was able to monetize Plaintiffs' unauthorized recordings via targeted advertising and by improving the Google Assistant functionality. The Court DENIES Defendants' motion on this ground.

E. Counts 8 and 9 and *Fed. R. Civ. P. 9(b)*

In Count 8, Plaintiffs Brekhus and Hernandez allege that Defendants have violated the CLRA by making "improper representations" about Google Home devices and by advertising Google Home devices "with intent not to sell them as advertised." 3AC ¶¶ 263-270. In Count 9, Plaintiffs Brekhus and Hernandez allege that Defendants have engaged in common law fraud, deceit, and/or misrepresentation **[*969]** by "fraudulently and deceptively inform[ing] Plaintiffs that the Google Home Product had adequate security measures in place and that Defendants would not misuse their personal information." 3AC ¶¶ 271-278. Defendants move to dismiss both claims, arguing that neither **[**47]** claim meets the requisite *Fed. R. Civ. P. 9(b)* standard. Mot. at 18-20, 22-23.

HN16[] Fraud allegations must be pled "with particularity." *Fed. R. Civ. P. 9(b)*. To satisfy *Rule 9(b)*, "a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Cafasso, U.S. ex rel. v. Gen. Dynamics*

C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (internal marks omitted). Rule 9(b)'s heightened pleading standard extends to Plaintiffs' CLRA claim as it sounds in fraud. Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009). Plaintiffs do not dispute that the fraud and CLRA claims fall under this standard. *See* Opp. at 21-25. They do dispute whether their pleadings meet this standard. *Id.*

The Court finds the pleadings as to these claims exceedingly thin. Indeed, the Court struggled to identify a specific, cogent theory of fraudulent conduct alleged in the 3AC pursuant to which Brekhus and Hernandez intend to sue. *See* Tr. at 43:19-44:18 (clarifying theory of fraud). The allegation in the 3AC that Defendants promised "adequate security measures" is vague to the point of meaninglessness. 3AC ¶ 272 ("Defendants have fraudulently and deceptively informed Plaintiffs that the Google Home Product had adequate security measures in place and that Defendants would not misuse their personal **[**48]** information."). It is Plaintiffs' responsibility to detail what these security measures would be, and how Google failed to provide them. *See* Cafasso, 637 F.3d at 1055.

In the opposition brief and at the motion hearing, Plaintiffs clarified that their theory of fraud is predicated on Google's ability to *expand* the circumstances upon which the GAEDs would initiate recordings. Opp. at 22 ("the claims are that Google promised that the Google Home devices would active in only three limited circumstances, when in fact, Google retained the ability to unilaterally add additional circumstances, and it did so in the form of 'alarm events.'"); *see also* Tr. at 43:19-44:12 ("THE COURT: So you are saying that Google had a present intention to change the terms that it didn't disclose? That's what you are saying? [PLAINTIFFS]: Yes, Your Honor . . . We allege that at the time they made those representations, they knew that they could and would change the circumstances under which . . . the devices could record and transmit."). To this end, the pleading includes allegations that GAEDs belonging to third parties began recording audio after the detection of smoke alarms or breaking glass. 3AC ¶¶ 108-109. In response, Google explained **[**49]** that these recordings were accidental and were triggered by a software update that was consequently rolled back. *Id.* ¶ 110.

Acknowledging that this theory is less amorphous than Plaintiffs' "adequate security measures" theory, the Court nonetheless finds that it still falls far short of Rule 9's requirements. First, the Court is unable to find where this *unified theory* of fraud is alleged in the complaint. Instead, Plaintiffs have peppered relevant allegations throughout without providing the Court any guiding common thread. *Cf.* Tinian Women Ass'n v. United States Dep't of the Navy, 976 F.3d 832, 841 (9th Cir. 2020) ("Potentially relevant facts and regulations are scattered in different parts of the complaint, and a district court's job is not to piece together a jigsaw puzzle of claims."). And, even ignoring this flaw, the **[*970]** 3AC is void of facts that so much as suggest that (1) Brekhus and Hernandez justifiably and detrimentally relied on Defendants' alleged misrepresentations or (2) Google, *at the time of the alleged misrepresentations*, had the intent to mislead or omit material information about the future circumstances under which the GAEDs would record audio. ***HN17***[] Plaintiffs must plead additional facts that establish these "indispensable elements of fraud." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir. 2003) ("indispensable elements **[**50]** of a fraud claim include a false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages" (internal marks and citation omitted).

The Court GRANTS Defendants' motion to dismiss Counts 8 and 9. While the Court remains skeptical that Plaintiffs can fix the identified defects, because this is the first instance the Court has had to consider these claims, Plaintiffs are allowed LEAVE TO AMEND. *See* Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).

F. Count 7: California UCL

HN18[] Count 7 is brought under California's Unfair Competition Law ("UCL"), which prohibits any "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The California Supreme Court has clarified that the UCL, because it is "written in the disjunctive," prohibits three separate types of unfair competition: (1) unlawful acts or practices, (2) unfair acts of practices, and (3) fraudulent acts or practices. Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999); *accord* Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1168 (9th Cir.

2012). To plead a UCL claim, a plaintiff's allegations must show that a defendant's conduct violates one of these three "prongs." *Id.* In addition, because a UCL claim may only be brought by "a person who has suffered injury in fact and has lost money or property as a result **[**51]** of the unfair competition," *Cal. Bus. & Prof. Code § 17204*, a plaintiff must "demonstrate some form of economic injury." *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 323, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*. This requirement is sometimes referred to as "UCL standing." *Id. at 320-21*.

In their motion to dismiss, Defendants contend that Plaintiffs have failed to allege economic injury, which would preclude any UCL claim. Mot. at 20-21. Defendants also challenge the sufficiency of Plaintiffs' allegations as to both of the UCL prongs alleged ("unlawful" and "unfair"). Mot. at 23-24.

i. Economic injury

The Court begins by addressing Defendants' contention that Plaintiffs have not alleged economic injury, as necessary to bring a UCL claim. Mot. at 20. ***HN19***[] Under California law, a UCL plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 322, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*. "There are innumerable ways in which economic injury" may be shown; for instance:

> A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest **[**52]** diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required **[*971]** to enter into a transaction, costing money or property, that would otherwise have been unnecessary.

Id. at 323.

In the instant case, Plaintiffs advance two theories of economic injury. First, Plaintiffs allege overpayment for their Google Assistant Enabled Devices, i.e. "that had they known their private communications would be intercepted, recorded, disclosed, and misused, they would not have made their purchase, or would have paid less for them. Opp. at 18 (citing 3AC ¶¶ 11, 126, 254, 261). Certainly, overpayment is an economic injury under the UCL. *See, e.g., Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 966 (9th Cir. 2018)*, *cert. denied*, *139 S. Ct. 640, 202 L. Ed. 2d 492 (2018)*. The question becomes whether Plaintiffs have pleaded sufficient facts to establish overpayment here.

This Court previously held that the complaint sufficiently alleged that "Plaintiffs Kumandan and Spurr 'purchased their Google Manufactured Device either directly from Google or from actual or apparent agents of Google.'" Order on Motion to Dismiss at 45 (quoting Consol. FAC ¶ 215). Neither the 3AC, nor Defendants' motion, changes that conclusion. *See* *U.S. v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997)*; *see also* Reply at 14 ("Plaintiffs B.S., Galvan, E.G., Brekhus, **[**53]** and Hernandez have not alleged economic loss"). The Court thus turns to consider the allegations of Galvan, E.G., B.S., Brekhus, and Hernandez.

Defendants maintain that the 3AC contains insufficient details regarding Plaintiffs' purchase of their GAEDs. Mot. at 20. According to Defendants, the 3AC does not allege that Plaintiffs purchased and overpaid for their devices. *Id.* They continue: "Plaintiffs contend generally that they 'would not have purchased a [GAED], or would have paid less' had they known about Google's alleged conduct ([3]AC ¶ 261), but absent any further detail explaining how Plaintiffs suffered an economic loss from a service they paid nothing for, this is nothing more than a legal conclusion." *Id.*

That is true of Named Plaintiff B.S., who allegedly interacted with a GAED that she did not own. 3AC ¶ 20 ("Plaintiff Spurr owned at least three Google Home devices"). It is also true of Named Plaintiffs Galvan and E.G., who allegedly interacted with devices not manufactured by Defendants, a Samsung smartphone and the Samsung Galaxy Tab, *id.* ¶ 29, and Named Plainitff Brekhus, who interacted from a device he received for free pursuant to his paid Spotify subscription, *id.* ¶ **[**54]** 46. Because these Named Plaintiffs have failed to allege that they paid any money for a Google Assistant Enabled Device, they cannot have been injured by overpayment. *See* Order on Motion to Dismiss at 45. Named Plaintiff Hernandez, however, alleges that he purchased a Google Home Mini device from Best Buy in December 2018. 3AC ¶ 62. He also alleges that he "would not have purchased the Google Home device, nor would he have set it up or used it, had he known that any of Google's representations [about activation phrases and manual activation] were false." *Id.* ¶ 66. The Court therefore finds that Plaintiff Hernandez has plausibly alleged that he would not have purchased his GAED, or would have paid less for it, if he had been aware of Defendants' practices with regard to false accepts.

Plaintiffs' second theory of economic injury is that they have a "property interest" in the recordings that were unlawfully obtained by Google and that they are therefore entitled to restitution. 3AC ¶¶ 261-62; *see* Opp. at 19 (citing *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144, 131 Cal. Rptr. 2d 29,* ***[*972]*** *63 P.3d 937 (2003)*). According to Plaintiffs, "Google profited from the use of Plaintiffs' unauthorized recordings by using them to improve the functionality of Google Assistant and for targeted **[**55]** advertising." Opp. at 23. ***HN20***[] The California Supreme Court has "defined an order for 'restitution' as one 'compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken.'" *Korea Supply Co., 29 Cal. 4th at 1144*. In other words, restitution under the UCL must "restore the status quo" by "returning to the plaintiff" funds taken from him or "benefits in which the plaintiff has an ownership interest." *Id. at 1148-49*; *see also* *Hadley v. Kellogg Sales Co., 324 F. Supp. 3d 1084, 1113 (N.D. Cal. 2018)* ("[I]t is well-established that nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment, is unavailable in a ... class action under the FAL, CLRA, and UCL." (internal quotation marks omitted)). Defendants object, and contend that Plaintiffs fail to allege that their voice recordings have any value or, in the alternative, that Plaintiffs fail to connect such value to "'a realistic economic harm or loss that is attributable to [Google's] alleged conduct.'" Mot. at 20-21 (quoting *In re Facebook Internet Tracking Litig., 140 F.Supp.3d 922, 931 (N.D. Cal. 2015)*.

The Court finds that Plaintiffs' theory of economic loss here is "purely hypothetical." *In re Facebook, Inc., Consumer Priv. User Profile Litig., 402 F. Supp. 3d 767, 804 (N.D. Cal. 2019)*; *see also* *id. at 784* ("The plaintiffs do not plausibly allege that they intended to sell their non-disclosed personal information to someone else."). While **[**56]** Plaintiffs contend that the value of their "voice recordings can be inferred by the fact that Google uses them to improve the functionality of Google Assistant and to target advertising," Opp. at 19, there are no facts to suggest that Plaintiffs intended to monetize their individual voice recordings, nor is there any facts that suggest there is a market in which Plaintiffs could sell such recordings. That Defendants were able to monetize and profit from the unauthorized recordings does not give rise to an inference that Plaintiffs "lost money or property," *Cal. Bus. & Prof. Code § 17204*. As another court in this district has explained, claiming that a defendant "may have gained money through its sharing or use of the plaintiffs' information" is "different from saying the plaintiffs lost money." *In re Facebook, Inc., Consumer Privacy User Profile Litig., 402 F. Supp. 3d at 804*. And while Plaintiffs cite to *In re Facebook, Inc. Internet Tracking Litigation* in a Hail Mary attempt to save this theory, there, the Ninth Circuit discussed the value of Facebook user's browsing histories in the context of the *Computer Data and Access Fraud Act ("CDAFA")*, disgorgement, and Article III standing. *956 F.3d 589, 600-601 (9th Cir. 2020)*, *cert. denied sub nom. Facebook, Inc. v. Davis, 141 S. Ct. 1684, 209 L. Ed. 2d 464 (2021)* ("California law requires disgorgement of unjustly earned profits[1] regardless of whether a **[*973]** defendant's actions caused **[**57]** a plaintiff to directly

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[1] This Court has already stressed the difference between disgorgement—which the Ninth Circuit considered in *In re Facebook, Inc. Internet Tracking Litigation*—and restitution—which Plaintiffs seek here:

> "'Disgorgement' is a broader remedy than restitution" in that disgorgement "has been used to refer to surrender of all profits earned as a result of an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice." *[Korea Supply Co., 29 Cal. 4th] at 1145* (emphasis in original). By contrast, restitution under the UCL must "restore the status quo" by "returning to the plaintiff" funds taken from him or "benefits in which the plaintiff has an ownership interest." *Id. at 1148-49*. Put another way, restitutionary **[**58]** disgorgement "focuses on the plaintiff's loss, and nonrestitutionary disgorgement "focuses on the defendant's unjust enrichment." *Meister v. Mensinger, 230 Cal. App. 4th 381, 398, 178 Cal. Rptr. 3d 604 (2014)*. Although the defendant's benefit and the plaintiff's loss are often the same, nonrestitutionary disgorgement may also be had "where a benefit has

expend his or her own financial resources . . . This unauthorized use of their information for profit would entitle Plaintiffs to profits unjustly earned. Thus, Plaintiffs sufficiently alleged a state law interest whose violation constitutes an injury sufficient to establish standing to bring their claims for CDAFA violations and California common law trespass to chattels, fraud, and statutory larceny."). ***HN21***[] Indeed, the "requirement that injury be economic renders standing under *section 17204* substantially narrower than federal standing under [*Article III*], which may be predicated on a broader range of injuries. *Kwikset Corp., 51 Cal. 4th at 324*.

In sum, the Court GRANTS Defendants' motion to dismiss Galvan, E.G., B.S., and Brekhus's UCL claims for failure to adequately plead economic injury. Plaintiffs Kumandan, Spurr, and Hernandez have adequately pled economic injury. Because their UCL claims shall go forward, the Court proceeds to consider of the adequacy of Plaintiffs Kumandan, Spurr, and Hernandez's pleadings under the unlawful and unfair prongs of the UCL.

i. Unlawful Prong

HN22[] The "unlawful" prong of the UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech, 20 Cal. 4th at 180*. In other words, to be "unlawful" under the UCL, Defendants' conduct must violate another "borrowed" law. *HSBC Bank Nevada, 691 F.3d at 1168*. "Virtually any state, federal or local law can serve as the predicate **[**59]** for an action under *section 17200*." *Id.* (quoting *People ex rel. Bill Lockyer v. Fremont Life Ins. Co., 104 Cal. App. 4th 508, 515, 128 Cal. Rptr. 2d 463 (2002)*) (alterations omitted). Here, Plaintiffs predicate their "unlawful" claim on Defendants' alleged violations of (1) the Wiretap Act, (2) the SCA, (3), *CIPA §632*, (4) the common law prohibition of intrusion upon seclusion, (5) the California Constitution's right of privacy, (6) the CLRA, and (7) *Cal. Bus. & Prof. Code § 22576*,[2] for having breached the Privacy Policy. Opp. at 20; 3AC ¶ 258.

Because Plaintiffs assert each of these alleged violations as independent counts, the Court has already considered the adequacy of Plaintiffs' allegations as to those counts. The Court's findings in that regard are equally determinative of the validity of Plaintiffs' UCL claim. See Mot. at 24 ("To the extent this **[**60]** claim is premised on other claims that are subject to dismissal, Plaintiffs' 'unlawful' UCL claim fails as well."). **[*974]** The Court has not dismissed any of these claims in full but has narrowed them where appropriate; accordingly, the Court DISMISSES WITHOUT LEAVE TO AMEND Plaintiffs' UCL unlawful claim to the extent it is predicated on aspects of predicate claims the Court has dismissed.

ii. Unfair Prong

> been received by the defendant but the plaintiff has not suffered a corresponding loss." *Id.* (internal quotations and alterations omitted).

Order on Motion to Dismiss at 46.

[2] This provision states:

> An operator of a commercial Web site or online service that collects personally identifiable information through the Web site or online service from individual consumers who use or visit the commercial Web site or online service and who reside in California shall be in violation of this section if the operator fails to comply with the provisions of *Section 22575* or with the provisions of its posted privacy policy in either of the following ways:
>
> (a) Knowingly and willfully.
>
> (b) Negligently and materially.

Cal. Bus. & Prof. Code § 22576. Plaintiffs allege that Defendants violate this provision by virtue of its breach of contract, as alleged in Count 6. *See* 3AC ¶¶ 241, 258.

Plaintiffs allege that Defendants have "engaged in business acts or practices deemed 'unfair' under the UCL." 3AC ¶ 259. ***HN23***[] "The UCL does not define the term 'unfair.' In fact, the proper definition of 'unfair' conduct against consumers is currently in flux among California courts." *Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018)* (internal quotations omitted). For some years, the California Courts of Appeal formulated different tests, such as whether the practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," *Cel-Tech, 20 Cal. 4th at 184* (quoting *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 887, 85 Cal. Rptr. 2d 301 (1999)*) ("*South Bay* test"), or whether "the gravity of the harm to the alleged victim" outweighs "the utility of the defendant's conduct," *id.* (quoting *State Farm Fire & Casualty Co. v. Superior Court, 45 Cal. App. 4th 1093, 1104, 53 Cal. Rptr. 2d 229 (1996)*) ("*State Farm Fire* test"). Then, in *Cel-Tech*, the California Supreme Court **[**61]** appeared to confine "unfair" to "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *20 Cal. 4th at 187*. "It further required that 'any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.'" *HSBC Bank Nevada, 691 F.3d at 1170* (quoting *Cel—Tech, 20 Cal. 4th at 185*). The *Cel-Tech* Court explained that the prior definitions were "too amorphous" and "provide[d] too little guidance to courts and businesses." *HSBC Bank Nevada, 691 F.3d at 1169* (quoting *Cel—Tech, 20 Cal. 4th at 185*).

However, the *Cel-Tech* court expressly limited its decision, stating, "Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as 'fraudulent' or 'unlawful' business practices or 'unfair, deceptive, untrue or misleading advertising.'" *Cel—Tech, 20 Cal. 4th at 187 n.12*. Consequently, California courts remain divided on whether the *Cel-Tech* definition applies to "consumer actions" or whether the *State Farm Fire* and *South Bay* tests remain valid. *See* *HSBC Bank Nevada, 691 F.3d at 1170*. The Ninth Circuit has noted this continued controversy but **[**62]** awaits the California Supreme Court's resolution of it. *See id.*; *Hodsdon, 891 F.3d at 866*. In this case, the parties follow the Ninth Circuit's lead and argue under *Cel-Tech* and the prior balancing tests from *State Farm Fire* and *South Bay*. *See* 3AC ¶ 259; Mot. at 23-24; Opp. at 20-21.

First, as to Plaintiffs' claim that Defendants' conduct is unfair under the *Cel-Tech* test, the Court finds that Plaintiffs have alleged harm to competition or violation of the "letter, policy, or spirit of the antitrust laws." *HSBC Bank Nevada, 691 F.3d at 1170*. *See* Mot. at 24. In particular, Plaintiffs argue that "Google's actions . . . have violated California's strong public policy of protecting privacy. Google's conduct of intercepting, recording, disclosing, and otherwise misusing Plaintiffs' and Class members' private conversations violated the Wiretap Act, SCA, *CIPA §632*, **[*975]** California common law, the California constitution, and breached its contract with Plaintiffs." Opp. at 21 (citing 3AC ¶ 260). Plaintiffs also cite to the United States House of Representatives Subcommittee on Antitrust, Commercial and Administrative Law report entitled "Investigation of Competition in Digital Markets." 3AC ¶ 123. According to Plaintiffs, this report finds that "as competition **[**63]** has been reduced online, consumers have been subject to privacy abuses by Google, including through the use of the voice assistant, Google Assistant" and that "there is a significant potential for misuse of data collected by voice assistants to harm competition or consumers." *Id.* At this current juncture, the Court finds these allegations sufficient under *Cel-Tech*.

Second, as to the pre-*Cel-Tech* definitions of "unfair," some courts have treated the *State Farm Fire* and *South Bay* tests as distinct tests; others, including the Ninth Circuit, have referred to them together as the "balancing test," *see* *HSBC Bank Nevada, 691 F.3d at 1169*; *accord* *Herskowitz v. Apple Inc., 940 F. Supp. 2d 1131, 1146 (N.D. Cal. 2013)*. In any event, the parties agree that both tests require the Court to "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *HSBC Bank Nevada, 691 F.3d at 1169*; *see* Mot. at 23; Opp. at 20. Plaintiffs contend that "Google's conduct of secretly intercepting, recording, disclosing, and misusing their communications harmed them by invading their privacy and there is no corresponding benefit to consumers. Opp. at 21 (citing 3AC ¶ 260). According to Defendants, Plaintiffs have failed to pass the balancing test because they "admit that the Assistant provides a substantial benefit **[**64]** to consumers" and "concede that they took advantage of these benefits and wish to continue doing so." Mot. at 24 (citing 3AC ¶¶ 4, 20, 29, 39, 51, 65, 67, 79, 80, 82, 127).

At the motion to dismiss stage, the Court cannot say that the benefits from Google Assistant's unauthorized recordings necessarily outweighs the harms from such recordings. *See* *McCoy v. Alphabet, Inc., No. 20-CV-05427-SVK, 2021 U.S. Dist. LEXIS 24180, 2021 WL 405816, at *10 (N.D. Cal. Feb. 2, 2021)* ("At the motion to dismiss stage, the Court cannot say that the benefits from collecting that information to develop new products, features, and technologies for the benefit of the users and the public necessarily outweighs the harm."); *In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1073 (N.D. Cal. 2012)* ("While the benefits of Apple's conduct may ultimately outweigh the harm to consumers, this is a factual determination that cannot be made at this stage of the proceedings."); *see also* Order on Motion to Dismiss at 51 ("Just how 'occasional' the error is, however, is a question of fact that remains unanswered at this stage. Moreover, the harm that is asserted here is the invasion of privacy, which is difficult to quantify. The Court cannot say, as a matter of law, that the utility of the Google Assistant necessarily outweighs the harm from false accepts.").

Defendants' **[**65]** motion to dismiss on the unfair prong of the UCL is DENIED.

G. Count 10: Declaratory Judgment

HN24[] Finally, Defendants move to dismiss Count 10, Plaintiffs' request for declaratory judgment under the *Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq.*[3] Declaratory relief is appropriate **[*976]** when (1) "the judgment will serve a useful purpose in clarifying and settling the legal relations in issue," and (2) "it will terminate and afford relief from the uncertainty... giving rise to the proceeding." *Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1470 (9th Cir. 1984)* (citations omitted). "A claim for declaratory relief is unnecessary where an adequate remedy exists under some other cause of action." *Mangindin v. Washington Mut. Bank, 637 F. Supp. 2d 700, 707 (N.D. Cal. 2009)*; *see also* *Tyson v. Nationstar Mortg. LLC, No. 15-cv-01548, 2016 U.S. Dist. LEXIS 777, 2016 WL 39903, at *5 (N.D. Cal. Jan. 4, 2016)* (dismissing declaratory relief where "Plaintiffs' declaratory relief claim is duplicative of their TILA rescission claim").

The Court finds that Plaintiffs have not met the requirements for declaratory relief. Pursuant to their declaratory judgment claim, Plaintiffs seek a declaration that "Defendants continue to owe a legal duty to not intercept, record, disclose, and otherwise misuse Plaintiffs' and Class Members' confidential communications under, *inter alia*, the common law, the Wiretap Act, the SCA, CIPA, *Cal. Penal Code §632*, and *Cal. Bus. & Prof. Code §22576*." 3AC ¶ 283. They also seek an injunction "enjoining Google from engaging **[**66]** in the unlawful conduct alleged in this claim and requiring Google to delete all recordings of Class Members, to cease further recording, and to implement functionality sufficient to prevent unauthorized recordings in the future." *Id.* ¶ 284. The injunctive relief Plaintiffs seek is duplicative of the relief Plaintiffs seek under the UCL. *Compare* 3AC ¶ 262 with *id.* ¶ 284. In other words, if Plaintiffs are successful in their alternate claims for relief, Plaintiffs' claim for declaratory relief would be unnecessary. *See* *Tyson, 2016 U.S. Dist. LEXIS 777, 2016 WL 39903, at *5*. Accordingly, the Court GRANTS WITHOUT LEAVE TO AMEND Defendants' motion to dismiss Plaintiffs' cause of action for declaratory relief.

V. ORDER

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[3] In the instant motion, Defendants insist that they previously moved to dismiss this claim. Mot. at 24. A review of Google's prior briefing reveals that Google did, indeed, move to dismiss Plaintiffs' declaratory judgment claim—in a single footnote buried at the end of twenty-five page brief. This Court's Standing Orders are clear that "[f]ootnotes shall not be used to cite to legal authorities or evidence." Standing Order for Civil Cases IV.F. The Court assumed that it did not need to caution parties not to raise dispositive arguments in footnotes. *See Estate of Saunders v. Comm'r*, 745 F.3d 953, 962 fn. 8 (9th Cir. 2014) ("***HN25***[] Arguments raised only in footnotes, or only on reply, are generally deemed waived"); *Khoja v. Orexigen Therapeutics, Inc.*, 498 F. Supp. 3d 1296, 1309 fn. 4 (S.D. Cal. 2020); *Cheever v. Huawei Device USA, Inc.*, No. 18-CV-06715-JST, 2019 U.S. Dist. LEXIS 231125, 2019 WL 8883942, at *3 (N.D. Cal. Dec. 4, 2019); *Sanders v. Sodexo, Inc.*, No. 2:15-cv-00371-JAD-GWF, 2015 U.S. Dist. LEXIS 96073, 2015 WL 4477697, at *5 (D. Nev. July 20, 2015) ("'Many courts will disregard arguments raised exclusively in footnotes.'" (quoting Bryan Garner, The Redbook: A Manual on Legal Style 168 (3d ed. 2013))).

For the foregoing reasons, the Court rules on Defendants' motion to dismiss the 3AC as follows:

- Count 1: GRANTED IN PART and DENIED IN PART WITHOUT LEAVE TO AMEND
- Count 2: GRANTED IN PART and DENIED IN PART WITHOUT LEAVE TO AMEND
- Count 3: DENIED
- Count 4: DENIED
- Count 5: DENIED
- Count 6: GRANTED IN PART and DENIED IN PART WITHOUT LEAVE TO AMEND
- Count 7: GRANTED IN PART and DENIED IN PART WITHOUT LEAVE TO AMEND
- Count 8: GRANTED WITH LEAVE TO AMEND
- Count 9: GRANTED WITH LEAVE TO AMEND

- Count 10: GRANTED WITHOUT LEAVE TO AMEND **[**67]**

Any amended complaint is **due by August 2, 2021**. Plaintiffs are directed to file a redlined complaint as an attachment to any amended complaint. Leave to amend is **[*977]** restricted to Counts 8 and 9; Plaintiff may not add new parties or claims without obtaining prior express leave of the Court. Any future motion to dismiss SHALL be limited to Counts 8 and 9. Briefing on the motion shall be limited to 5 pages for the opening and opposition briefs and 3 pages for the reply brief.

IT IS SO ORDERED.

Dated: July 1, 2021

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

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Tershakovec v. Ford Motor Co.

United States District Court for the Southern District of Florida, Miami Division

July 1, 2021, Decided

Case Number: 17-21087-CIV-MORENO

Reporter

546 F. Supp. 3d 1348 *; 2021 U.S. Dist. LEXIS 123401 **; 105 U.C.C. Rep. Serv. 2d (Callaghan) 286

GEORGE TERSHAKOVEC, DIANA TERSHAKOVEC, JACQUES RIMOKH, HERBERT ALLEY, MICHAEL DELAGARZA, ATTILA GONDAN, ERIC KAMPERMAN, GREG ROBERTS, RICHARD KOWALCHIK, TRAVIS MCRAE, MICHAEL MCCURRY, MARK HOCHSPRUNG, JOHN AUBREY, JOSE CRUZ, ERIC EVANS, BYRON HARPER, and TODD NEWTON, individually and on behalf of all others similarly situated, Plaintiffs, vs. FORD MOTOR COMPANY, Defendant.

Subsequent History: Reconsideration granted by, in part *Tershakovec v. Ford Motor Co., 2021 U.S. Dist. LEXIS 157604, 2021 WL 3711444 (S.D. Fla., Aug. 20, 2021)*

Reversed by, in part, Affirmed by, in part, Vacated by, in part, Remanded by, in part *Tershakovec v. Ford Motor Co., Inc., 2023 U.S. App. LEXIS 17185, 2023 WL 4377585 (11th Cir. Fla., July 7, 2023)*

Prior History: *Tershakovec v. Ford Motor Co., 2018 U.S. Dist. LEXIS 19429, 2018 WL 11353637 (S.D. Fla., Feb. 5, 2018)*

Core Terms

track, Limp, consumer, class member, advertising, summary judgment, Plaintiffs', damages, predominance, coolers, warranty, package, notice, argues, courts, state law, class certification, design defect, deceptive, named plaintiff, class action, fraud claim, puffery, cases, driving, questions, dealers, affirmative defense, economic loss rule, class-wide

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Appropriateness**

Fed. R. Civ. P. 56(a) provides that summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The existence of some factual disputes between litigants will not defeat an otherwise properly ground motion for summary judgment; the requirement is that there be no genuine issue of material fact. Mere metaphysical doubt as to the material facts will not suffice.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] **Entitlement as Matter of Law, Appropriateness**

The basic issue before a court on a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. The moving party has the burden of showing the absence of a genuine issue as to any material fact, and in deciding whether the movant has met that burden, the court must view the movant's evidence and all factual inferences arising from it in the light most favorable to the nonmoving party. If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment.

Antitrust & Trade Law > Consumer Protection > False Advertising

HN3[] **Consumer Protection, False Advertising**

Puffery can be generally understood as generalized, vague, nonquantifiable statements of corporate optimism. The "touchstone" of a puffery analysis is the likelihood that reasonable consumers would rely on that representation. Whether a representation is mere puffery depends, in part, on the context in which it is made.

Antitrust & Trade Law > Consumer Protection > False Advertising

HN4[] **Consumer Protection, False Advertising**

Both state and federal courts hold that whether a statement is puffery is a question of fact, save for the unusual case where the answer is so clear it may be decided as a question of law.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN5[] **Deceptive & Unfair Trade Practices, State Regulation**

Florida's Deceptive and Unfair Trade Practices Act requires: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. To satisfy the first element, a plaintiff must show that the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances. In determining whether a representation is likely to mislead consumers acting reasonably, courts consider the net impression created. If the statements are likely to mislead reasonable consumers, then it makes no difference if the statements are technically or literally true. And how a reasonable consumer would interpret a term is an issue of fact.

Torts > Products Liability

HN6[ ] Torts, Products Liability

Consumer complaints suffice to establish knowledge on the part of a manufacturer, but only if there are an unusual number of complaints such that the manufacturer would be on notice of the problem.

Torts > Products Liability > Types of Defects > Design Defects

HN7[ ] Types of Defects, Design Defects

Courts that do not find design defects to be covered by express warranties are generally presented with warranty language that only covers materials and workmanship.

Torts > Products Liability > Types of Defects > Design Defects

HN8[ ] Types of Defects, Design Defects

Courts commonly use at least one of the following three tests to determine whether a product is defectively designed: (1) the consumer expectation test; (2) the risk utility test; and (3) the reasonable alternative design test. A product is defectively designed under the consumer expectation test if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer.

Commercial Law (UCC) > ... > Contract Provisions > Warranties > Implied Warranty of Merchantability

Torts > Products Liability > Theories of Liability > Breach of Warranty

Commercial Law (UCC) > ... > Breach, Excuse & Repudiation > Notice Requirements > Notice of Breach

HN9[ ] Warranties, Implied Warranty of Merchantability

Illinois law provides two exceptions to the notice requirement: when (1) the seller has actual knowledge of the defect of the particular product or (2) the seller is deemed to have been reasonably notified by the filing of the buyer's complaint alleging breach of UCC warranty. A seller's generalized knowledge about the safety concerns of third parties is insufficient to fulfill the UCC notice requirement.

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Remedies

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Remedies

HN10[] **Types of Losses, Economic Losses**

The economic loss rule precludes tort recovery for economic harms based on a duty arising from a contractual relationship. However, the rule slightly varies from state to state and there are certain exceptions. The chief exception is that tort claims may survive the economic loss rule when the claim is for fraud, i.e., the plaintiff was harmed even before the contract was signed.

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Remedies

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Remedies

HN11[] **Types of Losses, Economic Losses**

Under Missouri law, a fraud claim independent of a contract is actionable, but it must be based upon a misrepresentation that was outside of or collateral to the contract, such as many claims of fraudulent inducement. To decide whether a fraud claim is independent of a contract claim under the economic loss doctrine, a court should look at (1) whether the subject matter of the alleged misrepresentations was incorporated into the parties' contract and (2) whether the plaintiff suffered additional damages outside the contract as a result of the alleged fraud. Additionally, the fraudulent inducement exception is subject to a widely recognized limitation that where the fraudulent misrepresentation concerns the quality, character, or safety of the goods sold, the economic loss doctrine bars the fraud claim because it is substantially redundant with warranty claims.

Bankruptcy Law > ... > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles

Bankruptcy Law > Individuals With Regular Income > Estate Property

HN12[] **Duties & Functions, Capacities & Roles**

A pre-petition cause of action is the property of a Chapter 7 bankruptcy estate, and only the trustee in bankruptcy has standing to pursue it. Failure to list an interest on a bankruptcy schedule leaves that interest in the bankruptcy estate.

Governments > Legislation > Statute of Limitations > Time Limitations

HN13[] **Statute of Limitations, Time Limitations**

A cause of action can accrue for ownership purposes before the statute of limitations for that cause of action has begun to run.

Torts > Procedural Matters > Conflict of Law > Place of Injury

HN14[] **Conflict of Law, Place of Injury**

In Florida, absent special circumstances, the state where an injury occurred is the decisive consideration in determining the applicable choice of law.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN15[] **Class Actions, Certification of Classes**

A plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN16[] **Prerequisites for Class Action, Adequacy of Representation**

Parties seeking class action certification must satisfy the four requirements of *Fed. R. Civ. P. 23(a)*, commonly referred to as numerosity, commonality, typicality, and adequacy of representation. Parties moving for class certification bear the burden of establishing each element of *Rule 23(a)*. If the party seeking class certification fails to demonstrate any requirement, the case may not continue as a class action. Specifically, the four requirements of *Rule 23(a)* are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN17[] **Class Actions, Certification of Classes**

For purposes of commonality for class certification, even a single common question will do. A question is common if answering it resolves an issue that is central to the validity of each one of the claims in one stroke.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN18[] **Prerequisites for Class Action, Adequacy of Representation**

The typicality test for class certification is not demanding. Typicality requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. *Fed. R. Civ. P. 23(a)(3)*. The typicality test centers on whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named class plaintiffs, and whether other class members have been injured by the same course of conduct. Although similar to commonality in that it concentrates on the nexus between class members and their designated representative, typicality differs from commonality in that it focuses on the class representative's individual characteristics in comparison to those of the proposed class. Typicality is satisfied where the named plaintiffs' claims arise from the same event or pattern or practice and are based on the same legal theory as the claims of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN19[] **Prerequisites for Class Action, Adequacy of Representation**

The purpose of the adequacy requirement is to protect the legal rights of absent class members. Adequacy of representation is primarily based on the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the class and whether plaintiffs have interests antagonistic to those of the rest of the class. The inquiry requires a court to consider both whether there are any inter-class conflicts and whether class counsel and named plaintiffs will prosecute the case with zeal.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN20[] **Class Actions, Certification of Classes**

In addition to meeting the four requirements of *Fed. R. Civ. P. 23(a)*, parties seeking class certification must prove that the action is maintainable under one of the three subsections of *Rule 23(b)*. Certification under *Rule 23(b)(3)* is appropriate when (1) questions of law or fact common to the members of the class predominate over any questions affecting only individuals members, and when (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN21[] **Prerequisites for Class Action, Maintainability**

Fed. R. Civ. P. 23(b)(3)'s predominance requirement is more demanding than the commonality requirement of *Rule 23(a)*. It tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation, by asking whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. Thus, the predominance inquiry calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under *Rule 23(b)(3)* even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to individual class members.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN22[] **Class Actions, Certification of Classes**

Individual issues are a threat to predominance in a class action even when they come up in affirmative defenses. The general rule is that courts are reluctant to deny class action status under *Fed. R. Civ. P. 23(b)(3)* simply because affirmative defenses may be available against individual members.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN23[] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23(b)(3) requires that any model supporting a plaintiff's damages be consistent with its theory of liability. In short, the requirement ensures that the damages are capable of determination via class-wide proof, just like the theory of liability.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN24[] **Prerequisites for Class Action, Maintainability**

It is universally true in *Fed. R. Civ. P. 23(b)(3)* class actions that damages must be susceptible to class-wide measurement such that individual issues do not predominate over common questions.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN25[] **Prerequisites for Class Action, Maintainability**

There are four non-exhaustive factors a court should consider in assessing whether a class action is superior to individual litigation: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN26[] Class Actions, Certification of Classes

The class action device exists to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN27[] Class Actions, Certification of Classes

Unjust enrichment is a fact-intensive inquiry that focuses on the totality of the circumstances, not just the defendant's conduct. Before it can grant relief on that equitable claim, a court must examine the particular circumstances of an individual case and assure itself that, without a remedy, inequity would result or persist. Due to the necessity of an inquiry into the individualized equities attendant to each class member, courts find unjust enrichment claims inappropriate for class action treatment.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN28[] Class Actions, Certification of Classes

The predominance inquiry for class certification is not determined by simply counting the number of individual questions versus common ones, a court must consider their relative importance.

Counsel: [1]** For George Tershakovec, Diana Tershakovec, Jacques Rimokh, Herbert Alley, individually and on behalf of all others similarly situated, Plaintiffs: Catherine Y.N. Gannon, LEAD ATTORNEY, Shelby R. Smith, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Nicholas Styant-Browne, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA' Rachel Wagner Furst, LEAD ATTORNEY, Grossman Roth Yaffa Cohen, P.A., Coral Gables, FL; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro, LLP, Seattle, WA; Garth Daniel Wojtanowicz, PRO HAC VICE, Hagens Berman Sobol Shapiro, LLP, Seattle, WA; Jerrod C. Patterson, PRO HAC VICE, Hagens Berman Sobol Shapiro, LLp, Seattle, WA; Stuart Z. Grossman, Grossman, Roth, Yaffa, Cohen, PA, Coral Gables, FL.

For Michael DELAGARZA, Michael McCurry, Plaintiffs: Rachel Wagner Furst, LEAD ATTORNEY, Grossman Roth Yaffa Cohen, P.A., Coral Gables, FL; Stuart Z. Grossman, Grossman, Roth, Yaffa, Cohen, PA, Coral Gables, FL.

For Attila Gondan, Eric Kamperman, Greg Roberts, Richard KOWALCHIK, Travis Mcrae, Mark Hochsprung, John Aubrey, Jose Cruz, Eric Evans, Byron Harper, Todd Newton, Wayne Linn, Stephen Kelly, Jill Kelly, Frank Porter, Ernesto Larios, Shaunti **[**2]** Yanik-Larios, Josh Long, Plaintiffs: Nicholas Styant-Browne, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA' Garth Daniel Wojtanowicz, PRO HAC VICE, Hagens Berman Sobol Shapiro, LLP, Seattle, WA; Jerrod C. Patterson, PRO HAC VICE, Hagens Berman Sobol Shapiro, LLp, Seattle, WA; Shelby R. Smith, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Rachel Wagner Furst, Grossman Roth Yaffa Cohen, P.A., Coral Gables, FL; Stuart Z. Grossman, Grossman, Roth, Yaffa, Cohen, PA, Coral Gables, FL.

For Ford Motor Company, Defendant: David George, LEAD ATTORNEY, Ashley R. Fickel, Krista L. Lenart, PRO HAC VICE, Dykema Gossett PLLC; Henry Salas, LEAD ATTORNEY, Cole, Scott, & Kissane P.A., Miami, FL; John

M. Thomas, LEAD ATTORNEY, PRO HAC VICE, Dykema Gossett, PLLC, Ann Arbor, MI; Sean Hernandez, Cole, Scott, Kissane P.A., Miami, FL.

Judges: FEDERICO A. MORENO, UNITED STATES DISTRICT JUDGE.

Opinion by: FEDERICO A. MORENO

Opinion

[*1357] **ORDER ON SUMMARY JUDGMENT AND CLASS CERTIFICATION**

THIS CAUSE came before the Court upon Ford's Motion for Summary Judgment and Plaintiffs' Motion for Class Certification.

THE COURT has considered the motions, the responses, the replies, the supplemental briefing, oral argument, the pertinent **[**3]** portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motions are disposed of as follows:

This Order **grants** Ford summary judgment on Plaintiffs' claims concerning the occurrence of Limp Mode on public roads, all of Plaintiff Cruz's claims, the express and implied warranty claims of Plaintiffs Roberts, Hochsprung, Kowalchik, and **[*1358]** Porter, as well as the express warranty claims of any class members who did not fulfill their presentment and notice obligations. It **denies** summary judgment on all other claims.

The Order also **certifies** nine state law classes and Magnuson-Moss classes in Texas and California under *Rule 23(b)(3)*. The class is defined as "All persons who purchased a Class Vehicle from a Ford-authorized dealer or distributor located in [insert state here] before April 1, 2016."

I. Introduction

Plaintiffs are purchasers of Defendant Ford's Shelby GT350 Mustang car. The Shelby Mustang is a performance version of the standard Mustang. It is several cuts above both the base version of the Mustang and the Mustang GT (which has a V8 engine). Only true car enthusiasts opt for the Shelby GT350, and they do so mainly for its racing and track capabilities. In fact, **[**4]** the name "Shelby" comes from Carroll Shelby, a race car driver and designer for Ford in the mid-20th century. Indeed, Ford touted the Shelby as "an all-day track car that is also street legal."

Like any car, consumers had the option to customize it to their liking. This included choosing between five packages—the base package, technology package, track package, R package, and R technology package. **The two lowest packages, base and technology, did not come with transmission and differential coolers**. The coolers prevent the engine from overheating at consistently high rotations per minute, allowing the driver to drive faster for longer. In order to prevent overheating in the Shelbys without the coolers, Ford programmed the Base and Technology packages to rapidly decelerate when engine temperature got too high. Both parties refer to this as "Limp Mode." This was an intentional design choice. Originally, all Shelbys had the coolers, but Ford removed the coolers from the Base and Tech packages a few years before launch—allegedly to increase profit margins in their volume-leading Tech package.

Obviously, track driving is done at very fast speeds for a prolonged period. Plaintiffs allege that **[**5]** many of their vehicles unexpectedly entered Limp Mode, both on the track and the open road. The Shelbys are essentially unusable for sustained track driving—the main reason many Plaintiffs bought the car. Plaintiffs now bring a variety of claims under the statutory and common laws of several different states. To be brief, the Plaintiffs make two broad categories of complaint: 1) Ford advertised all Shelbys as track-capable, the advertising induced Plaintiffs to purchase the car, and then the car did not perform as advertised. 2) The consistent occurrence of limp mode is a breach of Ford's express and implied warranties. Finally, the named Plaintiffs ask this Court to certify a class.

II. Legal Standard

HN1[] *Fed. R. Civ. P. 56* provides, "summary judgment is appropriate where there 'is no genuine issue as to any material fact' and the moving party is 'entitled to judgment as a matter of law.'" *See* *Alabama v. N. Carolina, 560 U.S. 330, 130 S. Ct. 2295, 2308, 176 L. Ed. 2d 1070 (2010)* (quoting *Fed. R. Civ. P. 56(a)*). The existence of some factual disputes between litigants will not defeat an otherwise properly ground motion for summary judgment; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (emphasis added). Mere "metaphysical doubt as to the material facts" will not suffice. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

[*1359] ***HN2***[] The basic issue **[**6]** before the court on a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson, 477 U.S. at 251 (1986)*. The moving party has the burden of showing the absence of a genuine issue as to any material fact, and in deciding whether the movant has met this burden the court must view the movant's evidence and all factual inferences arising from it in the light most favorable to the nonmoving party. *Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997)*. "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1534 (11th Cir. 1992)*.

III. False Advertising

Many of Plaintiffs' claims focus on Ford's marketing. There are claims under various state statutes prohibiting deceptive business practices, common law fraudulent concealment claims, and one claim for violation of California's false advertising law. In their summary judgment briefing, the parties do not discuss the differences between the various states' laws. Instead, Ford makes the general objection that its advertisements are not actionable because they are mere puffery.

Most of the facts are not disputed. Ford advertised the **[**7]** entire Shelby lineup "track-ready" and "track-capable." While not directly relevant to the puffery analysis, Ford knew race-track enthusiasts were the Shelbys target audience. In a track day invitation sent to all Shelby owners post-purchase, Ford's marketing manager wrote that the GT350 had "exceptional race track capabilities, we're sure that's one of the reasons you purchased your GT350—perhaps the main reason." There should be no doubt that Ford touted the Shelby lineup as designed for the track. Other advertising materials include phrases like "an all-day track car that's also street legal," "tested endlessly on the most challenging roads and tracks in the world," "we wanted to build the best possible Mustang for the places we most love to drive - challenging back roads with a variety of corners and elevation changes - and the track on weekends," and finally described the Mustang as "track-focused."

Rather than deny the obvious, Ford's two categories of responses argue that 1) their advertising is mere puffery, as evidenced by the fact that no one really agrees on what "track-capable" means and 2) Ford's advertising actually differentiated the Base and Tech models from the others **[**8]** because Ford lavished much more "track" praise on the higher end models and specifically warned consumers that Base and Tech models would need aftermarket coolers. *See* D.E. 140 at 3; D.E. 141-54.

A. Mere Puffery

While true that each circuit and the various states will have their own slightly nuanced definition of puffery, ***HN3***[] puffery can be generally understood as "generalized, vague, nonquantifiable statements of corporate optimism."

Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 575 U.S. 175, 135 S. Ct. 1318, 191 L. Ed. 2d 253 (2015); *Carvelli v. Ocwen Fin. Corp., 934 F.3d 1307, 1318 (11th Cir. 2019)*. Or, as Judge Learned Hand wrote, "[t]here are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity." *Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853, 856 (2d Cir. 1918)*. One Multi-District Litigation judge considering puffery across several jurisdictions held that the "touchstone" of the puffery analysis is "the likelihood that reasonable consumers would rely on that representation." *In re Chrysler-Dodge-Jeep **[*1360]** Ecodiesel Mktg., Sales Practices, & Prod. Liab. Litig., 295 F. Supp. 3d 927, 1007 (N.D. Cal. 2018)*. Finally, "[w]hether a representation is mere puffery depends, in part, on the context in which it is made." *In re Petrobras Sec. Litig., 116 F. Supp. 3d 368, 381 (S.D.N.Y. 2015)* (internal citation and omitted) (Rakoff, J.).

Ford argues their "track-capable" claim and related advertising is puffery, and therefore non-actionable, because there are many definitions of "track" driving. Ford claims calling a Base Shelby "track-ready" is vague, subjective, and unable **[**9]** to be objectively verified. At the summary judgment stage, this argument, much like the Mustangs' engines, blows smoke.

Ford further argues "track" could mean everything ranging from a drag race at a stoplight on Red Road to a 20-minute session doing laps on a racetrack. Some of the other "events" Ford cites include autocross, gymkhana, drag strip, roll racing, drift, and closed road. "Track Days," Ford says, are a *specific* event where the Base and Tech models of the Shelby GT350 struggle the most and often enter Limp Mode. According to Ford, "Track Day" has a specific meaning within the racing community; it does not simply refer to a day at the track. Ford further argues that there is not even one type of Track Day, some have sessions of 25-30 minutes, some have no defined sessions at all, some are on oval tracks, while some are on a road course. To prove its point, Ford cites to many different depositions of named Plaintiffs and its own employees which demonstrate that each person has their own idea of what qualifies as a car as being "track-capable" and that the term has no standard definition. For example, Plaintiff Cruz gave the amorphous definition that "track ready" vehicles **[**10]** have limits that exceed those of a "normal" vehicle. Plaintiff Gondan testified "I don't know what you mean by 'track.' There are drag strips, drag tracks. There are road courses. Autocross." Plaintiff Kelly agreed that "track capable can mean different things to different people." Plaintiff Evans said he needed the MagneRide suspension in order to take his car to the track, whereas Plaintiff Hochsprung said the MagneRide suspension was irrelevant.

But for Ford to prevail on the puffery argument at the summary judgment stage, it must convince this Court that no reasonable juror could find that Ford's advertisements claiming its Shelby Mustangs were "track-capable" or "track-ready" led a reasonable consumer to believe that he could do intense track driving without the car entering Limp Mode. That is a tall task. ***HN4***[] Further, both state and federal courts hold that whether a statement is puffery is a question of fact, save for the unusual case where the answer is so clear it may be decided as a question of law. *Commonwealth by Shapiro v. Golden Gate Nat'l Senior Care LLC, 648 Pa. 604, 626-27, 194 A.3d 1010 (2018)* (collecting cases).

Here, the facts are such that a reasonable consumer could rely on Ford's representations as conveyances of fact, rather than "general claims of superiority made **[**11]** by a salesman." *See* *Mfg. Research Corp. v. Greenlee Tool Co., 693 F.2d 1037, 1040 (11th Cir. 1982)*. A general claim of superiority, for example, may be something like "Built Ford Tough." Or perhaps a representation that is "not the sort of empirically verifiable statement that [could] be affirmatively disproven" would read "[i]t's inevitable... Mustangers have more fun."[1] *Next Century Communs. Corp. v. **[*1361]** Ellis, 318 F.3d 1023, 1028 (11th Cir. 2003)*. Those are, however, plainly not the sort of advertisements the Court is faced with today. In one press release, Ford touts the Shelby GT350s' transmission as "developed with all-day track capability and high-RPM capability at the forefront." This statement is specific—it focuses on the car's transmission—and it is empirically verifiable. Indeed, "all-day" is measured in time and "high-RPM" is literally measured in rotations per minute. Ford's argument that "it cannot be objectively verified whether any given GT350—or any other vehicle—is 'track ready' or 'track capable' or is a 'thoroughbred capable of tackling the world's most challenging roads and racetracks'" is ironic. Racing is an activity obsessed with metrics and objective verification—victory is often decided by tenths of a second and Ford relentlessly tests its performance vehicles so

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[1] https://www.designnews.com/automotive/classic-mustang-ads-take-us-back-dawn-pony-car-era/gallery?slide=5

that they meet the expectations of their target **[**12]** customer, considered "gearheads." Internal Ford documents show the company believed, for the GT350 "performance is defined as track performance." Plaintiffs cite evidence showing that the Base/Tech Shelbys caught fire after being put through their paces by Ford Engineering, and afterwards, the engineering team informed the marketing team that it was concerned that the Base Shelby was not "track durable" nor "appropriate for track use." (D.E. 141 at 5). The bottom line is that if Ford itself believes "track capable" and similar claims are objective standards, it is certainly possible a reasonable juror may feel the same way.

B. Deceptive Advertising

Ford attempts to elide the distinction between its puffery defense and its separate argument that its advertising, viewed as a whole, was not deceptive. While it is true that the Court must consider the allegedly misleading statements in context rather than in a vacuum, Ford's other statements about the higher-end Shelbys do not make its "track-capable" claims any more vague or subjective even though they may make Ford's advertising, as a whole, less deceptive. *See* *Marty v. Anheuser-Busch Companies, LLC, 43 F. Supp. 3d 1333 (S.D. Fla. 2014)* (finding single statement was not puffery after considering it in light of **[**13]** Defendant's entire advertising campaign).

The Court now turns to Ford's argument that its Shelby advertising was not deceptive, first, because it warned consumers that aftermarket coolers would be necessary for track days and, second, because it specified elsewhere in its advertising materials that certain non-Base and non-Technology models were the "track day specialists." Plaintiffs bring deceptive advertising claims under a variety of state laws, but the Defendants do not make state specific objections regarding what qualifies as deceptive. ***HN5***[] Florida's Deceptive and Unfair Trade Practices Act, for example, requires: "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *Carriuolo v. Gen. Motors Co., 823 F.3d 977, 983 (11th Cir. 2016)*. "To satisfy the first element, the plaintiff must show that 'the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances.'" *Id. at 983-84*. "In determining whether a representation is likely to mislead consumers acting reasonably, courts consider the net impression created." *F.T.C. v. RCA Credit Servs., LLC, 727 F.Supp.2d 1320, 1329 (M.D. Fla. 2010)*. If the statements are "likely to mislead reasonable consumers," then it makes no difference if the statements are "technically or literally true." *F.T.C. v. Peoples Credit First, LLC, 244 F. App'x 942, 944 (11th Cir. 2007)*. And how a reasonable consumer would interpret **[**14]** a term is an issue of fact. *Jankus v. Edge Inv'rs, L.P., 650 F. Supp. 2d 1248, 1258 (S.D. Fla. 2009)*. Here, it is plausible that a reasonable **[*1362]** juror could find that a reasonable consumer would be misled by the "net impression" created by Ford's advertising.

Granted, Ford recommended that consumers add transmission and differential coolers to the Base and Technology models if they planned on "sustained high speeds or track day use." Complaint ¶ 359. However, Plaintiffs allege that this recommendation came on page 25 of the Supplemental Owner's Guide—a pamphlet only available in the glove box of the car one has already purchased. Ford disputes this and claims the Guide was available online, pre-purchase. Ford points to Plaintiff Kamperman's testimony that he viewed the language "over and over" as proof that Plaintiffs' knew about the need for coolers *before* purchase. But nowhere in the selected section does he say he viewed the Guide *pre-purchase*. Thus, a genuine dispute of material fact precludes summary judgment on this basis. Further, a Ford marketing employee told one customer that if he planned to use his Technology package Shelby on the racetrack for "sustained lap sessions, we would still recommend that you purchase coolers." Complaint ¶ 328. Notably, **[**15]** however, this statement was made to *one* consumer rather than the general consuming public.

Ford also points to the way in which it described the higher end "R" and "Track" packages as evidence its advertising was not deceptive. In various brochures made available to dealers and consumers before purchase, the R model was marketed as "the most track-ready" and recommended for "hardcore track use" while the Track model was touted as the "track-day specialist." In contrast, those same materials were silent on the Base and Technology models' track capabilities. But merely highlighting that the most expensive, souped-up Shelby models would be *more* track capable than the Base and Technology models does not cure the deception. With all due respect to American engineering, Plaintiffs surely knew a Ferrari would be better suited for intense track driving than the Base Shelby, but they were nonetheless entitled to rely on Ford's representation that its car was an "all-day track car."

Ford succinctly summarizes the false/deceptive advertising issue in its reply brief. It writes, "the statements at issue were made in a wide variety of contexts, some of which included pictures of vehicles on road **[**16]** courses and some that did not, some of which differentiated between models and some that did not, and some that specifically identified which models had coolers and noted that coolers were needed for 'trade day use,' and some that did not." (D.E. 167 at 6). Exactly. With such variable evidence, it cannot be said that there is no genuine dispute of material fact such that judgment for Ford would be appropriate.

IV. Subjective Knowledge

Ford then makes state-specific and plaintiff-specific arguments that certain Plaintiffs' subjective knowledge that their Base or Technology package Shelbys would go into Limp Mode after intense driving precludes their common-law and statutory fraud claims. Ford argues Oregon, Texas, Washington, Florida, and New York common law all require proof of reliance for a successful fraud claim. Additionally, Oregon, Texas, and Washington statutory fraud laws require proof of reliance or proof that but-for the fraud, the injury would not have occurred. Further, Florida and New York statutory fraud laws do not require proof of reliance, Defendant says, but a Plaintiff cannot claim they were deceived if they subjectively knew the truth. Plaintiffs do not dispute most **[**17]** of Ford's characterizations of the relevant law. Now, the plaintiff-specific evidence.

[*1363] A. Plaintiff Long (Oregon)

Obviously, one cannot "rely" on fraudulent representations if one subjectively knows those representations to be false. Long saw a YouTube video of a car going into Limp Mode and some online comments to the same effect. He also called Ford customer service and they told him there was "no certain fix." However, when Long spoke to his contact at the local Ford dealer, he felt that he was being reassured that he would not have a problem with Limp Mode. Whether Long's subjective knowledge was such that he could not have relied on Ford's representations about the cars is a question of credibility best answered by a jury.

B. Plaintiff Kamperman (Texas)

Kamperman plainly knew the difference between the Tech package and the other Shelbys. He said the "the track [package] would be able to withstand much longer periods at high speeds." But elsewhere in his testimony, Kamperman said he believed that the car he purchased was *also* track capable, albeit not to the same degree, "because it was listed on the same page with the other track ready cars. . . . it said 'this car can definitely **[**18]** be tracked.'" Kamperman certainly gives testimony that would have a finder of fact doubt whether he was truly deceived by Ford's advertising. But again, whether Kamperman's subjective knowledge was such that he could not have relied on Ford's representations about the cars is a question of credibility best answered by a jury.

C. Plaintiff Evans (Washington)

Evans saw Internet forums were Tech package Shelbys were not performing well at the track. He also knew that the car did not have coolers. However, he also testified that he had an expectation that Ford would fix the Limp Mode problem before he took delivery. Based on this evidence, the Court cannot definitively say that there is no genuine dispute as to whether Evans could have relied on Ford's alleged misrepresentations. Thus, the Court **denies** summary judgment on the common law and statutory fraud claims under Oregon, Texas, and Washington law.

D. Plaintiff Kowalchik (Florida)

Kowalchik knew that the Tech package did not have coolers, and he plainly testified that he would add them afterwards because a car is not "complete" without them. Although Kowalchik is a self-described "gearhead," he did not purchase the more track-ready car **[**19]** because he could not afford it. However, somewhat confusingly, Kowalchik also testified that "Nobody said you couldn't drive the car on a track. Nobody said, 'Oh, by the way, we put a dog of a transmission in it that's going to overheat if you get aggressive with it.'" And also, "Something was not as I had assumed it would be based upon all of Ford's advertisements." Once again, Kowalchik's testimony about how he is a car-expert and always planned to modify his lower-tier Mustang is not helpful to the Plaintiffs' case, but the testimony, on the whole, does not categorially rule out Kowalchik's reliance on Ford's advertisements. Thus, the Court denies summary judgment.

E. Plaintiff Kelly (New York)

Kelly understood that his Tech package Shelby would only be suitable for short track days. But, importantly, Kelly testified that he thought "short track day" meant 20-30 minute sessions. In other words, Kelly thought his car would be suited for what Ford considers a regular "track day." Thus, summary judgment is denied for any state law claims on the basis that Plaintiffs had subjective knowledge that Base and Tech package Shelbys **[*1364]** would enter Limp Mode in certain driving conditions.

V. Objective [**20] Knowledge

Ford then argues that summary judgment on statutory fraud claims is required because no reasonable consumer under the circumstances could have been deceived. Ford cites case law holding that it must be *probable*, not merely possible, that a significant portion of the general public could be misled. Then it argues Plaintiffs who took delivery after February 2016 could not reasonably claim to be misled because of information and rumors available on Internet forums that the cars at issue could not do track days. Plainly, this argument is not a summary judgment winner. It certainly is genuinely disputed as to whether a Plaintiff was likely to be misled, and posts on Internet forums are not sufficient evidence to put the question beyond the debate of a jury.

VI. Omission Claims

Next, Ford argues that summary judgment on the Plaintiffs' statutory and common-law *omission* claims is required. The omission claims allege that Ford concealed that Limp Mode would occur on **public roadways under normal driving conditions**.[2] Ford moves for summary judgment and argues that first, Ford's actual knowledge of the defect must be proven and second, it had no such knowledge of any occurrence of Limp **[**21]** Mode on public roads at the time Plaintiffs purchased their vehicles.

The evidence Plaintiffs offer as proof that Ford had knowledge that Limp Mode would occur on public roads under normal driving conditions is easily summarized. It includes testimony by a Ford Performance parts manager that he was aware of a consumer report that Limp Mode occurred on a public road, a 2014 internal email from Ford's Chief Functional Engineer warning not to send cars without coolers to Germany (likely due to the manner of driving on the autobahn), and the subsequent remedial measure of Ford adding standard coolers in later model years.

Statutory and common-law fraud by omission standards vary slightly from state to state—some require actual knowledge, and in some states, "should have known" is sufficient. Of all the evidence in this case, it is telling that there is only one internal email that mentions Limp Mode on public roads; and even then, the email merely relays a *single*, unverified consumer report with no other diagnostic information. The Court is unconvinced that this is sufficient evidence such that any reasonable juror could find that Ford had knowledge that the Base and Tech Shelbys would go **[**22]** into Limp Mode under normal driving conditions. Plaintiffs only cite three cases where

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[2] Notably, this claim is NOT about Limp Mode occurring while Plaintiffs drove their cars on the track or in more aggressive ways.

consumer complaints supported a finding of corporate knowledge, and all three of those cases were at the motion to dismiss stage. Several courts in the Ninth Circuit have held that ***HN6***[] consumer complaints suffice to establish knowledge, but only if there are an unusual number of complaints such that the manufacturer would be on notice of the problem. *Williams v. Yamaha Motor Co., 851 F.3d 1015, 1026 (9th Cir. 2017)*. In this district, Judge Ruiz recently considered a claim on similar facts and concluded

> There is certainly no hard-and-fast rule on how many consumer complaints a plaintiff must show to sufficiently plead a defendant's knowledge; perhaps 12 examples could provide a sufficient factual assertion in the proper case. But here, **[*1365]** not only is it a very small number relative to the "hundreds of thousands" of vehicles that supposedly have this defect, but, like the plaintiffs in *Espineli*, Plaintiffs have offered no context as to how many complaints are normal such that someone could infer they were more than a "blip on [Defendants'] radar."

Timothy Lewis, Teresa Massa, Linda Gazie, Steven Wallach, Ana Schwartz, Joseph Monopoli$, James Fitzpatrick, & Synthia Praglin, ***[**23]*** *on behalf of themselves & all others similarly situated$, Plaintiffs, v. Mercedes-Benz USA, LLC, Daimler AG & Grammer AG, Defendants., No. 19-CIV-81220-RAR, 2021 U.S. Dist. LEXIS 60557, 2021 WL 1216897 (S.D. Fla. Mar. 30, 2021)* (internal citations omitted). Judge Ruiz ultimately dismissed the claim. This Court grants summary judgment on these claims. Just as unverified internet reports could not give consumers objective knowledge of Limp Mode, they are not sufficient to impute to Ford Management actual knowledge of Limp Mode occurring on public roads.

VII. Breach of Express Warranty

Ford next asks for summary judgment on Plaintiffs' various state law claims that Ford breached the express warranty. Ford's broadest argument is that Ford never breached the warranty because Limp Mode is a *safety feature*, not a malfunction, failure, or defect. The New Vehicle Limited Warranty promises that if your

> "Ford was properly operated and maintained, and was taken to a Ford dealership for a warranted repair during the warranty period, then authorized Ford Motor Company dealers will, without charge, repair, replace, or adjust all parts on your vehicle that **malfunction or fail during normal use** during the applicable coverage period **due to a manufacturing defect** in factory-supplied **[**24]** materials or factory workmanship. This warranty does not mean that each Ford vehicle is defect free. **Defects may be unintentionally introduced into vehicles during the design** and manufacturing processes and such defects could result in the need for repairs." (emphasis added).

Plaintiffs argue that the "malfunction" here is the premature overheating of the engine caused by the lack of coolers (i.e., the "defect"). Defendant responds that first, premature overheating is not a malfunction—it is a designed safety feature; second, Ford argues, even if premature overheating could be considered a malfunction, it never occurred in Plaintiffs' vehicles precisely because of Limp Mode.

The Court is not convinced by the second argument. Plaintiffs describe the malfunction as premature overheating, but this is essentially synonymous with Limp Mode. Plaintiffs' breach of warranty argument is best rephrased as "my car was defective because it did not have the necessary coolers to go really fast for a long time." And because the evidence shows this was a deliberate design choice by Ford, it can be described as an alleged *design* defect, as opposed to a *manufacturing* defect. So, the two questions become: **[**25]** 1) Does the New Vehicle Limited Warranty cover design defects? And 2) Can a "safety feature" that **performed as intended** qualify as a design defect?

A. Warranty Interpretation

The first question first. Judge Dimitrouleas concluded that the same warranty language here covered design defects in a 2014 suit against Ford. *Sanchez-Knutson v. Ford Motor Co., 52 F. Supp. 3d 1223, 1232 (S.D. Fla. 2014)* ("[T]to the extent that the language is ambiguous regarding whether design defects are covered, that ambiguity is construed against Ford, the drafter."). The Ninth Circuit **[*1366]** found design defects were covered, as well, noting "Ford's express warranty is not simply a 'materials and workmanship' warranty, as it references defects that are introduced during the 'design' process. *Daniel v. Ford Motor Co., 806 F.3d 1217, 1224-25 (9th Cir. 2015)*. ***HN7***[] Courts that do *not* find design defects to be covered by express warranties are generally presented with warranty language that only covers "materials and workmanship." *See$, e.g., Bruce Martin Const., Inc. v. CTB, Inc., 735 F.3d 750 (8th Cir. 2013)*. The warranty *here* covers design defects that may be "unintentionally" introduced. In the other cases cited, the *design* was (of course) intentional, but the *consequences* were unintentional. Here, both the design and its consequences were intentional—Limp Mode worked just the way Ford wanted it to. So to decide whether this **[**26]** Warranty covers design defects, perhaps it is best to consider the second question: Whether it is even *possible* on facts like these.

Can Limp Mode even be considered a design defect if it worked as expected? The answer here varies by state and is fact intensive. For example, in Florida, "the definition of design defect is in a state of flux." *In re Standard Jury Instructions in Civil Cases—Report No. 09-10 (Prods. Liab.), 91 So. 3d 785, 789 (Fla. 2012)* (Pariente, J., concurring). ***HN8***[] Courts commonly use at least one of the following three "tests" to determine whether a product is defectively designed: (1) the consumer expectation test; (2) the risk utility test; and (3) the reasonable alternative design test. *Pierre v. Intuitive Surgical, Inc., 476 F. Supp. 3d 1260, 1270 (S.D. Fla. 2020)* (Ruiz, J.). A product is defectively designed under the consumer expectation test if "the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer." *Tillman v. C.R. Bard, Inc., 96 F. Supp. 3d 1307, 1338-39 (M.D. Fla. 2015)*; *Restatement (Second) of Torts § 402A*. Should a jury find that the Base or Tech GT350's did not perform as safely as an ordinary consumer would expect, then it is possible that Plaintiffs may recover for breach of warranty. At that point, it would be unnecessary to address Florida's other tests. On the other hand, a jury could find that a design defect does not exist under applicable **[**27]** state law and Ford does not breach its warranty merely because a consumer was misled by allegedly false advertising. Plaintiffs do not seek to certify express warranty classes, and the state law variations can be dealt with at trial through the appropriate jury instructions and verdict forms.

B. Presentment and Notice

Ford has two other arguments as to why summary judgment must be granted on the breach of warranty claims, even if the warranty covers design defects and Limp Mode is indeed found to be a design defect. First, Ford argues that some Plaintiffs never experienced Limp Mode and so the alleged defect never manifested. Second, some Plaintiffs failed to present their vehicles to Ford for repair and thus did not comply with the terms of the warranty.

Plaintiffs argue that even if some Plaintiffs did not experience Limp Mode, its occurrence is a virtual certainty. This Court previously denied Ford's motion to dismiss on the manifestation/virtual certainty issue after thoroughly reviewing the relevant state law. *Tershakovec v. Ford Motor Co., No. 17-21087-CIV, 2018 U.S. Dist. LEXIS 116130, 2018 WL 3405245 at *6-9 (S.D. Fla. July 12, 2018)*. Although Ford argues this time is different because "the evidence now conclusively rebuts" the contention that Limp Mode is a virtual certainty, it is fundamentally inconsistent **[**28]** for Ford to argue on one page of its briefing that Limp Mode was a conscious and well-executed design choice and **[*1367]** then argue on another page that Limp Mode may never occur. Even if Ford's argument were logically consistent, the evidence is inconclusive as to whether Limp Mode is a virtual certainty. Summary judgment in favor of Ford is inappropriate on that basis.

Next, Ford correctly notes there are two "notice" issues that Plaintiffs conflate. Presentment and notice of breach are separate. Presentment is a contractual obligation under the warranty, while the obligation of pre-suit notice of breach stems from *UCC § 2-607* as adopted in Illinois, Missouri, and Florida. With respect to presentment under the warranty, Plaintiffs argue that Ford Headquarters waived the requirement that Plaintiffs present their cars to the dealership for service by instructing all Ford dealers to let customers know Limp Mode is normal and to refer them to the Supplemental Owner's Guide for instructions on aftermarket coolers. The implication is that Ford Headquarters' message to all dealers was a form of anticipatory repudiation, which occurs when the obligor commits a voluntary and affirmative act that makes it "actually **[**29]** or apparently impossible for him to perform."

Restatement (Second) of Contracts § 250, cmt. c. However, this argument fails—Ford did not repudiate its obligations under the warranty.

It is clear that a service bulletin from Ford to its network of dealers that advises the dealers that Limp Mode is normal and refers customers to the owner's guide does not make it impossible for Ford to perform its obligation—in fact, it instructs dealers on *exactly how* to perform their obligation. Unfortunately for Plaintiffs, the dealers' performance of their obligation means turning customers away without a solution, but the Court will not excuse Plaintiffs' presentment under the warranty merely because that presentment would be futile. Thus, summary judgment is granted in favor of Ford on the breach of express warranty claims by Plaintiffs who did not present their vehicles to Ford for repair.

C. Plaintiffs Roberts, Hochsprung, Kowalchik, and Porter

Finally, Ford seeks summary judgment for the express and implied breach of warranty for three plaintiffs—Roberts (Missouri), Hochsprung (Illinois), and Kowalchik (Florida)—who failed to give pre-suit notice, and one plaintiff—Porter (Illinois)—who allegedly contacted a Ford *dealer* but not Ford Motor Company **[**30]** as is required by law. Under *Section 2-607 of the Uniform Commercial Code*, "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." Plaintiffs concede that Roberts, Hochsprung, and Kowalchik did not notify Ford that they considered Ford to have breached its warranty but argue that Ford waived the notice requirement. As noted above, Ford has not waived the notice requirement. Thus, Ford is granted summary judgment on Roberts, Hochsprung, and Kowalchik's express and implied warranty claims.

Summary judgment is also granted on Porter's express and implied breach of warranty claims even though ***HN9***[] Illinois law provides two exceptions to the notice requirement: "when (1) the seller has actual knowledge of the defect of the particular product or (2) the seller is deemed to have been reasonably notified by the filing of the buyer's complaint alleging breach of UCC warranty." *Connick v. Suzuki Motor Co., 174 Ill. 2d 482, 492, 675 N.E.2d 584, 221 Ill. Dec. 389 (1996)* (internal citation omitted). There is no doubt Ford had actual knowledge that Limp Mode occurred in the Base and Tech GT350's—Ford designed them that way. But the seller's "generalized knowledge about the safety concerns of third parties **[*1368]** is insufficient to fulfill plaintiffs' **[**31]** UCC notice requirement." *Id.* In other words, under Illinois law, the seller must be on notice that *this particular product* is troublesome rather than merely knowing that the Shelby GT350 Base and Tech models *in general* have had some Limp Mode issues. The Illinois Supreme Court cited Judge Learned Hand's interpretation of *§ 2-607*: "The notice of the breach required is **not** of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of *buyer's claim* that they constitute a breach." *American Mf'g Co. v. United States Shipping Bd. Emergency Fleet Corp., 7 F.2d 565, 566 (2d Cir. 1925)* (emphasis in *Connick*). Even though Ford knew that Limp Mode existed in every car, Ford did not know that Porter wanted his car remedied. *See Anthony v. Country Life Mf'g, LLC., 70 Fed. Appx. 379, 383-84 (7th Cir. 2003)* (nutrition bar manufacturer did not have actual notice of plaintiff's claim that its bars contained substances not approved by the Food and Drug Administration, even though manufacturer was aware of ingredients in bars, because plaintiff failed to notify defendant of the claimed breach of implied warranty of merchantability prior to filing suit (citing *Connick*)).

Of course, any Plaintiff on whose state law warranty claims summary judgment was granted to Ford should also have their Magnuson-Moss Warranty Act claims dismissed because a valid **[**32]** state law claim is a prerequisite to the federal claim.

VIII. Unjust Enrichment

Ford argues Plaintiffs' unjust enrichment claims should be dismissed because 1) the parties' relationship is governed by an express contract and 2) because the Plaintiffs' have an adequate remedy at law. The Court denies summary judgment on these equitable claims and will deal with them at trial.

IX. Economic Loss Rule

Ford seeks summary judgment on the common law fraud claims under Missouri, Texas, and New Jersey law because Plaintiffs' claims are barred by the economic loss rule. ***HN10***[] Put simply, the economic loss rule precludes tort recovery for economic harms based on a duty arising from a contractual relationship. However, the rule slightly varies from state to state and there are certain exceptions.

The chief exception is that tort claims may survive the economic loss rule when the claim is for fraud, i.e., Plaintiff was harmed even before the contract was signed. Both parties agree on the law in Texas and New Jersey—when Defendant had no intention of performing its obligation under the contract, Plaintiffs' fraud claim survives the economic loss rule. *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc., 960 S.W.2d 41 (Tex. 1998)*; *Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co., 226 F. Supp. 2d 557 (D.N.J. 2002)*. The parties dispute, however, whether Ford had any **[**33]** intention of performing the contract at the time it was made. There is clearly a factual dispute as to whether Ford knew that the Base and Tech package Shelby GT350's were Track Day capable. If Ford indeed knew that the lack of a cooler would be fatal to the track performance Plaintiffs expected, a fraud claim would be well-founded and it would survive the economic loss rule because Ford never intended to deliver the quality of car for which Plaintiffs signed up. Thus, summary judgment is denied on the Texas and New Jersey tort claims.

HN11[] Missouri law is more complicated. "A fraud claim *independent of the contract* is actionable, but it must be based upon a misrepresentation that was *outside of or collateral to the contract*, such as many claims of fraudulent inducement." **[*1369]** *AKA Distrib. Co. v. Whirlpool Corp., 137 F.3d 1083, 1086 (8th Cir. 1998)*. To decide whether a fraud claim is independent of a contract claim under the economic loss doctrine, a court should look at (1) whether the subject matter of the alleged misrepresentations was incorporated into the parties' contract and (2) whether the plaintiff suffered additional damages outside the contract as a result of the alleged fraud. *Compass Bank v. Eager Rd. Assocs., LLC, 922 F. Supp. 2d 818, 827 (E.D. Mo. 2013)*. Additionally, "the fraudulent inducement exception is subject to a widely **[**34]** recognized limitation that where the fraudulent misrepresentation concerns the quality, character, or safety of the goods sold, the economic loss doctrine bars the fraud claim because it is substantially redundant with warranty claims." *Flynn v. CTB, Inc., No. 1:12CV68 SNLJ, 2015 U.S. Dist. LEXIS 129976, 2015 WL 5692299 (E.D. Mo. Sept. 28, 2015)*.

Of course, the fraud here clearly concerns the quality of the goods sold. However, other Missouri courts have disagreed with the *Flynn* court. A Western District of Missouri judge held that something can be *both* concerning the quality of goods sold and necessarily separate from the contract because the conduct was *prior* to formation of the contract. *Patterson Oil Co. v. Verifone, Inc., No. 2:15-CV-4089, 2015 U.S. Dist. LEXIS 141635, 2015 WL 6149594, at *8 (W.D. Mo. Oct. 19, 2015)* ("Claims about the quality of goods sold may therefore fall within the fraudulent inducement exception if they are nevertheless independent of the contract formed."). A court in this district considered the Missouri economic loss rule in *Wilson v. Volkswagen Grp. of Am., Inc., No. 17-23033-CIV, 2018 U.S. Dist. LEXIS 164774, 2018 WL 4623539 (S.D. Fla. Sept. 26, 2018)* and agreed with the *Patterson Oil* court. There, he held that Plaintiffs' fraud claims could survive despite the *Flynn* case. However, the *Flynn* court better applies the principles articulated by the Eighth Circuit. In *Dannix Painting, LLC v. Sherwin-Williams Co., 732 F.3d 902 (8th Cir. 2013)*, the Eighth Circuit stated:

> Where there are well-developed contractual remedies, such as the remedies that the [U.C.C.] (in force in all U.S. states) provides **[**35]** for breach of warranty of the quality, fitness, or specifications of goods, there is no need to provide tort remedies for misrepresentation. The tort remedies would duplicate the contract remedies, adding unnecessary complexity to the law. Worse, the provision of these duplicative tort remedies would undermine contact law.

Dannix, 732 F.3d at 908. Here, the warranty claim would provide the exact same damages as the tort remedy, running afoul of the logic behind the "quality of goods" exception described above. An example of fraudulent inducement that would survive Missouri's economic loss rule may be if Ford told potential customers that Dale

Earnhardt Jr.'s favorite car was a Ford Mustang when that simply was not true. That claim does not concern the quality or safety of the car, but nonetheless may have enticed a buyer. However, because the fraud at issue here was about an alleged design defect covered by the warranty, the Court grants summary judgment to Ford on the Missouri fraud claims because they are barred by the state's economic loss rule.

X. Plaintiff Cruz's Standing

Plaintiff Cruz, who asserts Pennsylvania state law claims, filed for Chapter 7 bankruptcy in March 2017. On May 16, 2017 he joined this **[**36]** lawsuit. And on June 12, 2017 his debts were discharged. ***HN12***[] "A pre-petition cause of action is the property of the Chapter 7 bankruptcy estate, and only the trustee in bankruptcy has standing to pursue it." *Parker v. Wendy's Int'l, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004)*. Failure to list an interest on a bankruptcy schedule leaves that interest in **[*1370]** the bankruptcy estate. *Id.* Ford argues that because Plaintiff Cruz did not list his claims against Ford, only the bankruptcy estate has standing to pursue those claims—not Mr. Cruz. Cruz argues that he only discovered that he had a claim *after* filing his bankruptcy petition.[3] Under Pennsylvania law, Cruz says, accrual of the statute of limitations may be tolled "when a plaintiff is unable, despite the exercise of due diligence, to know of the injury or its cause." *Mest v. Cabot Corp., 449 F.3d 502, 510 (3d Cir. 2006)* (cleaned up).

However, the Eleventh Circuit has explicitly separated the statute of limitations issue from accrual of the claim. ***HN13***[] "A cause of action can accrue for ownership purposes before the statute of limitations for that cause of action has begun to run." *In re Alvarez, 224 F.3d 1273, 1277 n.7 (11th Cir. 2000)* (quoting *State Farm Life Ins. Co. v. Swift (In re Swift), 129 F.3d 792, 798 (5th Cir. 1997)*).[4] Thus, even if the *statute of limitations* was tolled due to Cruz's debatable lack of knowledge, the claims still belonged to him at the time his bankruptcy petition were discharged. **[**37]** Summary judgment is granted to Ford on Plaintiff Cruz's claims. Because the Court grants summary judgment on all of Cruz's claims due to lack of standing, it does not address Ford's argument that Cruz cannot pursue his implied warranty claim under New York law because he was not in privity with Ford. Although, it appears Ford has the better argument there, too.

XI. Plaintiff Long—Time Bar

Ford argues Plaintiff Long's Oregon Unfair Trade Practices Act claim is time barred because it has a one-year statute of limitations, Long knew that his car was defective *before* he even took delivery in 2016 and did not file his claim until February 2018. Plaintiffs counter that 1) whether Long knew of the defect is a question for the jury and 2) even if he knew about it, his claim is timely under the relation back doctrine. As discussed above in the "subjective knowledge" section, there is not sufficient evidence to say there is no genuine dispute as to whether Long knew about Limp Mode before taking delivery/filing his suit. Thus, whether Long's claim is time-barred is a question best left for trial.

XII. Class Certification

Plaintiffs' seek to certify a *Rule 23(b)(3)* class that spans eleven states, has approximately **[**38]** 1,700 members, and values each of their damages at approximately $9,000. The certification dispute centers around predominance.

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[3] Ford heavily disputes this and points to Cruz's testimony that he experienced Limp Mode in 2016.

[4] The Ninth Circuit has also distinguished claim accrual from the statute of limitations. *Goldstein v. Stahl (In re Goldstein), 526 B.R. 13, 21-22 (B.A.P. 9th Cir. 2015)* ("It is important, however, to distinguish principles of accrual from principles of discovery and tolling, which may cause the statute of limitations to begin to run after accrual has occurred for purposes of ownership in a bankruptcy proceeding.") (internal citation omitted).

It is clear (and Ford even concedes) that the *Rule 23(a)* factors are met here. But Ford argues that common questions do not predominate over individual ones, and thus, certification under *23(b)(3)* must be denied.

First, an overview of how the Plaintiffs propose the class should be structured. The Plaintiffs propose three alternatives class structures.

1) **Individual State Classes**: 11 classes comprised of California, Florida, Illinois, Missouri, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Texas, and Washington residents.

[*1371] 2) **Bellwether State Classes**: California, Florida, and Missouri Classes would go to trial as a bellwether.

3) **State Law Groupings**: The Plaintiffs would break the classes into types of law—Consumer Protection, Fraudulent Concealment (common law), Implied Warranty, Unjust Enrichment Classes. Then, there would be three or four subclasses under each class to account for the variations in state law.

a. For example, the Plaintiffs propose splitting the "Consumer Protection Acts" class into (i) the Unfair and Deceptive Conduct Consumer Protection class to pursue **[**39]** claims under statutes that prohibit unfair/deceptive conduct—nine states (ii) Omissions Consumer Protection class to pursue claims under statutes that prohibit omissions of material fact—two states (iii) and Unconscionable Acts or Practices Consumer Protection class that prohibits unconscionable conduct—two states.

Even though having eleven proposed state law classes within a single class action is unusual, it is the superior method among those Plaintiff proposes. Eleven different classes within one case looks more like a Multi-District Litigation than a standard class action—indeed, most class actions certify at most, three or four different state law classes. Of course, the Plaintiffs structured their class this way to avoid the choice of law issues concomitant with a proposed *nationwide* class (an issue that would almost certainly defeat predominance). Typically, manageability is a concern when there are variations in state law *within* a class, but here, the Plaintiffs have made the classes small enough that the law that applies to each class is uniform. But there still may be manageability problems at a hypothetical trial.

As explained more fully below, only *some* state classes are **[**40]** right for certification. Further, only *some* categories of claims can be certified—namely the common law and statutory fraud claims, whereas the warranty and unjust enrichment claims will be swamped by individual questions. Thus, the Court believes a potential trial with multiple verdict forms that tick through the elements of the nine certified state class' statutory and common law fraud claims is manageable.

A. Choice of Law

Before discussing the specifics of *Rule 23*, the Court must clarify the choice of law issues presented in the parties' class certification briefing. The Plaintiffs define their state law classes as "All persons in the State of XYZ who purchased a Class Vehicle from a Ford-authorized dealer or distributor." That is both a little too vague and incorrect as a matter of law. As Defendant points out, Florida's choice of law rules require that Plaintiffs' claims are governed by the laws of the states where the vehicles were purchased, not where the owners ride. *In re: Takata Airbag Prod. Liab. Litig., No. 14-24009-CV, 2016 U.S. Dist. LEXIS 142864, 2016 WL 6072406 (S.D. Fla. Oct. 14, 2016)*. Plaintiffs argue that this case is factually distinct and the law of the state where the Plaintiff resides governs. The Court disagrees. As it noted in *In re: Takata*, ***HN14***[] in Florida, absent special circumstances, the state **[**41]** where the injury occurred would . . . be the decisive consideration in determining the applicable choice of law. *Pysca Panama, S.A. v. Tensar Earth Techs., Inc., 625 F. Supp. 2d 1198, 1220 (S.D. Fla. 2008)* (cleaned up). And again, as the Court has previously ruled, the injury occurs where the car is sold.

Plaintiffs understand this choice of law decision leaves them without named class **[*1372]** representatives in New Jersey and Pennsylvania—they ask the Court to substitute other class members as representatives. Although the Court has the power to do so, it declines to exercise that power at this stage in a case originally filed in 2017.

B. *Rule 23(a)*

HN15[] A plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable. *Little v. T—Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012)*. The Court finds the classes are clearly defined and it is administratively simple to identify class members thanks to Ford's recordkeeping. *HN16*[] Parties seeking class action certification must also satisfy the four requirements of *Federal Rule of Civil Procedure 23(a)*, commonly referred to as numerosity, commonality, typicality, and adequacy of representation. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. Parties moving for class certification bear the burden of establishing each element of *Rule 23(a)*. *London v. Wal—Mart Stores, 340 F.3d 1246, 1253 (11th Cir. 2003)*. If the party seeking class certification fails to demonstrate any requirement, the case may not continue **[**42]** as a class action. *Jones v. Roy, 202 F.R.D. 658, 662 (M.D. Ala. 2001)*. Specifically, the four requirements of *Rule 23(a)* are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)*.

As mentioned in this Order's introduction, the Court tweaks the class definition Plaintiffs propose. *Fed. R. Civ. P. 23(c)(1)(B)* ("An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under *Rule 23(g)*."). To restate, the class shall be defined as "All persons who purchased a Class Vehicle from a Ford-authorized dealer or distributor located in [insert state here] before April 1, 2016." The Court understands that, after its choice of law and class certification holdings in this Order, class counsel may need an opportunity to amend its named plaintiffs in order to substitute in the proper parties. To the extent Plaintiffs make such a request (*not* a request to add *new* named plaintiffs), it will be granted.

1. Numerosity

Plaintiffs claim that **[**43]** there are 1,668 class vehicles. Granted, the Court does not ultimately certify all states, but surely over 1,000 putative plaintiffs satisfies the Eleventh Circuit's rule that "generally less than twenty-one [class members] is inadequate, more than forty adequate, with numbers between varying according to other factors." *Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986)* (alteration added) (citing 3B Moore's Federal Practice ¶ 23.05[1] at n.7 (1978)).

2. Commonality

HN17[] For purposes of [commonality], "even a single common question will do." *Carriuolo v. Gen. Motors Co., 823 F.3d 977 (11th Cir. 2016)* (citing *Wal—Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*). A question is common if answering it resolves "an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc., 564 U.S. at 350*. Surely commonality is satisfied. For example, if the answer to the common question "was Ford's advertising mere puffery?" is "yes", all of Plaintiffs' fraud claims will fail.

[*1373] 3. Typicality

HN18[] The typicality test is not demanding. *In re Checking Acct. Overdraft Litig., 307 F.R.D. 630, 642 (S.D. Fla. 2015)*. Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)(3)*. The typicality test centers on "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named class plaintiffs, and whether other class members have been injured by the same **[**44]** course of conduct." *Hanon v. Dataprods. Corp., 976 F.2d 497, 508 (9th Cir. 1992)*. Although similar to commonality in that it concentrates on the "nexus" between class members and their designated representative, typicality differs from commonality in that it focuses on the class representative's individual characteristics in comparison to those of the proposed class. *Piazza v. EBSCO Indus. Co., 273 F.3d 1341, 1346 (11th Cir. 2001)*; *Prado—Steiman v. Bush, 221 F.3d 1266, 1269 (11th Cir. 2000)*. Typicality is satisfied where the named plaintiffs' claims "arise from the same event or pattern or practice and are based on the same legal theory" as the claims of the class. *Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984)*, *cert. denied*, *470 U.S. 1004, 105 S. Ct. 1357, 84 L. Ed. 2d 379 (1985)*.

Here, class representatives and absent class members complain of the same injury allegedly caused by the same course of conduct by Ford. Ford's only specific typicality objection is to Plaintiff Cruz, on whose claims the Court has already granted summary judgment to Ford. Ford's general objection that its unique defenses against some named plaintiffs is insufficient to defeat typicality, particularly when all named plaintiffs' "claims share the same essential characteristics as the claims of the class at large." *Bruhl v. Price Waterhousecoopers Int'l, 257 F.R.D. 684, 690 (S.D. Fla. 2008)* (Marra, J.). Ford's arguments are better directed at the adequacy and predominance tests.

4. Adequate Representation

HN19[] The purpose of the adequacy requirement is to "protect the **[**45]** legal rights of absent class members." *Lyons v. Georgia—Pacific Corp. Salaried Employees Ret. Plan, 221 F.3d 1235, 1253 (11th Cir. 2000)*. Adequacy of representation is primarily based on "the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the . . . class" and "whether plaintiffs have interests antagonistic to those of the rest of the class." *Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 726 (11th Cir. 1987)*. This inquiry requires the Court to consider both whether there are any inter-class conflicts and whether class counsel and named plaintiffs will prosecute the case with zeal. *Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181 (11th Cir. 2003)*.

First, this case does not present classic concerns about inter-class conflicts that threaten the absent class members' right to adequate representation. Unlike in *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* or *Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*, all class members would be entitled to the same recovery if they prevail on their substantive claims. No one class member is harmed by the success of another. *In re Nat'l Football League Players Concussion Inj. Litig., 821 F.3d 410 (3d Cir. 2016)*, *as amended* (May 2, 2016) (finding no fundamental conflicts of interest in *Rule 23(b)(3)* class where structural protections helped to align interests of present and future claimants). No such structural provisions are necessary here, where **[*1374]** all class members share the interest of maximizing present monetary recovery. *See* *Tefel v. Reno, 972 F. Supp. 608, 617 (S.D. Fla. 1997)* ("If the Plaintiffs succeed, the benefits will inure to all class members. **[**46]** Where the named plaintiffs in a class action are seeking the same type of relief for themselves as they seek for class members, the adequacy of representation requirement of *Rule 23(a)(4) of the Federal Rules of civil Procedure* is satisfied."). Nor is this a case where some particularly high-dollar claims are being diluted by virtue of being lumped in with less valuable ones. Indeed, if not for class certification, it is likely that no plaintiff would find it economically viable to pursue a claim. Second, Ford raises no issue nor does the Court believe there to be any issue with class counsel's ability to represent the class.

Finally, Ford also rests a portion of its adequacy argument on the possibility their unique defenses against class representatives forcing those representatives to devote significant energy and resources on their own cases at the expense of the class as a whole. *Ross v. Bank S., N.A., 837 F.2d 980 (11th Cir.)*, *reh'g granted and opinion vacated sub nom.* *Ross v. Bank S., N.A. (Three Cases), 848 F.2d 1132 (11th Cir. 1988)*, and *on reh'g*, *885 F.2d 723 (11th Cir. 1989)* ("The existence of even an arguable defense can vitiate the adequacy of representation if it will distract the named plaintiff's attention from the issues common to the class."). Although Ford's point is well-taken, it does not defeat adequacy of representation for a few reasons. First, *Ross* and **[**47]** its progeny are securities fraud cases. These cases are unique in the sense that often (particularly after the passage of the Private Securities Litigation Reform Act of 1995) the named plaintiff is a large institutional investor that could have some of its other business interests threatened by a large recovery against the defendant against whom it is litigating. Second, the "unique defense," here, reliance and knowledge, is so central to all class members' claims that the time and resources named plaintiffs spend on the issue would actually help prove all class members' case.[5] As shown in the

[5] In some cases where the Court found unique defenses defeated adequate representation, the defenses were unrelated to the merits of the case. *See, e.g.*, *Kline v. Wolf, 88 F.R.D. 696, 699-700 (S.D.N.Y.1981)* (finding that named plaintiff's claim was atypical because of a credibility problem).

parties' briefing papers, Plaintiffs argue that, based on Ford's advertisements and disclosures (or lack thereof), it was actually impossible for any class member to have known the truth. That argument—if true—benefits all class members. Lastly, the Court is reluctant to decline to certify a class on the basis of "unique defenses" when the Court, earlier in this opinion, thoroughly considered and decided not to grant the Defendant summary judgment on the basis of those same defenses. It would be a perverse result to dash all class members' chances of recovery in the name of protecting them from **[**48]** a highly uncertain threat.

C. *Rule 23(b)(3)*

HN20[] In addition to meeting the four requirements of *Rule 23(a)*, parties seeking class certification must prove that the action is maintainable under one of the three subsections of *Rule 23(b)*. *Amchem Prods., 521 U.S. at 614*. Plaintiffs seek class certification under *Rule 23(b)(3)*, which is appropriate when (1) "questions of law or fact common to the members of the class predominate over any questions affecting only individuals members," and when (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*.

[*1375] 1. Predominance

HN21[] *Rule 23(b)(3)*'s predominance requirement is "more demanding" than the commonality requirement of *Rule 23(a)*. *See* *Comcast Corp. v. Behrend, 569 U.S. 27, 34, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*. It "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem, 521 U.S. at 623*, by "ask[ing] whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016)*. Thus, the predominance inquiry

> calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while **[**49]** a common question is one where "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof."

Id. (quoting 2 Newberg on Class Actions § 4:50 at 196-97 (5th ed. 2012)). "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under *Rule 23(b)(3)* even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to individual class members. . . ." *Id.* (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, pp. 123-124 (3d ed. 2005) (footnotes omitted)).

Here, the individual issue of each class member's knowledge of the truth about his car threatens to swamp the common questions about Ford's conduct. Ford argues that at least 6 of the 19 named plaintiffs subjectively knew the truth about the GT 350's—namely, that they could not perform on the track like Ford advertised that they could. As a result, Ford says, Plaintiffs cannot maintain a successful statutory or common law fraud claim. How could a buyer have "relied" on the misrepresentation or how could **[**50]** the misrepresentation have "caused" damages when the Plaintiff bought the car *despite* knowing the truth? Thus, the question is: What is the implication of an "actual, subjective knowledge" defense on the predominance of common issues?

Plaintiffs have two responses: First, that knowledge is irrelevant. They say that materiality, reliance, and causation, three elements of some of the statutory consumer protection and fraudulent concealment claims, can be proven on a class wide basis with reference to an objective consumer standard. Plaintiffs cite case law that shows, in some states, that a Plaintiff can prove those elements in their case-in-chief with reference to an "objective consumer." In this sense, common issues predominate because "the addition or subtraction of any of the plaintiffs to or from the class [does not] have a substantial effect on the substance or quantity of evidence offered." *Klay v. Humana, Inc., 382 F.3d 1241, 1255 (11th Cir. 2004)*. Plaintiffs do not have to affirmatively prove the *absence* of their knowledge of the truth about the cars as an element of their causes of action. In fact, the Eleventh Circuit held in *Klay* that, in certain cases, circumstantial evidence common to the entire class could be used to prove reliance. **[**51]** *Id. at 1259*; *see* *Rowe v. Bankers Life & Cas. Co., No. 09-CV-491, 2012 U.S. Dist. LEXIS 43198, 2012 WL 1068754 at *10-12 (N.D. Ill. Mar. 29, 2012)* (collecting cases courts were willing to infer reliance and causation on a class-wide basis). In other words, if the reasonable consumer would have relied on Ford's representations and omissions, Plaintiffs can still succeed even if *this particular class member* did not.

[*1376] And second, Plaintiffs also argue that the classes should be certified because it was factually impossible for a plaintiff to have known the truth about the Base and Tech package cars, rendering reliance and causation a non-issue. The deposition excerpts Ford highlights in its summary judgment briefing show that some named Plaintiffs knew there were differences between the various GT350 trim levels. Plaintiff Kowalchik testified that he always planned to add after-market coolers and that he was a "gearhead." Some others noted they had seen YouTube videos or read Internet forums about a Limp Mode rumor. But those excerpts do *not* show two things: First, that the Plaintiffs knew that the lack of coolers specifically meant the Base and Tech GT350's were incapable of Track Days, and second, that any of the additional information Plaintiffs knew came from Ford itself. This is a crucial point—although Ford shows that **[**52]** the disclaimers about the Base and Tech GT350's Track Day performance were available in the Supplemental Owner's Guide and that the Guide was available in the glovebox upon delivery, Ford is unable to point to any record evidence that convinces the Court it was available *prior to purchase*. Ford claims the Guide was available online, but as Plaintiffs note, Ford gives no specifics about *when* the document was posted and not one of the 25 named Plaintiffs referenced the Guide in their deposition testimony. This means class members could not have learned the truth—from Ford—until sometime in April 2016. Whether their knowledge was sufficient to conclude they knew their cars could not complete a Track Day without entering Limp Mode is a jury question, but surely a reasonable consumer cannot have been expected to search the Internet for unverified reports of problems she did not know existed. *Falk v. Gen. Motors Corp., 496 F. Supp. 2d 1088, 1097 (N.D. Cal. 2007)* ("But GM is alleged to have *known* a lot more about the defective speedometers, including information unavailable to the public. Many customers would not have performed an Internet search before beginning a car search. Nor were they required to do so.").

Case law from federal courts from across the country **[**53]** demonstrate that a presumption of causation and reliance is only appropriate in some states and in some fact patterns. One such case is when a Defendant's representations to the entire class were uniform. However, after Judge Dow in *Row v. Bankers Life & Cas. Co.*, cited above, noted that class-wide proof could be used for causation and reliance in such a scenario, he explained the limitations of that approach when "there is more than one logical explanation for the plaintiff's participation in the transaction or conduct at issue." *2012 U.S. Dist. LEXIS 43198, [WL] at *11* (internal quotations and citation omitted). Another Northern District of Illinois Court aptly illustrated the different scenarios. In Scenario A, a court allowed class-wide proof of reliance when it certified a class of plaintiffs who claimed they were misled by a volleyball club when they purchased lessons from the club because the club did not disclose its owner had been accused of rape and sexual abuse. *Mullen v. GLV, Inc., 330 F.R.D. 155 (N.D. Ill. 2019)*. In Scenario B, a court held plaintiffs could *not* use class-wide proof of reliance when de-certifying a class that claimed they were misled by Coca-Cola because the corporation did not disclose that its fountain diet coke had more artificial ingredients **[**54]** than its bottled diet coke. *Oshana v. Coca-Cola Co., 472 F.3d 506 (7th Cir. 2006)*. Common-sense makes all the difference, the *Mullen* court held. Reasonable parents would not knowingly send their child to camp with an adult who had a history of rape and abuse. On the other hand, a reasonable consumer may well purchase one product over another despite a misleading **[*1377]** advertisement, whether because of a difference in taste, price, or other considerations. *Mullen, 330 F.R.D. at 166*.

Even though common sense dictates this case is more akin to Scenario B because Plaintiffs could have purchased their GT350 for myriad reasons including, for example, in Plaintiff Kamperman's case, "because I was not going to need a car that required the capability to run for extended periods of time at high speeds,"[6] it is also true that Ford's representations to Plaintiffs were uniform and the evidence appears to show that no class member could possibly have known from Ford that the car was ill-equipped to complete a Track Day. In this particular predominance

[6] Plaintiffs cite Ford's expert Dr. Nauhaus for the statistic that 70% of "performance enthusiasts" at the time of purchase intended to use their vehicle for road course track days

inquiry, the Court finds that the more relevant considerations are Ford's uniform course of conduct and the dearth of evidence pointing to individual reliance issues that stem from Ford's communications. To the extent such individual **[**55]** issues appear later in the litigation, the Court can resolve them then. *In re Linerboard Antitrust Litig., 305 F.3d 145 (3d Cir. 2002)* ("Many courts faced with similar circumstances have certified class status with the expectation that individual questions concerning fraudulent concealment can be resolved at a later damages phase.").

The Court is also cognizant that, beyond the Plaintiffs' challenge in proving their case-in-chief, Ford will also present affirmative defenses that may be unique to each class member. Ford will seek to introduce deposition testimony of the Plaintiff who said, for example, "I was starting to learn about the car not performing as I expected." *See Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc., 601 F.3d 1159, 1170 (11th Cir. 2010)* ("If the defendant has non-frivolous defenses to liability that are unique to individual class members, any common questions may well be submerged by individual ones. This principle emerges clearly from our case law and that of other circuits."). ***HN22***[] Individual issues are a threat to predominance even when they come up in affirmative defenses. *Id. at 1177*. ("The risk of voluminous and individualized extrinsic proof runs particularly high where a defendant raises substantial affirmative defenses to breach."). But of course, in close cases like this one, there is Eleventh Circuit precedent **[**56]** that points in the opposite direction. "The general rule, regularly repeated by courts in many circuits, is that courts traditionally have been reluctant to deny class action status under *Rule 23(b)(3)* simply because affirmative defenses may be available against individual members." *Brown v. Electrolux Home Prod., Inc., 817 F.3d 1225, 1240 (11th Cir. 2016)* (cleaned up). These competing authorities highlight that class certification in the face of affirmative defenses is a matter of degree—and here, the individual affirmative defense of a lack of reliance is not significant or complex enough to defeat predominance in the face of the Defendant's common course of conduct. This case is more like *Brown* than *Sacred Heart Health Sys.* —in the latter case, the contracts between Plaintiffs and Defendant were materially different. *Sacred Heart Health Sys., Inc., 601 F.3d at 1171*. The Court estimated there were approximately 33 unique variations. In other words, neither the Plaintiffs' nor Defendants' conduct was common. *Brown*, on the other hand, involved a consumer product—a washing machine—that was uniformly marketed and sold to Plaintiffs. In holding that the affirmative defense of misuse did not necessarily defeat predominance in the class' warranty claims, Chief Judge Pryor wrote that affirmative defenses on narrow **[*1378]** issues **[**57]** such as misuse (or, in this case, a plaintiff's knowledge) are often easy to resolve and district courts have several tools to manage them. *Brown, 817 F.3d at 1241*.

2. Predominance and Damages

HN23[] Finally, *Rule 23(b)(3)* also requires that any model supporting a plaintiff's damages be consistent with its theory of liability. *Comcast Corp. v. Behrend, 569 U.S. 27, 35, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*. In short, this requirement ensures that the damages are capable of determination via classwide proof—just like the theory of liability. *Id.* Here, Plaintiffs rely on their expert, Ted Stockton, to propose that class members should recover $8,982.99—a "market-based measure of what would be required to restore the consumer to the originally negotiated state of utility." Pl. Mot. for Class Certification at 43. Stockton arrives at this number, roughly, by estimating the cost of adding the necessary coolers to the Base and Tech GT350's. Defendant seizes on Plaintiffs' description of these damages as a "benefit of the bargain" theory and argues not all of the statutory and common law fraud laws in the various states in which the Plaintiffs seek certification provide for recovery under such a theory. Florida's statutory fraud law permits recovery under either benefit of the bargain theory of for "out-of-pocket" **[**58]** damages, for instance, but the other states, such as California, permit only out-of-pocket damages. *Pulaski & Middleman, LLC v. Google, Inc., 802 F.3d 979, 983 (9th Cir. 2015)*. Out-of-pocket damages measure the difference between what a plaintiff paid and what the plaintiff would have paid but for the misconduct. And as noted above, benefit of the bargain damages measure the difference between what a plaintiff received and the market value of the product if it performed as promised.

Translated from legalese to the facts of this case, recovery on a benefit of the bargain theory means the class members recover the difference between the value of the car as-is and the market value of a Base or Tech GT350 that could complete a Track Day without Limp Mode; recovery on an out of pocket theory means the class members recover the difference between what they paid for their cars and what they would have paid had they known they would enter Limp Mode when attempting to complete a Track Day. According to Ford, the mismatch between the various bases for liability and what they describe as the Plaintiffs' 'benefit of the bargain' damages theory is fatal to class certification under *Comcast Corp.*

But it is unclear whether the *Comcast* Court's specific concerns apply outside **[**59]** of the antitrust context. ***HN24***[] Surely it is universally true in *23(b)(3)* class actions that damages must be susceptible to classwide measurement such that individual issues do not predominate over common questions. *Comcast, 569 U.S. at 35*. But some courts have limited *Comcast* to "where multiple theories of liability exist, those theories create separable anticompetitive effects, and the combined effects can result in aggregated damages." *In re VHS of Michigan, Inc., 601 F. App'x 342, 344 (6th Cir. 2015)*. "Where there is no chance of aggregated damages attributable to rejected liability theories, the Supreme Court's concerns do not apply." *Id.*; *see also* *Comcast Corp. v. Behrend, 569 U.S. 27, 42-43, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* ("The Court's ruling is good for this day and case only. In the mine run of cases, it remains the "black letter rule" that a class may obtain certification under *Rule 23(b)(3)* when liability questions common to the class predominate over damages questions unique to class members.") (Ginsburg and Breyer, JJ., dissenting).

Defendants rightly point out multiple legal theories of liability exist here, but **[*1379]** those multiple theories of liability do not create "separable effects" that, when combined, result in aggregated damages. In *Comcast*, the Plaintiffs' damages were not consistent with their theory of liability because substantive ***antitrust law*** requires **[**60]** that a "private plaintiff identify the economic rationale for a business practice's illegality under the antitrust laws and show that its harm flows from whatever it is that makes the practice unlawful." 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, ***Antitrust Law*** ¶ 391a, p. 320 (3d ed. 2007). In other words, ***antitrust law*** requires a plaintiff to specifically explain which effect of a defendant's conduct makes the conduct unlawful and calculate the damages attributable only to that isolated impact. The fraud laws at issue in this class action impose no such requirement. Although different *types* of damages are available for violations of Florida's fraud laws versus California's fraud laws, the harm that the plaintiffs suffer due to violations of those different laws is the same—Ford's alleged fraud caused them to overpay for their vehicles. On the other hand, again, the harm suffered by antitrust plaintiffs by each different antitrust impact is *legally separable and distinct* and requires a damages calculation tied to its theory of liability. Thus, because the Plaintiffs suffer the same harm because of the violation of any state's fraud law, Mr. Stockton's damages model is sufficiently **[**61]** connected to the Plaintiffs' theories of liability. The model calculates how much a class member "overpaid" for his vehicle due to Ford's misrepresentations and omissions, it "is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*," and thus satisfies *Rule 23(b)*. *Comcast, 569 U.S. at 38*.

Even if *Comcast*'s concerns apply here, Plaintiffs meet its test because Stockton's calculation matches *both* theories of liability. If one had to devise a damages model for either of those theories of liability independently, Stockton's model would be applicable to the class a whole and would accurately measure either benefit of the bargain or out of pocket damages.

Thus, if the Court is going to deny Ford summary judgment on whether their advertising was misleading and agrees with Plaintiffs that the advertising was uniformly targeted to all putative class members, then it would be logically inconsistent to deny certification on the grounds that Plaintiffs may not use class-wide proof to win a presumption of reliance and causation. The Court will certify the state classes where state law does not prohibit such a presumption, discussed in more detail below.

3. Superiority

The predominance **[**62]** inquiry narrowly tilts in favor of certification and the superiority analysis helps push it over the edge. ***HN25***[] There are four non-exhaustive factors a court should consider in assessing whether a class action is superior to individual litigation: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action. *Klay, 382 F.3d at 1269* (citing *Fed. R. Civ. P. 23(b)(3)*).

Even if some class members have slightly stronger claims than others (perhaps because it is crystal clear that they relied on no source other than Ford's representations), their interest in going it alone is outweighed by the fact that their recovery of at most $9,000 will be dwarfed **[*1380]** by their litigation costs. Relatedly, no class members are currently going it alone so the second factor is satisfied as well. And further, Plaintiffs correctly point out that it is desirable to concentrate the litigation **[**63]** in this Court due to the Court's familiarity with the factual and legal issues—this would conserve judicial as well as litigant resources such that the claims can be resolved on the merits rather than devolving into a war of attrition. *See* *Carriuolo v. Gen. Motors Co., 823 F.3d 977, 989 (11th Cir. 2016)*. Finally, as noted above, manageability is a concern due to numerous state law classes and the possibility of individual affirmative defenses. However, "[t]his concern will rarely, if ever, be in itself sufficient to prevent certification of a class." *Klay, 382 F.3d at 1272*. If these potential manageability issues worsen and eventually threaten to derail the case, the Court always has the option to exercise its powers under *Fed. R. Civ. P. Rule 23(d)(1)*. ***HN26***[] The class action device exists "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (cleaned up). And because those solo actions may also seem de minimis to a regulator, the class action also serves to deter or discipline bad actors where there would otherwise be no government intervention. *See generally* Brian T. Fitzpatrick, The Conservative Case for Class Actions (2019).

D. State-by-State Decisions on Certification

Now the Court turns to a state-by-state **[**64]** analysis (both statutory and common law) to determine which state classes can be certified.

1. California

A California class can be certified for both statutory and common law fraud claims because state law does not require an individualized showing of reliance in either case. *Daniel v. Ford Motor Co., 806 F.3d 1217, 1225 (9th Cir. 2015)*; *Anderson v. Apple Inc., 500 F. Supp. 3d 993 (N.D. Cal. 2020)* (holding that a Court may assume reliance when the alleged omission is "plausibly material"); *Tietsworth v. Sears, 720 F. Supp. 2d 1123, 1147 (N.D. Cal. 2010)* ("Courts have recognized that this element, which is often phrased in terms of reliance or causation, may be presumed in the case of a material fraudulent omission.") (internal citation and quotations omitted).

2. Florida

A Florida class can be certified on the Florida Deceptive and Unfair Trade Practices claim, but not on the Florida common law claims. *Carriuolo v. Gen. Motors Co., 823 F.3d 977, 983 (11th Cir. 2016)* (holding a similar class can be certified under Florida Deceptive and Unfair Trade Practices Act). However, Plaintiffs' Florida common claims should be dismissed under the economic loss rule. Even though Defendant did not make this argument in its summary judgment motion, it is clearly governed by this Court's previous decisions. *Cardenas v. Toyota Motor Corp., 418 F. Supp. 3d 1090 (S.D. Fla. 2019)* (dismissing fraudulent concealment claims under Florida economic loss rule); *In re Takata Airbag Prod, Liab. Litig., 193 F. Supp. 3d 1324 (S.D. Fla. 2016)* (same).

3. Illinois

An Illinois class can be certified for both **[**65]** statutory and common law fraud claims. *Cannon v. Nationwide Acceptance Corp., No. 96 C 1136, 1997 U.S. Dist. LEXIS 20019, 1997 WL 779086, at *3 (N.D. Ill. Dec. 12, 1997)* ("Individual reliance need not be shown for claims brought under Racketeer Influenced and Corrupt Organizations Act **[*1381]** and the Illinois Consumer Fraud Act."). *See supra*.

4. Missouri

Defendants are entitled to summary judgment on Plaintiff's Missouri common law claims due to the Economic Loss rule. However, a Missouri Merchandising Practices Act class can be certified. *Glen v. Fairway Indep. Mortg. Corp., 265 F.R.D. 474, 481 (E.D. Mo. 2010)*, *order clarified*, *No. 4:08CV730 RWS, 2010 U.S. Dist. LEXIS 20660, 2010 WL*

891621 (E.D. Mo. Mar. 8, 2010) ("Because the class claim is based upon a promise given to all putative class members in a form contract and can be proven with common evidence, individualized inquires are not necessary and do not defeat class certification.").

5. New Jersey

Pursuant to the Court's choice of law analysis, the New Jersey class has no named plaintiff and therefore cannot be certified.

6. New York

A New York class can be certified for both statutory and common law fraud claims. Defendants concede that New York's consumer fraud statute does not require proof of individual reliance. *See* *Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005)* ("A private action brought under § 349 does not require proof of actual reliance"). And although reliance is an element of fraudulent concealment under New York law, it does not defeat predominance. *In re NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. 493, 520 (S.D.N.Y. 1996)* ("Courts have overwhelmingly held that, even when the issue **[**66]** of fraudulent concealment involves both common and individual questions, the common question of whether Defendants successfully concealed the existence of the alleged conspiracy predominates over any individual questions regarding the knowledge or diligence of individual plaintiffs.").

7. Oregon

Plaintiffs do not seek a statutory class, but a common law fraud class can be certified. *Wieber v. FedEx Ground Package Sys., Inc., 231 Ore. App. 469, 220 P.3d 68, 78 (Ore. 2009)* ("Direct evidence of reliance in support of a fraud claim is not required; a plaintiff may prevail on a showing that a reasonable inference of reliance can be drawn from the facts in evidence.").

8. Pennsylvania

No class can be certified under Pennsylvania law because there is no named Plaintiff. All of Plaintiff Cruz's were dismissed for lack of standing.

9. Tennessee

The named Plaintiff can bring his statutory claim, but not on behalf of the class. *Cardenas v. Toyota Motor Corp., 418 F. Supp. 3d 1090 (S.D. Fla. 2019)*. However, a fraudulent concealment class can be certified. *Bearden v. Honeywell Int'l Inc., 720 F. Supp. 2d 932 (M.D. Tenn. 2010)* (holding that the mere possibility, without further evidence, of individual reliance issues will not defeat predominance).

10. Texas

Plaintiffs do not seek a common law class, and although reliance is an element of the statutory claim, "[t]his does not mean, of course, that reliance or other elements of **[**67]** their causes of action cannot be proved class-wide with evidence generally applicable to all class members; class-wide proof is possible when class-wide evidence exists. *Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 693 (Tex. 2002)*. Thus, a Texas statutory class can be certified.

[*1382] 11. Washington

Both statutory and common law classes can be certified. *Vernon v. Qwest Commc'ns Int'l, Inc., 643 F. Supp. 2d 1256, 1268 (W.D. Wash. 2009)* ("Washington courts do not require a plaintiff to allege individual reliance on Defendants' conduct, particularly where the non-disclosure of a material fact is alleged."). While the Court has not found Washington case law directly addressing a presumption of reliance in common law fraudulent concealment cases, the Supreme Court of Washington has expressly approved a rebuttable presumption of reliance in omission cases because "it is virtually impossible to prove reliance in cases alleging nondisclosure of material facts." *Morris v. Int'l Yogurt Co., 107 Wash. 2d 314, 328, 729 P.2d 33 (1986)*.

E. Remaining Certification Decisions on Unjust Enrichment and Warranty Claims

But not all claims can be certified—individual questions are a larger barrier to some claims than they are to others. For example, the predominance requirement posts a unique barrier to Plaintiffs' request to certify their unjust enrichment claims. ***HN27***[] Unjust enrichment "is a fact-intensive inquiry that focuses **[**68]** on the totality of the circumstances, not just defendant's conduct." *In re McCormick & Co., Inc., Pepper Prod. Mktg. & Sales Practices Litig., 422 F. Supp. 3d 194, 232 (D.D.C. 2019)*. Further, while the nominal elements of an unjust enrichment claim are materially similar in each state, the specific contours of what is "unjust" varies. *See Id. at 232-33* (collecting cases); *see also Lilly v. Ford Motor Co., No. 00 C 7372, 2002 U.S. Dist. LEXIS 5698, 2002 WL 507126 (N.D. Ill. Apr. 3, 2002)* ("Unjust enrichment is an equitable doctrine. There would be individual questions as to whether a particular class member is subject to equitable defenses."). The Eleventh Circuit has spoken clearly on this issue. "Before it can grant relief on this equitable claim, a court must examine the particular circumstances of an individual case and assure itself that, without a remedy, inequity would result or persist. Due to the necessity of this inquiry into the individualized equities attendant to each class member, courts, including ours, have found unjust enrichment claims inappropriate for class action treatment." *Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1274 (11th Cir. 2009)*.

Next, the Court addresses the Plaintiffs' request for class certification of their implied warranty claims in California, New Jersey, Missouri, Pennsylvania, and Texas.[7] As noted above, New Jersey and Pennsylvania classes cannot be certified because there are no class representatives. A Missouri class also cannot be certified **[**69]** because the Court granted summary judgment on both class representatives' implied warranty claims.[8] That leaves California and Texas. Ford argues that the question of whether an individual plaintiff gave sufficient notice is an individual one that defeats predominance. Plaintiffs note that only four named class members failed to give notice—none of those Plaintiffs were in the Texas or California classes. It is true that notice is an individual issue. But it is a simple one. ***HN28***[] The predominance inquiry is not determined by simply counting **[*1383]** the number of individual questions versus common ones—a Court must consider their relative importance. *Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800 (7th Cir. 2013)*. Here, the simply question of notice can be determined, if necessary, by a claims administrator while the big question of whether the product was defective at the time it was sold is a common one. Thus, the Court finds the California and Texas implied warranty classes can be certified, along with the Magnuson-Moss classes.

XIII. Conclusion

The iconic Ford Mustang made an indelible pony-shaped mark on American car culture. Through product placement in James Bond movies and racing partnerships with figures like Carroll Shelby, Ford has spent half a century **[**70]** cultivating an aura of performance and adventure. But these Plaintiffs allege, to Lee Iacocca's chagrin, that their cars are more like Pintos than Mustangs. The thrust of Plaintiffs' claims is that Ford billed *all* of their GT350 Mustangs as race cars capable of all-day track performance with the knowledge and expectation that performance enthusiasts would buy them on that basis. In reality, Plaintiffs say, the Base and Technology package versions of the cars were intentionally designed without coolers in order to inflate Ford's profits margins. As a result, the Base and Tech cars could not complete a full "Track Day" without going into "Limp Mode." There are so many fact-intensive questions, including: Did Ford's advertising really communicate what Plaintiffs allege? And did Plaintiffs know, or should they have known, the cars they were purchasing did not have coolers? Therefore, the

[7] Plaintiffs do not seek an express warranty class.

[8] In its class certification briefing, Defendant appears to concede that Missouri does not require a plaintiff to prove notice of breach. But in the preceding sentence, Defendant cites the Missouri statute that reads "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." *Mo. Rev. Stat. § 400.2-607(3)(a)*. Yet, the Defendant sought summary judgment against a Missouri Plaintiff's warranty claims for failure to give notice of breach. The Court will follow Missouri law.

Court declines to settle the majority of these claims at the summary judgment stage. However, Ford is granted summary judgment on Plaintiffs' claims concerning the occurrence of Limp Mode on public roads, all of Plaintiff Cruz's claims, the express and implied warranty claims of Plaintiffs Roberts, Hochsprung, **[**71]** Kowalchik, and Porter, as well as the express warranty claims of any class members who did not fulfill their presentment and notice obligations.

The class certification decision was closer than the summary judgment decision. Ford raises the valid concern that Plaintiffs cannot prove elements of their claims, such as reliance, on a classwide basis and the valid concern that it will seek to raise unique affirmative defenses for each class member. But Plaintiffs have done enough to show that these facts permit presumptions of reliance and that Ford's evidence of potential affirmative defenses is not strong enough to defeat the predominance of common issues. Requiring *every* issue to be common would defeat the utility of the class action device. Thus, with the class definition set out by the Court above, the Court certifies statutory and common law fraud classes in California, Florida, Illinois, New York, and Washington; statutory fraud classes in Missouri and Texas; common law fraud classes in Oregon and Tennessee; and implied warranty and Magnuson-Moss classes in California and Texas. Grossman, Roth, Yaffa, and Cohen and Hagens Berman are appointed as class counsel and are directed to **[**72]** give absent class members appropriate notice under *Rule 23*.

DONE AND ORDERED in Chambers at Miami, Florida, this 1st of July 2021.

/s/ Federico A. Moreno

FEDERICO A. MORENO

UNITED STATES DISTRICT JUDGE

Ticas v. Youssef

Superior Court of California, County of Los Angeles

July 16, 2021, Decided

20STCP03768

Reporter

2021 Cal. Super. LEXIS 97005 *

MIGUEL TICAS, et al. vs JOESEF R. YOUSSEF, DDS

Core Terms

cause of action, demurrer, alleges, pled, surgery, battery, patient, billing, unfair, emotional distress, contends, billing practices, insurance company, Plaintiffs', reasons, removal, wisdom tooth, fraudulent, consented, consumer, dental, outrageous conduct, misrepresentations, fails

Counsel: **[*1]** For Plaintiff(s): No Appearances.

For Defendant(s): No Appearances.

Judges: Judge: Honorable Richard J. Burdge Jr.

Opinion by: Richard J. Burdge Jr

Opinion

NATURE OF PROCEEDINGS: Hearing on Demurrer - with Motion to Strike (CCP 430.10)

The court's tentative ruling is posted online for parties to review.

The parties submit to the Court's tentative ruling via telephone.

The Court's tentative ruling is adopted as the final order of the court as follows:

Dr. Youssef's demurrer is sustained as to the second, fifth and sixth causes of action. Plaintiffs are granted 30 days leave to amend. Having overruled Dr. Youssef's demurer to the third and fourth causes of action, the motion to strike is moot. Dr. Youssef is to give notice.

Background

This action arises out of Defendant, Joesef R. Youssef, DDS' ("Dr. Youssef") care and treatment of Plaintiffs, Miguel Ticas ("Mr. Ticas") and Christina Ticas. ("Mrs. Ticas") Plaintiffs allege that on October 29, 2019, Dr. Youssef performed oral surgery on Mr. Ticas to remove his right lower wisdom tooth. However, Dr. Youssef allegedly abandoned the surgery without removing this tooth despite billing Mr. Ticas and his insurance for the removal. Plaintiffs allege that other oral surgeons have **[*2]** since confirmed that Dr. Youssef lacked the necessary training and experience to handle the surgery, and that Mr. Ticas suffered pain and ongoing complications as a result. Mrs. Ticas also alleges that she has lost income and suffered loss of consortium.

Plaintiffs' operative First Amended Complaint ("FAC"), filed February 8, 2021, alleges the following causes of action: (1) medical negligence, (2) violation of Consumer Legal Remedies Act, (3) fraud, (4) injunctive relief pursuant to Business and Professions Code §17200, (5) medical battery, (6) intentional infliction of emotional distress.

Dr. Youssef now demurs to the FAC's second through sixth causes of action. Dr. Youssef also moves to strike portions of the FAC. Plaintiffs oppose both motions.

Discussion[1]

Legal Authority

A demurrer is an objection to a pleading, the grounds for which are apparent from either the face of the complaint or a matter of which the court may take judicial notice. (*Code Civ. Proc., § 430.30, subd. (a)*; see also *Blank v. Kirwan (1985) 39 Cal.3d 311, 318*.) The purpose of a demurrer is to challenge the sufficiency of a pleading "by raising questions of law." (*Postley v. Harvey (1984) 153 Cal.App.3d 280, 286*.) The court "treat[s] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. . . ." (*Berkley v. Dowds (2007) 152 Cal.App.4th 518, 525* (Berkley).) **[*3]** "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (*Code Civ. Proc., § 452*; see also *Stevens v. Sup. Ct. (1999) 75 Cal.App.4th 594, 601*.) "When a court evaluates a complaint, the plaintiff is entitled to reasonable inferences from the facts pled." (*Duval v. Board of Trustees (2001) 93 Cal.App.4th 902, 906*.)

The general rule is that the plaintiff need only allege ultimate facts, not evidentiary facts. (*Doe v. City of Los Angeles (2007) 42 Cal.4th 531, 550*.) "All that is required of a plaintiff, as a matter of pleading, even as against a special demurrer, is that his complaint set forth the essential facts of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source and extent of his cause of action." (*Rannard v. Lockheed Aircraft Corp. (1945) 26 Cal.2d 149, 156-157*.) "[D]emurrers for uncertainty are disfavored and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond." (*Mahan v. Charles W. Chan Ins. Agency, Inc. (2017) 14 Cal.App.5th 841, 848, fn. 3*, citing *Lickiss v. Fin. Indus. Regulatory Auth. (2012) 208 Cal.App.4th 1125, 1135*.) In addition, even where a complaint is in some respects uncertain, courts strictly construe a demurrer for uncertainty "because ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of California, Inc. (1993) 14 Cal.App.4th 612, 616*.)

Demurrers do not lie as to only parts of causes of action where some valid claim is alleged but "must dispose of an entire **[*4]** cause of action to be sustained." (*Poizner v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 119*.) "Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment." (*Goodman v. Kennedy (1976) 18 Cal.3d 335, 349*.)

Analysis

Second Cause of Action: Violation of Consumer Legal Remedies Act

"The CLRA declares unlawful a variety of "unfair methods of competition and unfair or deceptive acts or practices" used in the sale or lease of goods of services to a consumer." (*Cal. Civ. Code § 1770, subd. (a)*; *Bower v. AT&T Mobility, LLC (2011) 196 Cal.App.4th 1545, 1556*(Bower).) However, a Plaintiff in a CLRA action must also show that she suffered "some kind of tangible increased cost or burden . . ." (*Bower, supra, 196 Cal.App.4th at 1556*, quoting *Meyer v. Sprint Spectrum L.P. (2009) 45 Cal.4th 634, 641*.)

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[1] Dr. Youssef submits the declaration of his counsel, Yee Lam ("Lam") to demonstrate compliance with statutory meet and confer requirements. Lam attests that on March 4, 2021, her office sent Plaintiffs' counsel a meet and confer letter regarding the arguments raised in the instant demurrer and motion to strike. (Lam Decl. ¶ 2, Exh. A.) On March 9, 2021, Plaintiffs' counsel responded by agreeing to withdraw the FAC's prayer for punitive damages but otherwise stated that the FAC was sufficiently pled. (Lam Decl. ¶ 3, Exh. B.) The Lam Declaration is sufficient for purposes of ***Code of Civil Procedure sections 430.41*** and ***435.5***.

Dr. Youssef contends that the FAC's second cause of action is insufficiently pled because the FAC does not allege that Plaintiffs relied upon Dr. Youssef's alleged statement that the wisdom tooth had been removed. (Demurrer, 9-11.) Additionally, Plaintiffs argue that the FAC fails to allege how Dr. Youssef engaged in false advertising as defined in *Civil Code sections 1770(a)(5)*, *(14)* or *(16)*. (Id.) Finally, Dr. Youssef argues that the second cause of action is insufficiently pled because billing practices to an insurance company cannot form the basis of a CLRA claim, as an insurance company is not a consumer within the **[*5]** meaning of the CLRA (Id.) Finally, Dr. Youssef contends that the second cause of action is insufficiently pled because the FAC fails to allege how Plaintiffs were harmed by Dr. Youssef's alleged statements about removal of the wisdom tooth. (Id.)

Pursuant to *Civil Code section 1761, subdivision (d)*, a "consumer" is "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes."

In opposition, Plaintiffs contend that the second cause of action is sufficiently pled because it is based only on Dr. Youssef's billing practices, not the dental surgery. (Opposition, 3-5.) Plaintiffs argue that billing practices of a healthcare facility can form the basis of a CLRA claim. (Id.) Plaintiffs cite to *Hale v. Sharp Healthcare (2010) 183 Cal.App.4th 1373* (Hale) in support of this argument.

In Hale, an uninsured patient brought an action on behalf of herself and other uninsured patients, alleging that defendant healthcare providers violated the CLRA and Unfair Competition Law by deceptively charging uninsured patients fees that substantially exceeded fees it accepted from insured patients. (Id. at 1377.) The trial court sustained defendants' demurrer without leave to amend and the patient appealed. (Id.) The Court of Appeal concluded **[*6]** that the trial court erred by sustained the demurrer to the patient's UCL and CLRA causes of action. (Id.) The Court of Appeal held that the patient had standing to bring her UCL claim because the patient alleges that she paid $500 of her $14,447.65 medical bill and as such, was a bona fide consumer of medical services. (Id. at 1383-1384.) Additionally, the Court of Appeal noted that the patient sufficiently alleged reliance because the Complaint alleges that the patient signed the Admission Agreement and was expected to be charged regular rates. (Id. at 1385.) According to the Hale court, this is sufficient to state a claim to the extent the patient's CLRA claim is fraud based. (Id. at 1387.)

In reply, Dr. Youssef contends that Plaintiffs' reliance on Hale is misplaced because he made no representations regarding his billing practices and Plaintiffs failed to allege any reliance upon his billing practices. (Reply, 2-3.)

Here, the FAC alleges that Dr. Youssef "falsified billing records to plaintiff's insurance company" by billing for a procedure which has not been completed and billing for "office visits which never occurred." (FAC ¶ 13.) According to Plaintiffs, this conduct violates **[*7]** at least *Civil Code section 1770(a)(5)*, *(14)* and *(16)*. (FAC ¶ 14.) Plaintiff Mr. Ticas was allegedly harmed because he could not "obtain corrected dental surgery" through his insurance company. (FAC ¶ 16.) However, the FAC also alleged that Mr. Ticas has since visited other oral surgeons for a second opinion. (FAC ¶ 9.)

The court finds the second cause of action insufficiently pled. Plaintiffs' reliance on Hale is misplaced, as Hale does not stand for the general proposition that billing practices of a healthcare facility can form the basis of a CLRA claim. The Hale court found plaintiff's CLRA claim sufficiently pled in part because Plaintiff had sufficiently alleged reliance. Unlike Hale, the FAC alleges that Mr. Ticas underwent dental surgery with Dr. Youssef and later discovered that the surgery had not been completed. Thus, the FAC does not allege that Plaintiffs relied on Dr. Youssef's statements or conduct or that he paid fraudulent bills.

For these reasons, Dr. Youssef's demurrer to the second cause of action is sustained.

Third Cause of Action: Fraud

"The elements of fraud that will give rise to a tort action for deceit are: '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge **[*8]** of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.'" *Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951, 974*.) Fraud must be pled in the complaint specifically. General and conclusory allegations are not sufficient. (Nagy v. Nagy (1989) 210 Cal.App.3d 1262, 1268.) Unlike most causes of action where the "the policy of liberal construction of the pleadings," fraud requires particularity, that is, "pleading facts which show how, when, where, to whom, and by what means the representations were tendered." (Lazar v. Superior Court (1996) 12 Cal.4th 631, 645.) Every element of a fraud cause of action must be alleged both factually and specifically. (Hall v. Department of Adoptions (1975) 47 Cal.App.3d 898, 904; Cooper v. Equity General Insurance (1990) 219 Cal.App.3d 1252, 1262.)

Dr. Youssef contends that the FAC's third cause of action is insufficiently pled because the FAC fails to allege fraud with the required specificity. (Demurrer, 12-15.) Specifically, Dr. Youssef argues that the FAC fails to allege any specific facts regarding misrepresentations by Dr. Youssef, that Dr. Youssef had knowledge of the falsity of any misrepresentations, or that Plaintiffs relied on any of Dr. Youssef's alleged misrepresentations. (Id.)

In opposition, Plaintiffs contend that the third cause of action is sufficiently pled because the FAC alleges that Dr. Youssef told Plaintiff and his insurance company **[*9]** that he had removed the wisdom tooth when he had not, which is sufficient to state a claim for fraud. (Opposition, 5-8.)

Here, the FAC alleges that Dr. Youssef committed fraud through "falsely representing that a dental procedure" had been completed and also by "charging plaintiffs' insurance company for office visits which never occurred." (FAC ¶ 20.) Dr. Youssef allegedly "did these fraudulent acts knowingly and intentionally." (Id.)

The court finds the third cause of action is sufficiently pled. The Complaint alleges that Dr. Youssef submitted false bills and was paid for them because the insurer relied on their accuracy. As a result, Plaintiff could not receive insurance payments for certain necessary services..

For these reasons, Dr. Youssef's demurrer is overruled as to the third cause of action.

Fourth Cause of Action: Injunctive Relief pursuant to Business & Professions Code §17200

Business and Professions Code section 17200 ("UCL") prohibits "unfair competition," which is defined to include "any unlawful, unfair or fraudulent business act or practice" and "unfair, deceptive, untrue or misleading advertising" and any act prohibited by business and professions code section 17500. A cause of action under the UCL must be stated with "reasonable particularity." (Gutierrez v. Carmax Auto Superstores California (2018) 19 Cal.App.5th 1234, 1261.)

"While **[*10]** the scope of conduct covered by the UCL is broad, its remedies are limited. [Citation.] A UCL action is equitable in nature; damages cannot be recovered. [Citation.] [The Supreme Court has] stated that under the UCL, '[p]revailing plaintiffs are generally limited to injunctive relief and restitution.'" (Korea Supply Co. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1144.) UCL actions based on "unlawful" conduct may be based on violations of other statutes. (See Klein v. Chevron U.S.A., Inc. (2012) 202 Cal.App.4th 1342, 1383.)

Dr. Youssef contends that the FAC's fourth cause of action is insufficiently pled because the FAC does not plead this cause of action with reasonable particularity. (Demurrer, 15-16.) Specifically, Dr. Youssef argues that the FAC's fourth cause of action is uncertain because it does not allege, for example, the amounts incorrectly billed, any statutes Dr. Youssef allegedly violated, or the people who allegedly communicated such incorrect billing. (Id.)

In opposition, Plaintiffs contend that the fourth cause of action is sufficiently led because the FAC sufficiently alleges a claim under the "unfairness" prong of the UCL, which is broadly defined. (Opposition, 8-9.) Plaintiffs cite to cases, including Podolsky v. First Healthcare Corp. (1996) 50 Cal.App.4th 632, 647 (Podolsky) for this argument. **[*11]**

In Podolsky, the Court of Appeal stated that the "unfairness" prong of the UCL is intentionally broad. (Id. at 647.) Specifically, "[t]he test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." (Id.) Additionally, the California Supreme Court has held that "unfair" in the UCL is defined as follows: "conduct that threatens an incipient violation of an ***antitrust law*** or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 187* (Cel-Tech).)

Here, the FAC alleges that Dr. Youssef "overbilled Mr. Ticas for the botched surgery" he did not perform and also billed for "office visits which never occurred." (FAC ¶¶ 7-8.) Additionally, the FAC alleges that "Defendants" engaged in "unlawful, unfair and fraudulent business practices through their fraudulent billing practices." (FAC ¶ 25.)

The court finds the FAC's fourth cause of action is sufficiently pled for the same reasons that the third cause of action was sufficiently pled.

[*12] For these reasons, Dr. Youssef's demurrer to the fourth cause of action is overruled.

Fifth Cause of Action: Medical Battery

Dr. Youssef contends that the FAC's fifth cause of action is sufficiently pled because the sixth cause of action is based on an "undesirable outcome" of Mr. Ticas' dental surgery and thus, is not actionable as battery. (Demurrer, 16-17.) Dr. Youssef cites to cases, including *Conte v. Girard Orthopaedic Surgeons Medical Group, Inc., (2003) 107 Cal.App.4th 1260, 1268* (Conte) for the argument that there is no cause of action for battery where the doctor's touching was within the scope of consent.

In Conte, plaintiff sought treatment following an injury during a motorcross accident. (Id. at 1263-1264.) Plaintiff sought other consultations and then signed a consent form for surgery, which he believed was for a repair of his shoulder and not for a diagnostic procedure. (Id. at 1265.) Thereafter, Plaintiff discovered that his shoulder was not repaired but instead a diagnostic procedure was completed. (Id.) Plaintiff brought a claim for battery, arguing that defendant was liable for battery because he performed a substantially different procedure than the one to which he consented. (Id. at 1268.) The Court of Appeal held that battery was not appropriate, as the **[*13]** doctor in this case did less than he was authorized to do by completing a diagnostic procedure which was not substantially different than the one to which plaintiff had consented. (Id.)

In opposition, Plaintiffs contend that the fifth cause of action is sufficiently pled because the FAC alleges that Dr. Youssef intentionally mislead Plaintiffs about his lack of training and qualifications, which is sufficient to state a claim for battery. (9-11.) Plaintiffs cite cases, including *Rains v. Superior Court (1984) 150 Cal.App.3d 933, 939-942* (Rains) in support of their arguments.

In Rains, plaintiffs participated in in-patient psychiatric treatment and consented to physical violence as a therapeutic measure. (*Rains, supra, 150 Cal.App.3d at 935*.) Plaintiffs brought an action for battery, alleging that defendants engaged in touching outside of the scope of their consent. (*Id. at 936*.) The Court of Appeal held that Plaintiffs properly stated a claim for battery because the complaint properly alleges that the defendants intentionally misrepresented the necessity of physical violence and thus, plaintiffs' consent was "legally ineffective." (*Id. at 940-941*.)

Here, the FAC alleges that Mr. Ticas consented to removal of his right lower wisdom tooth rather than partial removal followed by "ham-handed, substandard **[*14]** effort to cover up the botched surgery." (FAC ¶ 30.) As such, Defendants allegedly "exceeded the scope of consent" when Dr. Youssef performed the surgery "rather than inform the client" and then "performed procedures wholly outside of the scope of consent." (FAC ¶ 31.)

The court finds Plaintiffs' fifth cause of action insufficiently pled. The court finds Conte similar to the instant action. As with the plaintiff in Conte who consented to a shoulder repair surgery but received a shoulder diagnostic procedure, here Mr. Ticas consented to a total removal of his wisdom tooth but allegedly received a partial removal. Thus, Dr. Youssef's conduct was within the scope of consent according to the guidance from Conte and is not actionable as medical battery. Plaintiffs' citation to Rains is misplaced, as Rains involved misrepresentations about defendants' proposed medical procedures prior to those procedures taking place. Here, the FAC does not allege that Dr. Youssef engaged in any such representations prior to engaging in dental surgery.

For these reasons, Dr. Youssef's demurrer to the fifth cause of action is sustained.

Sixth Cause of Action: Intentional Infliction of Emotional Distress

The elements **[*15]** of a claim for intentional infliction of emotional distress ("IIED") are: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Christensen v. Superior Court (1991) 54 Cal.3d 868, 903* (Christensen).) Under California law, for conduct to be "outrageous" it must be "so extreme as to exceed all bounds of that usually tolerated in a civilized community." (See *Ess v. Eskaton Props., Inc. (2002) 97 Cal.App.4th 120, 130*.) Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. (*Hughes v. Pair (2009) 46 Cal.4th 1035, 1051*.)

Dr. Youssef contends that the sixth cause of action is insufficiently pled because the FAC fails to allege that Dr. Youssef engaged in extreme or outrageous conduct. (Demurrer, 17-18.) Specifically, Dr. Youssef contends that the FAC's sixth cause of action is based on the same facts as the first cause of action for negligence, which are insufficient to support a claim for IIED. (Id.)

In opposition, Plaintiffs contend that the sixth cause of action is sufficiently pled because the allegations **[*16]** about Dr. Youssef's representations regarding the surgery and fraudulent billing can "reasonably be considered outrageous conduct" beyond the bounds to be tolerated in a civilized society. (Opposition, 11.)

In reply, Dr. Youssef contends that the FAC insufficiently pleads a claim for IIED because an allegation that a healthcare provider lacks the required skill to perform a procedure constitutes a negligence claim. (Reply, 7-8.)

Here, the FAC alleges that Dr. Youssef's conduct, "namely, botching a surgery, then covering it up and lying to plaintiff's insurance company that the surgery had been successfully completed" constitutes "extreme and outrageous conduct." (FAC ¶ 36.) As a result of Dr. Youssef's conduct, "plaintiff" suffered extreme emotional distress. (FAC ¶ 37.)

The court finds the sixth cause of action insufficiently pled. Specifically, the court agrees with Dr. Youssef that the sixth cause of action relies on substantially the same allegations as the first cause of action, which are insufficient to state a claim for IIED. Additionally, the FAC does not allege that Dr. Youssef "covered up" the allegedly failed surgery with the intention of causing Plaintiffs emotional distress **[*17]** or with reckless disregard of the probability of causing Plaintiffs emotional distress, other than conclusory statements to this effect.

For these reasons, Dr. Youssef's demurrer to the sixth cause of action is sustained.

Conclusion

Dr. Youssef's demurrer is sustained as to the second, fifth and sixth causes of action. Plaintiffs are granted 30 days leave to amend. Dr. Youssef is to give notice.

MOTION TO STRIKE

Having overruled Dr. Youssef's demurrer to the third and fourth causes of action, the motion to strike is moot.

Marcum v. Columbia Gas Transmission, LLC

United States District Court for the Eastern District of Pennsylvania

July 19, 2021, Decided; July 19, 2021, Filed

CIVIL ACTION NO. 19-3873

Reporter
549 F. Supp. 3d 408 *; 2021 U.S. Dist. LEXIS 133569 **; 2021 WL 3033749

SCOTT R. MARCUM AND KERSTIN MARCUM, Plaintiffs, v. COLUMBIA GAS TRANSMISSION, LLC, COLUMBIA GAS TRANSMISSION COMMUNICATIONS CORPORATION, CROWN CASTLE INTERNATIONAL CORP. AND PERCHERON, LLC, Defendants.

Prior History: Marcum v. Columbia Gas Transmission, LLC, 423 F. Supp. 3d 115, 2019 U.S. Dist. LEXIS 201793, 2019 WL 6217878 (E.D. Pa., Nov. 20, 2019)

Core Terms

Plaintiffs', stormwater, runoff, natural gas, installation, pipeline, damages, preempted, storm water, easement, alteration, ordinances, landowner, grading, restoration, preemption, regulation, nuisance, berm, township, fiduciary duty, state law, diversion, trespass, parties, argues, summary judgment motion, fiduciary relationship, post-construction, allegations

Counsel: **[**1]** For SCOTT R. MARCUM, KERSTIN R. MARCUM, Plaintiffs: JOSEPH P. GREEN , JR., LEAD ATTORNEY, LAW OFFICES, WEST CHESTER, PA.

For COLUMBIA GAS TRANSMISSION, LLC, Defendant: ALEX G. MAHFOOD, NICOLLE R. SNYDER BAGNELL, LEAD ATTORNEYS, NICOLE A. JENSEN, REED SMITH LLP, PITTSBURGH, PA.

For COLUMBIA GAS TRANSMISSION COMMUNICATIONS CORPORATION, CROWN CASTLE INTERNATIONAL CORP., also known as, CROWN CASTLE INTERNATIONAL I, LLC, also known as, CROWN CASTLE FIBER LLC, Defendants: ANTHONY J. CANALE, LEAD ATTORNEY, BUNKER & RAY, WA01A, PHILADELPHIA, PA.

For PERCHERON, LLC, also known as, PERCHERON FIELD SERVICES, LLC, also known as, PERCHERON ENERGY LLC, also known as, PERCHERON PROFESSIONAL SERVICES, LLC, Defendant: ELIZABETH M. THOMAS, GREGORY J. KROCK, LEAD ATTORNEYS, BLAEC C. CROFT, MCGUIRE WOODS LLP, PITTSBURGH, PA.

Judges: WENDY BEETLESTONE, J.

Opinion by: WENDY BEETLESTONE

Opinion

[*414] **MEMORANDUM OPINION**

This suit arises from the installation of a gas pipeline through the residential property of Plaintiffs Scott and Kerstin Marcum. Plaintiffs allege that the flow of stormwater runoff onto their property increased following the installation, resulting in property damage. They blame the pipeline's owner, Defendant Columbia Gas Transmission, **[**2]** LLC ("Columbia"), which, they say, failed to restore the property with sufficient stormwater management controls. They bring claims for: (1) negligent construction and failure to maintain; (2) violation of the *Pennsylvania Storm Water Management Act ("SWMA")*, *32 Pa. Stat. Ann. § 680.13*; (3) nuisance; (4) trespass to land by alteration of surface and subsurface drainage; and, (5) breach of fiduciary duty to maintain.[1] Columbia moves to exclude the testimony of Plaintiffs' liability expert, Chad Ingram, and for summary judgment.

I. BACKGROUND

The property in question has been subject to a pipeline easement since 1957, when the original owner entered into a Right of Way Agreement with Columbia's predecessor granting the latter the right to install and operate a 10-inch underground gas pipeline through the premises.

Plaintiffs bought the property in 1998. Shortly thereafter, they were approached by Columbia, which sought to amend the 1957 Agreement. Specifically, it proposed replacing the existing 10-inch pipeline with a 24-inch pipeline (the "1896 line"). Plaintiffs wouldn't agree to the amendment, so Columbia initiated a condemnation action as authorized by the *Natural Gas Act, 15 U.S.C. § 717f(h)*. That litigation was resolved in 2002, when Plaintiffs entered into an amended **[**3]** Right of Way Agreement with Columbia for the installation, operation, and maintenance of the 1896 line (the "2002 Amendment").

A few years later, an agent for Columbia approached Plaintiffs seeking to amend the 2002 Amendment. Columbia wanted to install another pipeline—this one 26-inches in diameter (the "1278 line"). In 2014, after consulting with an attorney, Plaintiffs entered into a second amended Right of Way Agreement with Columbia for the installation, operation, and maintenance of the 1278 line (the "2014 Amendment"). In conjunction with the 2014 Amendment, Plaintiffs executed a release of claims. In return Plaintiffs received $35,000 from Columbia.

Columbia sought permission for construction of the 1278 line from the Federal Energy Regulatory Commission ("FERC") and applied for various state permits. In support of its applications, Columbia submitted to FERC, the Pennsylvania Department of Environmental Protection ("PADEP"), and the Chester County Conservation District ("CCCD") an updated Erosion and Sediment Control Plan as well as Post Construction Storm Water Management and Site Restoration Plans for review and approval. FERC approved the 1278 pipeline on December 18, 2014. **[**4]** In February 2015, the CCCD in conjunction with the PADEP issued to Columbia an Erosion and Sediment Control General Permit ("ESCGP-2"). The following month, FERC issued a notice to proceed with construction of the 1278 line through Plaintiffs' property.

Columbia installed the 1278 line in the summer of 2015. The construction process was not entirely smooth. Plaintiffs' property **[*415]** is located downslope from two other properties. To prevent excess stormwater from running down this slope and entering Plaintiffs' property during construction, Columbia installed temporary erosion and sediment ("E&S") controls. These controls were overburdened in July by a significant overnight rain. Stormwater runoff flowed toward Plaintiffs' home, leaving sediment deposits on their rear patio and yard. Columbia installed additional E&S controls in response, but these too were overwhelmed during an August storm, resulting in washout of the restored easement area.

There were, from Plaintiffs' perspective, issues with Columbia's post-construction site restoration efforts as well. According to Plaintiffs, prior to the 2015 construction, there were several water diversion features on the properties of Plaintiffs **[**5]** and their uphill neighbor which served to lessen the flow of stormwater onto Plaintiffs' property. They contend, primarily, that upon finishing construction of the 1896 line in 2002, Columbia built a water diversion berm—a retentive grading technique used to manage stormwater runoff—in the easement area across Plaintiffs'

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[1] Plaintiffs alleged a claim of fraudulent concealment against Columbia but withdrew this claim in response to Columbia's summary judgment motion.

backyard. The purpose of this berm, according to Plaintiffs, was to divert enhanced stormwater runoff resulting from the 2002 construction away from Plaintiffs' home, allowing it to instead drain to the side of Plaintiffs' house and into culverts in the street below. Plaintiffs contend that Columbia removed this berm when installing the 1278 line and failed to replace it when restoring the site.

Columbia disputes these facts. It agrees, however, that there were certain permanent berms located on the property immediately uphill from Plaintiffs' own which were removed and replaced during the 2015 construction. The parties now dispute whether these replacement berms serve to concentrate, rather than disperse, stormwater runoff toward Plaintiffs' home. Columbia also acknowledges that, as part of the construction process, a number of trees were cleared from Plaintiffs' **[**6]** property as well as from the property of Plaintiffs' uphill neighbor. These trees were not replaced. The parties dispute whether Columbia undertook any stormwater remediation measures in the formerly wooded area, such as cultivating brushy vegetation to help slow the velocity of stormwater and surface runoff coming down the hillside.

According to Plaintiffs, since the 2015 installation of the 1278 line, increased stormwater runoff has caused significant damage to their home and property including, in February 2018, the formation of a large and growing sinkhole within the easement area. Plaintiffs filed this action shortly thereafter.

II. COLUMBIA'S *DAUBERT* MOTION

Plaintiffs proffer Chad Ingram, an engineer, to testify regarding the effect of the pipeline construction on stormwater flow. Plaintiffs contend that Ingram's reports and testimony in this matter support their allegation that Columbia's failure to install adequate stormwater controls increased the flow of runoff onto their property. Columbia moves to exclude Ingram's testimony and opinions pursuant to *Federal Rule of Evidence 702*.[2]

[*416] A. Legal Standard

The Federal Rules of Evidence govern the admission of expert opinions in a federal case. *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587-89, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. *Rule 702* provides: **[**7]**

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

This rule "embodies a trilogy of restrictions on expert testimony: qualification, reliability, and fit." *Schneider ex rel. Estate of Schneider v. Fried, 320 F.3d 396, 404 (3d Cir. 2003)*. Qualification requires "that the witness possess

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[2] Columbia separately moves to exclude the testimony and opinions of James Tupitza, a real estate attorney proffered by Plaintiffs to testify regarding customs and practices in pipeline condemnation and construction litigation. Tupitza has authored an eight-page report responding to four hypothetical questions posed by Plaintiffs' counsel. Most of his opinions involve matters—specifically, the release executed by Plaintiffs in conjunction with the 2014 Amendment and Plaintiffs' breach of fiduciary duty claim—which, even if they were appropriate matters for expert opinion, will not be relevant at trial given the Court's disposition of these issues in the present opinion. It is thus unclear whether and to what extent Plaintiffs will continue to proffer Tupitza as an expert witness moving forward. Given that the substance of Tupitza's opinions is not relevant to the Court's disposition of its summary judgment motion, Columbia's *Daubert* challenge will be denied without prejudice to raise again should Plaintiffs seek to put Tupitza on the stand at trial.

specialized expertise." *Id.* To be reliable, the expert's opinion must be premised on more than mere "'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his or her belief." *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 (3d Cir. 1994)* (quoting *Daubert, 509 U.S. at 590*). Finally, the expert's testimony must "fit" the case at hand, that is, "must be relevant for the purposes of the case and must assist the trier of fact." *Calhoun v. Yamaha Motor Corp., U.S.A., 350 F.3d 316, 321 (3d Cir. 2003)* (quoting *Schneider, 320 F.3d at 405*). When a party challenges an expert's opinions pursuant to *Rule 702*, the proffering party bears the burden of demonstrating by a preponderance **[**8]** of the evidence that the opinions of its proposed expert are admissible. *Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 417-18 (3d Cir. 1999)*.

The proffering party is not, however, required to "carry the burden of proving to the judge that the expert's assessment of the situation is correct." *United States v. Mitchell, 365 F.3d 215, 244 (3d Cir. 2004)* (quoting *Ruiz-Troche v. Pepsi Cola Bottling Co., 161 F.3d 77, 85 (1st Cir. 1998)*); *see also* *Paoli, 35 F.3d at 744* ("The grounds for the expert's opinion merely have to be good, they do not have to be perfect."). Trial courts must act as gatekeepers to ensure the relevance and reliability of all expert testimony, *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*, but this gatekeeping obligation "is not intended to serve as a replacement for the adversary system," *Fed. R. Evid. 702*, advisory committee's note. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert, 509 U.S. at 596*.

B. Discussion

Plaintiffs retained Ingram through his firm, Ingram Engineering Services, Inc. ("IES"), to investigate the increased stormwater runoff they observed on their **[*417]** property during and following construction of the 1278 line. Ingram drafted his first report in April of 2016. After visiting the property, he opined, *inter alia*, that "[t]he grading of the easement [was] restored in such a manner that conveys additional **[**9]** storm water toward the rear and east side of the property." He concludes:

> that post-construction failures are caused from the inadequate re-grading performed during the restoration process. IES suspects that a diversion berm existed before the construction which conveyed stormwater properly into the street and away from the rear and sides of [Plaintiffs'] property. During construction activities for the pipe installation, the berm was removed during final grading operations. Once the pipe installation was completed, the area was re-graded which resulted in a significant increase in stormwater being conveyed toward the rear and side yards rather than towards the street. In addition to the improper conveyance, the grading has allowed excessive flow rates which have caused erosion and sediment run-off[.]

Ingram returned to Plaintiffs' property in early 2018 after the sinkhole began to form and authored a second report, which reiterated his findings concerning the inadequacy of Columbia's post-construction site restoration measures and the removal of the water diversion berm. In the report, he notes that "IES estimates the volume of stormwater doubled based upon the location of" the removed **[**10]** berm. He also provides an opinion on the cause of the sinkhole, explaining that it:

> is likely due to the presence of carbonite geology (soluble limestone) or improper backfill operation at this localized area. A small swale immediately upslope of said subsidence/sinkhole has formed and conveys concentrated stormwater into the opening. This is accelerating subsurface erosion and has created a safety hazard.

Ingram visited the property twice in September 2020, and thereafter authored his third and final report. The purpose of this report was "to determine if continued deterioration resulting from stormwater runoff is observed [on Plaintiffs' property] as well as to evaluate the grading on the subject property and upslope tributary drainage area within the pipeline easement." Ingram observed, among other things, continued erosion and deterioration at the property; stormwater runoff continuing to culminate in the rear of Plaintiffs' property; water damage to Plaintiffs' home; and additional surface depressions located in the area of the sinkhole. The report notes that Columbia did some work on the sinkhole in December 2018 but opines that poor soil compaction around the pipeline and continued **[**11]** concentrated runoff in the area will continue to produce subsidence on Plaintiffs' property.

Columbia does not question Ingram's qualifications, and the Court finds that Ingram—a licensed Pennsylvania engineer who operates his own firm and worked on pipeline projects in his former role as in-house township engineer—possesses the specialized expertise necessary to opine on pipeline construction and stormwater flow. Columbia does, however, dispute whether Ingram's opinions on these issues are reliable and whether they fit the facts of this case. Its motion refers to only one of Ingram's opinion (elicited by defense counsel during Ingram's expert deposition) namely that prior to Columbia's construction of the 1278 line, there was 88% less stormwater entering Plaintiffs' property. Nevertheless, Columbia seeks to exclude Ingram's opinions and testimony in their entirety.

[*418] With respect to reliability, Columbia contends that Ingram's opinions are not based on sufficient facts and data and are, instead, based on nothing more than *ipse dixit*. It points out that Ingram did not review, *inter alia*, Plaintiffs' depositions, stormwater flow rate data prior to Plaintiffs' purchase of the property, the **[**12]** plans associated with the 2002 construction of the 1896 line, or scientific data related to local precipitation between 2010 and 2020. But an expert's opinion need not rest on perfect grounds: "As long as an expert's scientific testimony rests upon 'good grounds, based on what is known,'" it should be subjected to the adversary process. *Mitchell, 365 F.3d at 244* (quoting *Ruiz-Troche, 161 F.3d at 85*). Ingram's opinions and testimony are based on his years of experience as an engineer, as well as his prior work on pipeline-related projects. He conducted several post-construction site inspections and reviewed time-stamped pre-construction photographs and videos, construction-related documents and existing grading plans, and site-specific topographic and aerial data and images. Whether Ingram should have done more research and performed more calculations is an appropriate issue for cross-examination at trial, *Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408, 414 (3d Cir. 2002)*; *Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 806 (3d Cir. 1997)* (credibility and weight of expert testimony decided by factfinder); however, the Court finds that his opinions are based on a sufficient factual foundation and supporting methodology to survive the present motion.

With respect to the "fit" requirement, expert testimony is admissible under this prong if it "is sufficiently tied to **[**13]** the facts of the case that it will aid the jury in resolving a factual dispute." *United States v. Schiff, 602 F.3d 152, 173 (3d Cir. 2010)* (quoting *Daubert, 509 U.S. at 591*). "This condition goes primarily to relevance. Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert, 509 U.S. at 591*. The standard for meeting the "fit" requirement "'is not that high,' but 'is higher than bare relevance.'" *Schiff, 602 F.3d at 173* (quoting *Paoli, 35 F.3d at 745*). Ingram's opinions meet this standard: They squarely address the parties' fundamental factual disputes regarding the property's pre-and post-construction topography and how the alleged topographical changes have increased stormwater runoff. They also address Plaintiffs' sinkhole and subsidence allegations, another issue central to this litigation. Columbia's motion to preclude Ingram from testifying in this matter will therefore be denied.[3]

III. COLUMBIA'S SUMMARY JUDGMENT MOTION

Columbia next moves, pursuant to *Federal Rule of Civil Procedure 56*, for summary judgment on all of Plaintiffs' claims. The substantive law of Pennsylvania governs this diversity action. *Chamberlain v. Giampapa, 210 F.3d 154, 158 (3d Cir. 2000)*.

A. Legal Standard

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[3] Columbia requests a *Daubert* hearing. Courts have discretion to grant or deny such requests. *Padillas, 186 F.3d at 418* (the decision to hold a *Daubert* hearing "rests in the sound discretion of the district court"). In this case, because the full record on this issue is presently before the Court, including Ingram's several reports and deposition testimony, a *Daubert* hearing is unnecessary. *See* *Oddi v. Ford Motor Co., 234 F.3d 136, 154 (3d Cir. 2000)* (*Daubert* hearing properly denied where district court "already had before it the depositions and affidavits of the plaintiff's experts").

"[S]ummary judgment is appropriate where there is no genuine issue as to any **[*419]** material fact and the moving party is entitled to a judgment as a matter of **[**14]** law." *Alabama v. North Carolina, 560 U.S. 330, 344, 130 S. Ct. 2295, 176 L. Ed. 2d 1070 (2010)* (citations and internal quotations omitted). In ruling on a summary judgment motion, a court must "view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion." *Scott v. Harris, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)* (internal quotations and alterations omitted). "A genuine issue is present when a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the non-moving party in light of his burden of proof." *Doe v. Abington Friends Sch., 480 F.3d 252, 256 (3d Cir. 2007)*.

B. Discussion

As should be apparent from the case background, this matter is riddled with factual disputes concerning what Columbia did and did not do prior to constructing the 1278 line and during the post-construction site restoration process. Typically, such disputes would make summary judgment inappropriate. Columbia argues, however, that Plaintiffs' allegations and evidence fail to support their various claims. It further contends that Plaintiffs' claims are precluded by the release they executed prior to Columbia's work on the 1278 line, and raises certain timeliness concerns.

1. The Release

Up first is whether the release executed by Plaintiffs in connection with the 2014 Amendment acts as a bar to their claims. The release **[**15]** is titled "Release of Specific Claims" and reads, in relevant part:

> [T]he undersigned hereby release and discharge Columbia Gas Transmission, LLC, its successors, assigns, affiliates, agents, contractors and subcontractors, from the below listed claims and damages to the date hereof caused by the laying, construction, maintenance, replacement, alteration or removal of its facilities or any other exercise of its rights[.]

It is unclear what specific claims and damages the parties intended to be released: Although the language of the release suggests that it applies only to "the below listed claims and damages," no such list appears within the document. Regardless, by its clear terms, the provision applies only to claims and damages "to the date hereof caused," that is, claims and damages incurred prior to the document's execution. Plaintiffs executed the release on May 21, 2014. Their claims all arise out of the construction and maintenance of the 1278 line, which did not begin until the summer of 2015. Because the release does not absolve Columbia from liability for its post-execution conduct, it does not bar the claims asserted in this suit.

2. The Statute of Limitations

Another threshold **[**16]** issue is the extent to which the relevant limitations period bars recovery for Plaintiffs' alleged damages. The parties agree that a two-year statute of limitations applies to each of Plaintiffs' claims. *See* *42 Pa. Con. Stat. § 5524* (two-year limitations period applies to actions for "injuring personal property," actions based on "tortious conduct," and actions based "upon a statute for a civil penalty or forfeiture"). Plaintiffs filed this action on April 5, 2018. Given the two-year limitations period, Columbia contends that Plaintiffs are precluded from recovering for damages sustained prior to April 5, 2016. This would include, *inter alia*, damages stemming from Columbia's alleged failure to implement adequate E&S controls when constructing the 1278 line in the summer of 2015.

[*420] Plaintiffs agree with Columbia that damages incurred after April 5, 2016 are timely sought. But they urge application of the discovery rule to permit them to recover for damages sustained prior to this date.[4] Their request will be denied.

For statute of limitations purposes, a claim accrues in a property damage action "when the injury occurred or was discovered." *CTS Corp. v. Waldburger, 573 U.S. 1, 8, 134 S. Ct. 2175, 189 L. Ed. 2d 62 (2014)*. Pursuant to Pennsylvania's discovery rule, "the statute of **[**17]** limitations begins to run when the complaining party 'knows, or reasonably should know (1) that he has been injured, and (2) that his injury has been caused by another party's conduct.'" *Miller v. Phila. Geriatric Ctr., 463 F.3d 266, 276 (3d Cir. 2006)* (quoting *Bohus v. Beloff, 950 F.2d 919, 924 (3d Cir. 1991)*). Here, the record establishes that Plaintiffs were aware of the damages they sustained during the 2015 construction of the 1278 line—namely, the July 2015 incident where heavy rain caused sediment-laden runoff to deposit on Plaintiffs' patio and yard and the August 2015 incident where heavy rain caused washout of the restored easement area—when they occurred. Plaintiffs documented both events that summer, taking photographs and videos of the damage, the failed E&S controls, and Columbia's cleanup efforts.

In November 2015, Plaintiff Scott Marcum contacted Columbia's agents to inform them of enhanced stormwater runoff. At that time, Plaintiff expressly complained that this increase was due to Columbia's removal of the water diversion berm on Plaintiffs' property. Columbia's construction manager visited the property the following month, investigated the easement, and told Plaintiff that he saw "an issue with the grade." In mid-December, Plaintiff informed Columbia that he was contemplating **[**18]** bringing suit.

The question of when an injury is discovered for statute of limitations purposes is ordinarily one for the jury. *Gleason v. Borough of Moosic, 609 Pa. 353, 15 A.3d 479, 485 (Pa. 2011)*. But where the salient facts are not in dispute, the court is permitted to determine whether the discovery rule applies. *Fine v. Checcio, 582 Pa. 253, 870 A.2d 850, 858 (Pa. 2005)* ("Where, however, reasonable minds would not differ in finding **[*421]** that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause, . . . the discovery rule does not apply as a matter of law."). Here, Plaintiffs documented their injuries as they occurred and, in 2015, expressly informed Columbia of the very same water diversion concerns at issue in this litigation. With respect to damages incurred prior to April 5, 2016, no fact finder could reasonably conclude that Plaintiffs were unaware of these damages or their cause.

Plaintiffs' only response to the contrary concerns their statutory SWMA claim. They argue that they could not have reasonably discovered the extent of Columbia's alleged SWMA violation until discovery in this action. But Plaintiffs' ignorance of a legal cause of action does not, in itself, require application of the discovery rule. Once a plaintiff "possesses the salient facts concerning **[**19]** the occurrence of his injury and who or what caused it, he has the ability to investigate and pursue his claim. Postponing the commencement of the limitations period until he has actually done so would nullify the justifiable rationale of the statute of limitations[.]" *O'Brien v. Eli Lilly & Co., 668*

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[4] Plaintiffs also spend much time pressing use of the continuing trespass doctrine. When a party alleges a continuing trespass, it is permitted to recover for damages incurred in the two-year statutory period preceding the suit, even if the original trespass upon which the action is based occurred outside the limitations period. *Kowalski v. TOA PA V, L.P., 2019 PA Super 93, 206 A.3d 1148, 1167-68 (Pa. Super. 2019)*. This Court previously held in Plaintiffs' favor on this issue, finding that Plaintiffs alleged a continuing trespass. *See* *Marcum v. Columbia Gas Transmission, LLC, 423 F. Supp.3d 115, 127 (E.D. Pa. 2019)*. It is unclear why Plaintiffs raise the doctrine again here, given that Columbia's moving brief does not raise the issue and, indeed, only questions Plaintiffs' ability to recover damages sustained prior to April 5, 2016—the same date from which Plaintiffs could recover damages pursuant to the continuing trespass doctrine. *See* *Kowalski, 206 A.3d at 1167*; *Marcum, 423 F. Supp.3d at 127* ("Plaintiffs thus can potentially recover for damages in the two-year statutory period preceding the suit."). In its reply brief, Columbia asserts that the continuing trespass doctrine does not apply and further argues that "all of Plaintiffs' claims for damages in this matter should be dismissed as time-barred." Courts need not address arguments raised for the first time in a reply brief. *See* *Gucciardi v. Bonide Prods., Inc., 28 F. Supp.3d 383, 393 (E.D. Pa. 2014)* ("Where a reply brief raises new arguments in support of a motion for summary judgment, the district court is justified in disregarding them."). Columbia's moving brief only questions Plaintiffs' ability to "recover[] for damages sustained prior to April 5, 2016," and this is the only timeliness argument that will be considered.

F.2d 704, 710 (3d Cir. 1981). Thus, Plaintiffs may not recover for damages incurred prior to April 5, 2016, but remain entitled to seek recovery for damages sustained after this date. *See* Robinson v. Pa. Hosp., 1999 PA Super 217, 737 A.2d 291, 294 (Pa. Super. 1999) ("Should new injuries appear from the original harm, no statute of limitations would bar a subsequent suit for recovery.").

3. The SWMA Claim

Section 13 of Pennsylvania's SWMA requires "[a]ny landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics" to:

> implement such measures consistent with the provisions of the applicable watershed storm water plan as are reasonably necessary to prevent injury to health, safety or other property. Such measures shall include such actions as are required:
>
> (1) to assure that the maximum rate of storm water runoff is no greater after development than prior to development activities; or
>
> (2) to manage the quantity, velocity and direction of resulting storm water runoff **[**20]** in a manner which otherwise adequately protects health and property from possible injury.

32 Pa. Stat. Ann. § 680.13. Plaintiffs allege that Columbia violated—and continues to violate—this statute by failing to comply with two municipal ordinances: (1) Caln Township Ordinance Section 88-3, which requires "any person engaging in activities which disturb the topography and vegetation of land" within the township to first secure a grading permit; and, (2) Caln Township Ordinance Section 135-105(B), which, like the SWMA, requires persons "engaged in the alteration or development of land" to "manage the rate, volume, direction, and quality of resulting stormwater runoff in a manner which otherwise adequately protects health, property, and water quality of waters of the commonwealth."

Columbia argues that this claim must be dismissed, for two reasons. First, it contends that the municipal ordinances upon which Plaintiffs premise their SWMA claim are preempted by the FERC order approving the 1278 line. Second, it argues that Plaintiffs fail to provide evidence that Columbia violated the terms of a "county-adopted watershed storm plan" as required to state their SWMA claim. *See* Lincoln Investors, L.P. v. King, 152 A.3d 382, 390 (Pa. Commw. 2016).

[*422] The preemption argument is dealt with **[**21]** first. Although Columbia suggests that the municipal ordinances cited by Plaintiffs are "preempted by FERC," it appears what Columbia means is that these ordinances are preempted by the Natural Gas Act, which "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300-01, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988). Columbia transports and sells natural gas in interstate commerce and is a "natural gas company" subject to FERC regulation under the Act. *See* 15 U.S.C. § 717a(6). The Act requires natural gas companies to obtain from FERC a "certificate of public convenience and necessity" prior to constructing or operating facilities used for the interstate transportation of natural gas. *See id.* § 717f(c).

Columbia obtained such a certificate before beginning work on the 1278 line. It maintains that it was not required to obtain an additional township grading permit or comply with the township's stormwater management ordinances, as neither requirement was mandated in the FERC order approving construction of the 1278 line. Plaintiffs offer no specific response to Columbia's argument that it was not required to obtain a township grading permit prior to installing the pipeline, effectively conceding **[**22]** this point. *See* Skirpan v. Pinnacle Health Hosps., 2010 U.S. Dist. LEXIS 94499, 2010 WL 3632536, at *6 (M.D. Pa. Apr. 21, 2010) (party waives issues unaddressed in its response to summary judgment motion). They do, however, contend that Columbia cannot hide behind the Natural Gas Act to escape post-construction liability for violations of state and local stormwater management provisions.

Federal law is, under the Supremacy Clause, "the supreme Law of the Land." U.S. Const., art. VI, cl. 2. Thus, Congress may preempt state laws through federal legislation. Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 376, 135 S.

Ct. 1591, 191 L. Ed. 2d 511 (2015). It may do so expressly or implicitly. Id. at 376-77. Where, as here, a statute contains no explicit preemption language, Congress may implicitly preempt state action through "field" or "conflict" preemption. Id. at 377.

Field preemption exists where Congress "intended 'to foreclose any state regulation in the *area*,' irrespective of whether state law is consistent or inconsistent with 'federal standards.'" *Id.* (quoting Arizona v. United States, 567 U.S. 387, 401, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012)). "In such situations, Congress has forbidden the State to take action in the *field* that the federal statute pre-empts." *Id.* Conflict preemption, on the other hand, "exists where 'compliance with both state and federal law is impossible,'" *id.* (quoting California v. ARC Am. Corp., 490 U.S. 93, 100, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)), or where the state law "stands as an obstacle to the accomplishment and execution" of the federal law, Williamson v. Mazda Motor of Am., Inc., 562 U.S. 323, 330, 131 S. Ct. 1131, 179 L. Ed. 2d 75 (2011) (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)).

Columbia does not specify **[**23]** which form of implied preemption it believes to be at issue here. The United States Supreme Court has found FERC's regulatory authority under the Natural Gas Act to be field preemptive where a state law "amounts to a regulation in the field of gas transportation and sales for resale that Congress intended FERC to occupy." Schneidewind, 485 U.S. at 304. Thus, in *Schneidewind*, a state law requiring natural gas companies to obtain state approval before issuing long-term securities was preempted by the Natural Gas **[*423]** Act, because the law was "directed at . . . the control of rates and facilities of natural gas companies," "precisely the things over which FERC has comprehensive authority." Id. at 308.

In a later case, the Court clarified that the Natural Gas Act was not intended to limit the regulatory power of the states, but rather "was drawn with meticulous regard for the continued exercise of state power." Oneok, 575 U.S. at 385-86 (quoting Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind., 332 U.S. 507, 517-18, 68 S. Ct. 190, 92 L. Ed. 128 (1947)); *see* id. at 387 (Natural Gas Act was not intended to preempt "traditional" state regulation). Considering whether the Natural Gas Act field preempts state ***antitrust law*** as applied to natural gas companies, the Court emphasized "the importance of considering the *target* at which the state law *aims* in determining whether that **[**24]** law is pre-empted." Id. at 385. Where a law is not "aimed at natural-gas companies in particular, but rather all businesses in the marketplace," it will not be field preempted, id. at 387, although conflict preemption principles may still apply, id. at 389. Because the state laws at issue were aimed primarily at the field of antitrust enforcement, rather than at natural gas regulation, the Court found that these laws were not field preempted.

Here, the state and local stormwater management laws cited by Plaintiffs do not target the natural gas industry, but rather apply broadly to "[a]ny landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics." *See* 32 Pa. Stat. Ann. § 680.13. They are, moreover, directed at protecting "health and property from possible injury," *see id.*, a subject traditionally left to the States to regulate, *see* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434, 54 S. Ct. 231, 78 L. Ed. 413 (1934) (states have inherent "authority to safeguard the vital interests of [their] people"). The Natural Gas Act does not field preempt these laws.

So, the only remaining question is whether these stormwater management provisions are conflict preempted. Courts regularly apply conflict preemption to state and local actions which serve to prohibit or unreasonably **[**25]** delay the construction of pipeline facilities approved by FERC. *See, e.g.*, PennEast Pipeline Co., LLC v. Permanent Easement of 0.06 Acres in Moore Twp., Northampton Cty., Pa., 2019 U.S. Dist. LEXIS 158149, 2019 WL 4447981, at *8 (E.D. Pa. Sept. 17, 2019) ("[S]tate and local regulation is preempted by the NGA to the extent they conflict with federal regulation or would delay the construction and operation of facilities approved by [FERC]."); Algonquin Gas Transmission, LLC v. Weymouth, Ma., 919 F.3d 54, 63-65 (1st Cir. 2019) (town's denial of a permit for a natural gas compressor station pursuant to a local wetlands ordinance conflicted with FERC project approval); Islander E. Pipeline Co., LLC v. Blumenthal, 478 F. Supp.2d 289, 294-95 (D. Conn. 2007) (requirement that natural gas company obtain a state permit prior to constructing pipeline conflicted with FERC project approval). But this case is distinguishable. The 1278 line has already been installed and is operational; thus, the core concern of these conflict preemption cases—namely, that application of state law will obstruct Congress's purposes in enacting the

Natural Gas Act and empowering FERC with the authority to facilitate the interstate transmission of natural gas—is not in play.

At heart, Plaintiffs' Complaint seeks damages for injuries caused by Columbia's alleged failure to comply with the provisions **[*424]** of the SWMA. Columbia fails to identify how this action for damages implicates FERC's authority under the Natural Gas Act to regulate the transportation of natural **[**26]** gas, *see, e.g.*, *Abramson v. Fla. Gas Transmission Co., 909 F. Supp. 410, 416-17 (Nov. 20, 1995)* (state tort law does not conflict with federal regulation of transportation and sale of natural gas), and fails to identify any authority finding preemption under similar circumstances. Accordingly, the Court declines to find the stormwater management laws relied on by Plaintiffs preempted by the Natural Gas Act.

Columbia next argues that Plaintiffs' allegations and evidence fail to support their SWMA claim. The contention is two-pronged: First, Columbia notes that to state a claim under *section 13 of the SWMA*, Plaintiffs must make "a showing that the landowner's conduct violated the terms of a county-adopted watershed storm water plan." *See Marcum, 423 F. Supp.3d at 125* (quoting *Lincoln, 152 A.3d at 390*). The parties agree that the relevant "county-adopted watershed storm water plan" is Chester County's Act 167 Stormwater Management Plan. Columbia argues that Plaintiffs fail to establish which terms of the Plan it is alleged to have violated.

This first argument is quickly put to bed. Plaintiffs argue that Columbia violated section 135-105 of the Caln Township Stormwater Management Ordinance, which adopts in its entirety Section 105(B) of Act 167's Stormwater Management Model Ordinance:

> [A]ny landowner or any person engaged in a regulated activity, including **[**27]** but not limited to the alteration or development of land, which may affect stormwater runoff characteristics, shall implement such measures as are reasonably necessary to prevent injury to health, safety, or other property. Such measures also shall include actions as are required to manage the rate, volume, direction, and quality of resulting stormwater runoff in a manner which otherwise adequately protects health, property, and water quality of waters of the commonwealth.

The township was required, pursuant to the SWMA, to adopt this provision. *See* *32 Pa. Stat. Ann. § 680.11* ("Within six months following adoption and approval of the watershed storm water plan, each municipality shall adopt or amend, and shall implement such ordinances and regulations . . . as are necessary to regulate development within the municipality in a manner consistent with the applicable watershed storm water plan and the provisions of this act."). Plaintiffs adequately identify which terms of Act 167 it believes Columbia to have violated.

Second, Columbia argues that it cannot be liable under the SWMA, because it complied with all of the Act 167 requirements necessary to obtain the state permits required by FERC. It is undisputed that Columbia's **[**28]** plans and submissions for the issuance of the required permits were reviewed by both the Chester County Conservation District and the Pennsylvania Department of Environmental Protection ("PADEP") and were found to be in conformance with Act 167. It is also undisputed that the PADEP issued Columbia an ESCGP-2 permit, allowing it to proceed with the 1278 pipeline project. But Columbia fails to clarify how these facts bear on its alleged liability under *section 13 of the SWMA*. Pursuant to that section, a landowner must, when altering or developing land, "manage the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately protects health and property from possible injury." *Id.* *§ 680.13*. The Act provides a civil remedy in damages for persons "injured by conduct which violates the provisions of *section 13*." *Id.* **[*425]** *§ 680.15(c)*. Columbia points to no statutory safe harbor provision insulating a landowner from liability for injuries caused by increased stormwater runoff if it obtains the requisite permits prior to engaging in land alteration.

Plaintiffs offer enough evidence from which a factfinder could conclude that Columbia's land alteration activities resulted in enhanced stormwater runoff, which **[**29]** has in turn damaged Plaintiffs' property. Whether Columbia's stormwater management efforts were sufficient to avoid SWMA liability is now a question for a jury if this matter proceeds to trial.

4. The Nuisance and Trespass Claims

Columbia also challenges Plaintiffs' nuisance and trespass claims. Because Columbia fails to identify a basis for granting summary judgment as to either claim, both will survive.

As to the nuisance claim, Columbia suggests that Plaintiffs premise this claim on Columbia's "fail[ure] to comply with *§ 680.13 of the Pennsylvania Storm Water Management Act*" and should therefore be dismissed for the same reasons as the SWMA claim. Columbia misreads Plaintiffs' Complaint. Although Plaintiffs' nuisance allegations do, like their SWMA allegations, fault Columbia for failing to "(1) assure that the maximum rate of storm water runoff is no greater after development than prior to development activities, and (2) manage the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately protects plaintiffs' property," these allegations do not suggest that Plaintiffs' nuisance claim is premised on their SWMA claim. Columbia fails, moreover, to **[**30]** provide any legal analysis or citation specific as to why summary judgment should be granted on Plaintiffs' nuisance claim. *See Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp., 26 F.3d 375, 398 (3d Cir. 1994)* ("An issue is waived unless a party raises it in its opening brief, and for those purposes 'a passing reference to an issue . . . will not suffice to bring that issue before this court.'" (alteration in original) (quoting *Simmons v. City of Philadelphia, 947 F.2d 1042, 1066 (3d Cir. 1991)*)).

Columbia's briefing on Plaintiffs' trespass claim is similarly sparse. Indeed, Columbia fails to make any argument at all as to the adequacy of Plaintiffs' trespass allegations and evidence. Although Plaintiffs will bear the burden of proving these claims at trial, Columbia—as the moving party—bears the initial burden of showing the basis for its summary judgment motion. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. This requires Columbia to do more than merely state that Plaintiffs' nuisance and trespass claims should be dismissed; it must provide some ground for dismissal. It fails to do so. Ergo, these two claims will proceed.

5. The Breach of Fiduciary Duty Claim

The same cannot be said for Plaintiffs' breach of fiduciary duty claim.

To establish a breach of fiduciary duty, Plaintiffs must show: (1) the existence of a fiduciary relationship; (2) the defendant's failure to act **[**31]** in good faith and solely for the benefit of the plaintiff with respect to matters within the scope of that relationship; (3) that the plaintiff suffered an injury; and, (4) that defendant's failure to act was a "real factor" in producing the plaintiff's injury. *Conquest v. WMC Mortg. Corp., 247 F. Supp.3d 618, 633-34 (E.D. Pa. 2017)* (quoting *Dinger v. Allfirst Fin., Inc., 82 F. App'x 261, 265 (3d Cir. 2003)*). Columbia questions only the first requirement, arguing that Plaintiffs fail to allege or produce evidence of a fiduciary relationship between the parties.

[*426] "A fiduciary duty is the highest duty implied by law." *Yenchi v. Ameriprise Fin., Inc., 639 Pa. 618, 161 A.3d 811, 819 (Pa. 2017)*. It "requires a party to act with the utmost good faith in furthering and advancing the other person's interests." *Id. at 820*. Given the significance of this obligation, a fiduciary duty must be imposed only "where the attendant conditions make it certain that a fiduciary relationship exists." *Id.*

Fiduciary relationships rarely arise in the context of arms-length transactions. *See id. at 822-23*. This is how Columbia characterizes its relationship with Plaintiffs: It argues that the parties' negotiation and execution of the 2014 Amendment was a "routine, arms-length business transaction" which took place over a period of 18 months, during which time Plaintiffs had ample opportunity to and did in fact consult with counsel. It notes **[**32]** that Plaintiffs voluntarily entered into the 2014 Amendment and received a negotiated sum of $35,000 in exchange.

To Plaintiffs, the parties' transaction was anything but "routine." They note that a fiduciary relationship may arise "when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed." *Id. at 820*. Such was the case here, they say: Although Plaintiffs negotiated for compensation of $35,000, they never had the option to refuse to grant an easement in light of Columbia's condemnation powers and were forced to contract on Columbia's terms.

Given the disparity in bargaining power between the parties, their execution of the 2014 Amendment cannot fairly be characterized as a "routine" business transaction. But neither can Columbia's substantial bargaining power be a basis for imposing a fiduciary duty. This power was bestowed by Congress pursuant to the Natural Gas Act, which authorizes gas companies like Columbia to acquire property by eminent domain if: (1) the company holds a certificate of public convenience and necessity from FERC; (2) it is unable **[**33]** to acquire the easement via negotiation with the landowner; and, (3) the landowner seeks an amount greater than $3,000. *See* *Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Twp., Lancaster Cty., Pa., Tax Parcel No. 1201606900000, 907 F.3d 725, 729 (3d Cir. 2018)* (citing *15 U.S.C. § 717f(h)*). Plaintiffs point to no language in the Act imposing on gas companies a corresponding duty to act solely for the benefit of the landowners whose property they condemn or otherwise obtain. Nor does the language of the 2014 Amendment create such a duty: It merely defines the parties' rights with respect to the easement area.

Plaintiffs fail, moreover, to provide any authority imposing a fiduciary relationship under similar circumstances. Their reliance on *Adair v. EQT Production Co., 2011 U.S. Dist. LEXIS 52932, 2011 WL 4527433 (W.D. Va. Jan. 21, 2011)*, is misplaced. That case did not involve the installation of natural gas pipelines, but rather the drilling and production of coal bed methane ("CBM"), a natural gas residing in coal seams. CBM was long considered a waste product until innovations in extraction technologies allowed for its commercial capture and sale. *2011 U.S. Dist. LEXIS 52932, [WL] at *1*. Given its newfound value, a question arose as to whether CBM was owned by landowners who retained rights to the gas estate/interest in the land, or by the entities or individuals who owned the coal estate/interest. *Id.* To avoid having ownership disputes slow the development of CBM, Virginia **[**34]** enacted a compulsory pooling statute, whereby all interests or estates would be **[*427]** pooled into CBM drilling units. *Id.* Pursuant to the statute, gas well operators would be appointed to drill for and produce CBM from the drilling units. *Id.* In drilling units where there were conflicting claims of CBM ownership or where the owners could not be found, the statute required unit operators to "deposit any funds due to these interests into escrow, to be held pending identification and location of the owner or a final agreement or determination as to ownership of the CBM estate/interest." *Id.*

The question presented to the *Adair* court was whether unit operators owe a fiduciary duty to properly account for and pay into escrow the funds due to potential CBM owners. That court said yes, recognizing that absent such a duty, the mineral interest owner would have "no assurance of ever receiving any benefit of their bargain." *2011 U.S. Dist. LEXIS 52932, [WL] at *25*. This situation is factually distinct from the present matter: Under Virginia's compulsory pooling statute, unit operators are placed in charge of funds due to potential CBM owners, putting the operators in a position similar to that of a trustee. *See* *Hale v. CNX Gas Co., LLC, 2011 U.S. Dist. LEXIS 52935, 2011 WL 4527447, at *26 (W.D. Va. Jan. 21, 2011)*. No similar statutory requirement **[**35]** exists here.

Plaintiffs also rely on Pennsylvania's Environmental Rights Amendment, *Pa. Const. art. I, § 27*, as a basis for finding a fiduciary relationship. This constitutional provision expressly names the Commonwealth as "trustee" of Pennsylvania's public natural resources and imposes on it a fiduciary duty "to 'conserve and maintain' the corpus of the trust." *Pa. Envt'l Def. Found. v. Commonwealth, 640 Pa. 55, 161 A.3d 911, 932 (Pa. 2017)* (quoting *Robinson Twp. v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 957 (Pa. 2013)*). Plaintiffs fail to clarify how this provision's imposition of a fiduciary duty upon the Commonwealth to act in the best interest of its citizens with respect to public natural resources bears on Plaintiffs' request for imposition of a fiduciary duty on Columbia to act in the best interest of Plaintiffs with respect to their personal property. Plaintiffs cite to no authority—constitutional, statutory, or otherwise—supporting the imposition of a fiduciary duty between a natural gas company and a landowner when the former obtains an easement from the latter for the installation of a gas pipeline. Thus, their breach of fiduciary duty claim will be dismissed.

6. The Negligent Construction and Failure to Maintain Claim

Finally, Columbia seeks dismissal of Plaintiffs' negligence claim. To succeed on this claim, Plaintiffs must establish that: **[**36]** (1) Columbia owed Plaintiffs a duty of care; (2) Columbia breached this duty; and, (3) the breach resulted in injury. *McCandless v. Edwards, 2006 PA Super 247, 908 A.2d 900, 904 (Pa. Super. 2006)*. Columbia contends that Plaintiffs fail to produce evidence suggesting that it breached its duty of care. Specifically, it argues that the applicable duty of care was set forth by the requirements of FERC relative to the construction of the pipeline. Because, says Columbia, there is no evidence that any FERC regulations were violated, its conduct with respect to the easement area could not have been negligent.

Again, Columbia fails to cite relevant authority in support of its position. But it does note that:

> the determination of whether an act or failure to act constitutes negligence, of any degree, in view of all the evidence has always been particularly committed to determination by a jury. It is an issue that may be removed from consideration by a jury and decided as a matter of law only where the case is entirely free from **[*428]** doubt and there is no possibility that a reasonable jury could find negligence.

Snead v. Soc'y for Prevention of Cruelty to Animals of Pa., 2007 PA Super 204, 929 A.2d 1169, 1183 (2007) (citations omitted). Here, Plaintiffs present evidence from which a jury could conclude that various water diversion features were removed from Plaintiffs' property **[**37]** during construction of the 1278 line. There is evidence indicating that Columbia's construction manager saw an issue with the property grading following installation. There is no indication that Columbia ever attempted to address this issue. Plaintiffs have documented water-related damage to their property including land-subsidence problems, which their expert attributes to accelerating surface and subsurface erosion.[5] From this evidence, a reasonable jury could find that the amount of water runoff on Plaintiffs' property has increased since the installation of the 1278 line, and that Columbia was negligent in failing to implement adequate stormwater management measures.

So, the negligence claim will proceed, along with the nuisance, trespass, and SWMA claims, limited by the timeliness concerns addressed above. An appropriate order follows.

July 19, 2021

BY THE COURT:

/s/ Wendy Beetlestone, J.

WENDY BEETLESTONE, J.

ORDER

AND NOW, this 19th day of July, 2021, upon consideration of Defendant Columbia Gas Transmission, LLC's ("Columbia") Motion for Summary Judgment (ECF Nos. 61 & 85) and Plaintiffs' response thereto (ECF Nos. 84 & 86-1); Columbia's Motion to Preclude the Testimony and Opinions **[**38]** of Chad Ingram (ECF No. 60) and Plaintiffs' response thereto (ECF No. 81); and Columbia's Motion to Preclude the Testimony and Opinions of James Tupitza (ECF No. 59) and Plaintiffs' response thereto (ECF No. 80), **IT IS ORDERED** that:

1. Columbia's Motion for Summary Judgment (ECF No. 61) is **GRANTED IN PART** and **DENIED IN PART**:

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[5] Columbia takes issue with the inability of Plaintiffs' expert to state with certainty whether the sinkhole which began to develop on Plaintiffs' property in February 2018 was due to the presence of soluble limestone in the sinkhole area or Columbia's reliance on poor backfilling methods when constructing the 1278 line. Columbia may seek to explore this issue during cross-examination, *see Kannankeril, 128 F.3d at 806*, but it is not dispositive to the present motion. Plaintiffs' primary contention is that this and their other water-related injuries were caused by enhanced stormwater runoff, which in turn was caused by Columbia's ongoing failure to install adequate stormwater controls.

a. With respect to Count Two (negligent construction and failure to maintain), Count Four (violation of the Pennsylvania Storm Water Management Act), Count Five (nuisance), and Count Six (trespass), the Motion is **DENIED**.

b. With respect to Count Seven (breach of fiduciary duty), the Motion is **GRANTED**, and this claim is **DISMISSED WITH PREJUDICE**.

2. Columbia's Motion to Preclude the Testimony and Opinions of Chad Ingram (ECF No. 60) is **DENIED.**

3. Columbia's Motion to Preclude the Testimony and Opinions of James Tupitza (ECF No. 59) is **DENIED WITHOUT PREJUDICE**.

BY THE COURT:

/s/ Wendy Beetlestone, J.

WENDY BEETLESTONE, J.

Siegler v. Sorrento Therapeutics, Inc.

United States Court of Appeals for the Federal Circuit

July 20, 2021, Decided

2020-1435

Reporter
2021 U.S. App. LEXIS 21391 *; 2021 U.S.P.Q.2D (BNA) 771; __ Fed.Appx. __; 2021 WL 3046590

SARA ELIZABETH SIEGLER, SARA ELIZABETH SIEGLER, Plaintiffs-Appellants v. SORRENTO THERAPEUTICS, INC., TNK THERAPEUTICS, INC., BDL PRODUCTS, INC., CARGENIX HOLDINGS LLC, PROSPECT CHARTERCARE ROGER WILLIAMS MEDICAL CENTER LLC, HENRY JI, STEVEN C. KATZ, TUFTS MEDICAL CENTER, Defendants-Appellees RICHARD PAUL JUNGHANS, Defendant

Notice: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[*1]** Appeal from the United States District Court for the Southern District of California in No. 3:18-cv-01681-GPC-MSB, Judge Gonzalo P. Curiel.

Siegler v. Sorrento Therapeutics, Inc., 2019 U.S. Dist. LEXIS 62813, 2019 WL 1574321 (S.D. Cal., Apr. 11, 2019)
Siegler v. Sorrento Therapeutics, Inc., 2019 U.S. Dist. LEXIS 23779 (S.D. Cal., Feb. 12, 2019)
Siegler v. Sorrento Therapeutics, Inc., 2019 U.S. Dist. LEXIS 216776, 2019 WL 6877594 (S.D. Cal., Dec. 17, 2019)
Siegler v. Sorrento Therapeutics, Inc., 2019 U.S. Dist. LEXIS 103674, 2019 WL 2549248 (S.D. Cal., June 20, 2019)
Siegler v. Sorrento Therapeutics, Inc., 2019 U.S. Dist. LEXIS 129755, 2019 WL 3532294 (S.D. Cal., Aug. 2, 2019)
Siegler v. Sorrento Therapeutics, Inc., 2018 U.S. Dist. LEXIS 186709, 2018 WL 9516052 (S.D. Cal., Oct. 31, 2018)

Disposition: AFFIRMED.

Core Terms

district court, Therapeutics, board of directors, second amended complaint, amended complaint, motion to dismiss, patent, trade secret, pleadings, argues, entity, allegations, amend, reconsideration motion, entry of default, cognizable, default, third amended complaint, copyright infringement, motion for default, default judgment, misappropriation, documents, motions, merits, motion for leave, judicial notice, fail to state, notice, rights

LexisNexis® Headnotes

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN1[] **Preclusion of Judgments, Law of the Case**

Under the law of the case doctrine, when a court decides on a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. This rule of practice promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues. While courts should be loath to revisit prior decisions of its own or of a coordinate court absent extraordinary circumstances, they have the power to do so in any circumstance.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

HN2[] **Involuntary Dismissals, Failure to Prosecute**

9th Cir. R. 42-1 contains no indication that a dismissal for failure to prosecute an appeal to hearing necessarily constitutes an adjudication on the merits.

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

HN3[] **Judicial Review, Jurisdiction**

Circuit courts may establish a bankruptcy appellate panel composed of bankruptcy judges to hear and determine certain appeals from bankruptcy courts. *28 U.S.C.S. § 158(a)*, *(b)(1)*, *(c)(1)*. The decisions of the bankruptcy appellate panel may be appealed to the circuit courts. *28 U.S.C.S. § 158(c)(2)*, *(d)(1)*.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN4[] **Estoppel, Collateral Estoppel**

Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. For the doctrine to apply, the party asserting preclusion must establish, inter alia, that the first proceeding ended with a final judgment on the merits.

Patent Law > Jurisdiction & Review > Standards of Review

HN5[] **Jurisdiction & Review, Standards of Review**

An appellate court reviews issues not unique to patent law under the law of the regional circuit in which the appeal would otherwise lie.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN6[] **Standards of Review, De Novo Review**

The Ninth Circuit reviews the grant of a motion to dismiss de novo. To survive a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Accordingly, an appellate court will affirm a dismissal for failure to state a claim where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory.

Civil Procedure > Parties > Pro Se Litigants > Pleading Standards

HN7[] **Pro Se Litigants, Pleading Standards**

Pro se litigants remain bound by the rules of procedure, even though courts are to construe their pleadings liberally.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN8[] **Complaints, Requirements for Complaint**

The failure to state a plausible claim is not a mere technical deficiency but a substantive shortcoming in a plaintiff's claim. Under the Federal Rules of Civil Procedure, plaintiffs must state a cognizable basis for relief—based on their factual allegations and without regard to their ability to prove those allegations—before they can proceed to proving the allegations and obtaining relief. A plaintiff's inability to simply state a cognizable basis for relief and the facts to support it is a basic deficiency that should be exposed at the point of minimum expenditure of time and money by the parties and the court.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Real Property Law > ... > Elements > Involuntary Acquisition & Diminution of Value > Takings

HN9[] **Fundamental Rights, Eminent Domain & Takings**

The Constitution generally protects individual rights only from government action, not from private action. Included in these individual rights is the *Fifth Amendment's* guarantee against government seizure of private property for public use without just compensation. The *Takings Clause of the Fifth Amendment* does not apply to a private party unless the private action may fairly be treated as that of the state.

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Expression & Idea Distinguished

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Scope of Protection

HN10[] **Statutory Copyright & Fixation, Expression & Idea Distinguished**

The copyright laws do not protect concepts or ideas in copyrighted works.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN11[] **Motions to Dismiss, Failure to State Claim**

Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice to state a cognizable claim.

Copyright Law > Scope of Copyright Protection > Publication

HN12[] **Scope of Copyright Protection, Publication**

17 U.S.C.S. § 705 plainly permits public inspection of certain records and indexes, as well as the articles deposited in connection with completed copyright registrations and retained under the control of the Copyright Office. *17 U.S.C.S. § 705(b)*; *37 C.F.R. § 201.2*.

Civil Procedure > Parties > Capacity of Parties

HN13[] **Parties, Capacity of Parties**

Under the Federal Rules of Civil Procedure, for parties other than an individual or corporation, their capacity to be sued is determined by the law of the state where the court is located. *Fed. R. Civ. P. 17(b)*.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > Ability to Engage in Litigation

HN14[] **Powers, Ability to Engage in Litigation**

California's Corporation Code only identifies a corporation or association as entities that may be sued. *Cal. Corp. Code § 105*. Under California law, a plaintiff may not sue a corporation's board of directors as an entity separate from the corporation.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

HN15[] **Clayton Act, Claims**

Section 14 of the Clayton Act extends a corporation's violation of a penal provision of the antitrust laws to individual directors who authorized or ordered the acts constituting the violation. *15 U.S.C.S. § 24*.

Business & Corporate Compliance > ... > Sole Proprietorships > Business & Corporate Law > Sole Proprietorships

HN16[] **Businesses & Corporations, Sole Proprietorships**

Under Ohio law, a sole proprietorship has no legal identity separate from that of the individual who owns it.

Constitutional Law > Congressional Duties & Powers > Bills of Attainder & Ex Post Facto Clause > Bills of Attainder

HN17[] Bills of Attainder & Ex Post Facto Clause, Bills of Attainder

Bills of attainder are legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. *U.S. Const. art. I, §§ 9-10*.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Relief From Default

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Judgments > Relief From Judgments

HN18[] Standards of Review, Abuse of Discretion

The Ninth Circuit reviews denials of motions for default judgment, leave to amend, and reconsideration for abuse of discretion. A district court abuses its discretion when it makes an error of law, when it rests its decision on clearly erroneous findings of fact, or when the appellate court is left with a definite and firm conviction that the district court committed a clear error of judgment.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

Civil Procedure > ... > Default & Default Judgments > Default Judgments > Entry of Default Judgments

Civil Procedure > ... > Default & Default Judgments > Entry of Default > Failure to Pursue Cause

HN19[] Default & Default Judgments, Default Judgments

Fed. R. Civ. P. 55 provides a two-step process for obtaining an entry of default judgment. First, a party must secure an entry of default by the court clerk. *Fed. R. Civ. P. 55(a)*. The entry of default is an official recognition of the fact that one party is in default. A defendant who fails to answer within the time specified by the rules is in default even if that fact is not officially noted, i.e., even if there is no entry of default. Second, only after an entry of default may a party seek a default judgment.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Relief From Default

Civil Procedure > Judgments > Relief From Judgments

HN20[] Default & Default Judgments, Relief From Default

A district court may set aside an entry of default for good cause under *Fed. R. Civ. P. 55(c)* or a final default judgment under *Fed. R. Civ. P. 60(b)*. *Fed. R. Civ. P. 55(c)*.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN21[] Amendment of Pleadings, Leave of Court

Fed. R. Civ. P. 15(a) provides that a party may amend its complaint once as a matter of course before a responsive pleading is served. Fed. R. Civ. P. 15(a)(1). In all other cases, a party may only amend its pleading with the opposing party's written consent or the court's leave. Fed. R. Civ. P. 15(a)(2). A court should freely give leave when justice so requires. But the liberality in granting leave to amend is subject to the qualification that amendment of the complaint does not cause the opposing party undue prejudice, is not sought in bad faith, and does not constitute an exercise in futility.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN22[] Motions to Dismiss, Failure to State Claim

A court deciding a Fed. R. Civ. P. 12(b)(6) motion must accept all factual allegations in the complaint as true. No evidentiary proof of factual allegations is required.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN23[] Standards of Review, Abuse of Discretion

An abuse of discretion occurs where a district court abuses its discretion when it makes an error of law, when it rests its decision on clearly erroneous findings of fact, or when the appellate court is left with a definite and firm conviction that the district court committed a clear error of judgment.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Governments > Courts > Rule Application & Interpretation

Evidence > Judicial Notice

HN24[] Standards of Review, Abuse of Discretion

The Ninth Circuit reviews the decision to take judicial notice for abuse of discretion. It reviews a district court's compliance with local rules under the same standard.

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN25[] Adjudicative Facts, Facts Generally Known

A court may only take judicial notice of adjudicative facts—facts of a particular case—that are not subject to reasonable dispute. Fed. R. Evid. 201.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN26[] **Procedural Due Process, Scope of Protection**

An opportunity to be heard does not require an oral or evidentiary hearing on the issue. The opportunity to brief the issue fully satisfies due process requirements.

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

HN27[] **Motion Practice, Content & Form**

Fed. R. Civ. P. 78 permit courts by rule or order to provide for submitting and determining motions on briefs, without oral hearings. *Fed. R. Civ. P. 78(b)*.

Counsel: SARA ELIZABETH SIEGLER, Pro se, Bedford, OH.

PETER STONE, Paul Hastings LLP, Palo Alto, CA, for defendants-appellees Sorrento Therapeutics, Inc., TNK Therapeutics, Inc., BDL Products, Inc., Cargenix Holdings LLC, Henry Ji. Also represented by KEVIN JAMES WHITE.

CHARLES M. MCMAHON, McDermott Will & Emery LLP, Chicago, IL, for defendants-appellees Prospect Chartercare Roger Williams Medical Center LLC, Steven C. Katz. Also represented by MICHAEL P. CHU; JIAXIAO ZHANG, Irvine, CA.

DAVID ALAN WOLLIN, Hinckley, Allen & Snyder LLP, Providence, RI, for defendant-appellee Tufts Medical Center.

Judges: Before PROST, SCHALL, and O'MALLEY, Circuit Judges.

Opinion by: O'MALLEY

Opinion

O'MALLEY, *Circuit Judge*.

Sara Elizabeth Siegler—and, purportedly, Sara Elizabeth Siegler ("SES"), a sole proprietorship that she owns and operates—appeals several decisions of the United States District Court for the Southern District of California. These include the denial of her motion for default judgment, the dismissals of her First and Second Amended Complaints, and the denials of her motions for reconsideration **[*2]** and motion for leave to amend. *See Siegler v. Sorrento Therapeutics, Inc. (Siegler I), No. 3:18-cv-01681-GPC-NLS, 2018 U.S. Dist. LEXIS 186709, 2018 WL 9516052 (S.D. Cal. Oct. 31, 2018)*; *Siegler v. Sorrento Therapeutics, Inc. (Siegler II), No. 3:18-cv-01681-GPC-NLS, 2019 U.S. Dist. LEXIS 23779, 2019 WL 581719 (S.D. Cal. Feb. 13, 2019)*; *Siegler v. Sorrento Therapeutics, Inc. (Siegler III), No. 3:18-cv-01681-GPC-MSB, 2019 U.S. Dist. LEXIS 62813, 2019 WL 1574321 (S.D. Cal. Apr. 11, 2019)*; *Siegler v. Sorrento Therapeutics, Inc. (Siegler IV), No. 3:18-cv-01681-GPC-NLS, 2019 U.S. Dist. LEXIS 103674, 2019 WL 2549248 (S.D. Cal. June 20, 2019)*; *Siegler v. Sorrento Therapeutics, Inc. (Siegler V), No. 3:18-cv-01681-GPC-NLS, 2019 U.S. Dist. LEXIS 129755, 2019 WL 3532294 (S.D. Cal. Aug. 2, 2019)*; *Siegler v. Sorrento Therapeutics, Inc. (Siegler VI), No. 3:18-cv-01681-GPC-MSB, 2019 U.S. Dist. LEXIS 216776, 2019 WL 6877594 (S.D. Cal. Dec. 17, 2019)*. Because we are unpersuaded by Siegler's arguments, we *affirm*.

I. BACKGROUND

A. Factual Background

Given the procedural posture of this matter, we assume the facts Siegler alleges are true. Siegler, a resident of Ohio, owns and operates an Ohio-based sole proprietorship in her own name, SES. According to Siegler, SES is "an early stage micro-entity without any marketed pharmaceutical products to date" and a "potential participant in the CAR T cell pharmaceutical market both domestically and abroad."[1] *Siegler II, 2019 U.S. Dist. LEXIS 23779, 2019 WL 581719, at *2*. In 2013, Siegler began collaborating with Dr. Richard Paul Junghans on developing new CAR T cell-based therapeutics for virology and oncology indications. See *id.* As part of the collaboration, Siegler authored two scientific articles, "In Vivo Testing of 3rd Generation Anti-CEA Designer CAR T Cells with Bcl-XL in Pancreatic Cancer" and "Phase 1b/2 Study of [2nd Generation] Anti-CEA Designer CAR T Cells in Breast Cancer."[2] *Id.* In 2015, Siegler registered these articles with the United States Copyright Office. *Id.* Around this time, Siegler made plans to use a facility at Prospect CharterCARE Roger Williams Medical Center LLC ("RWMC") to develop **[*3]** her research. *Id.*

Meanwhile, Dr. Junghans became employed on a part-time basis at Tufts Medical Center, a non-profit medical institution that is incorporated and has its principal place of business in Massachusetts. *See 2019 U.S. Dist. LEXIS 23779, [WL] at *2, *17*. Dr. Junghans also founded a company, BDL Products, Inc. *2019 U.S. Dist. LEXIS 23779, [WL] at *2*. TNK Therapeutics, Inc., a wholly owned subsidiary of Sorrento Therapeutics, Inc., later acquired BDL Products. *See 2019 U.S. Dist. LEXIS 23779, [WL] at *3*. They executed a Stock Purchase Agreement that was allegedly contingent on an exclusive license to several CARs between TNK Therapeutics and CARgenix Holdings LLC. *Id.* According to Siegler, these agreements contained a restrictive covenant that prohibited Dr. Junghans and Tufts Medical Center from working with her on their original collaboration. *Id.* Siegler ultimately terminated her relationship with Dr. Junghans. *Id.*

In 2016, Sorrento Therapeutics and TNK Therapeutics entered into an Immunotherapy Research Collaboration Agreement with RWMC. *Id.* According to Siegler, the agreement effectively precluded her from using the RWMC facility at which she planned to develop her research. *Id.* A 2018 extension of the agreement expressly placed the operation of the RWMC facility **[*4]** under Sorrento Therapeutics's management. *See id.*

Sorrento Therapeutics also executed a Sponsored Research Agreement with Tufts Medical Center. *2019 U.S. Dist. LEXIS 23779, [WL] at *4*. Under that contract, Sorrento Therapeutics awarded Tufts Medical Center funding for "discrete research to be conducted by Dr. Junghans at Tufts Medical Center in Boston, Massachusetts." *Id.* The two entities executed a second Sponsored Research Agreement the next year. *See id.*

Around this time in 2016, Sorrento Therapeutics and TNK Therapeutics entered into several more contracts with other companies. These included joint-venture agreements to commercialize anti-CEA CAR T constructs abroad and licenses to CAR T constructs. *See id.*

Additionally, in 2016, RWMC initiated a clinical trial to study the use of anti-CEA CAR T cells as a potential treatment for liver and pancreatic cancers. *2019 U.S. Dist. LEXIS 23779, [WL] at *3*.

Finally, RWMC filed two U.S. patent applications, No. 15/210,818 ("the '818 application") and No. 15/099,370 ("the '370 application"). *2019 U.S. Dist. LEXIS 23779, [WL] at *4*. Tufts Medical Center also filed a provisional application, Application No. 62/362,825 ("the '825 application"). *See id.* These applications related to anti-CEA CAR T cell constructs. The U.S. Patent and Trademark **[*5]** Office has only granted the '818 application, which issued on September 11, 2018, as U.S. Patent No. 10,071,118 ("the '118 patent"). *See id.*

B. Procedural History

1. Dismissal of the First Amended Complaint

On July 24, 2018, Siegler and SES sued Sorrento Therapeutics, TNK Therapeutics, CARgenix Holdings, BDL Products, and Sorrento Therapeutics's CEO Dr. Henry Ji (collectively, the "Sorrento Defendants"), as well as the Board of Directors of Sorrento Therapeutics, RWMC, an equity owner of CARgenix Holdings named Dr. Steven C. Katz, and Dr. Junghans. On August 20, 2018, Siegler and SES filed a First Amended Complaint as a matter of right, naming Tufts Medical Center as an additional defendant.

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[1] CAR T cells, or CARs, are chimeric antigen receptor T cells. CAR T cells are a potential cancer treatment.

[2] Anti-CEA CAR T cells target the carcinoembryonic antigen ("CEA") on tumor cells.

According to the First Amended Complaint, the defendants unlawfully researched anti-CEA CAR T cell constructs, mentioned them in corporate presentations, and filed related patent applications. Based on these allegations, Siegler asserted claims of copyright infringement and trade secret misappropriation, as well as a *Fifth Amendment* takings claim. Based on her allegations of the defendants' various business and contractual dealings, Siegler also asserted violations of the *Sherman Act*, the *Clayton Act*, the Foreign Trade Anti-Trust Improvement Act, and California's Unfair **[*6]** Competition Law. Finally, Siegler sought a declaratory judgment that RWMC's '818 application was invalid.

The Sorrento Defendants moved to dismiss the First Amended Complaint. *2019 U.S. Dist. LEXIS 23779, [WL] at *1*. Each of the other named defendants, except for the Board of Directors of Sorrento Therapeutics, timely joined the motion to dismiss. *See id.* Tufts Medical Center also moved to dismiss for lack of personal jurisdiction. *2019 U.S. Dist. LEXIS 23779, [WL] at *1, *17*.

The Board of Directors of Sorrento Therapeutics maintained that it is not a legal entity capable of being sued, as set forth in the Sorrento Defendants' motion to dismiss, but belatedly joined the motion over 21 days after service of process. *See* Notice of Joinder & Joinder by Putative Defendant the Board of Directors of Sorrento Therapeutics, Inc. in the Sorrento Defendants' Motion to Dismiss Plaintiff's Amended Complaint at 1, *Siegler II, 2019 U.S. Dist. LEXIS 23779, 2019 WL 581719* (No. 3:18-cv-01681-GPC-NLS); Memorandum of Points & Authorities in Support of the Omnibus Motion at 16-17, *Siegler I, 2018 U.S. Dist. LEXIS 186709, 2018 WL 9516052* (No. 3:18-cv-01681-GPC-NLS).

On October 30, 2018, Siegler moved for an entry of default and an order granting default judgment against the Board of Directors. Memorandum of Points & Authorities **[*7]** in Support of the Omnibus Motion at 16-17, *Siegler I, 2018 U.S. Dist. LEXIS 186709, 2018 WL 9516052* (No. 3:18-cv-01681-GPC-NLS). The district court denied Siegler's request for failure to secure an entry of default from the Clerk, pursuant to *Rule 55 of the Federal Rules of Civil Procedure*. *Siegler I, 2018 U.S. Dist. LEXIS 186709, 2018 WL 9516052, at *2*. The court denied Siegler's subsequent motion for reconsideration but welcomed Siegler to request an entry of default anew. *Siegler v. Sorrento Therapeutics, Inc., No. 3:18-cv-01681-GPC-NLS, 2018 U.S. Dist. LEXIS 204324, 2018 WL 6303728, at *1-2 (S.D. Cal. Dec. 3, 2018)*.

Siegler also moved for leave to amend the First Amended Complaint. *Siegler II, 2019 U.S. Dist. LEXIS 23779, 2019 WL 581719, at *6*. She sought to update her pleadings in two ways: (1) to incorporate the Patent Office's issuance of the '818 application as the '118 patent and (2) to identify a database of SES's, the defendants' copying of which potentially infringed Siegler's copyrights. *Id.*

On February 13, 2019, the district court granted both the Sorrento Defendants' and Tufts Medical Center's motions to dismiss and granted in part Siegler's motion to file a Second Amended Complaint. *2019 U.S. Dist. LEXIS 23779, [WL] at *20-21*. The court decided these motions without oral argument, pursuant to Civil *Local Rule 7.1(d)(1)* of the Local Rules of Practice for the United States District Court for the Southern District of California ("Local Rules"), and vacated the scheduled hearing. *2019 U.S. Dist. LEXIS 23779, [WL] at *1, *21*.

The district court dismissed all claims against the Board of Directors of Sorrento **[*8]** Therapeutics, as well as the takings claim against all defendants, with prejudice. The court explained that a corporate board of directors is not a separate entity from the corporation it manages and that it lacks the capacity to be sued. *2019 U.S. Dist. LEXIS 23779, [WL] at *14*. The court found no evidence that the Board of Directors existed independent of Sorrento Therapeutics and rejected Siegler's argument that she could sue it pursuant to *Section 14* of the Clayton Act—which provides for personal liability of a corporation's individual directors, officers, or agents where the corporation violates the penal provisions of ***antitrust law***. *2019 U.S. Dist. LEXIS 23779, [WL] at *13-14*. The court also explained that the *Fifth Amendment* applies only to government action. *2019 U.S. Dist. LEXIS 23779, [WL] at *16*. Because the court found no basis here for extending the *Fifth Amendment* to private entities, the court determined that further amendment would be futile. *2019 U.S. Dist. LEXIS 23779, [WL] at *16-17*.

The district court dismissed Siegler's copyright infringement, trade secret misappropriation, and antitrust claims without prejudice. *See* *2019 U.S. Dist. LEXIS 23779, [WL] at *7-16*. The court explained how the First Amended Complaint failed to state specific elements of each of these claims but granted Siegler leave to amend them. *See* *2019 U.S. Dist. LEXIS 23779, [WL] at *7-16*. The court advised Siegler to: (a) specifically identify the protectable elements of her copyrighted **[*9]** works that the defendants allegedly unlawfully copied, (b) clarify what trade secrets, if any, were misappropriated, (c) provide details about whether she redacted any of her submissions to the Copyright Office that allegedly contained trade secrets, and (d) allege the existence of a relevant market and an antitrust injury, both of which were required for her antitrust claims. *See* *2019 U.S. Dist. LEXIS 23779, [WL] at *9, *11-13, *13 n.11*. The district court also dismissed without prejudice Siegler's patent invalidity claim. *2019 U.S. Dist. LEXIS 23779, [WL at *14, *16*.

The district court further determined that it had no personal jurisdiction—general or specific—over Tufts Medical Center. *2019 U.S. Dist. LEXIS 23779, [WL] at *18, *20*. The court found that the defendant was not at home in California and that its two contracts with Sorrento Therapeutics were insufficient minimum contacts with the State of California. *See* *2019 U.S. Dist. LEXIS 23779, [WL] at *18-20*. The court rejected Siegler's argument that personal jurisdiction could be grounded in *Section 12* of the Clayton Act—which provides nationwide personal jurisdiction for antitrust suits—because it had dismissed Siegler's antitrust claims. *2019 U.S. Dist. LEXIS 23779, [WL] at *20*. But the court granted Siegler leave to amend because a second amended complaint (a) might be able to allege general jurisdiction and (b) may adequately plead antitrust claims supporting **[*10]** personal jurisdiction under *Section 12* of the Clayton Act. *Id.*

Finally, two other determinations by the district court are relevant to this appeal. First, the district court concluded that only Siegler herself, not SES, was a plaintiff. *2019 U.S. Dist. LEXIS 23779, [WL] at *1 n.1*. The court explained that, under Ohio law, a sole proprietorship has no legal identity separate from that of the individual who owns it. *Id.* Second, the district court declined to take judicial notice of several links to Securities and Exchange Commission ("SEC") filings in the First Amended Complaint. *2019 U.S. Dist. LEXIS 23779, [WL] at *1 n.2*. The court explained that, even though it could take notice of the content of the filings and the fact that they were filed, it could not take notice of the truth of the content or any inferences drawn therefrom. *Id.*

Siegler subsequently moved for reconsideration of the district court's dismissal of the First Amended Complaint. *Siegler III, 2019 U.S. Dist. LEXIS 62813, 2019 WL 1574321, at *1*. The court denied the motion, reasoning that Siegler had not identified any new evidence or new law and that the court had not committed clear error in dismissing the First Amended Complaint. *2019 U.S. Dist. LEXIS 62813, [WL] at *2*. The court also faulted Siegler for failing to provide an affidavit accompanying her motion, as required by the Local Rules. *Id.*

2. Dismissal of the **[*11]** Second Amended Complaint

On May 3, 2019, Siegler and SES filed a Second Amended Complaint against all previously named defendants. *Siegler V, 2019 U.S. Dist. LEXIS 129755, 2019 WL 3532294, at *5*. The Second Amended Complaint retained her claims of copyright infringement, trade secret misappropriation, a *Fifth Amendment* taking, antitrust violations, and invalidity of the '118 patent. *Id.* Siegler added new claims of unjust, uncompensated takings in violation of the *Fourteenth Amendment* and unjust enrichment. *Id.* Siegler also added challenges to the validity of RWMC's '370 application and Tufts Medical Center's '825 application. *2019 U.S. Dist. LEXIS 129755, [WL] at *6*.

Siegler's factual allegations remained largely unchanged. *Id.* She added that she sent Dr. Junghans drafts of the articles that she later registered with the Copyright Office. *2019 U.S. Dist. LEXIS 129755, [WL] at *2, *6*. She also alleged that Dr. Junghans executed a nondisclosure agreement with Sorrento Therapeutics that was intended to scuttle Siegler out of their planned collaboration and to deprive her of her right of first refusal on Dr. Junghans's inventions. *Id.* Finally, Siegler replaced the Board of Directors of Sorrento Therapeutics with its individual members.*2019 U.S. Dist. LEXIS 129755, [WL] at *6*.

The Sorrento Defendants moved to dismiss the Second Amended Complaint, and the other defendants joined the motion. *2019 U.S. Dist. LEXIS 129755, [WL] at *1 & n.1*. **[*12]** Tufts Medical Center also moved to dismiss for lack of personal jurisdiction. *2019 U.S. Dist. LEXIS 129755, [WL] at *1*.

Around this time, Siegler moved for leave to file a third amended complaint to supplement the Second Amended Complaint with "[n]ewly discovered information and additional updates" and a chart of various web documents. *Siegler IV, 2019 U.S. Dist. LEXIS 103674, 2019 WL 2549248, at *4*. The court denied her leave because Siegler neither detailed how she would integrate the web documents into a third amended complaint nor attached a proposed amended pleading. *Id.* The court added that it was not apparent how the web documents related to or cured any of the deficiencies in Siegler's pleadings. *Id.* For similar reasons, the court denied Siegler's motion for reconsideration of her motion for leave to amend. *Siegler V, 2019 U.S. Dist. LEXIS 129755, 2019 WL 3532294, at *26*. The court added that, after reviewing the purportedly newly discovered information that Siegler sought to include in a third amended complaint, "the Court is confident that none of the information contained therein would have cured the deficiencies" in her pleadings. *Id.*

On August 2, 2019, the court granted the Sorrento Defendants' motion to dismiss and denied Tufts Medical Center's motion to dismiss for lack of personal jurisdiction as moot. *2019 U.S. Dist. LEXIS 129755, [WL] at *1, *24*. As before, **[*13]** the court decided these motions without oral argument. *2019 U.S. Dist. LEXIS 129755, [WL] at *1*.

The district court dismissed all of Siegler's claims with prejudice because Siegler failed to cure the previously identified deficiencies. *See* *2019 U.S. Dist. LEXIS 129755, [WL at *7, *26*. It found that further amendment would be futile. *See* *2019 U.S. Dist. LEXIS 129755, [WL] at *12-13, *18, *20-22*.

The court explained that Siegler failed to state a copyright infringement claim because the Second Amended Complaint did not plead protectable expression. *2019 U.S. Dist. LEXIS 129755, [WL] at *8*. The court rejected Siegler's theory of copyright—"if I obtain copyright registration for an article *describing* a scientific discovery, course of treatment, or cell construct, then I also get to prevent others from performing, commercializing, or utilizing the same." *2019 U.S. Dist. LEXIS 129755, [WL] at *10*. The court added that Siegler inadequately alleged copying, as well. For the same reasons, the court dismissed Siegler's unjust enrichment claim, which was predicated on the same allegations as her copyright infringement claim.[3] *2019 U.S. Dist. LEXIS 129755, [WL] at *12*.

The court also explained that Siegler failed to state a trade secret misappropriation claim because the Second Amended Complaint did not specify any particular trade secrets. *2019 U.S. Dist. LEXIS 129755, [WL] at *13*. According to the court, Siegler's failure to allege that she redacted her copyright registrations when she **[*14]** filed with the Copyright Office precluded a favorable determination of trade secrets as a matter of law. *2019 U.S. Dist. LEXIS 129755, [WL] at *12*. Indeed, the court had previously explained that registration necessarily required some degree of public exposure and that submissions to the Copyright Office were publicly accessible. *See* *Siegler II, 2019 U.S. Dist. LEXIS 23779, 2019 WL 581719, at *10* (citing, *inter alia*, *17 U.S.C. § 705(b)*). Moreover, the court found that the Second Amended Complaint's new allegation that Siegler sent drafts of the copyrighted articles to Dr. Junghans contradicted the existence of a trade secret. *Siegler V, 2019 U.S. Dist. LEXIS 129755, 2019 WL 3532294, at *13*.

The court next explained that Siegler failed to state an antitrust violation because she inadequately alleged (1) the existence of a relevant market and (2) an injury to competition. *See* *2019 U.S. Dist. LEXIS 129755, [WL] at *14-18*. Indeed, even assuming that Siegler had adequately alleged a market of CAR T cell goods, the court found that Siegler's newly pled allegations of other entities' viable CAR T projects contradicted her claim that the defendants had reduced competition in the market. *2019 U.S. Dist. LEXIS 129755, [WL] at *17*. The court dismissed Siegler's claims under *Section 14* of the Clayton Act and California law because they depended on the same inadequate allegations as her antitrust claims. *2019 U.S. Dist. LEXIS 129755, [WL] at *18*.

The court also reiterated that it previously dismissed Siegler's *Fifth Amendment* **[*15]** takings claim with prejudice because the *Fifth Amendment* generally only applies to government action. *2019 U.S. Dist. LEXIS 129755, [WL] at *21-22*. For the same reason, the court dismissed Siegler's new *Fourteenth Amendment* claim with prejudice. *Id.*

[3] The court additionally held that the Copyright Act preempted Siegler's state-law cause of action. *Siegler V, 2019 U.S. Dist. LEXIS 129755, 2019 WL 3532294, at *12*.

The court finally dismissed Siegler's challenges to RWMC's '118 patent, its '370 application, and Tufts Medical Center's '825 application. *2019 U.S. Dist. LEXIS 129755, [WL] at *19-21*.

Because the court dismissed the entirety of the Second Amended Complaint with prejudice, as noted previously, the court determined that Tufts Medical Center's motion to dismiss for lack of personal jurisdiction was moot. *2019 U.S. Dist. LEXIS 129755, [WL] at *24*.

On December 17, 2019, the district court denied Siegler's motion to reconsider its dismissal of all claims in the Second Amended Complaint with prejudice. *Siegler VI, 2019 U.S. Dist. LEXIS 216776, 2019 WL 68877594, at *6*. The court reaffirmed its substantive rulings, further explaining that (1) it applied the correct standard in resolving the defendants' *Rule 12(b)(6)* motion to dismiss and (2) its dismissal with prejudice due to the futility of further amendment was proper. *2019 U.S. Dist. LEXIS 216776, [WL] at *6-7*.

3. Siegler's Appeals

On January 16, 2020, Siegler filed two notices of appeal. Her notice to the Ninth Circuit purported to appeal the district court's dismissal of her non-patent claims and its denials of her motions for reconsideration. Appellee's Appx. 149-50. Her notice to this court purported to appeal only the district court's dismissal of her patent invalidity claims. *Id.* at 153. In her briefing before **[*16]** this court, however, Siegler instead addressed other issues.

On January 27, 2020, the Ninth Circuit ordered Siegler to pay the filing and docketing fees for her appeal or to file a motion to proceed in forma pauperis within 21 days. *Siegler v. Sorrento Therapeutics, Inc. (Siegler VII), No. 20-55087, 2020 U.S. App. LEXIS 15419, 2020 WL 4218311, at *1 (9th Cir. 2020)*. On May 13, 2020, the Ninth Circuit dismissed Siegler's appeal for failure to comply with the court's orders, pursuant to *Rule 42-1* of the Ninth Circuit Rules. *Id.* The next day, the district court set an appeal mandate hearing. On June 8, 2020, the district court ordered the spreading of the mandate.[4]

We have jurisdiction pursuant to *28 U.S.C. § 1295(a)(1)*.

II. Discussion

Siegler presents ten issues for review on appeal. These issues cover numerous substantive and procedural determinations by the district court from the denial of her motion for default judgment against the Board of Directors of Sorrento Therapeutics through the denial of her motion for reconsideration of the dismissal of the Second Amended Complaint. Siegler also objects to the district court's setting of an appeal mandate hearing date after she filed her notices of appeal. But before we reach Siegler's arguments, we first address the appellees' assertion that the Ninth Circuit's mandate **[*17]** and the district court's spreading of the mandate constituted an adjudication on the merits of Siegler's non-patent claims.

A. The Ninth Circuit's Dismissal

Based on the Ninth Circuit's dismissal of Siegler's appeal for failure to comply with its orders, the appellees argue that the law of the case and collateral estoppel preclude our consideration of the arguments Siegler makes as to her non-patent claims. We disagree; the appellees read too much into the Ninth Circuit's dismissal.

At the outset, we have exclusive jurisdiction over Siegler's entire case, including her non-patent claims, because this court's jurisdiction is case-specific, not issue-specific, and because this case in part arises under patent law. *28 U.S.C. § 1295(a)(1)*. Here, Siegler sought a declaratory judgment of patent invalidity, which the district court dismissed with prejudice. *See* *Zenith Elecs. Corp. v. Exzec, Inc., 182 F.3d 1340, 1346 (Fed. Cir. 1999)* ("Our exclusive jurisdiction over matters arising in whole or in part under the patent laws is not defeated by the fact that the patent claims have been dismissed with prejudice."). That we have exclusive jurisdiction over Siegler's appeal

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[4] Some district courts schedule a date on which the mandate is "spread" and the federal appellate judgment becomes final. *See* *Calderon v. U.S. Dist. Ct., 128 F.3d 1283, 1286 n.2 (9th Cir. 1997)*, *overruled on other grounds by* *163 F.3d 530 (9th Cir. 1998)* (en banc).

counsels against treating the Ninth Circuit's dismissal for failure to pay fees or to move to proceed in forma pauperis **[*18]** as an adjudication on the merits.

The doctrine of the law of the case provides the appellees no help. ***HN1***[] Under that doctrine, when a court decides on a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815-16, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)*. This rule of practice promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." *Id. at 816* (internal quotation marks and citation omitted). While courts should be loath to revisit prior decisions of its own or of a coordinate court absent extraordinary circumstances, they have the power to do so in any circumstance. *See id. at 817*.

Here, the Ninth Circuit's dismissal of Siegler's appeal does not operate as a decision on the merits of Siegler's non-patent claims, particularly where our sister circuit lacked jurisdiction over any of Siegler's claims. ***HN2***[] Moreover, *Ninth Circuit Rule 42-1* (as well as the dismissal order) contains no indication that a dismissal for failure to prosecute an appeal to hearing necessarily constitutes an adjudication on the merits.

The appellees' reliance on *In re Wiersma, 483 F.3d 933 (9th Cir. 2007)*, is misplaced. There, the Ninth Circuit considered whether the Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") had mistakenly dismissed **[*19]** an appeal from the bankruptcy court for failure to prosecute when it intended to dismiss the appeal as interlocutory.[5] *See id. at 939-40*. The Ninth Circuit rejected this interpretation of the record, finding "no evidence that the BAP's intent was to dismiss the appeal as interlocutory." *Id. at 940*. Separately, it found that the bankruptcy court's decision—*i.e.*, the subject of the appeal before the BAP—was "a complete adjudication of the issues at bar." *Id. at 938-39*. The appellees conflate these determinations. The Ninth Circuit did not hold that the BAP's dismissal for failure to prosecute operated as a complete adjudication on the merits. We therefore conclude that the doctrine of the law of the case does not preclude our review of Siegler's non-patent claims.

The doctrine of collateral estoppel is even more inapplicable here. ***HN4***[] Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Hydranautics v. FilmTec Corp., 204 F.3d 880, 885 (9th Cir. 2000)*. For the doctrine to apply, the party asserting preclusion must establish, *inter alia*, that the first proceeding ended with a final judgment on the merits. **[*20]** *See id.* Because Siegler's appeals to the Ninth Circuit and this court are not separate cases for purposes of collateral estoppel, and because the Ninth Circuit's dismissal was not a final judgment on the merits, collateral estoppel does not foreclose our review of Siegler's non-patent claims.

B. Siegler's Arguments on Appeal

HN5[] Turning to Siegler's arguments on appeal, we review issues not unique to patent law under the law of the regional circuit in which the appeal would otherwise lie. *Centocor Ortho Biotech, Inc. v. Abbott Labs., 636 F.3d 1341, 1347 (Fed. Cir. 2011)*. We group Siegler's arguments into three main categories. First, Siegler challenges the dismissal of several of her claims with prejudice. Second, Siegler protests the denials of many of her motions, including for default judgment, leave to amend, and reconsideration. Third, Siegler objects to other decisions by the district court, including its decision not to take judicial notice, its decision to decide motions without oral argument, and its decision to set an appeal mandate hearing.

1. Dismissal of Siegler's Claims

Siegler argues that the district court erroneously dismissed (a) her *Fifth Amendment* takings claim, (b) her trade secret misappropriation claim, and (c) her claims against the Board of Directors of Sorrento **[*21]** Therapeutics. *See* Appellant's Br. 1, 6-8, 16. Siegler also disagrees with the district court's determinations that (d) Siegler is the

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[5] ***HN3***[] Circuit courts may establish a bankruptcy appellate panel composed of bankruptcy judges to hear and determine certain appeals from bankruptcy courts. *See 28 U.S.C. § 158(a)*, *(b)(1)*, *(c)(1)*. The decisions of the bankruptcy appellate panel may be appealed to the circuit courts. *See id.* at *§ 158(c)(2)*, *(d)(1)*.

only plaintiff in the action and (e) the court lacked personal jurisdiction over Tufts Medical Center. *See id.* at 8, 23. We see no error.

HN6[] The Ninth Circuit reviews the grant of a motion to dismiss *de novo.* *Depot, Inc. v. Caring for Montanans, Inc., 915 F.3d 643, 652 (9th Cir. 2019)*. To survive a motion to dismiss under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Id.* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*). Accordingly, we will affirm a dismissal for failure to state a claim where "there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Id.*

Siegler asserts that "[t]he sufficiency of the [Second Amended Complaint] should not have been tested via *[Federal Rule of Civil Procedure] 12(b)(6)* . . . in light of the lessened standard that should have been applied to pleadings prepared by a *pro se* litigant." Appellant's Br. 9. Moreover, according to Siegler, any failure to state a claim for relief would be "a mere technical deficiency." *Id.; see also id.* at 7 ("Within this context, technical deficiencies in the pleadings of Appellants were the basis for the prejudicial **[*22]** dismissals of CASD Document 75.").

We find no legal support for these arguments. ***HN7***[] The Ninth Circuit makes clear that pro se litigants remain bound by the rules of procedure, even though courts are to construe their pleadings liberally.[6] *See* *Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995)*; *see also* *Arunachalam v. Apple, Inc., 806 F. App'x 977, 980 (Fed. Cir. 2020)* ("Dr. Arunachalam, though pro se, is required to follow the Federal Rules of Civil Procedure the same as every other party that litigates in the federal courts.").

HN8[] Moreover, the failure to state a plausible claim is not a mere technical deficiency but a substantive shortcoming in a plaintiff's claim. Under the Federal Rules of Civil Procedure, plaintiffs must state a cognizable basis for relief—based on their factual allegations and without regard to their ability to prove those allegations—before they can proceed to proving the allegations and obtaining relief. A plaintiff's inability to simply state a cognizable basis for relief and the facts to support it is a "basic deficiency" that "should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558-60, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal quotation marks omitted).

Finding no error with the *Rule 12(b)(6)* standard that the district court applied, we turn now to each of the claims **[*23]** about which Siegler makes arguments.

a. Takings Under the *Fifth Amendment*

We agree with the district court that Siegler fails to state a cognizable takings claim under the *Fifth Amendment*. Siegler's principal shortcoming is that she has not alleged a government action or a private action fairly attributable to the government.

HN9[] The Constitution generally protects individual rights "only from *government* action, not from *private* action." *Single Moms, Inc. v. Mont. Power Co., 331 F.3d 743, 746 (9th Cir. 2003)*; *Lugar v. Edmondson Oil Co., 457 U.S. 922, 935, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)* ("[M]ost rights secured by the Constitution are protected only against infringement by governments."). Included in these individual rights is the *Fifth Amendment's* guarantee against government seizure of private property for public use without just compensation. The *Takings Clause of the Fifth Amendment* does not apply to a private party unless the private action may fairly be treated as that of the state. *See* *Single Moms, 331 F.3d at 747*.

Here, Siegler acknowledges that "[n]one of the Defendants-Appellees are the US government." Appellant's Br. 15; *see id.* at 1 ("One fact that was failed to be taken into account is the fact that the uncompensated, unjust takings of

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[6] To the extent Siegler argues that the district court did not construe her pleadings liberally, we disagree. *See, e.g.,* *Siegler II, 2019 U.S. Dist. LEXIS 23779, 2019 WL 581719, at *8, *13*; *Siegler V, 2019 U.S. Dist. LEXIS 129755, 2019 WL 3532294, at *18 n.13*.

the intellectual property . . . of Appellants was and is being carried out by *non-governmental* entities." (emphasis added)). Moreover, even construing Siegler's pleadings liberally, neither the First nor **[*24]** the Second Amended Complaints contain any allegations that *a governmental actor* took Siegler's intellectual property without just compensation. They instead relate to the alleged actions of private parties that are not fairly attributable to the government. For this reason, the district court correctly determined that Siegler's takings claim under the *Fifth Amendment* was not cognizable. At bottom, Siegler was not entitled to relief under the *Fifth Amendment* because she had not alleged a critical element to her claim—government action.

Siegler appears to suggest that she has a cognizable IP takings claim because the district court recognized that "a cognizable claim existed with regard to the IP of Appellants." Appellant's Br. 7; *see* *Siegler II, 2019 U.S. Dist. LEXIS 23779, 2019 WL 581719, at *8 n.5* ("Plaintiff might have articulated a claim of unlawful appropriation by contending that Defendants copied the copyrightable *expression* of her ideas."). We decline to read into the district court's encouragement an approval of Siegler's takings claim. The district court immediately clarified that, notwithstanding the potential to state a claim of copyright infringement, Siegler had not supplied the "critical element" of "alleging what if any part of her copyrighted works were protected **[*25]** subject matter." *Siegler II, 2019 U.S. Dist. LEXIS 23779, 2019 WL 581719, at *8 n.5*. The court added that it could not supply this element for Siegler, advising her "to specifically to identify [sic] what *protectable* elements of her copyrighted works were copied unlawfully by defendants."[7] *2019 U.S. Dist. LEXIS 23779, [WL] at *8 n.5, *9*.

Siegler also argues that the district court inappropriately applied *28 U.S.C. § 1498*, which governs patent and copyright infringement by the government. Appellant's Br. 15. But the district court did not apply, or even mention, this statute. Further, the district court dismissed Siegler's takings claim because the *Fifth Amendment* requires government action (and not because it conflated the *Fifth Amendment* with the statutory provision on copyright infringement by the government).

Siegler's reliance on *Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005)*, cannot rescue her takings claim. According to Siegler, *Kelo* stands for the proposition that "private property—such as the IP of a sole proprietorship—cannot be taken for public use without just compensation." Appellant's Br. 15; *see id.* at 3. Siegler is correct insofar as the government cannot take the private property of an individual for public use without just compensation. But, consistent with the Supreme Court's takings jurisprudence, the Court in *Kelo* considered whether the City of New London, **[*26]** Connecticut—*i.e.*, a municipal government—violated the *Takings Clause*. *545 U.S. at 472*. *Kelo* does not recognize a right to just compensation from private entities. For at least this reason, the district court correctly dismissed Siegler's takings claim for failure to state a claim.[8]

b. Trade Secret Misappropriation

We also agree with the district court that Siegler fails to state a cognizable trade secret misappropriation claim. Siegler's principal shortcoming is that she has not alleged the existence of a trade secret. The pleadings at most assert that the contents of Siegler's copyrights are protected by trade secret law. *See* *Siegler V, 2019 U.S. Dist. LEXIS 129755, 2019 WL 3532294, at *10*. ***HN11***[] But "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678*.

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[7] Siegler's arguments about her takings claim include two tables purporting to show the substantial similarity between Siegler's copyrights and the defendants' patent applications. Appellant's Br. 12-15. ***HN10***[] But, as the district court explained, the copyright laws do not protect concepts or ideas in copyrighted works. *See* *Siegler V, 2019 U.S. Dist. LEXIS 129755, 2019 3532294, at *10*. Siegler makes no arguments on appeal that the defendants' patent applications are substantially similar to her *expression*.

[8] Siegler appears to argue that her procedural due process rights were violated by the appellees and the district court, both of whom, she alleges, deprived her of her interest in her two copyrights. *See* Appellant's Br. 15-16. Her assertion against the appellees fails because they are not government actors. *See* *Siegler V, 2019 U.S. Dist. LEXIS 129755, 2019 WL 3532294, at *22 & n.18* (citing *Geneva Towers Tenants Org. v. Federated Mortg. Investors, 504 F.2d 483, 487 (9th Cir. 1974)*). We see no basis to her assertion against the district court, which patiently explained its rulings and painstakingly afforded Siegler an opportunity to present her arguments in writing.

Moreover, we reject Siegler's argument that "documents filed with the [C]opyright [O]ffice are not discoverable under any circumstance by an outsider." *See* Appellant's Br. 16. ***HN12***[] Title 17 of the U.S. Code, *Section 705*, plainly permits public inspection of certain records and indexes, "as well as the articles deposited in connection with completed copyright registrations and retained under the control of the Copyright Office." *17 U.S.C. § 705(b)*; *see 37 C.F.R. § 201.2* ("[I]nspection of copies or identifying material **[*27]** deposited in connection with a completed copyright registration may be undertaken in the Records Research and Certification Section."). The district court did not confuse the Copyright Office with the Patent Office, as Siegler argues. *See* Appellant's Br. 16. That the Patent Office publishes patent applications is not relevant to the Copyright Office's mandate to make deposited materials open to public inspection. Therefore, the district court's dismissal of Siegler's trade misappropriation claim was proper.

c. The Board of Directors of Sorrento Therapeutics

We next agree that Siegler fails to state a cognizable claim against the Board of Directors of Sorrento Therapeutics because it is not a separate legal entity from Sorrento Therapeutics. ***HN13***[] Under the Federal Rules of Civil Procedure, for parties other than an individual or corporation, their capacity to be sued is determined "by the law of the state where the court is located," here, California.[9] *Fed. R. Civ. P. 17(b)*. The Supreme Court of California has not addressed whether a corporation's board of directors may be sued as a legal entity separate from the corporation itself. ***HN14***[] But California's Corporation Code only identifies a corporation or association **[*28]** as entities that may be sued. *Cal. Corp. Code § 105*; *see Theta Chi Fraternity, Inc. v. Leland Stanford Junior Univ., 212 F. Supp. 3d 816, 821 (N.D. Cal. 2016)*. We are persuaded that, under California law, a plaintiff may not sue a corporation's board of directors as an entity separate from the corporation.

Siegler argues that *Section 14* of the Clayton Act provides "the authority under which the [Sorrento Therapeutics] Board of Directors could be property [sic] sued." Appellant's Br. 7. We disagree. ***HN15***[] *Section 14* of the Clayton Act extends a corporation's violation of a penal provision of the antitrust laws to *individual* directors who authorized or ordered the acts constituting the violation. *See 15 U.S.C. § 24*. Moreover, the statutory provision is *penal*; it cannot apply to Siegler's civil case. *See id.* ("[S]uch violation shall be deemed a misdemeanor . . . ."); *United States v. Wise, 370 U.S. 405, 414-15, 82 S. Ct. 1354, 8 L. Ed. 2d 590 (1962)*. It does not authorize Siegler to bring *civil* claims against the *collective* Board of Directors of Sorrento Therapeutics. The district court therefore correctly dismissed the Board of Directors of Sorrento Therapeutics from the First Amended Complaint.

d. SES

We also agree with the district court that the only plaintiff in this action is Siegler. ***HN16***[] Under Ohio law, "[a] sole proprietorship has no legal identity separate from that of the individual who owns it." *Patterson v. V & M Auto Body, 63 Ohio St. 3d 573, 589 N.E.2d 1306, 1308 (Ohio 1992)*. Here, there is no dispute **[*29]** that SES is a sole proprietorship. Necessarily, SES "has no legal identity separate from that of the individual who owns it," *i.e.*, Siegler. *See id.*

Siegler argues that such a determination would deny either her or SES's due process rights. *See* Appellant's Br. 23. According to Siegler, she could not organize SES as a corporation because corporations must be represented by counsel in court. *Id.* Siegler explains that, if SES were a corporation, it "would have been denied total access to the legal system by its current inability to afford legal representation." *Id.* We are unpersuaded by Siegler's argument because it assumes its conclusion. For the district court's decision to deny either her or SES's due process rights, Siegler and SES must be distinct legal identities, each possessing its own distinct right to due process. But *Patterson* requires treating Siegler and SES as having the same legal identity with one and the same right to due process. Because the district court's decision did not violate Siegler's due process rights, it necessarily did not violate SES's.[10]

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[9] *Rule 17(b) of the Federal Rules of Civil Procedure* provides two exceptions. Siegler does not argue that these exceptions apply, nor do we see their relevance here.

[10] We are bound by the facts before us and decline to consider the implications of the hypothetical where SES is a corporation.

Siegler also argues that her and SES's inability to fully exercise their rights to legal redress based on the corporate structure **[*30]** of SES "may unfairly single out sole proprietors in a manner that itself may be deemed unconstitutional within the framework of the Bill of Attainder." *Id.* ***HN17***[] Bills of attainder are "[l]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States v. Brown, 381 U.S. 437, 448-49, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965)*; *see* *U.S. Const. art. I, §§ 9-10*. Siegler's argument lacks merit, at minimum, because there is no legislative act here, much less one that punishes named individuals or easily ascertainable members of a group without a judicial trial. For these reasons, the district court properly dismissed SES.

e. Personal Jurisdiction over Tufts Medical Center

Finally, we decline to reach the issue of whether the district court had personal jurisdiction over Tufts Medical Center. We are unpersuaded by Siegler's arguments that the district court erred in dismissing the First and Second Amended Complaints against all defendants (including Tufts Medical Center). It is therefore unnecessary to further review whether Siegler's claims against Tufts Medical Center would have been properly dismissed for a lack of personal jurisdiction.

2. Denials of Siegler's **[*31]** Motions

Siegler argues that the district court erroneously denied (a) her motion for default judgment against the Board of Directors of Sorrento Therapeutics, (b) her motion for leave to file a third amended complaint, and (c) several of her motions for reconsideration. We disagree.

HN18[] The Ninth Circuit reviews denials of motions for default judgment, leave to amend, and reconsideration for abuse of discretion. *See* *Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir. 1986)* (motions for default judgment); *Curry v. Yelp Inc., 875 F.3d 1219, 1224 (9th Cir. 2017)* (motions for leave to amend); *SEC v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1100 (9th Cir. 2010)* (motions for reconsideration). A district court abuses its discretion when it makes an error of law, when it rests its decision on clearly erroneous findings of fact, or when the appellate court is left with "a definite and firm conviction that the district court committed a clear error of judgment." *United States v. 4.85 Acres of Land, 546 F.3d 613, 617 (9th Cir. 2008)* (citation omitted).

a. Motion for Default Judgment

The district court did not abuse its discretion in denying Siegler's motion for default judgment against the Board of Directors of Sorrento Therapeutics. ***HN19***[] *Rule 55 of the Federal Rules of Civil Procedure* provides a two-step process for obtaining an entry of default judgment. *See* *Eitel, 782 F.2d at 1471*. First, a party must secure an entry of default by the court clerk. *See* *Fed. R. Civ. P. 55(a)*. The entry of default is "an official recognition of the fact that **[*32]** one party is in default." 10A C. Wright & A. Miller, *Federal Practice and Procedure* § 2692 (4th ed.). A defendant who fails to answer within the time specified by the rules is in default even if that fact is not officially noted, *i.e.*, even if there is no entry of default. *See id.;* *Hughes v. Port of Seattle, Nos. 87-3627, -3650, 1988 U.S. App. LEXIS 22121, 1988 WL 60164, at *2 (9th Cir. 1988)* (unpublished table decision) ("The party must seek leave even if there has not been a formal entry of default once the party is technically in default."). Second, only after an entry of default may a party seek a default judgment. *See* 10A C. Wright & A. Miller, *Federal Practice and Procedure* § 2682.

HN20[] A district court may set aside an entry of default for good cause under *Rule 55(c)* or a final default judgment under *Rule 60(b)*. *Fed. R. Civ. P. 55(c)*. Courts have been extremely lenient in treating other pleadings as requests for leave to set aside a default. *See* *Hughes, 1988 U.S. App. LEXIS 22121, 1988 WL 60164, at *3*; *Davies v. Guinn Res. Co., No. 91-15065, 1992 U.S. App. LEXIS 28782, 1992 WL 317249, at *1 (9th Cir. 1992)* (unpublished table decision) ("The district court was free to construe Guinn's [belated] answer as a motion to set aside the default, and its order denying the motion to strike must be viewed as setting aside Guinn's default.").

Here, the district court denied Siegler default judgment because Siegler had not secured an entry of default prior to moving for default judgment. *Siegler I, 2018 U.S. Dist. LEXIS 186709, 2018 WL 9516052, at *2*. While we are **[*33]** inclined to agree with that conclusion, we also affirm the denial of Siegler's motion for a different reason. *See* *Eitel,* 782 F.2d at 1471 ("[W]e need not agree with the district court's reasoning to affirm. We may affirm on any ground finding support in the record."). As already discussed, the Board of Directors of Sorrento Therapeutics is not a separate legal entity from the corporation it serves. It is beyond dispute that Sorrento Therapeutics timely responded to the First Amended Complaint by filing a motion to dismiss in part on that ground. Therefore, the Board timely responded to the First Amended Complaint because it and the corporation are the same entity.[11]

Siegler argues that the district court denied her motion for default judgment "on a mere technicality (*i.e.*, that Appellants had not first asked the Clerk for the entry of default)." *See* Appellant's Br. 22. We do not need to reach that argument because we affirm the denial of her motion for a different reason. Moreover, denying default judgment here furthers the goal of resolving cases on their merits. *See* 10A C. Wright & A. Miller, *Federal Practice and Procedure* § 2681 ("Under modern procedure, defaults are not favored by the law and any **[*34]** doubts usually will be resolved in favor of the defaulting party. The reason for this attitude is that contemporary procedural philosophy encourages trial on the merits."). For these reasons, the district court did not abuse its discretion in denying Siegler's motion for default judgment.

b. Motion for Leave to Amend

The district court also did not abuse its discretion in denying Siegler leave to file a third amended complaint. ***HN21***[] Federal Rule of Civil Procedure 15(a) provides that a party may amend its complaint once "as a matter of course" before a responsive pleading is served. *DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir. 1987)*; Fed. R. Civ. P. 15(a)(1). In all other cases, a party may only amend its pleading with the opposing party's written consent or the court's leave. Fed. R. Civ. P. 15(a)(2). A court should freely give leave when justice so requires. *Id.* But the liberality in granting leave to amend is "subject to the qualification that amendment of the complaint does not cause the opposing party undue prejudice, is not sought in bad faith, and *does not constitute an exercise in futility*." *DCD Programs, 833 F.2d at 186* (emphasis added) (citations omitted).

Here, the district court denied Siegler leave because Siegler had not explained how the newly discovered information in a chart of links to web documents "relate to or cure any of the deficiencies **[*35]** identified" in the First Amended Complaint. *Siegler IV, 2019 U.S. Dist. LEXIS 103674, 2019 WL 2549248, at *4*. In denying Siegler's corresponding motion for reconsideration, the district court added that, after reviewing the newly discovered information, it was confident that none of that information "would have cured the deficiencies identified in the [First Amended Complaint], or in the present order dismissing the [Second Amended Complaint]." *Siegler V, 2019 U.S. Dist. LEXIS 129755, 2019 WL 3532294, at *26*. We see no error of law or clearly erroneous findings of fact in the district court's analysis. This is particularly so where (1) the district court advised Siegler on how to amend her claims when it granted her leave to file a Second Amended Complaint, (2) Siegler did not cure those deficiencies in the Second Amended Complaint, and (3) Siegler's newly discovered information did not cure her pleadings. *See Siegler II, 2019 U.S. Dist. LEXIS 23779, 2019 WL 581719, at *9, *11-13, *13 n.11*; *Siegler V, 2019 U.S. Dist. LEXIS 129755, 2019 WL 3532294, at *7, *12-13, *17, *23-26*. Further, we are unpersuaded by Siegler's bare, unsupported contention in her brief that the deficiencies in the Second Amended Complaint "could have been cured by additional amendment(s) had leave been granted to file a third amended complaint." *See* Appellant's Br. 9.

Siegler presents three further reasons for reversing the district court's denial of her motion for leave to amend. We reject each of **[*36]** them.

First, Siegler argues that the district court should have permitted her more than a single opportunity to amend her complaint. *See id.* at 10. But this argument is duplicative of her complaints about the district court's denial of leave to file a third amended complaint. And it does not address the court's conclusions that filing additional amendments

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[11] Even if the Board were a separate entity from the corporation it serves, we would view the district court's denial of Siegler's motion as setting aside the Board's default. *See Hughes, 1988 U.S. App. LEXIS 22121, 1988 WL 60164, at *2* ("[T]he district court denied Hughes' motion for a default judgment. We find that in so doing, the court implicitly set aside the default."). There is good cause to set aside the default here because the Board disputed whether it had the capacity to be sued. *See* Fed. R. Civ. P. 55(c).

would be futile. None of the cases Siegler cites mandates a minimum number of times a plaintiff may amend her pleadings. *See id.*

Second, Siegler argues that she was effectively denied a meaningful opportunity to be heard because the court dismissed her case before discovery and, therefore, she was "limited in the proof that could be provided." *Id.* at 10-11. This argument stems from a misunderstanding of the standards applied to a *Rule 12(b)(6)* motion. ***HN22***[] A court deciding such a motion must "accept all factual allegations in the complaint as true." *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*. No evidentiary proof of factual allegations is required.[12] Therefore, the district court did not deny Siegler a meaningful opportunity to be heard when it dismissed her claims prior to discovery.

Third, Siegler argues that the district court gave leeway to the defendants by denying Siegler's motion for default **[*37]** judgment on a "very minor technicality" but inconsistently denied her motion for leave to file a third amended complaint. Appellant's Br. 11. Because the Board of Directors of Sorrento Therapeutics is the same defendant as the corporation it serves, we disagree that denying Siegler's motion for default judgment is based on a very minor technicality. *See supra* Section II.B.2.a. Nor is that denial inconsistent with the district court's denial of Siegler's motion to amend. Reviewing both of the district court's decisions does not leave us with a definite and firm conviction that the district court committed a clear error of judgment. For these reasons, the district court did not err in denying Siegler's motion for leave to amend.

c. Motions for Reconsideration

Finally, the district court did not abuse its discretion in denying Siegler's motions for reconsideration of (1) the dismissal of the First Amended Complaint, (2) the dismissal of the Second Amended Complaint, and (3) the denial of leave to file a third amended complaint. Siegler does not explain how the district court abused its discretion, and we see no error of law or clearly erroneous findings of fact in its analyses. Instead, **[*38]** Siegler protests the district court's discretion to grant reconsideration, which "essentially sets up *pro se* litigants for potentially erroneous and manifestly unjust dismissals." *See* Appellant's Br. 17. ***HN23***[] This is an incorrect understanding of our standard of review, where a district court abuses its discretion when it makes an error of law, when it rests its decision on clearly erroneous findings of fact, or when we are left with a definite and firm conviction that the district court committed a clear error of judgment. *4.85 Acres of Land, 546 F.3d at 617*. We therefore uphold the district court's denials of Siegler's motions for reconsideration.

3. Other Discretionary Decisions

Siegler challenges (1) the district court's refusal to take judicial notice of SEC filings and other documents linked in her pleadings, (2) the district court's vacatur of three hearings in this case, and (3) the district court's setting of an appeal mandate hearing date after she filed her notices of appeal. Appellant's Br. 8, 17-19, 22. Siegler also lists several "instances of perceived disparate treatment and/or prejudice." *See id.* at 21. We are not persuaded by these arguments.

HN24[] The Ninth Circuit reviews the decision to take judicial notice **[*39]** for abuse of discretion. *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018)*. It reviews a district court's compliance with local rules under the same standard. *Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir. 1993)*.

First, the district court did not abuse its discretion by declining to take judicial notice of SEC filings and other documents linked in Siegler's pleadings. Siegler argues that the documents in her pleadings "were representative of transactions or the commercial elements by which defendants unjustly enriched themselves," as well as of commercial use. Appellant's Br. 8. ***HN25***[] But a court may only take judicial notice of adjudicative facts—facts of

[12] Siegler contends that *Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)*, confers on litigants a right to offer proof to support a complaint. Appellant's Br. 11. Not so. The Court instead determined that the plaintiff's complaint survived a *Rule 12(b)(6)* motion and that the case could proceed to discovery: the plaintiff's allegations were "sufficient to call for the opportunity to offer supporting evidence." *Haines, 404 U.S. at 519-20*.

a particular case—that are not subject to reasonable dispute. *See Fed. R. Evid. 201* & Notes. The district court may not take judicial notice of Siegler's desired *inference*, drawn from her linked documents, that the defendants unjustly enriched themselves. Moreover, taking judicial notice of the existence of certain commercial transactions, like the acquisition of BDL Products, does not aide Siegler. The district court dismissed her copyright infringement and unjust enrichment claims for a separate reason: Siegler failed to articulate the protectable elements of her copyrights. *See Siegler V, 2019 U.S. Dist. LEXIS 129755, 2019 WL 3532294, at *12*.

Second, the district court did not abuse its discretion by vacating three **[*40]** scheduled motions hearings. It was within the court's discretion to resolve motions without oral argument. *See, e.g., Carpinteria Valley Farms, Ltd. v. Cnty. of Santa Barbara, 344 F.3d 822, 832 n.6 (9th Cir. 2003)*. Indeed, *Civil Local Rule 7.1(d)* expressly permits as much: "A judge may, in the judge's discretion, decide a motion without oral argument."[13] To the extent Siegler argues that the district court's vacaturs of hearings denied her an opportunity to be heard, the Ninth Circuit has resoundingly rejected that argument. ***HN26***[] "[A]n opportunity to be heard does not require an oral or evidentiary hearing on the issue. The opportunity to brief the issue fully satisfies due process requirements." *Pac. Harbor Cap., Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1118 (9th Cir. 2000)* (citations omitted).

Third, even assuming (without deciding) that the district court abused its discretion in setting a date to spread the Ninth Circuit's mandate, we fail to see how that error would affect Siegler's rights. Indeed, we have exclusive jurisdiction over Siegler's entire case, *see supra* Section II.A, Siegler had an opportunity to present arguments to this court, and we have considered each of the arguments she raised. For this reason, even if the district court erred in this regard, the error would be harmless.

Finally, we consider the many instances of purported unfair treatment by the district court. **[*41]** *See* Appellant's Br. 20-21. While we can understand that Siegler feels unfairly treated as a result of the events she outlines, she was treated more than fairly by the district court.

III. CONCLUSION

We have considered Siegler's remaining arguments and find them to be without merit. We therefore *affirm*.

AFFIRMED

COSTS

No costs.

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[13] ***HN27***[] *Rule 78 of the Federal Rules of Civil Procedure* permit courts "by rule or order" to "provide for submitting and determining motions on briefs, without oral hearings." *Fed. R. Civ. P. 78(b)*. Siegler may disagree with the Southern District of California's decision to permit rulings on motions without oral argument, but we see no basis for overturning that decision.

SmileDirectClub, LLC v. Battle

United States Court of Appeals for the Eleventh Circuit

July 20, 2021, Decided

No. 19-12227

Reporter

4 F.4th 1274 *; 2021 U.S. App. LEXIS 21393 **; 29 Fla. L. Weekly Fed. C 102

SMILEDIRECTCLUB, LLC, Plaintiff—Appellee, versus TANJA D. BATTLE, in her official capacity as Executive Director of the Georgia Board of Dentistry, et al., Defendants—Appellants.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Georgia. D.C. Docket No. 1:18-cv-02328.

Smiledirectclub, LLC v. Ga. Bd. of Dentistry, 2019 U.S. Dist. LEXIS 140217 (N.D. Ga., May 8, 2019)

Disposition: APPEAL DISMISSED.

Core Terms

immunity, district court, collateral order doctrine, quotation, marks, overrule, interlocutory appeal, Sherman Act, final judgment, discovery, immunity from suit, motion to dismiss, immediate appeal, collateral-order, state action, unreviewability, tentative, qualified immunity, contractor, antitrust, non-final, cases, immediately appealable, stand trial, collateral, decisions, orders, political question, lack jurisdiction, summary judgment

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN1[ ] **Exemptions & Immunities, Parker State Action Doctrine**

Interlocutory appeals may not be taken under the collateral order doctrine from the denials of so-called state-action immunity under the Parker decision and its progeny.

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN2[] **Appellate Jurisdiction, Collateral Order Doctrine**

Whether an interlocutory appeal can be taken from the denial of Parker state action immunity presents a question of law subject to plenary review. The answer to that question involves consideration of two matters--the scope of the collateral order doctrine and the nature of Parker state action immunity.

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN3[] **Appellate Jurisdiction, Collateral Order Doctrine**

A circuit court generally only has jurisdiction over appeals from final decisions of the district courts. *28 U.S.C.S. § 1291*. There are a handful of exceptions to this final-judgment rule, among them the collateral order doctrine. First recognized in the doctrine allows for immediate appeals of a small class of non-final orders.

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

HN4[] **Appellate Jurisdiction, Collateral Order Doctrine**

The collateral order doctrine is sometimes called an exception to the final-judgment rule, but the doctrine is best understood not as an exception to the final decision rule laid down by Congress in *28 U.S.C.S. § 1291*, but as a practical construction of it. In other words, *§ 1291* entitles a party to appeal not only from a district court decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment, but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final.

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

HN5[] **Appellate Jurisdiction, Collateral Order Doctrine**

The United States Supreme Court has described the collateral order doctrine as narrow.

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN6[] **Appellate Jurisdiction, Collateral Order Doctrine**

In order to fall within the collateral order doctrine and be immediately appealable, a non-final order must satisfy three conditions. The order must: (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. That formulaic approach serves as a reminder that collateral order theory does not justify an ad hoc balancing of the arguments for and against immediate appeal on a case-by-case basis.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN7[] **Scope, Exemptions**

In the Parker Act, the United States Supreme Court held as a statutory matter that the Sherman Act does not reach state action. In a dual system of government in which, under the Constitution, the States are sovereign, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Evidence > Burdens of Proof > Allocation

HN8[] **Burdens of Proof, Allocation**

Private parties must satisfy the clear articulation and active supervision standards set out in and its progeny in order to receive the benefit of the Parker decision.

Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Immunity

HN9[] **Appellate Review, Appealability**

A non-final order denying a Parker-based summary judgment motion is immediately appealable under the collateral order doctrine. With respect to the unreviewability condition, the United States Court of Appeals for the Eleventh Circuit we characterized the Parker decision as providing immunity from suit, and not just a defense from liability. And because the denial of a claim of immunity from suit falls within the collateral order doctrine, the denial of a Parker-based motion is effectively unreviewable after final judgment.

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

HN10[] **Appellate Jurisdiction, Collateral Order Doctrine**

Orders denying certain immunities are strong candidates for prompt appeal under *28 U.S.C.S. § 1291* by way of the collateral order doctrine. Yet there is a crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges or claims. That is because the former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial, whereas the latter does not.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN11[] **Scope, Exemptions**

The Supreme Court has told us that Parker and its progeny are premised on an understanding that respect for the States' coordinate role in government counsels against reading the federal antitrust laws to restrict the States' sovereign capacity to regulate their economies and provide services to their citizens. In the view of the United States Court of Appeals for the Eleventh Circuit, the Parker decision and its progeny address the scope of the Sherman Act, and stand only for the proposition that the Act does not reach state action, not that it cannot do so.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN12[] **Appellate Jurisdiction, Interlocutory Orders**

The United States Supreme Court has cautioned federal courts to view claims of a right not to be tried with skepticism, if not a jaundiced eye, because virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a right not to stand trial. The Parker decision did not arise from any special concerns that would result from having to go to trial, and Parker protection is not lost if an immediate appeal is denied.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN13[] **Sherman Act, Defenses**

The Noerr-Pennington doctrine provides, in the United States Supreme Court's words, that defendants are immune from antitrust liability for engaging in conduct (including litigation) aimed at influencing decisionmaking by the government. Despite the immunity label placed on the Noerr-Pennington doctrine, courts have recognized that it can be said to spring directly from a construction of the Sherman Act and from consideration of *First Amendment* concerns.

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN14[] **Appellate Jurisdiction, Collateral Order Doctrine**

The third condition of the collateral order doctrine, which asks whether a right or claim can be vindicated adequately on appeal following final judgment, simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement. The decisive consideration is whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order. In determining the answer to this question, the focus is not on the specific case under consideration, but rather on the entire category to which a claim belongs. The crucial question is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN15[] **Appellate Jurisdiction, Final Judgment Rule**

Effective review remains available after final judgment because appellate courts can remedy the erroneous denial of Parker protection by vacating an adverse judgment. A denial of a Parker defense, therefore, does not satisfy the unreviewability condition of the Cohen decision.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN16[] **Judges, Discretionary Powers**

28 U.S.C.S. § 1292(b) gives a circuit court the discretion to hear an interlocutory appeal if the district court concludes that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

HN17[] **Appellate Jurisdiction, Collateral Order Doctrine**

Non-final denials of Parker protection do not fall within the collateral order doctrine.

Counsel: For SMILEDIRECTCLUB, LLC, Plaintiff - Appellee: Jeffrey S. Cashdan, Stephen B. Devereaux, Madison Kitchens, Adam Reinke, King & Spalding, LLP, ATLANTA, GA.

For TANJA D. BATTLE, in her official capacity as Executive Director of the Georgia Board of Dentistry, THOMAS P. GODFREY, GREGORY G. GOGGANS, RICHARD BENNETT, REBECCA B. BYNUM, TRACY GAY, STEVE HOLCOMB, LOGAN NALLEY, JR., ANTWAN L. TREADWAY, H. BERT YEARGAN, WENDY JOHNSON, individually and in their official capacities as Members of the Georgia Board of Dentistry, Defendants - Appellants: Andrew Alan Pinson, Christopher Michael Carr, Roger A. Chalmers, Bryan A. Thernes, Drew Waldbeser, Attorney General's Office, ATLANTA, GA; Michael A. Caplan, James William Cobb, Caplan Cobb, LLP, ATLANTA, GA.

For UNITED STATES OF AMERICA, Amicus Curiae: Steven Mintz, Robert Nicholson, U.S. Department of Justice, WASHINGTON, DC.

For FEDERAL TRADE COMMISSION, Amicus Curiae: Mark S. Hegedus, Federal Trade Commission, WASHINGTON, DC.

For STATE OF TENNESSEE, STATE OF ALASKA, STATE OF CONNECTICUT, STATE OF FLORIDA, STATE OF IDAHO, **[**2]** STATE OF KANSAS, STATE OF KENTUCKY, STATE OF LOUISIANA, STATE OF MAINE, STATE OF MINNESOTA, STATE OF NEBRASKA, STATE OF NEW JERSEY, STATE OF OHIO, STATE OF SOUTH

CAROLINA, STATE OF TEXAS, STATE OF UTAH, STATE OF WISCONSIN, Amici Curiae: Sarah Keeton Campbell, Office of Attorney General, NASHVILLE, TN.

For JESSICA JULIEN, Amicus Curiae: Jodi Avila, Baker McKenzie, LLP, MIAMI, FL.

Judges: Before WILLIAM PRYOR, Chief Judge, and WILSON, MARTIN, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, LAGOA, BRASHER, and TJOFLAT, Circuit Judges.* JORDAN, Circuit Judge, delivered the opinion of the Court, in which WILLIAM PRYOR, Chief Judge, and WILSON, MARTIN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, LAGOA, BRASHER, and TJOFLAT, Circuit Judges, joined.

Opinion by: JORDAN

Opinion

[*1276] JORDAN, Circuit Judge:

HN1[] Sitting as a full court, we hold that interlocutory appeals may not be taken under the collateral order doctrine from the denials of so-called "state-action immunity" under *Parker v. Brown, 317 U.S. 341, 350-52, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, and its progeny. We therefore dismiss this appeal by the members of the Georgia Board of Dentistry for lack of appellate jurisdiction.

I

SmileDirectClub, LLC, offers orthodontic treatments, including teeth alignment, at steep discounts. Its **[**3]** business model is described in detail in the panel opinion, *see* *SmileDirectClub, LLC v. Battle, 969 F.3d 1134, 1136-37 (11th Cir. 2020)*, and we briefly summarize it here.

Patients visit a SmileDirect location, where a technician takes a digital scan of their teeth. The scans are sent to SmileDirect's lab to create a model. They are also sent to a Georgia-licensed dentist or orthodontist, who determines whether any oral conditions warrant further investigation or prevent the patient from being a candidate for SmileDirect's alignment treatment. If there are no issues or problems, the dentist or orthodontist creates a patient-specific plan that results in a prescription for SmileDirect's clear aligners. The patient then receives the aligners by mail from SmileDirect.

In 2018, the Georgia Board of Dentistry—a state-organized entity mostly comprised of practicing dentists—voted to amend its *Rule 150-9-.02*, which relates to the expanded duties of dental assistants. As explained in the panel opinion, the "practical effect of the proposed amendment w[as] . . . to require that digital **[*1277]** scans, like the ones [performed] by SmileDirect at [its locations,] only take place when a licensed dentist is physically in the building where the scans are taking place, and to prohibit them otherwise." **[**4]** *Id. at 1137*. Georgia Governor Nathan Deal approved the amendment of *Rule 150-9-.02* through a "Certification of Active Supervision." *See id.* (internal quotation marks omitted).

SmileDirect then sued a number of defendants, including the Board members in their individual capacities. As relevant here, SmileDirect alleged that the Board's amendment of *Rule 150-9-.02* violated the Sherman Act, *15 U.S.C. § 1*, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or [interstate] commerce." The Board members moved to dismiss the antitrust claims against them in their individual capacities. They argued that they were entitled to dismissal based on so-called "state action immunity"

* Judge Gerald Bard Tjoflat took senior status on November 19, 2019 and elected to participate in this decision pursuant to *28 U.S.C. § 46(c)(2)*.

under *Parker* because they acted on behalf of Georgia in amending *Rule 150-9-.02*. The district court denied the motion, and the Board members filed an interlocutory appeal as permitted by our precedent. *See, e.g.,* Commuter Transp. Sys., Inc. v. Hillsborough Cnty. Aviation Auth., 801 F.2d 1286, 1289-90 (11th Cir. 1986); Praxair, Inc. v. Fla. Power & Light Co., 64 F.3d 609, 611 (11th Cir. 1995). The panel affirmed the district court's denial of the Board members' motion to dismiss, *see* SmileDirectClub, 969 F.3d at 1143-46, and we took the case en banc to consider whether denials of *Parker* "state action immunity" can be appealed prior to final judgment.[1]

II

HN2[] Whether an interlocutory appeal can be taken from the **[**5]** denial of *Parker* "state action immunity" presents a question of law subject to plenary review. *See* Pinson v. JPMorgan Chase Bank, N.A., 942 F.3d 1200, 1206 (11th Cir. 2019). The answer to that question involves consideration of two matters—the scope of the collateral order doctrine and the nature of *Parker* "state action immunity"—so we begin with some background.

A

HN3[] As a circuit court, we generally only have jurisdiction over appeals from "final decisions of the district courts." Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 103, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009) (quoting 28 U.S.C. § 1291). There are a handful of exceptions to this final-judgment rule, among them the collateral order doctrine. First recognized in Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), the doctrine allows for immediate appeals of a "small class" of non-final orders.

HN4[] The collateral order doctrine is sometimes called an "exception" to the final-judgment rule, but the doctrine "is **[*1278]** best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994) (citing Cohen, 337 U.S. at 546). In other words, "[§ 1291] entitles a party to appeal not only from a district court decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment, but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving **[**6]** a healthy legal system, nonetheless be treated as final." *Id.* (internal quotation marks and citations omitted). *Accord* 19 Moore's Federal Practice § 202.07[1] (3d ed. 2021).

HN5[] The Supreme Court has described the collateral order doctrine as "narrow." Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981). And it has remarked that the doctrine is only available in a "limited category of cases." Flanagan v. United States, 465 U.S. 259, 265, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984) (internal quotation marks and citations omitted). In its more recent decisions regarding the doctrine, the Court has repeatedly "emphasiz[ed] its modest scope." Will v. Hallock, 546 U.S. 345, 350, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006). "[A]lthough the Court has been asked many times to expand the 'small class' of collaterally appealable orders, [it] ha[s] instead kept it narrow and selective in its membership." *Id. See also* Digit. Equip. Corp., 511 U.S. at 868 ("[W]e have also repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered[.]") (citation omitted); 15A Charles Alan Wright et al., Federal Practice and Procedure, § 3911 (2d ed.

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[1] The district court ruled that SmileDirect's Sherman Act claim, as pled, was "sufficient to survive a Rule 12(b)(6) motion to dismiss on *Parker* immunity grounds." D.E. 51 at 13. Like the panel, we conclude that the district court's denial of the *Parker* defense was conclusive at this stage of the litigation. *See* SmileDirectClub, 969 F.3d at 1138 n.4. The district court did not definitively reject the *Parker* defense because the facts as pled might not be the facts at summary judgment or trial. But this does not mean that the district court's Rule 12(b)(6) ruling was tentative. *Cf.* Behrens v. Pelletier, 516 U.S. 299, 309, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996) (explaining that a motion to dismiss on qualified immunity grounds takes the defendant's conduct as alleged in the complaint, while a motion for summary judgment on qualified immunity grounds considers the evidence in the light most favorable to the plaintiff).

1992 & April 2021 update) ("The common admonition that this doctrine is a narrow 'exception' to the final-judgment doctrine may be revised to warn that it is a very narrow exception.").

HN6[] In order to fall **[**7]** within the collateral order doctrine and be immediately appealable, a non-final order must satisfy three conditions. The "order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* (citing *Cohen, 337 U.S. at 546*). This formulaic approach "serves as a reminder that collateral order theory does not justify an ad hoc balancing of the arguments for and against immediate appeal on a case-by-case basis." Wright et al., 15A Federal Practice and Procedure, at § 3911.[2]

B

HN7[] In *Parker, 317 U.S. at 350-52*, the Supreme Court held as a statutory matter that the Sherman Act does not reach state action. "[N]othing in the language of the Sherman Act or in its history," the Court wrote, "suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id. at 350-51*. The Court explained that "[i]n a dual system of government in which, under the Constitution, the States are sovereign, . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id. at* ***[*1279]*** *351*. That intuition shaped the Court's interpretation **[**8]** of the Sherman Act. Although California had imposed a "restraint" on trade, that restraint resulted from "an act of government which the Sherman Act did not undertake to prohibit." *Id. at 352*.

The Court later extended *Parker* to private parties and municipalities in certain circumstances. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 104-06, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)* (private parties); *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)* (municipalities and other political subdivisions). *HN8*[] Private parties, like the Board members in this case, must satisfy the "clear articulation" and "active supervision" standards set out in *Midcal, 445 U.S. at 105*, and its progeny in order to receive the benefit of *Parker*.

III

HN9[] We held in *Commuter Transportation Systems, 801 F.2d at 1289-90*—a case involving antitrust claims against a state airport authority—that a non-final order denying a *Parker*-based summary judgment motion is immediately appealable under the collateral order doctrine. With respect to the unreviewability condition, we characterized *Parker* as providing immunity from suit, and not just a defense from liability. *See id. at 1289*. And because the denial of a claim of immunity from suit falls within the collateral order doctrine, *see, e.g., Mitchell v. Forsyth, 472 U.S. 511, 525, 529-30, 105 S. Ct. 2806, 86 L. Ed. 2d 411 & n.10 (1985)* (holding that denials of absolute and qualified immunity are immediately appealable under the doctrine), we reasoned that the denial of a *Parker*-based motion is effectively **[**9]** unreviewable after final judgment. *See Commuter Transp. Sys., 801 F.2d at 1289*.[3]

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[2] As explained later, we conclude that the Board members cannot meet the third condition of effective unreviewability, and therefore do not discuss the first and second conditions.

[3] We later extended the jurisdictional ruling in *Commuter Transportation Systems* to private parties, but without explaining why they too are entitled to an immediate appeal when their *Parker* arguments are rejected before trial. *See Praxair, 64 F.3d at 611*. As things stand, we are the only circuit to allow private parties like the Board members to take an interlocutory appeal from the denial of a *Parker*-based motion to dismiss or motion for summary judgment. The other circuits to address the issue have held that private parties cannot use the collateral order doctrine to appeal a non-final order rejecting the application of *Parker. See Auraria Student Hous. v. Campus Village Apartments, LLC, 703 F.3d 1147, 1151 (10th Cir. 2013)*; *Acoustic Sys., Inc. v. Wenger*

There is some support for this aspect of *Commuter Transportation Systems. See Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391, 1395-97 (5th Cir. 1996)*; 1A Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law*** § 222b (4th ed. 2013). For example, in *Martin* the Fifth Circuit also treated *Parker* as providing "an entitlement not to stand trial under certain circumstances." *86 F.3d at 1395* (internal quotation marks and citation omitted). Yet just four years later, the full Fifth Circuit—in a unanimous opinion—retreated from this facet of *Martin in Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1 of Tangipahoa Parish, 171 F.3d 231, 234 (5th Cir. 1999)* (en banc): "While thus a convenient shorthand, '*Parker* immunity' is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation."

A

HN10[] "[O]rders denying certain immunities are strong candidates for prompt appeal under *§ 1291*" by way of the collateral order doctrine. *See Digit. Equip. Corp.,* ***[*1280]*** *511 U.S. at 871*. Yet there is a "crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges [or claims]." *United States v. Hollywood Motor Car Co., 458 U.S. 263, 269, 102 S. Ct. 3081, 73 L. Ed. 2d 754 (1982)*. This is because "[t]he former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial," whereas "[t]he latter does not." **[**10]** *Id.* "Those seeking immediate appeal . . . naturally argue that any order denying a claim of right to prevail without trial satisfies the third condition [of effective unreviewability]. But this generalization is too easy to be sound and, if accepted, would leave the final order requirement of *§ 1291* in tatters." *Hallock, 546 U.S. at 351*.

We conclude that *Commuter Transportation Systems* incorrectly characterized *Parker* as creating an immunity from trial. Though the Supreme Court has used the shorthand term "*Parker* immunity," *see, e.g., City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 370, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*, it has also referred to *Parker* as a "defense" to an antitrust claim, *see, e.g., Town of Hallie, 471 U.S. at 39*, so the "immunity" phrasing is not conclusive. We must figure out what *Parker* really represents in order to avoid what Justice Cardozo referred to as the "tyranny of labels." *Snyder v. Massachusetts, 291 U.S. 97, 114, 54 S. Ct. 330, 78 L. Ed. 674 (1934)*. *See also Surgical Care Ctr., 171 F.3d at 234* (addressing the "*Parker* immunity" shorthand: "The price of the shorthand of using similar labels for distinct concepts is the risk of erroneous migrations of principles.").

HN11[] The Supreme Court has told us that "*Parker* and its progeny are premised on an understanding that respect for the States' coordinate role in government counsels against reading the federal antitrust laws to restrict the States' sovereign capacity to **[**11]** regulate their economies and provide services to their citizens." *FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 236, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013)*. In our view, *Parker* and its progeny address the scope of the Sherman Act, and stand only for the proposition that the Act "does not reach state action, not that it cannot do so." *SmileDirectClub, 969 F.3d at 1147* (Jordan, J., concurring).

In reading *Parker* this way, we join the Fourth, Sixth, and Ninth Circuits. *See SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist., 859 F.3d 720, 726 (9th Cir. 2017)* ("[T]he state[ ]action doctrine is a defense to liability, not immunity from suit."); *S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436, 444 (4th Cir. 2006)* ("The Supreme Court did not say in *Parker* that states and their agencies are immune from federal restrictions placed upon a state's regulation of commerce within its borders or that Congress *could not* otherwise make states liable for antitrust violations."); *Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 567 (6th Cir. 1986)* ("[T]he [*Parker*] exemption is not an 'entitlement' of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim."). We also align ourselves with the Third, Fifth, and Tenth Circuits, which have similarly read *Parker* in opinions not addressing the collateral order doctrine. *See Kay Elec. Coop v. City of Newkirk, 647 F.3d 1039, 1042 (10th Cir. 2011)* (Gorsuch, J.) (noting that "the term 'immunity' may be a bit strong since the Court [in *Parker*] held only that Congress *hadn't* covered state action, not that **[**12]** it *couldn't*"); *Surgical Care Ctr., 171 F.3d at 234* ("'*Parker* immunity' is more accurately a strict standard for locating the reach of

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Corp., 207 F.3d 287, 292-94 (5th Cir. 2000); *We, Inc. v. City of Philadelphia, 174 F.3d 322, 329 (3d Cir. 1999)*; *Segni v. Com. Off. of Spain, 816 F.2d 344, 346 (7th Cir. 1987)*.

the Sherman Act than the judicial creation of a defense to liability for its violation."); Duke & Co. v. Foerster, 521 F.2d 1277, 1279 n.5 (3d Cir. 1975) ("[T]he thrust **[*1281]** of *Parker* is that the Sherman Act is simply inapplicable to activity mandated by state authority."), *overruled in part on other grounds by* Omni Outdoor Advert., 499 U.S. at 382-83.

HN12[] The Supreme Court has cautioned federal courts to "view claims of a right not to be tried with skepticism, if not a jaundiced eye," because "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a right not to stand trial." Digit. Equip. Corp., 511 U.S. at 873 (internal quotation marks and citations omitted). Applying that skepticism here, we agree with the Fourth, Sixth, and Ninth Circuits that *Parker* did not arise from any special concerns that would result from having to go to trial, and that *Parker* protection is not lost if an immediate appeal is denied. *See* SolarCity Corp., 859 F.3d at 726; S.C. State Bd. of Dentistry, 455 F.3d at 444; Huron Valley Hosp., 792 F.2d at 567. *Cf.* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 254, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010) ("[T]o ask what conduct [a statute] reaches is to ask what conduct [it] prohibits, which is a merits question.").

The treatment of the *Noerr-Pennington* doctrine provides an apt analogy. **HN13**[] That doctrine provides, in the Supreme Court's words, that **[**13]** "defendants are immune from antitrust liability for engaging in conduct (including litigation) aimed at influencing decisionmaking by the government." Octane Fitness, LLC v. Icon Health & Fitness, Inc., 572 U.S. 545, 556, 134 S. Ct. 1749, 188 L. Ed. 2d 816 (2014). Despite the "immunity" label placed on the *Noerr-Pennington* doctrine, we have recognized that it "can be said to spring directly from a construction of the Sherman Act" and from consideration of First Amendment concerns. *See* McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1559 (11th Cir. 1992). And several circuits have concluded that a "denial of immunity under the *Noerr-Pennington* doctrine is not an appealable collateral order . . . because it is effectively reviewable after final judgment." 19 Moore's Federal Practice, at § 202.07[1] & n. 53.8 (citing Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd., 711 F.3d 1136, 1138-41 (9th Cir. 2013); Hinshaw v. Smith, 436 F.3d 997, 1003 (8th Cir. 2006); Acoustic Sys., Inc., 207 F.3d at 295-96; We, Inc., 174 F.3d at 328-30).

What the Ninth Circuit said about *Noerr-Pennington* is just as true of *Parker*: "As a principle of statutory interpretation, [*Parker*] is no more a protection from litigation itself than is any other ordinary defense, affirmative or otherwise[,] and constitutionally grounded or not." Nunag-Tanedo, 711 F.3d at 1140. So, insofar as the unreviewability condition of the collateral order doctrine is concerned, *Commuter Transportation Systems* wrongly equated a *Parker* defense with an immunity from suit. *See generally* McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1339 (11th Cir. 2007) ("A party is entitled to a collateral order appeal when it has a substantial claim to a true immunity from suit: i.e., **[**14]** an immunity that not only insulates the party from liability, but also prevents the party from being exposed to discovery and/or trial.").[4]

[*1282] B

HN14[] We close with a final observation. The third condition of the collateral order doctrine, which asks whether a right or claim can be vindicated adequately on appeal following final judgment, "simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." Mohawk Indus., 558 U.S. at 107 (quoting Digit. Equip. Corp., 511 U.S. at 878-79). The "decisive consideration is whether delaying review until the entry of final judgment 'would imperil a substantial public

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[4] We acknowledge that some of the earlier Supreme Court cases applying the collateral order doctrine permitted appeals in scenarios not involving a claimed immunity from suit. *See, e.g.,* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170-72, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) (imposition of notice costs in a class action); Swift & Co. Packers v. Compania Colombiana del Caribe, 339 U.S. 684, 688-89, 70 S. Ct. 861, 94 L. Ed. 1206 (1950) (attachment of a vessel in an admiralty proceeding). Those cases, however, are too far removed from the *Parker* defense asserted here to be of much help. We are also wary of applying those cases beyond their particular facts given the Supreme Court's comment that "the collateral[ ]order doctrine may have expanded beyond the limits dictated by its internal logic and the strict application of the criteria set out in *Cohen*." Ashcroft v. Iqbal, 556 U.S. 662, 672, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

interest' or 'some particular value of a high order.'" *Id.* (quoting *Hallock, 546 U.S. at 352-53*). In determining the answer to this question, the focus is not on the specific case under consideration, but rather "on 'the entire category to which a claim belongs.'" *Id.* (quoting *Digit. Equip. Corp., 511 U.S. at 868*). "The crucial question . . . is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Id. at 108*.

Though its reading of the Sherman Act was **[**15]** partly rooted in federalism, *Parker* does not reflect a value of sufficiently high order to satisfy the third condition of the collateral order doctrine. This is admittedly a normative judgment, but the Supreme Court's 2006 decision in *Hallock* leads us to our conclusion.

In *Hallock*, the plaintiff and her company filed suit against the United States under the *Federal Tort Claims Act, 28 U.S.C. § 2674*. They alleged that federal agents had damaged property seized pursuant to a search warrant, leading to the loss of the business. *See* *Hallock, 546 U.S. at 347-48*. The district court dismissed the suit without reaching the merits, ruling that the agents' conduct fell within *28 U.S.C. § 2680(e)*, an exception to the FTCA's waiver of sovereign immunity. *See* *id. at 348*. When the plaintiff filed a suit against the agents for constitutional deprivations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, the agents sought dismissal under *28 U.S.C. § 2676*, the so-called "judgment bar" of the FTCA. They argued that the judgment in the FTCA action barred the *Bivens* suit. The district court denied the motion to dismiss, and the agents sought to appeal under the collateral order doctrine. *See* *id. at 348-49*. The Second Circuit ruled that the agents could take an immediate appeal, but the Supreme Court, in a unanimous opinion, vacated for lack of jurisdiction. *See* *id. at 355*.

The **[**16]** Court pointed to non-final denials of immunity—e.g., qualified immunity, absolute immunity, and *Eleventh Amendment* immunity—and to the denial of a double jeopardy claim as the sort of cases that warrant interlocutory appeal under the collateral order doctrine. *See* *id. at 350*. Then, explaining that not every right to dismissal can be considered a right not to stand trial, the Court confirmed that it is "some particular value of a high order," i.e., "avoidance of trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Id. at 352-53*. Turning to *§ 2676*'s judgment bar, the Court concluded that no such public interest **[*1283]** was at stake notwithstanding the sovereign immunity overtones:

> It is not the preservation of initiative but the avoidance of litigation for its own sake that supports the judgment bar, and if simply abbreviating litigation troublesome to Government employees were important enough for *Cohen* treatment, collateral order appeal would be a matter of right whenever the Government lost a motion to dismiss under the [FTCA], or a federal officer lost one on a *Bivens* action, or a state official was in that position in a case **[**17]** under *42 U.S.C. § 1983*, or *Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 [ ] (1908)*.

Id. at 353-54. The Court finished its opinion by analogizing to a res judicata/claim preclusion defense, a denial of which would not merit an immediate appeal under the collateral order doctrine. *See* *id. at 355* ("The judgment bar at issue in this case has no claim to greater importance than the typical defense of claim preclusion[.]").

Given what *Hallock* held, and what it said, we are unpersuaded by the Board members' arguments that *Parker* reflects a value of sufficiently high order because its reading of the Sherman Act is based in part on federalism concerns. If the Board members were correct, then the collateral order doctrine would potentially permit an immediate appeal of any pretrial order rejecting a claim by a state or its officials (or private parties acting in concert with a state) that a statute does not cover their conduct. The Supreme Court has never hinted at such an expansive view of the collateral order doctrine, and we decline to sanction it here. ***HN15***[] Effective review remains available after final judgment because "[a]ppellate courts can remedy the [erroneous denial of *Parker* protection] . . . by vacating an adverse judgment." *Mohawk Indus., 558 U.S. at 109*. A denial of a *Parker* defense, therefore, does not satisfy **[**18]** the unreviewability condition of *Cohen. Cf.* *Digit. Equip. Corp., 511 U.S. at 878* (a right to be free from trial "by [private] agreement does not rise to the level of importance needed for recognition under *§ 1291*").

HN16[] This does not mean that the denial of a dispositive motion grounded in *Parker* can never be reviewed prior to final judgment. For example, 28 U.S.C. § 1292(b) gives a circuit court the discretion to hear an interlocutory appeal if the district court concludes that the matter involves "a controlling question of law as to which there is substantial ground for difference of opinion" and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." This avenue, we think, gives those who seek dismissal of antitrust claims based on *Parker* an avenue to obtain interlocutory review. *See* Mohawk Indus., 558 U.S. at 110-11. There is also the rulemaking process. If states, municipalities, and private parties believe that there should be immediate review of a rejected *Parker* defense, they can propose a rule of appellate procedure that so provides. *See* id. at 114.[5]

IV

HN17[] Non-final denials of *Parker* protection do not fall within the collateral order doctrine. The appeal by the members of the Georgia Board of Dentistry **[**19]** is therefore dismissed for lack of jurisdiction.

APPEAL DISMISSED.

Concur by: WILLIAM PRYOR; TJOFLAT

Concur

[*1284] WILLIAM PRYOR, Chief Judge, joined by BRASHER, Circuit Judge, concurring:

I join Judge Jordan's opinion for the Court in full. I write separately to explain why the Court is right to overrule the line of precedent beginning with Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority, 801 F.2d 1286 (11th Cir. 1986). This appeal presents the rare case in which overruling a circuit precedent is appropriate.

Overruling circuit precedent is and should be a "rare step." McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1096 (11th Cir. 2017) (en banc). "Stability and predictability are essential factors in the proper operation of the rule of law[.]" *Id.* (alteration rejected) (internal quotation marks omitted). So we "should not lightly overrule past decisions." *Id.* (quoting Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970)). Our caution is especially important when we revisit decisions based on statutes "because Congress remains free to alter what we have done." *Id.* (internal quotation marks omitted).

But stare decisis is not an "inexorable command." Payne v. Tennessee, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). We may overrule a precedent if a "special justification" exists to do so. Allen v. Cooper, 140 S. Ct. 994, 1003, 206 L. Ed. 2d 291 (2020) (internal quotation marks omitted). For example, we may overrule a precedent when it is "plainly and palpably wrong" and overruling would not "result in more harm than continuing to follow **[**20]** the erroneous decision." McCarthan, 851 F.3d at 1096 (quoting Bryan A. Garner et al., *The Law of Judicial Precedent* § 46, at 388 (2016)). And we may overrule a precedent if its "statutory and doctrinal underpinnings have eroded and there has not been significant reliance on the precedent." *Id.* (citing Kimble v. Marvel Entm't, LLC, 576 U.S. 446, 458, 135 S. Ct. 2401, 192 L. Ed. 2d 463 (2015)).

Before we overrule a precedent, we weigh three considerations: the wrongness of the precedent, its negative consequences, and the extent to which it has generated reliance interests. Ramos v. Louisiana, 140 S. Ct. 1390,

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[5] We decided *Commuter Transportation Systems* in 1986, four years before Congress amended 28 U.S.C. § 2072(c), a provision of the Rules Enabling Act, to authorize the Supreme Court to adopt more nuanced finality requirements through rulemaking. *See* Mohawk Indus., 558 U.S. at 113-14.

1414-15, 206 L. Ed. 2d 583 (2020) (Kavanaugh, J., concurring in part). In this appeal, each consideration counsels in favor of overruling *Commuter Transportation Systems*.

First, as we unanimously recognize, Commuter Transportation Systems is wrong. The wrongness of a decision is "[t]he primary and most important factor to weigh in considering whether to overrule an earlier decision." Garner et al., *The Law of Judicial Precedent* § 47, at 397. We should ask "how wrong the precedent is as a matter of law." Ramos, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part). If the error is "clear and unambiguous," then the wrongness factor weighs heavily in favor of correction. McCarthan, 851 F.3d at 1096 (internal quotation marks omitted).

As the opinion for the Court ably explains, *Commuter Transportation Systems* is clearly **[**21]** and unambiguously wrong. It misunderstands a defense to liability as an immunity from suit. *See* Commuter Transp. Sys., 801 F.2d at 1289. So-called "state-action immunity" flows from the fact that state action falls outside the ambit of the Sherman Act as written. Parker v. Brown, 317 U.S. 341, 350-52, 63 S. Ct. 307, 87 L. Ed. 315 (1943). A statute can confer a right not to be tried—that is, an immunity from suit—only through an "explicit statutory . . . guarantee that trial will not occur." Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 874, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994) (internal quotation marks omitted). By contrast, a statutory omission establishes a mere defense to liability. **[*1285]** *Id.* Our confusion about this distinction led us to conclude mistakenly that a non-final order based on *Parker* is immediately appealable under the collateral-order doctrine. Court Op. at 8, 10. Properly understood as a defense to liability, state-action immunity does not satisfy the requirements for immediate appealability. *Cf.* Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995) (explaining that the denial of qualified immunity is immediately appealable because qualified immunity is "an *immunity from suit* rather than a mere defense to liability" (internal quotation marks omitted)).

Second, *Commuter Transportation Systems* has significant negative consequences. To evaluate whether a precedent causes "more harm than good," we must evaluate a range of **[**22]** consequences. McCarthan, 851 F.3d at 1096. As a legal matter, *Commuter Transportation Systems* is inconsistent with the applicable legal doctrines. We must consider "consistency and coherence with other decisions" when we consider the jurisprudential consequences of a precedent. Ramos, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part). After all, one of the purposes of stare decisis is to "promote[] the evenhanded, predictable, and consistent development of legal principles." Payne, 501 U.S. at 827. An outlier decision undermines this function by muddling the law, so it deserves "less precedential weight." Garner et al., *The Law of Judicial Precedent* § 47, at 397-98. *Commuter Transportation Systems* takes a liberal approach toward immunities from trial that is at odds with the narrowness of the doctrine. *See* Commuter Transp. Sys., 801 F.2d at 1289. The Supreme Court has made clear that we should "view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." Digit. Equip. Corp., 511 U.S. at 873. As mentioned, "[a] right not to be tried" in the relevant sense "rests upon an explicit statutory or constitutional guarantee that trial will not occur." Midland Asphalt Corp. v. United States, 489 U.S. 794, 801, 109 S. Ct. 1494, 103 L. Ed. 2d 879 (1989). Otherwise, "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" **[**23]** Digit. Equip. Corp., 511 U.S. at 873.

Because *Parker* creates only a defense to liability instead of a right not to be tried, it is also in tension with the collateral-order doctrine. The Supreme Court has explained that the collateral-order doctrine is "narrow": the criteria for immediate appealability are "stringent," few kinds of nonfinal orders qualify, and it "should stay that way." Id. at 868 (internal quotation marks omitted); *see* Court Op. at 6 (collecting cases). Allowing interlocutory appeal as of right for a defense to liability contravenes our mandate to keep the "'small class' of collaterally appealable orders . . . narrow and selective in its membership." Will v. Hallock, 546 U.S. 345, 350, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006).

As a practical matter, allowing unnecessary interlocutory appeals taxes the legal system. Although *Parker*-based interlocutory appeals are relatively infrequent, they are burdensome whenever they occur. Myriad problems "inherently accompan[y]" interlocutory appeals. Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 434, 105 S. Ct. 2757, 86 L. Ed. 2d 340 (1985). Interlocutory appeals "cause disruption, delay, and expense for the litigants." Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380, 107 S. Ct. 1177, 94 L. Ed. 2d 389 (1987). They burden appellate courts by requiring consideration of unnecessary and duplicative issues. 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3907, at 269 n.2 (2d ed. 1992). And **[*1286]** they "encroach[] upon the **[**24]** prerogatives of district court judges, who play a special role in managing ongoing litigation." *Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009)* (internal quotation marks omitted). We tolerate these costs in the handful of cases in which interlocutory appeal is necessary to "achiev[e] a healthy legal system," but we must guard against them otherwise. *Digit. Equip. Corp., 511 U.S. at 867* (internal quotation marks omitted). Here, as in most cases, the health of our legal system does not turn on the availability of interlocutory appeal. *Cf.* Court Op. at 14-17 (explaining that a *Parker*-based appeal is not effectively unreviewable after final judgment).

Finally, *Commuter Transportation Systems* has created no serious reliance interests. The only litigants with reliance interests in that decision are the government and quasi-government litigants that prefer the right to appeal an adverse ruling before it is final. To be sure, to the extent that there are erroneous denials of state-action immunity, our decision might create additional litigation costs. But "the convenience of government officials" does not "count in the balance of *stare decisis*." *Kisor v. Wilkie, 139 S. Ct. 2400, 2447, 204 L. Ed. 2d 841 (2019)* (Gorsuch, J., concurring in the judgment); *see also* *Hallock, 546 U.S. at 353* (refusing to consider "simply abbreviating litigation troublesome to [g]overnment **[**25]** employees" as an important interest for purposes of the collateral-order doctrine).

Nor is there a real risk that our decision will hamper the ability of states to regulate their economies. The *amici* states contend that our decision and its attendant litigation costs will have a "chilling effect" on state regulation, but I doubt it. *Parker*-based interlocutory appeals have never been common, and *Parker* remains an important defense to liability.

In any event, the ease of regulation is not a meaningful reliance consideration. *See* *Kisor, 139 S. Ct. at 2447* (Gorsuch, J., concurring in the judgment). General concerns about the "efficiency of [g]overment" and the effects of the "burden[s] and distract[ions]" of litigation can be asserted in any case involving the government. *Hallock, 546 U.S. at 353*. As we do not treat these concerns as "substantial public interest[s]" for purposes of the collateral-order doctrine, *id.*, we need not treat them as significant concerns when we evaluate reliance. These concerns are not "the sort of reliance interest[s] that could outweigh the countervailing interest[s]" that support overruling *Commuter Transportation Systems.* *Kisor, 139 S. Ct. at 2447* (Gorsuch, J., concurring in the judgment) (internal quotation marks omitted). "Continuing **[**26]** to follow [*Commuter Transportation Systems*] would do more harm than good," so "[t]his appeal presents the rare circumstance where we should overturn our precedents." *McCarthan, 851 F.3d at 1096, 1099*.

TJOFLAT, Circuit Judge, concurring:

There's a significant facial difference between this case and *Commuter Transportation Systems v. Hillsborough County Aviation Authority, 801 F.2d 1286 (11th Cir. 1986)*, that could lead some to the reasonable belief that we needn't overrule *Commuter* to conclude we lack jurisdiction. Namely, the District Court here expressly refrained from deciding whether the Board members established their *Parker*[1] defense, choosing instead to postpone the determination until further discovery had been conducted. Because jurisdiction under the collateral-order doctrine depends on a "fully consummated decision" in the **[*1287]** district court, it seems obvious at first blush that we lack jurisdiction. *Abney v. United States, 431 U.S. 651, 659, 97 S. Ct. 2034, 2040, 52 L. Ed. 2d 651 (1977)*.

By holding that *Parker* provides an immunity from suit, however, *Commuter* conferred a special status on the state-action doctrine. Immunities, unlike mere defenses from liability, are deemed denied even if not expressly ruled upon because a defendant who is forced to proceed to the next stage of litigation is conclusively and necessarily denied the immunity he claims. *Mitchell v. Forsyth, 472 U.S. 511, 527, 105 S. Ct. 2806, 2816, 86 L. Ed. 2d 411 (1985)*. That's why it's necessary for us to overrule *Commuter* ***[**27]*** even though the District Court below didn't literally decide the *Parker* issue.

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[1] *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315* (1943)

I.

The District Court did not decide whether the Board members had established their *Parker* defense at the motion-to-dismiss stage. Rather, it denied the Board members' *Rule 12(b)(6)* motion to dismiss only because it found that SmileDirect's complaint stated a claim under the Sherman Act. It expressly reserved the *Parker* question for after discovery:

> [T]he Complaint reveals a well-pleaded factual dispute that is not resolved by the Certification of Active Supervision. Only discovery will determine whether the Board provided all relevant information to the Governor, whether the proposed amendment was subjected to any meaningful review by the Governor, or whether the Certification of Active Supervision was merely "rubberstamped" as a matter of course.
>
> ...
>
> *Accordingly, the Court finds that a definitive ruling on Parker immunity would be premature at this stage*, that SmileDirect's Sherman Act anititrust claim, as pleaded, is sufficient to survive a *Rule 12(b)(6)* motion to dismiss on Parker immunity grounds, and that *further factual development is required to determine whether the Board members are entitled to Parker immunity. The Board members* ***[**28]*** *may therefore raise the Parker immunity defense at a later stage in this litigation, such as in a motion for summary judgment, if appropriate*.

On its face, this ruling seems to flunk *Cohen*'s first prong, which requires that the ruling appealed from "conclusively determine the disputed question."[2] *Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S. Ct. 2454, 2458, 57 L. Ed. 2d 351 (1978)*. This requirement ordinarily bars immediate review of an issue the district court did not rule on, or which it ruled on but left open to reconsideration. 15A Charles A. Wright & Arthur Miller, Federal Practice and Procedure § 3911.1 (2d ed. 2021).

One might reasonably wonder, then, whether it is necessary for us to overrule *Commuter*. After all, the District Court in *Commuter* never indicated that the extensive discovery record before it was insufficiently developed or that its summary judgment denial was in any way tentative or subject to revision. *Commuter, 801 F.2d at 1288-89*. Might not this be a basis on which to distinguish *Commuter*?

Possibly. But there's good reason to believe that claims of immunity from suit are different from mere defenses to liability when it comes to *Cohen*'s first prong. An immunity from suit—like qualified immunity **[*1288]** or absolute immunity—is "an entitlement not to stand trial or face the other **[**29]** burdens of litigation." *Mitchell, 472 U.S. at 526, 105 S. Ct. at 2815*. As such, it is "effectively lost if a case is erroneously permitted to go to trial." *Id.* In *Mitchell*, the Supreme Court explained why a pre-trial denial of qualified immunity would satisfy *Cohen*'s first prong even if the evidence at trial showed that the defendant was entitled to immunity after all:

> [T]he trial judge may rule only that if the facts are as asserted by the plaintiff, the defendant is not immune. At trial, the plaintiff may not succeed in proving his version of the facts, and the defendant may thus escape liability. Even so, the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations, and because "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred," it is apparent that "*Cohen*'s threshold requirement of a fully consummated decision is satisfied" in such a case.

Id. at 527, 105 S. Ct. at 2816 (quoting *Abney, 431 U.S. at 659, 97 S. Ct. at 2040*) (emphasis in original).

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[2] *Cohen*'s three prongs are: "[1] the order must conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers, 437 U.S. at 468, 98 S. Ct. at 2458* (citation omitted).

It seems to follow that a defendant's claim to immunity is conclusively denied whenever the defendant is made to proceed to the next stage of the litigation.[3] It matters not whether the **[**30]** district court intends to reconsider the ruling or even whether it makes an express ruling at all. By holding that *Parker* provides an immunity from suit rather than a mere defense to liability, *Commuter* therefore implicitly held that a defendant who raises *Parker* need not obtain an express and non-tentative ruling to immediately appeal. It is enough that the defendant is forced to proceed to discovery or trial. It is this implicit holding that stands in our way today notwithstanding the lack of an express ruling on *Parker*.

II.

Once we clear away *Commuter*, the conclusion that we lack jurisdiction follows per force. The Supreme Court and the lower federal courts have held that immediate review of tentative rulings—at least where a mere defense from liability is at issue—is unavailable under *Cohen*.

Consider *Swint v. Chambers County Commission, 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)*. In that case, a county moved for summary judgment on plaintiffs' *42 U.S.C. § 1983* claims, arguing the Supreme Court's decision in *Monell v. Department of Social Services of City of New York, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*, precluded liability. *Swint, 514 U.S. at 38-39, 115 S. Ct. at 1206*. The District Court denied the motion, citing a genuine issue of fact as to whether the sheriff who committed the raid that gave rise to plaintiffs' civil rights claims was a policymaker for the county, which if true would subject the county to liability **[**31]** under *Monell. Id. at 39-40, 115 S. Ct. at 1206-07*. In denying defendants' motions for reconsideration, however, the District Court indicated its intent to revisit the question:

> What th[is] Court decided in its [prior order] was that the Plaintiffs had come forward with sufficient evidence to persuade this Court that Sheriff Morgan **[*1289]** may be the final policy maker for the County. The parties will have an opportunity to convince this Court that Sheriff Morgan was or was not the final policy maker for the County, and the Court will make a ruling as a matter of law on that issue before the case goes to the jury.

Id. (alterations in original).

We thought we had jurisdiction to review the order not under the collateral-order doctrine (which we recognized didn't apply), but under our pendent appellate jurisdiction.[4] *Id. at 40-41, 115 S. Ct. at 1207*. And we reversed the order denying the county's motion for summary judgment. *Id. at 41, 115 S. Ct. at 1207*. The Supreme Court then vacated our opinion and held that we lacked jurisdiction over the county's appeal whether under the collateral-order doctrine or our pendent jurisdiction. *Id.* The collateral-order doctrine did not supply jurisdiction because

> [t]he District Court planned to reconsider its ruling on the county commission's summary judgment **[**32]** motion before the case went to the jury. That court had initially determined only that "Sheriff Morgan ... may have been the final policy maker for the County." The ruling thus fails the *Cohen* test, which "disallow[s] appeal from any decision which is tentative, informal or incomplete."

Id. at 42, 115 S. Ct. at 1208 (quoting *Cohen, 337 U.S. at 546, 69 S. Ct. at 1225*) (alterations in original).[5]

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[3] If qualified immunity is raised at the motion-to-dismiss stage, the defendant's claim is conclusively denied once the court subjects him to discovery. *Behrens v. Pelletier, 516 U.S. 299, 308, 116 S. Ct. 834, 839-40, 133 L. Ed. 2d 773 (1996)*. If it's raised at summary judgment, it's denied when the case proceeds to trial. *Mitchell, 472 U.S. at 527, 105 S. Ct. at 2816*.

[4] "Pendent jurisdiction is properly exercised over nonappealable decisions of the district court when the reviewing court already has jurisdiction over one issue in the case." *Stewart v. Baldwin Cty. Bd. of Educ., 908 F.2d 1499, 1509 (11th Cir. 1990)* (citation omitted). The individual defendants in *Swint* were denied qualified immunity, which we recognized supplied a basis for our appellate jurisdiction under *Mitchell, 472 U.S. at 530, 105 S. Ct. at 2817-18*. *Swint v. City of Wadley, Ala., 5 F.3d 1435, 1448-49 (11th Cir. 1993)*. We thus exercised our pendent jurisdiction over the county's appeal in the interest of "judicial economy." *Id. at 1449-50*.

The lower federal courts have found *Cohen*'s first factor lacking under similar circumstances. A Third Circuit case, *Harris v. Kellogg Brown & Root Services, Inc., 618 F.3d 398, 399 (3rd Cir. 2010)*, involved tort claims against a government contractor that performed allegedly negligent electrical maintenance for the United States military. The contractor, arguing that the case presented non-justiciable political questions and that it was immune from suit under the "combatant activities" exception to the Federal Tort Claims Act's waiver of sovereign immunity,[6] moved to dismiss the case. *Id. at 399*.

The District Court, in denying the motion without prejudice, concluded that the case did not present political questions and that the contractor, at least "at this time," was not entitled to immunity. *Id. at 400*. But the Court noted that "[i]f further factual development illuminates the presence **[*1290]** of political questions in this action, [the **[**33]** contractor] may renew its motion at that time," and also underscored that its decision respecting immunity "was informed by the fact that only 'limited discovery' had been conducted to date." *Id.* In declining to certify the question for interlocutory appeal under *28 U.S.C. § 1292(b)*,[7] the Court again emphasized that "the case was in the early stages of discovery" and that it "would entertain a renewed motion, if one was warranted in light of the facts obtained through further discovery." *Id.*

The contractor appealed under *§ 1291* and the Third Circuit tossed the case. *Id. at 400-01*. "[T]he order appealed did not 'conclusively determine' whether [the contractor] could successfully invoke the political question doctrine or the combatant activities exception," said the Court, because the District Court twice made clear that its order was not necessarily a "final disposition" of the issues. *Id. at 401-02*. That being so, exercising jurisdiction over the appeal would undermine *§ 1291*'s goal of "avoiding piecemeal litigation":

> It takes little imagination to foresee how reviewing the District Court's ruling now could undermine that goal. Suppose we undertook review here and concluded that, on the record before us, no political question existed. We would then remand the case, and presumably, discovery would continue. But because the presence or absence of a political question is such a fact-intensive inquiry, . . . a better-developed record could give rise to another colorable motion to dismiss. Suppose that this time, the District Court granted [the contractor]'s motion, and Plaintiffs appealed. We would again be **[**35]** required to decide the applicability of the political question doctrine to this case. There could be no clearer example of the very redundancy, delay, and waste of judicial resources that the final decision rule is intended to prevent.

Id. at 403-04 (citing *Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981)*).[8]

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[5] Even in cases where *Cohen*'s first prong is satisfied—for instance where the court determinatively rejects a defense in a bench trial under *Federal Rule of Civil Procedure 52(c)*—*Cohen*'s other two prongs may still prevent immediate review. Findings of fact underlying the court's ruling, for example, are likely to flunk the requirement that the issue reviewed be separate from the merits. *See Johnson v Jones, 515 U.S. 304, 314-15, 115 S. Ct. 2151, 2157, 132 L. Ed. 2d 238 (1995)*. And mere defenses from liability are unlikely to be considered "effectively unreviewable" as part of a final judgment. In *Swint*, for instance, the Court went on to hold that *Monell* was a mere defense to liability and that "[a]n erroneous ruling on liability may be reviewed effectively on appeal from final judgment." *514 U.S. at 43, 115 S. Ct. at 1208*.

[6] *See 28 U.S.C. § 2680(j)* (preserving immunity from "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war").

[7] *Section 1292(b)* provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings **[**34]** in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The Second Circuit has also interpreted *Cohen*'s first factor as precluding review of orders "expressly subject to future reconsideration by the issuing court." *Metro Servs. Inc. v. Wiggins, 158 F.3d 162, 165 (2d Cir. 1998)* (quoting *In re "Agent Orange" Prod. Liab. Litig., 745 F.2d 161, 163-64 (2d Cir. 1984)*). Applying this rule, the Second Circuit has refused to review the denial of *Feres*[9] immunity on a motion to dismiss where the District Court emphasized that its ruling was "tentative to **[*1291]** assist the parties in preparing for trial" and that the government could "renew its motion to dismiss at any time before or during trial as further evidence and legal developments suggest."[10] *In re Agent Orange, 745 F.2d at 164* (citation and quotation marks omitted). The Second Circuit has likewise refused to review a District Court's designation of lead plaintiffs in a class action where it "explicitly indicated that its designation of [the plaintiffs] will be subject to continuing reassessment throughout the course of the litigation." *Metro, 158 F.3d at 165*.

The Fourth Circuit, too, has joined these other **[**36]** circuits in this principle. *Jamison v. Wiley, 14 F.3d 222, 227-28 (4th Cir. 1994)*, involved a provision of the Westfall Act requiring district courts to substitute federal employee defendants in tort suits for the United States when the Attorney General certifies that the employee was acting within the scope of his employment at the time of the tort. The District Court initially swapped Wiley for the United States after the government filed a Westfall certification, but under authority of a Fourth Circuit decision interpreting the Act, decided to conduct an independent determination of the scope issue. *Jamison, 14 F.3d at 228-29*. In the meantime, the District Court vacated its initial substitution order and reinstated Wiley as the named defendant. *Id. at 229*. The Court noted, though, that "it was not making a final ruling on the substitution question at that time . . . [since] it could not determine [the issue] . . . without further 'factual inquiry.'" *Id.* After eight months and an evidentiary hearing, the District Court issued an order finding that "the acts at issue were not within the scope of Wiley's employment" and that substitution was therefore inappropriate. *Id.* (quotation marks omitted).

Wiley appealed this ruling, and Jamison argued that the Fourth Circuit lacked **[**37]** jurisdiction because the District Court's pre-hearing ruling was immediately appealable under *Cohen*, and Wiley's failure to appeal *that* order therefore made this appeal untimely. *Id. at 229-30*. The Fourth Circuit disagreed:

> The [pre-hearing] order does not meet the first—and most fundamental—requirement for appealability under *Cohen*, because it did not "conclusively determine" the issue in dispute: whether Wiley was entitled to have the United States substituted for him as defendant. ... Though the district court [] directed that Wiley be resubstituted as the named defendant, it made clear that its decision to do so was a tentative one, made only to return things to the status quo at the time of removal, and that it might well change its mind and resubstitute the United States after the evidentiary hearing. Such a tentative and preliminary ruling on a disputed issue, which plainly holds open the prospect of reconsideration and alteration by the district court itself, is not sufficiently "final" to be appealable under the collateral order doctrine.[11]

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[8] See *Metex Corp. v. ACS Industries, Inc., 748 F.2d 150, 153-54 (3d Cir. 1984)*, for another instance where the Third Circuit found *Cohen*'s "determinative ruling" requirement unsatisfied due to the provisional nature of a summary judgment denial.

[9] The Supreme Court held in *Feres v. United States, 340 U.S. 135, 146, 71 S. Ct. 153, 159, 95 L. Ed. 152 (1950)*, that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."

[10] Although the government pressed the argument, the Supreme Court did not reach the question whether the *Feres* doctrine provided an immunity from suit or whether it instead provided a mere defense to liability. *In re Agent Orange, 745 F.2d at 164*. The Court thought it didn't need to reach the question because it interpreted the District Court's order as leaving "open the distinct possibility of dismissal before the case is heard" so that "the occurrence of a trial is no certainty." *Id.; but see Behrens, 516 U.S. at 308, 116 S. Ct. at 839* ("*Harlow* and *Mitchell* make clear that [qualified immunity] is meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such *pretrial* matters as discovery." (citation and quotation marks omitted) (emphasis in original).

[11] The Fourth Circuit did find that the District Court's post-hearing ruling was immediately appealable under *Cohen* because "it finally and conclusively denied a claim of absolute immunity." *Jamison, 14 F.3d at 234*.

Id. at 230 (citation omitted).

[*1292] These cases represent the rule that, at least where a defense from liability is at issue, a district court's ruling will not satisfy **[**38]** *Cohen*'s first prong when the court states that the ruling is tentative and will be reconsidered later. Applying this principle here, this appeal is due to be dismissed because the District Court's ruling, like those in each of the foregoing cases, was manifestly "tentative, informal or incomplete." *Swint, 514 U.S. at 42, 115 S. Ct. at 1208* (quotation marks and citation omitted).

For this reason as well as the reasons set forth in the majority opinion, I concur in the decision to overrule *Commuter* and to dismiss this case for lack of jurisdiction.

Yellowcake, Inc. v. Hyphy Music, Inc.

United States District Court for the Eastern District of California

July 20, 2021, Decided; July 20, 2021, Filed

CASE NO. 1:20-CV-0988 AWI BAM

Reporter

2021 U.S. Dist. LEXIS 135269 *; 2021 WL 3052535

YELLOWCAKE, INC., Plaintiff v. HYPHY MUSIC, INC., Defendant;HYPHY MUSIC, INC., Count-Plaintiff v. YELLOWCAKE, INC., COLONIZE MEDIA, INC., JOSE DAVID HERNANDEZ, and JESUS CHAVEZ, SR. Counter-Defendants

Prior History: *Yellowcake, Inc. v. Hyphy Music, Inc., 2020 U.S. Dist. LEXIS 171587 (E.D. Cal., Sept. 18, 2020)*

Core Terms

albums, masters, tangible, allegations, Counterclaim, registration, hire, copyright infringement, cause of action, ownership, Copyright Act, co-author, rights, leave to amend, sound recording, license, oral agreement, exploit, written agreement, conversion, preempted, induced, joint ownership, recording, exclusive right, musical, ownership interest, written transfer, preemption, unfair

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[ ] **Motions to Dismiss, Failure to State Claim**

Under Fed. R. Civ. P. 12(b)(6), a claim may be dismissed because of the plaintiff's failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Counterclaims are subject to Rule 12(b)(6) challenges. A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. In reviewing a complaint under Rule 12(b)(6), all well-pleaded allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. However, complaints that offer no more than labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. The Court is not required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] Motions to Dismiss, Failure to State Claim

To avoid a Fed. R. Civ. P. 12(b)(6) dismissal, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Plausibility means more than a sheer possibility, but less than a probability, and facts that are merely consistent with liability fall short of plausibility. The following are principles for Rule 12(b)(6) motions: (1) to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively; (2) the factual allegations that are taken as true must plausibly suggest entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. If a motion to dismiss is granted, the district court should grant leave to amend even if no request to amend the pleading was made. However, leave to amend need not be granted if amendment would be futile or the plaintiff has failed to cure deficiencies despite repeated opportunities.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Copyright Law > ... > Assignments & Transfers > Formalities > Writing Requirement

HN3[] Types of Contracts, Oral Agreements

Ownership of copyrights cannot be transferred by oral agreement.

Business & Corporate Compliance > ... > Ownership Rights > Distribution > Infringement

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Derivative Works

Business & Corporate Compliance > ... > Ownership Rights > Displays > Infringement

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Infringement

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Registration Requirement

HN4[] Copyright, Infringement of Distribution Rights

The Copyright Act affords copyright owners the exclusive rights to display, perform, reproduce, or distribute copies of a copyrighted work, to authorize others to do those things, and to prepare derivative works based upon the copyrighted work. 17 U.S.C.S. § 106. Only the legal or beneficial owner of an exclusive right under a copyright has standing to sue for infringement of that right. Further, while one can own a copyright and have property rights in a work without a registration, the owner needs to register the copyright before he can sue for infringement. 17 U.S.C.S. §§ 408(a), 411(a). A claim for copyright infringement has two basic elements: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. To plead ownership, a plaintiff must plausibly allege it owns a valid copyright registration for its works.

Copyright Law > Scope of Copyright Protection > Publication > Copyright Act of 1976

Copyright Law > ... > Assignments & Transfers > Formalities > Writing Requirement

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > Scope of Conveyances

Copyright Law > Scope of Copyright Protection > Ownership Interests > Joint Authors & Works

HN5[] **Publication, Copyright Act of 1976**

Copyright owners may transfer any exclusive rights comprised in a copyright, including any subdivision of any of the rights specified in 17 U.S.C.S. § 106, so long as the transfer is evidenced by a signed writing. Specifically, the Copyright Act provides that a transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. 17 U.S.C.S. § 204(a). Section 204 of the Copyright Act invalidates a purported transfer of ownership unless it is in writing.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Burdens of Proof

Evidence > Burdens of Proof > Allocation

Copyright Law > ... > Assignments & Transfers > Formalities > Writing Requirement

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > Scope of Conveyances

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

HN6[] **Civil Infringement Actions, Burdens of Proof**

The general rule in the Ninth Circuit is that a third party may not raise noncompliance with 17 U.S.C.S. § 204(a)'s writing requirement as a defense to a copyright transfer. Section 204(a) is designed to resolve disputes between owners and transferees and to protect copyright holders from persons mistakenly or fraudulently claiming oral licenses or copyright ownership. In the absence of a dispute between the copyright owner and transferee, it would be unusual and unwarranted to permit a third-party infringer to invoke § 204(a) to avoid suit for copyright infringement. Although a third party may not raise noncompliance with § 204(a)'s writing requirement as a defense to a copyright transfer where the parties to the transfer do not dispute it existence, a third party is not foreclosed from challenging a plaintiff's ownership for purposes of standing. The copyright plaintiff bears the burden of establishing a qualifying ownership interest in the copyright both as a substantive element of the infringement claim and also as a necessary predicate for standing to bring the claim. The absence of standing to bring a copyright infringement claim is a jurisdictional failure.

Copyright Law > ... > Defenses > Estoppel > Equitable Estoppel

Copyright Law > ... > Assignments & Transfers > Licenses > Nonexclusive Licenses

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > Scope of Conveyances

Copyright Law > ... > Assignments & Transfers > Formalities > Writing Requirement

HN7[] **Estoppel, Equitable Estoppel**

A non-exclusive license may be granted orally or implied from conduct. The granting of a non-exclusive license waives the right of the copyright owner to sue the licensee for copyright infringement. Critically, a mere non-exclusive license does not constitute a transfer of copyright ownership and therefore cannot confer standing to assert a copyright infringement claim.

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Expression & Idea Distinguished

Copyright Law > Scope of Copyright Protection > Ownership Interests > Joint Authors & Works

Copyright Law > Scope of Copyright Protection > Ownership Interests > Initial Ownership

Copyright Law > ... > Protected Subject Matter > Limited Protection for Factual Works > Literal Forms of Expression

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Scope of Protection

HN8[] **Statutory Copyright & Fixation, Expression & Idea Distinguished**

A joint work is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. 17 U.S.C.S. § 101. The authors of a joint work are co-owners of the copyright in that work. 17 U.S.C.S. § 201(a). Each author must make an independently copyrightable contribution, which is a contribution that represents original expression that could stand on its own as the subject matter of copyright. That is, to be an author, one must supply more than mere direction or ideas; one must translate an idea into a fixed tangible expression entitled to copyright protection.

Copyright Law > ... > Damages > Types of Damages > Infringement Profits

Copyright Law > Scope of Copyright Protection > Ownership Interests > Joint Authors & Works

HN9[] **Types of Damages, Infringement Profits**

In the Ninth Circuit, a joint work has four elements: (1) a copyrightable work, (2) two or more authors, (3) the authors intend for their contributions to be merged into inseparable or interdependent parts of a unitary whole, and (4) each author made an independently copyrightable contribution to the work. In determining whether individuals are co-authors of a joint work, a contract that defines relationship as one of co-authors is dispositive. In the absence of a contract, courts consider whether: (1) a purported author superintends the work by exercising control; (2) the putative co-authors make objective manifestations of a shared intent to be co-authors; and (3) the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised. The first factor, control, will often be the most important consideration. Additionally, because each co-author of a joint work has an independent right to use or license the copyright, a co-author cannot be liable to another co-author for infringement of copyright, but co-authors must account to other co-authors for any profits earned from licensing or using the copyright.

Copyright Law > ... > Assignments & Transfers > Licenses > Exclusive Licenses

Copyright Law > ... > Assignments & Transfers > Licenses > Nonexclusive Licenses

Copyright Law > Scope of Copyright Protection > Ownership Interests > Joint Authors & Works

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > Scope of Conveyances

Copyright Law > ... > Assignments & Transfers > Formalities > Writing Requirement

HN10[] **Licenses, Exclusive Licenses**

Unless all co-authors of a joint work join in granting an exclusive license, a single co-author (acting on its own behalf) can grant only a non-exclusive license in the copyright work because one co-author cannot limit the other co-authors' independent right to exploit the copyright. However, a co-owner of a copyright is free to transfer his ownership interest to another, as long as the transfer is only of the exclusive copyright interests that the transferring co-owner himself possesses.

Copyright Law > Scope of Copyright Protection > Ownership Interests > Joint Authors & Works

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

HN11[] **Ownership Interests, Joint Authors & Works**

One joint owner of a copyright cannot sue another joint owner of a copyright for copyright infringement.

Business & Corporate Law > ... > Establishment > Elements > Application of Agency Law Principles

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Collective Works

Copyright Law > Scope of Copyright Protection > Ownership Interests > Works Made for Hire

HN12[] **Elements, Application of Agency Law Principles**

A work made for hire is defined as either:(1) a work prepared by an employee within the scope of his or her employment; or(2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audio visual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the works shall be considered a work made for hire. 17 U.S.C.S. 101. With respect to the first definition, the terms employee and scope of employment are construed according to common law agency principles.

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employees

HN13[] **At Will Employment, Definition of Employees**

The central question for determining whether a person is an employee is the hiring party's right to control the manner and means by which the product is accomplished. Factors that a court should consider for determining employee status include: the skill required for that occupation, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits, and the tax treatment of the hired party.

Copyright Law > Scope of Copyright Protection > Publication > Copyright Act of 1976

Copyright Law > Scope of Copyright Protection > Ownership Interests > Works Made for Hire

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > Scope of Conveyances

HN14[] Publication, Copyright Act of 1976

An employee's scope of employment is determined by examining three factors: (1) the work is of the kind the employee is employed to perform; (2) the work occurs substantially within the authorized time and space limits; and (3) it is actuated, at least in part, by a purpose to serve the employer. With respect to the second definition, works specially ordered or commissioned can only be made after the execution of an express agreement between the parties. No specific wording need be used in order for a writing to constitute a work for hire agreement. However, if there is no written instrument at all, then the work cannot be a commissioned or specially ordered work for hire. If a work is made for hire, the employer or other person for whom the work was prepared is considered the author and owns the copyright unless the parties have expressly agreed otherwise in a written instrument signed by them. 17 U.S.C.S. § 201(b).

Copyright Law > ... > Civil Infringement Actions > Remedies > Injunctions

HN15[] Remedies, Injunctions

The Copyright Act provides that a court may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright. 17 U.S.C.S. § 501(a). The plain language of § 501(a) presupposes either a plausibly pled or an adequately proven copyright infringement claim. This is consistent with the nature of an injunctive relief, which is not a standalone cause of action but a remedy that must be supported by a viable substantive cause of action.

Copyright Law > ... > Statutory Copyright & Fixation > Protected Subject Matter > Sound Recordings After 1972

HN16[] Protected Subject Matter, Sound Recordings After 1972

Copyright law protects intangible sound recordings but does not protect the material object in which the work is embodied.

Contracts Law > Statute of Frauds > Exceptions > Partial Performance

Contracts Law > Statute of Frauds > Requirements > Writings

HN17[] Exceptions, Partial Performance

With respect to the statute of frauds, full performance of a contract is an exception to the writing requirement.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Executed Contracts

Contracts Law > Statute of Frauds > Exceptions > Partial Performance

Contracts Law > Statute of Frauds > Requirements > Performance

HN18[] Types of Contracts, Executed Contracts

Cal. Civ. Code § 1624(a)(1) applies to agreements that by their terms are not to be performed within one year of making the agreement. Cal. Civ. Code § 1624(a)(1). However, even if a contract cannot be completely performed within one year of execution, if the contract has been fully performed by one party, the remaining promise is taken out of the statute of frauds and may be enforced by the performing party.

Copyright Law > Scope of Copyright Protection > Publication > Copyright Act of 1976

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Original Works of Authorship

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Scope of Protection

HN19[] **Publication, Copyright Act of 1976**

All state laws that are equivalent to any of the exclusive rights within the general scope of copyright as specified by 17 U.S.C.S. § 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified in 17 U.S.C.S. § 102 and 17 U.S.C.S. § 103 are governed exclusively by the Copyright Act. 17 U.S.C.S. § 301(a). A two part test is used to determine whether a state law claim is preempted by § 301(a). First, whether the subject matter of the state law claim falls within the subject matter of copyright as described in 17 U.S.C.S. §§ 102 and 103. Under the second prong, courts determine whether the state law claim contains an element not shared by a copyright claim; an element which changes the nature of the action so that it is qualitatively different from the copyright claim. In essence, courts should engage in a fact-specific inquiry into the actual allegations underlying the claims at issue in the case, so as to determine whether the gravamen of the state law claim asserted is the same as the rights protected by the Copyright Act.

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN20[] **Intentional Interference, Elements**

The elements of an Intentional Interference with Prospective Economic Advantage (IIPEA) claim are: (1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action. The third element, a wrongful act, refers to an unlawful act that is proscribed by a constitutional, statutory, regulatory, common law, or other determinable standard such that it is independently wrongful of its interfering character. IIPEA claims are more inclusive than intentional interference with contractual relations claims and do not require the existence of a valid contract.

Copyright Law > ... > Statutory Copyright & Fixation > Protected Subject Matter > Sound Recordings After 1972

HN21[] **Protected Subject Matter, Sound Recordings After 1972**

The Copyright Office permits registration of cover art as an associated image of sound recordings.

Torts > ... > Contracts > Intentional Interference > Elements

HN22[] **Intentional Interference, Elements**

The elements of a cause of action for Intentional Interference with Contractual Relations are: (1) a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. To state a claim for disruption of a contractual relation, the plaintiff need not show the defendant induced an actual or inevitable breach of the contract. It is sufficient to show the defendant's conduct made the plaintiff's performance, and inferentially enjoyment, under the contract more burdensome or costly.

Business & Corporate Compliance > ... > Ownership Rights > Displays > Infringement

Copyright Law > Scope of Copyright Protection > Publication > Copyright Act of 1976

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Scope of Protection

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Derivative Works

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Infringement

HN23[] **Copyright, Infringement of Display Rights**

Section 106 of the Copyright Act grants exclusive rights to a copyright holder to reproduce, prepare derivative works, distribute, perform, and display the copyrighted work. 17 U.S.C.S. § 106.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Copyright Law > ... > Assignments & Transfers > Formalities > Writing Requirement

HN24[] **Types of Contracts, Oral Agreements**

17 U.S.C.S. § 204(a) not only bars copyright infringement actions but also breach of contract claims based on oral agreements.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Torts > Business Torts > Unfair Business Practices > Elements

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN25[] **Trade Practices & Unfair Competition, State Regulation**

California's Unfair Competition Law (UCL) broadly proscribes the use of any unlawful, unfair or fraudulent business act or practice. Cal. Bus. & Prof. Code. § 17200. The UCL operates as a three-pronged statute: Each of these three adjectives unlawful, unfair, or fraudulent captures a separate and distinct theory of liability. The UCL's unlawful prong borrows violations of other laws and makes those unlawful practices actionable under the UCL, and virtually any law or regulation — federal or state, statutory or common law — can serve as a predicate. When the underlying legal claim that supports a UCL cause fails, however, so too will the the derivative UCL claim. A business practice is fraudulent under the UCL if members of the public are likely to be deceived. Unless a particular disadvantaged or vulnerable group is targeted, whether conduct is fraudulent is judged by the effect the conduct would have on a reasonable consumer. Conduct is unfair either when it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition, or when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

Copyright Law > Scope of Copyright Protection > Publication > Copyright Act of 1976

Copyright Law > Scope of Copyright Protection > Ownership Rights > Reproductions

Copyright Law > Scope of Copyright Protection > Ownership Rights > Performances

HN26[] **Publication, Copyright Act of 1976**

Reproducing and performing are actions that are expressly listed as exclusive rights in 17 U.S.C.S. § 106. 17 U.S.C.S. § 106.

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Confidentiality

HN27[] **Elements of Misappropriation, Confidentiality**

Common law misappropriation is covered under the umbrella of unfair competition and is normally invoked in an effort to protect something of value not otherwise covered by patent or copyright law, trade secret law, breach of confidential relationship, or some other form of unfair competition. The elements of a California common law misappropriation claim are: (1) the plaintiff made a substantial investment of time, effort and money into creating the thing misappropriated such that the court can characterize that thing as a kind of property right; (2) the defendant appropriated the thing at little or no cost, such that the court can characterize defendant's actions as reaping where it has not sown; and (3) the defendant injured plaintiff by the misappropriation.

Copyright Law > Scope of Copyright Protection > Publication > Copyright Act of 1976

Copyright Law > Scope of Copyright Protection > Ownership Rights

HN28[] **Publication, Copyright Act of 1976**

Inducing a breach of contract by facilitating a transfer of copyrighted works does not encompass any exclusive right under 17 U.S.C.S. § 106.

Torts > ... > Contracts > Intentional Interference > Elements

HN29[] **Intentional Interference, Elements**

Inducing a breach of contract is part of an Intenional Interference with Contractual Relations claim, specifically it is one of two ways to satisfy the third element of that cause of action. Without a valid contract, no breach can be induced.

Torts > Intentional Torts > Conversion > Elements

HN30[] Conversion, Elements

Conversion is an act of willful interference with a chattel, done without lawful justification, by which any person thereto is deprived of use and possession. Stated differently, conversion is the wrongful exercise of dominion over the property of another. The elements of conversion are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. To establish conversion, a plaintiff must show an actual and substantial interference with his ownership or right to posses the property. The measure of damages for a conversion claim is the full value of the property converted.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

HN31[] Federal & State Law Interrelationships, Federal Preemption

Claims for the conversion of tangible property involve actions different from those proscribed in the copyright laws and thus, are not preempted. While conversion is generally immune from preemption because it involves tangible property, conversion actions seeking only damages for reproduction of the property — not return of tangible property — are preempted by the Copyright Act.

Business & Corporate Compliance > ... > Ownership Rights > Distribution > Infringement

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Derivative Works

Business & Corporate Compliance > ... > Ownership Rights > Displays > Infringement

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Infringement

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Scope of Protection

HN32[] Copyright, Infringement of Distribution Rights

17 U.S.C.S. § 106 grants copyright owners the exclusive rights' to display, perform, reproduce, or distribute copies of a copyrighted work, to authorize others to do those things, and to prepare derivative works based upon the copyrighted work.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN33[] Injunctions, Preliminary & Temporary Injunctions

A preliminary injunction is not a cause of action, it is a remedy.

Copyright Law > Scope of Copyright Protection > Publication > Copyright Act of 1976

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Registration Requirement

Copyright Law > ... > Civil Infringement Actions > Online Infringement > Defenses

Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Scope of Protection

HN34[] **Publication, Copyright Act of 1976**

The Copyright Act in part provides that no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with the Copyright Act. 17 U.S.C.S. § 411(a). While this section does not impose a precondition to copyright protection, it does expressly prohibit copyright owners from bringing infringement actions without first properly registering their work.

Copyright Law > ... > Deposit & Registration Requirements > Registration > Application Requirements

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Registration Requirement

Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates

HN35[] **Registration, Application Requirements**

Once a defendant alleges that (1) a plaintiff's certificate of registration contains inaccurate information; (2) the inaccurate information was included on the application for copyright registration; and (3) the inaccurate information was included on the application with knowledge that it was inaccurate, a district court is then required to submit a request to the Register of Copyrights to advise the court whether the inaccurate information, if known, would have caused it to refuse registration. Courts may not consider in the first instance whether the Register of Copyrights would have refused registration due to the inclusion of known inaccuracies in a registration application. Additionally, inadvertent mistakes on registration certificates do not invalidate a copyright and thus do not bar infringement actions, unless the alleged infringer has relied to its detriment on the mistake, or the claimant intended to defraud the Copyright Office by making the misstatement. If it is determined that a registration contains inaccurate information, and that the inaccurate information was included in the registration application with knowledge that the information was incorrect, and that the inaccurate information would have caused the Copyright Office to refuse registration, then a district court may declare the registration invalid.

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Registration Requirement

HN36[] **Defenses, Copyright Misuse**

A court cannot invalidate a copyright until it receives word from the Copyright Office regarding what effect the known inaccuracy would have had on the registration decision.

Counsel: [*1] For Yellowcake, Inc., a California corporation, Plaintiff: Seth Berman, PHV, LEAD ATTORNEY, PRO HAC VICE, Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wo, Lake Success, NY; Thomas P. Griffin, Jr., Hefner Stark & Marois, LLP, Sacramento, CA.

For Hyphy Music, Inc., Defendant: Alejandro Menchaca, LEAD ATTORNEY, Lopez and Prajin, Beverly Hills, CA; George Lewis Prajin, LEAD ATTORNEY, Lopez and Prajin, Newport Beach, CA.

For Hyphy Music, Inc., Hyphy Music, Inc., Counter Claimants: Alejandro Menchaca, LEAD ATTORNEY, Lopez and Prajin, Beverly Hills, CA; George Lewis Prajin, LEAD ATTORNEY, Lopez and Prajin, Newport Beach, CA.

For Colonize Media Inc, Colonize Media Inc, Counter Defendants: Seth Berman, PHV, LEAD ATTORNEY, PRO HAC VICE, Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wo, Lake Success, NY.

For Yellowcake, Inc., a California corporation, Yellowcake, Inc., a California corporation, Counter Defendants: Seth Berman, PHV, LEAD ATTORNEY, PRO HAC VICE, Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wo, Lake Success, NY; Thomas P. Griffin, Jr., Hefner Stark & Marois, LLP, Sacramento, CA.

Judges: Anthony W. Ishii, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: Anthony W. Ishii **[*2]**

Opinion

ORDER ON COUNTER-DEFENDANTS' MOTION TO DISMISS

(Doc. No. 23)

This is a copyright dispute involving seven musical albums by the artist Los Originales De San Juan. Counter-Plaintiff Hyphy Music, Inc. ("Hyphy") brings claims against Counter-Defendants Yellowcake, Inc. ("Yellowcake"), Colonize Media, Inc. ("Colonize"), Jose Hernandez ("Hernandez") (collectively "YCH") and Jesus Chavez, Sr. ("Chavez") for two copyright violations under the *Copyright Act (17 U.S.C. § 101 et seq.)* involving four of the albums and associated cover art of three of the albums, and state law claims for intentional interference with prospective economic advantage, intentional interference with contractual relations, unfair competition, conversion, and breach of contract. Currently before the Court is YCH's *Rule 12(b)(6)* motion to dismiss six of the seven counterclaims alleged against them. For the reasons that follow, Defendants' motion will generally be granted.

RULE 12(b)(6) FRAMEWORK

HN1[] Under *Federal Rule of Civil Procedure 12(b)(6)*, a claim may be dismissed because of the plaintiff's "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. Counterclaims are subject to *Rule 12(b)(6)* challenges. See *Seismic Reservoir 2020, Inc. v. Paulsson, 785 F.3d 330, 335 (9th Cir. 2015)*. A dismissal under *Rule 12(b)(6)* may be based on the lack of a cognizable legal theory or on the absence of sufficient facts **[*3]** alleged under a cognizable legal theory. *Mollett v. Netflix, Inc., 795 F.3d 1062, 1065 (9th Cir. 2015)*. In reviewing a complaint under *Rule 12(b)(6)*, all well-pleaded allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *Kwan v. SanMedica, Int'l, 854 F.3d 1088, 1096 (9th Cir. 2017)*. However, complaints that offer no more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *Johnson v. Federal Home Loan Mortg. Corp., 793 F.3d 1005, 1008 (9th Cir. 2015)*. The Court is "not required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Seven Arts Filmed Entm't, Ltd. v. Content Media Corp. PLC, 733 F.3d 1251, 1254 (9th Cir. 2013)*. ***HN2***[] To avoid a *Rule 12(b)(6)* dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal, 556 U.S. at 678*; *Mollett, 795 F.3d at 1065*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*; *Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013)*. "Plausibility" means "more than a sheer possibility," but less than a probability, and facts that are "merely consistent" with liability fall short of "plausibility." *Iqbal, 556 U.S. at 678*; *Somers, 729 F.3d at 960*. The Ninth Circuit has distilled the following principles for **[*4]** *Rule 12(b)(6)* motions: (1) to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively; (2) the factual allegations that are taken as true must plausibly suggest entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. *Levitt v. Yelp! Inc., 765 F.3d 1123, 1135 (9th Cir. 2014)*. If a motion to dismiss is granted, "[the] district court should grant leave to amend even if no request to amend the pleading was made . . . ." *Ebner v. Fresh, Inc., 838 F.3d 958, 962 (9th Cir. 2016)*. However, leave to amend need not be granted if amendment would be futile or the plaintiff has failed to cure deficiencies despite repeated opportunities. *Garmon v. County of L.A., 828 F.3d 837, 842 (9th Cir. 2016)*.

BACKGROUND

Hyphy is a record label that is in the business of producing, manufacturing, distributing, exploiting, selling, and licensing sound and audiovisual recordings and associated artwork. Chavez is the founder and principal of the musical group Los Originales De San Juan, a popular Mexican musical group.

In February 2013, Hyphy entered into an oral exclusive recording **[*5]** agreement with Chavez whereby Hyphy commissioned Chavez, for a period of five (5) years, to exclusively provide services as a recording artist in the making of sound and audio-visual recordings embodied in albums. Pursuant to the agreement, Hyphy agreed to: (1) select the musical compositions to be recorded on the albums; (2) produce the musical performances on the albums; (3) direct the recording and filming of musical and audiovisual performances to be embodied on the albums; and (4) pay Chavez a fixed amount per album. Chavez agreed to follow Hyphy's artistic direction, perform the recordings, and grant Hyphy the non-exclusive right to utilize Chavez's likeness and his group's name. Chavez also agreed that Hyphy would be the owner of all title, right, and interest in and to the tangible masters of the albums and all property rights in the musical performances embodied in the tangible masters (including the copyrights and any extensions and renewals of the copyrights) from the inception of the creation of each album. Hyphy performed the above services and contributed sufficient originality to the albums such that Hyphy at a minimum is a co-author, co-owner, or joint owner of the **[*6]** copyrights in the albums for purposes of the Copyright Act. Hyphy also produced, created, and designed the album cover art for the albums. Apparently, Hyphy and Chavez created four albums (Corridos de Poca M, Desde La Cantina de Mi Barrio, El Campesino, and Nuestra Historia). See FAC Ex. B. Hyphy also registered copyrights in the content of the four albums and in the cover art of three albums (Corridos de Poca M, Desde la Cantina de Mi Barrio, and El Campesino). Hyphy alleges that it is the exclusive copyright owner of the four albums and the albums' cover art. See id.

In April 2019, Hernandez had a meeting with Chavez wherein Hernandez expressed his interest in exploiting the four Los Originales' albums. Chavez advised Hernandez that he had entered into a contract with Hyphy and that Hyphy was the owner of the four albums. Hernandez intentionally misled Chavez and wrongfully told Chavez that Hyphy had no rights in the four albums and that Chavez was free to sell to Hernandez's companies, Colonize and Yellowcake. Hernandez offered Chavez a significant sum of money purportedly to purchase the rights to the four albums and also promised to indemnify Chavez if Hyphy sought legal redress **[*7]** from Chavez. Hernandez engaged in this conduct individually and on behalf of Colonize and Yellowcake to disrupt the contractual relations between Hyphy and Chavez. Chavez purportedly entered into an agreement with Yellowcake. In exchange for money, Chavez wrongfully transferred his ownership rights in the four albums and cover art to Yellowcake, even though Chavez had no such rights to grant.

In May or June 2019, Hyphy discovered that Yellowcake and Colonize created or caused the creation of copies of the four Los Originales albums and cover art and was distributing, selling and exploiting these works through online platforms such as ITunes, Amazon Music, and YouTube. The only difference between the cover art created by Hyphy and the cover art being utilized by Yellowcake and Colonize was that Yellowcake and Colonize removed the Hyphy logos and replaced them with Yellowcake and Colonize's respective logos. This was done without Hyphy's authorization. Yellowcake sent correspondences to Hyphy in which Yellowcake was claiming ownership of the masters and sound recordings of the seven albums. However, Yellowcake and Colonize have no direct license from Hyphy to use or exploit the seven **[*8]** albums and cover art.

Yellowcake and Colonize sent fraudulent takedown notices to YouTube that falsely claimed that Hyphy had no right to post or upload the three albums and cover art. Prior to the takedown notices, Hyphy had received significant revenue from YouTube, and the YouTube uploads provided an important and lucrative marketing channel for the four albums and cover art. Now, YCH's uploads of the albums and cover art have generated substantial views and revenue on their YouTube channels. YCH's exploitation of the four albums is unlawful and a blatant violation of California law and federal copyright law.

On June 4, 2020, Yellowcake filed a copyright infringement claim against Hyphy. Hyphy procured registered copyrights for the four albums on the following dates: March 17, 2017 (El Campesino), May 9, 2018 (Desde La Cantina de Mi Barrio), April 13, 2020 (Corridos De Poca M), and August 2, 2020 (Nuestra Historia). See Defendants' Request for Judicial Notice ("RJN") (Doc. No. 29) Exs. 1, 2, 3, 4.[1] On August 19, 2020, Hyphy filed its counterclaim, and on August 28, 2020, filed the active First Amended Counterclaim ("FAC").

COUNTER-DEFENDANTS' MOTION TO DISMISS

I. First Cause of [*9] Action — Copyright Infringement of Sound Recordings

Counter-Defendants' Arguments

Yellowcake explains that in March 2019, it entered into an asset purchase agreement with Chavez whereby Yellowcake purchased the entirety of Chavez's ownership in the rights, title, and interest in the sound recordings that comprise the albums of Los Originales De San Juan. Yellowcake then complied in all respects with the provisions of the Copyright Act by registering copyrights for each of the sound recordings. Yellowcake was issued a Certificate of Registration for each copyrighted sound recording.

Yellowcake argues that Hyphy's first copyright claim fails because Hyphy cannot establish that it has valid ownership of a copyright in the albums. Hyphy purports to make its ownership claim by alleging an oral agreement with Chavez. ***HN3***[] However, ownership of copyrights cannot be transferred by oral agreement. At best, all that could arise from the oral agreement was a non-exclusive license to use the albums/sound recordings. In the absence of a writing between Hyphy and Chavez, Chavez had the ability to transfer his ownership of the sound recordings to Yellowcake. Because Hyphy cannot rely on the oral agreement **[*10]** to establish exclusive rights in the four albums, the first cause of action for infringement and the third cause of action for associated injunctive relief should be dismissed.

Counter-Plaintiff's Opposition

Hyphy argues that, pursuant to Paragraph 17, the FAC alleges that Hyphy is a co-author of the four albums with Chavez. As a co-author, Hyphy has an equal undivided interest in the whole of the works with Chavez. This is the case regardless of whether the FAC in the alternative pleads that Hyphy was granted an oral license from Chavez. Therefore, YCH's arguments that Hyphy does not possess a valid copyright in the sound recordings and masters, or that any claim thereto is made only by way of an oral argument with Chavez, is misplaced. As a co-author, Hyphy

[1] The RJN requests that the Court to take judicial notice of copies of registration information from the U.S. Copyright Office's Online Catalog regarding the seven albums. See Doc. No. 29. The Court takes judicial notice of these governmental records. See *Fed. R. Evid. 201*; *Basile v. Twneitieth Century Fox Film Corp., 678 F. App'x 576, 577 (9th Cir. 2017)*; *Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1146 (9th Cir. 2008)*; *Yellowcake, Inc. v. Morena Music, Inc., 522 F. Supp. 3d 747, 2021 U.S. Dist. LEXIS 39127, *8 n.1 (E.D. Cal. Mar. 1, 2021)*; *Kaseberg v. Conaco, LLC, 360 F.Supp.3d 1026, 1029 n.2 (S.D. Cal. 2018)*; *Obodai v. YouTube LLC, 840 F.Supp.2d 714, 715 n.1 (S.D. N.Y. 2011)*.

may sue YCH for copyright infringement because Chavez never had the ability to grant the exclusive rights that YCH believed it had obtained.

Legal Standard

HN4[] "The Copyright Act affords copyright owners the 'exclusive rights' to display, perform, reproduce, or distribute copies of a copyrighted work, to authorize others to do those things, and to prepare derivative works based upon the copyrighted work." *Maloney v. T3Media, Inc., 853 F.3d 1004, 1010 (9th Cir. 2017)*; see *17 U.S.C. § 106*. Only the "legal or beneficial **[*11]** owner of an exclusive right under a copyright" has standing to sue for infringement of that right. *Righthaven LLC v. Hoehn, 716 F.3d 1166, 1169 (9th Cir. 2013)*. Further, while one can own a copyright and have property rights in a work without a registration, the owner needs to register the copyright before he can sue for infringement. See *17 U.S.C. §§ 408(a)*, *411(a)*; *Gold Value Int'l Textile, Inc. v. Sanctuary Clothing, Ltd. Liab. Co., 925 F.3d 1140, 1144 (9th Cir. 2019)*; *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co., 747 F.3d 673, 678 (9th Cir. 2014)*. A claim for copyright infringement has two basic elements: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 351, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991)*; *Great Minds v. Office Depot, Inc., 945 F.3d 1106, 1110 (9th Cir. 2019)*; *Seven Arts, 733 F.3d at 1254*. "To plead ownership, [a plaintiff] must plausibly allege it owns a valid copyright registration for its works." *Malibu Textiles, Inc. v. Label Lane Int'l, Inc., 922 F.3d 946, 951 (9th Cir. 2019)*.

Discussion

Hyphy's opposition focuses on allegations in Paragraph 17 to contend that it is a co-author and therefore a joint owner of the three albums. This is a reasonable reading of Paragraph 17. However, the FAC also alleges an agreement between Hyphy and Chavez for the intellectual property rights in the four albums. Further, documents from the Copyright Office indicate that Hyphy named itself as the author of the albums as an "employer" in a work for hire arrangement. Finally, although not mentioned in the opposition, Copyright Office documents for the El Campesino album identify Hyphy as the copyright claimant through **[*12]** a written transfer agreement. See RJN Ex. 4. Therefore, the opposition, the Counterclaim, and the judicially noticed documents indicate four potential theories of ownership by Hyphy. The Court will examine each theory separately.

1. Oral Transfer from Chavez to Hyphy

HN5[] "Copyright owners may transfer '[a]ny exclusive rights comprised in a copyright, including any subdivision of any of the rights specified in *[17 U.S.C. § 106]*,' . . . so long as the transfer is evidenced by a signed writing." *Corbello v. Devito, 777 F.3d 1058, 1062 (9th Cir. 2015)* (citing *17 U.S.C. §§ 201(d)(2)* and *204(a)*); see also *Jules Jordan Video, Inv. v. 144942 Canada, Inc., 617 F.3d 1146, 1156 (9th Cir. 2010)*. Specifically, the Copyright Act provides that a "transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." *17 U.S.C. § 204(a)*. "*[S]ection 204* of the Copyright Act invalidates a purported transfer of ownership unless it is in writing." *Effects Assocs. v. Cohen, 908 F.2d 555, 556 (9th Cir. 1990)*; see *Radio TV Espanola S.A. v. New World Entm't Ltd., 183 F.3d 922, 926-27 (9th Cir. 1999)*; *Konigsberg Int'l, Inc. v. Rice, 16 F.3d 355, 356-57 (9th Cir. 1994)*.

a. Ability to Raise Compliance with *§ 204(a)*

HN6[] The general rule in the Ninth Circuit is that a third party may not raise noncompliance with *17 U.S.C. § 204(a)*'s writing requirement as a defense to a copyright transfer. *DRK Photo, 870 F.3d at 986*. *Section 204(a)* is "designed to resolve disputes between owners and transferees and to protect copyright holders **[*13]** from persons mistakenly or fraudulently claiming oral licenses or copyright ownership." *Jules Jordan Video, 617 F.3d at 1157*; see

Billy-Bob Teeth, Inc. v. Novelty, Inc., 329 F.3d 586, 592 (7th Cir. 2003). In the absence of a dispute between the copyright owner and transferee, "it would be unusual and unwarranted to permit a third-party infringer to invoke § 204(a) to avoid suit for copyright infringement." Jules Jordan Video, 617 F.3d at 1157 (quoting Billy-Bob Teeth, 329 F.3d at 592). "Although a third party may not raise noncompliance with [§ 204(a)]'s writing requirement as a defense to a copyright transfer where the parties to the transfer do not dispute it existence, a third party is not foreclosed from challenging a plaintiff's ownership for purposes of standing." DRK Photo v. McGraw-Hill Global Educ. Holdings, LLC, 870 F.3d 978, 986 (9th Cir. 2017) (citing Jules Jordan Video, 617 F.3d at 1157 and Righthaven, 716 F.3d at 1169). The copyright plaintiff bears the burden of establishing a qualifying ownership interest in the copyright both as a substantive element of the infringement claim and also as a necessary predicate for standing to bring the claim. DRK Photo, 870 F.3d at 986. The absence of standing to bring a copyright infringement claim is a jurisdictional failure. Righthaven, 716 F.3d at 1172-73.

Here, no party has raised YCH's ability to raise § 204(a) with respect to the oral agreement between Chavez and Hyphy. Despite this failure, the Court finds that YCH's invocation of § 204(a) is appropriate. First, as *DRK Photo* expressly makes clear, YCH may invoke § 204(a) as a challenge to standing. **[*14]** Second, the express allegations in the FAC identify the only agreement between Hyphy and Chavez as an oral one. Thus, the express allegations by Hyphy plainly and clearly demonstrate a failure to meet § 204(a)'s requirements. Third, the Court does not find that the general rule against third parties raising § 204(a) applies in this situation. This is not a case in which there is no dispute between the copyright holder and the transferee. Chavez is a named counter-defendant. The single claim alleged against Chavez by Hyphy is for breach of oral agreement based on Chavez's transfer of his rights in the four albums to Yellowcake. Further, the fact that Chavez entered into a written agreement with YCH for the interest in the four albums indicates that Chavez believed that he had not transferred his ownership interests to Hyphy. This is contrary to Hyphy's alleged position that it held all exclusive rights by virtue of its oral agreement with Chavez. Thus, the counterclaim against Chavez and the nature of Chavez's actions towards the four albums clearly demonstrate a dispute between Chavez and Hyphy. Ultimately, the Court is faced with competing claims from two entities who claim ownership in copyrights **[*15]** through a common transferee and counter-defendant who transferred the copyrights twice. Under these circumstances, the Court finds that it is appropriate for YCH to raise the issue of compliance with § 204(a).

b. Effect of § 204(a)

The Counterclaim affirmatively states that Hyphy and Chavez entered into oral recording agreements that included the transfer to Hyphy of all intellectual property rights that Chavez had in the four albums. See FAC ¶ 16. There are no allegations in the FAC that Hyphy and Chavez entered into any kind of written agreement whatsoever.

The absence of a written agreement is a key argument made in YCH's motion, yet Hyphy's opposition does not address the argument in terms of answering the writing requirement. That is, Hyphy does not argue that it has a written agreement with Chavez or that a written agreement is somehow unnecessary to effect a transfer of Chavez's copyright interests. Instead, the opposition regarding the first cause of action mentions the oral agreement with Chavez one time, and only then in an attempt to recharacterize the agreement or the agreement's effect. Specifically, after stating the legal proposition that a co-author shares an equal undivided interest **[*16]** in a copyrighted work, Hyphy states: "This is the case regardless of whether Hyphy also pleads in the alternative that it was granted an oral license to such rights." Doc. No. 27 at 4:20-21.

It is noteworthy that the FAC never uses the term "license" or expressly alleges any claim or theory "in the alternative." Nevertheless, accepting that the FAC is alleging that a license exists, that does not aid Hyphy. ***HN7***[] A non-exclusive license may be granted orally or implied from conduct. Effects Assocs., 908 F.2d at 558. The granting of a non-exclusive license waives the right of the copyright owner to sue the licensee for copyright infringement. Graham v. James, 144 F.3d 229, 236 (2d Cir. 1998). Critically, a "mere 'non-exclusive license' does not constitute a 'transfer of copyright ownership' and therefore cannot confer standing to assert [a copyright] infringement claim." DRK Photo, 870 F.3d at 983; see Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1146 (9th Cir. 2008). Therefore, even if the Court accepts Hyphy's characterization of its agreement with Chavez, the license that would be created is non-exclusive only, the license could only serve as a defense to a claim by Chavez, and it would not form an ownership interest sufficient to confer standing under the first cause of action. The first cause of action is in no way furthered by the contention that the oral **[*17]** agreement created a license in the albums as between Chavez and Hyphy. *Yellowcake, Inc. v. Morena Music, Inc., 522 F. Supp. 3d 747, 2021 U.S. Dist. LEXIS 39127, *16 (E.D. Cal. Mar. 1, 2021)*.

The absence of a written transfer agreement defeats both Hyphy's standing to pursue, and substantive claim of, copyright infringement based on an oral transfer of ownership between Chavez and Hyphy. See *17 U.S.C. § 204(a)*; *DRK Photo, 870 F.3d at 986*; *Righthaven, 716 F.3d at 1172*; *Radio TV Espanola, 183 F.3d at 926-27*; *Konigsberg, 16 F.3d at 356-57*; *Effects Assocs., 908 F.2d at 556-57*. To the extent a non-exclusive license may be involved or pled in the FAC, that non-exclusive license does not give Hyphy standing to pursue a copyright infringement claim. *DRK Photo, 870 F.3d at 983*; *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *17*. Therefore, the first cause of action does not allege a valid or plausible ownership interest in the copyrights of the three albums based on an oral contractual transfer between Hyphy and Chavez. *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *17*.

2. Joint Owner/Co-Author

HN8[] A "joint work" is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." *17 U.S.C. § 101*; *Aalmuhammed v. Lee, 202 F.3d 1227, 1231 (9th Cir. 2000)*; *Ashton-Tate Corp. v. Ross, 916 F.2d 516, 520 (9th Cir. 1990)*. "The authors of a joint work are co-owners of the copyright in that work." *17 U.S.C. § 201(a)*; *Richlin v. MGM Pictures, Inc., 531 F.3d 962, 968 (9th Cir. 2008)*; *Ashton-Tate, 916 F.2d at 521*. Each author must make an "independently copyrightable contribution," which is a contribution that "represents original expression that could stand on its own as the subject matter of copyright." *Ashton-Tate, 916 F.2d at 521* (quoting P. Goldstein, *Copyright: Principles, Law and Practice* ***[*18]*** , § 4.2.1 p.379 (1989)); see also *Richlin, 531 F.3d at 968*. That is, "to be an author, one must supply more than mere direction or ideas; one must 'translate an idea into a fixed tangible expression entitled to copyright protection." *S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1087 (9th Cir. 1989)*; *Ashton-Tate, 916 F.2d at 521*. Therefore, ***HN9***[] in the Ninth Circuit, a "joint work" has four elements: (1) a copyrightable work, (2) two or more authors, (3) the authors intend for their contributions to be merged into inseparable or interdependent parts of a unitary whole, and (4) each author made an independently copyrightable contribution to the work. *Aalmuhammed, 202 F.3d at 1231*. In determining whether individuals are co-authors of a joint work, a contract that defines relationship as one of co-authors is dispositive. See *Richlin, 531 F.3d at 968*; *Aalmuhammed, 202 F.3d at 1234*. In the absence of a contract, courts consider whether: (1) a purported author "superintends" the work by exercising control; (2) the putative co-authors make objective manifestations of a shared intent to be co-authors; and (3) the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised. *Aalmuhammed, 202 F.3d at 1234*; see also *Richlin, 531 F.3d at 968*. The first factor, control, will often be the most important consideration. *Richlin, 531 F.3d at 968*; *Aalmuhammed, 202 F.3d at 1234*. Additionally, because each co-author of a "joint work" has an independent right **[*19]** to use or license the copyright, a co-author cannot be liable to another co-author for infringement of copyright, but co-authors must account to other co-authors for any profits earned from licensing or using the copyright. See *Ashton-Tate, 916 F.2d at 522*; *Oddo v. Ries, 743 F.2d 630, 632-33 (9th Cir. 1984)*. Further, ***HN10***[] unless all co-authors of a "joint work" join in granting an exclusive license, a single co-author (acting on its own behalf) can grant only a non-exclusive license in the copyright work because one co-author cannot limit the other co-authors' independent right to exploit the copyright. *Sybersound, 517 F.3d at 1146*. However, a co-owner of a copyright is free to transfer his ownership interest to another, as long as the transfer is only of the exclusive copyright interests that the transferring co-owner himself possesses. Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n, 953 F.3d 638, 645 n.2 (9th Cir. 2020).

Here, YCH does not argue that the relevant allegations in the FAC (Paragraphs 16 and 17) do not plausibly allege that the albums are joint works and that Chavez and Hyphy are co-authors. Additionally, recent Ninth Circuit authority indicates some of the requirements for a joint ownership as co-authors can at least be plausibly inferred from the Counterclaim. In *Abs Entertainment*, the Ninth Circuit addressed the copyright claims of remastering engineers in **[*20]** remastered sound recordings. See *Abs Entm't v. CBS Corp., 908 F.3d 405, 410-11 (9th Cir.*

2018). As relevant here, the Ninth Circuit made a distinction between remastering engineers and recording engineers/record producers:

> Nothing in this opinion should be construed to question or limit the creative contributions of the recording engineers and/or record producers responsible for the recording session that led to the initial fixation of the sound recording. The initial producer/engineer's role is often to work in collaboration with the performing artists to make many of the creative decisions that define the overall sound of the recording as fixed, including such things as microphone choice, microphone placement, setting sound levels, equipment used, processing filters employed, tapes selected, session structure, and other similar decisions analogous to the creative choices of photographers that courts have consistently held to be original. See *United States Copyright Office and Sound Recordings as Works Made for Hire: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 2nd Sess. (2000) (statement of Marybeth Peters, Register of Copyrights) ("The copyrightable elements in a sound recording **[*21]** will usually, though not always, involve 'authorship' both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording."); cf. *Burrow-Giles, 111 U.S. at 60* (holding that photographs are copyrightable to the extent of the photographer's decisions with respect to costume, accessories, pose of subjects, light and shade and evoking the desired expression).

Id. at 423. Given *Abs Entm't*'s observations regarding the contributions of record producers, and the absence of any substantive arguments against the relevant allegations of the FAC, for purposes of this motion, dismissal based on the absence of an ownership interest is inappropriate.

However, accepting the allegation of co-authorship, and thus joint ownership, of the four albums would appear to defeat Hyphy's claim of copyright infringement. *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *21*. Hyphy's theory means that it was a co-owner of the copyrights in the albums with Chavez. See id. There is no dispute that Chavez entered into a written transfer agreement with YCH. See Complaint at Ex. A; FAC ¶¶ 22, 23. Because it **[*22]** is clear that Hyphy was not a party to that transfer, Chavez could not transfer exclusive rights to YCH. See *Sybersound, 517 F.3d at 1146*. However, Chavez could transfer his ownership interest in the albums to YCH. See Tresona Multimedia, 953 F.3d at 645 n.2. Therefore, the agreement between Chavez and YCH could have transferred Chavez's interests in the album to YCH. The ultimate result would be that Hyphy is now a joint owner of the copyrights in the albums with YCH. ***HN11***[] One joint owner of a copyright cannot sue another joint owner of a copyright for copyright infringement. See *Ashton-Tate, 916 F.2d at 522*; *Oddo, 743 F.3d at 632-33*. Given the current state of the briefing before the Court, Hyphy's theory of co-authorship/joint ownership defeats its claim of copyright infringement because the other joint owner is Yellowcake. See id.; *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *22*.

3. Work for Hire

HN12[] A work made for hire is defined as either:

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audio visual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written **[*23]** instrument signed by them that the works shall be considered a work made for hire.

17 U.S.C. 101; *Hendricks & Lewis PLLC v. Clinton, 766 F.3d 991, 998 n.5 (9th Cir. 2014)*; *Jules Jordan Video, 617 F.3d at 1156*. With respect to the first definition, the terms "employee" and "scope of employment" are construed according to common law agency principles. *Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740-41, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989)*; *U.S. Auto Parts Network, Inc. v. Parts Geek, Ltd. Liab. Co., 692 F.3d 1009, 1015 (9th Cir. 2012)*; *JustMed, Inc. v. Byce, 600 F.3d 1118, 1125 (9th Cir. 2010)*. ***HN13***[] The central question for determining whether a person is an "employee" is "the hiring party's right to control the manner and means by which the product is accomplished." *Reid, 490 U.S. at 751*; *JustMed, 600 F.3d at 1125*. Factors that a court should consider for determining "employee" status include: the skill required for that occupation, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits, and the tax treatment of the hired party. *Reid, 490 U.S. at 751-52*; *JustMed, 600 F.3d at 1125*. ***HN14***[] An employee's "scope of employment" is determined by examining three factors: (1) the work is of the kind **[*24]** the employee is employed to perform; (2) the work occurs substantially within the authorized time and space limits; and (3) it is actuated, at least in part, by a purpose to serve the employer. *U.S. Auto Parts, 692 F.3d at 1015*. With respect to the second definition, "[w]orks 'specially ordered or commissioned' can only be made after the execution of an express agreement between the parties." *Gladwell Gov't Servs., Inc. v. County of Marin, 265 F. App'x 624, 626 (9th Cir. 2008)*; *Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 413 (7th Cir. 1992)*; *Sisyphus Touring, Inc. v. TMZ Prods., 208 F.Supp.3d 1105, 1111-12 (C.D. Cal. 2016)*. No specific wording need be used in order for a writing to constitute a "work for hire" agreement." *Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1141 (9th Cir. 2003)*. However, if there is no written instrument at all, then the work cannot be a commissioned or specially ordered "work for hire." *Jules Jordan Video, 617 F.3d at 1155*. If a work is made for hire, "the employer or other person for whom the work was prepared is considered the author" and owns the copyright "unless the parties have expressly agreed otherwise in a written instrument signed by them." *17 U.S.C. § 201(b)*; see *U.S. Auto Parts, 692 F.3d at 1015*.

As indicated above, there are only two ways that a work can be deemed a "work for hire." *17 U.S.C. § 101*. The FAC's allegations are insufficient to demonstrate either method.

First, there are no allegations that a written agreement exists between Chavez and Hyphy that states that the albums are commissioned works that are to be considered works for hire. In fact, the FAC alleges **[*25]** that the agreement with Chavez was oral. See Counterclaim ¶ 16. As a result of this allegation, the albums categorically cannot be specially ordered or commissioned works for hire under *§ 101(2)*. *Jules Jordan Video, 617 F.3d at 1155*; *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *24*.

Second, with respect to "employee" status, Paragraph 16 of the Counterclaim describes the relationship with Chavez. Some aspects of Paragraph 16 may be supportive of "employee" status under *Reid*, e.g. providing sound engineers and audio/visual directors, while others do not, e.g. Chavez was paid a fixed rate per album for the albums. Cf. FAC ¶ 16 with *Reid, 490 U.S. at 751-53*. However, neither Paragraph 16 nor the remainder of the FAC address all of the *Reid* factors. Further, unlike the express allegation that Hyphy did enough to be considered a co-author, or the express allegation that Chavez granted Hyphy all rights in the three albums, there are no express allegations that Chavez was an employee of Hyphy. Given who Chavez is (the founder and musical principal of Los Originales De San Juan), and the limited allegations made in the FAC, the Court finds it more plausible that Chavez is an independent contractor, particularly in the absence of an express allegation that Chavez was an employee of Hyphy. In the absence of **[*26]** an actual allegation that Chavez was an employee of Hyphy, supported by sufficient factual allegations that indicate employee status, there is not a sufficiently plausible indication that Chavez was an employee of Hyphy who was acting int the scope of his employment for Hyphy. See *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *26*.

4. Written Agreement

As indicated above, the copyright registration for the album/sound recording El Campesino identifies the "Copyright Claimant" as "Hyphy Music, Inc., Transfer: By written agreement." RJN Ex. 4. Thus, a judicially noticed document suggests that a written agreement for a transfer of the interest in El Campesino exists. Such an agreement would fatally undercut the basis for YCH's argument that no valid transfer or ownership interest exists. However, the Court finds it troubling that the written agreement was not alleged to exist in the original Counterclaim, the now operative FAC, or even the opposition to this motion to dismiss. Instead, each of these documents identify the existence of an oral agreement only. Considering the importance a written agreement would have to Hyphy's claims and its defense of those claims, the failure of Hyphy to allege or describe in any fashion a written agreement, **[*27]** and the FAC's clear factual allegation of only an oral agreement, the Court cannot conclude that a written transfer agreement exists.

5. Conclusion

The Counterclaim does not plausibly allege a valid transfer between Chavez and Hyphy, nor does the Counterclaim plausibly allege that the four albums were works for hire. Accepting that there are sufficient plausible allegations that indicate co-authorship between Hyphy and Chavez, the allegations in the FAC and the Complaint indicate that Chavez transferred at least his ownership interests in the albums to YCH. As a co-owner, Hyphy cannot sue YCH for copyright infringement. Since no plausible infringement claim is stated, dismissal is appropriate. See *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *26*.

II. Third Cause of Action — Injunctive Relief under the Copyright Act

HN15[] The Copyright Act provides that a court "may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." *17 U.S.C. § 501(a)*; *Flexible Lifeline sys. v. Precision Lift, Inc., 654 F.3d 989, 994 (9th Cir. 2011)*. The plain language of *§ 501(a)* presupposes either a plausibly pled or an adequately proven copyright infringement claim. This is consistent with the nature of an injunctive relief, which is not a standalone cause of action but a remedy that must be **[*28]** supported by a viable substantive cause of action. *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *26-*27*; *TYR Sport Inc. v. Warnaco Swimwear, Inc., 679 F.Supp.2d 1120, 1141 n.13 (C.D. Cal. 2009)*. Dismissal of the claim for injunctive relief as a distinct cause of action is appropriate, but Hyphy is free to request injunctive relief under *§ 501(a)* in the prayer or as part of the allegations under an infringement cause of action. *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *26-*27*.

III. Fourth, Fifth & Sixth Causes of Action — Intentional Interference with Prospective Business Advantage, Intentional Interference with Contractual Relations, UCL, & Conversion

Counter-Defendants' Arguments

YCH argues that the state law claims fail because they are preempted by the Copyright Act and fail to satisfy the California statute of frauds requirement. With respect to preemption, the state law claims are preempted by the Copyright Act because they are equivalent to the rights protected by the Copyright Act and the albums fall within the subject matter of the Copyright Act. Each cause of action depends on a valid transfer of a copyright interest from Chavez to Hyphy.

Counter-Plaintiff's Opposition

With respect to preemption, Hyphy argues that the Copyright Act does not preempt any of the state law claims. Each claim is at least partly based on YCH's wrongdoing affecting Hyphy's right to own and possess **[*29]** the tangible masters. ***HN16***[] Copyright law protects intangible sound recordings but does not protect the material object in which the work is embodied. The tangible embodiment of intangible rights, like the tangible masters here, are qualitatively different than what is protected by the Copyright Act. YCH cites no case in which the Copyright Act preempts a claim based on property rights in tangible embodiments like the masters. Therefore, there is no preemption.

HN17[] With respect to the statute of frauds, full performance of the contract is an exception to the writing requirement. Hyphy argues that it has fully performed under the terms of the oral agreement. Therefore, the California statute of frauds requirement has been met. Additionally, YCH's reliance on *17 U.S.C. § 204(a)*'s requirement for a writing is misplaced because that section only involves transfers of a copyright. That section can have no application to the masters, which are tangible property and not copyrights. Finally, Hyphy argues that each state law claim incorporates by reference allegations regarding its co-authorship of the albums. Thus, contrary to YCH's arguments, not one counterclaim relies solely on Hyphy being able to establish ownership **[*30]** of the copyrights at issue through a written contract.

Discussion

YCH's arguments against the state law counterclaims are primarily based on either Copyright Act preemption or state law statute of frauds.

1. California Statute of Frauds

HN18[] YCH invokes *Cal. Civ. Code § 1624(a)(1)*, which applies to agreements that by their terms are not to be performed within one year of making the agreement. See *Cal. Civ. Code § 1624(a)(1)*; *Zakk v. Diesel, 33 Cal.App.5th 431, 449, 245 Cal. Rptr. 3d 215 (2019)*. However, even if a contract cannot be completely performed within one year of execution, if the contract has been fully performed by one party, the remaining promise is taken out of the statute of frauds and may be enforced by the performing party. See *Dutton v. Interstate Investment Corp., 19 Cal.2d 65, 119 P.2d 138, (1941)*; *Dougherty v. California Kettleman Oil Royalties, 9 Cal.2d 58, 81, 69 P.2d 155 (1937)*; *Zakk, 33 Cal.App.5th 449-54*; *Secrest v. Security Nat'l Morg. Loan Trust 2002-2, 167 Cal.App.4th 544, 556, 84 Cal. Rptr. 3d 275 (2008)*.

Here, the allegations in the Counterclaim generally describe the 2013 oral agreement with Chavez as being one for the completion of musical albums over a period of five years in exchange for a fixed monetary amount per album. See Counterclaim ¶¶ 16, 17. There are no allegations that indicate that Chavez has additional contractual promises to perform. While there are no allegations that address the statute of frauds expressly, that is hardly surprising as the statute of frauds is an affirmative defense. See *Fed. R. Civ. P. 8(c)(1)*; *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship, 821 F.3d 1069, 1079-80 (9th Cir. 2016)*; *Walton v. City of Red Bluff, 2 Cal.App.4th 117, 131, 3 Cal. Rptr. 2d 275 (1991)*. Further, YCH does not address in its reply Hyphy's "full **[*31]** performance" argument. In the absence of any response from YCH, and because the applicability of the statute of frauds is not apparent from the face of the counterclaims, dismissal of any state law claim based on the potential application of the statue of frauds is inappropriate. See *McCalden v. California Library Ass'n, 955 F.2d 1214, 1219 (9th Cir. 1990)* (holding that a complaint may be dismissed on the basis of an affirmative defense if the defense clearly appears by the face of the complaint); *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *30*; *Williams v. Alhambra Sch. Dist. No. 68, 234 F.Supp.3d 971, 985 (D. Ariz. 2017)* (declining to dismiss a claim where the allegations did not clearly demonstrate the applicability of the statute of frauds).

2. Copyright Act Preemption

HN19[] All state laws that are "equivalent to any of the exclusive rights within the general scope of copyright as specified by [*§ 106*] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified in [*§ 102* and *§ 103*] . . . are governed exclusively by [the Copyright Act]." *17 U.S.C. § 301(a)*; see also *Maloney v. T3 Media, Inc., 853 F.3d 1004, 1010 (9th Cir. 2017)*; *Sybersound, 517 F.3d at 1150*. A two part test is used to determine whether a state law claim is preempted by *§ 301(a)*. *Maloney, 853 F.3d at 1010*; *Sybersound, 517 F.3d at 1150*. First, whether the subject matter of the state law claim falls within the subject matter of copyright as described in *17 U.S.C. §§ 102* and *103*. *Maloney, 853 F.3d at 1010*; *Sybersound, 517 F.3d at 1150*. Second, assuming that it does, whether the rights asserted under **[*32]** the state law are equivalent to the rights contained in *17 U.S.C. § 106*, which identifies the exclusive rights of copyright holders. *Maloney, 853 F.3d at 1010*; *Sybersound, 517 F.3d at 1150*. Under the second prong, courts determine whether the state law claim contains an element not shared by a copyright claim; "an element which changes the nature of the action so that it is qualitatively different from the [copyright claim]." *Summit Mach. Tool Manufacturing. Corp. v. Victor CNC Sys., 7 F.3d 1434, 1439-40 (9th Cir. 1993)* (quotation omitted); see *Laws v. Sony Music Entm't, Inc., 448 F.3d 1134, 1143 (9th Cir. 2006)*; *Altera Corp. v. Clear Logic, Inc., 424 F.3d 1079, 1089 (9th 2005)*. In essence, courts should "engage in a fact-specific inquiry into the actual allegations underlying the claims at issue in the case, so as to determine whether the 'gravamen' of the state law claim asserted is the same as the rights protected by the Copyright Act." *Crafty Prods. v. Michaels Cos., 424 F.Supp.3d 983, 995 (S.D. Cal. 2019)*; *Idema v. Dreamworks, Inc., 162 F.Supp.2d 1129, 1190 (C.D. Cal. 2001)*.

a. Intentional Interference with Prospective Economic Advantage ("IIPEA")

HN20[] The elements of an IIPEA claim are: (1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action. *Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc., 2 Cal. 5th 505, 512, 213 Cal. Rptr. 3d 568, 388 P.3d 800 (2017)*. The third element, a wrongful **[*33]** act, refers to an unlawful act that is proscribed by a constitutional, statutory, regulatory, common law, or other determinable standard such that it is independently wrongful of its interfering character. *Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937, 944, 81 Cal. Rptr. 3d 282, 189 P.3d 285 (2008)*. IIPEA claims are more inclusive than intentional interference with contractual relations claims and do not require the existence of a valid contract. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*.

The Counterclaim alleges that Hyphy was in an economic relationship with YouTube that would have resulted in economic benefit through uploading and commercially exploiting the albums and cover art (advertisements would be placed in the videos which would generate revenue). See Counterclaim ¶ 56. Yellowcake and Colonize knew about Hyphy's economic relationship with YouTube and intended to disrupt it. Yellowcake and Colonize sent fraudulent DMCA takedown notices[2] to YouTube, knowing that the notices would likely interfere with the economic relationship between Hyphy and YouTube. See id. at ¶ 57. The relationship was disrupted as YouTube agreed to clock Hyphy's video postings and to cease paying advertising revenues to Hyphy for the videos embodying the albums and cover art. See id. at ¶ 58. This disruption caused economic loss and harm **[*34]** to Hyphy. See id.

First, the albums are sound recordings and thus, are entitled to copyright protection. See *17 U.S.C. § 102(a)(7)*; *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *33*. Further, the albums' respective cover art appears to be the subject of registered copyrights as visual material. See FAC Ex. B (listing Copyright registrations numbers); cf. *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *33* (finding cover art for sound recording was the subject of a registered copyright).[3] The registration indicates that the cover art is "artwork and photograph for digital sound recordings." ***HN21***[] The Copyright Office permits registration of cover art as an associated image of sound recordings. *EMI Christian Music Grp., Inc. v. MP3tunes, LLC, 844 F.3d 79, 96-97 (2d Cir. 2016)*; *Morena Music,*

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[2] "DMCA" refers to the Digital Millennium Copyright Act, and the takedown procedures of the are found at *17 U.S.C. § 512(c)*. See *Vernor v. Autodesk, Inc., 621 F.3d 1102, 1105 & n.3 (9th Cir. 2010)*.

[3] The FAC lists the copyrights in the cover art for three albums that are at issue. See FAC Ex. B. However, the Court was unable to locate these registrations on the Copyright Office website. In the absence of any challenges by YCH, the Court will assume that Hyphy has simply made typographical errors while attempting to convey the cover art registration numbers. Nevertheless, Hyphy is expected to review the registration information provided and make appropriate corrections in any amended counterclaims. If Hyphy has no registrations in the cover art, then Hyphy must correct the FAC by dropping all allegations of registered cover art. Pursuing infringement claims based on non-existent registrations (as opposed to incorrectly entered existing registration numbers) is sanctionable.

2021 U.S. Dist. LEXIS 39127 at *33 (citing *EMI Christian*). Therefore, the cover art is also subject to copyright protection.

Second, the IIPEA claim is based on Yellowcake and Colonize utilizing § 512 of the DMCA/Copyright Act to enforce what they believe to be their exclusive rights in the albums and cover art. This led to YouTube prohibiting Hyphy from using YouTube's platform in connection with videos involving the albums and cover art. In other words, Yellowcake and Colonize interfered with Hyphy's ability to exploit the albums by reproducing, distributing, displaying, and/or performing the albums through YouTube. Hyphy's allegations call into question who has **[*35]** the ability to decide whether and how to display, copy, or make available the albums. This is conduct within the ambit of § 106. See 17 U.S.C. § 106; Morena Music, 2021 U.S. Dist. LEXIS 39127 at *34; McGowan, 505 F. Supp. 3d 1000, 2020 U.S. Dist. LEXIS 229408 at *39-*40; Hoff, 2019 U.S. Dist. LEXIS 140343 at *17-*18; Worth, 5 F.Supp.2d at 822-23.

Hyphy argues that its IIPEA claim is qualitatively different because it includes allegations that Yellowcake and Colonize interfered with Hyphy's right to possess and exploit the tangible masters of the albums. The Court agrees with Hyphy that claims based on the tangible masters of the sound recordings, as opposed to the copyrighted albums, would be qualitatively different from a copyright infringement claim. However, the allegations under the IIPEA claim do not reasonably indicate that the tangible masters have any relevance.

It is unknown how the tangible masters could have been affected by the § 512 takedown notices and YouTube's corresponding decision to not permit Hyphy to post *videos* on YouTube. To the Court's understanding, the tangible masters are not videos, they are sound/audio recordings. If anything, the videos being posted on YouTube would appear to be some form of copy of the masters, not the tangible masters themselves. Without additional allegations, it is unreasonable to infer that the tangible masters form the basis of any IIPEA claim **[*36]** as alleged in the Counterclaim. See Seven Arts, 733 F.3d at 1254; Morena Music, 2021 U.S. Dist. LEXIS 39127 at *35.

In sum, because Hyphy's IIPEA claim as pled is preempted by the Copyright Act, dismissal is appropriate. See Morena Music, 2021 U.S. Dist. LEXIS 39127 at *35; Crafty Prods., 424 F.Supp.3d at 995-96; Idema, 162 F.Supp.2d at 1193.

b. Intentional Interference with Contractual Relations ("IICR")

HN22[] The elements of a cause of action for IICR are: (1) a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. Quelimane Co. v. Stewart Title Guaranty Co., 19 Cal.4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513 (1998); Ghazarian v. Magellan Health, Inc., 53 Cal.App.5th 171, 191, 266 Cal. Rptr. 3d 841 (2020). "To state a claim for disruption of a contractual relation, the plaintiff need not show the defendant induced an actual or inevitable breach of the contract. It is sufficient to show the defendant's conduct made the plaintiff's performance, and inferentially enjoyment, under the contract more burdensome or costly." Ghazarian, 53 Cal.App.5th at 191 (quoting Golden West Baseball Co. v. City of Anaheim, 25 Cal.App.4th 11, 51, 31 Cal. Rptr. 2d 378 (1994)).

The Counterclaim alleges that Hernandez met with Chavez and expressed interest in exploiting the albums. See Counterclaim ¶ 62. Although Chavez advised Hernandez that Hyphy owned the albums, Hernandez intentionally misled Chavez by telling Chavez that Hyphy had no rights in the albums. See **[*37]** id. at ¶ 63. Hernandez offered to Chavez significant money for Chavez's rights in the albums and further induced Chavez to ignore his contractual obligations through an offer to indemnify Chavez in the event Hyphy brought suit. See id. As a result, Chavez entered into an agreement with Yellowcake for the transfer of his ownership and rights in the albums and cover art even though Chavez had no such rights to grant. See id. at ¶ 64. This interference with Hyphy's agreement with Chavez caused Hyphy harm. See id. at ¶ 65.

(1) Preemption

First, the albums and cover art are protected by the copyrights. See *17 U.S.C. § 102(a)*; *EMI Christian Music, 844 F.3d at 96-97*; *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *37*; FAC Ex. B.

Second, the allegations in essence complain that YCH induced Chavez to sell rights in the albums that he did not have, presumably because Chavez had already transferred all of his rights to Hyphy. See Counterclaim ¶¶ 16, 17, 62, 63, 64. In other words, the contract that was allegedly breached involved the ownership of the albums and cover art. These allegations do not identify or involve any of the rights listed in *§ 106*. ***HN23***[] *Section 106* of the Copyright Act grants exclusive rights to a copyright holder to reproduce, prepare derivative works, distribute, perform, and display the copyrighted **[*38]** work. See *17 U.S.C. § 106*; *Maloney, 853 F.3d at 1010*; *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *37*. Because Hyphy's IICR claim is qualitatively different from a copyright infringement claim because none of the rights listed in *§ 106* are the subject of the IICR claim. Dismissal of this claim on the basis of preemption is inappropriate. See *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *37*.

(2) Pleading Deficiency [4]

"*Section 204(a)* ***HN24***[] not only bars copyright infringement actions but also breach of contract claims based on oral agreements." *Valente-Kritzer Video v. Pinckney, 881 F.2d 772, 774 (9th Cir. 1989)*; *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *39*; *Johnson v. Altamirano, 418 F.Supp.3d 530, 556 (S.D. Cal. 2019)*. Here, Hyphy's IICR claim is based on YCH inducing Chavez to transfer his copyright interests to YCH, even though those transfers were the subject of an oral agreement between Chavez and Hyphy. Therefore, in order for YCH's conduct in inducing the transfer of copyrights from Chavez to YCH to be wrongful, a valid contract between Hyphy and Chavez for the transfer of those copyrights is an essential element of Hyphy's IICR claim. See *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *39*; *Johnson, 418 F.Supp.3d at 555-56*; *Quelimane, 19 Cal.4th at 55*. However, as explained above, *§ 204(a)* operates to invalidate the oral contract between Hyphy and Chavez to the extent that the oral contract included the transfer of copyright ownership in the albums.[5] See *Valente-Kritzer Video, 881 F.2d at 774*; *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *39*; *Johnson, 418 F.Supp.3d at 556*. That is, through operation of *§ 204(a)*, there is no valid contract between Chavez and Hyphy for the transfer of Chavez's copyright interests in the albums. **[*39]** See *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *39*; *Johnson, 418 F.Supp.3d at 555-56*. Therefore, any IICR claim based on the purported transfer of Chavez's ownership of the copyrights in the four albums fails because Hyphy cannot establish the first essential element of an IICR claim. See id.; *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners, 52 Cal.App.4th 867, 879, 60 Cal. Rptr. 2d 830 (1997)*; *A-Mark Coin Co. v. General Mills, Inc., 148 Cal.App.3d 312, 322, 195 Cal. Rptr. 859 (1983)*. Dismissal of the IICR claim is appropriate to the extent that the claim is based on ownership interests or the transfer thereof in the four albums. See *Valente-Kritzer Video, 881 F.2d at 774*; *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *40*; *Johnson, 418 F.Supp.3d at 556*; *Bed, Bath & Beyond, 52 Cal.App.4th at 879*; *A-Mark Coin Co., 148 Cal.App.3d at 322*.

c. UCL

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[4] YCH's motion did not argue that the IICR cause of action was not plausibly pled. However, the pleading deficiency identified in this section necessarily follows from the Court's analysis of the first cause of action. Because a failure to state a claim can be raised even at trial, see *Fed. R. Civ. P. 12(h)(2)*, and because the deficiency is fatal to part of the IICR cause of action, the Court addresses the matter *sua sponte* at this time. See ***Omar v. Sea Land Service, Inc., 813 F.2d 986, 991 (9th Cir. 1987)***.

[5] YCH did not move to dismiss the second cause of action for copyright infringement based on the three albums' cover art. Therefore, the analysis in this section and ultimate dismissal does not apply to issues surrounding the cover art.

HN25[] The UCL broadly proscribes the use of any "unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code. § 17200*; *Beaver v. Tarsadia Hotels, 816 F.3d 1170, 1177 (9th Cir. 2016)*. "The UCL operates as a three-pronged statute: 'Each of these three adjectives [unlawful, unfair, or fraudulent] captures a 'separate and distinct theory of liability.'" *Beaver, 816 F.3d at 1177* (citation omitted). The UCL's "unlawful" prong "borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL," and "virtually any law or regulation — federal or state, statutory or common law — can serve as a predicate . . . ." *Candelore v. Tinder, Inc., 19 Cal.App.5th 1138, 1155, 228 Cal. Rptr. 3d 336 (2018)*. When the underlying legal claim that supports a UCL cause fails, however, "so too will the [the] derivative UCL claim." *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc., 28 Cal.App.5th 923, 950, 239 Cal. Rptr. 3d 577 (2018)*. "A business practice is 'fraudulent'' under the UCL if members of the public are likely to be deceived." *Davis v. HSBC Bank, 691 F.3d 1152, 1169 (9th Cir. 2012)*; *Puentes v. Wells Fargo Home Morg., Inc., 160 Cal.App.4th 638, 645, 72 Cal. Rptr. 3d 903 (2008)*. Unless a particular disadvantaged or vulnerable **[*40]** group is targeted, whether conduct is "fraudulent" is judged by the effect the conduct would have on a reasonable consumer. *Puentes, 160 Cal.App.4th at 645*. Finally, California law with respect to "unfair" conduct is currently "in flux." *Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018)*. Conduct is "unfair" either when it "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition," or when it 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Id.

The Counterclaim alleges that Yellowcake and Colonize are reproducing and performing, or benefitting financially from, aiding, encouraging, enabling, inducing causing, materially contributing to, or otherwise facilitating the reproduction and performance of Hyphy's statutory and common law rights in the albums and cover art and have engaged in common law misappropriation. See Counterclaim ¶ 68. Hernandez also induced Chavez to breach his agreement with Hyphy in order to obtain rights which Chavez had no right to give. See id. The Counterclaim **[*41]** alleges that this conduct is unfair and constitutes unfair, unlawful, or deceptive practices under *Cal. Bus. & Prof. Code § 17200*. See id. at ¶ 68.

(1) Yellowcake and Colonize

First, as discussed above, the albums and cover art are protected by the copyright act. See *17 U.S.C. § 102*; *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *41*; *EMI Christian Music, 844 F.3d at 96-97*.

Second, the conduct alleged in Paragraph 68 involves reproducing and performing the albums and cover art and engaging in common law misappropriation. *HN26*[] Reproducing and performing are actions that are expressly listed as exclusive rights in *§ 106*. See *17 U.S.C. § 106*; *Maloney, 853 F.3d at 1010*.

HN27[] Common law misappropriation is covered under the umbrella of unfair competition and is "normally invoked in an effort to protect something of value not otherwise covered by patent or copyright law, trade secret law, breach of confidential relationship, or some other form of unfair competition." *City Solutions, Inc. v. Clear Channel Communications, 365 F.3d 835, 842 (9th Cir. 2004)*. The elements of a California common law misappropriation claim are: (1) the plaintiff made a substantial investment of time, effort and money into creating the thing misappropriated such that the court can characterize that "thing" as a kind of property right; (2) the defendant appropriated the "thing" at little or no cost, such that the court can characterize defendant's actions as "reaping where it has not sown;" **[*42]** and (3) the defendant injured plaintiff by the misappropriation. *Hollywood Screentest of Am., Inc. v. NBC Universal, Inc., 151 Cal. App. 4th 631, 650, 60 Cal. Rptr. 3d 279 (2007)*. The only "things" that are identified as "misappropriated" are the albums and cover art, see Counterclaim ¶ 68, both of which are protected by the Copyright Act. Further, the only alleged conduct that could readily be considered appropriation are the acts of reproducing, displaying, and performing, all of which are exclusive rights that belong to a copyright owner under *§ 106*.

Hyphy's opposition generally argues that the involvement of the tangible masters makes all of its claims qualitatively different from an infringement claim. The term "tangible masters" is not used under this cause of action, but the term does appear in Paragraph 16. Paragraph 67 of the UCL claim incorporates by reference all of the prior 66 paragraphs, including paragraphs that make up five other causes of action. See Counterclaim ¶ 67. This is an improper shotgun pleading technique that does not give proper notice to either YCH or the Court that the tangible masters are intended to play a role in the UCL claim.[6] See *Weiland v. Palm Beach Cnty. Sheriff's Office, 792 F.3d 1313, 1321-23 (11th Cir. 2015)*; *Deerpoint Grp., Inc. v. Agrigenix, LLC, 345 F.Supp.3d 1207, 1234 n.14 (E.D. Cal. 2018)*. Further, apart from the notice concerns, it is unclear how the tangible masters truly fit within the conduct alleged under the UCL **[*43]** and particularly Paragraph 68 given the other allegation involving the involvement of digital mediums such as YouTube. That is, it is unclear how tangible masters can play by utilized through YouTube. Therefore, Hyphy's reliance on the tangible masters does not reasonably fit within the allegations actually made within the FAC and the claim as pled is implausible.

Because the Court finds that the acts of reproducing, performing, and "misappropriating" are actions covered by *§ 106*, the UCL claims against Yellowcake and Colonize are preempted by the Copyright Act. See *Kodadek v. MTV Networks, Inc., 152 F.3d 1209, 1213 (9th Cir. 1998)*; *Media.net Adver. FZ-LLC v. NetSeer, Inc., 156 F.Supp.3d 1052, 1074-75 (N.D. Cal. 2016)*.

(2) Hernandez

The Counterclaim alleges that Hernandez induced Chavez to breach his agreement with Hyphy. No other conduct by Hernandez is expressly identified under the UCL claim. See Counterclaim ¶¶ 68-71.

(A) Preemption

HN28[] Inducing a breach of contract by facilitating a transfer of copyrighted works does not encompass any exclusive right under *§ 106*. See *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *44*. Therefore, the UCL claim against Hernandez is qualitatively different from a copyright infringement claim and not preempted by *§ 301*. See id.

(B) Pleading Defect [7]

HN29[] Inducing a breach of contract is part of an IICR claim, specifically it is one of two ways to satisfy the third **[*44]** element of that cause of action. As discussed above, through operation of *§ 204(a)*, there is no valid oral contract between Hyphy and Chavez for the transfer of a copyright in the albums. See *Valente-Kritzer Video, 881 F.2d at 774*; *Johnson, 418 F.Supp.3d at 556*. Without a valid contract, no breach can be induced. See *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *44*; *Johnson, 418 F.Supp.3d at 556*; *Bed, Bath & Beyond, 52 Cal.App.4th at 879*; *A-Mark Coin Co., 148 Cal.App.3d at 322*. In other words, Hernandez did not and could not induce Chavez to breach a valid oral agreement for the transfer of copyrights in the four albums. Without inducement, there is no wrongful conduct that could be considered "unfair," "fraudulent," or "unlawful." Thus, because there is no plausible

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[6] For any cause of action, not just the IIPEA claim, if prior paragraphs are intended to support that cause of action, then Hyphy should incorporate by reference only those specific paragraphs, e.g. "paragraphs 14 through 17, 27, 38 and 42 are hereby incorporates by reference." The wholesale incorporation by reference of all prior paragraphs, when not all prior paragraphs are relevant and intended to support a cause of action, is improper. *Weiland, 792 F.3d at 1321-23*; *Deerpoint Grp., 345 F.Supp.3d at 1234 n.14*.

[7] Like the IICR claim, YCH's motion did not argue that the UCL cause of action was not plausibly pled. However, the pleading deficiency identified in this section necessarily follows from the Court's analysis of the first cause of action and the IICR claim. Because the deficiency is fatal to part of the UCL claim, the Court addresses the matter *sua sponte* at this time. See ***Omar, 813 F.2d at 991***.

or viable claim, dismissal of any UCL claim that relates to the seven albums or transfer thereof is proper.[8] See Morena Music, 2021 U.S. Dist. LEXIS 39127 at *44-*45; AMN Healthcare, 28 Cal.App.5th at 950.

d. Conversion

HN30[] Conversion is "an act of willful interference with a chattel, done without lawful justification, by which any person thereto is deprived of use and possession." De Vries v. Brumback, 53 Cal.2d 643, 647, 2 Cal. Rptr. 764, 349 P.2d 532 (1960). Stated differently, conversion is "the wrongful exercise of dominion over the property of another." Lee v. Hanley, 61 Cal.4th 1225, 1240, 191 Cal. Rptr. 3d 536, 354 P.3d 334 (2015); Hester v. Public Storage, 49 Cal.App.5th 668, 680, 263 Cal. Rptr. 3d 299 (2020). The elements of conversion are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. Lee, 61 Cal.4th at 1240; Hester, 49 Cal.App.5th at 680. To establish conversion, a plaintiff must show an actual **[*45]** and substantial interference with his ownership or right to posses the property. Zaslow v. Kroenert, 29 Cal.2d 541, 550-51, 176 P.2d 1 (1946). The measure of damages for a conversion claim is the full value of the property converted. General Security Servs. Corp. v. County of Fresno, 815 F.Supp.2d 1123, 1143 (E.D. Cal. 2011); Intel Corp. v. Hamidi, 30 Cal.4th 1342, 1350, 1 Cal. Rptr. 3d 32, 71 P.3d 296 (2003); Irwin v. McDowell, 91 Cal. 119, 122, 27 P. 601 (1891).

The Counterclaim in relevant part alleges that Hyphy owns the tangible master recordings for the three albums and that Yellowcake intentionally interfered with Hyphy's ownership in that property by exercising dominion over the masters, exploiting the masters, claiming ownership in the masters, and interfering with Hyphy's ability to commercially exploit the masters. See Counterclaim ¶¶ 73, 74.

HN31[] The Ninth Circuit has recognized that claims for the conversion of tangible property involve actions different from those proscribed in the copyright laws and thus, are not preempted. Oddo, 743 F.2d at 635. "While conversion is generally immune from preemption because it involves tangible property, conversion actions seeking only damages for reproduction of the property — not return of tangible property — are preempted by the Copyright Act." Doody v. Penguin Group (USA), Inc., 673 F.Supp.2d 1144, 1164-65 (D. Haw. 2009); Marketing Info. Masters, Inc. v. Board of Trs. of Cal. St. Univ. Sys., 552 F.Supp.2d 1088, 1098 (S.D. Cal. 2008); Firoozye v. Earthlink Network, 153 F.Supp.2d 1115, 1130 (N.D. Cal. 2001).

Hyphy's invocation of the tangible masters, as opposed to the albums/sound recordings embodied within the masters which are subject to copyright protection, see 17 U.S.C. § 102(a)(7), is clearly an attempt to fit this **[*46]** claim within *Oddo*. However, the Court is not satisfied that Hyphy has alleged a viable claim, either in terms of Oddo or pleading the elements of conversion.

First, the FAC nowhere requests the return of the tangible masters. Instead, Hyphy alleged that it was harmed according to proof. This is indicative of a preempted copyright claim. Morena Music, 2021 U.S. Dist. LEXIS 39127 at *46; Doody, 673 F.Supp.2d at 1164-65.

Second, the Court understands that Hyphy is alleging that Yellowcake "exploited" the masters by reproducing them and making them available on platforms such as YouTube. The Court takes this to mean copying and distributing or displaying them through YouTube. Otherwise, it is unclear how tangible masters can be utilized through YouTube or other digital and on-line mediums since, to the Court's knowledge, the tangible masters are not videos. Similarly, the Court understands that Hyphy was attempting to exploit the masters in the same way as Yellowcake, but Yellowcake interfered through takedown notices and threats of litigation.

Hyphy's allegations regarding exploiting the tangible masters on digital platforms like YouTube seem like a copyright infringement claim. HN32[] Section 106 grants "copyright owners the 'exclusive rights' to display,

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[8] Because YCH does not address any issues surrounding the cover art, the analysis of this subsection is limited to actions involving the three albums.

perform, reproduce, or distribute **[*47]** copies of a copyrighted work, to authorize others to do those things, and to prepare derivative works based upon the copyrighted work." *Maloney, 853 F.3d at 1010*. The only difference between the conversion cause of action and copyright infringement appears to be that the tangible masters are the "works" at issue. Hyphy appears to be treating the tangible masters the same as or interchangeably with the copyrighted albums. Without additional allegations that adequately distinguish between the tangible masters and the copyrighted albums, as well as clarification of how the tangible masters, as opposed to the copyrighted albums, were being "exploited" on digital platforms like YouTube, the Court cannot find that Hyphy has affectively pled around *§ 301* preemption with respect to "exploitation" of the masters. See *Morena Music, 2021 U.S. Dist. LEXIS 39127 at *46*.

Third, and relatedly, it is unclear what exactly Hyphy means by the allegation of "exercising dominion." While it is possible to read this as an allegation that Yellowcake physically possessed Hyphy's masters, that is not what is expressly alleged, nor do the circumstances surrounding this case reasonably indicate that Yellowcake took physical possession of, or took any actions directly against, Hyphy's tangible **[*48]** masters. Additional allegations are necessary to explain how exactly Yellowcake "exercised dominion" over the tangible masters.

Fourth, it is unclear how Yellowcake claimed ownership of the tangible masters (or how merely claiming ownership in general) constitutes such a substantial interference with the tangible masters that Yellowcake would be required to pay Hyphy the full value of the tangible masters. Additional allegations are necessary because the allegations in the Counterclaim do not reasonably suggest that Yellowcake somehow took the tangible masters or actually interfered with the tangible masters. Instead, it appears that Hyphy is attempting to rebrand an infringement claim into a conversion claim by relying on the tangible masters instead of the copyrighted albums.

Finally, interfering with Hyphy's ability to commercially exploit the tangible masters does not appear to be an act of conversion. Such interference does not affect either actual ownership of the tangible masters or Hyphy's right to possess the tangible masters. The ability to commercially exploit the masters is perhaps a benefit of ownership, but it is not the same as ownership and also would not appear to justify **[*49]** the full value of the tangible masters as damages.

In sum, because the factual allegations do not plausibly indicate that Yellowcake converted the physical/tangible masters, and because the allegations do not sufficiently remove the conversion claim from *§ 301* preemption, dismissal of the conversion claim is appropriate.

IV. Conclusion

YCH has moved to dismiss all claims, except for the second cause of action for copyright infringement involving the cover art and the eighth cause of action against Chavez.

With respect to the first cause of action, a valid ownership interest has not been pled. First, the agreement to transfer between Chavez and Hyphy that is pled in the FAC is an oral agreement and thus, invalid under *§ 204(a)*. This defect cannot be remedied, so the dismissal of any infringement claim based on a transfer of copyrights through the oral agreement will be without leave to amend. Second, the co-author/joint owner theory does not yield a plausible claim because the pleadings indicate that the joint owners of the copyright in the four albums would be Hyphy and Yellowcake, and joint owners may not sue each other for copyright infringement. Dismissal of this infringement claim will be with **[*50]** leave to amend. However, Hyphy must be able to explain why Yellowcake is not a joint owner of the copyrights in the albums. Third, the allegations categorically show that the albums were not works for hire as specially commissioned works. The allegations are also insufficient to show that the albums were a work for hire based on Chavez being an employee who was acting within the scope of his employment for Hyphy when the albums were created. Because it is not clear that amendment of this employee work for hire theory would be futile, dismissal will be with leave to amend. Finally, while no pleading or opposition identifies a written agreement, judicially noticed documents identify a written agreement for the transfer of Chavez's interest in the El Campesino album to Hyphy. Because it is unclear that granting leave to add such a theory would be futile, Hyphy will be permitted to amend their first counterclaim to include a written agreement for the transfer of the El Campesino album.

HN33[] With respect to the third cause of action, a preliminary injunction is not a cause of action, it is a remedy. Therefore, dismissal of the request as a standalone cause of action is appropriate.

With respect **[*51]** to the IIPEA cause of action, that claim as pled is preempted by the Copyright Act. However, because it is not entirely clear that amendment would be futile with respect to a claim based on the tangible masters, dismissal will be with leave to amend to add such a claim.

With respect to the IICR claim, YCH has not adequately shown that this cause of action is preempted by the Copyright Act. However, application of *§ 204(a)* invalidates any oral contract for the transfer of Chavez's copyrights in the albums to Hyphy. Without a valid contract, there is no plausible IIRC claim. Therefore, dismissal of the IIRC claim to the extent that it is based on an oral contract for the transfer of copyrights in the albums between Chavez and Hyphy will be without leave to amend. However, because it is unclear whether a written contract exists for the transfer of El Campesino from Chavez to Hyphy, dismissal of the IIRC claim will be with leave to amend with respect to the El Campesino album and only to the extent that a written transfer agreement actually exists and is alleged in an amended counterclaim.

With respect to the UCL cause of action, the claims against Yellowcake and Colonize are preempted by the Copyright **[*52]** Act. With respect to Hernandez, while the Copyright Act does not preempt the UCL claim, no plausible UCL claim based on Hernandez inducing Chavez to transfer his interests in the copyrights of the albums can be stated because of application of *§ 204(a)*. Therefore, dismissal of the UCL claim against Hernandez to the extent that it is based on inducing a breach of the oral contract for the transfer of copyrights in the three albums between Chavez and Hyphy will be without leave to amend. However, because it is unclear whether a written contract exists for the transfer of El Campesino from Chavez to Hyphy, dismissal of the UCL claim will be with leave to amend with respect to the El Campesino album and only to the extent that a written transfer agreement actually exists and is alleged in an amended counterclaim.

With respect to the conversion cause of action, no plausible claim is alleged. Additional allegations are necessary to clarify what actions Yellowcake took with respect to the tangible masters that would rise to the level of conversion and justify the full value of the tangible masters as damages. Further, the allegations in the Complaint suggest that Hyphy is attempting to artfully plead **[*53]** a copyright infringement claim as a conversion claim, and thus avoiding preemption, by focusing on the tangible masters instead of the copyrighted albums. Thus, the claim appears to be preempted. However, because it is not clear that amendment would be futile, dismissal will be with leave to amend.

V. Validity of Hyhphy's Copyright Registrations in the Four Albums

HN34[] The Copyright Act in relevant part provides that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with [the Copyright Act]." *17 U.S.C. § 411(a)*. While this section does not impose a precondition to copyright protection, it does expressly prohibit "copyright owners from bringing infringement actions without first properly registering their work." *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 959 F.3d 1194, 1197 (9th Cir. 2020)*; see also *Alaska Stock, 747 F.3d at 678*.

HN35[] The Ninth Circuit has explained that, "once a defendant alleges that (1) a plaintiff's certificate of registration contains inaccurate information; (2) 'the inaccurate information was included on the application for copyright registration'; and (3) the inaccurate information was included on the application 'with knowledge that it was inaccurate,' a district **[*54]** court is then required to submit a request to the Register of Copyrights 'to advise the court whether the inaccurate information, if known, would have caused [it] to refuse registration.'" *Unicolors, 959 F.3d at 1197* (quoting *17 U.S.C. § 411(b)(1)-(2)*). Courts may "not consider in the first instance whether the Register of Copyrights would have refused registration due to the inclusion of known inaccuracies in a registration application." Id. Additionally, "inadvertent mistakes on registration certificates do not invalidate a copyright and thus do not bar infringement actions, unless . . . the alleged infringer has relied to its detriment on the mistake, or the claimant intended to defraud the Copyright Office by making the misstatement." *Jules Jordan Video, 617 F.3d at 1156* (quoting *Lamps Plus, Inc. v. Seattle Lighting Fixture Co., 345 F.3d 1140, 1145 (9th Cir. 2003)*); see also *Gold Value, 925 F.3d at 1146*. If it is determined that a registration contains inaccurate information, and that the inaccurate information was included in the registration application with knowledge that the information was incorrect, and that the inaccurate information would have caused the Copyright Office to refuse registration, then a district court may declare the registration invalid. See *Gold Value, 925 F.3d at 1148*; see also *Unicolors, 959 F.3d at 1200*.

Here, the work for hire theory and written agreement theory for Hyphy's ownership interest in the albums **[*55]** was brought to the Court's attention by YCH through judicially noticed documents from the U.S. Copyright Office's Public Catalog website, i.e. the registration information for the four albums. The registration information indicates that Hyphy is the author of three of the albums as an "employer for hire," see RJN Exs. 1, 2, 3, and for one album through a written transfer. See RJN Ex. 4. Neither Chavez nor Yellowcake are mentioned on the registration for the three work for hire albums, but Chavez is mentioned as an "author" on the "transfer agreement" album. See RJN Exs. 1, 2, 3, 4. YCH argues that absence of an allegation of a written agreement or reliance on a written agreement in the opposition makes the work for hire/"employer for hire" and "written transfer" status of Hyphy false. YCH argues that Hyphy had knowledge that these two copyright theories of ownership were false, and also knew of Yellowcake's registration in the Nuestra Historia album at the time that Hyphy filed for its registration in that album. YCH contends that because Hyphy knew of the falsity of its representations to the Copyright Office, and because the Copyright Office would not have granted registration with **[*56]** knowledge of the true information, Hyphy's registrations are invalid.

After review, the Court agrees that the judicially noticed registration information is inconsistent with the FAC. The FAC does not claim an ownership interest in any of the albums through either a work for hire or written transfer theory. Instead, the FAC attempts to claim ownership through either an oral transfer agreement with Chavez or as a co-author/joint owner. The FAC therefore indicates that the registrations contain incorrect information in terms of authorship and basis for copyright interest. Further, YCH is clearly alleging that Hyphy knew that it was submitting false information to the Copyright Office as part of the registration application. Under *Unicolors*, these allegations and the judicially noticed documents are sufficient to put the validity of Hyphy's copyright registrations at issue.

At this point, however, noting that the validity of the registrations is as far as the Court will go. First, no inquiry has been sent to the Copyright Office regarding inaccurate information. ***HN36***[] As *Unicolors* expressly states, this Court cannot invalidate a copyright until it receives word from the Copyright Office regarding **[*57]** what effect the known inaccuracy would have had on the registration decision. See *id. at 1197*. Therefore, invalidating the registrations at this point is clearly improper. See id. Second, and more fundamentally, YCH's arguments have been made for the first time as part of a reply. Hyphy has not had an opportunity to explain what was actually submitted in its application to the Copyright Office, explain the inconsistency between the FAC and the registration information, address the issue of knowledge or inadvertence, or otherwise respond to YCH's allegations.[9]

Under these circumstances, the Court will order the parties to submit additional briefing. Hyphy will be permitted to respond to the challenges to the validity of its registrations. Of particular import, Hyphy should attempt to explain the apparent inaccuracies in the registration information and explain what information was presented as part of its registration application. The Court will then permit YCH to reply to Hyphy's supplemental response. If, after reviewing the supplemental information, the Court is satisfied that there is inaccurate information that is part of the registrations and that was included in the applications to the Copyright **[*58]** Office, the Court will send an inquiry as required by *§ 411*/*Unicolors* to determine how the Copyright Office would have reacted. However, once the Court receives the response of the Copyright Office, and depending on the response, the Court will not invalidate the registration until the issue of Hyphy's knowledge/inadvertence has been decided.

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[9] Relatedly, while the submissions at this time suggest knowledge by Hyphy, the issue of knowledge has not been litigated or decided.

The issue of the registrations' validity is not one that should delay proceedings further. Assuming that the Court sends an inquiry to the Copyright Office, that inquiry will not affect the second or eighth causes of action. Further, even if Hyphy files an amended counterclaim and continues to pursue an infringement claim with respect to any of the albums, it seems unlikely that the issue of knowledge or inadvertence will be able to be decided before either a summary judgment motion or a trial. Therefore, the pre-trial and scheduling process will not be stayed pending either receipt of the supplemental briefing or a possible response from the Copyright Office.

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. Counter-Defendants' *Rule 12(b)(6)* motion to dismiss is GRANTED in part as follows:

a. The first cause of action for copyright infringement based on an oral transfer **[*59]** agreement between Chavez and Hyphy is DISMISSED without leave to amend;
b. The first cause of action for copyright infringement based on a work for hire through a special order or commission is DISMISSED without leave to amend;
c. The first cause of action for copyright infringement based on a co-author/joint owner, work for hire through an employer-employee relationship, or written transfer agreement is DISMISSED with leave to amend;
d. The third cause of action for preliminary injunction is DISMISSED without prejudice as this is a remedy and not a cause of action;[10]
e. The fourth cause of action for intentional interference with prospective economic advantage is DISMISSED and leave to amend is granted only with respect to a claim based on the tangible masters;
f. The fifth cause of action for intentional interference with contractual relations to the extent that it is based on an oral contract involving the transfer of copyrights in the three albums is DISMISSED without leave to amend, but leave to amend is GRANTED with respect to alleging a claim based on a written transfer from Chavez to Hyphy in the album El Campesino;

g. The sixth cause of action for *Cal. Bus. & Prof. Code § 17200* UCL against Yellowcake and Colonize **[*60]** is DISMISSED without leave to amend as preempted;

h. The sixth cause of action for *Cal. Bus. & Prof. Code § 17200* UCL against Hernandez based on inducement to breach an oral agreement relating to copyright ownership in the albums is DISMISSED without leave to amend, but leave to amend is GRANTED with respect to alleging a claim based on a written transfer from Chavez to Hyphy in the album El Campesino; and
i. The seventh cause of action for conversion based on actions directed against the tangible masters is DISMISSED with leave to amend;

2. Within twenty-one (21) days of service of this order, Hyphy may file an amended counterclaim that is consistent with the analysis of this order;

3. If Hyphy fails to timely file an amended Counterclaim, leave to amend shall be automatically withdrawn without further notice, and Defendants shall file an answer to the Counterclaim within twenty-eight (28) days of service of this order;

4. Within fourteen (14) days of service of this order, Hyphy shall file supplemental briefing, as discussed above, that addresses and responds to the arguments made in the Counter-defendants' reply brief concerning the validity of Hyphy's copyright registrations in the four albums; and

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[10] To be clear, Hyphy is free to request a preliminary injunction under the Copyright Act either in its Prayer for Relief or as part of the allegations under a copyright infringement cause of action.

5. Within seven **[*61]** (7) days of service of Hyphy's supplemental briefing, Counter-defendants shall file a response.

IT IS SO ORDERED.

Dated: July 20, 2021

/s/ Anthony W. Ishii

SENIOR DISTRICT JUDGE

Mount Wilson FM Broadcasters v. A 1 Elec. Serv. Co.

Superior Court of California, County of Los Angeles

July 22, 2021, Decided

21SMCV00548

Reporter
2021 Cal. Super. LEXIS 65933 *

MOUNT WILSON FM BROADCASTERS, INC., A CALIFORNIA CORPORATION v. A-1 ELECTRIC SERVICE COMPANY, INC., A CALIFORNIA CORPORATION

Core Terms

demurrer, unfair, consumer, cause of action, business practice, tentative ruling, unfair business practice, fraudulent, alleges

Counsel: **[*1]** For Plaintiff(s): Andrew J. Kazmer for Neal Zaslavsky via LA CourtConnect.

For Defendant(s): Todd Andrew Daley via LA CourtConnect.

Judges: H. Jay Ford III.

Opinion by: H. Jay Ford III

Opinion

Minute Order

NATURE OF PROCEEDINGS: Hearing on Demurrer - without Motion to Strike

****************************TENTATIVE RULING******************************

Defendant A-1 Electric Service Company's Demurrer to Complaint is MOOT as to the 5th cause of action for breach of implied warranty of fitness and OVERRULED as to the 6th cause of action for unfair business practice. Defendant A-1 to answer in 20 days.

5th cause of action for breach of implied warranty—Plaintiff filed a dismissal without prejudice of the 5th cause of action for breach of implied warranty on 7-12-21. The Court declines Defendants request for the Court to set aside the dismissal, rule on the demurrer and sustain the demurrer without leave to amend. A plaintiff has the absolute right to voluntarily dismiss pursuant to *CCP §581* "at any time before the actual commencement of trial, upon payment of costs, if any." One court has held that the plaintiff can dismiss without prejudice as long as no actual ruling or order has been made, even after the parties learn of an adverse **[*2]** tentative ruling. *Datner v. Mann Theatres Corp. (1983) 145 Cal.App.3d 768, 771*.). But see, Groth Bros.

Oldsmobile, Inc. v. Gallagher (2002) 97 Cal.App.4th 60, 72 (voluntary dismissal filed after court issued tentative ruling sustaining demurrer without leave to amend was ineffective and should have been vacated); See generally, Edmon & Kernow, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020), ¶11:25. In *Wells v. Marina City Properties, Inc. (1981) 29 Cal.3d 781, 785*, the Supreme Court stated in dictum: "[W]e note that such right of voluntary dismissal ... would also not be impaired prior to a decision sustaining the demurrer." *Wells, supra, 29 Cal.3d at pp. 789-790*; see also *Christensen v. Dewor Developments (1983) 33 Cal.3d 778, 785* (dismissal without prejudice while demurrer pending.)

Here. no tentative ruling had been issued when the dismissal was filed. The demurrer is not a motion dispositive of the entire action, like a motion for summary judgment or a motion for terminating sanctions. Under these circumstances, the Court declines to set the dismissal aside and deems the demurrer moot as to the 5th cause of action.

6th cause of action for violation of B&PC §17200—Defendant demurs to the 6th cause of action for violation of B&PC 17200 on grounds that it is uncertain, because Plaintiff fails to identify the specific prong of 17200 allegedly violated by Defendant. "Demurrers for uncertainty are disfavored and are granted only if **[*3]** the pleading is so incomprehensible that a defendant cannot reasonably respond. A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." *A.J. Fistes Corp. v. GDL Best Contractors, Inc. (2019) 38 Cal.App.5th 677, 695*.However, the 17200 claim is not so poorly pled that Defendant cannot respond, which is the standard for a demurrer based on uncertainty.

Defendant also argues the 6th cause of action fails to state sufficient facts to allege a violation of 17200. Defendant relies on *Khoury v. Maly's of California, Inc. (1993) 14 Cal.App.4th 612* as authority to sustain the demurrer based on Plaintiff's failure to identify the particular prong of 17200 violated by Defendant's conduct. "A plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation. Demurrer was properly sustained as to this cause of action because the second amended complaint identifies no particular section of the statutory scheme which was violated and fails to describe with any reasonable particularity the facts supporting violation." *Khoury, supra, 14 Cal.App.4th 612, 619*.

Plaintiff expressly alleges violation of the "unfair" and "fraudulent" prongs of B&PC §17200. See Complaint, **[*4]** ¶54 ("these acts constitute unfair business practices") and 55 ("the acts and conduct of the Defendants...constitute unfair and fraudulent business acts and practices and thereby violate [17200].") Plaintiff identifies a particular section of the B&PC violated by Defendant's conduct.

Plaintiff alleges that Defendant demanded payment for services that it knew were negligently rendered. Plaintiff alleges Defendant failed to bolt down and secure the generator they installed. See Complaint, ¶21. Plaintiff also alleges Defendant failed to specify the appropriate generator for Plaintiff s use. See Complaint, *'24. Plaintiff alleges these acts qualify as unfair and fraudulent. Plaintiff is seeking redress under B&PC §17200 as a consumer of Defendant's services, not as Defendant's competitor.

In cases involving a direct competitor, an unfair business practice is narrowly defined. "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or **[*5]** the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 187*.

In consumer cases, it is unclear if the Cel-Tech definition also exclusively applies or if the broad pre-Cel-Tech definition applies: "*[S]ection 17200 of the Business and Professions Code* defines 'unfair competition' to include, as relevant, 'unlawful, unfair or fraudulent business practice(s)'...It would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited, since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery." See *Motors, Inc. v. Times Mirror Co. (1980) 102 Cal.App.3d 735, 740*. Thus, whether a business is unfair is a fact intense inquiry that requires the Court to act as a court in equity. "It is really quite impossible" to make such a determination on demurrer. Id.

"Subsequent to the decision in Cel-Tech, a split of authority developed among the Courts of Appeal, which have applied three different tests for unfairness in consumer cases." *Drum v. San Fernando Valley Bar Assn. (2010) 182*

Cal.App.4th 247, 256. There are three possible tests to determine whether a business practice is "unfair" under §17200 in a consumer. The first test requires that the public policy that is a predicate to a consumer unfair competition action be tethered to specific constitutional, statutory or **[*6]** regulatory provisions. Id. Under the second test, the question is "whether the alleged business practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the utility of the defendants' conduct against the gravity of the harm to the alleged victim." Id. Under the third test, a business practice is unfair if (1) the consumer injury was substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury to consumers themselves that could not reasonably be avoided." Id.

Plaintiff does not allege Defendant's conduct violates any specific constitutional, statutory or regulatory provision. However, whether Defendant's alleged business practice is "immoral, unethical, oppressive, unscrupulous or substantially injurious to customers" requires a factual analysis outside the scope of a demurrer. The third potential test for "unfairness" in the consumer context likewise requires a factual analysis outside the scope of demurrer. Plaintiff has alleged a substantial consumer injury due to Defendant's business practice.

"The determination whether a business practice **[*7]** is unfair involves an examination of that practice's impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim. Whether a practice is unfair is a determination of fact which requires a review of the evidence from both parties. It thus cannot usually be made on demurrer." *Nolte v. Cedars-Sinai Medical Center (2015) 236 Cal.App.4th 1401, 1407-1408*. Plaintiff sufficiently alleges an unfair business practice for purposes of demurrer. Defendant's Demurrer is OVERRULED.

************************END OF TENTATIVE RULING*************************

The matter is called for hearing.

Both sides submit on the tentative ruling.

The Court adopts the tentative ruling as indicated above.

The Demurrer - without Motion to Strike filed by A-1 ELECTRIC SERVICE COMPANY, INC., a California Corporation on 04/29/2021 is Overruled.

Counsel are ordered to comply with *CRC 3.724* and *3.727*.

Notice is waived.

Conrad v. Jimmy John's Franchise, LLC

United States District Court for the Southern District of Illinois

July 23, 2021, Decided

Case No. 18-CV-00133-NJR

Reporter
2021 U.S. Dist. LEXIS 142272 *; 2021 WL 3268339

DONALD CONRAD, On Behalf of Himself & All Others Similarly Situated, Plaintiff, v. JIMMY JOHN'S FRANCHISE, LLC, JIMMY JOHN'S ENTERPRISES, LLC, and JIMMY JOHN'S LLC, Defendants.

Prior History: *Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 2018 U.S. Dist. LEXIS 128149, 2018 WL 3631577 (S.D. Ill., July 31, 2018)*

Core Terms

franchisees, employees, No-Poach, predominance, class member, class certification, suppressed, class action, franchise agreement, antitrust, wages, conspiracy, franchise, questions, training, brands, commonality, percent, common question, rule of reason, certification, adequacy, promoted, cleaned, female, hiring, individualized, restaurant, damages, parties

Counsel: **[*1]** For Donald Conrad, on Behalf of Himself and All Others Similarly Situated. Added per Doc. 75 First Amended Complaint., Plaintiff: Derek Y. Brandt, LEAD ATTORNEY, Connor P. Lemire, Leigh M. Perica, McCune Wright Arevalo, LLP, Edwardsville, IL; Jalle Habte Dafa, Michelle A. Lamy, PRO HAC VICE, Anne B. Shaver, Dean M. Harvey, Lin Y. Chan, Yaman Salahi, Lieff, Cabraser, et al. - San Francisco, CA, San Francisco, CA; Michele M. Vercoski, PRO HAC VICE, McCune Wright, LLP, Ontario, CA; Michelle E. Conston, PRO HAC VICE, Scott & Scott Attorneys at Law LLP - NY, New York, NY; Richard D. McCune, Jr., Sean C. Russell, Stephanie A. Hackett, PRO HAC VICE, Walter W. Noss, McCune Wright, LLP, Ontario, CA.

For Jimmy John's Franchise, LLC, a Delaware limited liability company, Jimmy John's Enterprises, LLC, a Delaware limited liability company, Jimmy John's LLC, a Delaware limited liability company, Defendants: Russell K. Scott, LEAD ATTORNEY, Greensfelder, Hemker & Gale, P.C. - Belleville, Belleville, IL; Caeli A. Higney, Joseph R. Rose, Rachel Susan Brass, PRO HAC VICE, Gibson Dunn & Crutcher LLP - San Francisco, San Francisco, CA; Kahn A. Scolnick, PRO HAC VICE, Gibson, Dunn & Crutcher, LLP, Los Angeles, **[*2]** CA.

Judges: NANCY J. ROSENSTENGEL, Chief United States District Judge.

Opinion by: NANCY J. ROSENSTENGEL

Opinion

MEMORANDUM AND ORDER

ROSENSTENGEL, Chief Judge:

This is an antitrust case brought by Plaintiff Donald Conrad against Defendants Jimmy John's Franchise, LLC; Jimmy John's Enterprises, LLC; and Jimmy John's LLC (*collectively* "Jimmy John's"). According to the Amended Complaint (Doc. 75), a "No-Poach Provision" in Jimmy John's Franchise Agreement effectively prohibited employees from switching between rival locations, stifling competition for labor in violation of *Section 1 of the Sherman Act*, *15 U.S.C. § 1*.

Based on an expert report from economist Dr. Hal Singer, Conrad alleges that the Provision suppressed wages for every Jimmy John's employee by 8.4 percent, causing [TEXT REDACTED BY THE COURT] in class-wide damages. (Doc. 115-13). But in an Order entered on February 24, 2021 (Doc. 223), the Court excluded the report under *Daubert*. Without expert testimony, Conrad cannot satisfy the predominance requirement under *Rule 23*. Yet other issues also preclude class certification: Conrad's claims are atypical of the unnamed class members because the No-Poach Provision was admittedly irrelevant to him; there is a potential conflict between managers **[*3]** and hourly employees; and several individual questions exist that cannot be answered using common proof. So for the reasons below, the Court denies Conrad's Motion for Class Certification, as well as his Motion to Strike.

BACKGROUND

Jimmy John's is a franchised sandwich fast-food chain with nearly 3,000 stores across 40 states. (Am. Compl. at 2). About 98 percent of those stores are independently owned and operated by around 800 franchisees. (*Id.*). The individual franchisees—not Jimmy John's — determine how much their employees get compensated. (North Dep. at 56:19-21, Doc. 115-14). Simply put, Jimmy John's "is not responsible for the employment matters of franchisees" (*id.* at 60:3-6), [TEXT REDACTED BY THE COURT]." (JJE Bonus Program at 2, Doc. 133-12; Franchise Operations at 6, Doc. 115-24).

Despite their relative independence, franchisees must maintain minimum brand standards to ensure a consistent customer experience across the country. (North Dep. at 70:19-22; McCrary Report ¶¶ 50, 85, Doc. 133-57). These brand standards include "a set of specific training requirements on each franchisee" (McCrary Report ¶ 68), and on "new and existing employees being promoted to the Certified Manager **[*4]** role." (*id.* ¶ 72). But Jimmy John's will only pay to train "up to two employees": "Franchisees must cover both fees and expenses for each additional employee sent for training." (*Id.* ¶ 80). The estimated total cost to train a certified manager is between [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] (*Id.*).

From at least 2014 to 2018, Jimmy John's included a so-called No-Poach Provision in its Franchise Agreement. (Conrad's Mem. in Supp. of Mot. for Class Cert. [*hereinafter* "Conrad's Mem."] at 1, 8, Doc. 115). Its terms changed over time. In 2014, for example, the Provision prohibited franchisees from recruiting or hiring anyone "who was employed within the preceding twenty-four (24) months, as a General Manager or Assistant Manager at a JIMMY JOHN'S® Restaurant . . . without obtaining the employer's prior written permission." (2014 Franchise Agreement § 7(d), Doc. 115-17). The Provision was enforced by the franchisees themselves, who could be forced to pay up to $50,000 for violating it. (*Id.*). In 2015, the Provision was amended to only prohibit recruiting (not hiring) but applied to all employees (not only managers). (2015 Franchise Agreement § 7(d), Doc. 133-15). And **[*5]** in 2016, it was limited even more so that the $50,000 penalty applied only when a *manager* was solicited in violation of the Provision. (2016 Franchise Agreement § 7(d), Doc. 133-26).

With that in mind, about 88 percent of employee release requests "were approved without conditions;" and "[o]nly [TEXT REDACTED BY THE COURT] approved employee releases were associated with conditions on reimbursement for training expenses." (McCrary Report ¶ 96) (emphasis omitted). In the rare case that "a release was refused for reasons other than poor performance or was approved conditional on compensation, 74 percent . . . involved managers - and training investments were explicitly mentioned in the negotiations for approximately half of those managers." (*Id.* ¶ 97) (emphasis omitted). On the other hand, non-managers were released 94 percent of the time. (*Id.*). "In other words, . . . the requests were almost always granted, and almost always without cost." (*Id.*).

In February 2018, Conrad started working at a Jimmy John's in Winter Park, Florida, "as an in-shop employee at $8.25 per hour." (Conrad's Resp. to Jimmy John's Second Set of Interrogs. at 7, Doc. 133-43). A month later, "he was promoted to Person **[*6]** In Charge and given a raise to $9.00 per hour." (*Id.*). And a month after that, he was "promoted to a salaried manager earning $91.00 per day." (*Id.*). Then, the area manager asked Conrad to switch to the Orlando location, where he would become a co-manager. (*Id.*). He did, receiving "a raise to $95.00 per day . . . ." (*Id.*). But the new position was short-lived: Conrad did not get along with the franchise co-owner's niece, who worked in the same store and supposedly "specifically targeted [Conrad's] work performance . . . ." (*Id.* at 5). In November, Conrad was fired after he told the niece "that he no longer cared for her opinions." (*Id.*). More accurately, he called her "a fucking bitch." (Conrad Dep. at 308:4-9, Doc. 133-48).

Now, Conrad alleges that the No-Poach Provision "reflects a naked restraint of competition" in violation of *Section 1 of the Sherman Act, 15 U.S.C. § 1*. (Am. Compl. at 1). In brief, he alleges that the No-Poach Provision had the effect of suppressing wages and stifling worker mobility, leading to class-wide injury and damages. (Conrad's Mem. at 1). The crux of his claim is that without the Provision, franchisees would be pressured to increase their wages to match competing locations **[*7]** or else risk losing their employees. (*Id.* at 15). Even so, Conrad admits that he "made no efforts to obtain employment at [another] Jimmy John's restaurant," (Conrad's Resp. to Second Set of Interrogs. at 6; Conrad Dep. at 61:10-12), and that the No-Poach Provision was "irrelevant" and "just didn't really have anything to" do with him. (Conrad Dep. at 189:9-14, 205:11-19). Still, he claims that he "suffered reduced wages and inhibited employment opportunities due to the" No-Poach Provision. (Am. Comp. at 7).

Conrad seeks to certify the following class under *Federal Rules of Civil Procedure 23(a)* and *23(b)(3)*:

> All persons in the United States who were employed at a Jimmy John's-branded restaurant at any time between January 24, 2014 to July 12, 2018, whether owned and operated as a corporate store or a franchise store.

(Conrad's Mem. at 1).

To support his claim, Conrad points to an expert report prepared by Dr. Hal Singer. (Singer Report at 1, Doc. 115-13). But the Court excluded Dr. Singer's opinions because his wage regressions suffered from a methodological flaw: Dr. Singer failed to adjust for those two percent of the wage data that do not consistently record employee wages as per-shift or per-hour, leading to inflated estimates **[*8]** of impact. (*See* Mem. & Order at 40-46, Doc. 223). On the other hand, the Court admitted both of Jimmy John's expert reports prepared by Dr. Janus Ordover (Ordover Report at 1, Doc. 133-56) and Dr. Justin McCrary (McCrary Report at 1, Doc. 133-57). (*See* Mem & Order at 46-65).

Finally, in responding to Conrad's Motion for Class Certification, Jimmy John's attached declarations from 19 franchise owners. (*See* Scolnick Decl. at 14, Doc. 133-1). But three purportedly never responded to Conrad's "repeated attempts to obtain discovery from them." (Conrad's Mot. to Strike at 1, Doc. 186). He therefore asks the Court to strike those franchisee-declarations under *Federal Rule of Civil Procedure 37*. (*Id.* at 5).

Law And Analysis

A. Motion to Strike

In general, "a party must, without awaiting a discovery request, provide to the other parties . . . the name and, if known, the address and telephone number of each individual likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses . . . ." *Fed. R. Civ. P. 26(a)(1)(A)*. There is also a continuing duty to supplement these disclosures "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and **[*9]** if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing . . . ." *Fed. R. Civ. P. 26(e)(1)(A)*.

"If a party fails to" meet its disclosure obligations, then the Court may prohibit it from using "that information or witness to supply evidence on a motion . . . unless the failure was substantially justified or is harmless." *Fed. R. Civ P. 37(c)(1)*. "The determination of whether a *Rule 26(a)* violation is justified or harmless is entrusted to the broad discretion of the district court." *Mid-America Tablewares v. Mogi Trading Co., 100 F.3d 1353, 1363 (7th Cir. 1996)*. "[T]he following factors should guide the district court's discretion: (1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date." *David v. Caterpillar, Inc., 324 F.3d 851, 857 (7th Cir. 2003)*.

Conrad claims that he "made numerous attempts to contact the remaining three franchisee declarants-Butler, Firmer, and Severson-regarding their document and deposition subpoenas," but they never responded. (Conrad's Mot. to Strike at 3). He also claims that Jimmy John's counsel refused to accept service of subpoenas on the declarants' behalf. **[*10]** (*Id.* at 3). He thus argues that sanctions are warranted. (*Id.* at 6-9). The Court disagrees.

First, the Court rejects Conrad's contention that Jimmy John's had to serve subpoenas on third parties outside its control. At the center of this case is Conrad's claim that the franchisees "are independently owned and operated as separate and distinct entities from Jimmy John's." (Am. Compl. at 2). *Cf. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* ("[O]fficers or employees of the same firm do not provide the plurality of actors imperative for a *§ 1* conspiracy."). In fact, Jimmy John's itself had to serve subpoenas on franchisees when they wanted to depose them or request document production. (*See* Rose Decl., Exs. 1-3, Docs. 195-1, 195-2, 195-3). Conrad also acknowledges that his efforts to serve the other 16 franchisees were made through their respective counsel. (Chan Decl. ¶ 7, Conrad's Reply Ex. 1). In short, Jimmy John's did not have to serve any of the franchisees on Conrad's behalf.

The Court also has reviewed the communications between the litigants and finds that Conrad's inability to depose the remaining three franchisees did not arise from any willfulness, bad faith, or fault of Jimmy John's counsel. Jimmy John's supplemented its **[*11]** initial disclosures in July 2020 with an address for each of the three franchisees. (Jimmy John's Supp. *Rule 26(a)(1)* Initial Disclosures at 5-7, Doc. 197-2). For Butler and Scott, Jimmy John's also included a store phone number. (*Id.* at 5, 7). True, these franchisees owned several Jimmy John's-branded stores; and Conrad first contacted Jimmy John's counsel on August 26 complaining of difficulties reaching them. (Email String at 1, Doc. 197-2, Ex. 2). But after a meet-and-confer on September 11, Jimmy John's counsel provided Butler and Finner's personal email addresses and the email address for Severson's attorney. (*Id.* Ex. 5). When they supposedly failed to respond (which Firmer disputes (Finney Decl. at 1, Doc. 197-1)), Conrad never sought court intervention, nor did he seek an extension of the deadline. Instead, he waited for the deadline to pass and now asks the Court to exclude the testimony in whole cloth. Such a harsh remedy is inappropriate given that Jimmy John's provided additional points of contact for the three franchisees. And while Conrad's contentions are not without force, any prejudice is harmless: Jimmy John's did not explicitly rely on those franchisee-declarations in opposing **[*12]** class certification, and the Court does not reference them below. In other words, those declarations are in no way dispositive. The Court thus denies Conrad's Motion to Strike.

B. Motion for Class Certification

Federal Rule of Civil Procedure 23 provides a mechanism by which "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members . . . ." *Fed. R. Civ. P. 23(a)*. But "[a]ggregation is not an end unto itself." Principles of the Law of Aggregation Litigation § 1.03 (2010). Rather, the objectives of *fidelity, finality*, and *feasibility* guide district courts in determining whether class certification is the fairest and most efficient mode of adjudication. *Id.* Ultimately, the Court is vested with "broad discretion to determine whether certification of a class-action lawsuit is appropriate." *Keele v. Wexler, 149 F.3d 589, 592 (7th Cir. 1998)* (cleaned up); *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 630, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (Breyer, J., concurring in part and dissenting in part) ("The law gives broad leeway to district courts in making class certification decisions, and their judgments are to be reviewed by the court of appeals only for abuse of discretion.").

Conrad seeks to certify a class under *Rule 23(b)*. "To achieve certification, a proposed class under *Rule 23(b)* must meet the requirements of *Rule 23(a)*—numerosity, typicality, commonality, **[*13]** and adequacy of representation—and one of the alternatives listed in *Rule 23(b)*." *Howard v. Cook Cty. Sheriff's Off., 989 F.3d 587, 597 (7th Cir.*

2021). Relevant here, Rule 23(b)(3) permits a class action if "the court finds that questions of law or fact common to the members of the class *predominate* over any other questions affecting only individual members, and that a class is *superior* to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). "If the party certification fails to meet any of these . . . requirements, class certification is precluded." Kress v. CCA of Tenn., LLC, 694 F.3d 890, 893 (7th Cir. 2012).

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common question of law or fact, etc." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (emphasis in original). That said, "Rule 23 must be liberally interpreted": "Its policy is to favor maintenance of class actions." King v. Kan. City S. Indus., Inc., 519 F.2d 20, 25-26 (7th Cir. 1975); Messner v. Northshore Univ. Health Sys., 669 F.3d 802, 815 (7th Cir. 2012) ("[I]n antitrust cases, Rule 23, when applied rigorously, will frequently lead to certification.") (cleaned up). Even so, Conrad bears "the burden of proving by a preponderance of the evidence that . . . the requirements of Rule 23" are met. Howard, 989 F.3d at 597.

i. Numerosity

"Determining whether the proposed class **[*14]** is sufficiently numerous for certification is usually straightforward. Affidavits, declarations, or even reasonable estimates in briefs are often sufficient to establish the appropriate size of the class and whether joinder might be a practical and manageable alternative to class action litigation." Manual for Complex Litigation § 21.141. "Numerosity is generally presumed when the proposed class would have at least 40 members." Lapin v Goldman Sachs & Co., 254 F.R.D. 168, 175 (S.D.N.Y. 2008) (citing 1 Newberg on Class Actions § 3.05 (2d ed. 1985)); *e.g.,* In re Gen. Motors Corp. Dex-Cool Prods. Liability Litig., 241 F.R.D. 305 (S.D. Ill. 2007); Exhaust Unlimited, Inc. v. Cintas Corp., 223 F.R.D. 506 (S.D. Ill. 2004).

The numerosity requirement is uncontested here. Conrad seeks to represent a putative class of over 615,000 current and former Jimmy John's employees. (Conrad's Mem. at 21). The Court agrees that the putative class is "so numerous that joinder of all members is impracticable," thus satisfying the numerosity requirement. *See* Fed. R. Civ. P. 23(a)(1).

ii. Commonality

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of the law." Dukes, 564 U.S. at 350 (cleaned up). Rather, "[t]heir claims must depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity **[*15]** will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "Identifying common questions typically requires examining the parties' claims and defenses, identifying the type of proof the parties expect to present, and deciding the extent to which there is a need for individual, as opposed to common, proof." Manual for Complex Litigation § 21.141. "'[E]ven a single [common] question' will do." Dukes, 564 U.S. at 359 (quoting Richard Nagareda, *The Preexistence and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 176 n.119 (2003)).

Courts often give "superficial treatment of" the commonality requirement given that it "may be a superfluous provision, or at least partially redundant, since the existence of common questions can be viewed as an essential ingredient of a finding that the case falls within one of the three categories of class actions described in" Rule 23(b). Wright & Miller, Federal Practice and Procedure § 1763. Relevant here, because predominance (discussed below) is governed by "a more stringent standard than" commonality, some "courts in actions brought under subdivision (b)(3) have not drawn a distinction between the two requirements." *Id.* Instead, they "either have dealt with the common-issue question simultaneously with their inquiry into whether **[*16]** common questions predominate or have assumed that Rule 23(a)(2) was satisfied and thought it necessary only to rule on the question whether the suit fit within subdivision (b)(3)." *Id.*; *accord* Comcast Corp. v. Behrend, 569 U.S. 27, 34, 133 S. Ct. 1426, 185 L. Ed.

2d 515 (2013) (noting that "[t]he same analytical principles govern Rule 23(b)" and Rule 23(a), but "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)"); Amchem, 521 U.S. at 609 ("The Third Circuit recognized that Rule 23(a)(2)'s 'commonality' requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions.").

Conrad contends that there are at least three common issues of law and fact: (1) "[w]hether Jimmy John's restaurants entered into an unlawful agreement not to poach one another's employees;" (2) "whether the No-Poach [Provision] should be judged unlawful;" and (3) "whether the agreement suppressed Class members' compensation; and if it did, the magnitude of that effect." (Conrad's Mem. at 22).

In response, Jimmy John's blurs its commonality and predominance arguments; but it devotes most of its attention to arguing that common issues do not predominate. (*See* Jimmy John's Resp. at 13-30) ("Plaintiff also fails to meet his burden of establishing Rule 23(a) commonality and Rule 23(b)(3) predominance."). Given the low threshold **[*17]** for commonality, the Court will not belabor this discussion and will instead focus on the more stringent standard for predominance below.

iii. Typicality

The typicality requirement "primarily directs the district court to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983). "'A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.'" *Id.* (quoting H. Newberg, *Class Actions* § 1115(b) at 185 (1977)). "The typicality requirement may be satisfied even if there are factual distinctions between the claims and the named plaintiffs and those of other class members. Thus, similarity of legal theory may control even in the face of differences of fact." *Id.* But "[e]ven though some factual variations may not defeat typicality," Oshana v. Coca-Cola Co., 472 F.3d 506, 514 (7th Cir. 2006), there must still "be enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group," Spano v. Boeing Co., 633 F.3d 574, 586 (7th Cir. 2011).

Conrad simply alleges that the typicality requirement **[*18]** is satisfied because "he worked in a Jimmy-John's-branded restaurant . . . ." (Conrad's Mem. at 22-23). But his core allegation is that the No-Poach Provision prevented workers from changing locations for better wages. Yet Conrad was not among those employees: He did not leave his job at Jimmy John's in search of higher wages, and he was never denied the opportunity to change locations because of the Provision. Indeed, he admits that he "made no efforts to obtain employment at [another] Jimmy John's restaurant" (Conrad's Resp. to Second Set of Interrogs. at 6; *see also* Conrad's Dep. at 61:10-12), and that the No-Poach Provision was "irrelevant" and "just didn't really have anything to" do with him (Conrad's Dep. at 189:9-14, 205:11-19). Rather, he was fired after he called a coworker—his boss's niece—"a fucking bitch." (*Id.* at 308:4-9). So while some factual distinctions will not preclude class certification, Conrad's claim is atypical of those putative class members who were actually denied the opportunity to change locations for better wages because of the No-Poach Provision. The typicality requirement is therefore not met.

iv. Adequacy

"[A]dequacy of representation is composed of **[*19]** two parts: 'the adequacy of the named plaintiff's counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interest' of the class members." Retired Chi. Police Ass'n v. City of Chi., 7 F.3d 584, 598 (7th Cir. 1993) (quoting Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 697 (7th Cir. 1986) (en banc)). Only the second part is at issue here.

"Rule 23 contemplates, and the district court should insist on, a conscientious representative plaintiff. All class suits create some conflict between the representative and the class; the representative and counsel may be tempted to sell out the class for benefits to themselves. Judges are on the lookout for persons who may pay inadequate attention to the interests of the others they purport to represent." Rand v. Monsanto Co., 926 F.2d 596, 599 (7th Cir. 1991), *overruled on other grounds*, Chapman v. First Index, Inc., 796 F.3d 783, 787 (7th Cir. 2015). "[T]he presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation. The fear is that the named plaintiff will become distracted by the presence of a possible defense applicable only to him so that the representation of the rest of the class will suffer." J.H. Cohn & Co. v. Am. Appraisal Assocs., Inc., 628 F.2d 994, 999 (7th Cir. 1980) (citations omitted).

To that end, "[a] class is not fairly and adequately represented **[*20]** if class members have antagonistic or conflicting claims." Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992). "The adequacy inquiry" thus "serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem, 521 U.S. at 625. In other words, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *E.* Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974)).

Jimmy John's argues that Conrad failed to establish the adequacy requirement because "there are significant economic conflicts between the interests of managers and the employees they supervised." (Jimmy John's Resp. at 11). It points to two conflicts in particular. First, Jimmy John's contends that because managers were charged with enforcing the allegedly anticompetitive No-Poach Provision, they cannot be in the same class as nonsupervisory employees like in-shoppers and drivers. Put differently, "[a]t any trial of this case, certain managers would be called as defense witnesses, testifying about the very decisions at issue here, and explaining that [the No-Poach Provision] was honored largely in the breach." (*Id.* at 12). Jimmy John's therefore argues that "[t]his is a paradigmatic and preclusive intra-class conflict because many **[*21]** putative class members participated in the challenged employment decisions." (*Id.*) (cleaned up). The Court agrees.

As a general matter, the litigants disagree about whether supervisory and nonsupervisory employees can ever be part of the same class. For its part, Jimmy John's points to Randall v. Rolls-Royce Corp., 637 F.3d 818 (7th Cir. 2011). There, the plaintiff sought to represent a putative class of "female employees of a Rolls-Royce plant" who charged the company "with sex discrimination . . . in paying the members of the class less than comparable male employees by setting the base pay of women employees . . . below that of male employees" and "denying them promotions they would have received had they been men." Id. at 820. In affirming the district court's denial of class certification, the Seventh Circuit acknowledged two conflicts between female supervisors and female nonsupervisory employees. Id. at 824. For one, the court was concerned that some female supervisors might "deliberately depress the salary of female employees whom they supervise, or increase the salary of male employees whom they supervise, in order increase evidence of discrimination." Id. at 824. Additionally, there was "even evidence that the [female supervisors] participated in decisions concerning **[*22]** female employees' compensation that, on their theory of the case, were" in fact "discriminatory." *Id.* (citing Wagner v. Taylor, 836 F.2d 578, 595, 266 U.S. App. D.C. 414 (D.C. Cir. 1987) ("Supervisory employees are often inappropriate representatives of nonsupervisory employees because the structure of the workplace tends to cultivate distinctly different interests between the two groups.")).

Conrad tries to differentiate *Randall* by noting that *this* case turns on actions by franchise **owners**, not managers. (Conrad's Reply at 3). In other words, the owners were the ones who entered into the supposedly anticompetitive Franchise Agreement, while the managers were just neutrally applying it. (*Id.*). But that position contradicts testimony suggesting that at least some managers were given broad discretion whether to enforce the No-Poach Provision. For example, one delivery driver and member of the putative class said that "[t]o apply for the job . . . , [he] simply walked into the store, told the **manager** that [he] was currently working at" another Jimmy John's location "and asked if they needed any help. The manager's response was, 'when can you start?'" Indeed, the manager did not "even notify" the franchise owner. (Hanzlik Decl. ¶ 7, Doc. No. 133-82) (emphasis added). **[*23]** Another manager similarly stated that he "never received instructions" from the franchise owner "to seek permission or releases when hiring applicants with prior Jimmy John's experience," and he "recall[ed] hiring about a dozen former Jimmy John's employees." (Arredondo Decl. ¶ 12, Doc. No. 133-78). While Conrad points to *Staton v.*

Boeing Co. 327 F.3d 938 (9th Cir. 2003), for the proposition that "supervisors and nonsupervisors may be included in the same certified class when both are subject to the policy or practice challenged by the lawsuit" (Conrad's Reply at 2), the Ninth Circuit there recognized that "whether employees at different levels of the internal hierarchy have potentially conflicting interests is context-specific and depends upon the particular claims alleged in a case." *Staton, 327 F.3d at 958*. The court then said that to satisfy the adequacy requirement, plaintiffs "'must offer evidence of coextensive interests or at least allege the existence of a general discriminatory policy.'" *Id. at 959* (quoting 5 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 24.42 at 24-170-71 (3d ed. 1992)). "Given that the named plaintiffs include[d] representatives of each major employee sub-group," the court found no conflicts. *Id. at 959*.

This Court too rejects the **[*24]** invitation to adopt a bright-line rule barring classes representing both supervisory and nonsupervisory employees. Yet even under the Ninth Circuit's level-handed approach, Jimmy John's has identified another significant conflict between managers and nonsupervisory employees that precludes certification. Jimmy John's franchisees take part in a profit-sharing program [TEXT REDACTED BY THE COURT]." (JJE Bonus Program at 2). Given that Conrad accuses the company of using the No-Poach Provision as a tool to "keep labor costs low" (Am. Compl. ¶ 119, Doc. 75), Jimmy John's argues that managers would be encouraged to enforce the provision to increase store profits. (Jimmy John's Resp. at 12). Simply put, not unlike the complicit female employees in *Randall*, "the fact that managers with profit-based bonuses allegedly made more money during the class period by taking steps to lower employee wages would put those class members against one another." (*Id.*).

Conrad, on the other hand, says that the profit-sharing program does not present a conflict because he "does not seek compensation for suppressed bonuses," only suppressed base pay. (Conrad's Reply at 3-4). But even assuming Conrad's theory—that **[*25]** the No-Poach Provision suppressed base pay across the board—is correct, it may equally be true that managers' bonuses exceeded their suppressed base pay. By extension, managers may be willing to suppress their own base pay if enforcing the No-Poach Provision would lead to a greater bonus. And unlike in *Staton*, Conrad is the only named plaintiff: He does not adequately represent the interest of managers who were motivated to reduce labor mobility so they can reap the benefits of the profit-sharing program. This conflict presents another reason why class certification is inappropriate.

v. Predominance

"The *Rule 23(b)(3)* predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem, 521 U.S. at 623*. "While similar to *Rule 23(a)*'s requirements for typicality and commonality, 'the predominance criterion is far more demanding.'" *Messner, 669 F.3d at 814* (quoting *Amchem, 521 U.S. at 623*). "In order to meet the predominance requirement of *Rule 23(b)(3)*, a plaintiff must establish that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof.'" *In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d at 136* (quoting *Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1233 (11th Cir. 2000)*). "Common issues may predominate when **[*26]** liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Id.* at 139 (collecting cases). But "[t]here is no mathematical or mechanical test for evaluating predominance." *Messner, 669 F.3d at 814*. "[A] court weighing class certification must" therefore "walk a balance between evaluating evidence to determine whether a common question exists and predominates, without weighing that evidence to determine whether the plaintiff class will ultimately prevail on the merits." *Bell v. PNC Bank, Nat'l Ass'n, 800 F.3d 360, 376 (7th Cir. 2015)* (emphasis in original).

The "predominance requirement is satisfied when 'common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication.'" *Id. at 815* (quoting 7AA Wright & Miller, Federal Practice & Procedure § 1778 (3d ed. 2011)). "Or, to put it another way, common questions can predominate if a 'common nucleus of operative facts and issues' underlies the claims brought by the proposed class." *Id.* (quoting *In re Nassau Cnty. Strip Search Cases, 461 F.3d 219, 228 (2d Cir. 2006)*) "'If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice **[*27]** for each member to make a prima facie showing, then it becomes a common question.'" *Id.* (quoting *Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005)*). That said, "[i]ndividual questions need not be absent. The text of *Rule 23(b)(3)* itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole." *Id.*

"Analysis of predominance under *Rule 23(b)(3)* 'begins, of course, with the elements of the underlying cause of action.'" *Messner, 669 F.3d at 815* (quoting *Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011)*). Here, the Court must examine whether Conrad can "establish each of the three required elements of an antitrust claim— (1) a violation of ***antitrust law***; (2) injury and causation; and (3) damages—using common evidence." *Id.*

As for the first requirement, "*Section 1* of the Sherman Act is designed to prevent businesses from entering into collusive agreements . . . ." *Omnicare, Inc. v. UnitedHealth Grp., Inc., 629 F.3d 697, 705 (7th Cir. 2011)*. "By its terms, *§ 1* prohibits '[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce,' though courts have long restricted its reach to agreements that unreasonably restrain trade." *Id.* (quoting *15 U.S.C. § 15*). "To prevail under *§ 1* under any theory, plaintiffs generally must prove three things: (1) that defendants had a contract, combination, or conspiracy **[*28]** ('an agreement'); (2) that as a result, trade in the relevant market was unreasonably restrained; and (3) that they were injured." *Id.*

In the first place, Conrad must present common evidence that Jimmy John's and its franchisees "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *See* *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. And because Conrad alleges a "hub-and-spokes conspiracy" (*see* Conrad's Mem. at 1-2), he must ultimately establish "both that there was a central coordinating party (the 'hub'), and that each participant (along the 'rim') recognized that it was part of the greater arrangement, and it coordinated or otherwise carried out its duties as part of the broader group," *Marion Healthcare, LLC v. Becton Dickinson & Co., 952 F.3d 832, 842 (7th Cir. 2020)*. "In other words, a 'hub-and-spokes conspiracy' requires a 'rim' connecting the various horizontal agreements." *Id.* "[F]or such a conspiracy to exist, 'those people who form the wheel's spokes must have been aware of each other and must do something in furtherance of some single, illegal enterprise.'" *United States v. Bustamante, 493 F.3d 879, 886-87 (7th Cir. 2007)* (quoting *United States v. Levine, 546 F.2d 658, 663 (5th Cir. 1977)*); *see also* *MM Steel, L.P. v. JSW Steel (USA) Inc., 806 F.3d 835, 844 (5th Cir. 2015)* (noting that the antitrust plaintiff must show that the spokes "knew the essential nature and general scope of the joint plan") (cleaned up). "[A] rimless wheel conspiracy," on the other **[*29]** hand, "is not a single, general conspiracy but instead amounts to multiple conspiracies between the common defendant and each of the other defendants." *Dickson v. Microsoft Corp., 309 F.3d 193, 203 (4th Cir. 2002)* (citing *Kotteakos v. United States, 328 U.S. 750, 768-69, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)*). So in the end, "to secure class certification," Conrad must "demonstrate (not merely allege) that there is proof common to all class members, and that this proof would show that they suffered 'injuries that reflected the anticompetitive effect of either the violation or the anticompetitive acts made possible by the violation.'" *Kleen Prods. LLC v. Int'l Paper Co., 831 F.3d 919, 926 (7th Cir. 2016)* (quoting *James Cape & Sons Co. v. PCC Constr. Co., 453 F.3d 396, 399 (7th Cir. 2006)*).

The predominance requirement is not satisfied here because, among other reasons, Conrad failed to establish that common evidence will show that the Jimmy John's franchisees had a conscious commitment to suppress labor mobility. Given that the No-Poach Provision was independently enforced (Jimmy John's itself having no hand), some franchisees took no part in doing so. For example, one franchisee suggested that he does not enforce the Provision because "employees are allowed to work wherever they want." (Jimmy John's Franchisee Forum Post from December 2017, Jimmy John's Resp. at Ex.133-19). Another posited, "Who really enforced that in their units? I'm not going to track where each employee **[*30]** goes to work at next." (Jimmy John's Franchisee Forum Post from July 2018, Jimmy John's Resp. at Ex. 45). (*See also* McNulty Decl. ¶ 33, Jimmy John's Resp. at Ex. 133-69) (franchisee hired manager after receiving verbal consent from previous franchisee-employer). Some also thought that the Provision only applied to managers—possibly because some versions of the Provision *did* only apply to managers. (*E.g.*, Email from Franchisee to Jimmy John's from August 2014, Jimmy John's Resp. at Ex. 133-14). These franchisees surely are not alone in their practice of not enforcing the Provision, permitting employees to change locations without exercising their right of enforcement. Indeed, Jimmy John's expert, Dr. McCrary, determined that 88 percent of releases—when requested at all—were granted. (McCrary Report ¶ 87, Jimmy John's Resp. at Ex. 133-57). While the evidence so far suggests that other franchisees did, in fact, enforce the Provision (*e.g.*, Jimmy John's Franchisee Forum Post from December 2017) ("[W]e were already sued last year for this."), that only highlights the individualized nature of Conrad's claims. *See* *United States v. Townsend, 924 F.2d 1385, 1391 (7th Cir. 1991)* ("[M]ere knowledge of the hub's activities, or those of the other spokes, **[*31]** is not enough to tie the conspiracy together.").

Although "[t]here have been many antitrust class actions in which the relief sought was damages, and the fact that the damages would generally be different for each member of the class was not deemed an insuperable obstacle," *Hardy v. City Optical Inc., 39 F.3d 765, 771 (7th Cir. 1994)*, separate proof would be needed to establish which franchisees, if any, consciously acted to further the unlawful objective of suppressing labor mobility. Along those lines, though "[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent action," *id. at 199*, the circumstances must still reveal "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement," *Am. Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*. No such evidence exists here. In sum, Conrad has not shown that common evidence will establish that each (or even most) of the franchisees conspired with Jimmy John's in the common pursuit of suppressing labor mobility.

Individual inquiries also arise from the changing face of the No-Poach Provision. True, each of the nearly 800 franchisees signed a franchise agreement containing some form of the Provision. But Conrad claims that there was a "standard franchise agreement." **[*32]** (Am. Compl. at 9). Not so. In 2014, for example, the No-Poach Provision prohibited franchisees from **hiring** *managers* who had worked for another franchisee within the past two years. In 2015, that prohibition was removed; from then on, franchisees were simply not allowed to **solicit** other franchisee's *workers*. While Conrad contends that most franchisees were governed by a similar version of the Provision found in the 2014 Franchise Agreement (Conrad's Mem. at 8-9), the agreements expired every 10 years (*see, e.g.*, 2007 Franchise Agreement § 1(D), Doc. 133-3; 2015 Franchise Agreement § 1(D); 2016 Franchise Agreement § 1(D)). In other words, the class members "'held a multitude of jobs, at different levels of [Jimmy John's] hierarchy, for variable lengths of time, in [3,000] stores, sprinkled across [40] states,'" with each franchisee having its own philosophy on enforcing the No-Poach Provision, "subject to a variety of [agreements] that all differed . . . .'" *See* *Dukes, 564 U.S. at 360* (quoting *Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 652 (9th Cir. 2010)* (Kozinski, C.J., dissenting)). Proof of impact would thus vary among class members depending on their position and which version of the Franchise Agreement they were governed by. Similarly, given that Conrad seeks **[*33]** to certify a class of all Jimmy John's employees from 2014 to 2018 whose franchisees signed different agreements, overwhelming individualized inquiries would be required to establish that each franchisee participated in the same "conspiracy."

The Court also excluded Dr. Singer's testimony because he used a flawed methodology to predict antitrust impact. More specifically, the Court determined that Dr. Singer's regression models suffered from a systemic failure to adjust for those two percent of the wage data that did not consistently record employee wages as per-shift or per-hour, leading to inflated estimates of impact. Fatally, Conrad relies only on Dr. Singer's report to support his claim that the wages of every Jimmy John's employee nationwide were suppressed by the No-Poach Provision. On the other hand, the Court admitted the testimony of Dr. Ordover, Jimmy John's expert, who ably demonstrated that—after adjusting for Dr. Singer's error—"managers paid on an hourly basis had an average wage suppression of approximately two percent, while salaried managers suffered no suppression at all." (Ordover Report at 21, Jimmy John's Resp. at Ex. 133-67). "Without presenting another methodology, **[*34]** [Conrad] cannot show *Rule 23(b)(3)* predominance: Questions of individual damages calculations will inevitably overwhelm questions common to the class." *See* *Comcast Corp., 569 U.S. at 34*.

Additionally, the United States Supreme Court recently concluded in *NCAA v. Alston* that the plaintiff's monopsony claims were appropriately analyzed under the rule of reason, not the per se rule. *141 S. Ct. 2141, 2157, 210 L. Ed. 2d 314 (2021)*. In brief, a class of current and former student-athletes sued the NCAA and 11 Division I conferences for using their "monopsony power to cap artificially the compensation offered to recruits." *Id. at 2152* (cleaned up). Even though the defendants *admitted* that their conduct constituted "horizontal price fixing in a market where [they] exercise monopoly control" *id. at 2154*, the Court took "special care not to deploy" the per se rule given the "often hard-to-see efficiencies attendant to complex business arrangements," *id. at 2156*. *Cf.* *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* ("[A] per-se rule is applied when 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.'") (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*). Rather, the Supreme Court agreed with the district court's finding that the "fuller review" offered by the rule of reason was more appropriate in a monopsony case involving "an **[*35]** industry in which some horizontal restraints on competition are essential if the product is to be available at all." *Alston, 141 S. Ct. at 2157* (cleaned up); *see also* *id. at 2158* ("Whether an antitrust violation exists necessarily depends on a careful analysis of market realities.").

Alston thus answers a question this Court punted at the motion-to-dismiss stage: The rule of reason applies in this monopsony case challenging a nationwide franchise's use of intrabrand restraints that were arguably "designed to help [the company] more effectively compete with other brands by ensuring cooperation and collegiality among franchisees, and by encouraging investment in training." (Jimmy John's Resp. at 5). *See also* United States' Statement of Interest, *Stigar v. Dough, Inc.*, No. 2:18-CV-00244-SAB, Doc. 30, at 11-16 (E.D. Wash. Mar. 7, 2019) (arguing that no-poach provisions in franchise agreements are subject to the rule of reason).

With that in mind, the rule of reason raises more individualized issues precluding class certification. "Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and **[*36]** other factors dictated by business judgment without increasing its exposure to antitrust liability." *Copperweld Corp., 467 U.S. at 773*. To that end, "even under the best of circumstances, applying the antitrust laws can be difficult—and mistaken condemnations of legitimate business arrangements are especially costly, because they chill the very procompetitive conduct the antitrust laws are designed to protect." *Alston, 141 S. Ct. at 2161*. Indeed, "[t]he whole point of the rule of reason is to furnish 'an enquiry meet for the case, looking into the circumstances, details, and logic of a restraint' to ensure that it unduly harms competition before a court declares it unlawful." *Id. at 2160* (quoting *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*); *see also* *id. at 2164* ("[A]ntitrust courts must give wide berth to business judgments before finding liability."); Frank H. Easterbrook, *The Limits of Antitrust*, *63 Tex. L. Rev. 1, 15 (1984)* ("For a number of reasons, errors on the side of excusing questionable practices are preferable.").

Here, Jimmy John's expert Dr. McCrary persuasively described how most putative class members likely *benefited* from the No-Poach Provision because it gave franchisees an added incentive to provide more training, thus promoting employee advancement. (McCrary Report ¶¶ 96-98). For example, the Senior Director of **[*37]** Marketing Execution and Operations refused to release one certified manager because the franchisee "invested a lot of time and money in training him and getting him certified": The No-Poach Provision protected the investment franchisees made in training their employees. (Email from Buergler to Hooper at 1, Doc. 133-20) (emphasis added). Similarly, the Director of Franchise Development understood the Provision as a means "to keep the peace among franchisees," thereby "reduc[ing] friction within the system." (Morena Dep. at 12:16-18, Doc. 133-53). In other words, the No-Poach Provision not only had the potential to encourage investment in training, but it may also have promoted cooperation between franchisees, increasing coordination and thus "increasing the overall demand for the brand." (McCrary Report ¶ 153; *see id.* § 6.2). (*See also* Hooper Dep. at 87:12-15) ("I think that the brand is stronger when [franchisees support each other] instead of bickering and squabbling over stuff that is external to serving customers freaky fast."). Perhaps more importantly, Dr. McCrary suggests that increasing the use of certified managers "improves the speed at which orders are executed and the frequency **[*38]** of complaints with the store." (McCrary Report ¶ 147; *see id.* § 6.1). These procompetitive justifications, coupled with the fact that most release requests were *approved* without conditions, present overwhelming individualized questions precluding certification. *See* *Kohen v. Pac. Inv. Mgmt. Co. LLC., 571 F.3d 672, 677 (7th Cir. 2009)* ("[A] class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant . . . .").

Along those lines, the Court noted in excluding Dr. Singer's testimony that Conrad's baseline premise—that every Jimmy John's employee nationwide was injured by the No-Poach Provision, no matter their position or location—

was mere *ipse dixit*. Indeed, "[c]ommon proof of actual injury to each class member requires that all class members operate in the same relevant market, otherwise, they could not be affected in a common manner by the challenged conduct." *Exhaust Unlimited, Inc., 223 F.R.D. at 513*. And "[i]t is by now well established that any rule of reason analysis requires a showing of anticompetitive market effect. To hold otherwise would ignore the very purpose of the antitrust laws which were enacted for the protection of competition, not competitors." *Lektro-Vend Corp. v. Vendo Corp., 660 F.2d 255, 268 (7th Cir. 1981)* (applying the rule of reason to noncompetition **[*39]** covenant).

With that in mind, the Court remains of the same mind as Dr. Ordover and Dr. McCrary, whose prudent analyses revealed that the relevant labor market includes not merely Jimmy John's franchisees but also other quick-service restaurants ("QSRs"). Dr. Ordover recognized, for example, that "it is likely that the putative class members seek employment in a labor market (or multiple labor market) that is (or are) much broader than Jimmy John's branded stores." (Ordover Report ¶ 91). He then aptly demonstrated that "99 percent of Jimmy John's branded stores have at least ten other QSR brands within ten miles, with an average number of nearby brands of 53" (*id.* ¶ 103), and "an average number of QSR locations of nearly 257" (*id.* ¶ 104).

Similarly, given that "[s]ome franchisees indicate that they compete with all other employers in the local area hiring minimum wage employees," Dr. McCrary explained how "the only way an individual worker's wage could be suppressed by the [No-Poach Provision] is if the worker had developed specific skills at Jimmy John's that raised their productivity at Jimmy John's more than at other competing brands. If not, then competition from other brands would **[*40]** push the worker's wage at Jimmy John's up to the competitive level associated with that worker's skills." (McCrary Report ¶ 93). Without reaching the merits on that question here, individualized inquiries would still be needed to determine whether a given Jimmy John's employee could have been injured given the varied and dynamic labor markets across the country. In sum, the Court agrees with Jimmy John's that Conrad's "failure to offer classwide evidence of a relevant labor market is case-ending." (Jimmy John's Resp. at 22).

i. Superiority

"*Rule 23(b)(3)* also conditions class certification on whether the class action device is superior to other available methods for fairly and efficiently resolving the dispute in question." *Messner, 669 F.3d at 814 n.5*. Relevant considerations include:

> (A) The class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) The extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) The likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

The superiority requirement is satisfied when "a class action **[*41]** would achieve economies of time, effort, and expense and promote . . . uniformity of decisions as to persons similarly situated, without sacrificing procedural unfairness or bringing about other undesirable results." *Amchem, 521 U.S. at 615*. Indeed, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Id. at 617* (quoting *Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)*). "But when a separate evidentiary hearing is required for each class member's claim, the aggregate expense may, if each claim is very small, swamp the benefits of class-action treatment." *Pastor v. State Farm Mut. Auto. Ins. Co., 487 F.3d 1042, 1047 (7th Cir. 2007)*.

Jimmy John's argues that the superiority argument is not satisfied because the individualized questions discussed above—and more like them—would make a trial unmanageable:

> For instance, for any given class member, it would first be necessary to identify her employer and determine if they were aware of Section 7(d), and, if so, whether they enforced or ignored it. What were that franchisee's practices with respect to hiring, pay, and retention of employees—e.g., did the franchisee pay more than other

> QSRs in the area, or pay more at one of its Jimmy John's **[*42]** stores than others? Did the class member work for only a few weeks before quitting—and if so, could a reasonable factfinder still conclude that she would have received a promotion or raise but-for 7(d)? For a longer-tenured class member, did he receive a promotion, bonus, or raise? Did he move between stores—if so, did he do it for increased pay, or did he accept lower pay for other perceived advantages, such as proximity to his home? Were there any other separately-owned Jimmy John's stores within a reasonable commute of the class member's store? Was she an in-shopper or a manager—if the latter, what was her role in setting pay for other class members? Did she keep wages low in order to increase her own bonus?

(Jimmy John's Resp. at 30).

The Court agrees. Conrad characterizes these assertions as a "fiction that [he] is unable to quantify the wage suppression of each Class Member attributable to the restraint." (Conrad's Reply at 14). But Jimmy John's contentions go beyond mere difficulties in assessing individual damages. *See* *Mullins v. Direct Digit., LLC, 795 F.3d 654, 663 (7th Cir. 2015)* ("It has long been recognized that the need for individual damages determinations at this later stage of the litigation does not itself justify the denial of **[*43]** certification.").

True enough, individual actions for suppressed wages may ultimately prove impractical, prohibitively expensive, or inefficient. Even so, a class action is hardly desirable when predominance is so lacking. *See* *Messner, 669 F.3d at 814 n.5* (citing *Klay v. Humana, Inc., 382 F.3d 1241, 1269 (11th Cir. 2004)* ("Superiority analysis is intertwined with predominance analysis; when there are no predominant common issues of law or fact, class treatment would be either singularly inefficient or unjust.") (cleaned up)).

The issue is not simply one of assessing individual damages—rather, it is one where "it is apparent that [the class] contains a great many persons who have suffered no injury" and "thus require more than a thousand separate hearings" to assess the validity of each claim. *See* *Kohen, 571 F.3d at 677*. For example, the Court described above how the No-Poach Provision changed over time; how enforcement practices differed among franchisees; and how most class members—including Conrad—were never actually denied the chance to change shops, either because the franchisees acquiesced or because they did not seek a move in the first place. In the end, a class action is not superior to individual suits when the class is "defined so broadly as to include many members who could not **[*44]** bring a valid claim even under the best of circumstances." *See* *Messner, 669 F.3d at 824*. Thus the superiority requirement, too, is unsatisfied.

CONCLUSION

For the reasons set forth above, the Court **DENIES** Conrad's Motion to Strike (Doc. 186) and Motion for Class Certification (Doc. 113).

IT IS SO ORDERED.

DATED: July 23, 2021

/s/ Nancy J. Rosenstengel

NANCY J. ROSENSTENGEL

Chief U.S. District Judge

Ni-Q, LLC v. Prolacta Bioscience, Inc.

United States District Court for the District of Oregon

July 26, 2021, Decided; July 26, 2021, Filed

Case No. 3:17-cv-934-SI

Reporter

2021 U.S. Dist. LEXIS 138675 *; 2021 WL 3145968

NI-Q, LLC, Plaintiff, v. PROLACTA BIOSCIENCE, INC., Defendant.

Prior History: *Ni-Q, LLC v. Prolacta Bioscience, Inc., 2017 U.S. Dist. LEXIS 227054, 2017 WL 11492162 (D. Or., Dec. 12, 2017)*

Core Terms

products, antitrust, submarket, breast milk, customers, inequitable conduct, prices, relevant market, summary judgment motion, patent, standardized, monopolization, unenforceable, counterclaim, milk, summary judgment, sterilized, moot, interchangeable, infringement, nonmoving, purposes, argues, evidence show, invalidity, consumers, matching, supplemental complaint, supplemental pleading, declaratory judgment

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

HN1[] **Summary Judgment, Burdens of Proof**

A party is entitled to summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine dispute of material fact. The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. Although credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ruling on a motion for summary judgment, the mere existence of a scintilla of evidence in support of the plaintiff's position is insufficient. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.

Civil Procedure > Pleading & Practice > Pleadings > Supplemental Pleadings

HN2[] Pleadings, Supplemental Pleadings

Fed. R. Civ. P. 15(d) provides that a court may permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. This rule also permits a supplemental pleading to correct a defective complaint and circumvents the needless formality and expense of instituting a new action when events occurring after the original filing indicated a right to relief. The purpose of Rule 15(d) is to promote as complete an adjudication of the dispute between the parties as is possible.

Civil Procedure > Pleading & Practice > Pleadings > Supplemental Pleadings

HN3[] Pleadings, Supplemental Pleadings

Amended pleadings under Fed. R. Civ. P. 15(a) differ from supplemental pleadings under Fed. R. Civ. P. 15(d). The former relate to matters that occurred prior to the filing of the original pleading and entirely replace the earlier pleading; the latter deal with events subsequent to the pleading to be altered and represent additions to or continuations of the earlier pleadings.

Civil Procedure > Pleading & Practice > Pleadings > Supplemental Pleadings

HN4[] Pleadings, Supplemental Pleadings

A supplemental pleading is the mechanism used for events, transactions, and occurrences that happened after the date of the pleading to be supplemented. Fed. R. Civ. P. 15(d) allows the addition of post-complaint allegations. Indeed, Rule 15(d) is somewhat narrower in scope than the rule it replaced, because it does not expressly apply to pre-action matters of which a party was ignorant at the time the original pleading was filed but embraces only events that have happened after the date of the pleading to be supplemented.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

HN5[] Attempts to Monopolize, Elements

In order to prevail on a Walker Process claim, the antitrust-plaintiff must show two things: first, that the antitrust-defendant obtained the patent by knowing and willful fraud on the patent office and maintained and enforced the patent with knowledge of the fraudulent procurement; and second, all the other elements necessary to establish a Sherman Act monopolization claim. To state an antitrust claim of monopolization under § 2 of the Sherman Act, a plaintiff must show: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN6[] Relevant Market, Product Market Definition

A relevant antitrust market consists of all products that are reasonably interchangeable by consumers for the same purposes. The principle most fundamental to product market definition is cross-elasticity of demand for certain products or services. Commodities which are reasonably interchangeable for the same or similar uses normally should be included in the same product market for antitrust purposes. "Reasonable interchangeability" may be determined by looking at price, use, and qualities of the products. Ultimately what constitutes a relevant market is a factual determination for the jury. The definition of an antitrust "relevant market" is typically a factual rather than a legal inquiry, but certain legal principals govern the definition.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

HN7[] Entitlement as Matter of Law, Appropriateness

At summary judgment, the court must view the facts in the light most favorable to the nonmoving party and resolve all reasonable inferences in favor of the nonmoving party.

Antitrust & Trade Law > Regulated Practices > Market Definition

HN8[] Regulated Practices, Market Definition

In Brown Shoe, the U.S. Supreme Court explained that within a broad market, well-defined submarkets may exist that themselves constitute markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. The Ninth Circuit, however, has repeatedly noted that the Brown Shoe indicia are practical aids for identifying the areas of actual or potential competition and that their presence or absence does not decide automatically the submarket issue. Instead, whether isolating a submarket is justified turns ultimately upon whether the factors used to define the submarket are economically significant.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN9[] Relevant Market, Product Market Definition

In an antitrust case, the scope of the relevant market is not governed by the presence of a price differential between competing products.

Antitrust & Trade Law > Regulated Practices > Market Definition

HN10[] Regulated Practices, Market Definition

In an antitrust case, for the sixth factor, sensitivity to price changes, courts typically consider whether a sufficient number of customers would switch to other technologies in response to a price increase.

Counsel: **[*1]** Brenna K. Legaard, K & L GATES LLP, Portland, OR. Of Attorneys for Plaintiff.

Kristin L. Cleveland, KLARKQUIST SPARKMAN LLP, Portland, OR; Orion Armon, COOLEY LLP, Denver, CO; Alexandra Mayhugh, COOLEY LLP, Santa Monica, CA; David Burns and M. Howard Morse, COOLEY LLP, Washington, DC. Of Attorneys for Defendant.

Judges: Michael H. Simon, United States District Judge.

Opinion by: Michael H. Simon

Opinion

OPINION AND ORDER

Michael H. Simon, District Judge.

In this action brought by Plaintiff Ni-Q, LLC (Ni-Q) against Defendant Prolacta Bioscience, Inc. (Prolacta), Ni-Q sought a declaratory judgment of non-infringement and invalidity of U.S. Patent No. 8,628,921 (the '921 Patent). Prolacta asserted a counterclaim for infringement of that patent. The Court granted Ni-Q's first motion for partial summary judgment, finding that certain claims of the '921 Patent were invalid under *35 U.S.C. § 101* and that even if they were valid, Ni-Q did not infringe the '921 Patent as a matter of law. The Court also granted Ni-Q's second motion for partial summary judgment, finding that certain claims of the '921 Patent were invalid as anticipated under *35 U.S.C. § 102(b)* (pre-America Invents Act).

Upon the stipulated request of the parties, the Court dismissed Ni-Q's claims requesting a declaratory judgment of non-infringement and invalidity **[*2]** as moot, after Prolacta surrendered the '921 Patent during reissue, when the U.S. Patent and Trademark Officer (USPTO) issued the RE48,240 patent. The Court also dismissed Prolacta's counterclaim for infringement of the '921 Patent.

In its Third Amended Complaint, Ni-Q added claims asserting that Prolacta violated *Oregon's Unlawful Trade Practices Act (UTPA)* and *Section 2* of the Sherman Act, *15 U.S.C. § 2*, alleging a *Walker Process* claim of enforcement of a fraudulently obtained patent.[1] Ni-Q, however, has stated that it will voluntarily dismiss its UTPA claim, leaving only its antitrust claim. In response to Prolacta's counterclaim, Ni-Q also asserted an affirmative defense of inequitable conduct, alleging that Prolacta engaged in fraud on the USPTO in obtaining the '921 Patent, among other patents.

Now before the Court is Ni-Q's third motion for summary judgment, arguing that the '921 Patent is unenforceable because of Prolacta's inequitable conduct, Ni-Q's fourth motion for summary judgment, on its antitrust claim, and Ni-Q's motion for leave to file a supplemental complaint adding a claim for a declaratory judgment that the '921 Patent is unenforceable because of inequitable conduct and that Prolacta engaged in fraud on the PTO during the reissue of the '921 Patent. For the following reasons, Ni-Q's motion for leave to file **[*3]** a supplemental complaint is denied, Ni-Q's third motion for summary judgment is denied as moot, and Ni-Q's fourth motion for summary judgment is denied.

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[1] In *Walker Process Equipment v. Food Machine & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*, the Supreme Court held that a plaintiff could sue under *§ 2* of the Sherman Act based on the alleged maintenance and enforcement of a fraudulently obtained patent.

STANDARDS

A. Summary Judgment

HN1[] A party is entitled to summary judgment if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. The moving party has the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *Clicks Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 (9th Cir. 2001)*. Although "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment," the "mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient . . . ." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (citation and quotation marks omitted).

B. Supplemental Pleading

HN2[] *Rule 15(d) of the Federal Rules of Civil Procedure* provides that a court may "permit a party to serve a supplemental **[*4]** pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." This rule also "permits a supplemental pleading to correct a defective complaint and circumvents 'the needless formality and expense of instituting a new action when events occurring after the original filing indicated a right to relief.'" *Northstar Fin. Advisors Inc. v. Schwab Invs., 779 F.3d 1036, 1044 (9th Cir. 2015)* (quoting 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Fed. Prac. & Proc*. § 1505 (3d ed. 2015) (Wright & Miller)). "The purpose of *Rule 15(d)* is to promote as complete an adjudication of the dispute between the parties as is possible." *LaSalvia v. United Dairymen of Arizona, 804 F.2d 1113, 1119 (9th Cir. 1986)* (simplified).

HN3[] Amended pleadings under *Rule 15(a)* differ from supplemental pleadings under *Rule 15(d)*. "The former relate to matters that occurred prior to the filing of the original pleading and entirely replace the earlier pleading; the latter deal with events subsequent to the pleading to be altered and represent additions to or continuations of the earlier pleadings." Wright & Miller, § 1504.

DISCUSSION

A. Motion to File Supplemental Complaint

Ni-Q moves for leave to file a supplemental complaint alleging a claim for inequitable conduct. Much of the conduct alleged in the proposed supplemental claim, however, **[*5]** is conduct that occurred before the date that the Third Amended Complaint was filed.[2] *HN4*[] A supplemental pleading is the mechanism used for events, transactions, and occurrences that happened *after* the date of the pleading to be supplemented. *Id.*; *see also LaSalvia, 804 F.2d*

[2] Ni-Q alleges a few facts relating to the reissue of the '921 Patent that may have occurred after the filing of the Third Amended Complaint (those facts do not have specific dates, but given the timing of the reissue patent prosecution, the alleged conduct is likely to have occurred after October 2019). The core of Ni-Q's proposed inequitable conduct claim, however, is that Prolacta engaged in inequitable conduct in originally prosecuting the '921 Patent, which occurred well before the filing of the Third Amended Complaint. Indeed, Ni-Q included most of the same allegations in its inequitable conduct affirmative defense to Prolacta's counterclaim.

at 1119 ("*Federal Rule of Civil Procedure 15(d)* allows the addition of *post-complaint allegations*." (emphasis added)). Indeed, *Rule 15(d)* is "somewhat narrower in scope" than the rule it replaced, "because it does not expressly apply to pre-action matters of which a party was ignorant at the time the original pleading was filed (these matters may be raised under *Rule 15(a)*) but embraces only events that have happened 'after the date of the pleading to be supplemented.'" *Wright & Miller* § 1504. That the alleged conduct is not post-complaint conduct is apparent by the fact that Ni-Q asserts nearly identical allegations in its affirmative defense of inequitable conduct to Prolacta's counterclaim. Thus, the proper mechanism was for Ni-Q to move for leave to file a Fourth Amended Complaint.

Additionally, even considering Ni-Q's request on the merits, or construing Ni-Q's request as one under *Rule 15(a) of the Federal Rules of Civil Procedure* instead of under *Rule 15(d)*, the Court would deny the request as moot, untimely, and unduly prejudicial. The sole basis on **[*6]** which Ni-Q asserts that it should be able to add a new claim four years into this litigation is an anticipated motion for attorney's fees under *35 U.S.C. § 285*. The Court, however, will consider Ni-Q's arguments and evidence relating to inequitable conduct when such a motion is filed. *See* *Liebel-Flarsheim Co. v. Medrad, Inc., 481 F.3d 1371, 1383 (Fed. Cir. 2007)* ("We agree with the district court that the inequitable conduct counterclaim is moot. . . . The only other additional relief that may be available to Medrad by an inequitable conduct determination is attorney fees under *35 U.S.C. § 285*. Medrad admitted during oral arguments that, although it plans to predicate an attorney fee application on inequitable conduct, it has not filed that application yet. We therefore affirm the decision that the inequitable conduct counterclaim is presently moot.").

B. Motions for Summary Judgment

1. Inequitable Conduct

Ni-Q filed its motion for summary judgment on its affirmative defense of inequitable conduct before the parties stipulated that the Court should dismiss Ni-Q's declaratory judgment claims on infringement and invalidity and Prolacta's counterclaim. Ni-Q argued in its motion that the '921 Patent was unenforceable because of Prolacta's inequitable conduct. The Court requested supplemental briefing **[*7]** on the legal effect, if any, of the Court ruling on Ni-Q's summary judgment motion after the Court dismissed Ni-Q's claims relating to infringement and invalidity and Prolacta's counterclaim. Ni-Q cites *Monsanto Co. v. Bayer Bioscience N.V., 514 F.3d 1229 (Fed. Cir. 2008)*, in support of the proposition that the Court should resolve this motion and find the '921 Patent unenforceable.

Monsanto does not support Ni-Q's assertion that a court can, independent of a motion for attorney's fees under *§ 285*, find a patent that is not in suit unenforceable for inequitable conduct. As the Federal Circuit explained in *Monsanto*:

> The question facing this court is, thus, whether a district court's jurisdiction under *§ 285* to determine whether there was inequitable conduct in the prosecution of patents that are otherwise no longer in suit confers on that court the jurisdiction to hold such patents unenforceable for inequitable conduct. We hold that it does.

Id. at 1243. The prerequisite in *Monsanto* for the court having jurisdiction to hold the patent that was no longer in suit unenforceable was the existence of a pending motion under *§ 285*. Here, Ni-Q has not yet filed a motion under *§ 285*.[3]

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[3] Ni-Q also cites *Advanced Magnetic Closures, Inc. v. Rome Fastener Corp., 607 F.3d 817 (Fed. Cir. 2010)*. Like in *Monsanto*, the jurisdiction for the court in *Advanced Magnetic* to make findings on inequitable conduct and unenforceability on a patent not in suit stemmed from the presence of a filed motion under *§ 285*. *Id. at 827* ("This court has held that a district court retains jurisdiction to consider a motion for attorney's fees under *35 U.S.C. § 285* and to make findings of inequitable conduct—even after a party has dismissed its counterclaims as to that patent.").

Ni-Q's affirmative defense of inequitable conduct to claimed infringement by Prolacta is moot because **[*8]** the '921 Patent is no longer in suit, Ni-Q's declaratory judgment claims have been dismissed, and Prolacta's infringement counterclaim has been dismissed. Thus, Ni-Q's motion for summary judgment is denied as moot. As discussed above, the Court will consider Ni-Q's arguments relating to inequitable conduct, including whether such conduct rendered the '921 Patent unenforceable, in any future motion under *§ 285*.

2. Antitrust

Ni-Q's Third Amended Complaint alleges that Prolacta engaged in fraud on the USPTO and attempted monopolization under *15 U.S.C. § 2* based on the fraudulently obtained patent. Ni-Q alleges that the relevant market is "the market for breast milk having standardized macronutrient content within the US." Third Am. Compl. ¶ 72. In Ni-Q's motion for summary judgment, however, Ni-Q argues that Prolacta has engaged in monopolization (instead of attempted monopolization) and that the relevant market is "DNA-matched, nutrient standardized human breast milk." It troubles the Court that Ni-Q's changed its antitrust theory and asserted relevant market definition after the close of fact discovery.[4] Prolacta, however, responded to Ni-Q's motion on the merits, although Prolacta reserved its rights under *Rule 37(c) of the Federal Rules of Civil Procedure* to exclude Ni-Q's **[*9]** "late" assertion of a revised antitrust theory and new market definition. Because Prolacta did not challenge Ni-Q's late changes of its relevant market definition and antitrust theory, the Court will address these issues on the merits of Ni-Q's motion for summary judgment.

HN5[] "In order to prevail on a *Walker Process* claim, the antitrust-plaintiff must show two things: first, that the antitrust-defendant obtained the patent by knowing and willful fraud on the patent office and maintained and enforced the patent with knowledge of the fraudulent procurement; and second, all the other elements necessary to establish a Sherman Act monopolization claim." *TransWeb, LLC v. 3M Innovative Props. Co., 812 F.3d 1295, 1306 (Fed. Cir. 2016)*. "To state an antitrust claim of monopolization under *§ 2* of the Sherman Act, a plaintiff must show: '(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury.'" *Unigestion Holdings, S.A. v. UPM Tech., Inc., 412 F. Supp. 3d 1273, 1284 (D. Or. 2019)* (quoting *Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)*).

Prolacta argues that there are disputed issues of material fact on all the elements of Ni-Q's *Walker Process* antitrust claim—whether Prolacta engaged in the requisite fraud, whether Prolacta has monopoly power in an appropriately defined relevant market, and whether there is antitrust **[*10]** injury. Because the Court finds that there is a disputed issue of material fact on the definition of the relevant market, the Court need not reach Prolacta's remaining arguments.

HN6[] A relevant antitrust market consists of all products that are "reasonably interchangeable by consumers for the same purposes." *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; *see also* *Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979)* ("The principle most fundamental to product market definition is 'cross-elasticity of demand' for certain products or services. Commodities which are 'reasonably interchangeable' for the same or similar uses normally should be included in the same product market for antitrust purposes."). "Reasonable interchangeability" may be determined by looking at price, use, and qualities of the products. *E. I. du Pont, 351 U.S. at 404*. "Ultimately what constitutes a relevant market is a factual determination for the jury." *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1203 (9th Cir. 1997)*; *see also* *Apple Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1196 (N.D. Cal. 2008)* ("The definition of an antitrust 'relevant market' is typically a factual rather than a legal inquiry, but certain legal principals govern the definition." (citing *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1045 (9th Cir. 2008)*).

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[4] Fact discovery closed on July 31, 2020. Ni-Q disclosed its new asserted relevant market to Prolacta on August 27, 2020, through Supplemental Interrogatory responses. Ni-Q filed its motion for summary judgment on its antitrust claim on September 18, 2020.

Ni-Q argues that the relevant market is a submarket of milk products, or even human breast milk, that is bought to feed to neonates and must contain all three attributes that Prolacta has included in the '921 Patent—standardized **[*11]** nutrients, DNA matching, and human breast milk. Focusing on "technological, rather than economic, substitution is," however, "a fatal flaw in establishing [the] proposed market definition." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 375 F.3d 1341, 1364 (Fed. Cir. 2004)*, *rev'd on other grounds*, *546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006)*. Additionally, the evidence shows that there are material disputes about whether Ni-Q's proposal is a proper submarket definition.

At its essence, Ni-Q's argument and evidence relating to relevant market definition is that Prolacta "DNA-matches" when no other supplier of human breast milk does so and that some customers are willing, at least on occasion, to pay a premium for Prolacta's DNA-matched products. From this, Ni-Q asserts that it has provided a proper definition of a relevant submarket. If the issue before the Court was whether such a proposed definition is sufficient to withstand a motion to dismiss, Ni-Q would likely prevail. That is not, however, the current procedural posture. Ni-Q, as the plaintiff in an antitrust claim, is seeking summary judgment in its favor. Thus, the relevant question is whether, as a matter of law, Ni-Q's proposed market definition is the only reasonable definition supported by the facts or whether a jury must decide the most appropriate **[*12]** market definition supported by the facts. ***HN7***[] Moreover, at summary judgment, the Court must view the facts in the light most favorable to the nonmoving party and resolve all reasonable inferences in favor of the nonmoving party. This presents a very steep burden for Ni-Q at this stage of the proceedings.

Ni-Q appears to argue (or assume) that any patented product that is mildly commercially successful must be in a unique (and single-seller) market for purposes of the antitrust laws. That is not, however, how markets are defined under the antitrust laws. *Accord* *In re Live Concert Antitrust Litig., 863 F. Supp. 2d 966, 993 (C.D. Cal. 2012)* (finding that the expert's analysis of the relevant product market "failed to provide any meaningful discussion as to whether and how any such indicia are 'economically significant' in this particular case" and instead "essentially boils down to: plenty of people (including consumers and industry participants) recognize 'rock' as a type of music; therefore, the relevant market in this case is comprised of 'live rock music concerts'"). Ni-Q's proposed market definition (even for a submarket) ignores record evidence that *consumers* consider donated human breast milk products, whether pasteurized, sterilized, "DNA-matched," or with standardized **[*13]** nutrition or fortified after purchase, all to be reasonably interchangeable. For example, Dr. William Rhine, of Lucile Salter Packard Children's Hospital at Stanford University, an expert who has submitted declarations on behalf of Prolacta on the benefits of human breast milk, standardized nutrients, and DNA tested breast milk, testified at deposition that his hospital uses donated breast milk from the Human Milk Banking Association of North America (HMBANA), and fortifies it. ECF 219-9 at 6-8. Additionally, Ni-Q's designated corporate representative at Ni-Q's deposition under *Rule 30(b)(6)* testified that HMBANA milk that is fortified meets the standard of care in the industry. ECF 220-1 at 28-29. He also testified that customers view all donated breast milk, including through HMBANA, as "equal," "substitutes," the "same across the board," and that customers "believe that if they are getting milk from a HMBANA bank that it's the same as milk as Prolacta, that it's the same milk from Ni-Q." *Id.* at 44-46; *see also* ECF 206 at 2 (Ni-Q's Chief Executive Officer explaining in his Declaration that hospitals that want to "feed babies a human milk diet" can choose milk from HMBANA, Prolacta, Ni-Q, or Medolac). **[*14]** Indeed, the evidence shows that by far HMBANA has the largest market share of sales of donated human breast milk. HMBANA milk is pasteurized but not sterilized or DNA tested, and it does not have standardized nutrition. That some customers, on some occasions, might prefer and buy human breast milk that is sterilized or DNA-matched and has standardized nutrition does not mean that it is undisputed that all three attributes constitute a relevant submarket for antitrust purposes. The key question is whether consumers consider these breast milk products to be reasonably interchangeable, at least depending upon respective prices. The whole point of defining a relevant market (or submarket) for antitrust purposes is to determine which products have the ability or potential to assert a competitive influence on the pricing decisions of the products of an antitrust defendant. "A firm with market power can profitably increase its price above the competitive level for a sustained period of time." ABA ***ANTITRUST LAW*** SECTION, Monopolization and Dominance Handbook 7 (2d ed. 2021).

Ni-Q also ignores evidence in the record that the sterilization of breast milk performed by Ni-Q and Medolac replaces **[*15]** the DNA matching performed by Prolacta and renders that attribute unnecessary and broadening the correct market definition. Thus, there is an issue of fact whether human breast milk that is sterilized is reasonably interchangeable with human breast milk that is DNA-matched, even if standardized nutrition were an appropriate attribute for a submarket.

Moreover, Ni-Q relies on Prolacta's pricing to argue monopolization, but the evidence on pricing is disputed and ambiguous. The evidence shows that some of Prolacta's pricing is high but sometimes it is discounted and sometimes Ni-Q has higher pricing than Prolacta on some products. HMBANA, however, has much lower prices, and the evidence does not show that Prolacta can unilaterally price its products however it likes based on monopoly power. Indeed, Prolacta lowered its prices because of pricing pressure from HMBANA's products.

Viewed in the light most favorable to the nonmoving party, the evidence shows that consumers of Prolacta's products have alternatives in human breast milk products from Ni-Q, Medolac, and HMBANA.[5] This is sufficient to show a genuine dispute on the question of market definition. Although Prolacta's products may have **[*16]** some different attributes, "where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others." *E.I. du Pont, 351 U.S. at 394*.

Ni-Q also argues that its proposed submarket definition is proper under *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. ***HN8***[] In *Brown Shoe*, the Supreme Court explained that within a broad market, well-defined submarkets may exist that themselves constitute markets for antitrust purposes. *Id. at 325*. "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* The Ninth Circuit, however, has "repeatedly noted that the *Brown Shoe* indicia are practical aids for identifying the areas of actual or potential competition and that their presence or absence does not decide automatically the submarket issue." *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1375 (9th Cir. 1989)*. Instead, "[w]hether isolating a submarket is justified turns ultimately upon whether the factors used to define the submarket are 'economically significant.'" **[*17]** *Id.* There are questions of fact for the jury to decide.

A review of the *Brown Shoe* factors shows that they do not support finding Ni-Q's proposed submarket is the only properly defined market (or even submarket), which is required for Ni-Q to prevail at summary judgment. The first factor, public recognition of a separate submarket, is not undisputed. Indeed, there is no evidence in the record, let alone undisputed evidence, that customers or suppliers consider DNA-matched, nutrient standardized human breast milk to be its own relevant submarket. Instead, as previously discussed, the evidence shows that customers view human breast milk products interchangeably. There also is evidence that suppliers, including both Ni-Q and Prolacta, consider HMBANA to be a primary competitor. *See, e.g.*, ECF 220-1 at 31-32 (Ni-Q's corporate designee discussing HMBANA, Prolacta, and Medolac as Ni-Q's competitors); ECF 204 at 5 (Ni-Q stating that Prolacta "regards HMBANA as its primary competitor"); ECF 205-1 at 4 (Prolacta's corporate designee testifying that Prolacta competes with HMBANA).

The second factor, the product's peculiar characteristics and uses, also involves disputed issues of material fact. **[*18]** As noted, there is evidence that sterilization replaces DNA matching. This supports the conclusion that any potential submarket would include at least products that are *either* DNA-matched or sterilized candidates. There also is some evidence that consumers do not find the attributes of sterilization or DNA matching, or nutrient standardization, economically significant. That suggests there should be no submarket for a premium donated breast milk containing any of these attributes. *See, e.g., In re Super Premium Ice Cream Distrib. Antitrust Litig., 691 F. Supp. 1262, 1268 (N.D. Cal. 1988)*, *aff'd sub nom Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc., 895 F.2d 1417 (9th Cir. 1990)* (Table). Thus, there are disputed issues of fact regarding this factor and it does not support Ni-Q's proposed submarket definition.

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[5] Consumers also may have reasonable alternatives to Prolacta's products from formula based on cow's milk, although there is a stronger argument that those alternatives could be considered part of a separate product market.

For the third factor, unique production facilities, Ni-Q does not provide argument or evidence that Prolacta's facilities are unique. For the fourth factor, distinct customers, Ni-Q does not argue, let alone provide undisputed evidence, that Prolacta's customers are distinct from other breast milk customers. The customers are the same—neonatal intensive care units and similar facilities and their patients. At most, Ni-Q shows that at least some of these customers are willing some of the time to pay more for Prolacta's products. But these are the same **[*19]** customers who also purchase Ni-Q's, Medolac's, and HMBANA's products. Ni-Q does not argue, or provide evidence, that it is undisputed that there is a subset of customers for whom Prolacta's products are the *only reasonable* alternative. *See, e.g.*, ECF 218 at 20-25 (Declaration of Margaret E. Guerin-Calvert, President and Senior Managing Director of FTI Consulting, Inc.'s Center for Healthcare Economics and Policy, Prolacta's economics expert, explaining how Prolacta's customers are not captive).

For the fifth factor, distinct prices, Ni-Q relies on the fact that Prolacta's list prices are higher than Ni-Q's and Medolac's. Ni-Q argues that the fact that Prolacta charges higher prices means that it monopolizes the market. As noted, the price information is not as clear as presented by Ni-Q; both Ni-Q and Prolacta have a range of prices. ***HN9***[] Further, "the scope of the relevant market is not governed by the presence of a price differential between competing products." *Twin City Sportserv., Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975)*.

For the sixth factor, sensitivity to price changes, Ni-Q does not provide any economic evidence that Prolacta's prices are not sensitive to price changes. Ni-Q argues that it does not need economic evidence because Prolacta charges **[*20]** higher prices. That, however, is not the question. ***HN10***[] For this factor, courts "typically consider whether a sufficient number of customers would switch to other technologies in response to a price increase. If enough customers switch, then [the product does] not constitute an independent market." *DSM Desotech Inc. v. 3D Sys. Corp., 749 F.3d 1332, 1343-44 (Fed. Cir. 2014)*. Here, the evidence shows that changes in the prices charged by Prolacta for its products can, and do, cause customers to switch to those other products. Ni-Q admits that Prolacta lowered its prices to better compete with HMBANA, and Prolacta's corporate designee testified to that fact. *See, e.g.*, ECF 205-1 at 12 (Prolacta's corporate designee testifying that market for Prolacta's products is a "price-sensitive market" and that Prolacta lowered its prices in 2016 after conducting a market survey and "consider[ing] HMBANA's pricing"); *accord* ECF 218 at 23 (Prolacta's economics expert discussing how a large percentage of Prolacta's customers switched to purchasing competitors' products between 2016 and June 2020). Thus, it is a disputed issue of fact whether a price increase of Prolacta's products would cause customers to switch to competitor's products.

For the seventh factor, distinct vendors, **[*21]** Ni-Q argues that the vendors are distinct because HMBANA does not standardize nutrition or match DNA and Ni-Q and Medolac do not match DNA. That argument relates to the *product's* peculiar characteristics. Ni-Q does not argue or present evidence that the *vendors* are distinct.

As noted, at summary judgment the facts must be viewed in the light most favorable to the nonmoving party, which is Prolacta. Ni-Q has not met its burden of proving a relevant market (or even submarket) as a matter of law. *See, e.g.*, ECF 218 at 1-25 (Prolacta's economics expert explaining why Ni-Q's proposed market definition is an improper antitrust market definition). A jury will need to decide that question.

CONCLUSION

The Court DENIES Plaintiff's Motion for Leave to File a Supplemental Complaint (ECF 236). The Court DENIES AS MOOT Plaintiff's Motion for Summary Judgment that U.S. Patent No. 8,628,921 is Unenforceable Due to Inequitable Conduct (ECF 201). The Court DENIES Plaintiff's Motion for Summary Judgment as to Its Sherman Antitrust Act Claim (ECF 204).

IT IS SO ORDERED.

DATED this 26th day of July, 2021.

/s/ Michael H. Simon

Michael H. Simon

United States District Judge

Ruiz v. Celsius Holdings

United States District Court for the Southern District of California

July 27, 2021, Decided; July 28, 2021, Filed

Case No.: 3:21-cv-00128-GPC-KSC

Reporter

2021 U.S. Dist. LEXIS 235986 *; 2021 WL 5811264

JIMY RUIZ and MICHAEL CAVALLERO on behalf of themselves and all others similarly situated, Plaintiffs, v. CELSIUS HOLDINGS, INC., Defendant.

Core Terms

beverages, fruit, label, consumer, flavored, premium, advertising, misleading, unfair, ingredients, front, products, allegations, deceived, Orange, motion to dismiss, business practice, misrepresentations, vignette, argues, food, deceptive, express warranty, regulation, marketed, injury in fact, promise, prong, deceptive act, representations

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 12(b)(6) permits dismissal for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. Under Fed. R. Civ. P. 8(a)(2), the plaintiff is required only to set forth a short and plain statement of the claim showing that the pleader is entitled to relief, and give the defendant fair notice of what the claim is and the grounds upon which it rests.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] Motions to Dismiss, Failure to State Claim

A complaint may survive a motion to dismiss only if, taking all well-pleaded factual allegations as true, it contains enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN3[] Standing, Injury in Fact

U.S. Const. art. III, § 2 the United States Constitution requires that a plaintiff have standing to bring a claim. The irreducible constitutional minimum of Article III standing requires that the plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. The Supreme Court noted that concreteness is quite distinct from particularization. An injury is particularized if it affects the plaintiff in a personal and individual way. In addition, for an injury to be concrete, it must be de facto, meaning that it is real and not abstract. However, an injury need not be tangible in order to be concrete, and intangible injuries may constitute injury in fact. Economic injury is clearly a sufficient basis for standing. Certainly, an economic injury qualifies as a concrete injury.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Constitutional Law > ... > Case or Controversy > Standing > Elements

Evidence > Burdens of Proof > Allocation

HN4[] Standing, Burdens of Proof

The plaintiff bears the burden of demonstrating the elements of U.S. Const. art. III standing. At the pleading stage, the plaintiff must clearly allege facts demonstrating each element. In a class action, U.S. Const. art. III standing is met at the motion to dismiss stage if at least one named plaintiff satisfies the requirements.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN5[] Class Actions, Certification of Classes

At the pleading stage in a putative class action, a plaintiff's claims related to products that are substantially similar to the product purchased by the plaintiff should not be dismissed for lack of standing.

Governments > Courts > Authority to Adjudicate

HN6[] Courts, Authority to Adjudicate

As statutory standing is not jurisdictional, the Court need not reach the issue sua sponte.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

HN7[] **Heightened Pleading Requirements, Fraud Claims**

Where a claim alleges fraud or is grounded in fraud, *Fed. R. Civ. P. 9(b)* requires a plaintiff to state with particularity the circumstances constituting fraud or mistake. *Fed. R. Civ. P. 9(b)*. However, malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. A party must set forth the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN8[] **Heightened Pleading Requirements, Fraud Claims**

Allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. Particularity requires plaintiff to allege the who, what, when, where, and how of the alleged fraudulent conduct. In addition, the complaint must state what is false or misleading about a statement, and why it is false.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN9[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b)'s requirements apply to state law claims grounded in fraud.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

HN10[] **Heightened Pleading Requirements, Fraud Claims**

Under *Fed. R. Civ. P. 9(b)*, knowledge may be alleged generally. *Fed. R. Civ. P. 9(b)*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN11[] **Deceptive & Unfair Trade Practices, State Regulation**

A plaintiff must adequately allege the defendant was aware of a product defect in order to state a Consumer Legal Remedies Act claim arising from the defendant's failure to disclose that defect, because a seller generally has no duty to disclose defects of which it is not aware.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN12[] False Advertising, State Regulation

The reasonable consumer standard applies to a plaintiffs' claims under the California Unfair Competition Law, False Advertising Law, Consumer Legal Remedies Act, and General Business Law (GBL). Under the reasonable consumer standard, a plaintiff must show that members of the public are likely to be deceived. The materially misleading prong of GBL claims requires that the act is likely to mislead a reasonable consumer acting reasonably under the circumstances. This requires more than a mere possibility that the label might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Whether a business practice is deceptive will usually be a question of fact not appropriate for decision at the motion to dismiss stage.

Business & Corporate Compliance > ... > Contracts Law > Breach > Breach of Warranty

Commercial Law (UCC) > ... > Contract Provisions > Warranties > Express Warranties

Torts > Products Liability > Theories of Liability > Breach of Warranty

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Express Warranties

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Warranties

HN13[] Breach, Breach of Warranty

Cal. Com. Code § 2313 defines an express warranty. In short, an express warranty is a contractual promise from the seller that the goods conform to the promise. To prevail on a breach of express warranty claim under California law, a plaintiff must prove that (1) the seller's statements constitute an affirmation of fact or promise or a description of the goods, (2) the statement was part of the basis of the bargain, and (3) the warranty was breached. Product packaging may serve as part of an express warranty. Typically, whether the label actually provided a warranty and is likely to deceive a consumer are not appropriate questions to decide on a dismissal motion.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Torts > Business Torts > Unfair Business Practices > Elements

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN14[] State Regulation, Claims

A business act or practice may violate the California Unfair Competition Law (UCL) if it is either unlawful, unfair, or fraudulent. Each of these three adjectives captures a separate and distinct theory of liability. The unlawful prong incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under the UCL. As to the unfair prong, an unfair business practice is one that either offends an established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. To state a claim under the fraudulent prong of the UCL, a plaintiff must allege that members of the public are likely to be deceived by the defendant's acts.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > Federal Food, Drug & Cosmetic Act

HN15[] **Deceptive Labeling & Packaging, Federal Food, Drug & Cosmetic Act**

The FDCA explicitly provides that a dietary supplement shall be deemed to be a food within the meaning of the FDCA subject to certain exceptions. *21 U.S.C.S. § 321(ff)*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices

HN16[] **Consumer Protection, Deceptive & Unfair Trade Practices**

While an antitrust violation describes one variety of unfair business practice, case law relating to antitrust injury is limited to actions based on unfairness to competitors. For actions between competitors, an unfair practice must be tied to a legislatively declared policy.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices

HN17[] **Consumer Protection, Deceptive & Unfair Trade Practices**

To determine whether a practice is unfair, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN18[] **Trade Practices & Unfair Competition, State Regulation**

California's False Advertising Law prohibits any unfair, deceptive, untrue, or misleading advertising. *Cal. Bus. & Prof. Code § 17500*. California laws prohibit not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN19[] **Trade Practices & Unfair Competition, State Regulation**

The Consumer Legal Remedies Act (CLRA) prohibits particular unfair and deceptive acts and practices in a transaction intended to result or which results in the sale or lease of goods or services to any consumer. *Cal. Civ. Code § 1770(a)*. Conduct that is likely to mislead a reasonable consumer violates the CLRA.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN20[] **Deceptive & Unfair Trade Practices, State Regulation**

A plaintiff must demonstrate actual reliance on the unfair or deceptive act to succeed in a claim under the Consumer Legal Remedies Act.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN21[] **False Advertising, State Regulation**

Under the New York General Business Law, deceptive acts or practices and false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in New York state are unlawful. *N.Y. Gen. Bus. Law § 349(a)*, *§ 350*. To successfully assert a claim under *N.Y. Gen. Bus. Law § 349(h)* or *§ 350*, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.

Business & Corporate Law > Distributorships & Franchises > Disclosure & Registration > Requirements

Governments > Legislation > Statutory Remedies & Rights

HN22[] **Disclosure & Registration, Requirements**

N.Y. Gen. Bus. Law § 349(h) provides a private right of action. *N.Y. Gen. Bus. Law § 349(h)*. The private right of action for *§ 350* claims is provided in *§ 350-e*. *N.Y. Gen. Bus. Law § 350-e(1)*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN23[] **Deceptive & Unfair Trade Practices, State Regulation**

A *N.Y. Gen. Bus. Law § 349* or *§ 350* claim will not lie where the deceptive act itself was the only injury, such as when a plaintiff alleges she was deceived into making a purchase and merely seeks a refund of the purchase price. Aside from reliance requirement, *§ 350* standard is identical to *§ 349*. However, the New York Court of Appeals has left open the possibility that a plaintiff might have a claim for the higher price the consumer paid for the product as a result of the misrepresentation. A plaintiff therefore may satisfy the injury requirement by articulating a price premium theory, or alleging that the deceptive practice caused her to pay more than the product was actually worth.

Counsel: [*1] For Celsius Holdings Inc., Defendant: Joel B. Rothman, LEAD ATTORNEY, PRO HAC VICE, Schneider Rothman Intellectual Property Law Group PLLC, Boca Raton, FL.

For Jimy Ruiz, on behalf of himself and all others similarly situated, Plaintiff: Jordan L. Lurie, LEAD ATTORNEY, Pomerantz LLP, Los Angeles, CA.

For Celsius Holdings Inc., Defendant: Jonah Adam Grossbardt, LEAD ATTORNEY, Matthew Laurence Rollin, Sriplaw, Beverly Hills, CA.

For Jimy Ruiz, on behalf of himself and all others similarly situated, Plaintiff: Ari Y. Basser, LEAD ATTORNEY, Pomerantz LLP, Los Angeles, CA.

For Celsius Holdings Inc., Defendant: Robert S. Niemann, LEAD ATTORNEY, Keller and Heckman LLP, San Francisco, CA.

For Michael Cavallero, Plaintiff: Ari Y. Basser, Pomerantz LLP, Los Angeles, CA.

For Jimy Ruiz, on behalf of himself and all others similarly situated, Plaintiff: Michael David Braun, LEAD ATTORNEY, Kuzyk Law, Los Angeles, CA.

For Michael Cavallero, Plaintiff: Ari Y. Basser, Pomerantz LLP.

Judges: Hon. Gonzalo P. Curiel, United States District Judge.

Opinion by: Gonzalo P. Curiel

Opinion

ORDER: (1) DENYING DEFENDANT'S MOTION TO DISMISS; AND (2) DENYING AS MOOT PLAINTIFFS' APPLICATION TO FILE SUR-REPLY [ECF No. 20.]

Before the Court is Defendant **[*2]** Celsius Holdings, Inc.'s Motion to Dismiss the First Amended Complaint of Plaintiff Jimy Ruiz and Michael Cavallero. ECF No. 20. The motion has been fully briefed. ECF Nos. 25, 26. The Court finds the motion suitable for disposition without a hearing pursuant to Civil Local Rule 7.1(d)(1). For the reasons set forth below, the Court **DENIES** Defendant's motion to dismiss and also **DENIES AS MOOT** Plaintiffs' application to file a sur-reply.

I. BACKGROUND[1]

Plaintiffs Jimy Ruiz and Michael Cavallero ("Plaintiffs") are individuals residing in Chula Vista, California and White Plains, New York, respectively, who were frequent purchasers of the "healthy energy" drink products sold by Defendant Celsius Holdings, Inc. ("Defendant"). ECF No. 13 ("FAC") ¶¶ 2, 5, 11, 19. Defendant manufactures, markets, advertises, and sells beverages that tout healthful ingredients as compared to competing energy drinks. *Id.* ¶¶ 2 -3. The front labels on the beverages feature a name, such as "Sparkling Orange," and an image (or vignette) of the fruit identified by the name. *Id.* ¶¶ 5, 36. However, the beverages do not contain the ingredient reflected in the name and vignette, but rather "natural flavor." *Id.* ¶ 6. Plaintiffs purchased Defendant's **[*3]** beverages that featured names such as Sparkling Orange, Peach Mango Green Tea, Sparkling Grape Rush, and Sparkling Strawberry Guava, believing that the beverages contained the fruits depicted by the name and vignette. *Id.* ¶¶ 12-13, 20-21. Plaintiffs would not have purchased Defendant's beverages or would not have paid as much for them had they known that the beverages did not include the depicted fruits, and thus lost money as a result of the alleged misrepresentation. *Id.* ¶¶ 16, 24, 80.

On January 22, 2021, Plaintiffs filed their initial putative class action complaint. ECF No. 1. On March 26, 2021, Defendant filed a motion to dismiss. ECF No. 10. On April 16, 2021, Plaintiffs filed their First Amended Complaint ("FAC"), asserting putative class claims on behalf of themselves and other consumers for (1) breach of express warranty, *Cal. Comm. Code § 2313*; (2) unlawful business practices in violation of the California Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200 et seq.*; (3) unfair business practices in violation of the UCL; (4) fraudulent business practices in violation of the UCL; (5) false advertising in violation of the False Advertising Law ("FAL"), *Cal. Bus. & Prof. Code § 17500 et seq.*; (6) violation of the Consumer Legal Remedies Act ("CLRA"), *Cal.*

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[1] The factual background in this section is drawn from Plaintiffs' First Amended Complaint.

Civ. Code § 1750 et seq.; (7) violation **[*4]** of New York's Consumer Protection from Deceptive Acts and Practices Law, N.Y. Gen. Bus. Law ("GBL") § 349 et. seq.; (8) violation of New York's Consumer Protection from Deceptive Acts and Practices Law, N.Y. Gen. Bus. Law § 350 et. seq.; and (9) restitution based on quasi-contract/unjust enrichment. FAC ¶¶ 96-156. On May 14, 2021, Defendant filed the instant motion to dismiss the FAC. ECF No. 20.

II. LEGAL STANDARD

HN1[] Federal Rule of Civil Procedure ("Rule") 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *See* Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1990). Under Rule 8(a)(2), the plaintiff is required only to set forth a "short and plain statement of the claim showing that the pleader is entitled to relief," and "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

HN2[] A complaint may survive a motion to dismiss only if, taking all well-pleaded factual allegations as true, it contains enough facts to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant **[*5]** is liable for the misconduct alleged." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (citations omitted).

III. DISCUSSION

Defendant moves to dismiss the FAC in its entirety on the basis of lack of standing, failure to comply with Rule 9(b), and failure to state a claim. Plaintiffs oppose.

A. Standing

HN3[] Article III, Section 2 the United States Constitution requires that a plaintiff have standing to bring a claim. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "[T]he 'irreducible constitutional minimum of [Article III] standing'" requires that "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (citing Lujan, 504 U.S. at 560). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548 (quoting Lujan, 504 U.S. at 560). The Supreme Court noted that **[*6]** concreteness is quite distinct from particularization. *Id.* An injury is "particularized" if it affects "the plaintiff in a personal and individual way." *Id.* In addition, for an injury to be "concrete", it must be "de facto," meaning that it is "real" and not "abstract." *Id.* However, an injury need not be "tangible" in order to be "concrete," and intangible injuries may constitute injury in fact. Id. at 1549. "Economic injury is clearly a sufficient basis for standing." San Diego Cnty. Gun Rights Committee v. Reno, 98 F.3d 1121, 1130 (9th Cir. 1996); Debernardis v. IQ Formulations, LLC, 942 F.3d 1076, 1084 (11th Cir. 2019) ("Certainly, an economic injury qualifies as a concrete injury.").

HN4[] The plaintiff bears the burden of demonstrating the elements of Article III standing. Spokeo, Inc., 136 S. Ct. at 1547. At the pleading stage, the plaintiff "must 'clearly . . . allege facts demonstrating' each element." *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 518, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). In a class action, Article III standing is met at the motion to dismiss stage if at least one named plaintiff satisfies the requirements. *Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007)*.

Defendant disputes that Plaintiffs have met any of the three Article III standing requirements. ECF No. 20-1 at 13-15. As to the injury in fact requirement, Plaintiffs allege that they suffered economic injury because they paid more for the beverages than they otherwise would have, believing that the beverages contained real fruit as a result of **[*7]** Defendant's labeling. FAC ¶¶ 75, 77, 80. Defendant argues that a conclusory allegation that a consumer paid more than she believes she should have does not suffice to demonstrate injury. ECF No. 20-1 at 15 (citing *McGee v. S-L Snacks National, 982 F.3d 700, 710 (9th Cir. 2020)*). But *McGee* stands for the opposite of what Defendant suggests, as it notes that the Ninth Circuit "has consistently recognized that a plaintiff can satisfy the injury in fact requirement by showing that she paid more for a product than she otherwise would have due to a defendant's false representations about the product." *McGee, 982 F.3d at 706*. The Ninth Circuit distinguished the allegations in *McGee* from this line of cases because the plaintiff did not allege the defendant misrepresented the product, causing her to overpay. *Id. at 707*. Plaintiffs here have alleged that they would not have purchased, or would have paid less for, Defendant's beverages if Defendant had not represented that the beverages contained fruit. This is sufficient to establish injury in fact. *See* *Mazza v. Am. Honda Motor Co., 666 F.3d 581, 595 (9th Cir. 2012)* ("To the extent that class members were relieved of their money by Honda's deceptive conduct—as Plaintiffs allege—they have suffered an 'injury in fact.'"); *Pirozzi v. Apple, Inc., 966 F. Supp. 2d 909, 917 (N.D. Cal. 2013)* ("palpable economic injuries have long been recognized as sufficient to lay the basis **[*8]** for standing") (quoting *Sierra Club v. Morton, 405 U.S. 727, 733-34, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)*).

Defendant's arguments regarding traceability and redressability also fail. Although Defendant contends that Plaintiffs only have themselves to blame for paying the alleged price premium, the FAC alleges that the product labeling led Plaintiffs to believe that the beverages contained fruit, and that they relied on this representation when deciding to purchase the product. FAC ¶¶ 74-78. Since the Court must accept as true the allegation that Plaintiffs paid what they did for the beverages because the front labels caused them to believe the beverages contained fruit, whether Plaintiffs have adequately alleged that reliance on the beverage name and vignette was *reasonable* is not a question of causation, but rather of whether Plaintiffs have stated a claim arising from fraud. Further, Plaintiffs' alleged economic injury of overpaying could be redressed by damages or restitution.[2] *See* *Coe v. Philips Oral Healthcare Inc., No. C13-518-MJP, 2014 U.S. Dist. LEXIS 22983, 2014 WL 722501, at *4 (W.D. Wash. Feb. 24, 2014)* (citing *Association of Public Agency Customers v. Bonneville Power Admin., 733 F.3d 939, 954 (9th Cir. 2013)*) ("Without question, the relief sought—compensation for the overpayment—remedies the alleged injury."). Additionally, although not addressed by Defendant, because Plaintiffs are previously deceived consumers who would purchase Defendant's product in the future if the beverages **[*9]** were not misleadingly marketed, they have alleged standing to seek an injunction. *See Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 969-71 (9th Cir. 2018)*; FAC ¶¶ 18, 26, 84.

The Supreme Court's recent decision in *TransUnion* is inapposite.[3] That case held that a plaintiff who "has not suffered any physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts" lacks Article III standing even if Congress provides a cause of action to sue for a defendant's violation of law. *TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2206, 210 L. Ed. 2d 568 (2021)*. Plaintiffs here allege monetary harm in the form of overpayment, a form of injury that the *TransUnion* court noted would confer standing. The fact that Plaintiffs' complaint makes reference to FDCA labeling requirements does not transform them from purchasers that allege monetary loss as a result of alleged deceptive labeling into "unharmed

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[2] Defendant contends, for the first time on reply, that Plaintiffs have failed to allege an inadequate remedy at law under ***Sonner v. Premier Nutrition Corp., 971 F.3d 834, 944 (9th Cir. 2020)***. ECF No. 26 n.3. Because Defendant raised this issue for the first time on reply, the Court need not consider it. *Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007)*.

[3] Plaintiffs filed an ex parte application to file a sur-reply on this issue, noting that Plaintiffs agreed that they would not oppose any request by Defendant to file a sur-sur reply. *See* ECF No. 28. Because the Court easily concludes that *TransUnion* does not affect the standing analysis in this case, the Court sees no need to have the parties engage in further briefing. Accordingly, the Court **DENIES AS MOOT** Plaintiffs' ex parte application.

plaintiffs seeking to enforce general compliance with regulatory law."[4] ECF No. 26 at 8; *cf.* *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs., & Prod. Liab. Litig., 295 F. Supp. 3d 927, 947 (N.D. Cal. 2018)* ("Even if Plaintiffs' claims were tied to EPA and CARB emission standards . . . Plaintiffs allege that they paid money for the Class Vehicles that they would not have otherwise spent but for Defendants' misrepresentations and concealment of material facts.").

While not directly raised by Defendant, **[*10]** because it concerns subject matter jurisdiction, the Court also briefly addresses whether Plaintiffs have standing to pursue claims related to the other "fruit" beverages that they did not personally purchase. "Courts in this circuit have diverged on the question." *Donohue v. Apple, Inc., 871 F. Supp. 2d 913, 921 (N.D. Cal. 2012)* (collecting cases); *see also* *Coe, 2014 U.S. Dist. LEXIS 22983, 2014 WL 722501, at *4*. ***HN5***[] The Court concurs with the majority of district courts to consider this issue and finds that at the pleading stage in a putative class action, a plaintiff's claims related to products that are substantially similar to the product purchased by the plaintiff should not be dismissed for lack of standing. Rather, such issues should be deferred until the class certification stage when the court addresses commonality, typicality, and adequacy. *See* *Donahue, 871 F. Supp. 2d at 922*; *Anderson v. Jamba Juice, 888 F. Supp. 2d 1000, 1005-06 (N.D. Cal. 2012)*. Here, as discussed further below, Plaintiffs allege substantially the same "labeling infirmity" on all of Defendant's "fruit" beverages. FAC ¶ 28. Further, Plaintiffs assert claims for injunctive relief, and they state generally that they would purchase Defendant's beverages in the future should they be able to rely on the labeling, which plausibly includes "fruit" beverages in Defendant's product lines other than the ones they purchased previously. **[*11]** *Id.* ¶¶ 18, 26.

Accordingly, the Court finds that Plaintiffs have adequately alleged standing.[5]

B. *Rule 9(b)*

HN7[] Where a claim alleges fraud or is grounded in fraud, *Rule 9(b)* requires a plaintiff to "state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. However, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.* A party must set forth "the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Odom v. Microsoft Corp., 486 F.3d 541, 553 (9th Cir. 2007)* (internal quotation marks omitted).

HN8[] Allegations of fraud must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*; *see also* *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)* (noting that particularity requires plaintiff to allege the "who, what, when, where, and how" of the alleged fraudulent conduct). In addition, the complaint must state "what is false or misleading about a statement, and why it is false." *In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)* (en banc) *superseded by statute on other grounds*, Private Sec. Litig. Reform Act of 1995, *15 U.S.C. § 78u-4(b)(1)*, *as recognized in* *Ronconi v. Larkin, 253 F.3d 423, 429 n.6 (9th Cir. 2001)*.

HN9[] *Rule 9(b)*'s requirements apply to state law claims grounded in fraud. *See* *Vess v. Ciba-Geigy Corp., U.S.A., 317 F.3d 1097, 1103-05 (9th Cir. 2003)* (applying **[*12]** *Rule 9(b)* to UCL and FAL claims to the extent they alleged fraud); *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)* (applying *Rule 9(b)* particularity requirement to UCL and CLRA claims grounded in fraud). Accordingly, Plaintiffs must meet the particularity

[4] Defendant also argues at length that Plaintiffs do not have standing to enforce the FDCA. *E.g.*, ECF No. 26 at 9-12. However, Plaintiffs do not bring a cause of action under the FDCA. Instead, the FDCA is relevant only insofar as Plaintiffs allege it serves as a predicate law for their UCL claim, which the Court discusses *infra*.

[5] Although Plaintiffs address statutory standing for the UCL, FAL, and CLRA claims in their opposition, *see* ECF No. 25 at 12-13, Defendant only raised Article III standing in its motion to dismiss. ***HN6***[] As statutory standing is not jurisdictional, the Court need not reach the issue sua sponte. *Jewel v. Nat'l Sec. Agency, 673 F.3d 902, 907 n.4 (9th Cir. 2011)*.

requirement for their UCL claims (counts two, three, and four), their FAL claim (count five), their CLRA claim (count six), and their New York GBL claims (counts seven and eight)[6] for allegations of fraud.

With respect to the Sparkling Orange beverage, Plaintiffs have successfully identified the "the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Odom, 486 F.3d at 553*. Plaintiffs state that they purchased the Sparkling Orange beverage at specified retailers throughout the class period. FAC ¶¶ 12, 20. Plaintiffs allege that Defendant was responsible for marketing and advertising the beverage and creating the label, and that named Plaintiffs viewed the label. *Id.* ¶¶ 2, 6, 12, 13, 20, 21. Moreover, there appears to be no dispute that the label depicted and described by Plaintiffs is substantially similar to the label Defendant currently uses to market the Sparkling Orange beverage, giving Defendant adequate notice of the particular **[*13]** misconduct alleged. *Compare* FAC ¶ 5 *with* ECF No. 20-1 at 8. Plaintiffs have also explained why the front label of the Sparkling Orange beverage is false and misleading. Specifically, Plaintiffs allege that the name and vignette of an orange slice mislead prospective purchasers into thinking that the beverage contains orange when it does not contain orange. FAC ¶¶ 5, 6. Plaintiffs further allege that consumers rely on front-of-package marketing to make their purchasing decisions, citing to studies, and notes that competitor products explicitly indicate that the beverage is "flavored" on the front label if they do not include orange, or actually include the fruit identified. *Id.* ¶¶ 66, 70. While Defendant may disagree that its packaging is misleading to a reasonable consumer, these allegations suffice to put Defendant on notice of how Plaintiffs claim the labeling is false or misleading. *Rule 9(b)* is therefore satisfied with respect to Plaintiffs' allegations regarding the Sparkling Orange beverage. *Cf. In re 5-hour ENERGY Mktg. & Sales Pracs. Litig., No. MDL 13-2438 PSG PLAX, 2014 U.S. Dist. LEXIS 149732, 2014 WL 5311272, at *17 (C.D. Cal. Sept. 4, 2014)* (noting that many courts in California have found similar allegations sufficient to satisfy *Rule 9(b)* in cases alleging label-based fraud).

The parties also dispute whether Plaintiffs have complied with **[*14]** *Rule 9(b)* with respect to the varieties of beverage sold by Defendant, as the FAC primarily discusses the labeling of the Sparkling Orange beverage. ECF No. 20-1 at 19; ECF No. 25 at 14 n.3. Plaintiffs list several other examples of Defendant's beverages that they purchased and allege to have misleading labels, including Peach Mango Green Tea, Sparkling Grape Rush, and Sparkling Strawberry Guava. FAC ¶¶ 12, 20. The FAC also lists the flavors in Defendant's product lines that offer "fruit" beverages "affected by the same labeling infirmity described herein."[7] *Id.* ¶ 28, n.3. By any reasonable reading of the FAC, this alleges that the "fruit" beverages listed feature a front label with the name and vignette of the fruit or fruits identified, leading consumers to believe that the beverage contains the fruit or fruits depicted by the front label when it does not. Plaintiffs therefore allege a consistent misrepresentation across all of the "fruit" beverages named in the FAC, giving Defendant adequate notice of the particular misrepresentations alleged. However, should Plaintiffs wish to assert claims relating to products not identified in the FAC, Plaintiffs must amend their complaint to give Defendant **[*15]** notice of the alleged misrepresentations at issue.

Defendant also argues that Plaintiffs fail to adequately plead Defendant's knowledge of the alleged misrepresentations. ECF No. 20-1 at 19-20. ***HN10***[] Under *Rule 9(b)*, knowledge may be alleged generally. *Fed. R. Civ. P. 9(b)*. Further, Plaintiffs allege that Defendant both manufactured and marketed the product, FAC ¶¶ 2, 6, so it is plausible to conclude that Defendant was aware the beverage did not contain fruit but was marketed with a

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[6] While the Second Circuit has determined that GBL claims need not meet the *Rule 9(b)* particularity requirement, *see Pelman ex rel. Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005)*, its reasoning appears at odds with the Ninth Circuit's decision in *Kearns*, which held that even claims that do not reflect the elements of common law fraud must meet *Rule 9(b)*'s requirements if they are grounded in fraud. *See Keegan v. Am. Honda Motor Co., 838 F. Supp. 2d 929, 958 (C.D. Cal. 2012)*. The Court therefore presumes that *Rule 9(b)* applies to allegations of fraudulent conduct underlying Plaintiffs' GBL claims.

[7] The products identified in the FAC are: Sparkling Peach Vibe, Sparkling Orange, Sparkling Wild Berry, Sparkling Grape Rush, Raspberry Acai Green Tea, Grapefruit Melon Green Tea, Sparkling Fuji Apple Pear, Sparkling Kiwi Guava, Sparkling Watermelon, Peach Mango Green Tea, Jackfruit, Cherry Lime, Strawberry Dragon Fruit, Blueberry Pomegranate, Sparkling Blood Orange Lemonade, Watermelon Berry, Sparkling Grapefruit, Sparkling Orange Pomegranate, and Sparkling Cucumber Lime. FAC ¶ 28 n.3.

label featuring a fruit name and vignette. Plaintiffs need not allege facts regarding Defendant's state of mind with greater specificity than this at the pleading stage.[8]

C. Reasonable Consumer Standard

Defendant's primary argument is that Plaintiffs have failed to adequately plead that a reasonable consumer would be misled by the fruit name and vignette on the front label of Defendant's beverages, given that the beverages advertise "0 Sugar," minimal calories, and do not list the fruit in the ingredients on the back panel. ECF No. 20-1 at 16-18. Plaintiffs argue that what a reasonable consumer would believe is a factual issue inappropriate for adjudication at the motion to dismiss stage, and that the inclusion of an accurate ingredients label **[*16]** does not render consumers' reliance on the front label unreasonable. ECF No. 25 at 18-21.

HN12[] The "reasonable consumer standard" applies to Plaintiffs' claims under the UCL,[9] FAL, CLRA, and GBL. *See* *Freeman v. Time, Inc., 68 F.3d 285, 289-90 (9th Cir. 1995)*; *Williams v. Gerber Prod. Co., 552 F.3d 934, 938 (9th Cir. 2008)*; *Orlander v. Staples, Inc., 802 F.3d 289, 300 (2d Cir. 2015)*. "Under the reasonable consumer standard, [a plaintiff] must 'show that members of the public are likely to be deceived.'" *Williams, 552 F.3d at 938* (quoting *Freeman, 68 F.3d at 289*); *see also* *Orlander, 802 F.3d at 300* (noting that the "materially misleading" prong of GBL claims requires that the act is "likely to mislead a reasonable consumer acting reasonably under the circumstances.") (internal citation omitted). "This requires more than a mere possibility that [the] label 'might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.'" *Ebner v. Fresh, Inc., 838 F.3d 958, 965 (9th Cir. 2016)* (citation omitted). "[W]hether a business practice is deceptive will usually be a question of fact not appropriate for decision" at the motion to dismiss stage. *Williams, 552 F.3d at 938* (citing *Linear Technology Corp. v. Applied Materials, Inc., 152 Cal. App. 4th 115, 134-35, 61 Cal. Rptr. 3d 221 (2007)*); *Barton v. Pret A Manger (USA) Ltd., 535 F. Supp. 3d 225, 2021 WL 1664319, at *5 (S.D.N.Y. 2021)*.

Plaintiffs' allegations that a reasonable consumer would be deceived by the packaging in this case are similar to those found sufficient in *Williams*. There, the court noted that the product at issue "is called 'fruit juice snacks' and the packaging **[*17]** pictures a number of different fruits, potentially suggesting (falsely) that those fruits or their juices are contained in the product." *Williams, 552 F.3d at 939*. The Ninth Circuit disagreed with the district court's conclusion that no reasonable consumer would be deceived by the representations on the front of the box merely because the ingredients were specifically identified on the side of the box. *Id. at 939-40*. Similarly, Plaintiffs maintain here that the front of the packaging includes a name and picture of fruit, which plausibly suggests that a reasonable consumer may be deceived into thinking the beverage contains fruit. Like the Ninth Circuit found in *Williams*, a reasonable consumer might not "look beyond misleading representations on the front of the [can] to discover the truth from the ingredient list in small print" on the back of the can. *Id. at 939*. Defendant argues that a reasonable consumer would not conclude that a sugar-free, low-calorie beverage contains any fruit, *see* ECF No. 26 at 6, but this is a factual assertion that depends on whether it is commonly known that it is not possible to make a sugar-free, low-calorie drink that includes any amount of fruit. Here, Plaintiffs have alleged facts suggesting that consumers **[*18]** rely on front-of-package representations to make their purchasing decisions, that some seek out products that contain "real" ingredients, and that competing products specifically identify if they are fruit "flavored,"

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[8] Defendant's argument that Plaintiffs must allege Defendant was aware of a defect at the time of sale for their CLRA claim is unconvincing. *Wilson v. Hewlett-Packard* ***HN11***[] dealt with an alleged fraudulent omission, and stands for the principle that a plaintiff must adequately allege the defendant was aware of a product defect in order to state a CLRA claim arising from the defendant's failure to disclose that defect, because a seller generally has no duty to disclose defects of which it is not aware. *Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1145 (9th Cir. 2012)*. Plaintiffs adequately allege that Defendant knowingly made an affirmative misrepresentation by marketing the product with the fruit name and vignette despite being aware the product contained no fruit at the time of sale.

[9] Plaintiffs argue that this standard applies to their "unlawful" UCL claims only insofar as the predicate act contains the reasonable consumer test. ECF No. 25 at 18. Because the Court concludes the FAC adequately alleges deception under the reasonable consumer standard, the Court does not resolve this issue.

FAC ¶¶ 49, 66, 70, bolstering their allegation that a reasonable consumer would be deceived. Regardless of whether Plaintiffs will succeed in convincing a factfinder, "[t]he facts of this case . . . do not amount to the rare situation in which granting a motion to dismiss is appropriate" on the issue of whether a business practice is deceptive to a reasonable consumer. *Williams, 552 F.3d at 938-39*.

Accordingly, the Court finds that Plaintiffs have plausibly alleged that a reasonable consumer would be deceived by Defendant's labeling practices.

D. Failure to State a Claim

Defendant also argues that Plaintiffs fail to state a claim for relief for any of the causes of action asserted in the FAC.

1. Count One: Express Warranty

HN13[] *Section 2313* of the California Commercial code defines an express warranty.[10] In short, an express warranty "is a contractual promise from the seller that the goods conform to the promise." *Daugherty v. American Honda Motor Co., Inc., 144 Cal. App. 4th 824, 830, 51 Cal. Rptr. 3d 118 (2006)*. "To prevail on a breach of express warranty claim under California law, a plaintiff must prove that: (1) **[*19]** the seller's statements constitute an affirmation of fact or promise or a description of the goods; (2) the statement was part of the basis of the bargain; and (3) the warranty was breached." *In re ConAgra Foods, Inc., 90 F. Supp. 3d 919, 984 (C.D. Cal. 2015)*, *aff'd sub nom.* *Briseno v. ConAgra Foods, Inc., 674 F. App'x 654 (9th Cir. 2017)*, *and aff'd sub nom.* *Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017)* (citation omitted). Product packaging may serve as part of an express warranty. *Rosales v. FitFlop USA, LLC, 882 F. Supp. 2d 1168, 1178 (S.D. Cal. 2012)* (citing *Cal. Comm. Code § 2313(b)*); *Baird v. Samsung Elecs. Am., Inc., 522 F. Supp. 3d 679, 2021 WL 1799432, at *3 (N.D. Cal. 2021)*. Typically, "[w]hether the label actually provided a warranty and is likely to deceive a consumer are not appropriate questions to decide on a dismissal motion." *Augustine v. Talking Rain Beverage Co., Inc., 386 F. Supp. 3d 1317, 1332 (S.D. Cal. 2019)* (citation omitted).

The Court finds that Plaintiffs have plausibly alleged that the labeling constituted a "description of the goods" warranting that the beverages **[*20]** contained the fruit identified in the name and depicted by the vignette. *Cal. Comm. Code § 2313(b)*. While Defendant avers that the picture of fruit merely signifies that the beverage is fruit-flavored, it would be premature to decide at this juncture whether a reasonable consumer would view the label as a promise that the beverage contains fruit, or, as Defendant argues, as a promise that the beverage tastes like the fruit. The *McKinnis v. Kellogg* case cited by Defendant is distinguishable. There, the court found that "[a]bsent a representation that Froot Loops contains actual fruit," the plaintiffs failed to state a claim for breach of express warranty where the front of the box included the text "natural fruit flavors" surrounded by small illustrations of fruit. *McKinnis v. Kellogg USA, No. CV07-2611ABC(RCX), 2007 U.S. Dist. LEXIS 96106, 2007 WL 4766060, at *4-5 (C.D. Cal. Sept. 19, 2007)*. The court noted that the term "Froot" was fanciful, not descriptive of the ingredients, and

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[10] The section provides:

"(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

that the illustrations of fruit were only included next to the "natural fruit flavors" text, which was permissible under FDA regulations to convey that the product was flavored. *Id.* Here, in contrast, Plaintiffs plausibly allege that the beverage labels include a representation that the beverages contain actual fruit; while Froot Loops promised only "natural fruit flavors," **[*21]** the front label of Defendant's beverages include only the fruit name and vignette and no such clarification that the flavoring is derived from natural flavors. To the extent *McKinnis* suggests that an accurate ingredients panel insulates a defendant from liability, *2007 U.S. Dist. LEXIS 96106, [WL] at *5*, this position is undermined by the Ninth Circuit's decision in *Williams. Williams, 552 F.3d at 939*; *cf. Brady v. Bayer Corp., 26 Cal. App. 5th 1156, 1178, 237 Cal. Rptr. 3d 683 (2018)* (finding plaintiff plausibly alleged that front label for "One A Day" vitamins created express warranty that one gummie would be sufficient for one day's vitamins, even though serving size of two gummies was listed on the back label).

Plaintiffs have also adequately alleged that the warranty that the beverages contained fruit contributed to their purchase of the product, and that the beverages do not in fact contain fruit. Accordingly, the Court DENIES Defendant's motion to dismiss Plaintiffs' claim for breach of express warranty.

2. Counts Two, Three, and Four: UCL

HN14[] A business act or practice may violate the UCL if it is either "unlawful," "unfair," or "fraudulent." *Rubio v. Capital One Bank, 613 F.3d 1195, 1203 (9th Cir. 2010)*. Each of these three adjectives captures "a separate and distinct theory of liability." *Kearns, 567 F.3d at 1127* (citing *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301 (1999)*). The unlawful prong incorporates other laws and treats violations of those laws as unlawful **[*22]** business practices independently actionable under the UCL. *Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000)*. As to the unfair prong, "[a]n unfair business practice is one that either 'offends an established public policy' or is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *McDonald v. Coldwell Banker, 543 F.3d 498, 506 (9th Cir. 2008)* (quoting *People v. Casa Blanca Convalescent Homes, Inc., 159 Cal.App.3d 509, 530, 206 Cal. Rptr. 164 (1984)*). To state a claim under the fraudulent prong of the UCL, a plaintiff must allege that "members of the public are likely to be deceived" by the defendant's acts. *Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1152 (9th Cir. 2008)*; *Kearns, 567 F.3d at 1125*.

a. Unlawful (Count Two)

Plaintiffs allege that Defendant's labeling constitutes an unlawful business practice because the labels violate the FDCA, *21 U.S.C. § 301 et seq.* and implementing regulations, as well as California's Sherman Food, Drug, and Cosmetic Law ("Sherman Law"), *Cal. Health & Safety Code § 109875 et seq.*, which incorporates FDCA regulations. FAC ¶¶ 103-112. Plaintiffs point to one regulation, *21 C.F.R. § 101.22*, which regulates how labels are permitted to advertise the characterizing flavor of the product depending on whether the flavor is derived from the characterizing ingredient or from other flavors. *21 C.F.R. § 101.22(i)*. In short, the regulation provides that "[i]f the food is one that is commonly expected to contain a characterizing food ingredient, and . . . the food contains no such ingredient, the name of the characterizing **[*23]** flavor . . . shall be immediately followed by the word 'flavored,'" for instance, "strawberry flavored shortcake." *21 C.F.R. § 101.22(i)(1)(i)*. The regulation also requires that "[i]f none of the natural flavor used in the food is derived from the product whose flavor is simulated, the food . . . shall be labeled either with the flavor of the product from which the flavor is derived or as 'artificially flavored.'" *21 C.F.R. § 101.22(i)(1)(ii)*.

Plaintiffs allege that Defendant's labels characterize the beverages as containing particular fruits, yet do not contain those fruits and do not indicate that the beverage is "flavored" or "artificially flavored." FAC ¶¶ 57-59. This would constitute a violation of the FDCA regulation and thus the Sherman Law, which may serve as a predicate violation constituting an unlawful business practice under the UCL. *See Hilsley v. Gen. Mills, Inc., 376 F. Supp. 3d 1043, 1050 (S.D. Cal. 2019)*. Defendant argues that its product is "a liquid dietary supplement, not a food," and that Plaintiffs fail to allege why it would be commonly expected for the product to contain any particular characterizing food ingredient. ECF No. 20-1 at 23. ***HN15***[] However, the FDCA explicitly provides that "a dietary supplement shall be deemed to be a food within the meaning of" the FDCA subject to certain exceptions. **[*24]** *21 U.S.C. §*

321(ff). Defendant has also not establish that, as a matter of law, beverages labeled with particular fruits would not be commonly expected to contain the fruit.

The Court therefore DENIES Defendant's motion to dismiss the claim under the unlawful prong of the UCL.

b. Unfair (Count Three)

Plaintiffs also allege that the same labeling practice is unfair because it causes significant harm to the consumer that outweighs Defendant's conceivable justifications for the practice. FAC ¶ 116. Defendant argues that its business practice is not unfair because it does not violate the policy or spirit of ***antitrust law***. *See* ECF No. 20-1 at 23.

HN16[] While an antitrust violation describes one variety of unfair business practice, the Ninth Circuit has recognized that case law relating to antitrust injury "was limited to actions based on unfairness to competitors." *Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 735 (9th Cir. 2007)* (noting that for actions between competitors, an unfair practice must be tied to a "legislatively declared" policy). For actions based on unfairness to consumers, "[i]n the absence of further clarification by the California Supreme Court," the Ninth Circuit concluded that such claims may still be analyzed using the more general "balancing test" articulated **[*25]** in *South Bay Chevrolet v. General Motors. Id. at 736* (citing *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301 (1999)*); *Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018)* (noting that "the proper definition of 'unfair' conduct against consumers is currently in flux among California courts.") (citation omitted). ***HN17***[] In *South Bay*, the California Court of Appeal explained that to determine whether a practice is unfair, "the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *South Bay, 72 Cal. App. 4th 861, 886, 85 Cal. Rptr. 2d 301 (1999)* (citation omitted); *Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1169 (9th Cir. 2012)*.

While the Court recognizes the unsettled state of the law regarding the UCL's definition of "unfairness," Defendant has not provided any argument for why the Court should decline to apply the balancing test urged by Plaintiffs. Accordingly, the Court heeds *Lozano*'s suggestion that a district court does "not apply the wrong legal standard by relying on the balancing test from *South Bay*." *Lozano, 504 F.3d at 736*. Plaintiffs have identified the harm to consumers as leading them to pay more money for the product than they otherwise would have absent the misleading labels. Defendant's justification is that it wishes to advertise the flavor of the product. Plaintiffs plausibly allege that Defendant's interest in having a front label that advertises fruit without clarifying that the beverages are merely **[*26]** fruit "flavored" is outweighed by the harm to consumers. *Cf. Beckman v. Arizona Canning Co., LLC, No. 3:16-CV-02792-JAH-BLM, 2019 U.S. Dist. LEXIS 154441, 2019 WL 4277393, at *11 (S.D. Cal. Sept. 9, 2019)* ("Countless food manufactures have successfully displayed and marketed their product without consumer confusion or a likelihood of deception."). Indeed, as Defendant vociferously argues that its "advertising states that the product is orange flavored," ECF No. 20-1 at 26, it does not explain what interest it has in omitting the word "flavored" from the front of the can other than a general disagreement with the FDCA labeling requirements.

Accordingly, the Court DENIES Defendant's motion to dismiss Plaintiffs' claim under the unfair prong of the UCL.

c. Fraudulent (Count Four)

As explained above with respect to the "reasonable consumer" issue, the Court finds that Plaintiffs have adequately alleged that "members of the public are likely to be deceived" by the labels into thinking that the beverages contain fruit.[11] *Sybersound Recs., 517 F.3d at 1152*. Accordingly, the Court DENIES Defendant's motion to dismiss Plaintiffs' claim under the fraudulent prong of the UCL.

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[11] The case cited by Defendant, *Clark v. Westbrae Natural, Inc.*, is distinguishable because the court found it implausible, based on the facts alleged, that a reasonable consumer would expect the inclusion of the word "vanilla" indicates that the flavor is derived *exclusively* from the vanilla bean. *Clark v. Westbrae Nat., Inc., No. 20-CV-03221-JSC, 2020 U.S. Dist. LEXIS 224966, 2020 WL 7043879, at *3 (N.D. Cal. Dec. 1, 2020)*. Plaintiffs more plausibly allege that a reasonable consumer would believe a drink advertising a particular fruit contains at least some amount of that fruit.

3. Count Five: FAL

HN18[] California's FAL prohibits any "unfair, deceptive, untrue, or misleading advertising." **[*27]** Cal. Bus. & Prof. Code § 17500. "California laws prohibit not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." Moore v. Mars Petcare US, Inc., 966 F.3d 1007, 1017 (9th Cir. 2020) (citations omitted).

Defendant argues that Plaintiffs have failed to show that Defendant knew or failed to use reasonable care to know their advertising was untrue or misleading. ECF No. 20-1 at 26. But as explained above, Plaintiffs have plausibly alleged that Defendant included the fruit vignette and name on the beverage labels despite knowing that the beverages did not contain the fruit. FAC ¶¶ 6, 28, 35, 37. Plaintiffs have also alleged that Defendant aimed to target more health-conscious consumers with its advertising. *Id.* ¶¶ 31. While Defendant argues that its "advertising states that the product is [fruit] flavored," ECF No. 20-1 at 26, this is not what the packaging says, according to the FAC. It is therefore plausible that Defendant was aware of the misleading nature of the product labeling.

The Court therefore DENIES Defendant's motion to dismiss the FAL claim.

4. Count Six: CLRA

HN19[] The CLRA prohibits particular unfair and deceptive acts and practices in a "transaction **[*28]** intended to result or which results in the sale or lease of goods or services to any consumer." *Cal. Civ. Code § 1770(a)*. "Conduct that is 'likely to mislead a reasonable consumer' violates the CLRA." Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1140 (9th Cir. 2012) (quoting Colgan v. Leatherman Tool Grp., Inc., 135 Cal. App. 4th 663, 680, 38 Cal. Rptr. 3d 36 (2006)). Plaintiffs allege that Defendant's labeling constitutes a prohibited practice under the CLRA by representing that the goods have ingredients they do not have, *Cal. Civ. Code § 1770(a)(5)*, representing that the goods are of a particular standard, quality, or grade when they are not, *Cal. Civ. Code § 1770(a)(7)*, and advertising goods with the intent not to sell them as advertised, *Cal Civ. Code § 1770(a)(9)*. HN20[] A plaintiff must demonstrate actual reliance on the unfair or deceptive act to succeed in a claim under the CLRA. Cohen v. DIRECTV, Inc., 178 Cal. App. 4th 966, 980, 101 Cal. Rptr. 3d 37 (2009).

Aside from arguments related to the reasonable consumer standard for deception that the Court has already rejected,[12] Defendant contends that Plaintiffs have not stated a CLRA claim because Plaintiffs did not establish actual reliance on the alleged misrepresentations. ECF No. 20-1 at 26. But the FAC alleges that Plaintiff Ruiz believed that the beverages contained fruit as a result of the labeling, and would not have purchased them on the same terms had he known they did not contain fruit. FAC ¶¶ 13, 15, 16. Plaintiffs also allege that the inclusion of "real" **[*29]** ingredients as opposed to natural flavors in food products is a material consideration to many consumers when deciding what products to purchase. *Id.* ¶¶ 48, 49. The FAC therefore sufficiently pleads reliance on the prohibited acts.

Thus, the Court DENIES Defendant's motion to dismiss Plaintiffs' CLRA claim.

5. Counts Seven and Eight: GBL

HN21[] Under the New York GBL, "[d]eceptive acts or practices" and "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in" New York state are unlawful. N.Y. Gen. Bus. Law §§ 349(a), 350. "To successfully assert a claim under General Business Law § 349(h)[13]] or § 350, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." Koch v. Acker, Merrall & Condit

[12] Because Plaintiffs plausibly allege Defendant engaged in a prohibited act under ***Section 1770(a)(5)***, representing the goods have an ingredient they do not have, the Court does not reach Plaintiffs' alternative theories under the CLRA.

[13] HN22[] Section 349(h) provides a private right of action. N.Y. Gen. Bus. Law § 349(h). The private right of action for Section 350 claims is provided in Section 350-e. N.Y. Gen. Bus. Law § 350-e(1).

Co., 18 N.Y.3d 940, 941, 967 N.E.2d 675, 944 N.Y.S.2d 452 (2012) (citation omitted); Spagnola v. Chubb Corp., 574 F.3d 64, 74 (2d Cir. 2009).

HN23[] "[A] section 349 [or 350] claim will not lie where the deceptive act itself was the only injury," such as when a plaintiff alleges she was deceived into making a purchase and merely seeks a refund of the purchase price. Servedio v. State Farm Ins. Co., 889 F. Supp. 2d 450, 452 (E.D.N.Y. 2012), *aff'd*, 531 F. App'x 110 (2d Cir. 2013); Greene v. Gerber Prod. Co., 262 F. Supp. 3d 38, 67-68, n.12 (E.D.N.Y. 2017) (quoting Goshen v. Mut. Life Ins. Co. of N.Y., 98 N.Y.2d 314, 324 n.1, 774 N.E.2d 1190, 746 N.Y.S.2d 858 (2002)) (noting that aside from reliance requirement, Section 350 standard is identical to Section 349). However, the New York Court of Appeals has "left open the possibility **[*30]** that 'a plaintiff might have a claim for the *higher* price the consumer paid for the product as a result of the misrepresentation.'" Servedio, 889 F. Supp. 2d at 452 (quoting Small v. Lorillard Tobacco Co., 94 N.Y.2d 43, 56, 720 N.E.2d 892, 698 N.Y.S.2d 615 (1999)) (emphasis in original). A plaintiff therefore may satisfy the injury requirement by articulating a "price premium" theory, or alleging that the deceptive practice caused her to pay more than the product was actually worth. Id. at 453; *see also* Orlander, 802 F.3d at 302 (finding that a plaintiff need only "allege that, on account of a materially misleading practice, she purchased a product and did not receive the full value of her purchase," and finding requirement satisfied where the plaintiff "did not receive the services that Defendant misleadingly told Plaintiff he was purchasing"); Wright v. Publishers Clearing House, Inc., 439 F. Supp. 3d 102, 114 (E.D.N.Y. 2020); Koenig v. Boulder Brands, Inc., 995 F. Supp. 2d 274, 288 (S.D.N.Y. 2014).

Defendant argues that Plaintiff Cavallero has not sufficiently alleged a separate injury under the GBL, since he bought a can of Defendant's beverage and received a can of Defendant's beverage. ECF No. 20-1 at 29. Plaintiffs contend that they have plausibly alleged that they paid a price premium for Defendant's beverages because the beverages lacked the promised ingredients and they would not have paid as much for them had they known the truth. ECF No. 25 at 31.

Courts have differed somewhat **[*31]** in determining what is needed to allege a "price premium" theory of injury under the GBL. In an unpublished Ninth Circuit case, for instance, the court found that the plaintiffs had failed to allege they paid a price premium for a Starbucks DoubleShot Espresso beverage that did not actually contain two shots of espresso, reasoning that the plaintiffs had alleged no details regarding the price premium and concluding that "[t]he bare recitation of the word 'premium' does not adequately allege a cognizable injury" under the GBL. Naimi v. Starbucks Corp., 798 F. App'x 67, 70 (9th Cir. 2019) (granting leave to amend "to allege the necessary factual details concerning the alleged price premium they paid"). The district court in Greene v. Gerber also considered whether specific alleged facts supported the plaintiff's claim that she paid a price premium for infant formula marketed as allergy-reducing, including that parents value a formula's ability to prevent allergies and that formulas without allergy claims were priced lower. Greene, 262 F. Supp. 3d at 68. However, that court clarified that a plaintiff need not identify precisely comparable products to support her price premium theory at the motion to dismiss stage. Id. at 69. Several other district courts in New York have found price premium injuries **[*32]** sufficiently pleaded despite minimal factual enhancement where the products the plaintiffs ultimately received did not contain the attributes the defendants had advertised. Daniel v. Mondelez Int'l, Inc., 287 F. Supp. 3d 177, 198 n.19 (E.D.N.Y. 2018) (noting that weight of authority in Second Circuit "allow[s] complaints that lack allegations of both cheaper and exactly comparable products to survive motions to dismiss"); Koenig, 995 F. Supp. 2d at 288 (finding price premium injury adequately pleaded for milk misleadingly advertised as fat-free); Stoltz v. Fage Dairy Processing Indus., S.A., No. 14-CV-3826 MKB, 2015 U.S. Dist. LEXIS 126880, 2015 WL 5579872, at *23 (E.D.N.Y. Sept. 22, 2015) (finding price premium allegations sufficient where plaintiffs alleged defendants commanded a premium for yogurt by deceiving customers about the attributes of the yogurt). *But see* Colella v. Atkins Nutritionals, Inc., 348 F. Supp. 3d 120, 143 (E.D.N.Y. 2018) ("[P]laintiff only conclusorily asserts that [defendant] charges a premium for its products and provides no facts regarding what the premium was, what price he paid for the products, or the price of non-premium products.").

Here, the Court concludes that Plaintiffs have pleaded sufficient facts to support their price premium theory at the motion to dismiss stage. Plaintiffs have alleged that consumers seek out products that feature "real" ingredients and that at least one competitor changed its formulation to include fruit as customer demand transparency and "clean **[*33]** labeling." FAC ¶¶ 49, 50. Because these allegations suggest that the inclusion of real fruit is valued by consumers, Plaintiffs plausibly allege that they paid a price premium for a beverage they believed contained fruit. *Cf.* *Daniel, 287 F. Supp. 3d at 196* ("In most cases, 'price premium' should . . . be observable through an increased price in comparison to products without the desirable quality."). Following the district court in *Greene, 262 F. Supp. 3d at 69*, the Court declines to dismiss the GBL claims on the ground that Plaintiffs have not alleged a precisely comparable product to demonstrate the amount of the price premium, as whether Plaintiffs can indeed show that they paid a price premium is a question of fact not properly determined at the pleading stage.

Further, as found above, Plaintiffs adequately allege Defendant's labeling is deceptive. New York case law does not compel a different finding for the GBL claims. Notably, the Second Circuit has applied the same "reasonable consumer" standard to claims under both New York's GBL and California's UCL and FAL, including the holding in *Williams* that reasonable consumers should not be expected to review information on the product's back label to correct misrepresentations on the front label. **[*34]** *Mantikas v. Kellogg Co., 910 F.3d 633, 636-38 (2d Cir. 2018)* (citing *Williams, 552 F.3d at 939*).

Accordingly, the Court DENIES Defendant's motion to dismiss the GBL claims.

6. Count Nine: Quasi-Contract or Unjust Enrichment

Defendant only challenges Plaintiffs' equitable claims on the grounds that Plaintiffs have failed to allege that Defendant's product labels are false, misleading, or untrue. ECF No. 20-1 at 30. Because the Court finds Plaintiffs adequately allege that the labels would be deceptive to a reasonable consumer, the Court DENIES Defendant's motion to dismiss the quasi-contract or unjust enrichment claims.

IV. CONCLUSION

For the reasons set forth above, the Court:

1. DENIES AS MOOT Plaintiffs' Application to File Sur-Reply; and
2. DENIES Defendant's Motion to Dismiss.

IT IS SO ORDERED.

Dated: July 27, 2021

/s/ Gonzalo P. Curiel

Hon. Gonzalo P. Curiel

United States District Judge

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Deslandes v. McDonald's USA, LLC

United States District Court for the Northern District of Illinois, Eastern Division

July 28, 2021, Decided; July 28, 2021, Filed

No. 17 C 4857

Reporter
2021 U.S. Dist. LEXIS 140735 *; 2021 WL 3187668

LEINANI DESLANDES, Plaintiff, v. McDONALD'S USA, LLC, McDONALD'S CORPORATION, and DOES 1 through 10, Defendants.

Core Terms

franchisees, restaurants, employees, rule of reason, relevant market, horizontal, hiring, training, brand, anticompetitive, effects, markets, output, franchise agreement, competitors, class member, outlets, procompetitive, geographic, parties, predominate, franchisor, market power, antitrust, franchise, vertical, class certification, common question, quick-look, ancillary

Counsel: **[*1]** For Leinani Deslandes, on behalf of herself and all others similarly situated, Plaintiff: Michele Vercoski, Richard McCune, Jr., McCune Wright Arevalo, Ontario, CA; Derek Yeats Brandt, McCune Wright Arevalo, LLP, Edwardsville, IL.

For McDonald's USA, LLC, a Delaware limited liability company, McDonald's Coporation, a Delaware corporation, Defendants: David Jarrett Arp, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn & Crutcher LLP, Washington, DC; Matthew Cameron Parrott, LEAD ATTORNEY, PRO HAC VICE, Gibson, Dunn & Crutcher LLP, Irvine, CA; Rachel Susan Brass, LEAD ATTORNEY, PRO HAC VICE, Gibson, Dunn & Crutcher Llp, San Francisco, CA; Rachael Cecelia Brennan Blackburn, Robert M. Andalman, A & G Law LLC, Chicago, IL.

Judges: HON. JORGE ALONSO, United States District Judge.

Opinion by: JORGE ALONSO

Opinion

MEMORANDUM OPINION AND ORDER

After a hiring restriction prevented plaintiff Leinani Deslandes ("Deslandes") from taking a better-paying position with a rival McDonald's outlet, she filed this suit seeking relief under *Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1*. Deslandes and Stephanie Turner ("Turner"), who filed a related suit (19-cv-5524), move for certification of a nationwide class of persons who were employed by a McDonald's restaurant during a five-year period. **[*2]** For the reasons set forth below, plaintiffs' motion is denied.

I. BACKGROUND

Deslandes filed suit against two defendants. The first is McDonald's USA, LLC, which is a wholly-owned subsidiary of the second defendant, McDonald's Corporation. Together ("McDonald's"), these entities are the franchisors of the popular restaurants ("McDonald's restaurants"), with McDonald's Corporation serving as franchisor for franchise agreements signed until 2005 and McDonald's USA, LLC serving as the franchisor for franchise agreements signed after that time. Although most (90-95%) of McDonald's restaurants are owned and operated by franchisees, the rest are operated by McDonald's USA, LLC (Def. Brief at 3/Docket 299 at 10) and are commonly referred to as McOpCos.

For many years, including at least 1973 to 2017, the franchise agreement contained a provision that stated:

> Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph 14 shall not be violated if such person has left **[*3]** the employ of any of the foregoing parties for a period in excess of six months.

Plaintiffs allege that this provision violated the Sherman Antitrust Act and suppressed their wages.

In or about March 2017, McDonald's Corp. announced to the McOpCos and the franchisees that it would discontinue enforcement of the no-hire provision. (Singer Report at ¶ 3). In July 2018, McDonald's Corp. entered an agreement with the Washington State Attorney General that it would neither include the hiring provision in future franchise agreements nor enforce it with respect to the franchise agreements that already include the provision. (Singer Report at ¶ 3).

II. DISCUSSION

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)* (quoting *Califano v. Yamasaki, 442 U.S. 682, 700-701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)*). "A class action may be maintained if *Rule 23(a)* is satisfied and" if the case falls within at least one of the categories outlined in *Rule 23(b)*. *Fed.R.Civ.P. 23(b)*; *see also* *Wal-Mart Stores, 564 U.S. at 345*. *Rule 23(a)* allows "[o]ne or more members of a class" to "sue or be sued as representative parties on behalf of all class members only if:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to **[*4]** the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). *Rule 23(b)(3)* allows class certification where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed.R.Civ.P. 23(b)(3)*. *Rule 23(c)(1)(A)* requires that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." *Fed.R.Civ.P. 23(c)(1)(A)*.

To support a motion for class certification, a "party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart, 564 U.S. at 350*. Thus, the "party seeking certification bears the burden of demonstrating that certification is proper by a preponderance of the evidence." *Chicago Teachers Union, Local No. 1 v. Board of Ed. of City of Chi., 797 F.3d 426, 433 (7th Cir 2015)*. A court considering a motion for class certification must engage in "a rigorous **[*5]** analysis" that "will frequently" overlap with the merits, because the considerations "are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Comcast Corp. v. Behrend, 569 U.S. 27, 33-34, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (citations omitted).

Plaintiffs seek to certify a class of:

> All persons who were employed at a McDonald's-branded restaurant in the United States from June 28, 2013 to July 12, 2018. Excluded from the Class are Defendants' directors and officers, the Judge, and the Judge's staff and immediate family members.

(Plfs. Brief at 1/Docket 268 at 7).

1. **Numerosity**

First, the Court agrees that the number of class members makes joinder impracticable. Plaintiffs assert that there are "hundreds of thousands" of class members. (Docket 268 at 8). Defendants say there are "millions" of class members. (Docket 299 at 8). Either way, the class contains far more members than would be practicable to join. *See* *Mulvania v. Sheriff of Rock Island Cty., 850 F.3d 849, 859 (7th Cir. 2017)* ("While there is no magic number that applies to every case, a forty-member class is often regarded as sufficient to meet the numerosity requirement.").

2. Common issues and whether they will predominate

Next, the Court considers whether plaintiffs have shown the existence of one or more common issues and whether such common questions **[*6]** will predominate over individual questions. The Supreme Court has described what makes an issue common. It has said:

> Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law. . . . Their claims must depend upon a common contention[.] . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Wal-Mart, 564 U.S. at 349-50 (citations omitted). In describing the difference between common and individual questions, the Supreme Court has explained:

> An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'

Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016) (citation omitted); *see also* *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012)* ("If, to make a prima facie showing on a given question, the members of a proposed class will need to **[*7]** present evidence that varies from member to member, then it is an individual question.") (quoting *Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005)*).

To be suitable for class action treatment, a case must not only involve common questions (*Fed.R.Civ.P. 23(a)(2)*), but those common questions must predominate (*Fed.R.Civ.P. 23(b)*). "The *Rule 23(b)(3)* predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. *Rule 23(b)(3)*'s "predominance criterion is far more demanding" than "*Rule 23(a)*'s commonality requirement[.]" *Amchem, 521 U.S. at 623-34*. "Analysis of predominance under *Rule 23(b)(3)* 'begins, of course, with the elements of the underlying cause of action.'" *Messner, 669 F.3d at 815* (quoting *Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 131 S.Ct. 2179, 2184, 180 L. Ed. 2d 24 (2011)*).

The parties agree[1] that the elements of plaintiffs' cause of action are: (1) a violation of the antitrust laws; (2) injury resulting from the violation, which is to say that plaintiffs suffered antitrust "impact;" and (3) damages. *Messner, 669 F.3d at 815*. The parties do not agree, however, on the proper analysis of plaintiff's antitrust claim, so the Court must first resolve that issue.

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[1] *See* Plfs. Brief at 20/Docket 268 at 26; Def. Brief at 11, 16, 18/Docket 299 at 18, 23, 25.

Quick look versus Rule of Reason

The parties disagree about whether plaintiffs' antitrust claim may be considered under a quick look analysis or whether it will require rule of reason analysis.[2]

This Court has previously explained:

> Section 1 of the Sherman Antitrust **[*8]** Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . " 15 U.S.C. § 1. This language has long been interpreted to "outlaw only *unreasonable* restraints" of trade. State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997). Some restraints are deemed so anti-competitive (and, thus, unreasonable) that they are illegal *per se*, while other restraints, which may have procompetitive effects, are judged under the rule of reason (or its subset: the quick look).
>
> As the Supreme Court has explained, restraints that are "unlawful *per se*" are those that "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit" that it is obvious they are unreasonable restraints of trade. Khan, 522 U.S. at 10. The *per se* rule applies to restraints "'that would always or almost always tend to restrict competition and decrease output.'" Leegin, 551 U.S. at 886. Accordingly, the *per se* rule is reserved for restraints with respect to which "courts have had considerable experience" such that they "can predict with confidence that [the restraint] would be invalidated in all or almost all instances under the rule of reason[.]" Leegin, 551 U.S. at 886-87.
>
> Most restraints are not *per se* unlawful but are instead analyzed under **[*9]** the rule of reason. Khan, 522 U.S. at 10. Under the rule of reason, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." Khan, 522 U.S. at 10. Generally, this requires a plaintiff to show the defendant has "market power—that is the ability to raise prices significantly without going out of business—without which the defendant could not cause anticompetitive effects on market pricing." Agnew v. National Collegiate Athletic Ass'n, 683 F.3d 328, 335 (7th Cir. 2012). In this case, market power would be the power to suppress wages.
>
> Courts sometimes apply a third test of reasonableness, the quick look, which is a short form of rule of reason analysis. Illinois Corp. Travel, Inc. v. American Airlines, Inc., 806 F.2d 722, 727 (7th Cir. 1986) ("This is the sort of short form or quick look Rule of Reason analysis endorsed in NCAA v. Board of Regents, 468 U.S. 85, 109-10, 104 S. Ct. 2948, 82 L. Ed. 2d 70 & n. 42 (1984)). As the Seventh Circuit has explained:
>
> > the quick-look approach can be used when 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets,' but there are nonetheless reasons to examine the potential **[*10]** procompetitive justifications.
>
> Agnew, 683 F.3d at 336 (internal citation omitted) (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)). Under quick-look analysis, if the defendant lacks legitimate justifications for facially anticompetitive behavior then the court "condemns the practice without ado" without resort to analysis of market power. Agnew, 683 F.3d at 336; Chicago Prof. Sports Ltd. Partnership v. NBA, 961 F.2d 667, 674 (7th Cir. 1992); *see also* National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 109-10 n. 42, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) ("While the 'reasonableness' of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the

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[2] The Court notes the Supreme Court issued its decision in NCAA v. Alston, __ U.S. __, 141 S.Ct. 2141, 210 L. Ed. 2d 314 (2021), after the parties had briefed their motion for class certification. The Court allowed each party to file a brief discussing the impact of that case on this motion.

> means by which the effects of the conduct on the market place can be assessed, market power is only one test of 'reasonableness.' And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.").

*Deslandes v. McDonald's USA, LLC, Case No. 17 C 4857, 2018 U.S. Dist. LEXIS 105260, 2018 WL 3105955 at *4-5 (N.D. Ill. June 25, 2018)*.

Plaintiff now argues, "[t]his Court has already held that an abbreviated from of the rule of reason—the quick-look test—is appropriate given the predictable effects that ensue" from the alleged conduct. (Docket 371 at 4). That is imprecise. The Court said plaintiff had *stated a claim* for a restraint that *might* be unlawful under a quick look. Specifically, the Court stated: **[*11]**

> Here, plaintiff argues that she has alleged the existence of a horizontal agreement in restraint of trade. Plaintiff alleges that McDonald's franchisees signed written franchise agreements pursuant to which each agreed not to hire employees (including former employees who left within the prior six months) from other McDonald's restaurants. Specifically, the franchisees were not allowed to hire anyone who was employed (or had been employed in the prior six months) by "McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant[.]" (Am. Complt. ¶ 87). Plaintiff alleges that the McOpCos were similarly restricted.
>
> Defendants argue that this is merely a vertical restraint, because it was spearheaded by the entity at the top of the chain. The Court agrees that the restraint has vertical elements, but the agreement is also a horizontal restraint. It restrains competition for employees among horizontal competitors: the franchisees and the McOpCos. Plaintiff has alleged that McOpCos run McDonald's-brand restaurants and, thus, compete directly with franchisees for employees. Plaintiff has also alleged that the McOpCos are subsidiaries of defendant **[*12]** McDonald's and that the restraint explicitly restricts franchisees from hiring employees of McDonald's subsidiaries, i.e., the franchisees' competitors. Thus, McDonald's, by including the no-hire provision in its agreement with franchisees, was protecting its own restaurants (i.e., *itself*) from horizontal competition for employees. *Cf. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* ("the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* of the Sherman Act"). The Court finds that plaintiff has alleged a horizontal restraint of trade.
>
> Naked horizontal agreements (i.e., those among competitors) to fix prices or to divide markets are *per se* unlawful. *Leegin, 551 U.S. at 886*; *Federal Trade Comm'n v. Superior Court Trial Lawyers Assoc., 493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)* (horizontal agreement among lawyers not to accept appointments to represent indigent criminal defendants until fees increased was a naked price restraint and *per se* unlawful); *Blackburn v. Sweeney, 53 F.3d 825, 827 & 828 (7th Cir. 1995)* ("reciprocal agreement [among attorneys] to limit advertising to different geographical regions was . . . an agreement to allocate markets so that the *per se* rule of illegality applies"). This includes naked agreements to set wages. *Arizona Hosp., 2009 U.S. Dist. LEXIS 42871, 2009 WL 1423378 at * 3* (plaintiff's allegations that hospital association set prices for temporary nurses stated claim for **[*13]** *per se* violation of the Sherman Act).
>
> A horizontal agreement not to hire competitors' employees is, in essence, a market division. *See United States v. eBay, Inc., 968 F.Supp. 2d 1030, 1039 (N.D. Cal. 2013)* ("The court thus finds that the United States' allegations concerning agreement between eBay and Intuit [not to hire each other's employees] suffice to state a horizontal market allocation agreement."). The Department of Justice, which enforces rather than interprets the law, has warned employers that it considers naked no-hire agreements to be *per se* unlawful. (Press Release, U.S. Dep't of Justice, *Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How **Antitrust Law** Applies to Employee Hiring and Compensation* (Oct. 20, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.). Thus, because a no-hire agreement is, in essence, an agreement to divide a market, the Court has no trouble concluding that a naked horizontal no-hire agreement

> would be a *per se* violation of the antitrust laws. Even a person with a rudimentary understanding of economics would understand that if, say, large law firms in Chicago got together **[*14]** and decided not to hire each other's associates, the market price for mid-level associates would stagnate. With no competition for their talent (aside from lower-paying in-house or government jobs), associates would have no choice but to accept the salary set by their firms or to move to another city. Thus, such a claim would be suitable for *per se* treatment.
>
> Not all horizontal restraints are *per se* unlawful, however. Some horizontal restraints are *ancillary* to agreements that are procompetitive, usually in the sense of enhancing output (i.e., producing either a greater quantity of goods or a new good that would not otherwise exist). *Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 188-89 (7th Cir. 1985)* ("A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote."). A restraint is ancillary if it "promoted enterprise and productivity when it was adopted." *Polk Bros., 776 F.2d at 189*. When a restraint is ancillary, it is judged either under the rule of reason or given a "quick look." For example, no-hire agreements that are ancillary to the sale of a business can have procompetitive effects, so they **[*15]** are judged under the rule of reason. *Eichorn v. AT&T Corp., 248 F.3d 131, 144 (3d Cir. 2001)*.
>
> Similarly, where the horizontal restraint is necessary in order for the product to exist at all, a restraint will not be judged *per se* unlawful but rather will be judged under the rule of reason, including by "quick look." *Law v. National Collegiate Athletic Assoc., 134 F.3d 1010 (10th Cir. 1998)*; *see also* *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*; *National Collegiate Athletic Ass'n. v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. In *Law*, a group of college basketball coaches brought suit challenging the NCAA's rule limiting annual salaries for certain assistant basketball coaches to $16,000 per year. Because some restraints were necessary in order to make college sports available, the court concluded that the horizontal price restraint should be analyzed under the rule of reason, and, in particular, the "quick look." *Law, 134 F.3d at 1018 & 1020* ("We find it appropriate to adopt such a quick look rule of reason in this case.")
>
> In this case, plaintiff has alleged a horizontal restraint that is ancillary to franchise agreements for McDonald's restaurants. Each time McDonald's entered a franchise agreement, it increased output of burgers and fries, which is to say the agreement was output enhancing and thus procompetitive. (That is not to say that the provision itself was output enhancing. The very fact that McDonald's has managed to continue signing franchise agreements **[*16]** even after it stopped including the provision in 2017 suggests that the no-hire provision was not necessary to encourage franchisees to sign.) Because the restraint alleged in plaintiff's complaint is ancillary to an agreement with a procompetitive effect, the restraint alleged in plaintiff's complaint cannot be deemed unlawful *per se*. Plaintiff's claim does not rise and fall on *per se* treatment, though. She claims in the alternative that the restraint is unlawful under quick-look analysis.
>
> The next question, then, is whether plaintiff has plausibly alleged a restraint that might be found unlawful under quick-look analysis. The Court thinks she has. Even a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate. Plaintiff herself experienced the stagnation of her wages. A supervisor for a competing McDonald's restaurant told plaintiff she would like to hire plaintiff for a position that would be similar to plaintiff's position but that would pay $1.75-2.75 more per hour than she was earning. Unfortunately for plaintiff, the no-hire agreement prevented the McOpCo from offering **[*17]** plaintiff the job. When plaintiff asked her current employer to release her, plaintiff was told she was too valuable. The Court agrees that an employee working for a below-market wage would be extremely valuable to her employer.

*Deslandes, 2018 U.S. Dist. LEXIS 105260, 2018 WL 3105955 at *6-7*.

The Court specifically stated, "Though the Court has concluded that plaintiff has stated a claim for a restraint that might be unlawful under quick-look analysis, the evidence at a later stage may not support it." *Deslandes, 2018*

U.S. Dist. LEXIS 105260, 2018 WL 3105955 at *8. Accordingly, the Court gave plaintiff leave to amend to add a claim under the rule of reason. *Id.* Plaintiff declined.[3]

Alston

Since that time, the parties have engaged in discovery, and the Supreme Court has clarified when quick-look analysis applies, which is rarely. In *NCAA v. Alston, __ U.S. __, 141 S.Ct. 2141, 210 L. Ed. 2d 314 (2021)*, college athletes brought suit against the NCAA, claiming its agreement with member schools to limit compensation to student athletes amounted to an unlawful restraint of trade in violation of the Sherman Antitrust Act. The NCAAargued that the court should apply a quick look, but the Supreme Court disagreed.

The Supreme Court, in a unanimous decision, first noted that claims regarding restraints of trade "presumptively" call for rule of reason analysis. *Alston, 141 S.Ct. at 2151*. It went on to explain that **[*18]** a quick look suffices:

> *only* for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in *the great in-between*—a quick look is sufficient for approval or condemnation.

Alston, 141 S.Ct. at 2155 (emphasis added). On one end of that spectrum, the Supreme Court explained, are restraints that are "so obviously incapable of harming competition that they require little scrutiny," such as joint ventures commanding such a small share of the market (say, 5-6%) that any reduction in output would be made up by the rest of the market. *Alston, 141 S.Ct. at 2155-56*. On the opposite end of the spectrum are those "agreements among competitors" that "so obviously threaten to reduce output and raise prices that they might be condemned" after a quick look. *Alston, 141 S.Ct. at 2156*. The Supreme Court said such quick-look condemnations should be rare, explaining, "we take special care not to deploy these condemnatory tools until we have amassed 'considerable experience with the type of restraint at issue' and 'can predict with confidence that it would be invalidated in all or almost all instances.'" *Alston, 141 S.Ct. at 2156* (citing *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 886-887, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*).

This case falls in "the great in-between" of restraints that require rule-of-reason analysis. This Court cannot say that **[*19]** it has enough experience with no-hire provisions of franchise agreements to predict with confidence that they must always be condemned, which means, under *Alston*, that the Court must apply rule of reason analysis to this case. The Supreme Court's recent unanimous decision in *Alston* is not, however, the only reason the Court must apply the rule of reason. Two additional reasons support applying the rule of reason.

Pro-competitive effects

First, defendants have put forth sufficient evidence of pro-competitive effects of the hiring restriction to warrant full rule of reason analysis. Specifically, defendants put forth the expert report of Dr. Justin McCrary ("Dr. McCrary"), who holds a Ph.D. in Economics and is a Professor at Columbia University.[4] (Plaintiffs do not challenge the admissibility of either Dr. McCrary's report or the report by Dr. Kevin M. Murphy ("Dr. Murphy"), defendants' other expert witness.)

Dr. McCrary first describes the benefits of a franchise business model and the free-rider problem that can be expected with such a model. Without franchising, an owner of a chain of restaurants will face several problems in trying to expand quickly. In addition to needing a significant **[*20]** amount of capital, the owner might have difficulty

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[3] Likewise, plaintiff Turner failed to state a claim under the rule of reason. Her complaint is limited to a quick look claim. [Case No. 19-cv-5524, Docket 1].

[4] The Court is not suggesting that this evidence is undisputed or that a fact-finder would find it persuasive. The point is merely that in the face of defendants' significant evidence of pro-competitive effects, a full analysis under the rule of reason, rather than a quick look, is necessary.

ensuring the non-owner manager of each outlet has an incentive to maximize sales and profits. This is where the franchise model can help. When each outlet is owned and operated by a franchisee, the franchisee's compensation is "directly tied to *the profits*" of running the outlet. (McCrary Rep. at ¶ 32).

The franchise model allows for quicker growth of the brand but comes with a free-rider problem. As with any brand or trademark, the benefit of the brand to the consumer is the consistency the consumer can expect each time he makes a purchase from that brand and the reduced search costs inherent in sticking with what is known. For such branding to be effective in a franchise model, each franchisee must be delivering a product and experience that is nearly identical. Any given franchisee, however, (and particularly one with an outlet along, say, an interstate highway that receives few repeat customers) has an incentive to cut corners (either in food quality or customer service) in order to boost its own profits. That hurts the brand, because when a customer has a bad experience at one outlet, he might refrain from visiting other outlets **[*21]** in the future. Dr. McCrary describes how franchisors, in order to control the free-rider problem and promote a consistent brand, include in their franchise agreements provisions and restraints to control quality. The franchisor, thus, requires, among other things, a particular level of quality, cleanliness and service. Dr. McCrary argues that these sorts of restrictions are procompetitive, because they strengthen the quality of the brand, thereby encouraging additional franchisees to open outlets and increasing the output of the end product.

Dr. McCrary goes on to describe the exponential growth in the number of McDonald's restaurants after 1955, when Ray Kroc ("Kroc") began including brand restrictions in franchise agreements. Among the restrictions Kroc included were:

> specific requirements related to: the look of the store, the neon sign, and the parking lot; employee appearance, product appearance (containers, bags, napkins, spoons, etc. had to meet . . . specifications); advertising and marketing (all 'signs, cards, notices, displays or decorations' were required to be supplied or approved by McDonald's), product and service quality, operations, and inspections of financial books **[*22]** and operation methods.

(McCrary Rep. at ¶ 67). Kroc also added a royalty payment of 1.9 percent of gross sales and included an employment restriction similar to the one at issue in this case. Specifically, those early franchisees agreed "'not [to] employ or seek to employ any person who is at the time employed' by McDonald's or a 'similar establishment' licensed by McDonald's, i.e., one of McDonald's other franchisees.'" (McCrary Rep. at ¶ 69). After Kroc's changes, McDonald's grew from nine outlets in 1955, to 229 in 1960, to more than 2000 by the early 1970's, to about 6,000 by 1980, and to more than 14,000 today.

Today, McDonald's restaurants are still required to maintain consistency. Franchisees are required to comply with standardized employee uniforms and appearance, hours of operation and restaurant appearance. McDonald's has specific rules for menu and food preparation (including the strict procedure for cooking fries), inventory control and bookkeeping. McDonald's restaurants are audited regularly to ensure compliance with the brand standards.

To that end, Dr. McCrary reports, McDonald's also imposes strict training guidelines. Although franchisees make their own hiring and **[*23]** compensation decisions, they are required to follow certain training guidelines. Each restaurant must be managed by a person who has taken a week-long training class at McDonald's Hamburger University. Defendant does not charge for that course, but the franchisee must pay the trainee's travel expenses and must also pay the trainee for the time spent there. In fact, all employees must be paid for all the time they spend training. Department managers complete about 45 weeks of training, and shift managers take about fourteen weeks of training. In 2015, McDonald's estimated the cost of training a new manager to be $4,392 and the cost to train a shift manager to be $2,744. Crew members, too, must learn restaurant maintenance, customer service and how to operate each food preparation station.

Dr. McCrary opines that the hiring restriction encourages franchisees to train their employees without fear that other outlets will free-ride on this training by hiring away employees trained in the McDonald's way. It also encourages cooperation among franchisees. For example, franchisees are required to manage their restaurants personally and are required to complete significant training (which can **[*24]** take years if the potential franchisee has no McDonald's experience) before signing a franchise agreement. That training sometimes involves on-the-job training in an existing franchise restaurant. Absent the hiring restriction, current franchisees would be reluctant to allow potential franchisees to train in their restaurants for fear they would use the opportunity to recruit employees.

Dr. McCrary opines that the hiring restraint increases output in the hamburger market, because it encourages the very training that enhances the brand (by ensuring uniform food quality, customer service and building cleanliness). Dr. McCrary says his opinion is consistent with labor theory developed by Gary Becker, who noticed that "firms are more willing to invest in training that is specific to their firm because there is a smaller chance they will lose that investment to competing firms." (McCrary Rep. at ¶ 331; *see also* ¶¶ 120-130). The hiring provision makes the training related to the brand specific to the franchisee (rather than just to the brand), because it prevents other outlets from free riding on that training. All that training leads to greater brand consistency, better food quality and **[*25]** customer satisfaction, which is to say a strong brand. (McCrary Rep. at ¶ 145). A strong brand with satisfied customers leads to additional franchise outlets, thereby increasing output of hamburgers and fries. Dr. McCrary cites evidence that many franchisees chose a McDonald's franchise (over other potential branded restaurants) to open, because of the hiring provision. (McCrary Rep. at ¶ 131). That suggests the provision itself was output enhancing in the market for hamburgers and fries. When new outlets open, the outlets must be staffed. Thus, new restaurants also increase output in the labor market (i.e., demand for labor).

Dr. McCrary also opined that it does not make economic sense for McDonald's, as franchisor, to enable its franchisees to act as monopsony purchasers of labor. In simple terms:

> [T]he alleged monopsony conspiracy does not make economic sense for McDonald's because it would lead to a reduction in labor at each franchisee, which would lead [to] a reduction in sales at McDonald's restaurants. Indeed, a basic tenet of franchising economics is that franchisors do not benefit when their franchisees gain market power because franchisees will then sell less of their products, **[*26]** which undermines the brand's growth.

(McCrary Rep. at ¶ 201(a)). To the extent a franchisee is a labor monopsonist, the franchisee would hire less labor (reduce labor output) at a lower price. In the process, the franchisee would increase his profit but would be limited in his output of hamburgers, which, in turn reduces revenue. That is because the monopsonist franchisee is still selling into a competitive market for lunch and cannot increase price. His revenue per unit is the same, but he is selling fewer burgers, so his revenue goes down even as his profit goes up. This is good for the franchisee, but it is terrible for the franchisor, who is paid based on franchisees' revenue, not profit. So, while it might be good for the franchisee to be a labor monopsonist, it is terrible for the franchisor, who wants to increase output of hamburgers and fries. The case of McDonald's is slightly different, because it also operates restaurants, the McOpCos. As Dr. McCrary points out, however, defendant's revenue from franchise royalties is far greater than its revenue from operating restaurants.

Defendants have offered enough evidence of procompetitive effects to warrant rule of reason analysis. **[*27]**

Vertical restraint in many locations

Second, the evidence plaintiffs put forth in connection with their motion for class certification does not show that all of the plaintiffs faced horizontal restraints ancillary to output-enhancing agreements. The reason the Court concluded that the plaintiff had adequately *alleged* a restraint that might be subject to quick look analysis is that plaintiff had alleged a horizontal restraint (albeit one that is ancillary to an output-enhancing agreement) by alleging that McOpCos compete directly with franchisees for labor. "[I]n the market for employees, the McDonald's franchisees and McOpCos *within a locale* are direct, horizontal competitors." *Deslandes, 2018 U.S. Dist. LEXIS 105260, 2018 WL 3105955 at 8* (emphasis added). In her complaint, plaintiff had alleged a provision of the franchise agreement that prohibited franchisees from hiring McDonald's Corp. employees within six months. That provision is part of a vertical franchise agreement (between franchisor and franchisee), but it is also a horizontal agreement because entities (McOpCos) owned by the franchisor (McDonald's Corp.) compete with the franchisees, both in selling hamburgers and in hiring employees.

At the class certification stage, plaintiffs want **[*28]** to certify a nationwide class. They have not, however, put forth evidence that McOpCos compete with franchisees in every part of the United States. Plaintiffs agree that only "5-10%" of the McDonald's restaurants were owned by McOpCos, but they do not say where those McOpCos operated. (Plfs. Brief at 3/Docket 268 at 9). The total number of McDonald's restaurant locations exceeds 14,000. (Docket 299 at 10). Record evidence shows that, as of 2015, only 900 out of 3000 franchisees (many of whom owned multiple locations) operated a McDonald's restaurant near a McOpCo-owned McDonald's restaurant. (King Dep. at 99/Docket 270-14 at 20). Defendants put forth evidence that in many parts (some twenty states) of the United States, no McDonald's restaurants are owned by McOpCos. (Murphy Rep. at p. 10). In locations where no McOpCos compete with franchisees, the hiring provision cannot be said to be horizontal.[5] In locations where only franchisees compete, the hiring provision is merely vertical. Vertical restraints are judged under the rule of reason. *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 907, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*.

For all of these reasons, the Court must apply rule of reason analysis to this case. The upshot of applying rule of reason analysis to this case **[*29]** is that the question of whether defendants engaged in an unreasonable restraint of trade is not a common question. It cannot be answered for all of the members of the proposed class with the same evidence, because not all of the plaintiffs sold their services in the same relevant market.

Relevant market

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, "outlaw[s] only *unreasonable* restraints" of trade. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)* (emphasis added). The rule of reason, thus,:

> requires courts to conduct a fact-specific assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect' on competition. The goal is to 'distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'

Ohio v. American Express Co., ___ U.S. ___, 138 S.Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018) (citations omitted). To establish a claim under the rule of reason, a plaintiff must first "prove that the challenged restraint has a substantial anticompetitive effect that harms consumers *in the relevant market*" by either using "[d]irect evidence" of "actual detrimental effects . . . such as reduced output, increased prices, or decreased quality in the *relevant market*" or "[i]ndirect evidence" of "proof of market power plus some evidence that the **[*30]** challenged restraint harms competition." *AmEx, 138 S.Ct. at 2284* (emphasis added). The burden then shifts to the defendant "to show a procompetitive rationale for the restraint." *AmEx, 138 S.Ct. at 2284*. Finally, the "burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *AmEx, 138 S.Ct. at 2284*.

Thus, the definition of a relevant market is essential on a rule of reason claim. *AmEx, 138 S.Ct. at 2285* ("courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market"); *Alston, 141 S.Ct. at 2158* ("Whether an antitrust violation exists necessarily depends on a careful analysis of market realities."). How precisely that relevant market must be defined depends on whether the alleged restraint is vertical or horizontal. In the case of vertical restraints, a relevant market must always be defined. *AmEx, 138 S.Ct. at 2285 n. 7*. That is because "[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market." *AmEx, 138 S.Ct. at 2285 n. 7*; *see also* *Republic Tobacco Co. v. North Atlantic Trading Co., Inc., 381 F.3d 717, 737 (7th Cir. 2004)* ("As horizontal agreements are generally more suspect than vertical agreements, we must be cautious about importing relaxed standards of proof from horizontal **[*31]** agreement cases into vertical agreement cases."). In some cases of

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[5] Plaintiffs also put forth evidence that, in 2015, the McOpCos, after raising their starting wages by $1 per hour, decided not to hire employees from franchisees for a period of one year. Whether that constituted a unilateral act or a horizontal agreement in connection with a vertical relationship is not clear from the evidence. Even if it is the latter, it still would be horizontal only where McOpCos compete with franchisees, not nationwide.

horizontal restraint, the definition of the market can be somewhat less precise, although the general contours of the market must be apparent. AmEx, 138 S.Ct. at 2285 n. 7 ("Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive.") (citing FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)). In *Indiana Federation of Dentists*, the Supreme Court did not require a precise definition of the relevant market, where it was clear the competitors had 100% of the market in one town and 67% in the other, "in light of the reality that markets for dental services tend to be relatively localized[.]" 476 U.S. at 460-61. In other words, "if a plaintiff *can show the rough contours of a relevant market*, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power—in lieu of the usual showing of a precisely defined relevant market." Republic Tobacco, 381 F.3d at 737 (emphasis added) ("Economic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition **[*32]** of a product and geographic market.").

Plaintiffs have made no attempt to identify a relevant market, beyond arguing that "the 'rough contours' are the service market for McDonald's restaurant workers," (Plfs. Reply at 3/Docket 346 at 10) as though a relevant market could be limited to one brand or as though all the plaintiffs live in one "company town." The evidence plaintiffs have put forth in an attempt to establish anticompetitive effects *assumes* that plaintiffs sell their labor in one national market, as does their proposed class definition.

Plaintiffs have not, however, put forth evidence that they sell their labor in a national market, and it defies logic to suppose that they do. *See* Ioana Marinescu & Herbert Hovencamp, "Anticompetitive Mergers in Labor Markets" 94 *Indiana Law Journal* 1031, 1048 ("The boundaries of labor markets are driven mainly by employee skills or training. Geographic markets are driven mainly by the location and mobility of current or prospective employees. . . . [A]pplications for a job decline rapidly with distance[.] . . . Traditional geographic markets for products are frequently defined in terms of shipping costs . . . Measuring geographic markets for **[*33]** labor is more complex. Commuting 'costs' include not merely the price of a subway ticket or gasoline, but also time and convenience, and these things frequently vary from one commuter to another."); *see also* Herbert J. Hovencamp, "Competition Policy for Labour Markets" (2019) *Faculty Scholarship at Penn Law*. 2090 at ¶ 12 ("most labour markets are geographically quite small, many of them no larger than the commuting range of employees.").

The Court has no doubt that national labor markets exist for certain jobs. The market for Chief Executive Officers is an obvious example. In the market for Chief Executive Officers, companies recruit nationally (or internationally), pay for the new hire to relocate and sometimes allow (or require) her to commute home via the company's private jet until she relocates. Likely, there are many other high-skill, high-earning jobs (such as dermatologist or computer engineer) for which the relevant market is essentially national or regional. That could be true in any labor market where positions are so highly-skilled or highly-paid that employers can recruit from across the nation, because the labor is worth enough to the employer to pay for relocation and/or **[*34]** the salary is sufficiently high to incentivize an employee to move. That is not, however, the market in which these plaintiffs offer their services. As this Court has previously said about the markets in which plaintiffs sell their labor:

> The relevant market for employees to do the type of work alleged in this case is likely to cover a relatively-small geographic area. Most employees who hold low-skill retail or restaurant jobs are looking for a position in the geographic area in which they already live and work, not a position requiring a long commute or a move. That is not to say that people do not move for other reasons and then attempt to find a low-skill job; the point is merely that most people do not search long distances for a low-skill job with the idea of then moving closer to the job.

Deslandes, 2018 U.S. Dist. LEXIS 105260, 2018 WL 3105955 at *8. Even looking at the rough contours of the relevant markets in which plaintiffs sell their labor suggests there are hundreds or thousands of local relevant markets in this case.

The evidence put forth at the class certification stage bears out the intuition that the proposed class members sell their labor in local geographic markets, generally within easy commuting distance. Defendants, for example, **[*35]** put forth evidence of McOpCos in Kearney, Nebraska that, in 2015, sought approval to increase starting wages from $9.00 per hour due to competition from local employers (which they listed as Arby's, KFC, Taco Bell, HyVee, Walmart, Hotels, Qdoba, Jimmy Johns, Applebees, Buffalo Wild Wings, Perkins, Burger King, Culvers and The Buckle), many of whom paid $10 per hour. (Docket 310-4 at 10-12). Defendants put forth evidence of franchisees' declaring that they compete for employees with local employers. [Docket 310-12 at 5 ("We sometimes offer raises to retain employees sought by other local employers, including quick-service restaurants like Wendy's and retail stores like Wal-Mart, among many others."); Docket 310-12 at 14 ("The McDonald's stores I oversee [in Orlando] compete for employees with the theme parks nearby, such as Disney and Universal, as well as Culver's, Wendy's, Chipotle, and other retail establishments."); Docket 310-12 at 21-22 ("The main competitors for labor in the Jacksonville market are the other quick service restaurants in the vicinity of our restaurants. Comparatively, the main competitors for labor in the Orlando market are the other quick service restaurants, **[*36]** as well as theme parks, Wal-Mart, Sam's Club, and Costco. . . . [W]e have offered raises to retain employees sought by other local employers. These employers include other quick-service restaurants, such as Krystals, LongHorn Steakhouses, KFCs, Papa John's, Panera Breads, Starbucks, Chick-fil-A's, Burger Kings, Little Caesars, Panda Expresses, Wendy's, and Fire House Subs—all of which (among others) are located throughout Jacksonville near the restaurants operated by [us]."; Docket 310-12 at 29 & 31 ("The main competitors for both workforce and customers to my McDonald's-brand restaurants in the Northern Kentucky region are other quick service restaurants such as Wendy's and Burger King." . . . "The turnover rate for my restaurants at the hourly crew person level is 139%. Most of the employees who leave fall into three categories: 1) Looking for a more specific shift (9:00 a.m. to 5:00 p.m. and/or no weekend shifts); 2) the company can provide more hours then we can; or 3) increased pay. For example, the local Amazon distribution center offers higher pay and more consistent weekly hours.")].

The expert opinions are consistent with that evidence. Even Dr. Peter Capelli ("Dr. Capelli"), **[*37]** one of plaintiffs' experts, recognized that crew members likely sell their labor in local markets. (Capelli Dep. at 235-36/Docket 302-1 at 608-09) ("My testimony is that for the restaurant employees in particular, the crew employees, there may be labor markets of different geographic size and that the key issue there might not even be size, it might be commuting distance."). Dr. McCrary said something similar. (McCrary Rep. at ¶ 288) ("McDonald's franchisees also report surveying competitors *in their geographic location* in order to set market-driven wages.") (emphasis added). Dr. Murphy, defendants' other expert (the admissibility of whose report plaintiffs did not challenge), similarly opined:

> For low-skilled and relatively low-wage workers, such as the majority of those in the putative class, evidence suggests that labor markets generally are local. Commuting time and costs likely are too high for distant employers to be reasonable alternatives for most employees. There are certain fixed time and monetary costs of relocating (finding a new place to live, moving children into new schools) and those costs likely are relatively high the lower the expected increased earnings from relocating. **[*38]** Given average wages at [quick service restaurants], and other employers that individual McDonald's restaurants consider to be their competitors, it is unlikely that employees will seek opportunities more than a few miles from where they reside.

(Dr. Murphy Rep. at ¶ 109). Dr. Hal J. Singer ("Dr. Singer"), plaintiffs' expert, calculated that only 8% of McDonald's employees commute ten or more miles to work. (Singer Rep. at ¶ 64/Docket 270-5 at 54). Thus, about 92% of McDonald's employees work within ten miles of home. The relevant market for each plaintiff's labor is a small, geographic area. There are likely hundreds or thousands of relevant markets among the class members.

Any given plaintiff can establish that the restraint is anticompetitive only by showing anticompetitive effects in the relevant market where she sells her labor. Those markets vary by plaintiff, which means this is not a question that can be answered with common evidence. It is simply not a question that is common to a nationwide class. To be sure, this might be a common question as to the subset of plaintiffs who work in each of the respective relevant markets across the country. For example, this is likely a common **[*39]** question as to every plaintiff in the relevant market of, say, the Chicago Loop (which relevant market perhaps includes areas within a mile or two radius thereof). It is not, however, a common question as to the nationwide class these plaintiffs ask to certify. Plaintiffs do not seek to certify smaller subclasses.

The issue of anticompetitive effects in relevant markets will predominate. It will undoubtedly be true that in some relevant markets, McDonald's restaurants will have so many competitors for labor that the restraint will have no anticompetitive effect. In other markets, McOpCos and franchisees may have so little outside competition for employees that the restraint will impact the market. The anticompetitive effects of the restraint will have to be judged separately for each of the hundreds (or thousands) of relevant markets, and that will be the predominant issue, especially if, as plaintiffs assert, antitrust impact is a common question (an issue this Court need not address).[6]

The proposed class does not meet the predominance requirement of *Rule 23(b)*.

3. Adequacy

Rule 23(a)'s requirement that "the representative parties will fairly and adequately protect the interests of the class," **[*40]** has two components: the adequacy of the named plaintiffs and the adequacy of proposed class counsel. *See* *Gomez v. St. Vincent Health, Inc., 649 F.3d 583, 592 (7th Cir. 2011)* (citations omitted).

One of the reasons why courts insist that class counsel be adequate is:

> the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers[.]

Creative Montessori Learning Centers v. Ashford Gear LLC, 662 F.3d 913, 918 (7th Cir. 2011). The Seventh Circuit recognizes:

> There is . . . a much greater conflict of interest between the members of the class and the class lawyers than there is between an individual client and his lawyer. The class members are interested in relief for the class but the lawyers are interested in their fees, and the class members' stakes in the litigation are too small to motivate them to supervise the lawyers in an effort to make sure that the lawyers will act in their best interests.

Thorogood v. Sears, Roebuck and Co., 547 F.3d 742, 744 (7th Cir. 2008) (citations omitted). That is of "particular significance" where class members "lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf." **[*41]** *Creative Montessori, 662 F.3d at 917*.

Accordingly, "[a]nything 'pertinent to counsel's ability to fairly and adequately represent the class,'" bears "on the class certification decision." *Reliable Money Order, Inc. v. McKnight Sales Co., Inc., 704 F.3d 489, 498 (7th Cir. 2013)* (citations omitted). Among other things, a court "must . . . consider counsel's work on the case to date." *Reliable Money Order, 704 F.3d at 498 n. 7*; *see also* *Nagel v. ADM Investor Services, Inc., 65 F. Supp.2d 740, 746 (N.D. Ill. 1999)* (Easterbrook, J.) ("One important part of a judge's job under *Rule 23* is to protect putative class members from self-appointed champions whose work is not up to snuff.").

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[6] Because the Court has determined that the question of whether the restraint caused anticompetitive effects in the hundreds (or thousands) of relevant markets will predominate, the Court need not consider whether the question of antitrust impact is a common question. (It is difficult, though, to imagine that it could be a common question, as opposed to a question that would need to be answered separately for each relevant market. Each person's injury is the amount his or her wages were suppressed multiplied by the hours worked. The amount each person's wages are suppressed will almost certainly vary depending on the amount of labor market power McDonald's possessed in each relevant market. *See, e.g.* *State of Ala. v. Blue Bird Body Co., Inc., 573 F.2d 309, 327-28 (5th Cir. 1978)* ("This proof of injury in a price-fixing case will generally consist of some showing by the plaintiff that, as a result of this conspiracy, he had to pay supracompetitive prices for school buses. . . . [W]e do not understand how the plaintiffs can make this proof without examining the relevant school bus market where each individual plaintiff is located.").) Because the Court need not consider whether impact is a common question, the Court need not decide whether to exclude the report and testimony of plaintiff's expert, Dr. Singer. *See* *Messner, 669 F.3d at 812* ("When an expert's report or testimony is 'critical to class certification,' we have held that a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification."). Here, the outcome of this motion is the same with or without Dr. Singer's report and testimony. The same is true as to the report and testimony of Dr. Capelli.

Even were it not the case that individual issues will predominate, the Court would be hesitant to certify the proposed class. One unusual aspect of this case is that, while plaintiffs cannot prevail as class, they could lose as one. That owes to the fact that counsel for the named plaintiff made a strategic decision early in this case not to amend the complaint to add a claim under the rule of reason. If the Court certified a nationwide class (which, again, would not be appropriate for the reasons outlined above), it would be to the great detriment of the class. The class members would lose on a rule-of-reason claim, because their attorneys waived it.[7] Dr. Singer, plaintiffs' expert, calculated aggregate class damages at $2.74 billion. (Singer Rep. at ¶ 5/Docket **[*42]** 270-5 at 9). It is no surprise, then, that attorneys might take a shot at a nationwide-class jackpot (of which they might hope to collect a third, which is about $913,000,000.00) rather than propose a small, local class under the rule of reason. The reward to any given plaintiff would likely be quite similar whether he proceeded as part of a small, local class or a massive nationwide class. Only the lawyers had something to gain by foregoing a claim under the rule of reason, which makes one wonder whether the attorneys were looking out mostly for themselves when they chose not to amend to add a claim under the rule of reason. Perhaps these attorneys took a gamble, choosing not to pursue a rule-of-reason claim in the hopes of the huge reward of certifying a nationwide class under quick-look analysis. Such a self-interested decision would not instill confidence that the attorneys would adequately represent the class.

This case will not proceed as a class action.[8] When plaintiff filed her complaint, it "toll[ed] the applicable statute of limitations for all persons encompassed by the class complaint." *China Agritech, Inc. v. Resh, __ U.S. __, 138 S.Ct. 1800, 1804, 201 L. Ed. 2d 123 (2018)* (citing *American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*); *see also* *Collins v. Village of Palatine, Ill., 875 F.3d 839, 843 (7th Cir. 2017)* ("the filing of a proposed class action immediately **[*43]** pauses the running of the statute of limitations for all class members."). Each class member remains free to pursue his or her own claim. *China Agritech, 138 S.Ct. at 1810*.

III. CONCLUSION

For all of these reasons, plaintiffs' motions [268, 269] for class certification are denied. Defendants' *Daubert* motions [301, 307] to exclude the expert testimony of Dr. Singer are denied (without prejudice) as moot, and defendants' *Daubert* motions [300, 304] to exclude the expert testimony of Dr. Capelli are denied (without prejudice) as moot. Plaintiff's unopposed motion [288] to file supplemental **[*44]** expert report is granted. Defendants' motion to [348] file surreply is granted.

This case is set for status hearing on October 5, 2021 at 9:30 a.m.

SO ORDERED.

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[7] One might think this would have prompted defendants to consent to certification of a class, such that they could win with one fell swoop. *Thomas v. UBS AG, 706 F.3d 846, 850 (7th Cir. 2013)* ("[Defendant] opposed [class] certification even though a defendant with a winning case has much to gain from it—the judgment for a defendant will be *res judicata* in any suit by a class member who had not opted out of the class, provided 'that the named plaintiff at all times adequately represent the interests of absent class members.'") (citation omitted). Perhaps defendants assume most plaintiffs will opt out of a doomed-to-fail class. In any case, defendants do not want a nationwide class certified, and they will get their wish.

[8] The problems discussed above are not the only problems with the proposed class definition. As defendants point out, the proposed class is overly broad in that it contains individuals who could not have been injured by the alleged wrongful conduct. "[I]f the [class] definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct, it is too broad." *Kohen v. Pacific Inv. Mgt. Co., LLC, 571 F.3d 672, 677 (7th Cir. 2009)*; *Messner, 669 F.3d at 824* ("If, however, a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification."). Here, plaintiffs challenge a hiring restriction that applies only to current employees or employees who have left in the past six months. It can have no effect on new hires or on employees within the first few weeks of work. More than 2% of new hires leave within two weeks. More than 11% leave within a month. More than 20% leave within two months. (Figure 12 of Dr. Murphy Rep. at p. 67). It is clear the proposed class definition was too broad, but the Court need not decide by what degree.

ENTERED: July 28, 2021

/s/ Jorge Alonso

HON. JORGE ALONSO

United States District Judge

Yanagi v. Bank of Am., N.A. (In re Herrero)

United States Bankruptcy Court for the District of Hawaii

July 28, 2021, Decided

Case No. 10-02991, Chapter 7, Adv. Pro. No. 21-90005

Reporter
2021 Bankr. LEXIS 1995 *; 2021 WL 3195802

In re: MYRNA M. HERRERO, Debtor.RICHARD A. YANAGI, Chapter 7 Trustee; and FREDRICK A. MENDOZA, Plaintiffs, vs. BANK OF AMERICA, N.A., JOEL BRANDON VILLAMOR, JULIA KELLY, PROSPECT MORTGAGE, LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., and DOE DEFENDANTS 1-50 Defendants.

Subsequent History: Motion denied by *Yanagi v. Bank of Am. (In re Herrero), 2021 Bankr. LEXIS 3074, 2021 WL 5182426 (Bankr. D. Haw., Nov. 5, 2021)*

Magistrate's recommendation at *Yanagi v. Bank of Am., N.A. (In re Herrero), 2021 Bankr. LEXIS 3277 (Bankr. D. Haw., Nov. 9, 2021)*

Core Terms

Plaintiffs', class action, tolling, mortgage, statute of limitations, allegations, damages, quiet title, foreclosure, limitations period, ejectment, notice, requests, wrongful conduct, recorded, predict, subparagraph, time-barred, leave to amend, federal court, tolling rule, state law, twenty-year, accrued, Courts, putative class action, named plaintiff, conveyance, occurrence, argues

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. A *Fed. R. Civ. P. 12(b)(6)* dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. When ruling on a *rule 12(b)(6)* motion, a court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded factual allegations as true.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] Motions to Dismiss, Failure to State Claim

The key is whether the allegations are well-plead; a court is not bound by conclusory statements, statements of law, or unwarranted inferences cast as factual allegations. While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds' of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Federal Preemption

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN3[] Statute of Limitations, Federal Preemption

A federal court hearing claims under state law applies the substantive law of the state, including the state's statute of limitations. Federal courts must abide by a state's tolling rules, which are integrally related to statutes of limitations.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Governments > Courts > Judicial Precedent

HN4[] Federal & State Interrelationships, Erie Doctrine

When interpreting state law, federal courts are bound by decisions of the state's highest court. In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Class Actions

Governments > Legislation > Statute of Limitations > Tolling

HN5[] Tolling of Statute of Limitations, Class Actions

Under the class action tolling rule, the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. The Hawaii Supreme Court has adopted the class action tolling rule and has also approved so-called cross-jurisdictional tolling, under which the pendency of a class action in federal court tolls the statute of limitations for purposes of a subsequent state court action.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Class Actions

Governments > Legislation > Statute of Limitations > Tolling

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN6[] Tolling of Statute of Limitations, Class Actions

Courts have developed three different approaches to whether class action tolling applies where the named plaintiffs in the putative class action lack standing. Courts following the first approach maintain that the filing of a class action does not satisfy American Pipe's requirements when the putative class representative lacks standing. Courts following the second approach reason that a suit on a claim that the claimant had no power to bring still functions to give a defendant notice of whatever causes of action are asserted therein, so the named plaintiff's lack of standing has no effect. Courts following the third, middle-ground, approach will not apply class action tolling to later claims brought by putative class members if the class representative's lack of standing was clear from the pleadings. Courts employ the middle-ground approach for two reasons: one, if it is clear from the face of the complaint that the plaintiff lacks standing, the defendant may not be notified of the substantive claims against it, and two, any putative class members who argue reliance upon that filing would be allowed, effectively, to sleep on their rights.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Class Actions

Civil Procedure > ... > Voluntary Dismissals > Court Order > Dismissal With Prejudice

HN7[] Class Actions, Certification of Classes

Tolling continues on appeal from a dismissal with prejudice only when a class has been certified. The limitations clock resumes when a noncertified class claim is dismissed with or without prejudice.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Class Actions

Governments > Legislation > Statute of Limitations > Tolling

HN8[] Tolling of Statute of Limitations, Class Actions

Federal courts have stressed that the class action tolling rule does not leave a plaintiff free to raise different or peripheral claims. When a plaintiff invokes American Pipe in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that concern the same evidence, memories, and witnesses as the subject matter of the original class suit, so that the defendant will not be prejudiced.

Civil Procedure > Judgments > Entry of Judgments > Compelling Specific Acts

HN9[] Entry of Judgments, Compelling Specific Acts

Haw. R. Civ. P. 15 seeks to balance the plaintiff's interest in having all of its claims against the defendant decided in a single action with the defendant's interest in receiving timely notice of the claims against it.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

HN10[] Amendment of Pleadings, Relation Back

Haw. R. Civ. P. 15 allows an amended pleading to relate back to the date of the original pleading when the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Class Actions

Governments > Legislation > Statute of Limitations > Tolling

HN11[] **Tolling of Statute of Limitations, Class Actions**

At most, the class action tolling rule requires the claims asserted in the original and subsequent actions to be the same; the relief requested need not be identical.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

HN12[] **Amendment of Pleadings, Relation Back**

Under *Haw. R. Civ. P. 15(c)*, any amendment requiring additional evidentiary proof which was not reasonably foreseeable from the earlier pleadings should be deemed to contain a new occurrence. If the rule were otherwise, parties may have to gather the evidence after it has dissipated and this would directly contravene the purpose of the statute.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Torts > Business Torts > Unfair Business Practices > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN13[] **Trade Practices & Unfair Competition, State Regulation**

Under *Haw. Rev. Stat. § 480-24*, unfair and deceptive trade practices and unfair methods of competition claims are subject to a four-year statute of limitations.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Rights Law > Protection of Rights > Procedural Matters > Continuing Violations

Torts > ... > Settlements > Releases From Liability > Validity

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN14[] **Remedies, Damages**

Under Haw. Rev. Stat. § 480-24(a), a cause of action for a continuing violation is deemed to accrue at any time during the period of the violation. A continuing violation is a continuing pattern of related improper conduct. To allege a continuing violation under federal ***antitrust law*** in the Ninth Circuit, a plaintiff must allege that a defendant completed an overt act during the limitations period that is (1) a new and independent act that is not merely a reaffirmation of a previous act and (2) inflicts new and accumulating injury on the plaintiff.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN15[] **Public Enforcement, State Civil Actions**

Haw. Rev. Stat. § 480-3 directs that this chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes.

Governments > Legislation > Statute of Limitations > Time Limitations

HN16[] **Statute of Limitations, Time Limitations**

Under Hawaii law, a claim that a deed is void is not subject to a statute of limitations.

Governments > Legislation > Statute of Limitations > Time Limitations

HN17[] **Statute of Limitations, Time Limitations**

Under Hawaii law, the proper standard to determine the relevant limitations period is the nature of the claim or right, not the form of the pleading. Different limitations periods may apply to different claims, even when they are stated in the same count and arise from the same transaction.

Governments > Legislation > Interpretation

HN18[] **Legislation, Interpretation**

The Hawaii Supreme Court has often stated that the fundamental starting point for statutory interpretation is the language of the statute itself. Where the statutory language is plain and unambiguous, a court's sole duty is to give effect to its plain and obvious meaning.

Governments > Legislation > Statute of Limitations > Time Limitations

HN19[] **Statute of Limitations, Time Limitations**

Under Hawaii law, a twenty-year limitations period applies to actions to recover possession of any lands, or make any entry thereon, while a six-year limitations period applies to actions for the recovery of any debt founded upon any contract, obligation, or liability and personal actions of any nature whatsoever not specifically covered by the laws of the State. A personal action, or action in personam, is one where the judgment will impose a personal liability or obligation and does not affect the nature of the parties' interest in property.

Governments > Legislation > Statute of Limitations > Time Limitations

Real Property Law > Financing > Foreclosures > Deficiency Judgments

HN20[] **Statute of Limitations, Time Limitations**

As the Hawaii Supreme Court has held, a mortgagee can foreclose on a mortgage if within the statute of limitations for real actions, but cannot recover a money judgment on the underlying note. The mortgagee may not collect a deficiency judgment in those circumstances, either, illustrating that the only timely claim is against the land.

Real Property Law > Title Quality > Adverse Claim Actions > Quiet Title Actions

HN21[] **Adverse Claim Actions, Quiet Title Actions**

In an action to quiet title under Hawaii law, a plaintiff must at least prove that he has a substantial interest in the property and that his title is superior to that of the defendants. The tender rule requires a borrower, in bringing a quiet title action, to allege that he has paid, or is able to tender, the amounts owed.

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Causes of Action

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Commencement of Adversary Proceedings

HN22[] **Adversary Proceedings, Causes of Action**

Fed. R. Civ. P. 15 applies in adversary proceedings through *Fed. R. Bankr. P. 7015*. Under *Rule 15*, after a brief period in which a party may amend as of right, leave to amend lies within the sound discretion of the trial court.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN23[] **Motions to Dismiss, Failure to State Claim**

The U.S. Court of Appeals for the Ninth Circuit has stated that, in dismissing for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts. While leave to amend shall be freely given when justice so requires, futile amendments should not be permitted.

Counsel: **[*1]** For Richard A. Yanagi, as Trustee of the Bankruptcy Estate of Myrna M. Herrero, Plaintiff (21-90005): James J. Bickerton, Bickerton Dang, Honolulu, HI; Bridget G. Morgan-Bickerton, Bickerton Law Group, LLLP, Honolulu, HI; Van-Alan H. Shima, Affinity Law Group, LLLC, Honolulu, HI.

For Fredrick A. Mendoza, Plaintiff (21-90005): Van-Alan H. Shima, Affinity Law Group, LLLC, Honolulu, HI.

For BANK OF AMERICA, N.A., Mortgage Electronic Registration Systems, Inc., Defendants (21-90005): Patricia J. McHenry, LEAD ATTORNEY, Cades Schutte LLP, Honolulu, HI.

For Joel Brandon Villamor, Julia Kelly, Defendants, Cross-Claimants (21-90005): Charles A. Price, LEAD ATTORNEY, Koshiba Price & Gruebner, Honolulu, HI.

Prospect Mortgage, LLC, Defendant, Pro se.

For Myrna M Herrero, fka Myrna A Mendoza, fdba Kauai Business Organizer, Debtor (10-02991): Van-Alan H. Shima, Affinity Law Group, LLLC, Honolulu, HI; Thomas D. Yano, Lihue, HI.

For Richard A. Yanagi, Trustee (10-02991): Allison A. Ito, CHOI & ITO, Honolulu, HI.

For Office of the U.S. Trustee, U.S. Trustee (10-02991): Curtis B. Ching, Office of The United States Trustee, Honolulu, HI.

Judges: Robert J. Faris, United States Bankruptcy Judge.

Opinion by: Robert J. Faris

Opinion

Dkt. 10, **[*2]** 18, 19

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

In this adversary proceeding, Plaintiffs Richard A. Yanagi, as trustee of the chapter 7 bankruptcy estate of Myrna M. Herrero, and Fredrick A. Mendoza assert claims against two groups of defendants: Counts I and II state claims against Bank of America, N.A. ("BANA") and Mortgage Electronic Registration Systems, Inc. ("MERS"), and Count III states claims against Joel Brandon Villamor, Julia Kelly, and Prospect Mortgage, LLC ("the QTE Defendants"). The Plaintiffs' claims arise out of the allegedly wrongful nonjudicial foreclosure of real property belonging to Ms. Herrero and Mr. Mendoza (the "Property").

BANA and MERS move to dismiss the complaint, arguing that the Plaintiffs' claims are untimely under the applicable statutes of limitations, that the mortgage held by MERS has been released, and that the Plaintiffs have not proven their ability to tender the amount of the indebtedness on the real property, which is required to state a claim for wrongful foreclosure.

For the reasons described below, I will GRANT the motion in part and DENY it in part.

I. **BACKGROUND**[1]

A. **Foreclosure**

Ms. Herrero and Mr. Mendoza owned **[*3]** real property in Eleele, Hawaii. In August 2009, the mortgage on their property was assigned to BAC Home Loans Servicing, L.P ("BAC"). On June 24, 2010, BAC purportedly conducted a public auction of the Property.[2] BAC submitted the highest bid at the June 24 auction as a credit bid on behalf of

[1] The facts recited below are mostly taken from the complaint, the allegations of which I must accept as true for purposes of this motion. *See* *Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir. 2003)*.

[2] Compl. ¶ 36, ECF No. 1.

the Federal National Mortgage Association ("Fannie Mae"), which held a beneficial interest in the note and mortgage.[3]

On July 9, 2010, BAC's attorney executed a Mortgagee's Affidavit of Foreclosure Under Power of Sale pertaining to the foreclosure of the mortgage and sale of the Property.[4] The foreclosure affidavit was recorded in the Bureau of Conveyances on July 19, 2010.[5] On July 27, 2010, BAC executed a "Mortgagee's Quitclaim Deed Pursuant to Power of Sale" conveying the Property to Fannie Mae.[6] On August 6, 2010, the quitclaim deed was recorded.[7]

In July 2011, BAC merged into BANA and BANA assumed all of BAC's obligations and liabilities existing at the time of the merger.[8]

The Property changed hands several times until it was finally conveyed to Defendants Villamor and Kelly by warranty deed on February 19, 2016.[9] On February 20, 2016, Mr. Villamor and Ms. Kelly executed a mortgage **[*4]** on the Property in favor of MERS.[10] On March 15, 2021, a Release of Mortgage was recorded whereby MERS acknowledged full payment and satisfaction of the mortgage.

B. **Bankruptcy Case and** ***Degamo*** **Class Action**

On September 29, 2010, Ms. Herrero filed her chapter 7 bankruptcy petition. She did not list claims against BANA in her bankruptcy schedules.[11] On December 28, 2010, she obtained a chapter 7 discharge and her case was closed.[12]

Ms. Herrero was allegedly a class member in a putative class action entitled *Degamo v. Bank of America, N.A.*, filed in state court on September 7, 2012[13] and removed to federal district court on March 25, 2013.[14] The plaintiffs in *Degamo* asserted claims against BANA for wrongful nonjudicial foreclosure in violation of *Haw. Rev. Stat. § 667-5* and unfair or deceptive acts or practices or unfair methods of competition under *Haw. Rev. Stat. chapter 480*.[15] MERS was not a defendant in the class action.

On September 22, 2017, one of the named plaintiffs, Milagros Juan Degamo, was dismissed from the class action.[16] The court dismissed the *Degamo* class action with prejudice on March 14, 2019, because the remaining named plaintiffs lacked prudential standing as a result of prior bankruptcy filings. **[*5]** [17]

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[3] *Id.* ¶ 47.

[4] *Id.* ¶ 43.

[5] *Id.*

[6] *Id.* ¶ 46.

[7] *Id.*

[8] *Id.* ¶ 10.

[9] *Id.* ¶ 52.

[10] *Id.* ¶ 53.

[11] *See* Debtor's Schedules, ECF No. 1 in main bankruptcy case.

[12] Discharge of Debtor, ECF No. 10 in main bankruptcy case; Final Decree, ECF No. 11 in main bankruptcy case.

[13] Compl. ¶ 18, ECF No. 1.

[14] Def.'s Notice of Removal, *Degamo v. Bank of Am., N.A.*, No. 1:13-cv-00141-JAO-KJM (D. Haw. Mar. 25, 2013), ECF No. 1.

[15] First Am. Compl. ¶ 46, *Degamo*, No. 1:13-cv-00141-JAO-KJM (D. Haw. Apr. 23, 2013), ECF No. 14.

On December 31, 2020, Ms. Herrero moved to reopen her chapter 7 case to add her claim against BANA and others arising from the nonjudicial foreclosure sale to her bankruptcy schedules.[18] I entered an order granting the motion on January 4, 2021,[19] and Richard A. Yanagi was appointed as the chapter 7 trustee on January 7, 2021.[20]

C. **The Adversary Complaint and Motion to Dismiss**

Mr. Mendoza and Trustee Yanagi filed their adversary complaint, commencing this proceeding, on February 9, 2010.[21] Count I of the complaint alleges that BANA's foreclosure of the Property did not comply with *section 667-5* and the power of sale in the mortgage.[22] Count II alleges that BANA engaged in unfair and deceptive trade practices ("UDAP") and unfair methods of competition ("UMOC") in violation of *Haw. Rev. Stat. chapter 480*.[23] Count III is a claim for quiet title and ejectment against the QTE Defendants.

On March 22, 2021, BANA and MERS filed this motion, arguing that the complaint should be dismissed under *Fed. R. Civ. P. 12(b)(6)*, made applicable by *Fed. R. Bankr. P. 7012(b)*.[24] The remaining QTE Defendants joined in the motion on March 24, 2021.[25] The motion came for hearing on May 14, 2021. Van-Alan H. Shima appeared for the Plaintiffs and Patricia J. McHenry appeared for BANA and MERS.

II. **STANDARD [*6]**

A. ***Rule 12(b)(6)* Standard**

HN1[] "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'"[26] "A *Rule 12(b)(6)* dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'"[27] When ruling on a *rule 12(b)(6)* motion, a court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded factual allegations as true.[28]

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16 Stip. Dismiss Pl. Degamo's Claims, *Degamo*, No. 1:13-cv-00141-JAO-KJM (D. Haw. Sept. 22, 2017), ECF No. 76.

17 Order Denying Pls' Mot. Accept Ratification or Permit Substitution and *Renewed Mot. for Leave to File Second Am. Compl, Degamo, No. 1:13-cv-00141-JAO-KJM, 2019 U.S. Dist. LEXIS 41608, at *23 (D. Haw. Mar. 14, 2019)*, ECF No. 147.

18 Mot. Reopen Ch. 7 Case, ECF No. 13 in main bankruptcy case.

19 Order Granting Mot. Reopen, ECF No. 14 in main bankruptcy case.

20 Notice of Appointment of Successor Trustee, ECF No. 21 in main bankruptcy case.

21 Compl., ECF No. 1.

22 *Id.* at ¶ 67.

23 *Id.* at ¶¶ 80-89.

24 First Am. Mot. Dismiss Compl., ECF No. 10.

25 Joinder in Am. Mot. Dismiss. Compl., ECF No. 11.

26 *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*).

27 *Barnes v. Belice (In re Belice), 461 B.R. 564, 573 (B.A.P. 9th Cir. 2011)* (quoting ***Johnson v. Riverside Healthcare Sys., L.P., 534 F.3d 1116, 1121 (9th Cir. 2008)***).

28 *Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir. 2003)*.

HN2[] The key is whether the allegations are well-plead; a court is not bound by conclusory statements, statements of law, or unwarranted inferences cast as factual allegations.[29] "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[30]

B. **Statutes of Limitations and Tolling Based on State Law**

HN3[] A federal court hearing claims under state law applies the substantive law of the state, including the state's statute of limitations.[31] "Federal courts must abide by a state's tolling rules, which **[*7]** are integrally related to statutes of limitations."[32]

HN4[] "When interpreting state law, federal courts are bound by decisions of the state's highest court. 'In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.'"[33]

III. DISCUSSION

A. **Class Action Tolling**

HN5[] Under the class action tolling rule, "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."[34] The Hawaii Supreme Court has adopted the class action tolling rule[35] and has also approved so-called "cross-jurisdictional tolling," under which the pendency of a class action in federal court tolls the statute of limitations for purposes of a subsequent state court action.[36]

1. End of Class Action Tolling

BANA claims that class action tolling ended on September 22, 2017, when the last plaintiff with prudential standing was dismissed from *Degamo*. The Plaintiffs argue that the statute of limitations still has **[*8]** not begun to run because the judgment in *Degamo* was vacated in part and no class certification motion has yet been denied.[37]

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[29] Belice, 461 B.R. at 573.

[30] *Id.*

[31] *See* **Albano v. Shea Homes Ltd. Partnership 634 F.3d 524, 530 (9th Cir. 2011)**.

[32] *Id.*

[33] Ariz. Elec. Power Coop., Inc. v. Berkeley, 59 F.3d 988, 991 (9th Cir. 1995) (quoting In re Kirkland, 915 F.2d 1236, 1238 (9th Cir. 1990)) (internal citations omitted).

[34] Patrickson v. Dole Food Co., 137 Haw. 217, 368 P.3d 959, 968 (Haw. 2015) (quoting Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 551, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)).

[35] Levi v. Univ. of Hawaii, 67 Haw. 90, 679 P.2d 129, 132 (Haw. 1984)

[36] Patrickson, 368 P.3d at 970.

[37] Compl. ¶ 12 n.1, ECF No. 1. After the Plaintiffs commenced this adversary proceeding, the Ninth Circuit Court of Appeals affirmed the district court's denial of the plaintiffs' bankruptcy trustees' ratification of the action, substitution of the bankruptcy

To decide when tolling ended, I must predict (1) whether the Hawaii Supreme Court would apply class action tolling where the named plaintiffs lacked standing to bring their claims, and (2) whether the court would continue to apply class action tolling after a putative class action is dismissed where the dismissal is appealed. There is no controlling Hawaii Supreme Court precedent on these questions.

Answering the first issue, I predict that the Hawaii Supreme Court would apply class action tolling where the named plaintiffs' lack of standing is not clear from the face of the complaint.

HN6[] Courts have developed three different approaches to whether class action tolling applies where the named plaintiffs in the putative class action lack standing.[38] Courts following the first approach maintain that the filing of a class action does not satisfy *American Pipe*'s requirements when the putative class representative lacks standing.[39] Courts following the second approach reason that a suit on a claim that the claimant had no power to bring still functions "to give a defendant notice **[*9]** of whatever causes of action are asserted therein," so the named plaintiff's lack of standing has no effect.[40] Courts following the third, "middle-ground," approach will not apply class action tolling to later claims brought by putative class members if the class representative's lack of standing was clear from the pleadings. Courts employ the middle-ground approach for two reasons: one, if it is clear from the face of the complaint that the plaintiff lacks standing, the defendant may not be notified of the substantive claims against it, and two, "any putative class members who argue reliance upon that filing would be allowed, effectively, to sleep on their rights."[41]

Of the three approaches, I believe the middle-ground approach is most consistent with the Hawaii Supreme Court's holdings in *Patrickson* and *Levi*.[42] This approach strikes a balance between "[t]he primary purpose of a statute of limitations," which "is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend" and a major purpose of a class action suit, which is "to prevent multiplicity of actions, thereby preserving the economies **[*10]** of time, effort and expense."[43]

A member of the proposed class in *Degamo* would not have known that the named plaintiffs lacked standing from the face of the complaint. Conversely, BANA received notice of the claims pending against it when plaintiffs with Article III standing and without any facially clear defects in prudential standing filed a complaint.[44] It is therefore fair to make BANA defend against these claims now. Thus, class action tolling did not end on September 7, 2012, when the last plaintiff with prudential standing was dismissed from *Degamo*.

In response to the second question, I predict that the Hawaii Supreme Court would end class action tolling after the trial court dismisses all claims in a non-certified putative class action, even if the dismissal is appealed.

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trustees for the plaintiffs, and leave to file a second amended complaint. The court vacated the district court's denial of the motions to intervene by five members of the putative class and remanded the matter. *Degamo v. Bank of Am., 849 F. App'x 620 (9th Cir. 2021)*.

[38] 3 William B. Rubenstein, Newberg on Class Actions § 9:57.

[39] *Id.*

[40] *Id.* (quoting *Rose v. Ark. Valley Env't & Util. Auth., 562 F. Supp. 1180, 1193 (W.D. Mo. 1983)*).

[41] *Id.*

[42] *Patrickson v. Dole Food Co., 137 Haw. 217, 368 P.3d 959, 970 (Haw. 2015)*; *Levi v. Univ. of Hawaii, 67 Haw. 90, 679 P.2d 129, 132 (Haw. 1984)*.

[43] *Levi, 679 P.2d at 131-32*.

[44] *See id. at 132* ("The filing of a class action within the statute of limitations places a defendant on notice of the subject matter and size of the prospective litigation.").

HN7[] In *Taylor v. United Parcel Service, Inc.*, the Fifth Circuit Court of Appeals held that tolling continues on appeal from a dismissal with prejudice only when a class has been certified.[45] The *Taylor* court emphasized "the distinction between putative members of an uncertified class and members of a certified class in determining the application of tolling principles."[46] Following *Taylor*, the Seventh Circuit Court of **[*11]** Appeals held in *Collins v. Village of Palatine* that "the limitations clock resumes when a *noncertified* class claim is dismissed with or without prejudice."[47] In *Bermudez Chavez v. Occidental Chemical Corporation*, the New York Court of Appeals also held that tolling ends upon clear dismissal of a putative class action.[48] It reasoned that, "[u]nder those circumstances, future plaintiffs are on notice that they must take steps to protect their rights because the litigation no longer compels the court to address class certification or the named plaintiffs to advance absent class members' interests. . . ."[49]

Because the Hawaii Supreme Court based its adoption of the class action tolling rule on federal law, I believe it likely that the Hawaii Supreme Court would adopt the majority rule among federal courts when determining when to end class action tolling. The rule has also found traction with state courts. Therefore, I predict that, in these circumstances, the Hawaii Supreme Court would hold the appeal of *Degamo* did not extend tolling because the district court never certified it as a class action. Based on both of my predictions of state law, I hold that tolling ended on March 14, 2019.

Assuming **[*12]** that the Plaintiffs' claims accrued on the date of the foreclosure sale, June 24, 2010, the statute of limitations ran for two years, two months, and thirteen days until it was tolled by the filing of *Degamo* on September 7, 2012. Applying class action tolling until *Degamo* was dismissed on March 14, 2019, the statute ran for another one year, ten months, and twenty-five days before the adversary complaint was filed on February 9, 2021. By this calculation, the statute of limitations ran for about four years and one month, well within the six-year limitations period applicable to the Plaintiffs' wrongful foreclosure claims.

2. Scope of Tolling

BANA argues that the Plaintiffs' requests for restitution-and rescission-based damages, additional allegations of BANA's wrongful conduct in subparagraphs 61(a), (g), and (h) of Count I, and additional allegations of wrongful conduct in paragraph 81 of Count II are outside the scope of class action tolling. I agree in part and disagree in part for reasons I will describe below.

a. **Measures of Damages**

HN8[] Federal courts have stressed that the class action tolling rule "does not leave a plaintiff free to raise different or peripheral claims."[50] "[W]hen a plaintiff **[*13]** invokes *American Pipe* in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that 'concern the same evidence, memories, and witnesses as the subject matter of the original class suit,' so that 'the defendant will not be prejudiced.'"[51]

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[45] *554 F.3d 510, 520-21 (5th Cir. 2008)*.

[46] *Id. at 517*.

[47] *875 F.3d 839, 845 (7th Cir. 2017)* (emphasis added).

[48] *35 N.Y.3d 492, 132 N.Y.S.3d 224, 158 N.E. 3d 93, 104 (N.Y. 2020)*.

[49] *Id.*

[50] *Williams v. Boeing Co., 517 F.3d 1120, 1136 (9th Cir. 2008)* (quoting *Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352-53, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)*) (cleaned up).

[51] *Crown, Cork & Seal, 462 U.S. at 355* (Powell, J., concurring) (quoting *Am. Pipe, 414 U.S. at 561* (Blackmun, J., concurring)).

"There is no consensus on whether class action tolling is available only as to claims that are identical to those asserted in the initial putative class action."[52] For some courts, a common legal and factual nexus is sufficient to allow tolling.[53] In contrast, the Ninth Circuit Court of Appeals requires that the causes of action be "identical."[54] But there is no precedent from the Hawaii Supreme Court directly on point, and it is Hawaii state law that controls this inquiry.

I predict that the Hawaii Supreme Court would not require exact identity of claims and would instead consider whether "new claims" would relate back to the class action complaint if they were alleged in an amended pleading in the same action under *Haw. R. Civ. P 15(c)*.[55] ***HN9***[] That rule seeks to balance the plaintiff's interest in having all of its claims against the defendant decided in a single action with the defendant's **[*14]** interest in receiving timely notice of the claims against it. These are the same factors that the Hawaii Supreme Court analyzed when it adopted the class action tolling rule.[56]

I disagree with BANA's assertion that the additional measures of damages requested by the Plaintiffs "would not relate back if alleged in a new pleading in the same action, let alone be tolled under *American Pipe*."[57] ***HN11***[] At most, the class action tolling rule requires the *claims* asserted in the original and subsequent actions to be the same; the *relief* requested need not be identical.[58]

The Hawaii Supreme Court's holding in *Mauian Hotel* is instructive. There, an insurer, on behalf of third-party plaintiff Napili-Kai, amended its answer to add a claim against another third-party plaintiff, Austin, Smith & Associates, Inc.[59] The amendment referred to some factual allegations in the earlier pleadings, but it "also contained additional allegations of fact to support its claim for [property damages]."[60] Austin, Smith & Associates asserted the statute of limitations as an affirmative defense and moved for summary judgment.[61] The lower court granted the motion and Napili-Kai appealed.[62]

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[52] 1 McLaughlin on Class Actions § 3:15 (17th ed.).

[53] *Id.*

[54] ***Card v. Duker, 122 Fed. Appx. 347, 349 (9th Cir. 2005)*** ("The Supreme Court has thus not extended tolling due to class litigation beyond *American Pipe's* narrow allowance for identical causes of action brought where the class was decertified.").

[55] ***HN10***[] ***Haw. R. Civ. P. 15*** allows an amended pleading to relate back to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading[.]"

[56] *Compare* ***Mauian Hotel, Inc. v. Maui Pineapple Co., 52 Haw. 563,481 P.2d 310, 314 (Haw. 1971)*** *with* *Levi v. Univ. of Hawaii, 67 Haw. 90, 679 P.2d 129, 131-32 (Haw. 1984)*.

[57] BANA's Mot. Dismiss Compl. 14, ECF No. 6.

[58] *See* *Martell v. Trilogy Ltd., 872 F.2d 322, 326 (9th Cir. 1989)* (interpreting *Fed R. Civ. P. 15(c)*); *Kern Oil & Refining Co. v. Tenneco Oil Co., 840 F.2d 730, 736 (9th Cir. 1988)* ("Under *Rule 15*, the only question is whether the later claims arise out of the conduct, transaction, or occurrence brought to the defendant's attention by the initial claim. When this is so[,] later-filed claims may relate back, even if they rest on a different legal theory . . . .").

[59] ***481 P.2d at 312***.

[60] ***Id. at 314***.

[61] ***Id. at 312***.

[62] *Id.*

To decide whether the new allegations **[*15]** "alter[ed] the fact situation to such an extent that the subsequent claim [arose] not out of the original occurrence but instead out of another,"[63] the *Mauian Hotel* court looked to the policy behind Hawaii's *rule 15(c)*:

> *Rule 15(c)* assumes that pleading the occurrence will properly notify the other party of what evidence to gather. . . . ***HN12***[] [U]nder *15(c)* ***any amendment requiring additional evidentiary proof which was not reasonably foreseeable from the earlier pleadings*** should be deemed to contain a new occurrence. If the rule were otherwise, parties may have to gather the evidence after it has dissipated and . . . this would directly contravene the purpose of the statute.[64]

The court found that "the subsequent claim [arose] out of a new occurrence and not the one originally described."[65] "[N]othing in the original pleadings even hinted at the subsequently alleged damage to Napili-Kai's property" and "the allegation of injury to the Napili-Kai Hotel raise[d] numerous possible evidentiary questions."[66] Therefore, the court held that the subsequent claim did not relate back under *rule 15(c)*.

Here, unlike in *Mauian Hotel*, the Plaintiffs' requests for damages measured on principles of restitution and rescission do not require **[*16]** additional evidence that was not reasonably foreseeable from the earlier pleadings. These "new" measures of damages may require the court to determine the market value of the Property when it was sold and the losses that Ms. Herrero and Mr. Mendoza suffered as a consequence of the foreclosure sale, including loss of use and loss of the Property's rental value. BANA received notice that these issues would arise in the *Degamo* trial from the First Amended Complaint, which sought various forms and calculations of damages, including increased residual debt, loss of net equity, loss of use, and loss of the properties' rental value.[67]

BANA compares this case to *Williams v. Boeing Co.*, where the Ninth Circuit Court of Appeals held that compensation discrimination claims in class action plaintiffs' second amended complaint would not relate back to their earlier claims of retaliation, hostile work environment, and denial of opportunities for promotion under *Haw. R. Civ. P. 15(c)*'s federal analogue. BANA argues that here, as in *Williams*, the Plaintiffs' claim "is a new legal theory depending on different facts, not a new legal theory depending on the same facts."[68] I also find the comparison **[*17]** useful, but I draw the opposite conclusion. Here, the new measures of damages sought by the Plaintiffs are based on the same facts and events alleged in *Degamo*.

In *Williams*, the plaintiffs would have had to amend their complaint "to include additional facts to support the compensation discrimination claim" and "different statistical evidence and witnesses would be used to prove the . . . claims because of the different processes [the defendant used] to make salary and promotion decisions."[69] As a contrast, *Williams* cited *Martell v. Trilogy Ltd.*, where the court held that the amended complaint related back under *rule 15* where it added a new theory of recovery based on facts alleged in the original complaint.[70]

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63 *Id.*

64 *Id.* (emphasis added).

65 ***Id. at 314***.

66 *Id.*

67 *See* First Am. Compl. ¶¶ 48, 121, *Degamo v. Bank of Am., N.A.*, No. 1:13-cv-00141-JAO-KJM (D. Haw. Apr. 23, 2013), ECF No. 14.

68 BANA's Mot. Dismiss Compl. 15, ECF. No. 6 (citing *Williams, 517 F.3d at 1133*).

69 *Williams, 517 F.3d at 1133*.

70 *See id.* (citing *Martell, 872 F.2d at 325-26*).

The present scenario is more like *Martell* than *Williams*. Here, BANA received notice of the evidence it needed to gather when *Degamo* was filed.[71] It cannot assert that it was caught off-guard by the Plaintiffs' request for different measures of damages based on the same evidence.[72] Therefore, I determine that the statute of limitations on the Plaintiffs' requests for restitution and rescission was tolled during the *Degamo* class action to the same extent as their requests for other measures **[*18]** of damages.

b. **Additional Wrongful Conduct Alleged in Count I**

Count I of the adversary complaint alleges numerous defects in the foreclosure sale conducted by BANA,[73] including defects that BANA contends were absent from the *Degamo* complaint. Specifically, BANA argues that the plaintiffs' allegations in subparagraph 61(a) that Ms. Herrero and Mr. Mendoza were not served with a notice of acceleration that complied with the mortgage, and their allegation in subparagraph 61(h) that the auction was postponed but there was no new posting on the property advertising a new auction date, are outside the scope of class action tolling and therefore time-barred.[74] I agree in part but disagree in part for reasons I will explain below.

I agree that the Plaintiffs' allegations of wrongful conduct regarding the notice of acceleration are not subject to class action tolling. The allegedly wrongful conduct asserted in *Degamo* began with the notice of sale. The notice of acceleration would have been issued before the notice of sale, i.e., before the events that *Degamo* was concerned with. The allegations relating to the notice of acceleration "alter[] the fact situation to such an **[*19]** extent that the subsequent claim arises not out of the original occurrence but instead out of another."[75] Thus, the Plaintiffs' allegations of wrongful conduct regarding the notice of acceleration in subparagraph 61(a) of the complaint are not subject to class action tolling.

However, the same is not true of subparagraphs (g) and (h). These "new" allegations of wrongful conduct, specifically that there was no posting on the property advertising a new auction date, arise out of the same occurrence described in *Degamo*: the noticing of the foreclosure sale.[76] Accordingly, the Plaintiffs' allegations in subparagraph 61(h) were subject to class action tolling.

c. **Additional Wrongful Conduct Alleged in Count II**

As I will describe in the next section, the Plaintiffs' UDAP and UMOC claims are time-barred even with the application of class action tolling, so I need not consider whether their additional allegations of wrongful conduct in paragraph 81 of the complaint are subject to tolling.

B. **Accrual and Timeliness of UDAP and UMOC Claims**

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[71] *See* ***Mauian Hotel, 481 P.2d at 313*** ("***Rule 15(c)*** contemplates that once a party has been properly put on notice regarding what evidence to gather[,] the statute [of limitations] is satisfied, regardless of when the claim itself is asserted.").

[72] *See* *Martell, 872 F.2d at 326* (quoting *Barthel v. Stamm, 145 F.2d 487, 491 (5th Cir. 1944)*, *cert. denied*, ***324 U.S. 878, 65 S. Ct. 1026, 65 S. Ct. 1926, 89 L. Ed. 1430 (1945)***) ("When a suit is filed in federal court under the Rules, the defendant knows that the whole transaction in it will be fully sifted, by amendment if need be, and that the form of action or the relief prayed . . . will not be confined to their first statement."); *see also* *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* (allowing amendment of the complaint under ***rule 15*** where "the amendment would have done no more than state an alternative theory for recovery.").

[73] Compl. ¶ 61, ECF No. 1.

[74] First Am. Mot. Dismiss Compl. 14, ECF No. 10.

[75] ***Mauian Hotel, 481 P.2d at 314***.

[76] *See* First Am. Compl. ¶ 14(c), *Degamo v. Bank of Am., N.A.*, No. 1:13-cv-00141-JAO-KJM (D. Haw. Apr. 23, 2013), ECF No. 14 (alleging that BANA's policies and practices, adopted to deter public participation and "chill" bid prices at nonjudicial foreclosure auctions, "included, but were not limited to . . . postponing auctions without publishing notices of the rescheduled auctions' new dates and times.").

HN13[] Under *Haw. Rev. Stat. section 480-24*, UDAP and UMOC claims are subject to a four-year statute of limitations. Here, the Plaintiffs' claims are timely only if I determine **[*20]** that they accrued on August 6, 2010, the date that the quitclaim deed to Fannie Mae was recorded.[77] Otherwise—whether they accrued on June 24, 2010, the date of the foreclosure sale; July 9, 2010, the date that the foreclosure affidavit was recorded; or July 27, 2010, the date that BANA executed the quitclaim deed to Fannie Mae—the claims are time-barred. In the absence of direct guidance, I predict that the Hawaii Supreme Court would hold that UDAP and UMOC claims based on a wrongful foreclosure accrue, at the latest, on the date that the affidavit of foreclosure is recorded.[78] I therefore conclude that the Plaintiffs' claims are time-barred.

The Plaintiffs urge me to determine that their UDAP and UMOC claims accrued on the date that the quitclaim deed to Fannie Mae was recorded, as the last event in a "continuing violation" of *Haw. Rev. Stat. chapter 480*. But the quitclaim conveyance cannot constitute a "continuing violation" of *Haw. Rev. Stat. chapter 480* because it did not cause any additional harm.

HN14[] Under *Haw. Rev. Stat. section 480-24(a)*, "a cause of action for a continuing violation is deemed to accrue at any time during the period of the violation." A "continuing violation" is a "continuing pattern of related improper conduct . . . ."[79] To allege a continuing **[*21]** violation under federal ***antitrust law*** in the Ninth Circuit,[80] a plaintiff must allege that a defendant completed an overt act during the limitations period that is (1) "a new and independent act that is not merely a reaffirmation of a previous act" and (2) "inflict[s] new and accumulating injury on the plaintiff."[81]

The damages asserted by the Plaintiffs are loss of monies invested in the Property, loss of market value, loss of use and rental value from the date that Ms. Herrero and Mr. Mendoza lost possession, and moving and rental expenses.[82] The Property was conveyed when the affidavit was recorded, and any loss of use and value stems from that conveyance.[83] Ergo, the Plaintiffs' UDAP and UMOC claims accrued on that date. The later execution and recordation of the deed did not result in any further loss and therefore did not inflict a "new and accumulating injury" upon Ms. Herrero and Mr. Mendoza.

Therefore, I hold that the Plaintiffs' UDAP and UMOC claims are completely barred by the applicable statute of limitations.

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[77] If the Plaintiffs' claims accrued on August 6, 2010, the statute of limitations would have run for two years and one month until *Degamo* was filed on September 7, 2012. After the district court dismissed *Degamo* on March 14, 2019, the statute ran for another one year, ten months, and twenty-five days before the Plaintiffs filed their adversary complaint on February 9, 2021. In total, the statute of limitations would have run for 1,459 days, or three years, eleven months, and twenty-five days, making the plaintiffs' claims timely by just a few days.

[78] BANA argues that UDAP and UMOC claims stemming from a wrongful foreclosure accrue on the date of the foreclosure sale, not the date that the foreclosure affidavit is recorded. However, I need not reach this issue because the Plaintiffs' claims would be time-barred if they accrued on either date.

[79] *Au v. Republic State Mortg. Co., 2013 U.S. Dist. LEXIS 46722, at *45 n.24 (D. Haw. Mar. 29, 2013)*.

[80] ***HN15***[] *Haw. Rev. Stat. section 480-3* directs that "[t]his chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes[.]"

[81] *Samsung Electronics Co. v. Panasonic Corp., 747 F.3d 1199, 1202 (9th Cir. 2014)* (quoting *Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 238 (9th Cir. 1987)*).

[82] Compl. ¶ 87, ECF No. 1. The complaint alleges that BANA engaged in various practices designed to "chill" bidding prices and achieve a high self-sale rate, including publication of false, deceptive, or misleading notices of sale. *See id.* ¶¶ 76-80, 83, 85. Any injury caused thereby accrued when the notice of sale was published or, at the latest, when the property was conveyed.

[83] *See In re Hoopai*, No. 04-02511, 2005 Bankr. LEXIS 884, 2005 WL 1156091, at *4 (Bankr. D. Haw. Jan. 12, 2005) ("[T]itle passes in a non-judicial foreclosure sale when the affidavit is recorded, not when the auction is held.").

C. **Limitations Period for Quiet Title and Ejectment Claims**

The timeliness of the Plaintiffs' claims against the QTE Defendants depends on which limitations period **[*22]** they are subject to under Hawaii law.[84] MERS argues that quiet title and ejectment claims are subject to a six year limitations period under *Haw. Rev. Stat. § 657-1*. The Plaintiffs argue that their quiet title and ejectment claims are subject to either no statute of limitations at all or a twenty-year limitations period under *Haw. Rev. Stat. section 657-31*. If the Plaintiffs are correct, their claims are timely. If BANA is correct, the claims are time-barred.

For the reasons that follow, I conclude that any portion of the Plaintiffs' quiet title and ejectment claim seeking recovery of the land is subject to a twenty-year limitations period under *Haw. Rev. Stat. section 657-31*, while any claims for money damages, including lost rental value, are subject to a six-year limitations period under *section 657-1(4)*. Thus, the Plaintiffs' request for return of the property is timely, but their request to recover its lost rental value is not.

First, I disagree with the Plaintiffs' argument that their quiet title and ejectment claims are not subject to a statute of limitations because the foreclosure sale was void and not voidable. ***HN16***[] Under Hawaii law, "a claim that a deed is void is not subject to a statute of limitations."[85] But the most recent precedent from the Hawaii Supreme Court has referred **[*23]** to wrongful foreclosures as "voidable," not "void."[86] Therefore, I predict that the supreme court would hold that the sale of the Property, if in violation of the power of sale or *Haw. Rev. Stat. section 667-5*, was voidable.[87]

Second, different limitations periods should apply to the Plaintiffs' quiet title and ejectment claims based on the relief sought. Here, the Plaintiffs' claims have two basic elements: a request for title and possession of the Property, and a request for compensation for the loss of the Property and its use. I predict that the Hawaii Supreme Court would apply a twenty-year statute of limitations to the Plaintiffs' requests for return of the Property and a six-year statute of limitations to their requests for monetary compensation.

HN17[] Under Hawaii law, "[t]he proper standard to determine the relevant limitations period is the nature of the claim or right, not the form of the pleading."[88] Different limitations periods may apply to different claims, even when they are stated in the same count and arise from the same transaction.[89]

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[84] The federal district court for this district has observed that "[i]t is not clear what statute of limitations period applies to a quiet title claim arising from an alleged wrongful foreclosure [under Hawaii law]." *Lynch v. Bank of N.Y. Mellon, Civ. No. 17-00195 LEK-RLP, 2018 U.S. Dist. LEXIS 127224, 2019 WL 3624969, at *6 (D. Haw. July 30, 2018)*. The district court has predicted that the Hawaii Supreme Court would apply a six-year statute of limitations to quiet title claims. *Moore v. Kailua Kona Properties, LLC, Civ. No. 18-00159 LEK-KSC, 2018 U.S. Dist. LEXIS 79365, 2018 WL 2172489, at *2 (D. Haw. May 10, 2018)*.

[85] *Hancock v. Kulana Partners, LLC, 145 Haw. 374, 452 P.3d 371, 378 (2019)*.

[86] *Santiago v. Tanaka, 137 Haw. 137, 366 P.3d 612, 633 (Haw. 2016)* ("Where it is determined that the nonjudicial foreclosure of a property is wrongful, the sale of the property is invalid and ***voidable*** at the election of the mortgagor, who shall then regain title to and possession of the property.") (emphasis added).

[87] I recognize that the court recently took the question up on certiorari in *Delapinia v. Nationstar Mortgage, LLC, 146 Haw. 218, 458 P.3d 929, 941 (Haw. App. 2020)*, *cert. granted*, *SCWC-17-0000387, 2020 Haw. LEXIS 133, 2020 WL 2992104 (Haw. June 4, 2020)*.

[88] ***Au v. Au, 63 Haw. 210, 626 P.2d 173, 177 (Haw. 1981)***.

[89] *See id.* ("Different causes of action arising from a single transaction may be plead together. However, where two or more causes of action arise from a single transaction, different statute[s] of limitations are applicable to the separate claims.") (internal citation omitted).

HN18[] The Hawaii Supreme Court "has often stated that 'the fundamental starting point for statutory interpretation is the language of the statute itself. **[*24]** . . . Where the statutory language is plain and unambiguous, [a court's] sole duty is to give effect to its plain and obvious meaning.'"[90]

HN19[] Under Hawaii law, a twenty-year limitations period applies to "action[s] to recover possession of any lands, or make any entry thereon,"[91] while a six-year limitations period applies to "[a]ctions for the recovery of any debt founded upon any contract, obligation, or liability" and "[p]ersonal actions of any nature whatsoever not specifically covered by the laws of the State."[92] A personal action, or "action in personam," is one "where the judgment will impose a personal liability or obligation and does not affect the nature of the parties' interest in property."[93] Here, the Plaintiffs' requests for return of the Property do not seek recovery of a debt founded on a contract, obligation, or liability, as contemplated by *section 657-1(1)*. And I will not apply *section 657-1(4)*, which functions as a "catchall" for personal actions that do not fit into one of the other provisions of *section 657*, when another statute of limitations is both more specific and more relevant. Based on the plain language of the statutes, these requests for relief would fit most closely within *section 657-31*.

The ICA reached a similar conclusion **[*25]** regarding claims for foreclosure in *Bowler v. Christiana Trust*. There, the court rejected the argument that a foreclosure action was "'of like character' to '[a]ctions for the recovery of any debt founded upon any contract, obligation, or liability,'"[94] stating that "[t]he supreme court has long distinguished an action to recover a debt or enforce a promissory note from an action to foreclose a mortgage."[95] Observing that distinction, the court held that a foreclosure action was more similar to an "action to recover possession of any lands, or make any entry thereon" and therefore subject to a twenty-year limitations period under *section 657-31*.[96]

Bowler is not a state supreme court case and does not concern wrongful foreclosure claims, but it is persuasive as a decision of the state's intermediate appellate court. The *Bowler* court also supported its decision with a detailed analysis of Hawaii Supreme Court precedent.[97] It stated that "the determinative issue is not the method of the foreclosure or the purpose of the security interest, but rather the fact that a mortgage is a conveyance of a real property interest, which allows the mortgagee to sell and take possession of the property."[98] The *Bowler* **[*26]** court's reasoning also applies to the Plaintiffs' quiet title and ejectment claims, which challenge a conveyance of a real property interest and seek to take possession of the property in question. And, if claims for foreclosure are subject to a twenty-year limitations period as determined in *Bowler*, the same must be true of claims seeking to undo a foreclosure.

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90 *Schmidt v. Board of Directors of Ass'n of Apartment Owners of Marco Polo Apartments, 73 Haw. 526, 836 P.2d 479, 482 (Haw. 1992)* (quoting *In re Tax Appeal of Lower Mapunapuna Tenants Ass'n, 73 Haw. 63, 828 P.2d 263, 266 (Haw. 1992)*) (cleaned up).

91 *Haw. Rev. Stat. § 657-31*.

92 *Haw. Rev. Stat. § 657-1(1)*, *(4)*.

93 *DW Aina Leʻa Development, LLC v. State Land Use Commission, 148 Haw. 396, 477 P.3d 836, 846 (Haw. 2020)* (quoting *1 Am. Jur. 2d Actions § 28* (2020)) (refusing to apply *section 657-31* to regulatory takings claims "designed to secure compensation," but not affecting the defendant's interest in the property, and instead applying *section 657-1(4)*).

94 No. CAAP-16-0000728, 143 Haw. 235, 426 P.3d 459, 2018 WL 4659562, at *5 (Haw. App. Sep. 28, 2018).

95 *Id.*

96 *Id.*

97 *See Bowler*, 143 Haw. 235, 426 P.3d 459, 2018 WL 4659562, at *5-8 (Haw. App. 2018) (discussing *Hilo v. Liliuokalani, 15 Haw. 507 (Haw. Terr. 1904)*; *Kipahulu Sugar Co. v. Nakila, 20 Haw. 620, 621 (Haw. Terr. 1911)*).

98 426 P.3d 459, [WL] at *8.

But, because of the distinction between an action to recover a debt and an action to recover land, I will apply the six-year statute of limitations to the Plaintiffs' requests for money damages.

HN20[] As the Hawaii Supreme Court has held, a mortgagee can foreclose on a mortgage if within the statute of limitations for real actions, but cannot recover a money judgment on the underlying note.[99] The mortgagee may not collect a deficiency judgment in those circumstances, either, illustrating that the only timely claim is against the land.[100] Here, similarly, the Plaintiffs seek lost rent as damages for their quiet title claims. The Plaintiffs' request for money damages is therefore a personal action that does not fit within the provisions of *subsections 657-1(1) through (3)*. Thus, I will apply *Haw. Rev. Stat. section 657-1(4)* to these requests for relief.

In summary, I conclude that the Plaintiffs' **[*27]** requests for money damages on their quiet title and ejectment claims are time-barred. As described above, their requests for recovery of title and possession are subject to a twenty-year statute of limitations and are therefore timely.

D. **The "Tender Rule"**

BANA argues that the Plaintiffs have not sufficiently alleged that they can tender the amount of indebtedness on the mortgage. The Plaintiffs dispute that Hawaii law requires any allegation of proof of ability to tender, but allege that, given the sums they are owed in damages, they will be able to make tender if required to do so by law.[101] Based on this allegation, I decline to dismiss the Plaintiffs' quiet title and ejectment claims for failure to satisfy the tender rule.

HN21[] In an action to quiet title under Hawaii law, a plaintiff "must at least prove that he has a substantial interest in the property and that his title is superior to that of the defendants. The tender rule requires a[] borrower, in bringing a quiet title action, to allege that he has paid, or is able to tender, the amounts owed."[102] In *Delapinia*, the ICA affirmed the circuit court's dismissal of the Plaintiffs' quiet title claim because they "did not 'allege that they have **[*28]** paid or are able to tender the amount of indebtedness that would be due under the mortgage[.]'"[103]

The Plaintiffs argue that *Delapinia*'s precedential value is uncertain because the Hawaii Supreme Court has taken certiorari. But *Delapinia*, as a decision of Hawaii's intermediate appellate court, is currently controlling state law. However, even if the tender rule applies, I determine that the allegations of the adversary complaint are sufficient to defeat a motion for summary judgment. For purposes of this motion, I must accept as true the Plaintiffs' statement that they will be able to make tender by offsetting their claims for damages against the amount of their indebtedness on the mortgage. The Plaintiffs do not need to allege that they can pay the full amount owing in cash.

E. **Defendant MERS Should Be Dismissed**

MERS points out that, on March 15, 2021, a Release of Mortgage was recorded, acknowledging "full payment and satisfaction" and discharging the mortgage held by MERS.[104] Therefore, MERS argues, the Plaintiffs cannot state a quiet title and ejectment claim against it. The Plaintiffs did not contest this allegation in their opposition. I hold that

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[99] *Kipahulu Sugar Co., 20 Haw. at 622* ("In the case at bar the statute has run against the note, but the period prescribed for the recovery of land has not expired. The plaintiff was, therefore, entitled to a decree of foreclosure."); *Hilo v. Liliuokalani, 15 Haw. at 508* ("Actions on the notes were of course barred long ago by the statute . . . . But that did not bar the remedy against the land."); *see also* *Maile v. Carter, 17 Haw. 49, 52 (Haw. Terr. 1905)* (citing *Campbell v. Kamaiopili, 3 Haw. 477 (Haw. Kingdom 1872)*); *Castle v. Smith, 17 Haw. 32 (Haw. Terr. 1905)*; *Kaikainahaole v. Allen, 14 Haw. 527 (Haw. Terr. 1902)*;.

[100] *Kipahulu Sugar Co., 20 Haw. at 622* ("To allow a deficiency judgment would virtually be to enforce payment of the defendant's note, action upon which is, concededly, barred.").

[101] Compl. ¶ 69, ECF No. 1.

[102] *Delapinia, 458 P.3d at 939* (internal citations omitted).

[103] *Id.*

[104] First Am. Mot. Dismiss Compl. 17, ECF No. 10.

because MERS no longer claims an interest **[*29]** in the property, the Plaintiffs cannot state a claim against MERS on which relief can be granted.

The Release of Mortgage, recorded in the State of Hawaii Bureau of Conveyances as Doc. No. A-77440970, is a matter of public record of which I may properly take judicial notice.[105] The release demonstrates that MERS no longer has an interest in the property. Therefore, the Plaintiffs' claims against MERS should be dismissed.

F. **Leave to Amend**

HN22[] *Fed. R. Civ. P. 15* applies in adversary proceedings through *Fed. R. Bankr. P. 7015*. Under *rule 15*, "'after a brief period in which a party may amend as of right,' leave to amend lies 'within the sound discretion of the trial court.'"[106] The Plaintiffs have not requested leave to amend.

HN23[] The Ninth Circuit has stated that "in dismissing for failure to state a claim under *Rule 12(b)(6)*, 'a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'"[107] While "leave to amend 'shall be freely given when justice so requires,' . . . futile amendments should not be permitted."[108] Here, amendment of the complaint would be futile because the pleading could not be cured by the allegation of other **[*30]** facts. Therefore, I will deny leave to amend the complaint as to claims, measures of damages, and allegations of wrongful conduct dismissed by this order.

Absent tolling, all of the Plaintiffs' monetary claims are undoubtedly time-barred. The only type of tolling that the Plaintiffs have mentioned is class action tolling, and it seems highly unlikely that any other tolling doctrine could apply. Thus, granting leave to amend to add facts that render the Plaintiffs' claims in subparagraph 61(a) timely would be futile.

The same is true of the Plaintiffs' UDAP and UMOC claims and portions of the Plaintiffs' quiet title and ejectment claims. A four-year limitations period clearly applies to the Plaintiffs' UDAP and UMOC claims under *Haw. Rev. Stat. section 480-24*. No other facts or arguments could possibly justify the application of a longer period. Thus, the Plaintiffs' claims in paragraph 81, which are not subject to class action tolling, are indisputably time-barred. Likewise, because they were not subject to class action tolling, the Plaintiffs' quiet title and ejectment claims against the remaining defendants are also time-barred to the extent that they seek money damages. Lastly, MERS is no longer a proper defendant **[*31]** to the Plaintiffs' quiet title and ejectment claims because the mortgage has been released; no amendment can cure that.

Leave to amend is therefore denied.

III. CONCLUSION

In conclusion, I will GRANT the Defendants' motion in part. I hereby DISMISS the Plaintiffs' additional allegations of wrongful conduct in Count I, subparagraph 61(a); all of the Plaintiffs' UDAP claims in Count II; the Plaintiffs' requests for money damages on their quiet title and ejectment claims in Count III; and all of the Plaintiffs' claims against MERS, without leave to amend.

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105 *See* *Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001)* (quoting *Mack v. S. Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986)*).

106 *DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185-86* (quoting *United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981)*).

107 *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)*.

108 *Klamath-Lake Pharma. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1292-93 (9th Cir. 1983)* (quoting *Fed. R. Civ. P. 15(a)*).

I will DENY the motion as to all other elements of the complaint, including, but not limited to, the Plaintiffs' requests for restitution, rescissory damages, or other equitable damages; the allegations in subparagraph 61(h); and the Plaintiffs' claims for recovery of the Property against the remaining QTE Defendants.

Date Signed:

July 28, 2021

SO ORDERED:

/s/ Robert J. Faris

Robert J. Faris

United States Bankruptcy Judge

Yellowcake, Inc. v. Morena Music, Inc.

United States District Court for the Eastern District of California

August 2, 2021, Decided; August 2, 2021, Filed

CASE NO. 1:20-CV-0787 AWI BAM

Reporter

2021 U.S. Dist. LEXIS 144231 *; 2021 WL 3287719

YELLOWCAKE, INC., Plaintiff v. MORENA MUSIC, INC., and EDUARDO LEON dba Long Play Music, and DOES 1-50 inclusive, DefendantsMORENA MUSIC, INC, Count-Plaintiff v. YELLOWCAKE, INC., COLONIZE MEDIA, INC., and JOSE DAVID HERNANDEZ, Counter-Defendants

Prior History: *Yellowcake, Inc. v. Morena Music, Inc., 522 F. Supp. 3d 747, 2021 U.S. Dist. LEXIS 39127, 2021 WL 795823 (E.D. Cal., Mar. 1, 2021)*

Core Terms

co-owner, albums, allegations, exclusive right, rights, infringement, license, Counterclaim, ownership interest, notice, copyright infringement, misrepresentations, transferring, musical, unfair, void ab initio, non-exclusive, recordings, co-author, possessed, ownership, transfer agreement, exclusive license, leave to amend, Copyright Act, documents, sanctions, assignee, entirety, licensee

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

Under Fed. R. Civ. P. 12(b)(6), a claim may be dismissed because of the plaintiff's failure to state a claim upon which relief can be granted. Counterclaims are subject to Rule 12(b)(6) challenges. A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. In reviewing a complaint under Rule 12(b)(6), all well-pleaded allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. However, complaints that offer no more than labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. The Court is not required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] Motions to Dismiss, Failure to State Claim

To avoid a Fed. R. Civ. P. 12(b)(6) dismissal, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Plausibility means more than a sheer possibility, but less than a probability, and facts that are merely consistent with liability fall short of plausibility.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN3[] Motions to Dismiss, Failure to State Claim

The United States Court of Appeals for the Ninth Circuit has distilled the following principles for Fed. R. Civ. P. 12(b)(6) motions: (1) to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively; (2) the factual allegations that are taken as true must plausibly suggest entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. If a motion to dismiss is granted, the district court should grant leave to amend even if no request to amend the pleading was made. However, leave to amend need not be granted if amendment would be futile or the plaintiff has failed to cure deficiencies despite repeated opportunities.

Copyright Law > Scope of Copyright Protection > Ownership Interests > Joint Authors & Works

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

HN4[] Ownership Interests, Joint Authors & Works

It is concrete law that co-owners of a copyright cannot sue another co-owner for copyright infringement.

Copyright Law > Scope of Copyright Protection > Ownership Interests > Joint Authors & Works

HN5[] Ownership Interests, Joint Authors & Works

A co-owner cannot unilaterally grant exclusive rights in a copyright without the agreement of all other co-owners.

Business & Corporate Compliance > ... > Ownership Rights > Distribution > Infringement

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Derivative Works

Business & Corporate Compliance > ... > Ownership Rights > Displays > Infringement

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Infringement

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Scope of Protection

HN6[] Copyright, Infringement of Distribution Rights

The Copyright Act affords copyright owners the exclusive rights to display, perform, reproduce, or distribute copies of a copyrighted work, to authorize others to do those things, and to prepare derivative works based upon the copyrighted work. 17 U.S.C.S. § 106. Only the legal or beneficial owner of an exclusive right under a copyright has standing to sue for infringement of that right. A claim for copyright infringement has two basic elements: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. To plead ownership, a plaintiff must plausibly allege it owns a valid copyright registration for its works.

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Expression & Idea Distinguished

Copyright Law > Scope of Copyright Protection > Ownership Interests > Joint Authors & Works

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Scope of Protection

HN7[] Statutory Copyright & Fixation, Expression & Idea Distinguished

One method of copyright ownership involves co-ownership. A joint work is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. 17 U.S.C.S. § 101. The authors of a joint work are co-owners of the copyright in that work. 17 U.S.C.S. § 201(a). Each author must make an independently copyrightable contribution, which is a contribution that represents original expression that could stand on its own as the subject matter of copyright. That is, to be an author, one must supply more than mere direction or ideas; one must translate an idea into a fixed tangible expression entitled to copyright protection.

Copyright Law > Scope of Copyright Protection > Ownership Interests > Joint Authors & Works

Copyright Law > ... > Assignments & Transfers > Licenses > Nonexclusive Licenses

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > Scope of Conveyances

HN8[] Ownership Interests, Joint Authors & Works

One co-owner of a copyright may bring suit to enforce a copyright without joining the other co-authors/co-owners to the suit. Because each co-owner of a joint work has an independent right to use or license the copyright, a co-owner cannot be liable to another co-owner for infringement of copyright, but co-owners must account to other co-authors for any profits earned from licensing or using the copyright. Further, unless all co-owners/co-authors of a joint work join in granting an exclusive license, a single co-author (acting on its own behalf) can grant only a non-exclusive license in the copyright work because one co-author cannot limit the other co-authors' independent right to exploit the copyright. However, a co-owner of a copyright is free to transfer his ownership interest to another, as long as the transfer is only of the exclusive copyright interests that the transferring co-owner himself possesses. A co-owner of a copyright can transfer its interests in the copyright without the permission of the other co-owners.

Business & Corporate Compliance > ... > Contract Formation > Contracts Law > Contract Formation

HN9[] Contracts, Contract Formation

A contract that is void ab initio is null from the beginning, and treated as if it had never existed.

Copyright Law > ... > Assignments & Transfers > Licenses > Nonexclusive Licenses

HN10[] **Licenses, Nonexclusive Licenses**

A non-exclusive licensee cannot sue for copyright infringement.

Copyright Law > ... > Assignments & Transfers > Licenses > Exclusive Licenses

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > Scope of Conveyances

Copyright Law > Scope of Copyright Protection > Ownership Interests > Joint Authors & Works

Copyright Law > ... > Assignments & Transfers > Licenses > Nonexclusive Licenses

HN11[] **Licenses, Exclusive Licenses**

The United States Court of Appeals for the Ninth Circuit, in finding that its decision in Sybersound did not prohibit copyright co-owners from transferring their rights without permission from other co-owners, described and explained part of Sybersound as follows: We held in Sybersound that when one co-owner independently attempts to grant an exclusive license of a particular copyright interest, that licensee does not have standing to sue alleged third-party infringers. After all, one co-owner, acting independently, may not limit the other co-owners' independent rights to exploit the copyright. Such a conclusion stems from the self-evident principle that a joint-owner cannot transfer more than he himself holds; thus, an assignment or exclusive license from one joint-owner to a third party cannot bind the other joint-owners or limit their rights in the copyright without their consent. In other words, the third party's right is exclusive as to the assigning or licensing co-owner, but not as to the other co-owners and their assignees or licensees. As such, a third-party assignee or licensee lacks standing to challenge the attempted assignments or licenses of other copyright owners.

Business & Corporate Compliance > ... > Copyright Law > Copyright Infringement Actions > Civil Infringement Actions

Copyright Law > Scope of Copyright Protection > Ownership Interests > Joint Authors & Works

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN12[] **Copyright, Civil Infringement Actions**

The copyright statute permits infringement suits only if brought by owners of an exclusive right against alleged violators of such exclusive right. 17 U.S.C.S. § 501. If an "exclusive right" could only be possessed by a sole owner of a copyright, a co-owner would be unable to bring an infringement action to protect his interest. Moreover, such a limitation would contradict the principle of the free transferability of copyright ownership interests—a principle reflected in both the express language of 17 U.S.C.S. § 201(d) and Ninth Circuit precedent, neither of which treat transferability differently based on whether the original copyright owner is a sole owner or a co-owner. Thus, the Ninth Circuit's Sybersound decision merely imposes a standing limitation on copyright assignees and licensees that reflects the basic principle that one cannot give away more than one's share in a copyright—it need not, and should not, be extended to limit a co-owner's ability to transfer unilaterally any exclusive copyright interests that he himself possesses.

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > Scope of Conveyances

HN13[] **Assignments & Transfers, Scope of Conveyances**

A co-owner of a copyright is free to transfer that ownership interest to another, as long as the transfer was only of exclusive copyright interests that the co-owner itself possess.

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > Scope of Conveyances

HN14[] **Assignments & Transfers, Scope of Conveyances**

A transfer is limited by the rights possessed by the transferor and the rights that are attempted to be transferred. One cannot convey what one does not possess.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN15[] **State Regulation, Claims**

The California Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 et seq., broadly proscribes the use of any unlawful, unfair or fraudulent business act or practice. Cal. Bus. & Prof. Code. § 17200. The UCL operates as a three-pronged statute: Each of these three adjectives unlawful, unfair, or fraudulent captures a separate and distinct theory of liability. The UCL's unlawful prong borrows violations of other laws and makes those unlawful practices actionable under the UCL, and virtually any law or regulation — federal or state, statutory or common law — can serve as a predicate. When the underlying legal claim that supports a UCL cause fails, however, so too will the the derivative UCL claim.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN16[] **Trade Practices & Unfair Competition, State Regulation**

For purposes of the California Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 et seq., conduct is unfair either when it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition, or when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

Civil Procedure > Sanctions > Baseless Filings > Certification Requirements

HN17[] **Baseless Filings, Certification Requirements**

Fed. R. Civ. P. 11(c)(2) provides strict procedural requirements for parties to follow when they move for sanctions under Rule 11. Among other things, a motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). Fed. R. Civ. P. 11(c)(2).

Counsel: **[*1]** For Yellowcake, Inc., a California corporation, Plaintiff: Seth Berman, PHV, LEAD ATTORNEY, PRO HAC VICE, Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wo, Lake Success, NY; Thomas P. Griffin, Jr., Hefner Stark & Marois, LLP, Sacramento, CA.

For Morena Music, Inc., a California corporation, Eduardo Leon, Doing business as, Long Play Music, Defendants: Alejandro Menchaca, LEAD ATTORNEY, Lopez and Prajin, Beverly Hills, CA; George Lewis Prajin, LEAD ATTORNEY, Lopez and Prajin, Newport Beach, CA; Anthony Rodriguez Lopez, Law Offices Lopez & Associates, Beverly Hills, CA.

For Eduardo Leon, Morena Music, Inc., a California corporation, Counter Claimants: Alejandro Menchaca, LEAD ATTORNEY, Lopez and Prajin, Beverly Hills, CA; George Lewis Prajin, LEAD ATTORNEY, Lopez and Prajin, Newport Beach, CA; Anthony Rodriguez Lopez, Law Offices Lopez & Associates, Beverly Hills, CA.

For COLONIZE MEDIA, INC, Jose David Hernandez, Counter Defendants: Seth Berman, PHV, LEAD ATTORNEY, Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wo, Lake Success, NY.

For Yellowcake, Inc., a California corporation, Counter Defendant: Seth Berman, PHV, LEAD ATTORNEY, Abrams, Fensterman, Fensterman, Eisman, **[*2]** Formato, Ferrara, Wo, Lake Success, NY; Thomas P. Griffin, Jr., Hefner Stark & Marois, LLP, Sacramento, CA.

Judges: Anthony W. Ishii, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: Anthony W. Ishii

Opinion

ORDER ON COUNTER-DEFENDANTS' MOTION TO DISMISS

(Doc. No. 41)

This is a copyright dispute involving three musical albums by the artist Los Originales De San Juan. Through a First Amended Counterclaim ("FAC"), Counter-Plaintiff Morena Music, Inc. ("Morena") brings claims against Counter-Defendants Yellowcake, Inc. ("Yellowcake"), Colonize Media, Inc. ("Colonize"), and Jose Hernandez ("Hernandez") (collectively "YCH") for two copyright violations under the Copyright Act (*17 U.S.C. § 100 et seq.*) involving the albums and associated cover art, and a state law claim for unfair competition (*Cal. Bus. & Prof. Code § 17200 et seq.*) ("UCL"). Currently before the Court is YCH's second *Rule 12(b)(6)* motion to dismiss two of the three claims alleged against them. For the reasons that follow, YCH's motion will be granted.

***RULE 12(b)(6)* FRAMEWORK**

HN1[] Under *Federal Rule of Civil Procedure 12(b)(6)*, a claim may be dismissed because of the plaintiff's "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. Counterclaims are subject to *Rule 12(b)(6)* challenges. See *Seismic Reservoir 2020, Inc. v. Paulsson, 785 F.3d 330, 335 (9th Cir. 2015)*. A dismissal under *Rule 12(b)(6)* may be based on the lack of a cognizable legal theory or on the absence of sufficient **[*3]** facts alleged under a cognizable legal theory. *Mollett v. Netflix, Inc., 795 F.3d 1062, 1065 (9th Cir. 2015)*. In reviewing a complaint under *Rule 12(b)(6)*, all well-pleaded allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *Kwan v. SanMedica, Int'l, 854 F.3d 1088, 1096 (9th Cir. 2017)*. However, complaints that offer no more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *Johnson v. Federal Home Loan Mortg. Corp., 793 F.3d 1005, 1008 (9th Cir. 2015)*. The Court is "not required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Seven Arts Filmed Entm't, Ltd. v. Content Media Corp. PLC, 733 F.3d 1251, 1254 (9th Cir. 2013)*. ***HN2***[] To avoid a *Rule 12(b)(6)* dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal, 556 U.S. at 678*; *Mollett, 795 F.3d at 1065*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*; *Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013)*. "Plausibility" means "more than a sheer possibility," but less than a probability, and facts that are "merely consistent" with liability fall short of "plausibility." *Iqbal, 556 U.S. at 678*; *Somers, 729 F.3d at 960*. ***HN3***[] The Ninth Circuit has distilled the following principles **[*4]** for *Rule 12(b)(6)* motions: (1) to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively; (2) the factual allegations that are taken as true must plausibly suggest entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. *Levitt v. Yelp! Inc., 765 F.3d 1123, 1135 (9th Cir. 2014)*. If a motion to dismiss is granted, "[the] district court should grant leave to amend even if no request to amend the pleading was made . . . ." *Ebner v. Fresh, Inc., 838 F.3d 958, 962 (9th Cir. 2016)*. However, leave to amend need not be granted if amendment would be futile or the plaintiff has failed to cure deficiencies despite repeated opportunities. *Garmon v. County of L.A., 828 F.3d 837, 842 (9th Cir. 2016)*.

BACKGROUND

From the FAC, Morena is a record label that is in the business of producing, manufacturing, distributing, exploiting, selling, and licensing sound and audio-visual recordings and artwork. Jesus Chavez Sr. ("Chavez") is the founder and principal of the musical group Los Originales De San Juan, a popular Mexican musical group.

On September 16, 2013, Morena entered **[*5]** into an oral recording agreement with Chavez whereby Morena commissioned Chavez to provide services as a recording artist in the making of sound and audio-visual recordings for three albums (50 Mentadas, 15 Corridos Inmortales, and Celebrando 39). Pursuant to the agreement, Morena agreed to: (1) select the musical compositions to be recorded on the albums; (2) commission and/or provide the sound engineers and audio-visual directors; (3) produce the musical performances on the albums; (4) direct the recording and filming of musical and audiovisual performances to be embodied on the albums; and (5) pay Chavez a fixed amount per album. Chavez agreed to follow Morena's artistic direction, perform the recordings, and grant Morena the non-exclusive right to utilize Chavez's likeness and his group's name. Morena performed the above services and thereby contributed sufficient originality to the albums such that Morena at a minimum is a co-author, co-owner, or joint owner of the copyrights in the albums for purposes of the Copyright Act. Morena also produced, created, and designed the album cover art for each of the three albums. Morena also registered copyrights in the content of the three **[*6]** albums and in the cover art of the three albums. Morena alleges that it is the exclusive copyright owner of the cover art and at least a co-owner of the albums with Chavez.

In April 2019, Hernandez had a meeting with Chavez. At the meeting, Hernandez intentionally and willfully misled Chavez into mistakenly believing that Morena had no rights in the Los Originales' albums and cover art and that Chavez was free to sell all rights in the works exclusively to Yellowcake and Colonize. Hernandez offered Chavez a significant amount sum of money and promise to indemnify to purchase the exclusive rights in the albums and cover art. Hernandez engaged in fraudulent or wrongful conduct. As a result, Chavez purportedly entered into an agreement ostensibly to sell the entirety of all right, title, and interest in and to the albums and cover art exclusively to Yellowcake. However, Chavez did not possess such exclusive rights to grant in their entirety, which allegedly rendered such agreement void ab initio.

On December 21, 2019, Morena discovered that Yellowcake and Colonize created or caused the creation of copies of the three Los Originales albums and cover art and was distributing, selling and **[*7]** exploiting these works through online platforms such as ITunes, Amazon Music, and YouTube. This was done without Morena's authorization. Yellowcake sent correspondences to Morena in which Yellowcake was claiming ownership of the masters and sound recordings of the three albums.

Yellowcake and Colonize sent fraudulent takedown notices to YouTube that falsely claimed that Morena had no right to post or upload the three albums and cover art. Prior to the takedown notices, Morena had received significant revenue from YouTube, and the YouTube uploads provided an important and lucrative marketing channel for the three albums and cover art. Now, YCH's uploads of the albums and cover art have generated substantial revenue on YouTube. However, Yellowcake and Colonize do not possess exclusive right or license from Chavez and Morena as co-owners to use and exploit the albums and cover art and thus, have no authority to engage in the on-going reproduction, use, and or display of the albums and cover art.

COUNTER-DEFENDANTS' MOTION TO DISMISS

I. First Cause of Action — Copyright Infringement of Sound Recordings

Counter-Defendants' Arguments

Yellowcake argues that in the prior motion to dismiss, the **[*8]** Court held that Morena could maintain a copyright infringement claim as a joint owner of the albums if it could show that Yellowcake was not a joint owner. However, the FAC expressly alleges that Morena is a co-owner of the albums and fails to show that Yellowcake is not a co-owner. ***HN4***[] It is concrete law that co-owners of a copyright cannot sue another co-owner for copyright infringement.

In reply, Yellowcake argues that Morena's reliance on the rule that a co-owner cannot grant an exclusive license without the permission of the other co-owners of the copyright is misplaced. In the Court's prior dismissal order, the Court recognized that there was no dispute that Chavez entered into a written transfer agreement with Yellowcake and that, while Chavez as a co-owner could not transfer exclusive interests, he could transfer his own ownership interest. The Court recognized that if Morena is a joint owner, the effect of the transfer agreement between Morena and Chavez was to make Morena and Yellowcake joint owners of the copyrights. Therefore, the fact that Chavez could not transfer an exclusive license if he was merely a co-owner does not mean that Yellowcake is not at least a co-owner of the **[*9]** copyright with Morena.

Counter-Plaintiff's Opposition

Morena argues that it has alleged that it is at least a co-owner of the copyright in the albums with Chavez. ***HN5***[] A co-owner cannot unilaterally grant exclusive rights in a copyright without the agreement of all other co-owners. The FAC establishes that any document purporting to grant Yellowcake exclusive rights in the copyrights is void ab initio because Morena never agreed to allow Chavez to assign exclusive rights and Chavez alone did not possess such exclusive rights to sell. Therefore, Morena is not a co-owner with Yellowcake even if there is no dispute that Yellowcake and Chavez entered into a written transfer agreement. Accepting the allegations as true, the Court must deny dismissal.

Legal Standard

HN6[] "The Copyright Act affords copyright owners the 'exclusive rights' to display, perform, reproduce, or distribute copies of a copyrighted work, to authorize others to do those things, and to prepare derivative works based upon the copyrighted work." *Maloney v. T3Media, Inc., 853 F.3d 1004, 1010 (9th Cir. 2017)*; see *17 U.S.C. § 106*. Only the "legal or beneficial owner of an exclusive right under a copyright" has standing to sue for infringement of that right. *Righthaven LLC v. Hoehn, 716 F.3d 1166, 1169 (9th Cir. 2013)*. A claim for copyright infringement has two basic elements: **[*10]** (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 351, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991)*; *Great Minds v. Office Depot, Inc., 945 F.3d 1106, 1110 (9th Cir. 2019)*; *Seven Arts, 733 F.3d at 1254*. "To plead ownership, [a plaintiff] must plausibly allege it owns a valid copyright registration for its works." *Malibu Textiles, Inc. v. Label Lane Int'l, Inc., 922 F.3d 946, 951 (9th Cir. 2019)*.

HN7[] One method of copyright ownership involves co-ownership. *Richlin v. MGM Pictures, Inc., 531 F.3d 962, 968 (9th Cir. 2008)*. A "joint work" is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." *17 U.S.C. § 101*; *Aalmuhammed v. Lee, 202 F.3d 1227, 1231 (9th Cir. 2000)*; *Ashton-Tate Corp. v. Ross, 916 F.2d 516, 520 (9th Cir. 1990)*. "The authors of a joint work are co-owners of the copyright in that work." *17 U.S.C. § 201(a)*; *Richlin, 531 F.3d at 968*; *Ashton-Tate, 916 F.2d at 521*. Each author must make an "independently copyrightable contribution," which is a contribution that "represents original expression that could stand on its own as the subject matter of copyright." *Ashton-Tate, 916 F.2d at 521* (quoting P. Goldstein, *Copyright: Principles, Law and Practice*, § 4.2.1 p.379 (1989)); see also *Richlin, 531 F.3d at 968*. That is, "to be an author, one must supply more than mere direction or ideas; one must 'translate an idea into a fixed tangible expression entitled to copyright protection." *S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1087 (9th Cir. 1989)*; *Ashton-Tate, 916 F.2d at 521*. ***HN8***[] One co-owner may bring suit to enforce a copyright without joining the other co-authors/co-owners to the suit. *Corbello v. Devito, 777 F.3d 1058, 1065 (9th Cir. 2015)*. Because each co-owner of a "joint work" has an independent right to use **[*11]** or license the copyright, a co-owner cannot be liable to another co-owner for infringement of copyright, but co-owners must account to other co-authors for any profits earned from licensing or using the copyright. See *id. at 1062, 1066*; *Ashton-Tate, 916 F.2d at 522*; *Oddo v. Ries, 743 F.2d 630, 632-33 (9th Cir. 1984)*. Further, unless all co-owners/co-authors of a "joint work" join in granting an exclusive license, a single co-author (acting on its own behalf) can grant only a non-exclusive license in the copyright work because one co-author cannot limit the other co-authors' independent right to exploit the copyright. *Sybersound, 517 F.3d at 1146*. However, a co-owner of a copyright is free to transfer his ownership interest to another, as long as the transfer is only of the exclusive copyright interests that the transferring co-owner himself possesses. Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n, 953 F.3d 638, 645 n.2 (9th Cir. 2020); see *Corbello, 777 F.3d at 1065*. A co-owner of a copyright can transfer its interests in the copyright without the permission of the other co-owners. *Corbello, 777 F.3d at 1064-66* & n.5.

Discussion

Both parties acknowledge that the Court previously dismissed any copyright infringement claim by Morena that was based on Morena being a co-author/co-owner of the albums. See *Yellowcake, Inc. v. Morena Music, Inc., 522 F. Supp. 3d 747, 2021 U.S. Dist. LEXIS 39127, *21-*22 (E.D. Cal. Mar. 1, 2021)*. The Court dismissed this theory because the allegations of the Counterclaim and Yellowcake's Complaint indicated that, by virtue of the transfer **[*12]** agreement between Yellowcake and Chavez, Morena was a co-owner with Yellowcake. See id. The Court dismissed Morena's infringement claim with leave to amend and instructed Morena that any amendment was required to explain why Yellowcake was not a co-owner with Morena. See id. at *50. In response to the Court's order, Morena contends that it is relying on the theory that it is a co-owner with Chavez and that Yellowcake is not a co-owner because the agreement between Chavez and Yellowcake is void ab initio. Specifically, after alleging that Morena "is at least a co-owner along with Chavez in the copyrights for the Los Originales Albums," FAC ¶ 18, the FAC in alleges: ". . . Chavez purportedly entered into an agreement to ostensibly sell the entirety of all right, title, and interest in and to the Los Originales Albums and Cover Art exclusively to . . . Yellowcake. At the time he entered into this agreement with . . . Yellowcake, however, Chavez did not possess such exclusive rights to grant in their entirety, rendering such agreement void ab intio." FAC ¶ 21.

HN9[] A contract that is "void ab initio" is "[n]ull from the beginning," Black's Law Dictionary (11th Ed. 2019), and treated as if it **[*13]** had never existed. *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co., 156 Cal.App.4th 1259, 1266, 67 Cal. Rptr. 3d 917 (2007)*; see also *Chen v. Bell-Smith, 768 F.Supp.2d 121, 134 (D. D.C. 2011)*. If the transfer agreement between Chavez and Yellowcake is void ab initio, then the transfer agreement transferred nothing between Chavez and Yellowcake. See Chen, 768 F.Supp.2d at 134; A-Mark Coin Co. v. General Mills, Inc., 148 Cal.App.3d 312, 322, 195 Cal. Rptr. 859 (1983) ("No rights are enforceable under a void contract.").

Morena relies heavily on *Sybersound* to argue that it is a co-owner with Chavez and not Yellowcake. In *Sybersound*, plaintiff Sybersound attempted to enforce karaoke-use interests in certain copyrights. See Sybersound, 517 F.3 at 1141-42. Sybersound claimed "to have acquired an ownership interest in [several songs] by entering into a written agreement with TVT, an original [co-owner] to the copyright of these songs." Id. at 1142. Sybersound argued that "it stepped into TVT's shoes and became a co-owner in the karaoke-use interest of the copyright when it became the 'exclusive assignee and licensee of [TVT's] copyrighted interests for purposes of karaoke use, and also exclusive assignee of the right to sue to enforce the assigned copyright interests . . . pursuant to the assignment agreement with TVT." Id. at 1145. The Ninth Circuit found that Sybersound's position was flawed because TVT could not grant an exclusive right in the karaoke interests of the copyrights. See id. The Ninth Circuit assumed **[*14]** that the karaoke-use interest was an interest protected by copyright but observed that TVT was not the exclusive owner of that interest. See id. "[U]nless all the other co-owners of the copyright joined in granting an exclusive right to Sybersound, TVT, acting solely as a co-owner of the copyright, could grant only a non-exclusive license to Sybersound because TVT may not limit the other co-owners' independent right to exploit the copyright." Id. Additionally, the Ninth Circuit rejected the argument that Sybersound became an exclusive assignee of TVT's copyright interests because the assignment agreement transferred all its karaoke interests to Sybersound. See id. at 1146. The Ninth Circuit held that, in order to be effective, an assignment or any other alienation permitted by the Copyright Act must be exclusive, and because TVT's assignment was admittedly non-exclusive, TVT succeeded only in transferring what it could — a non-exclusive license. See id. ***HN10***[] A non-exclusive licensee cannot sue for copyright infringement. See id.

In *Corbello*, the Ninth Circuit addressed the argument that *Sybersound* prohibited co-owners from transferring their rights without the permission of other co-owners. See Corbello, 777 F.3d at 1064. ***HN11***[] In **[*15]** finding that *Sybersound* did not prohibit co-owners from transferring their rights without permission from other co-owners, the *Corbello* court described and explained part of *Sybersound* as follows:

> We held [in *Sybersound*] that when one co-owner independently attempts to grant an exclusive license of a particular copyright interest, that licensee—in this case, Sybersound—does not have standing to sue alleged third-party infringers. [Sybersound, 517 F.3d] at 1146. After all, one co-owner, acting independently, "may not limit the other co-owners' independent rights to exploit the copyright." Id. Such a conclusion stems from the self-evident principle that a joint-owner cannot transfer more than he himself holds; thus, an assignment or exclusive license from one joint-owner to a third party cannot bind the other joint-owners or limit their rights in the copyright without their consent. In other words, the third party's right is "exclusive" as to the assigning or licensing co-owner, but not as to the other co-owners and their assignees or licensees. As such, a third-party assignee or licensee lacks standing to challenge the attempted assignments or licenses of other copyright owners.
>
> . . . But [*Sybersound*'s] emphasis **[*16]** on the word "exclusive" in these provisions cannot mean that only sole owners possess "exclusive" rights, as such a rule would run directly contrary to another well-settled principle of copyright law: the right of one joint-owner to sue third-party infringers without joining any of his fellow co-owners, a right Sybersound itself expressly recognizes. See id. at 1145 . . . . ***HN12***[] After all, the copyright statute permits infringement suits only if brought by owners of an "exclusive right" against alleged violators of such "exclusive right." 17 U.S.C. § 501 (emphasis added). If an "exclusive right" could only be possessed by a sole owner of a copyright, a co-owner would be unable to bring an infringement action to protect his interest.
>
> Moreover, such a limitation would contradict the principle of the free transferability of copyright ownership interests—a principle reflected in both the express language of § 201(d) and our Circuit precedent, neither of which treat transferability differently based on whether the original copyright owner is a sole owner or a co-owner. See, e.g., Silvers, 402 F.3d at 887; Gardner, 279 F.3d at 779; Bagdadi, 84 F.3d at 1197. Thus, *Sybersound* merely imposes a standing limitation on copyright assignees and licensees that reflects the basic principle that one cannot give **[*17]** away more than one's share in a copyright—it need not, and should not,

> be extended to limit a co-owner's ability to transfer unilaterally any exclusive copyright interests that he himself possesses.

Id. at 1065-66. The *Corbello* transfer was not affected by *Sybersound* and "constituted a transfer of DeVito's derivative-work interest in the copyright, rather than a license." *Id. at 1066*. Thus, the plaintiff could bring an infringement claim as an owner of a copyright interest. *Id. at 1064-66*.

Part of the analysis from *Corbello* was quoted with approval in *Tresona*. See Tresona, 953 F.3d at 645. *Tresona* further emphasized that the transfer in *Corbello* was a transfer of an interest and not a mere non-exclusive license. See id. at 645 n.2. ***HN13***[] "[A] co-owner of a copyright is free to transfer that ownership interest to another, as long as the transfer was only of 'exclusive copyright interests that [the co-owner itself] possess.'" Id. (quoting *Corbello, 777 F.3d at 1066*.

In this case, Yellowcake's Complaint alleges that it is the exclusive owner of the copyrights to the albums; documents from the Copyright Office indicate that Yellowcake is the sole claimant by virtue of a written transfer contract to the albums/copyrights; and the FAC alleges that Chavez and Yellowcake entered into an agreement for **[*18]** the sale of all rights, titles, and interests in the albums. See Doc. No. 1 & Ex. A; FAC ¶ 21. The allegation of the FAC combined with the actual copyright documents submitted by Yellowcake indicate that Chavez was not attempting to assign an exclusive license or carve out an exclusive interest as in *Sybersound*. Instead, the FAC when read in light of the copyright documents indicate that Chavez was selling everything, including all of his own rights in the albums, to Yellowcake. There is no indication or allegation that Chavez reserved any kind of ownership interest in the copyrights or divided any of the interests. Chavez could sell all interests that he possessed as a co-owner in the albums, and the consent of Morena was not required. See *Corbello, 777 F.3d at 1064-66* & n.5.

Of course, *Sybersound, Corbello*, and *Tresona* indicate that Chavez could not have sold the totality of all the exclusive rights in the albums/copyrights because Morena as a co-owner did not consent. However, the Court cannot conclude that simply because all existing exclusive rights in the jointly-owned copyrights/albums could not have been transferred is enough to render the agreement between Chavez and Yellowcake void ab initio.

First, Morena **[*19]** cites no authority that the agreement between Chavez and Yellowcake is void ab initio. Second, even in *Sybersound*, the Ninth Circuit read the transfer agreement as effecting the creation of a non-exclusive license because TVT could not grant the exclusive rights or license at issue. See *Sybersound, 517 F.3d at 1146*. *Sybersound* did not hold that the assignment was void ab initio. Third, *Corbello* and *Tresona* examined *Sybersound* and concluded that agreements which unsuccessfully attempt to transfer exclusive rights that a transferor does not have are still effective as between the transferor and the transferee. See Tresona, 953 F.3d at 645; *Corbello, 777 F.3d at 1065*. ***HN14***[] The key is that a transfer is limited by the rights possessed by the transferor and the rights that are attempted to be transferred. See Tresona, 953 F.3d at 645 n.2; *Corbello, 777 F.3d at 1064-66*. One cannot convey what one does not possess. In this case, Chavez (per the FAC's allegations) had a full co-ownership interest in the albums that he could transfer without the consent of Morena. See *Corbello, 777 F.3d at 1064-66* & n.5; see also Tresona, 953 F.3d at 645 & n.2.

In sum, because the allegations and judicially noticed documents indicate that Chavez attempted to convey all rights he possessed in the copyrights, even if he misunderstood the extent of the rights he possessed, the circumstances at this time **[*20]** appear to be more in-line with *Corbello* than *Sybersound*, meaning that a transfer of all of Chavez's rights in the copyrights was accomplished. Thus, the allegations and judicially noticed documents do not plausibly indicate that Morena is a co-owner with Chavez and not Yellowcake. The end result is that Chavez has no more exclusive rights in the copyrights, is no longer an owner of the copyrights, and that (crediting Morena's allegations in this *Rule 12(b)(6)* motion) Morena and Yellowcake are co-owners of the copyrights. Since co-owners cannot be liable to each other for copyright infringement, see *id. at 1066*; *Ashton-Tate, 916 F.2d at 522*; *Oddo, 743 F.2d at 632-33*, dismissal of the first cause of action is appropriate.

This is the second time that the Court has dismissed the co-owner theory of copyright infringement because the allegations and judicially noticeable documents indicated that Morena and Yellowcake were co-owners. Therefore, dismissal will be without leave to amend at this time. However, the Court recognizes that no scheduling order has been entered and no discovery or amendment deadlines set. It is possible that further discovery could alter the Court's analysis. If Morena diligently obtains evidence that indicates that Yellowcake is not a co-owner **[*21]** of the copyrights, Morena may file a motion for reconsideration or file a timely amended counterclaim in accordance with any deadlines set by a scheduling order. Finally, because co-owners are required to account to each other for their use of a co-owned copyrights, the Court will permit Morena to file an amended counterclaim that includes a claim for an accounting against Yellowcake. See *Corbello, 777 F.3d at 1062*; *Ashton-Tate, 916 F.2d at 522*; *Oddo, 743 F.2d at 632-33*.

II. Third Cause of Action — UCL

Counter-Defendant's Argument

YCH argues that the FAC's UCL claim is conclusory, lacks factual support, and improperly lumps all Counter-Defendants together without describing what each defendant did. As best can be gleaned from the allegations, it appears that Morena is alleging a UCL claim due to alleged infringing conduct. However, the Court already determined that such a claim is preempted by the Copyright Act. Therefore, no claim is plausibly alleged.

Counter-Plaintiff's Opposition

Morena argues that its UCL claim is not preempted by the Copyright Act because its claim is premised on all of YCH's wrongful conduct, including Hernandez intentionally and willfully misleading Chavez into granting Yellowcake rights in the albums that he did not possess. The conduct **[*22]** that is incorporated by reference is "unfair" because YCH's conduct of misleading Chavez into mistakenly believing that Morena had no rights to the albums/copyrights was an act that threatened or harmed competition and that was immoral and unethical.

Legal Standard

HN15[] The UCL broadly proscribes the use of any "unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code. § 17200*; *Beaver v. Tarsadia Hotels, 816 F.3d 1170, 1177 (9th Cir. 2016)*. "The UCL operates as a three-pronged statute: 'Each of these three adjectives [unlawful, unfair, or fraudulent] captures a 'separate and distinct theory of liability.'" *Beaver, 816 F.3d at 1177* (citation omitted). The UCL's "unlawful" prong "borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL," and "virtually any law or regulation — federal or state, statutory or common law — can serve as a predicate . . . ." *Candelore v. Tinder, Inc., 19 Cal.App.5th 1138, 1155, 228 Cal. Rptr. 3d 336 (2018)*. When the underlying legal claim that supports a UCL cause fails, however, "so too will the [the] derivative UCL claim." *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc., 28 Cal.App.5th 923, 950, 239 Cal. Rptr. 3d 577 (2018)*. California law with respect to "unfair" conduct is currently "in flux." *Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018)*. ***HN16***[] Conduct is "unfair" either when it "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as **[*23]** a violation of the law, or otherwise significantly threatens or harms competition," or when it 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Id.

Discussion

The third counterclaim incorporates by reference all prior paragraphs, states that YCH's conduct including acts of infringement harmed Morena and the public, and notes that a UCL claim can be based on the violation of any state or federal law. See FAC ¶¶ 54-56.

The most natural reading of the third cause of action is that Morena's UCL claim is based on infringement of Morena's copyrights in the albums and cover art by YCH; no other basis is clearly apparent. However, the Court already held that such a UCL claim based on infringement is preempted by the Copyright Act. See *Yellowcake, at *43-*44*. Morena does not address the Court's prior analysis, nor does it vigorously defend any UCL claim based on infringing conduct by YCH. The Court detects no reason to deviate from its prior conclusion. Therefore, any UCL claim based on infringing conduct is preempted. See id.

Morena's opposition argues that it has incorporated by reference other paragraphs and thus, **[*24]** the entirety of YCH's conduct is at issue. In particular, however, Morena's opposition focuses on Hernandez intentionally and willfully misleading Chavez into the mistaken belief that Morena had no rights in the albums and thus, that he could freely sell all rights in the albums to YCH. There are problems with this theory.[1]

First, Paragraph 53 of the FAC, which is the first paragraph of the third cause of action, incorporates by reference all prior paragraphs. As part of the incorporation by reference, irrelevant paragraphs are included. This pleading practice — incorporating all prior paragraphs by reference irrespective of relevance to the claim being pled — is an improper shotgun pleading technique that generally does not give sufficient notice of the actual basis for a claim. See *Weiland v. Palm Beach Cnty. Sheriff's Office, 792 F.3d 1313, 1321-23 (11th Cir. 2015)*; *Deerpoint Grp., Inc. v. Agrigenix, LLC, 345 F.Supp.3d 1207, 1234 n.14 (E.D. Cal. 2018)*. The Court held that Morena's prior Counterclaim used improper shotgun pleading and explained that the practice should be avoided. See *Yellowcake, 2021 U.S. Dist. LEXIS 39127 at *34-*35* & n.4. Morena did not heed the Court's prior analysis. The basis identified from the opposition for Morena's UCL claim is not clear or obvious from the other prior paragraphs. Morena's second use of the shotgun pleading technique once again fails to apprise the Court **[*25]** and opposing counsel of the basis for its UCL claim. See id. On this basis alone, dismissal of the third counterclaim is appropriate.

Second, even if the Court held that the FAC gives fair notice of a UCL claim based on Hernandez's conduct in obtaining Chavez's ownership interests in the albums, Morena has not adequately alleged that any "unfair" conduct caused it harm. Chavez was at least a co-owner of the albums. As a co-owner, Chavez had the ability to transfer the entirety of his own interests in the albums without the permission of co-owner Morena. See *Corbello, 777 F.3d at 1064-66* & n.5. Morena has no recognizable interest in or claim to Chavez's ownership rights that would allow it to veto or limit a full transfer by Chavez. Thus, Hernandez could attempt to obtain or actually obtain the totality of Chavez's ownership interest in the copyrights, irrespective of Morena's interests or consent. While Morena alleges that Hernandez made misrepresentations in obtaining Chavez's ownership interests, the misrepresentations do not appear to be germane. Even if Chavez believed the misrepresentations that Morena had no ownership interest in the copyrights, Chavez still would have correctly believed that he was transferring **[*26]** all ownership interests that he possessed through the transfer agreement. Even considering the alleged true extent of Chavez's ownership interests in the copyrights, Chavez could still sell his actual interest without regard to Morena. Further, the misrepresentations were directed solely to Chavez in order to convince him to sell. It would therefore seem that the person who would be injured from Hernandez's misrepresentations is Chavez, not Morena.[2] There is no indication that Hernandez made misrepresentations to Morena or that Morena detrimentally relied on the misrepresentations in any way. While the Court would agree that Yellowcake's conduct after acquiring Chavez's interests and registering the copyrights was detrimental to Morena, that conduct is separate from and post-dates any

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[1] There are three bases for a UCL claim, "unlawful," "fraudulent," and "unfair" conduct. *Beaver, 816 F.3d at 1177*. Morena presumably knows exactly what conduct of YCH violates which aspects of the UCL. It is up to Morena to clearly explain its theories of liability. It is not enough for Morena to say that the entirety of YCH's conduct is at issue and then identify only one act by Hernandez. Since Morena has only identified one act by Hernandez, the Court will only focus on Hernandez's misleading acts/misrepresentations in obtaining Chavez's copyright interests.

[2] The Court notes that any injury to Chavez would appear to be theoretical at best. By believing Hernandez, Chavez may have actually obtained a windful because Yellowcake allegedly was attempting to pay for all rights that existed in the copyrights, not just Chavez's. Presumably one would pay more to be a sole-owner of a copyright, as opposed to a joint-owner. Thus, it seems unlikely that Chavez has suffered any injury from the conduct of YCH.

misrepresentations from Hernandez to Chavez. Therefore, it is unclear how misrepresentations to Chavez about the extent of his or Morena's ownership interests in the albums are either "unfair" or injurious to Morena.

In sum, there is no plausible claim alleged for a violation of the UCL.[3] The UCL theory that is clearly alleged in the FAC is preempted and the theory that is identified in the opposition is **[*27]** neither fairly noticed nor plausibly pled in the FAC. This is the second time that the Court has dismissed Morena's UCL claim. The only theories of UCL liability that have been adequately identified are not plausible. Thus, the Court will dismiss the UCL claim without leave to amend.[4]

III. *Rule 11* Sanctions

HN17[] *Rule 11(c)(2)* "provides strict procedural requirements for parties to follow when they move for sanctions under *Rule 11*." *Radcliffe v. Rainbow Const. Co., 254 F.3d 772, 788 (9th Cir. 2001)*; see *Hadsell v. Baskin, 790 Fed. App'x 97, 98 (9th Cir. 2020)*. Among other things, a "motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates *Rule 11(b)*." *Fed. R. Civ. P. 11(c)(2)*.

In this case, YCH requests *Rule 11* sanctions as part of its *Rule 12(b)(6)* motion. YCH's request therefore violates the "separate motion" requirement. Because YCH has failed to meet the "strict procedural requirements" of *Rule 11(c)(2)*, YCH's motion for *Rule 11* sanctions will be denied. See id.; *Cohen v. American Sec. Ins. Co., 735 F.3d 601, 607 n.3 (7th Cir. 2013)*; *Williamson v. Recovery L.P., 542 F.3d 43, 51-52 (2d Cir. 2008)*; *Beltran v. Procare Pharm., LLC, 2020 U.S. Dist. LEXIS 194043, *9 (C.D. Cal. Oct. 19, 2020)*; *South Shore Ranches, LLC v. Lakelands Co., LLC, 2009 U.S. Dist. LEXIS 42941, *21 (E.D. Cal. May 13, 2009)*.

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. Counter-Defendants' *Rule 12(b)(6)* motion to dismiss (Doc. No. 41) is GRANTED;

2. The first and third counterclaims are DISMISSED without leave to amend;

3. Within fourteen (14) days of service of this order, Counter-Plaintiff may file a Second Amended Counterclaim that adds a claim for an accounting;

4. If Counter-Plaintiff fails to **[*28]** timely file a Second Amended Complaint, then Defendants shall file an answer to the First Amended Counterclaim within twenty-one (21) days of service of this order; and

5. Counter-Defendants' motion for *Rule 11* sanctions is DENIED.

IT IS SO ORDERED.

Dated: August 2, 2021

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[3] The Court also agrees with YCH that the complaint improperly lumps all Defendants together under the third cause of action without adequately differentiating which defendant committed which wrongful acts, or how each Defendant may be liable for the acts of another Defendants. See FAC ¶¶ 53-57. The third cause of action therefore violates the general rule that broad allegations that lump multiple defendants together without distinguishing the alleged wrongs or actions between the defendants fail to provide individual defendants with adequate notice. See *Warnshuis v. Bausch Health U.S., LLC, 2020 U.S. Dist. LEXIS 107136, *23 (E.D. Cal. June 18, 2020)* (and cases cited therein).

[4] Again, Morena indicated that the entirety of YCH's conduct is at issue for purposes of its UCL claim. If Morena can identify specific conduct by Yellowcake, Colonize, or Hernandez that is actionable under the UCL, then Morena can file a motion for reconsideration of the decision to dismiss the third cause of action without leave to amend.

/s/ Anthony W. Ishii

SENIOR DISTRICT JUDGE

Quadvest, L.P. v. San Jacinto River Auth.

United States Court of Appeals for the Fifth Circuit

August 3, 2021, Filed

No. 20-20447

Reporter
7 F.4th 337 *; 2021 U.S. App. LEXIS 23008 **

QUADVEST, L.P.; WOODLAND OAKS UTILITY, L.P., Plaintiffs-Appellees, versus SAN JACINTO RIVER AUTHORITY, Defendant-Appellant.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Texas. USDC No. 4:19-CV-4508.

Quadvest v. San Jacinto River Auth., 2020 U.S. Dist. LEXIS 156144, 2020 WL 5034155 (S.D. Tex., Aug. 14, 2020)

Core Terms

bonds, groundwater, facilities, River, immunity, surface water, contracts, state-action, purposes, provisions, authorization, Conservation, raw, wholesale, tributaries, powers, waters, enabling statute, watershed, funds, construct, districts, municipal, appointed, entity, plans, anticompetitive, properties, acquire, bodies

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Preliminary Considerations > Jurisdiction

HN1[] **Standards of Review, De Novo Review**

An appellate court must first examine the basis of its jurisdiction, a question it reviews de novo.

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN2[] **Appellate Jurisdiction, Collateral Order Doctrine**

The U.S. Court of Appeals for the Fifth Circuit's precedent holds that the collateral order doctrine confers jurisdiction to review an interlocutory appeal of a district court's denial of state-action immunity in certain circumstances. The collateral order doctrine provides a practical construction of *28 U.S.C.S. § 1291*'s final decision requirement, rendering a district court's interlocutory decision immediately appealable if it (1) conclusively determine[s] the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) would be effectively unreviewable on appeal from a final judgment.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

Civil Rights Law > ... > Section 1983 Actions > Scope > Private Facilities

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN3[] **Scope, Exemptions**

Denials of state-action immunity to state, state-entity, and municipal defendants are immediately appealable collateral orders because (1) denials of states' and state entities' claims to state action immunity clearly purport to be conclusive determinations that they have no right not to be sued under federal antitrust laws; (2) an appellate court reviewing the denial of the state or state entity's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim; and (3) state action immunity shares the essential element of absolute, qualified and *Eleventh Amendment* immunities—an entitlement not to stand trial under certain circumstances, which is effectively lost if a case is erroneously permitted to go to trial. However, the U.S. Court of Appeals for the Fifth Circuit does not allow such immediate appeals for private defendants because it must view claims of a right not to be tried with skepticism and the state action doctrine does not immunize private defendants from suit. Accordingly, the denial of state-action immunity to a private party would not be effectively unreviewable on appeal from a final judgment.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN4[] **Exemptions & Immunities, Parker State Action Doctrine**

The U.S. Supreme Court has rejected a purely formalistic inquiry into whether a defendant invokes state-action immunity as a prototypical state agency or a private party.

Governments > Local Governments > Property

HN5[] **Local Governments, Property**

As a public entity, the San Jacinto River Authority is entitled to a presumption that it acts in the public interest absent a showing to the contrary.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN6[] **Motions to Dismiss, Failure to State Claim**

In reviewing the denial of a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the court takes all well-pleaded facts as true.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

***HN7*[]** **Complaints, Requirements for Complaint**

When the complaint attaches written exhibits, the exhibits are considered a part of the pleading for all purposes. *Fed. R. Civ. P. 10(c)*. If an attached exhibit contradicts a factual allegation in the complaint, then indeed the exhibit and not the allegation controls.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

***HN8*[]** **Motions to Dismiss, Failure to State Claim**

A motion to dismiss is properly denied if, accepting the well-pled factual allegations in the plaintiff's complaint as true, the plaintiff states a claim to relief that is plausible on its face.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

***HN9*[]** **Standards of Review, De Novo Review**

State authorization is generally interpreted by an objective test that looks at the language of the statute; if other evidence is needed, it can be gleaned from legislative histories or state judicial decisions. This analysis ordinarily produces a legal conclusion reviewed de novo. Thus, in reviewing the denial of a motion to dismiss based upon state-action immunity, an appellate court will affirm the denial if, taking the well-pleaded factual allegations in the complaint as true and looking to the language of the relevant authorizing statute (and, to the extent necessary, legislative history or judicial decisions), the defendant is not entitled to state-action immunity.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

***HN10*[]** **Sherman Act, Defenses**

U.S. Supreme Court precedent recognizes three tiers of protection from federal antitrust lawsuits under the state-action immunity doctrine: (1) clear exercises of a state's sovereign power are immune from federal antitrust scrutiny ipso facto (Parker immunity); (2) acts of a prototypical state agency or municipality are entitled to immunity if pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation (Hallie scrutiny); and (3) actions by private parties or state agencies controlled by participants in the market they regulate are protected if they meet the aforementioned clear articulation requirement and are also subject to active supervision by the state (Midcal scrutiny). Because states regulate their economies in many ways not inconsistent with the antitrust laws, state-action immunity is disfavored. Ipso facto Parker immunity applies only for state legislation and decisions of a state supreme court, acting legislatively rather than judicially.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Energy & Utilities Law > Antitrust Issues > Monopolization

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN11[] **Scope, Exemptions**

Anticompetitive conduct by a nonsovereign actor must be clearly articulated and affirmatively expressed as state policy to merit state-action immunity. This inquiry involves two distinct questions: (1) Does state law authorize the defendant to engage in the challenged conduct?; and (2) Did the state authorize the challenged conduct with an intent to displace competition with regulation or monopoly service? State lawmakers need not expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. Rather, state-action immunity applies if the anticompetitive effect was the foreseeable result of the state's authorization. When anticompetitive consequences are simply one foreseeable possibility among many, then authorization should not be inferred.

Governments > Local Governments > Property

Governments > Public Improvements > Sanitation & Water

HN12[] **Local Governments, Property**

The Enabling Statute allows the San Jacinto River Authority (SJRA) to contract with municipalities or other corporate bodies or persons for the purpose of establishing and collecting rates and other charges for the sale or use of water, water transmission, treatment or connection facilities and any other services sold, furnished or supplied by SJRA. Enabling Statute § 3(xviii).

Governments > Local Governments > Administrative Boards

Governments > Public Improvements > Sanitation & Water

HN13[] **Local Governments, Administrative Boards**

The Enabling Statute permits the San Jacinto River Authority to enter into any and all necessary and proper contracts necessary or useful in the furtherance of any power granted by law. Enabling Statute § 3(xv).

Governments > Public Improvements > Sanitation & Water

HN14[] **Public Improvements, Sanitation & Water**

Section 3(xviii) of the San Jacinto River Authority's (SJRA's) Enabling Statute authorizes SJRA to participate in the markets for water, water transmission and treatment, and other services through contracts establishing rates and other charges. Precedent establishes that mere authorization to participate in a market does not constitute authority to monopolize that market.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN15[] **Scope, Monopolization Offenses**

Even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization.

Counsel: For Quadvest, L.P., Woodland Oaks Utility, L.P., Plaintiffs - Appellees: J. David Rowe, Curran Walker, Attorney, DuBois, Bryant & Campbell, L.L.P., Austin, TX; Kurt Howard Kuhn, Kuhn Hobbs, P.L.L.C., Austin, TX.

For San Jacinto River Authority, Defendant - Appellant: James E. Zucker, Constance Hankins Pfeiffer, Esq., Reagan William Simpson, Esq., Yetter Coleman, L.L.P., Houston, TX.

Judges: Before WIENER, ELROD, and HIGGINSON, Circuit Judges.

Opinion by: STEPHEN A. HIGGINSON

Opinion

[*339] STEPHEN A. HIGGINSON, *Circuit Judge*:

Plaintiffs-Appellees Quadvest and Woodland Oaks Utility, investor-owned water utilities, sued Defendant-Appellant San Jacinto River Authority ("SJRA"), a state entity, alleging that SJRA violated *Section 1 of the Sherman Act* when it entered into **[*340]** and enforced contracts relating to the purchase of wholesale water in Montgomery County, Texas. SJRA asserted its entitlement to state-action antitrust immunity in a motion to dismiss, which the district court denied. We AFFIRM.

I.

Quadvest and Woodland Oaks Utility ("Plaintiffs") entered into contracts with SJRA governing Plaintiffs' purchase and use of water. **[**2]** Plaintiffs now challenge those contracts as anticompetitive in violation of *Sherman Act Section 1*. The instant interlocutory appeal asserts that SJRA is entitled to state-action immunity from Plaintiffs' lawsuit because the contracts were entered into and are enforced pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation. *See* *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. We first discuss SJRA's creation and its enabling statute.

A. Creation of SJRA and Enabling Statute

SJRA is a political subdivision of the State of Texas, created in 1937 by the Texas Legislature to conserve, control, and utilize the storm and flood waters of the San Jacinto River and its tributary streams. According to Plaintiffs' First Amended Complaint ("FAC"), SJRA owns one-third of the water rights to the surface water in Lake Conroe in addition to groundwater-producing wells. Plaintiffs assert that SJRA is both a water wholesaler and retailer, (1) wholesaling raw and treated surface water to utilities that re-sell the water to their end-user customers, (2) wholesaling raw groundwater to municipal utility districts **[**3]** that serve The Woodlands, and (3) retailing raw surface water to its own end-user customers.[1]

SJRA's Enabling Statute, as amended,[2] vests SJRA with the authority to:

- "store, control and conserve the storm and flood waters of the watershed of the San Jacinto River and its tributaries," (§ 3(i));
- "provide water for domestic, municipal, commercial, industrial and mining purposes . . . including water supplies for cities, towns and industries, and in connection therewith to construct or otherwise acquire water transportation, treatment and distribution facilities and supplemental sources of supply," (§ 3(v));
- "enter into any and all necessary and proper contracts . . . necessary or useful in the furtherance of any power granted by law to [SJRA]," (§ 3(xv)); and

- "enter into such contracts . . . with municipalities or other corporate **[*341]** bodies or persons, public or private, for the purpose of establishing and collecting . . . rates and other charges for the sale or use of water, water transmission, treatment or connection facilities . . . and any other services sold, furnished or supplied by [SJRA]," (§ 3(xviii)).

B. The Lone Star District Regulatory Plan

In June 2006, the Texas Water Development **[**4]** Board, in association with SJRA and Lone Star Groundwater Conservation District (a state entity charged with regulating groundwater use in Montgomery County), commissioned a study to assess the County's long-term groundwater supply needs. According to the FAC, groundwater has historically been less expensive, and thus more widely used, than surface water in Montgomery County. The study determined that, based on projections of future water needs, potable water demand would eventually exceed the estimated sustainable recharge rate of the Gulf Coast Aquifer (Montgomery County's source of groundwater), necessitating the use of surface water. The report further concluded that new surface water treatment facilities would need to be constructed to meet the projected need for potable surface water.

Citing the recommendations of the report, SJRA and Lone Star executed a Memorandum of Understanding ("MOU") by which the parties agreed to "pursue a cooperative implementation strategy . . . to finance and provide wholesale surface water to converting [groundwater] users," "to spread financing costs . . . in an equitable manner to all permitted users of water throughout [Montgomery] County, regardless **[**5]** of which particular users actually convert from groundwater to surface water," and to assess water use fees to "equalize the cost of groundwater and surface water."

Lone Star subsequently adopted a District Regulatory Plan (the "Lone Star Plan") to regulate groundwater production in Montgomery County, consistent with the MOU. Among other requirements, the Lone Star Plan mandated that all "large volume groundwater users" ("LVGUs")[3] reduce their groundwater consumption to either (a)

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[1] Although the FAC describes SJRA as wholesaling only "raw surface water" to utilities, the GRP Contracts provide for SJRA to also wholesale treated surface water to utilities.

[2] *See* 1937 Tex. Gen. & Spec. Laws, ch. 426; 1939 Tex. Gen. & Spec. Laws, ch. 10; 1941 Tex. Gen. Laws, chs. 480 & 613; 1943 Tex. Gen. Laws, ch. 371; 1951 Tex. Gen. Laws, chs. 366 & 367; 1967 Tex. Gen. Laws, ch. 547; *1991 Tex. Gen. Laws, ch. 698*; *2003 Tex. Gen. Laws, ch. 847*; *2015 Tex. Gen. Laws, ch. 1148*.

According to the FAC, SJRA's Enabling Statute was deleted from Vernon's Texas Statutes and Codes Annotated when they were recodified but was not relocated to a new code. All citations in this opinion are to the version of SJRA's Enabling Statute that is currently in force, which Plaintiffs compiled into a single document as an exhibit to the FAC. We append the full Enabling Statute to our decision for reference.

70% of the volume they were permitted to produce in 2009 or (b) 10 million gallons (the "Groundwater Reduction Rule"). Alternatively, LVGUs could satisfy the Lone Star Plan by participating in a "joint groundwater reduction plan" ("Joint GRP") with one or more additional LVGUs, pursuant to which the LVGUs could achieve 30% groundwater use reduction on aggregate, rather than individually.

C. SJRA's Groundwater Reduction Plan Contracts with Plaintiffs

In March 2011, SJRA (itself an LVGU subject to the Lone Star Plan) finalized a Joint GRP to allow participating LVGUs to collectively achieve compliance with Lone Star's Groundwater Reduction Rule. Under SJRA's Joint GRP, some LVGUs would "over convert" to surface **[**6]** water (i.e., reduce their groundwater consumption by greater than 30%), thereby allowing other LVGUs to continue to use more groundwater **[*342]** than would otherwise be permitted. According to an exhibit to the FAC, 140 of the 202 LVGUs in Montgomery County had joined the Joint GRP by executing contracts with SJRA as of February 8, 2011. Plaintiffs are each party to such a contract with SJRA (together, the "GRP Contracts").

The GRP Contracts require Plaintiffs to pay SJRA a volume-based fee for pumping groundwater, regardless of the source (the "Groundwater Pumpage Fee"). SJRA would use the Groundwater Pumpage Fee proceeds to develop a surface water treatment facility and transmission system. Plaintiffs allege that the Groundwater Pumpage Fee is calculated to equalize the costs of groundwater and surface water. Upon completion of the surface water treatment facility, the GRP Contracts allow SJRA to (1) require Plaintiffs to connect to SJRA's transmission system and (2) dictate how much surface water each Plaintiff must buy from SJRA (the "Surface Water Put Option"). The GRP Contracts also allow SJRA to charge a volume-based fee on any water imported from a non-Joint GRP participant (the "Water **[**7]** Importation Fee").

D. Montgomery County Water Utilities' Lawsuit Against Lone Star

In 2015, Plaintiffs and other Montgomery County LVGUs sued Lone Star, alleging that it lacked statutory authority for the Groundwater Reduction Rule. After an initial state trial court ruling declaring the Rule void *ab initio* and an interlocutory appeal, the parties filed motions for partial non-suit following Lone Star's withdrawal of its appeal. The trial court thus entered a final judgment in May 2019 declaring that the Groundwater Reduction Rule had been adopted without legal authority and was thereby void.

E. Procedural History

Plaintiffs in the instant lawsuit are investor-owned water utilities that sell drinking water to retail consumers in Montgomery County and were subject to Lone Star's Groundwater Reduction Rule before it was invalidated. They aver that they rely exclusively on groundwater and do not buy surface water from SJRA.

Plaintiffs filed this lawsuit against SJRA on November 15, 2019, and amended their complaint on February 3, 2020. The FAC alleges that the GRP Contracts constitute continuing violations of *Sherman Act Section 1*, which declares that "[e]very contract . . . in restraint of **[**8]** trade or commerce among the several States . . . is . . . illegal." *15 U.S.C. § 1*. Specifically, Plaintiffs assert that the Groundwater Pumpage Fee provision "constitute[s] [a] horizontal agreement[] between SJRA and each Plaintiff to fix the price of wholesale raw water in Montgomery County by assessing pumpage fees to LVGU participants so as to equalize the wholesale price of raw groundwater with the

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[3] The Lone Star Plan defined "Large Volume Groundwater User" or "LVGU" as "any person or entity that, through a single well or a combination of wells, actually produced or was authorized by a permit or permits issued by [Lone Star] to produce 10 million gallons or more of groundwater annually from the Gulf Coast Aquifer within the [Lone Star] District during calendar year 2009. A Large Volume Groundwater User does not include any person or entity that produces groundwater solely for its own domestic use associated with a single family residence, agricultural use, as that term is defined by Chapter 36, Water Code, or both domestic and agricultural use."

wholesale price of raw surface water." They further allege that the Surface Water Put Option and Water Importation Fee provisions are unreasonable restraints of trade. Plaintiffs request a declaratory judgment that the GRP Contracts are illegal and unenforceable and an injunction prohibiting SJRA from enforcing the GRP Contracts or taking any other acts to enforce the Joint GRP.

SJRA moved to dismiss the FAC pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, asserting that the action was barred by the statute of limitations and laches, that SJRA was entitled to state-action immunity, and that the FAC failed to state a Sherman Act claim.

On August 14, 2020, the district court entered an order denying SJRA's motion to dismiss. Relevant to the instant interlocutory appeal, the district **[**9]** court concluded **[*343]** that SJRA had failed to demonstrate its entitlement to state-action immunity.

SJRA filed a notice of interlocutory appeal on August 21, 2020, appealing the district court's order denying its state-action immunity defense.

II.

HN1[] We must first examine the basis of our jurisdiction, a question we review de novo. *Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987)*; *United States v. Slovacek, 699 F.3d 423, 425 (5th Cir. 2012)*.

HN2[] Our precedent holds that the collateral order doctrine confers jurisdiction to review an interlocutory appeal of a district court's denial of state-action immunity in certain circumstances.[4] *See* *Martin v. Mem'l Hosp. at Gulfport,*

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[4] This issue is the subject of an active circuit split. Every other circuit to have considered this issue disagrees with our precedent, instead holding that interlocutory appeals from denials of state-action immunity may not be taken under the collateral order doctrine. *See* *Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 567-68 (6th Cir. 1986)*; *S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436, 441-47 (4th Cir. 2006)*; *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist., 859 F.3d 720, 727 (9th Cir.)*, *cert. granted*, ***138 S. Ct. 499, 199 L. Ed. 2d 381 (2017)***, *and cert. dismissed by agreement of the parties*, ***138 S. Ct. 1323, 200 L. Ed. 2d 510 (Mar. 22, 2018)***; *SmileDirectClub, LLC v. Battle, No. 19-12227, 4 F.4th 1274, 2021 U.S. App. LEXIS 21393, *18-19 (11th Cir. July 20, 2021)* (en banc) (overruling the Eleventh Circuit's prior precedent which agreed with our *Martin* precedent, *Commuter Transp. Sys., Inc. v. Hillsborough Cnty. Aviation Auth., 801 F.2d 1286, 1290 (11th Cir. 1986))*.

In 2017, the Supreme Court granted a writ of certiorari in *SolarCity* to decide "[w]hether orders denying state-action immunity to public entities are immediately appealable under the collateral-order doctrine." ***SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist., No. 17-368, 138 S. Ct. 499, 199 L. Ed. 2d 381 (Dec. 1, 2017)***. The parties reached a settlement agreement before oral argument was heard, however, and the Court dismissed the petition pursuant to the parties' agreement. ***138 S. Ct. 1323, 200 L. Ed. 2d 510 (2018)***. Last month, the en banc Eleventh Circuit held that "interlocutory appeals may not be taken under the collateral order doctrine from the denials of so-called 'state-action immunity,'" overruling its prior precedent. *SmileDirectClub, 4 F.4th 1274, 2021 U.S. App. LEXIS 21393, at *2, *18-19*.

Other courts, in critiquing our precedent, have noted that (1) the Supreme Court has repeatedly emphasized the narrowness of the collateral order doctrine in recent decisions, *see* *SmileDirectClub, 4 F.4th 1274, 2021 U.S. App. LEXIS 21393, at *6*; *SolarCity, 859 F.3d at 730*; (2) the Court in *Will v. Hallock* held that government defendants are not entitled to immediate appealability merely to avoid the burdens of trial absent "some particular value of a high order," *see* *SolarCity, 859 F.3d at 724* (discussing *546 U.S. 345, 352-55, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006))*; *see also* *SmileDirectClub, 4 F.4th 1274, 2021 U.S. App. LEXIS 21393, at *16-17*; and (3) as our en banc court has observed, "*Parker* immunity is an inapt description, for its parentage differs from the qualified and absolute immunities of public officials. . . . '*Parker* immunity' is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation." *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Par., 171 F.3d 231, 234 (5th Cir. 1999)* (en banc); *see* *S.C. State Bd. of Dentistry, 455 F.3d at 444-45*; *SmileDirectClub, 4 F.4th 1274, 2021 U.S. App. LEXIS 21393, at *9* ("There is some support for this aspect of *Commuter Transportation Systems*. For example, in *Martin* the Fifth Circuit also treated *Parker* as providing 'an entitlement not to stand trial under certain circumstances.' . . . Yet just four years later, the full Fifth Circuit—in a unanimous opinion—retreated from this facet of *Martin* in *Surgical Care Center of Hammond*." (citations omitted) (quoting *Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391, 1395 (5th Cir. 1996)))*. We remain bound, however, by our precedent absent

86 F.3d 1391, 1396-97 [*344] (5th Cir. 1996). The collateral order doctrine provides a "practical construction" of 28 U.S.C. § 1291's "final decision" requirement, Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)), rendering a district court's interlocutory decision immediately appealable if it "[1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] [would] **[**10]** be effectively unreviewable on appeal from a final judgment," Will v. Hallock, 546 U.S. 345, 349, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006) (internal quotation marks omitted).

HN3[] In *Martin*, we held that denials of state-action immunity to state, state-entity, and municipal defendants are immediately appealable collateral orders because (1) "denials of states' and state entities' claims to state action immunity clearly purport to be conclusive determinations that they have no right not to be sued under **[**11]** federal antitrust laws"; (2) "[a]n appellate court reviewing the denial of the state or state entity's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim"; and (3) "state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities—an entitlement not to stand trial under certain circumstances," which is "effectively lost if a case is erroneously permitted to go to trial." 86 F.3d at 1395-97 (internal quotation marks omitted).

However, this court does not allow such immediate appeals for private defendants because we must "view claims of a right not to be tried with skepticism" and "the state action doctrine does not immunize private defendants from suit." Acoustic Sys., Inc. v. Wenger Corp., 207 F.3d 287, 292 (5th Cir. 2000) (internal quotation marks omitted). Accordingly, the denial of state-action immunity to a private party would not be effectively unreviewable on appeal from a final judgment. *Id.*

Plaintiffs argue that because SJRA is a participant in the market relevant to their antitrust claim—the market for wholesale raw **[**12]** water in Montgomery County—SJRA invokes state-action immunity as a private party rather than a state entity and is thereby subject to the doctrine's "active supervision" requirement. They rely on the Supreme Court's opinion in *North Carolina State Board of Dental Examiners v. FTC*, where in deciding that the active supervision requirement applied to a state regulatory board controlled by active market participants, the Court distinguished such boards, which are more akin to "private trade associations," from "prototypical state agencies." 574 U.S. 494, 511, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015). Following *Dental Examiners*, we held that a state regulatory board composed of private market participants invoked state-action immunity "as a private party" and was thus unentitled to immediate appeal of a Federal Trade Commission order denying its state-action immunity defense. *See* La. Real Est. Appraisers Bd. v. FTC, 976 F.3d 597, 604 (5th Cir. 2020), *cert. denied*, *141 S. Ct. 2506, 209 L. Ed. 2d 540, 2021 U.S. LEXIS 1819, 2021 WL 1241021 (2021)*.

SJRA, like the defendant in *Martin*, is a state-created entity that, unlike the defendant in *Louisiana Real Estate Appraisers*, **[*345]** is not alleged to be controlled by private market participants. *See* Martin, 86 F.3d at 1395-97; **[**13]** La. Real Est. Appraisers Bd., 976 F.3d at 604. **HN4**[] However, the Supreme Court has rejected a "purely formalistic inquiry" into whether a defendant invokes state-action immunity as a prototypical state agency or a private party. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985); *see also* La. Real Est. Appraisers Bd., 976 F.3d at 604. Relevant here, Plaintiffs allege that SJRA is an active participant in the market over which it purportedly exerts anticompetitive control.

In *Hallie* and again in *Dental Examiners*, the Court focused on the risk of private interests influencing a state entity's decisions. *See* Hallie, 471 U.S. at 45; Dental Examiners, 574 U.S. at 507-08; *see also* La. Real Est. Appraisers Bd., 976 F.3d at 604. **HN5**[] As a public entity, SJRA is entitled to a presumption that it acts in the public interest "absent a showing to the contrary." Hallie, 471 U.S. at 45. Although SJRA allegedly participates in the Montgomery County wholesale raw water market, Plaintiffs have not shown at this early stage that SJRA is influenced by or pursues outside private interests. We thus conclude that, for the purposes of our jurisdictional analysis, SJRA

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reconsideration by our full court. We further note that neither party raised this issue in its appellate briefing nor during oral argument.

invokes state-action **[**14]** immunity as a state entity. The instant interlocutory appeal is thereby proper under this court's precedent.

III.

We now turn to the merits of SJRA's appeal. The district court denied SJRA's motion to dismiss, concluding that state-action immunity did not apply. On appeal, SJRA asserts that the district court erred because SJRA's entry into and enforcement of the GRP Contracts was authorized by its Enabling Statute, and the displacement of competition in the wholesale raw water market was the foreseeable result of this authorization. Plaintiffs maintain that SJRA's Enabling Statute does not authorize its anticompetitive conduct.

HN6[] In reviewing the denial of a motion to dismiss under *FRCP 12(b)(6)*, this court "tak[es] all well-pleaded facts as true." *Zantiz v. Seal, 602 F. App'x 154, 159 (5th Cir. 2015)* (per curiam) (unpublished) (citing *Brown v. Miller, 519 F.3d 231, 236 (5th Cir. 2008))*. ***HN7***[] When, as here, the complaint attaches written exhibits, the exhibits are considered "a part of the pleading for all purposes." *Fed. R. Civ. P. 10(c)*. If an attached exhibit contradicts a factual allegation in the complaint, "then indeed the exhibit and not the allegation controls." *United States ex rel. Riley v. St. Luke's Episcopal Hosp., 355 F.3d 370, 377 (5th Cir. 2004)*; **[**15]** *see also* *Smit v. SXSW Holdings, Inc., 903 F.3d 522, 528 (5th Cir. 2018)*.

HN8[] A motion to dismiss is properly denied if, accepting the well-pled factual allegations in the plaintiff's complaint as true, the plaintiff states a claim to relief that is plausible on its face. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. ***HN9***[] "State authorization is generally interpreted by an objective test that looks at the language of the statute; if other evidence is needed, it can be gleaned from legislative histories or state judicial decisions." *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Par., 171 F.3d 231, 234 (5th Cir. 1999)* (en banc) (quoting 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW***, ¶ 222b (1997)). This analysis "ordinarily produces a legal conclusion reviewed de novo." *Id.*

[*346] Thus, in reviewing the denial of a motion to dismiss based upon state-action immunity, we will affirm the denial if, taking the well-pleaded factual allegations in the complaint as true and looking to the language of the relevant authorizing statute (and, to the extent **[**16]** necessary, legislative history or judicial decisions), the defendant is not entitled to state-action immunity. *See, e.g, Earles v. State Bd. of Certified Pub. Accts., 139 F.3d 1033, 1040-44 (5th Cir. 1998)*.

A.

HN10[] Supreme Court precedent recognizes three tiers of protection from federal antitrust lawsuits under the state-action immunity doctrine: (1) clear exercises of a state's sovereign power are immune from federal antitrust scrutiny *ipso facto* ("*Parker* immunity"), *Dental Examiners, 574 U.S. at 504* (discussing *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943))*; (2) acts of a "prototypical state agenc[y]" or municipality are entitled to immunity if pursuant to a "clearly articulated and affirmatively expressed" state policy to replace competition with regulation ("*Hallie* scrutiny"), *id. at 504, 506-07, 511* (quoting *FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 225, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013))* (discussing *Hallie, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24*); and (3) actions by private parties or state agencies controlled by participants in the market they regulate are protected if they meet the aforementioned "clear articulation" requirement and are also subject to "active supervision" by the state ("*Midcal* scrutiny"), *id. at 507* (discussing **[**17]** *Midcal, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233*). Because "[s]tates regulate their economies in many ways not inconsistent with the antitrust laws," "state-action immunity is disfavored." *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 635-36, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)* (citing *Lafayette v. La. Power & Light Co., 435 U.S. 389, 398-99, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978))*.

Ipso facto Parker immunity applies only for "[s]tate legislation and decisions of a state supreme court, acting legislatively rather than judicially." *Dental Examiners, 574 U.S. at 504* (internal quotation marks omitted). This case does not fit those circumstances, and SJRA thus invokes state-action immunity as a nonsovereign actor.

HN11[] Anticompetitive conduct by a nonsovereign actor must be "clearly articulated and affirmatively expressed as state policy" to merit state-action immunity. *Midcal, 445 U.S. at 105* (quoting *La. Power & Light Co., 435 U.S. at 410*). This inquiry involves two distinct questions: (1) Does state law authorize the defendant to engage in the challenged conduct?; and (2) Did the state authorize the challenged conduct with an intent to *displace competition* with regulation or monopoly service? 1A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, ¶ 225, p. 140 (4th ed. 2013) ("Areeda **[**18]** & Hovenkamp"); *see also* *Phoebe Putney, 568 U.S. at 228*.

State lawmakers need not "expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." *Hallie, 471 U.S. at 43*. Rather, state-action immunity applies if the anticompetitive effect was the "foreseeable result" of the state's authorization. *Id. at 42*. "[W]hen anticompetitive consequences are simply one 'foreseeable' possibility among many, then authorization should not be inferred." Areeda & Hovenkamp at ¶ 225, p. 170 (discussing *Phoebe Putney, 568 U.S. 216, 133 S. Ct. 1003, 185 L. Ed. 2d 43*).

[*347] B.

Plaintiffs challenge three provisions of the GRP Contracts as anticompetitive in violation of Sherman Act *Section 1*: (1) the Groundwater Pumpage Fee, which requires Plaintiffs to pay SJRA a volume-based fee for pumping groundwater, regardless of the source; (2) the Surface Water Put Option, which allows SJRA to dictate the amount of surface water Plaintiffs must buy from SJRA; and (3) the Water Importation Fee, which charges Plaintiffs if they purchase water from a non-Joint GRP participant. The FAC alleges that the Groundwater Pumpage Fee fixes the price of wholesale raw water in Montgomery County **[**19]** by equalizing the wholesale price of raw groundwater with that of raw surface water, and also that the Surface Water Put Option and Water Importation Fee are unreasonable restraints of trade.

We first ask whether SJRA's Enabling Statute authorizes its entry into and enforcement of the challenged provisions. *See* *Phoebe Putney, 568 U.S. at 228*. SJRA may be correct that its Enabling Statute authorizes the challenged provisions. *HN12*[] *HN13*[] The Enabling Statute allows SJRA to contract with "municipalities or other corporate bodies or persons . . . for the purpose of establishing and collecting . . . rates and other charges for the sale or use of water, water transmission, treatment or connection facilities . . . and any other services sold, furnished or supplied by [SJRA]." Enabling Statute § 3(xviii). The Groundwater Pumpage Fee could be considered a rate or charge for a service provided by SJRA—coordinated compliance with Lone Star's Groundwater Reduction Rule—as well as a charge for the use of SJRA's water transmission, treatment, and connection facilities. Similarly, the Surface Water Put Option could be viewed as a charge for the use of SJRA's facilities. The Enabling Statute also permits SJRA **[**20]** to "enter into any and all necessary and proper contracts . . . necessary or useful in the furtherance of any power granted by law." Enabling Statute § 3(xv). Though this statutory language is quite nonspecific, SJRA may have an argument that the Water Importation Fee is "necessary or useful" to provide the service of regulatory compliance to the Joint GRP participants.

But our inquiry does not end there. To warrant state-action immunity, the alleged anticompetitive effect—the displacement of competition in the Montgomery County wholesale raw water market—must be the "inherent, logical, or ordinary result" of the state's authorization. *Phoebe Putney, 568 U.S. at 229*. *HN14*[] Section 3(xviii) of SJRA's Enabling Statute authorizes SJRA to participate in the markets for water, water transmission and treatment, and other services through contracts establishing rates and other charges. Precedent establishes that mere authorization to participate in a market does not constitute authority to monopolize that market. *See* *id. at 228* ("Grants of general corporate power that allow substate governmental entities to participate in a competitive marketplace should be, can be, and typically are used in ways **[**21]** that raise no federal antitrust concerns."); *Hammond, 171 F.3d at 235* (distinguishing "a statute that in empowering a municipality necessarily contemplates the anticompetitive activity from one that merely allows a municipality to do what other businesses can do").

SJRA's state authorization is more akin to the enabling laws at issue in *Phoebe Putney* and *Hammond*, where the defendants were statutorily authorized to acquire hospitals and enter into contracts and joint ventures to sell hospital services, respectively, than it is similar to the legislative **[*348]** grants in cases finding clear articulation. *See* *Phoebe Putney, 568 U.S. at 219-20*; *Hammond, 171 F.3d at 233*. The statutory powers SJRA invokes as authorizing its challenged conduct "should be, can be, and typically are used in ways that raise no federal antitrust concerns." *Phoebe Putney, 568 U.S. at 228*. This statutory authorization lacks the indicators of monopolistic intent present in cases finding clear articulation, where the defendants were explicitly granted authority to regulate a market, such as through zoning ordinances, *City of Columbia v. Omni Outdoor Advert. Inc., 499 U.S. 365, 373, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*, professional conduct rules, *Earles* ***[**22]*** , *139 F.3d at 1042*, and the maintenance of "fair competition," *Spec's Fam. Partners, Ltd. v. Nettles, 972 F.3d 671, 683 (5th Cir. 2020)*.

SJRA argues that monopoly is the foreseeable result of its statutory authorization because "[w]henever SJRA contracts with an entity to supply surface water (at cost, as SJRA must), other raw water competitors (like groundwater wholesale suppliers) are necessarily displaced." This argument contravenes precedent holding that bare authority to participate in a market does not inherently result in monopoly. *See* *Phoebe Putney, 568 U.S. at 228*; *Hammond, 171 F.3d at 235*. This assertion is further undermined by the FAC, which alleges that groundwater in Montgomery County is plentiful and was historically less expensive than surface water. Accepting this factual allegation as true, *Iqbal, 556 U.S. at 678*, statutory authority to sell surface water would not inherently, logically, or ordinarily result in the displacement of competition in the market for allegedly cheaper, plentiful groundwater.

Even if SJRA's Enabling Statute could be read as vesting SJRA with monopoly power over the market for surface water in Montgomery County, precedent cautions against interpreting **[**23]** such statutory authority as extending to the entire wholesale raw water market. ***HN15***[] "[E]ven a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." *La. Power & Light Co., 435 U.S. at 417*; *see also* Areeda & Hovenkamp at ¶ 222, p. 79 (citing *Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982))* ("[A]uthorization from the state must be 'market-specific' in the sense that it authorizes the subdivision to displace competition in a specific area of commerce."). Here, SJRA's hypothetical monopoly authority over the surface water market in Montgomery County would not foreseeably extend to the entire wholesale raw water market.

We therefore conclude, with attention to the record before us, that the Texas Legislature did not authorize SJRA's entry into and enforcement of the challenged GRP Contract provisions with the intent to displace competition in the market for wholesale raw water in Montgomery County. SJRA is thus not entitled to state-action immunity at this stage.

IV.

For the foregoing reasons, we AFFIRM the district court's denial of SJRA's motion to dismiss based upon state-action immunity. **[**24]**

Current Through:

Acts 1937, 45th R.S., ch. 426

Acts 1939, 46th R.S., ch. 10

Acts 1941, 47th R.S., ch. 480 & 613

Acts 1943, 48th R.S., ch. 371

Acts 1951, 52nd R.S., ch. 366 & 367

Acts 1967, 60th R.S., ch. 547

Acts 1991, 72nd R.S., ch. 698

Acts 2003, 78th R.S., ch. 847

Acts 2015, 84th R.S., ch. 1148

SECTION 1. It being declared by the Constitutional provision the policy of the State of Texas, *Section 59, Article 16*, to provide for the conservation and development of all the natural resources of the State, including the control, storing, preservation, and **[*349]** distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power, and all other useful purposes, the reclamation and irrigation of its arid, semi-arid, and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State, are each and all hereby declared public rights and duties, which may be effected through the creation within the State, or the **[**25]** divisions of the State, into such number of conservation and reclamation districts as many be determined to be essential to the accomplishment of the purposes of the policy expressed in the Constitution of the State; such Districts to be governmental agencies and bodies politic and corporate, with all rights, privileges, and functions as may be conferred by law, there is hereby created the San Jacinto River Conservation District [now the San Jacinto River Authority][1] .

SEC. 1A. (a) The District is subject to review under Chapter 325, Government Code (Texas Sunset Act), but may not be abolished under that chapter. The review shall be conducted under *Section 325.025, Government Code*, as if the District were a state agency scheduled to be abolished September 1, 2021, and every 12th year after that year.

(b) The District shall pay the cost incurred by the Sunset Advisory Commission in performing the review. The Sunset Advisory Commission shall determine the cost, and the District shall pay the amount promptly on receipt of a statement from the Sunset Advisory Commission detailing the cost.

SEC. 2. The San Jacinto River Conservation and Reclamation District is created as a governmental agency, **[**26]** a body politic and corporate, vested with all the authority as such under the Constitution and laws of the State; and shall have and be recognized to exercise all of the powers of such governmental agency and body politic and corporate as expressly authorized in the provisions of the Constitution, *Section 59 of Article 16*, for Districts created to conserve, control, and utilize to beneficial service the storm and flood waters of rivers and streams of the State, or such powers as may be contemplated and implied by the purposes of this provision of the Constitution, and as may be conferred by General Law, and in the provisions of this Act; and shall have and be recognized to exercise all the rights and powers of an independent governmental agency, body politic and corporate, to formulate any and all plans deemed essential to the operation of the District[2] and for its administration in the control, storing, preservation, and distribution to all useful purposes of the storm and flood waters of the San Jacinto River and its tributary streams; and as such District, shall have and be recognized to exercise such authority and power of control and regulation over such storm and flood waters **[**27]** of the San Jacinto River and its tributaries as may be exercised by the State of Texas, subject to the provisions of the Constitution and the Acts of the Legislature.

[*350] SEC. 3. The San Jacinto River Authority, in addition to all powers expressly or impliedly granted by other Sections of this Act, by complying where applicable with the provisions of Chapter 1, Title 128, Vernon's Texas Civil Statutes, as amended, is hereby empowered as follows:

(i) to store, control and conserve the storm and flood waters of the watershed of the San Jacinto River and its tributaries, and to prevent the escape of any such waters through every practical means; so as to prevent the devastation of lands from recurrent overflows, and to protect life and property;

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[1] See Acts of 1951, 52nd Leg., ch. 366, § 1; any usage hereinafter of the term "San Jacinto River Conservation and Reclamation District" shall mean the "San Jacinto River Authority" and vice versa.

[2] See Acts of 1951, 52nd Leg., ch. 366, § 2; any usage hereinafter of the term "District" shall mean the "Authority" and vice versa.

(ii) to provide through every practical means for the control, utilization and coordination of regulation of the waters of the san Jacinto River and its tributaries;

(iii) to appropriate the waters of the San Jacinto River and its tributaries, to construct dams and other facilities for the impoundment, conservation, diversion and utilization of such waters, and to devote such waters to municipal, domestic, agricultural, commercial, industrial, mining, **[**28]** and other beneficial uses, within and without the watershed of said River;

(iv) to provide waters for the irrigation of lands where irrigation is required for agricultural purposes or may be deemed helpful to more profitable agricultural production;

(v) to provide water for domestic, municipal, commercial, industrial and mining purposes within and without the watershed of said River, including water supplies for cities, towns and industries, and in connection therewith to construct or otherwise acquire water transportation, treatment and distribution facilities and supplemental sources of supply;

(vi) to encourage and develop drainage systems and provisions for drainage of lands in the valleys of the San Jacinto River and its tributary streams needing drainage for profitable agricultural production; and drainage for other lands in the watershed area of the Authority requiring drainage for the most advantageous use;

(vii) to encourage through practical and legal means the conservation of soils against destructive erosion and thereby preventing the increased flood menace incident thereto;

(viii) to forest and reforest and to aid in the foresting and reforesting of the watershed area of the **[**29]** San Jacinto River and its tributaries and to prevent and aid in the prevention of soil erosion and floods in, on, and upon all lands situated within the boundaries of said Authority;

(ix) to control, store, and employ the waters of the San Jacinto River and its tributaries in the development and distribution of hydroelectric powers, where such use may be economically coordinated with other and superior uses, and subordinated to the uses declared by law to be superior;

(x) to encourage, aid, and protect navigation and harbor improvements;

(xi) to acquire land adjacent to or in the vicinity of any waters impounded by the Authority or adjacent to or in the vicinity of San Jacinto River or any of its tributaries for park and recreation purposes and to acquire or construct park and recreation facilities thereon. Except as may otherwise be provided by the general law, the acquisition or construction any recreation and park facilities by the Authority shall be subject to the approval of the Texas State Parks and Wildlife Commission and to such conditions as the Commission may prescribe;

(xii) to acquire or construct facilities for the gathering, transporting, treating and disposing of sewage **[**30]** and industrial waste and effluent;

[*351] (xiii) to control, store and employ all or any of such waters for each and every purpose for which the same when controlled and conserved may be utilized in the performance of a useful service and contemplated and authorized by the provisions of the Constitution and the public policy therein declared;

(xiv) to construct and otherwise acquire and to repair, improve, extend, operate and maintain all works, plants and other facilities necessary or useful in the furtherance of any power granted by law to the Authority, including, but not limited to, water storage reservoirs, dams, canals, waterways, and water transportation facilities of all kinds, water treatment facilities, hydroelectric facilities, municipal water supply facilities, facilities for the treatment of sewage and industrial waste and effluent, parks and recreation facilities, and all other necessary and useful structures, facilities and equipment;

(xv) to enter into any and all necessary and proper contracts with other Federal or State agencies, districts and bodies politic and corporate, and others, to make and enter into such cooperative and coordinative contracts with such agencies, districts **[**31]** and bodies politic and corporate, and others, necessary or useful in the furtherance of any power granted by law to the Authority, including the power to pledge its funds and its other assets or any part thereof;

(xvi) to acquire any properties necessary for any of its corporate purposes by purchase, by condemnation as elsewhere provided in this Act, or by gift, and to acquire property by lease or other contract, upon such terms as may be accepted by the Authority's Board of Directors;

(xvii) to operate the water and sewage properties and facilities of other public bodies or political subdivisions upon such terms as the Authority may agree in connection with the supplying by the Authority of any water or sewage or waste disposal or other services to public bodies;

(xviii) to enter into such contracts, upon such terms and for such periods of time as the Board of the Authority might approve, with municipalities or other corporate bodies or persons, public or private, for the purpose of establishing and collecting, and by resolution or order of otherwise establish and collect, rates and other charges for the sale or use of water, water transmission, treatment or connection facilities, sewage **[**32]** or industrial or other waste disposal services and facilities of all types, park or recreation facilities, power, electric energy, and any other services sold, furnished, or supplied by the Authority, which fees and charges shall be sufficient to produce revenue adequate—

(1) to pay expenses necessary to the operation and maintenance of the properties and facilities of the Authority;

(2) to pay the interest on or the principal of any bonds or other obligations issued by the Authority when and as same become due and payable and to fulfill any reserve or other fund obligations of the Authority in connection with such bonds; and

(3) to pay such other expenses as the Board of Directors shall deem necessary and proper for any purposes in the corporate operations, and functions of the Authority; and

(xix) to authorize by its contracts any other districts, agencies, and bodies politic and corporate and individuals to participate in the joint construction, operation, and maintenance of all of said water storage reservoirs, dams, canals, waterways, and water lines and all other structure, facilities, and equipment in connection therewith, or in connection with sewage or **[*352]** waste facilities of all **[**33]** types, and all necessary facilities for the manufacture, sale, and transportation of such hydroelectric power, along with said Authority, and said Authority may by such contracts allow such other agencies, districts, and bodies politic and corporate, and others to receive such portion of the revenues derived from the sale of water and hydroelectric power or furnishing sewage and waste facilities and services, as the Board of Directors shall deem just, equitable, and proper.

SEC. 4. The powers and duties herein developed upon the San Jacinto River Authority are recognized to be taken subject to all legislative declarations of public policy in the maximum utilization of the storm, flood and unappropriated flow waters of the State for the purpose for which the Authority is created, as expressed and indicated in this Act, as amended, and subject to the continuing rights of supervision by the State which shall be exercised through the Texas Water Rights Commission, which agency shall be charged with the authority and duty to approve, or to refuse to approve, the adequacy of any plan or plans (devised in the exercise of any power granted under this Act) which contemplate improvements or facilities, **[**34]** the plans pertaining to which are required to be supervised or approved by said agency under the provisions of the General Law. If any such plans contemplate the installation, construction or other acquisition of parks and recreation facilities or of facilities for the gathering, transporting or disposal of sewage, or industrial wastes and effluent, said Commission shall not approve such plans until it finds that the Texas Parks and Wildlife Commission or the Texas Water Pollution Control Board, as the case may be, has issued such approvals or permits relating to such matters as may be required by this Act or the General Law.

SEC. 5. The area of said District is hereby established to comprise all the territory embraced within the watershed of the San Jacinto River and its tributary streams, save and except that portion of said watershed lying and being situated within the boundaries of Harris County, which is hereby expressly excepted from the boundaries of said District. Provided, that prior to September 1, 1941, the actual boundaries of said District shall be established by the

Reclamation Department of the General Land Office, so that the same may be expressed in written calls of **[**35]** the metes and bounds of said District. The written description of said boundaries shall be certified by the Commissioner of the General Land Office, approved by the State Board of Water Engineers, and recorded in the minutes of said District. The Board of Directors shall cause a certified copy of said certified boundaries to be filed and recorded in the office of the County Clerk of each county lying in whole or in part within the boundaries of said District, and it shall also file a copy thereof, together with a map showing said boundaries with the Tax Assessor and Collector of each of the counties lying in whole or in part within said District.

SEC. 6. The management and control of all the affairs of said District shall be vested in, and the powers, rights, privileges, and functions of the District shall be exercised by, a Board of Directors consisting of six (6) members,[3] all of whom shall be freehold property taxpayers and legal voters of the State of Texas and four (4) of whom shall be residents of a county wholly **[*353]** encompassed by the District. Members of such Board of Directors shall be appointed by the Governor for terms of six (6) years. Provided, the present Board of six (6) directors **[**36]** of said District, appointed by the State Board of Water Engineers under authority of House Bill No. 1094, Chapter 613, Acts of the Regular Session of the Forty-seventh Legislature, amending Section 6 of Chapter 426, Acts of the Regular Session of the Forty-fifth Legislature, as amended by House Bill No. 828, Chapter 480, Acts of the Regular Session of the Forty-seventh Legislature, for terms of two (2), four (4), and six (6) years, shall continue to serve as such until the expiration of the respective terms for which they were appointed. Upon the expiration of the respective terms for which the present members of the Board of Directors were appointed, the successors of each and all of them shall be appointed by the Governor for a term of six (6) years.

The directors shall hold office after their appointment and qualification until their successors shall be appointed and qualified. Should any vacancy occur in the Board of Directors, the same shall be filled in like manner by the Governor for the unexpired term. The Directors appointed shall, within the (30) days after their appointment, qualify by taking the official oath required of County Commissions, and shall execute bond in the **[**37]** sum of Five Thousand Dollars ($5,000) payable to the District, the sufficiency of which bond shall be determined by the State Board of Water Engineers, which bonds after being recorded in the official bond records of the county in which the District maintains its office shall be deposited with the depository selected and approved for the deposit of the funds of the District.

The Board of Directors shall organize by electing one of its members President, one Vice-President, one Secretary, and one Treasurer. Four (4) members, including the presiding officer, shall constitute a quorum to transact business. The President shall preside at all meetings of the Board and shall be the chief executive officer of the District. The Vice-President shall act as President in case of the absence or disability of the President. The Secretary shall act as Secretary of the Board and shall be charged with the duty of keeping a record of all proceedings and all orders of the Board. The Treasurer shall receive and receipt for all moneys received by the District and shall keep books and records of all moneys received and expended. In case of the absence of inability of the Secretary to act, a Secretary pro **[**38]** term shall be selected by the directors.

The domicile of the District shall be in the City of Conroe, in the County of Montgomery, Texas, where the District shall maintain its principal office. The Board of Directors shall have authority to fix the time, place and number of meetings of such Board by proper resolutions, regulations and bylaws passed by said Board. Said Board shall cause to be kept complete and accurate accounts conforming to approved methods of bookkeeping. Said accounts and all contracts, documents, and records of the District shall be kept at said principal office, and same shall be open to public inspection at all reasonable times.

SEC. 7. (a) The Board of Directors shall have all powers, both express and implied, to do and perform any and all acts for any on behalf of the Authority which are authorized by the Constitution and laws of the United States of America and the State of Texas for the purpose of the achievement of the plans and purposes intended in the creation of the Authority and in the exercise of all powers elsewhere herein granted to the Authority; and said **[*354]** Board of Directors shall have full and complete authority to do any and all acts necessary or

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[3] See *Sec. 651.0085, Tex. Gov't Code*, as amended (requiring governor to appoint additional member).

convenient **[**39]** to the exercise of the powers, privileges, and functions conferred upon said Authority and its Board of Directors by this Act or any other Act or law.

(b) The Board of Directors is hereby authorized and directed to make or cause to be made surveys and engineering investigations for the information of the Authority and to determine the plans necessary to the accomplishment of the purposes for which the Authority is created, and may employ engineers, attorneys, and all other technical and non-technical assistants or employees and fix and provide the amount and manner of their compensation for the making of such surveys, the preparation of plans, and the collection of data essential to the determination of the character, extent, and cost of all improvements essential in the exercise of any power granted herein or in any other law applicable to the Authority, and for expenditures found essential in the maintenance and administration of the Authority. The members of the Board of Directors shall receive a per diem of not more than Twenty-five ($25.00) Dollars per day for the period served, together with traveling and other necessary expenses. Any director may perform any service required **[**40]** by the Board, but in such case may not receive the per diem and other compensation at the same time.

(c) All bonds issued by the Authority shall be and are hereby declared to be legal and authorized investments for banks, savings banks, trust companies, building and loan associations, insurance companies, fiduciaries and trustees, and for any sinking funds of cities, towns, villages, counties, school districts and other political corporations and subdivisions of the State of Texas. Such bonds shall be eligible to secure the deposit of any and all public funds of the State of Texas and any and all public funds of cities, towns, villages, counties, school districts and other political corporations or sub-divisions of the State of Texas, and such bonds shall be lawful and sufficient security for said deposits at their market value when accompanied by all unmatured coupons appurtenant thereto.

(d) Money in any fund of the Authority or any fund established by the Board of Directors in connection with the authorization of its bonds, including but not limited to proceeds from the sale of bonds, and which funds are not needed to satisfy their particular purpose for any period of time may be **[**41]** invested or reinvested from time to time in direct obligations of or obligations the principal and interest of which are guaranteed by the United States of America or invested in direct obligations of or participation certificates guaranteed by the Federal Intermediate Credit Banks, Federal Land Banks, Federal National Mortgage Association, Federal Home Loan Banks, Banks for Cooperatives, and in certificates of deposit of any bank or trust company the deposits of which are fully secured by a pledge of securities of any of the kind hereinabove specified. The type and maturity of investments made hereunder shall be determined by the Board which, in the case of funds established in connection with the authorization of bonds, shall provide appropriate recitals with regard thereto in the resolutions relating to the issuance of such bonds. Income and profits on such investments shall be applied as provided in any such resolution, and, absent such provision, shall be applied to the uses hereinabove specified for bond proceeds.

SEC. 8. For the purpose of providing funds requisite to procure necessary engineering **[*355]** surveys, the collection and compilation of data respecting regional and general **[**42]** conditions entering into and influencing the character and extent of the improvements necessary to the storage, control, conservation, and equitable distribution, to the greatest public advantage of such flood waters when stored and controlled, it is hereby provided that any county lying in whole or in part within the area of the temporary District, as herein defined, may contribute to the funds from year to year for such engineering surveys and the compilation of data essential to the progress of flood control improvement in such amount as may be deemed an equitable part of the cost of such surveys and the compilation of necessary information in the estimated relations of such expenditures to the contemplated and probable benefit to be secured to the respective counties from the accomplishment of the plans and purposes of the creation of the District, and for the provision of such fund may make the necessary collections through their respective general funds, or may appropriate the amount of the estimated equitable contribution of such costs, of developing essential engineering data from their general fund.

SEC. 8c. (a) The Board of Directors of the Authority may adopt and enforce **[**43]** rules to:

(1) preserve and protect the sanitary condition and prevent waste or unauthorized use of water owned or controlled by the Authority;

(2) preserve, protect, secure, and regulate privileges on any Authority property; and

(3) ensure the public safety on, in, under, across, or within any Authority property.

(b) A rule adopted under this section must clearly define any conduct that constitutes an offense and plainly state the punishment for the offense. In adopting a rule under this section, the Board must prescribe a punishment that is proportionate to the seriousness of the offense. The Board may designate an offense only as a Class C misdemeanor.

(c) A rule adopted under this section does not take effect until the Authority has published once a week for two consecutive weeks a substantive statement of the rule and the penalty for violation of the rule in a newspaper with general circulation in each county in which the rule is to be effective. The statement must intelligently explain the purpose to be accomplished by or the acts prohibited by the rule. The statement must advise the public that violation of the rule will subject the violator to a penalty. The statement must advise **[**44]** the public that the full text of the rule is on file in the principal office of the Authority and that any interested person is entitled to read the full text. The Board may use one statement to satisfy the notice requirements of this section for any number of rules the Board adopts. The Board may amend a rule after the rule is adopted, but must meet the notice requirements under this subsection.

(d) The violation of a rule is not punishable as an offense unless the violation occurs after the 30th day on which the notice requirements under this section are met. A rule adopted under this section is effective until repealed, revoked, rescinded, or amended by official action of the Board.

(e) A rule adopted under this section shall be recognized by the courts of the state and is enforceable by complaint filed in the appropriate court by the proper prosecuting authority in a jurisdiction in which Authority property is located in the same manner as a penal statute under **[*356]** state law. A penalty provided by a rule under this section is in addition to any other penalty provided by lay. Rules promulgated under the authority of this chapter shall not conflict with any provision of the Parks and Wildlife **[**45]** Code or a rule adopted under the authority of the Parks and Wildlife Code.

(f) The Board, the commissioners court, and the law enforcement officials in a county in which Authority property is located may enter into a contract to provide for the employment, assignment, duties, equipping, or compensation of local law enforcement personnel to enforce the Board's rules. A contract under this subsection may require the Authority to pay the commissioners court a specified portion of the cost of providing the law enforcement personnel.

(g) In this section, "Authority property" means any land, easement, water, property, equipment, work, or facility owned or controlled, in whole or in part, by the Authority, including a reservoir, impoundment, lake, canal, channel, conduit, pipe, siphon, dam, dike, levee, embankment, or berm, but excluding Lake Houston and the San Jacinto River below Lake Houston, except for equipment, works or facilities owned by the Authority at or near a dam site.
SEC. 9. The San Jacinto River Conservation and Reclamation District is hereby declared to be a Conservation and Reclamation District, having all and singular, the powers, duties, functions, and to observe procedures **[**46]** in so far as the same may be applicable and practicable, to accomplish the purposes of this Act, as is provided by Chapter 25 of the General Laws of the Thirty-ninth Legislature, Regular Session, and the several amendments thereof; provided however, that the provisions of said Chapter 25, and the subsequent Amendments thereto, shall not apply to any matter specifically provided for herein, or expressly or impliedly excluded, relating to the creation of a district and to the issuance of preliminary bonds to finance the making of investigations upon which to base a plan for improvements and the levy of a tax therefore. It is however, provided that the District may upon a vote of the qualified electors issue such preliminary bonds and levy a tax to retire the same, which tax may be in addition to all other taxes hereby authorized; Section 15 of Chapter 280, General and Special Laws of the Forty-first Legislature of Texas, Regular Session, amending said Chapter 25, General Laws of the Thirty-ninth Legislature, Regular Session, and Section 6 of Chapter 107 of the General and Special Laws of the Fortieth Legislature, First Called Session, amending said Chapter 25, shall not control this **[**47]** District, but in lieu thereof it is specifically provided as follows:

(a) After the completion and approval of a plan for the coordination of improvements deemed adequate to serve said watershed as a whole, as hereinbefore provided for, the State Board of Water Engineers and the Reclamation Department of the General Land Office of Texas in authorizing improvements to control the waters of, and, or in allocating the right to use waters from said San Jacinto River and its tributaries shall substantially conform to, and shall effectually preserve the benefits of, the plan formulated by this District, and said District shall have the right to enforce the observance of the same by judicial decree.

(b) This District shall have the power to provide and maintain improvements for the common benefit of said District as a whole, subject only in appropriate case to the constitutional and statutory provisions concerning a vote by the qualified electors of the District.

[*357] (c) Especially shall said District have all and singular the powers contained in Section 15 of said Chapter 280, General and Special Laws of the Forty-first Legislature, relating to improvements peculiar to defined areas within a district. **[**48]**

(d) It is however, further provided that if the electors of any defined area within this District desire they may become a water control and improvement district for the purpose of independently providing, operating, and maintaining improvements designed peculiarly to serve such defined area. Such contained defined area may be so constituted under the applicable provisions of said Chapter 25 of the General Laws of the Regular Session of the Thirty-ninth Legislature. In like manner any other political subdivision of the State of Texas being in whole or in part in this District may independently provide, maintain, and operate works peculiarly designed to benefit such body politic. In either case, however, such works and the operation thereof shall be constructed and operated in such manner as will conform to this District plan to the greatest practicable degree.

(e) To the extent necessary to enable this District to construct, maintain, and operate works beneficial to the District as a whole, or to give the supervision, or to perform any service inuring to the benefit of the District as a whole and provide funds adequate to defray the cost of the administration to this District, it shall **[**49]** have power to levy and collect taxes, equitably distributed, which taxes shall be in addition to other taxes that may lawfully be levied by the State and other political subdivisions thereof.

(f) This Legislature finds and declares that the recurrent, devastating floods in the valley of the San Jacinto River, which have, over a long period of years, caused a deplorable loss of life and property, and the erosion of soil, and a depletion of the fertility of the lands in said valley and watershed served by the San Jacinto River in Texas, and the public highways and structures on land belonging to the State of Texas situated within said watershed, to be a public calamity, and the San Jacinto River Conservation and Reclamation District is hereby authorized to do any and all things necessary or suitable for the prevention of such public calamity.

SEC. 10. The San Jacinto River Conservation and Reclamation District shall not be authorized to issue bonds nor to incur any form of continuing obligations or indebtedness for purposes of effecting improvements comprehended in the plan of organization and administration of the District, nor incur any indebtedness in the form of a continuing charge **[**50]** upon land or properties within the District, unless such proposition shall have been submitted to the qualified property taxpaying voters of the District, or, in appropriate case, such voters of a defined area or political subdivision within the District, and approved by a majority of such electors voting thereon.

SEC. 10a. The Board of Directors of the San Jacinto River Conservation and Reclamation District, a State Agency, shall have full authority to negotiate and deal and/or contract with the United States of America or with any of its governmental agencies now in existence or that may hereafter come into existence and/or others for grants, and/or loans and/or allotments and is hereby granted the right and power to receive and accept grants and/or loans and/or allotments from the United States of America and/or others for the purpose of making investigations and assembling data and/or for any one or more purposes set forth in this Act and/or the Act creating the San Jacinto Conservation and Reclamation District and to receive and use **[*358]** said moneys for the purpose mentioned in said Acts.

SEC. 10b. The Authority shall have the authority and is hereby authorized to issue from time to **[**51]** time its negotiable revenue bonds for the purpose of making investigations and assembling data; for the purpose or purposes of purchasing, acquiring, and/or condemning lands, leases, easements, rights-of-way and other properties; and for the purpose of constructing, repairing, improving and extending any structures, dams, reservoirs, transmission facilities, water treatment, water supply, sewage and other waste gathering, transmission, treatment and disposal facilities, for developing park and recreation facilities; and for the purposes of acquiring, constructing, improving, repairing and extending any other properties and facilities deemed appropriate by the Board of Directors of the Authority in the exercise of powers granted the Authority in Section 3 or elsewhere in this Act. Any one or more or a combination of the foregoing purposes may be combined into a single issue of bonds. Such bonds shall be issued in accordance with, and may be secured by and payable from any or all the revenues of the Authority permitted by, Section 10c hereof, including, but not limited to, the proceeds of any one or more contracts between the Authority and any persons, firms, corporations, cities and **[**52]** political subdivisions.

If and when the Legislature remits the ad valorem tax in the counties for a certain period of years, the Directors may in their discretion if necessary with the approval of the Commissioners Court of the county in the watershed use part or all of the taxes remitted to said counties for the purpose of paying back to the United States of America or any of its agencies or others the money borrowed by the Authority for the purpose herein mentioned.

SEC. 10c. The bonds issued by the authority of this Act may either be (1) sold for cash, at public or private sale, at such price or prices as the Board of Directors shall determine, not to be for less than par and accrued interest, provided that the interest cost of the money received therefore, computed to maturity in accordance with the standard bonds tables in general use by banks and insurance companies, shall not exceed five (5) per cent per annum, or (2) may be issued on such terms as the Board of Directors shall deem necessary or convenient for any corporate purpose, or (3) may be issued to refund any bonds issued at any time under authority of this Act. All such bonds shall be authorized by resolution or resolutions **[**53]** of the Board of Directors concurred in by a majority of the members of the Board, and shall bear such date or dates, made at such time or times, bear interest at such rate or rates (not exceeding five (5) per cent per annum) payable annually or semiannually, that such denominations be in such form, either coupon or registered, carrying such registered privileges as to principal only or as to both principal and interest, and as to exchange of coupon bonds for registered bonds or vice versa, in exchange of bonds of one denomination for bonds of other denominations, be executed in such manner and be payable at such place or places within or without the State of Texas, as such resolution or resolutions may provide. Any resolution or resolutions authorizing any bonds may contain provisions, which shall be part of the contract between the directors and the bondholders thereof from time to time.

(a) Reserving the right to redeem such bonds at such time or times, in such amounts and at such prices not exceeding one hundred and two (102) per cent of the **[*359]** principal amount thereof, plus accrued interest, as may be provided;

(b) Providing for the setting aside of sinking funds or reserve funds and **[**54]** the regulation and disposition thereof;

(c) Pledging to secure the payment of the principal and interest on such bonds and the sinking fund or reserve fund payments agreed to be made in respect to such bonds all or any parts of the moneys that may be donated and/or granted herein by the State of Texas and all or any part of the gross or net revenues hereafter received by the district in respect of the property, real, personal, or mixed, to be acquired and/or constructed with such bonds or with proceeds thereof, or all or any part of the gross or net revenues thereafter received by the District from whatsoever source derived;

(d) Prescribing the purposes to which such bonds or any bonds thereafter to be issued or the proceeds thereof, may be applied;

(e) Agreeing to fix and collect rates and charges sufficient to produce revenues together with the moneys that may be granted and/or donated by the State of Texas adequate to pay the items specified herein, and prescribing the use and disposition of all revenues;

(f) Prescribing limitations upon the issuance of additional bonds and upon all agreements which may be made with the purchaser and successive bondholders;

(g) With regard to the construction, **[**55]** extension, improvement, operation, maintenance, depreciation, replacement, and betterments of the properties of the District and carrying of insurance upon all or any part of said property covering loss or damage or loss of use and occupance resulting from specified risks;

(h) Fixing the procedure, if any, by which, if the District shall so desire, the terms of any contract with bondholders of such bonds may be amended or abrogated, the amount of bonds the holders of such must consent thereto, and the manner in which such consent shall be evidenced, for the execution and delivery by the district to the bank or trust company authorized by law to accept such trust, or to the United States of America or any office or agency thereof, of indentures or agreements therein authorized to be made with all for the benefit of the holders of such bonds and such other provisions as may be contained in such indentures or agreements; and

(i) Such other provisions not inconsistent with provisions of this Act as the Board may approve.

Any such resolution and any indenture or agreement entered into pursuant thereto may provide that in the event that,

(1a) Defaults may be made in the payment of the interest **[**56]** on any or all bonds when and as the same shall become due and payable, or

(1b) Defaults shall be made in payment of the principal of any or all bonds when and as the same shall become due and payable whether at maturity thereof, by call for redemption or otherwise, or

(1c) Defaults shall be made in the performance in agreement made with purchasers or successive holders of any bonds, and such defaults shall have continued for such period, if any, as may be prescribed by said resolution in respect thereof, the trustee under the indenture or indentures entered into in respect of the bonds authorized, and by, or, if there shall be in such indenture, a trustee appointed in the manner provided in such resolution or resolutions by the bondholders of twenty-five (25) per cent aggregate principal amount **[*360]** of the bonds authorized hereby and at the time outstanding may, and upon the written request of the holders of twenty-five (25) percent in aggregate principal amount of the bonds authorized by such resolution or resolutions at the time outstanding, shall, in his or its own name, be for the equal and proportionate benefit of the holders of all such bonds; and with or without having possession thereof **[**57]** for the holders of all such bonds:

(1) By mandamus or suit, action or proceeding at law or in equity, enforce all rights of the holders of such bonds,

(2) Bring suit upon such bonds and/or appurtenant coupons,

(3) By action or suit in equity requiring the Directors to act as if they were the trustees of an express trust for the bondholders,

(4) By action or suit in equity enjoin any act or things which may be unlawful or in violation of the rights of the holders of such bonds, and/or

(5) After such notice of the Directors as such resolution may provide, declare the principal of all such bonds due and payable and if all defaults shall be made good, then with the written consent of the holders of twenty-five (25) per cent aggregate principal amount of such bonds at the time outstanding, annul such declaration and its consequent; provided, however, that the bondholders of more than the majority and principal amounts of bonds authorized thereby and at the time outstanding shall by instrument or instruments in writing delivered to such trustee, have the right to direct and control any and all actions taken or to be taken by such trustee under this paragraph. Such resolution, indenture or agreement **[**58]** may provide that in any such suit, action or proceeding, any such trustee, whether or not all of such bonds shall have been declared due and payable, and with or without possession of any thereof, shall be entitled as of right to the appointment of a receiver who may enter and take possession of all or any part of the properties of the District, and operate and maintain the same, and fix, collect and

receive rates and charges that together with the moneys that may be granted and/or donated by the State of Texas will be sufficient to provide revenues adequate to pay the items set forth herein, and cost and disbursements of such suit, action or proceeding, and to apply such revenue in conformity with the provisions of this Act and the resolution or resolutions authorizing such bonds. In any suit, action or proceeding by any such trustee or receivers, if any, counsel fees and expenses of such trustee and of receiver or receivers, if any, shall constitute taxable disbursements and all costs and disbursements allowed by the Court shall be a fixed charge upon any revenue pledged to secure the payment of such bonds. In addition to the powers hereinabove specifically provided for, each trustee **[**59]** shall have possess all powers necessary or appropriate for the exercise of any thereof, or incident to the general representation of the bondholders in enforcement of their rights.

Before any bonds shall be sold by the District, a certified copy of the proceedings for the issuance thereof, including the term of such bonds, together with any other information which the Attorney General of the State of Texas may require, shall be submitted to the Attorney General, and if he shall find that such bonds have been issued in accordance with law, and he shall approve such bonds, he shall execute a certificate to that effect which shall be filed in the office of the Comptroller of the State of Texas and be recorded in a record kept for that purpose. No bonds shall be issued until the same shall **[*361]** have been registered by the Comptroller who shall so register the same if the Attorney General shall have filed with the Comptroller his certificate approving the bonds and the proceedings for the issuance thereof as hereinabove provided.

All bonds approved by the Attorney General as aforesaid, and registered by the Comptroller as aforesaid, and issued in accordance with proceedings so approved shall be **[**60]** valid and binding obligations of the District and shall be incontestable for any cause from and after the time of such registration.

SEC. 10d. The Authority shall be authorized to enter into oil and gas leases with respect to its properties upon such terms as the Board of Directors may consider appropriate in the production of revenues to the Authority. The Authority shall be additionally authorized to sell or otherwise dispose of its properties if its Board of Directors shall have first determined that the property or interest to be disposed of is not necessary to the business of the Authority and shall have approved the terms of any such sale. All property of the Authority, however, shall be at all times exempted from forced sale under any judgment, suite or proceeding of any nature or kind.

SEC. 10e. The District shall have the power and is hereby authorized to acquire by purchase, lease, gift, or in any other manner (otherwise than by condemnation) and to maintain, use and operate any and all property of any kind, real, personal, or mixed, or any interest therein, within or without the boundaries of the District necessary or convenient to the exercise of the powers, rights, privileges, **[**61]** and functions conferred upon it by this Act.

The District shall have the power and right of eminent domain for the purpose of acquiring by condemnation any and all property of any kind, real, personal, or mixed, or any interest therein, within or without the boundaries of the District (other than such property of or any interest therein without the boundaries of the District as may at the time be owned by any body politic) necessary or convenient to the exercise of the powers, rights, privileges, and functions conferred upon it by this Act in the manner provided by General Law with respect to condemnation, or at the option of the District, in the manner provided by Statutes relative to condemnation by Districts organized under General Law pursuant to *Section 59 of Article 16 of the Constitution* of the State of Texas.

In condemnation proceedings, being prosecuted by said Districts, the District shall not be required to give bond for appeal or bond for costs.

That if in the exercise of the power of eminent domain, the relocation or change of grade of any railroad facilities are required, the same shall be accomplished under the provisions of Article 7880-123a, Revised Civil Statutes of **[**62]** Texas, 1925.

The District shall have the power and authority to overflow, and inundate any public lands and public property and to require the relocation of roads and highways in the manner and to the extend permitted to Districts organized under General Law pursuant to *Section 59 of Article 16 of Constitution* of the State of Texas

SEC. 10f. The Board of Directors shall have authority to make all necessary rules and regulations for the government and control of the District not inconsistent with the Constitution and Laws of the State of Texas.

SEC. 12. In the prosecution of the plans for which the District has been created for the storing, controlling, conserving, and **[*362]** distributing to useful purposes the storm and flood waters of the San Jacinto River watershed, the District shall be recognized to have the right to make use of the bed and banks of the San Jacinto River and of its tributary streams for any and all purposes necessary to the accomplishments of the plans of the District.

SEC. 13. Nothing in this Act, as amended, shall be construed to violate an provision of the Federal or State Constitution, and all acts done under this Act shall be in such manner as will confirm thereto, whether **[**63]** expressly provided or not. Where any procedure hereunder may be held by any court to be violative of either of such Constitutions, the Authority shall have the power by resolution to provide an alternative procedure conformable with such Constitutions. If any provision of this Act should be invalid, such fact shall not affect the validity of any other provisions of this Act, and the Legislature hereby declares that it would have enacted the valid provisions of the Act notwithstanding the invalidity of any other provision or provisions hereof.

SEC. 14. [OMITTED].

Agency v. Dfo Global Performance Commerce Ltd.

United States District Court for the Central District of California

August 4, 2021, Decided; August 4, 2021, Filed

SACV 20-1716 JVS (KESx)

Reporter

2021 U.S. Dist. LEXIS 190357 *; 2021 WL 4350056

Agency Y LLC et al. v. DFO Global Performance Commerce Ltd. et al.

Prior History: *Agency Y LLC v. DFO Global Performance Commerce LTD, 2021 U.S. Dist. LEXIS 61412 (C.D. Cal., Feb. 2, 2021)*

Core Terms

Global, allegations, argues, trademark infringement, false advertising, Media, false designation, announcement, unfair competition, agrees, website, brand, promissory fraud, fraudulent, promises, prong, promotion, unfair, motion to dismiss, advertising, rebranding, rerouting, contends, goodwill, deceive, cause of action, service mark, contracts, trademark, commerce

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

Under Fed. R. Civ. P. 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility if the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] **Motions to Dismiss, Failure to State Claim**

In resolving a Fed. R. Civ. P. 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Nor must the Court accept as true a legal conclusion couched as a factual allegation. Second, assuming the veracity of well-pleaded factual allegations, the Court must determine whether they plausibly give rise to an entitlement to relief. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Public Records

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN3[] **Adjudicative Facts, Facts Generally Known**

Under Fed. R. Evid. 201, the Court may take judicial notice of matters of public record if the facts are not subject to reasonable dispute. See Fed. R. Evid. 201(b).

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN4[] **Motions to Dismiss, Failure to State Claim**

Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim. The defendant may offer such a document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > Burdens of Proof

HN5[] **Infringement Actions, Determinations**

To state a claim for trademark infringement, a plaintiff must allege two elements: first, that the plaintiff owns a valid and protectible trademark; and second, that a defendant used, in commerce, a similar mark without authorization in a manner that is likely to cause consumer mistake, confusion, or deception.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

HN6[] **False Advertising, Elements of False Advertising**

A false advertising claim requires a showing that: (1) the defendant made a false statement either about the plaintiff's or its own product; (2) the statement was made in commercial advertisement or promotion; (3) the statement actually deceived or had the tendency to deceive a substantial segment of its audience; (4) the deception is material; (5) the defendant caused its false statement to enter interstate commerce; and (6) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff's product.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN7[] **Actual Fraud, Elements**

Promissory fraud is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. Cal. Civ. Code § 1710, subd. (4). The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or scienter); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN8[] **Heightened Pleading Requirements, Fraud Claims**

Under Fed. R. Civ. P. 9(b), a plaintiff must plead each element of a fraud claim with particularity, i.e., the plaintiff must set forth more than the neutral facts necessary to identify the transaction. A fraud claim must be accompanied by the who, what, when, where, and how of the fraudulent conduct charged. A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations. Statements of the time, place, and nature of the alleged fraudulent activities are sufficient, but mere conclusory allegations of fraud are not. Furthermore, though allegations based on information and belief are usually insufficient, in circumstances of corporate fraud, this rule may be relaxed as to matters within the opposing party's knowledge.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN9[] **State Regulation, Claims**

California's Unfair Competition Law (UCL) prohibits any unlawful, unfair, or fraudulent business act or practices. Cal. Bus. & Prof. Code § 17200 et. seq. To prevail on a UCL claim, a plaintiff must make a twofold showing: he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN10[] **Trade Practices & Unfair Competition, State Regulation**

In the context of Cal. Bus. & Prof. Code § 17200, unfair means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > False Designation of Origin

Business & Corporate Compliance > ... > Unfair Competition > Federal Unfair Competition Law > False Designation of Origin

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN11[] **Likelihood of Confusion, False Designation of Origin**

False advertising claims are properly stated where one alleges that a person is misrepresenting the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities in commercial advertising or promotion. 15 U.S.C.S. § 1125(a)(1)(B). A false designation of origin claim requires that a plaintiff show that the defendant used in commerce any word, term, name, symbol, or device that is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of defendant with plaintiff, or as to the origin, sponsorship, or approval of his goods by plaintiff.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN12[] **Motions to Dismiss, Failure to State Claim**

A court is not required to accept as true allegations contradicting documents that are referenced in the complaint.

Counsel: **[*1]** Attorneys Present for Plaintiffs: Not Present.

Attorneys Present for Defendants: Not Present.

Judges: James V. Selna, United States District Judge.

Opinion by: James V. Selna

Opinion

CIVIL MINUTES - GENERAL

Proceedings: [IN CHAMBERS] Order Regarding Motion to Dismiss

Defendant DFO Global Performance Commerce Ltd. (formerly DBA Direct Focus Online Ltd.) ("DFO Global") filed a motion to dismiss the Third Amended Complaint ("TAC") of Plaintiff Agency Y LLC ("Agency Y") and Plaintiff Global Media Holdings Incorporated ("Global Media") (together, "Plaintiffs"). Mot., Dkt. No. 58. Agency Y opposed the motion. Opp'n., Dkt. No. 59. DFO Global Replied. Reply, Dkt. No. 60.

For the following reasons, the Court **GRANTS in large part** and **DENIES in part** the motion, with leave to amend.

I. BACKGROUND

The following facts are alleged in Agency Y's TAC. See TAC Dkt. No. 48.

Tim Burd ("Burd") is a high-profile internet marketing professional. Id. ¶ 14. Burd's name is recognized as a source of origin for his internet marketing services, some of which he provides through his corporation, Global Media. Id. Global Media is the owner of the service mark TIM BURD, and it has applied for registration of the service mark. Id. On September 3, 2016, **[*2]** Burd created a Facebook Business Manager Account at the highest setting (5,000 ad accounts). Id. ¶ 15.Later in 2016, Burd and Sean Brown ("Brown") founded Agency Y and created a successful brand under the service mark "AGENCY Y" to promote internet marketing services via its website at "www.agencyy.com." Id. ¶ 16.The AGENCY Y brand consists of the AGENCY Y mark and "www.agencyy.com". Id. ¶ 17.

In December 2016, Agency Y registered www.agencyy.com through the registrar GoDaddy (the "Domain"), which has been an important mechanism through which Agency Y has interacted with its clients. Id. ¶ 18. Agency Y invested substantial time, effort, and resources in promoting and marketing its services through Agency Y. As a result, the mark in connection with these services was valuable with considerable goodwill. Id. ¶ 19. In 2017 alone, Agency Y expended approximately $ 700,000 on the marketing, advertising, and promotion of services offered under the AGENCY Y mark. Id. ¶ 20. From 2016 to 2020, Agency Y participated in numerous regional and global conferences to market and promote its services under the AGENCY Y mark. Id. Agency Y's mark is distinctive to both the public and Agency Y's trade. **[*3]** Id. In 2017, Agency Y generated over $ 750,000 in Year-1 revenue under its Agency Y mark. Id. Clients understood that the Agency Y services originated from Agency Y and Burd, and based on the strength of the Agency Y brand, Year 1 revenue, and Burd's reputation, the business could easily have sold for a substantial sum. Id. ¶ 22.

From December 2016 to February 2019, the Agency Y mark and services received significant media coverage and received substantial promotion from Facebook groups, name brand recognition with Burd, word of mouth marketing, and personal referrals. Id. ¶ 21.

In October 2017, Defendant Bruce Cran ("Cran") approached Burd and Brown about creating a joint venture between Cran's company and Agency Y to promote the AGENCY Y brand and grow Agency Y's business. Id. ¶ 25. In reliance on Cran's representations, in November 2017, Agency Y entered into an agreement (the "Agreement") with DFO NJ for a 23-month term (renewable for additional12-month terms). Id. ¶ 26. The Agreement promises Agency Y commissions for referring its clients to DFO Global in the event that Agency Y's clients engage DFO Global to perform internet marketing services for Agency Y's clients. Id. ¶ 27. **[*4]** As a practical matter, however, not only did Agency Y refer and introduce its existing and potential clients to DFO Global, but they would also manage leads, clients, and push for growth and "upsells". Id.

For approximately two years thereafter, Agency Y believed that the parties co-existed within the parameters of the Agreement, but DFO Global "kept Agency Y in the dark, thus obscuring its fraudulent behavior and devious intentions." Id. ¶ 28. During the initial and first renewal term of the Agreement, Agency Y remained the owner of the AGENCY Y service mark and all goodwill associated with it per Section 8(d) of the Agreement. Id. ¶ 29. In less than a year after DFO Global's assumption of the Agency Y brand, however, Agency Y noticed that the brand was suffering damage to its reputation due to subpar service resulting in decreased goodwill. Id. ¶ 30. In or around February 2019, Cran told Burd and Brown that some changes to the Agreement would be made to "bring it in line with the business relationship." Id. ¶ 31. Based on Cran's representations, on or about February 27, 2019, Agency Y entered into its first amendment to the Agreement ("First Addendum"), which states that DFO NJ was **[*5]** replaced by DFO BC or DFO NV—which have identical names (although the First Addendum does not specify which is DFO NJ's successor). Id. ¶ 32. The First Addendum also changed the provision in the Agreement that each party remains the owner of its respective marks and associated goodwill, replacing it with an assignment from Agency Y to DFO NJ's successor (either DFO BC or DFO NV). Id. DFO Global "intended to deceive and manipulate Agency Y to assign its intellectual property rights in the First Addendum." Id. ¶ 33.

Around September 2019, Cran told Burd and Brown that further modifications were required to the business terms of the Agreement, and that if the deal went awry, Agency Y could simply take back its IP. Id. ¶ 34. Based on Cran's representations, around September 10, 2019, Agency Y entered into its second amendment to the Agreement ("Second Addendum"), which also did not specify whether DFO BC or DFO NV is DFO NJ's successor. Id. ¶ 35. The Second Addendum reduced commissions payable to Agency Y from 10% of gross revenue to 10% of net profit, changed the mechanism for extension of the term, and put Agency Y on a "probationary period" with certain performance benchmarks it needed **[*6]** to meet to prevent termination of the Agreement. Id. ¶ 36. The Second Addendum also provided that in the event of termination, DFO Global would return to Agency Y its intellectual property. Id. When Cran made the representations to Burd and Brown to induce Agency Y to enter into the

Agreement and two addenda, DFO Global "had no intention of performing oral or written promises it made". Id. ¶ 37. Instead, DFO Global "intended to have Agency Y refer its clients to them, take over those clients, use the AGENCY Y brand to attract Agency Y's customers, and re-brand the services to make the AGENCY Y brand worthless and irrelevant." Id.

On June 4, 2020, Agency Y invoked Section 3(c) of the Second Addendum that authorizes the return of the Agency Y intellectual property rights. Id. ¶ 39. In the meantime, DFO Global had dismantled the Agency Y website, and since the filing of the original complaint in this action, DFO Global changed the www.agencyy.com website to display Agency Y on the "Home Page," but to link to DFO Global's new company, Amasa, at the "About" section. Id. ¶ 40. The Agency Y web address led only to the new website, www.agencyamasa.com, and remnants of Agency Y remained on the **[*7]** DFO Global website, but clicking on the link for more information about Agency Y directed to www.agencyamasa.com. Id. Moreover, on June 22, 2020, DFO Global announced a rebranding before the parties had an opportunity to discuss the proper distribution of the intellectual property assets upon termination of the Agreement. Id. ¶ 41.

The announcement describes the Agreement as "with Agency Y co-founder Tim Burd" when in fact it was with Agency Y itself, not Burd. Id. ¶ 42. Putting aside the announcement's false identification of the parties to the Agreement, it is true that Agency Y and Defendants' company dissolved their relationship. Id. However, the announcement was false in another sense: Agency Y did not decide to re-brand itself; DFO Global instead falsely stated that Agency Y had renamed itself Amasa. Id. DFO Global nevertheless controlled the domain names for both Agency Y and the new domain name, and diverted traffic that would have gone to www.agencyy.com (which DFO Global controlled) to www.agencyamasa.com (which DFO Global also controlled). Id. Agency Y's clientele and potential new clients could not reach Agency Y. Id.

II. Legal Standard

A. Motion to Dismiss

HN1[] Under *Rule 12(b)(6)*, a defendant **[*8]** may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

HN2[] In resolving a 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678*. Nor must the Court "'accept as true a legal conclusion couched as a factual allegation.'" *Id. at 678-80* (quoting *Twombly, 550 U.S. at 555*). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." *Id. at 679*. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

B. Request for Judicial Notice

HN3[] Under *Federal Rule of Evidence 201*, the **[*9]** Court may take judicial notice of matters of public record if the facts are not "subject to reasonable dispute." *Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001)*; see *Fed. R. Evid. 201(b)*.

III. Discussion

A. Incorporation By Reference

DFO Global first asks the Court to incorporate by reference the parties' Agreement and the two Addenda to the Agreement, because Agency Y refers extensively to these documents in its TAC. See Mot., Dkt. No. 58, at 4. Agency Y does not appear to oppose this request.

HN4[] "Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim. The defendant may offer such a document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)* (citations omitted).

The Court agrees with DFO Global that Agency Y relies extensively on the Agreement and its two Addenda in its TAC. See, e.g., TAC ¶¶ 25, 29, 32, 35-39. Accordingly, the Court GRANTS the request with respect to the Agreement between the parties and the First and Second Addenda to the Agreement.

B. Group Pleading

Next, DFO Global **[*10]** argues that the TAC is defective in that it fails to clarify which claim applies to which Defendant, and instead it alleges that "Defendants" committed each violation in each cause of action. Mot., Dkt. No. 58, at 4. Specifically, DFO Global argues that improperly grouping together the Defendants does not change the legal defenses between Agency Y and DFO Global at this stage, but that the decision to improperly group Cran with DFO Global is problematic because "[t]he TAC is devoid of any facts supporting a theory of personal liability as to Cran." Id., at 5.

Agency Y responds that they are uncertain of the precise relationship among the DFO Global entities, which is why it named all of them, and that without discovery "it is impossible to know the precise contours of the interrelationship among the various defendants." Opp'n., Dkt. No. 59, at 10. The Court agrees that group pleading is not inappropriate in this case, and that with respect to Cran the Court will dismiss claims that it finds are improperly stated with respect to him. Accordingly, the Court DENIES the motion to dismiss Cran due to a group pleading defect.

C. Motion to Dismiss

I. Agency Y's Claims

1. Trademark Infringement **[*11]**

DFO Global first asks the Court to dismiss Agency Y's trademark infringement claim as it relates to the Agency Y Mark on the ground that it is inconsistent with and barred by the parties' contracts. Mot., Dkt. No. 58, at 10. ***HN5***[] To state a claim for trademark infringement, a plaintiff must allege two elements: first, that the plaintiff owns a valid and protectible trademark; and second, that a defendant used, in commerce, a similar mark without authorization in a manner that is likely to cause consumer mistake, confusion, or deception. *So. Cal. Darts Ass'n v. Zaffina, 762 F.3d 921, 929 (9th Cir. 2014)*.

Specifically, DFO Global argues that Agency Y's trademark infringement claim, based on the allegedly unauthorized use of the Agency Y mark, is subject to dismissal because the allegation is inconsistent with the contracts. Mot., Dkt. No. 58, at 6. DFO Global states that "[a]ny use of the mark before June 2020 is barred by the agreements, and any use post-June 2020 is a contractual dispute, not a trademark claim." Id. As such, DFO Global concludes, Agency Y has not cured the defect that the Court identified in the FAC and SAC as reason to dismiss the trademark infringement claim with respect to the Agency Y mark. Id.

Agency Y responds that the defect has, **[*12]** in fact, been cured. Agency Y argues that unlike the SAC, the TAC "distinguishes between Agency Y's claim for infringement of its mark and [Global Media]'s claim for infringement of the Burd mark, by adding Burd as a plaintiff and pleading their respective claims in separate counts." Opp'n., Dkt. No. 59, at 16. The Court does not believe that this distinction makes a difference with respect to the sufficiency of the pleadings for the trademark infringement claims.

As was the case with previous iterations of this Complaint, the TAC has not sufficiently alleged facts that would lead to the existence of a valid trademark infringement claim with respect to the Agency Y mark given the express language in the contracts and addenda, which render this a contract dispute rather than a trademark infringement claim. As such, the Court again dismisses the trademark infringement claim with respect to the Agency Y mark as inconsistent with the contract. Accordingly, the Court **GRANTS** the motion to dismiss the trademark infringement claim as it relates to the Agency Y mark.

2. False Designation of Origin/ False Advertising/ Unfair Competition Claims

DFO Global next asks the Court to dismiss Agency Y's **[*13]** false designation of original, false advertising, and common law unfair competition claims. Mot., Dkt. No. 58, at 6.

HN6[] A false advertising claim requires a showing that: (1) the defendant made a false statement either about the plaintiff's or its own product; (2) the statement was made in commercial advertisement or promotion; (3) the statement actually deceived or had the tendency to deceive a substantial segment of its audience; (4) the deception is material; (5) the defendant caused its false statement to enter interstate commerce; and (6) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff's product. *Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 835 n.4 (9th Cir. 2002)*.

The TAC alleges false advertising premised on allegations that (1) DFO Global "sought to register the AGENCY Y mark in the United States Patent and Trademark Office." (TAC, Dkt. No. 48 ¶ 51); and (2) DFO Global re-routed Agency Y's URL to link to the Amasa website, which "misled the public, leading them to believe that Amasa was affiliated with Agency Y or was one and the same as Agency Y (Id. ¶ 40).

Regarding the United States **[*14]** Patent and Trademark Office ("USPTO") filing, DFO Global argues that Agency Y does not allege how exactly filing a trademark application with the USPTO is a "commercial advertisement or promotion" or explain how the application "actually deceived or had a tendency to deceive a substantial segment of its audience." Mot., Dkt. No. 58, at 7. Furthermore, DFO Global argues that the claim is barred under the economic loss doctrine. Id. The Court agrees that Agency Y's TAC suffers from the same defects as did its prior complaints. Just as before, any unlawfulness regarding DFO Global's filing with the USPTO is based on Section 8(d) of the Agreement, which provides that DFO Global is not the owner Agency Y mark (TAC ¶ 29), and Agency Y also again pleads that DFO Global's filing of the service mark was a violation of the Agreement (id. ¶ 108). As such, the Court once again finds that any damages resulting from the USPTO filing would be breach of contract damages, so the economic loss doctrine bars this tort claim.

Turning now to the false advertising claim based on the rerouting of the Agency Y URL to Amasa, Agency Y alleges that "[t]his misrepresented the nature, characteristics, and qualities **[*15]** of the mark," and that "Agency Y was injured as a result of this false advertising both by direct diversion of its sales to Defendants and the lessening of the goodwill associated with Plaintiff's services." Opp'n., Dkt. No. 59, at 17. However, the Court does not find that Agency Y has adequately alleged that this rerouting was false or a misrepresentation. As DFO Global notes, "after the emergence of a dispute between DFO [Global] and Agency Y, any public statement or representation that the

Agency Y business (i.e. the internet advertising services offered by DFO [global]) would continue instead as Amasa, is *accurate*, rather than false." Reply, Dkt. No. 60, at 6 (emphasis in original). Furthermore, the Court agrees that this kind of rerouting from one website to another does not constitute the kind of behavior that the Lanham Act prohibits. See *15 U.S.C. § 1125(a)(1)(B)* (the Lanham Act "prohibits a person from misrepresenting the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities in commercial advertising or promotion."

With respect to the false designation of origin claim, DFO Global argues that because Agency Y contends that **[*16]** a contractual dispute arose in June 2020 regarding the ownership of the AGENCY Y Mark (after DFO Global had been authorized to provide services related to the AGENCY Y Mark for years), Agency Y cannot also allege that ceasing to offer services under one mark and continuing the business under a new mark falsely designates source or is likely to cause confusion. Mot., Dkt. No. 58, at 8-9. The Court once again agrees that the rerouting to Amasa is accurate in showing that the services in question were coming from DFO Global. What is more, the Court finds that allegations that Agency Y's June 4, 2020 demand regarding the return of the IP Assets eliminated DFO Global's right to make changes to the website or inform the public of its rebranding is a breach of contract claim, not a false designation claim.

Accordingly, the Court **GRANTS** the motion to dismiss with respect to the false advertising, false designation of origin, and common law unfair competition claims.

3. Promissory Fraud Claim

DFO Global next argues that Agency Y's promissory fraud claim should be dismissed because it "merely upcycles its repeatedly dismissed fraudulent concealment claim under a different heading." Mot., Dkt. No. **[*17]** 58, at 10.

"'***HN7***[] Promissory fraud' is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." *Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951, 973-974, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (1997)* (citations omitted). *Cal. Civ. Code § 1710, subd. (4)*. "The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Beckwith v. Dahl, 205 Cal. App. 4th 1039, 1059-1060, 141 Cal. Rptr. 3d 142 (2012)* (citation omitted).

First, DFO Global argues that the promissory fraud claim lacks specificity as is required by *Rule 9(b)*. Mot., Dkt. No. 58, at 11. ***HN8***[] Under *Fed. R. Civ. P. 9(b)*, a plaintiff must plead each element of a fraud claim with particularity, i.e., the plaintiff "must set Title Agency Y LLC et al. v. DFO Global Performance Commerce Ltd. et al. forth more than the neutral facts necessary to identify the transaction." *Cooper v. Pickett, 137 F.3d 616, 625 (9th Cir. 1997)* (emphasis in original) (quoting *Decker v. GlenFed, Inc. (In re GlenFed, Inc. Sec. Litig.), 42 F.3d 1541, 1548 (9th Cir. 1994)*). A fraud claim must be accompanied by "the who, what, when, where, and how" of the fraudulent conduct charged. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (quoting *Cooper, 137 F.3d at 627*). "A pleading is sufficient under *rule 9(b)* if it identifies the **[*18]** circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." *Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989)*. Statements of the time, place, and nature of the alleged fraudulent activities are sufficient, but mere conclusory allegations of fraud are not. Id. Furthermore, though allegations based on information and belief are usually insufficient, in circumstances of corporate fraud, this rule may be relaxed as to matters within the opposing party's knowledge. Id.

DFO Global contends that the TAC does not state what promises were made, by whom, when and where they were made, or how, and that the mere contention that DFO Global "made false promises" in the contracts is insufficient under *Rule 9(b)*. Mot., Dkt. No. 58, at 11. Agency Y's opposition does not assist the Court in locating where any such specificity can be located. See Opp'n., Dkt. No. 59, at 18. Although Agency Y contends that its TAC is "remarkably fact-specific," it does not explain how exactly fraud was committed based on the rerouting of the website or the rebranding. See id., at 18-19. The Court agrees with DFO Global that Agency Y's allegations regarding promissory fraud are inadequate under *Rule 9(b)*'s standard. The general contention **[*19]** that DFO Global promised to "promote the AGENCY Y brand and grow Agency Y's services" (TAC ¶ 25) merely restates its claim for breach of contract, and the allegation regarding certain oral promises that were not memorialized in the parties' contracts (TAC ¶ 88) are too vague for the standard set by *Rule 9(b)*. Because the Court has found that this claim is inadequately plead under *Rule 9(b)*, it does not reach DFO Global's argument regarding economic loss on this claim. Accordingly, the Court GRANTS the motion to dismiss the promissory fraud claim with respect to the Agency Y mark for failure to comply with the heightened pleading standard required by *Fed. R. Civ. P. 9(b)* for fraud pleadings.

4. Unfair Competition Law Claims

DFO Global next argues that Agency Y's claims under the unlawful, unfair, and fraudulent prongs of California's Unfair Competition Law ("UCL") must be dismissed. Mot., Dkt. No. 58, at 13.

HN9[] California's UCL prohibits "any unlawful, unfair, or fraudulent business act or practices." *Cal. Bus. & Prof. Code §17200, et. seq.* To prevail on a UCL claim, a plaintiff must "make a twofold showing: he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition." *Peterson v. Cellco P'ship, 164 Cal. App. 4th 1583, 1590, 80 Cal. Rptr. 3d 316 (4th Dist. 2008)*.

As to the unlawful prong, DFO Global states simply: **[*20]** "Agency Y claims DFO [Global] has acted unlawfully due to the above allegations. Because these claims must be dismissed, as analyzed *supra*, the UCL claim predicated on the claims must be dismissed as well." Mot., Dkt. No. 58, at 13-14 (citing TAC, Dkt. No. 48 ¶ 94)). For the third time on this point, the Court agrees. Agency Y's contention of unlawful behavior under the UCL is based on the fact that DFO Global adopted and registered the Agency Y mark with the USPTO and engaged in conduct that violated the Lanham Act as asserted in the second and third causes of action. See TAC, Dkt. No. 48 ¶ 94. Thus, the UCL claim is premised on Agency Y's Lanham Act and promissory fraud causes of action, which as discussed above, cannot survive. Accordingly, the Court **GRANTS** the motion to dismiss the UCL claim based on the unlawful prong.

With respect to the unfair prong, DFO Global argues that Agency Y has not cured the defect that the Court noted with regard to the SAC, which was that it "fail[ed] to specifically explicate what public policy DFO Global violated through its allegedly unfair actions." Order, Dkt. No. 45, at 16. DFO Global contends that Agency Y's new allegation on this point is merely **[*21]** that DFO Global's actions "offend" and "violate" public policy. Mot., Dkt. No. 58, at 14 (citing TAC, Dkt. No. 48 ¶ 95, 96). Agency Y responds that the TAC does, in fact, directly tie the UCL claims to multiple federal statutes, including the Lanham Act *§1125(a)(1)* (established to protect consumers and businesses from unfair competition), and the *Sherman Act § 2*, *15 U.S.C. § 2*. Opp'n., Dkt. No. 59, at 18.

Once again, the Court finds that these allegations do not sufficiently allege violation of public policy. dismissal of Agency Y's UCL claim under the "unfair" prong. Mot., Dkt. No. 39, at 21. ***HN10***[] In the context of *section 17200*, "unfair...means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. The TAC does not add new allegations of any kind that do more than state that public policy has been violated in a conclusory manner. Accordingly, the Court **GRANTS** the motion to dismiss the UCL claim based on the unfair prong.

Finally, with regard to the fraudulent prong, DFO Global argues that Agency Y's allegations fail because they do not **[*22]** meet the *Rule 9(b)* pleading standard and because the "promissory fraud" claim on which it is based is improperly plead. Mot., Dkt. No. 58, at 14. For the same reasons discussed above regarding promissory fraud, the Court agrees, and **GRANTS** the motion to dismiss the UCL claim based on the fraudulent prong.

ii. Global Media's Claims: Causes of Action with Respect to the Burd Mark

1. Trademark Infringement

First, DFO Global argues that the Court should dismiss Global Media's claim for trademark infringement on the ground that the allegation is contradicted by the June 22 announcement. Mot., Dkt. No 58, at 15. Specifically, DFO Global contends that the TAC states that the announcement "implied that Burd . . . would continue his role in Amasa" which therefore constituted false, unauthorized use of the mark. (TAC ¶ 57), but that the announcement itself— which is quoted in the TAC— states the following:

> Media buying firm Agency Y has unveiled a new name, logo, and website as part of an extensive rebranding initiative. The company is now known as Amasa (uh-mah-suh). The initiative coincides with the dissolution of Direct Focus Online's agreement with Agency Y co-founder Tim Burd. Amasa will continue to **[*23]** put growth, data, and transparency at the core of its service offerings, which include media buying, conversion rate optimization, and strategic growth hacking.

Mot., Dkt. No. 58, at 15 (citing TAC ¶ 41). DFO Global argues that it is inconsistent to claim that this announcement implies that Burd will be continuing on with DFO/Amasa when the text itself referred to the dissolution of DFO Global's agreement with Burd. Id. Agency Y does not appear to respond directly to this point, and the Court is inclined to agree that it is inconsistent to state that DFO Global infringed the Burd mark through the June 22 announcement where the announcement itself directly states that there has been a dissolution between DFO Global and Burd.

With respect to the Pitchbook Profile, DFO Global notes that Agency Y's allegation is that the Profile leads to trademark infringement liability because it "states that Amasa's Executive Team includes Sean Brown and Tim Burd." Mot., Dkt. No. 58 (quoting TAC ¶ 59.) The Court finds that Agency Y does not sufficiently plead that this statement was untruthful or misleading under the circumstances when made, as the TAC does not plead the date that the Pitchbook profile **[*24]** was first made, or that at the time it was first made, that it was inaccurate. The TAC also does not plead that DFO Global was subsequently "re-stating" the Pitchbook profile causing it to be inaccurate. Thus, the Court finds that the TAC does not allege sufficient facts to plead a violation of the Lanham act with regard to the Pitchbook profile.

Accordingly, the Court GRANTS the motion to dismiss the trademark infringement claim with respect to the Burd mark.

2. False Advertising/ False Designation of Origin Claim

Next, DFO Global contends that Global Media's false advertising/ false designation of origin claim should be dismissed based largely on a now-familiar argument that the facts on which these claims are based (generally stemming from the June 22 announcement) are inconsistent with the claims. Mot., Dkt. No. 58, at 18 (citing TAC ¶ 64, 65). Specifically, DFO Global states that "as addressed above, this announcement specifically noted that the DFO entities were ending their relationship with Mr. Burd. It is therefore implausible that such an announcement could support a claim for false advertising or false designation of origin." Id.

HN11[] False advertising claims are properly stated **[*25]** where one alleges that a person is "misrepresenting the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities in commercial advertising or promotion." Alfasigma USA, Inc., 398 F. Supp. 3d at 590 (citing *15 U.S.C. § 1125(a)(1)(B)*). A false designation of origin claim requires that a plaintiff show that the defendant "used in commerce any word, term, name, symbol, or device ...' that is 'likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of [d]efendant with [p]laintiff, or as to the origin, sponsorship, or approval of his goods by [p]laintiff.'" *Blizzard Entm't, Inc., 2018 U.S. Dist. LEXIS 224178, 2018 WL 7448915, at *5*.

The Court agrees that neither a false advertising claim nor a false designation of origin claim is properly stated here. As noted above, Global Media's allegations regarding falsity here appear to be directly contradicted by the announcement itself. ***HN12***[] The Court is not required to "accept as true allegations contradicting documents that are referenced in the complaint." *Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008)*. Accordingly, the Court GRANTS the motion to dismiss the false advertising and false designation of origin claims with respect to the Burd mark.

3. Unfair Competition Law

Next, DFO Global argues that Global Media's **[*26]** claims under California's Unfair Competition Law must be dismissed because they are predicated on the above allegations of infringement, false advertising, and false designation of origin, all of which must be dismissed. Mot., Dkt. No. 58, at 19 (citing TAC ¶ 94-98). The Court agrees. Having dismissed Global Media's claims regarding trademark infringement, false advertising, and false designation of origin, the Court likewise GRANTS the dependent Unfair Competition Law claims with respect to the Burd mark.

iii. Allegations Against Cran

Finally, DFO Global seeks dismissal of all claims against Cran on the grounds that "Agency Y and [Global Media] fail to articulate how Cran *personally* committed trademark infringement, unfair competition, false advertising, false designation of origin, or cybersquatting relating to the AGENCY Y Mark, the Burd Mark, or the AGENCY Y URL." Mot., Dkt. No. 58, at 20. Essentially, DFO Global argues that the TAC does not allege any facts that tend to show that Cran, rather than DFO Global, did anything with respect to the alleged intellectual property at issue. Id. DFO Global also notes that Cran has not been served, and that the Court lacks personal jurisdiction **[*27]** over him. Id., at 19-21.

In response, Agency Y argues that Cran has not been served because he "has been intentionally evading service" and that Agency Y has "attempted to serve Cran multiple times at all known addresses, all of which have turned out to have no ties to Cran." Opp'n., Dkt. No. 59, at 19. Moreover, Agency Y states that since Cran has not been served, this is not the time to litigate the personal jurisdiction issue, and that since Cran has not appeared and is not a moving party, DFO Global does not have standing to address the TAC's allegations against him. Id. The Court agrees that DFO Global does not have standing to litigate the allegations against the heretofore unserved Cran. Accordingly, the Court DENIES the motion to dismiss the allegations against Cran.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS in large part** and **DENIES in part** the motion with leave to amend.

IT IS SO ORDERED.

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FTC v. Hackensack Meridian Health, Inc.

United States District Court for the District of New Jersey

August 4, 2021, Decided; August 4, 2021, Filed

Civil Action No. 20-18140

Reporter
2021 U.S. Dist. LEXIS 158158 *; 2021 WL 4145062

FEDERAL TRADE COMMISSION, Plaintiff, v. HACKENSACK MERIDIAN HEALTH, INC. and ENGLEWOOD HEALTHCARE FOUNDATION, Defendants.

Notice: NOT FOR PUBLICATION

Subsequent History: Affirmed by *FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160, 2022 U.S. App. LEXIS 7476 (3d Cir. N.J., Mar. 22, 2022)*

Prior History: *In re Hackensack Meridian Health, Inc., 2020 FTC LEXIS 139 (F.T.C., Dec. 3, 2020)*

Core Terms

merger, patients, insurers, Optimization, geographic, network, medical center, residents, competitors, plans, healthcare, inpatient, tertiary, Acquisition, negotiations, quaternary, cost saving, provider, effects, insurance company, demonstrates, transfers, beds, anticompetitive, entities, prima facie case, redirect, email, health system, facilities

Counsel: **[*1]** For HOSPITAL FOR SPECIAL SURGERY, Movant: JOHN P. BARRY, LEAD ATTORNEY, PROSKAUER ROSE, LLP., NEW YORK, NY.

For Mount Sinai Health System, Inc., Movant: SCOTT LANDAU, LEAD ATTORNEY, ABELL ESKEW LANDAU LLP, NEW YORK, NY.

For CARE PLUS BERGEN, INC., doing business as, BERGEN NEW BRIDGE MEDICAL CENTER, Movant: SAMUEL PARKER MOULTHROP, SAMUEL PARKER MOULTHROP, LEAD ATTORNEYS, RIKER, DANZIG, SCHERER, HYLAND, PERRETTI, LLP, MORRISTOWN, NJ.

For MEMORIAL SLOAN KETTERING CANCER CENTER, Movant: JOSEPH ANDREW MATTEO, LEAD ATTORNEY, SKADDEN ARPS SLATE MEAGHER & FLOM LLP, FOUR TIMES SQUARE, NEW YORK, NY.

For ST. JOSEPHS HEALTHCARE SYSTEM, INC., Movant: RICHARD HERNANDEZ, LEAD ATTORNEY, MCCARTER & ENGLISH, LLP, FOUR GATEWAY CENTER, NEWARK, NJ.

For CAREPOINT HEALTH MANAGEMENT ASSOCIATES, LLC, Movant: INA BETH SCHER, LEAD ATTORNEY, DAVIS & GILBERT, NEW YORK, NY.

For HUMANA INC., Movant: REBECCA MONCK RICIGLIANO, LEAD ATTORNEY, Crowell & Moring LLP, New York, NY.

For The Chartis Group, Movant: JESSICA GREER GRIFFITH, MCDERMOTT WILL & EMERY LLP, NEW YORK, NY.

For AMERIHEALTH NEW JERSEY, Movant: BRIAN JOSEPH BOYLE, LEAD ATTORNEY, MCDERMOTT WILL & EMERY LLP, WASHINGTON, DC.

For UNITEDHEALTHCARE, INC., Movant: JONATHAN **[*2]** RANDALL MACBRIDE, ZELLE LLP, PHILADELPHIA, PA.

For HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY, Movant: STEPHEN ALLEN LONEY, JR., LEAD ATTORNEY, HOGAN LOVELLS US LLP, PHILADELPHIA, PA.

For AETNA, INC., Movant: DENNIS S. SCHMELZER, LEAD ATTORNEY, Dechert LLP, WASHINGTON, DC.

For RWJBarnabas Health, Movant: SETH T. TAUBE, LEAD ATTORNEY, BAKER BOTTS, LLP, NEW YORK, NY.

For CIGNA CORPORATION, Movant: ALEX M. HYMAN, PAUL WEISS RIFKIND WHARTON & GARRISON LLP, NEW YORK, NY; ERIN LEFFLER, LEAD ATTORNEY, SHOOK HARDY & BACON LLP, PHILADELPHIA, PA.

For FEDERAL TRADE COMMISSION, Plaintiff: JONATHAN LASKEN, LEAD ATTORNEY, CHARLES E DICKINSON, CHRISTOPHER CAPUTO, NANDU MACHIRAJU, FEDERAL TRADE COMMISSION, BUREAU OF COMPETITION, WASHINGTON, DC; ANTHONY SAUNDERS, ELIZABETH ARENS, JONATHAN ROBERT WRIGHT, LINDSEY BOHL, ROHAN PAI, FEDERAL TRADE COMMISION, WASHINGTON, DC; CATHLEEN WILLIAMS, FEDERAL TRADE COMMISION, MERFERS IV, WASHINGTON, DC; CHRISTOPHER MEGAW, WASHINGTON, DC; EMILY BOWNE, VIENNA, VA; J. WELLS HARRELL, JAMIE FRANCE, FEDERAL TRADE COMMISSION, WASHINGTON, DC; NATHAN BRENNER, U.S. FEDERAL TRADE COMMISSION, WASHINGTON, DC; SAMANTHA GORDON, FEDERAL TRADE COMMISSION, ILLINOIS, CHICAGO, IL; SUSAN **[*3]** MUSSER, FEDERAL TRADE COMMISSION, DC, WASHINGTON, DC.

For HACKENSACK MERIDIAN HEALTH, INC., Defendant: FRANK F. VELOCCI, LEAD ATTORNEY, DRINKER BIDDLE & REATH LLP, FLORHAM PARK, NJ; JAMES BUCCI, LEAD ATTORNEY, GENOVA BURNS LLC, CAMDEN, NJ; JOHN S. YI, LEAD ATTORNEY, Faegre Drinker Biddle & Reath LLP, Philadelphia, PA; PAUL H. SAINT-ANTOINE, LEAD ATTORNEY, DRINKER BIDDLE & REATH LLP, PHILADELPHIA, PA.

For ENGLEWOOD HEALTHCARE FOUNDATION, Defendant: ANGELO JOSEPH GENOVA, LEAD ATTORNEY, PETER FRANCIS BERK, Genova Burns LLC, Newark, NJ; JAMES BUCCI, LEAD ATTORNEY, GENOVA BURNS LLC, CAMDEN, NJ; KERRY C DONOVAN, LEAD ATTORNEY, WINSTON & STRAWN LLP, NEW YORK, NY.

For NYU Langone Health, Defendant: STEVEN GERBER, Schoeman Updike Kaufman & Gerber LLP, WAYNE, NJ.

For MICHAEL K. FUREY, Interested Party: MICHAEL K. FUREY, LEAD ATTORNEY, RIKER, DANZIG, SCHERER, HYLAND & PERRETTI, LLP, MORRISTOWN, NJ.

For ST. MARY'S PASSAIC LLC'S, Interested Party: TYSON Y. HERROLD, LEAD ATTORNEY, BAKERHOSTETLER, CIRA CENTRE, 12TH FLOOR, PHILADELPHIA, PA.

For BRIGHTON HEALTHCARE SOLUTIONS, Interested Party: JOSEPH G. HARRAKA, JR., LEAD ATTORNEY, BECKER LLC, LIVINGSTON, NJ.

For WellCare Health Plans, Inc., Interested Party: **[*4]** DAVID MATTHEW STAUSS, LEAD ATTORNEY, HUSCH BLACKWELL LLP, DENVER, CO.

For NORTHWELL HEALTH, INC., Interested Party: THEODORA T. MCCORMICK, LEAD ATTORNEY, Epstein Becker & Green, PC, NEWARK, NJ.

For AMERIGROUP NEW JERSEY, INC., Interested Party: VALERIE SIROTA, LEAD ATTORNEY, TROUTMAN PEPPER HAMILTON SANDERS LLP, NEW YORK, NY.

Judges: JOHN MICHAEL VAZQUEZ, UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN MICHAEL VAZQUEZ

Opinion

OPINION WITH FINDINGS OF FACT & CONCLUSIONS OF LAW

John Michael Vazquez, U.S.D.J.

In this hotly contested matter, Plaintiff Federal Trade Commission ("FTC") seeks to stop Defendant Hackensack Meridian Health, Inc. ("HMH"), the largest health system in New Jersey, from acquiring Defendant Englewood Healthcare Foundation ("Englewood"), an alleged close and local competitor to two of HMH's medical centers. Presently pending before the Court is the FTC's motion for a preliminary injunction to prevent HMH and Englewood from consummating their proposed merger until completion of the pending administrative proceedings. D.E. 133. The parties agree to the relevant product market but little else. The relevant product market is a cluster of inpatient general acute care ("GAC") services sold and provided to **[*5]** commercial insurers and their members.

Defendants filed a brief in opposition to the FTC's motion, D.E. 157, to which the FTC filed a reply, D.E. 228. The parties also filed several motions *in limine* in advance of the evidentiary hearing, D.E. 246, 248, 260, 264, in addition to proposed findings of fact and conclusions of law, D.E. 320-21, 323-29. The Court reviewed the submissions in support of and opposition to the motions and held a seven-day evidentiary hearing via videoconference. The parties also provided post-hearing submissions, D.E. 320, 324, and the Court heard closing arguments, also via videoconference, on June 2, 2021. For the reasons stated below, the motion for a preliminary injunction is **GRANTED**.[1]

I. WITNESSES

During the evidentiary hearing, the Court heard testimony from the following individuals, in order of appearance:

- Michael Maron; President & Chief Executive Officer, Holy Name Medical Center;
- Michele Nielsen; Vice President of Network Contracting & New Jersey Market Lead, UnitedHealthcare;
- Lynda A. Grajeda; Director of Contracting for Medicaid & Medicare, Amerigroup of New Jersey[2];
- Walter C. Wengel, III; Senior Director for the New Jersey Network, Aetna;
- Sue Anderson; **[*6]** Principal, The Chartis Group;
- Kevin Lenahan; Senior Vice President, Chief Administrative Officer, Chief Financial Officer, Atlantic Health System;
- Dr. Leemore Dafny; Plaintiff's expert in healthcare and antitrust economics[3];
- Ken Kobylowski; Senior Vice President for Provider Contracting & Network Operations, AmeriHealth New Jersey & AmeriHealth Administrators;
- Ryan Tola; President, New Jersey Division, Doyle Alliance Group;
- Robert C. Garrett; President & Chief Executive Officer, HMH;
- Warren Geller; President & Chief Executive Officer, Englewood;
- Dr. Lawrence Wu; Defendants' expert in healthcare and antitrust economics;
- Kristen Strobel; Senior Director of Global Benefits, Becton, Dickinson & Co.;
- Patrick Young; President of Population Health, HMH;
- Allen Karp; Executive Vice President of Healthcare Management & Transformation, Horizon Blue Cross & Blue Shield of New Jersey;
- Mark Sparta; President & Chief Hospital Executive, Hackensack University Medical Center;
- Kevin C. "Casey" Nolan; Defendants' expert in hospital operations, capacity and strategic planning;

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[1] The Court has considered all submissions, testimony, and exhibits in this matter. To the extent the Court does not expressly address an argument raised by the parties, the Court has considered it and found that it does not change the Court's analysis.

[2] Ms. Grajeda testified that Amerigroup only offers Medicaid and Medicare plans in New Jersey. Tr. at 282:1-4. The FTC, however, expressly excludes Medicare Advantage and managed Medicaid insurers from its relevant product market. FTC Br. at 17 n.42. As a result, the Court finds little probative value to Ms. Grajeda's testimony.

[3] Dr. Dafny also testified as a rebuttal expert.

- Dr. Gautam Gowrisankaran; Defendants' expert in the areas of industrial organization, economics and econometrics in **[*7]** the healthcare industry;
- Dr. Stephen Brunnquell; President, Englewood Health Physician Network;
- Dr. Gregg Meyer; Defendants' expert in the area of healthcare quality, population health and value-based care;
- Lisa Ahern; Defendants' expert on cost savings and efficiencies for healthcare provider transactions; and
- Dr. Patrick Romano; Plaintiff's rebuttal expert on healthcare quality.[4]

II. BACKGROUND, EVIDENCE, and FINDINGS OF FACT

Defendants Englewood and HMH both have hospitals in Bergen County, a densely populated county in northern New Jersey. Englewood operates a single hospital, while HMH has two in the county, including one that it owns with a non-party partner.

Hospitals provide inpatient and outpatient care. Outpatient care generally refers to a same-day medical service, whereas inpatient care requires an overnight stay. Tr. at 48:11.[5] The focus of this case is inpatient care, specifically inpatient GAC services. As to inpatient GAC services, the type of care is divided into four categories: primary, secondary, tertiary, and quaternary care. The categories reflect the level of complexity of care; primary care is the least complex and quaternary care is the most complex. On average, **[*8]** patients need primary and secondary care more frequently than the higher levels of tertiary and quaternary care. Tr. at 49:7-19. For example, delivery of a baby without complications is considered primary care. A C-section, by comparison, reflects secondary care. A baby born with medical complications requiring neonatal treatment receives tertiary care. Tr. at 49:23-9. Quaternary care includes complex procedures such organ transplants and high-end cancer care. Tr. at 73:23-25; 736:15-19. Hospitals that provide only primary and secondary care are often referred to as community hospitals (although some witnesses used community hospital to refer to an entity that also provided limited tertiary services). *See, e.g.*, Tr. at 46:24-47:6.

A. Healthcare Providers

The following hospitals and healthcare systems are relevant to the Court's analysis: (1) Englewood; (2) Hackensack University Medical Center; (3) Pascack Valley Medical Center; (4) Holy Name Medical Center; (5) Valley Hospital Medical Center; (6) Bergen New Bridge Medical Center; (7) Palisades Medical Center; (8) Mountainside Medical Center; (9) St. Joseph's Hospital (2 locations); (10) St. Mary's General Hospital; (11) RWJBarnabas Health; **[*9]** (12) Atlantic Health System; and (13) New York city hospitals, including New York Presbyterian, Hospital for Special Surgery, Mt. Sinai, and Memorial Sloan Kettering.

1. Bergen County Hospitals

Defendant Englewood is a high-quality, community teaching hospital in Bergen County. Englewood provides primary, secondary, and some tertiary care, including cardiac and cancer surgery programs. Tr. at 845:13-19, 24-25; 845:25-846:3; 865:12-13. Englewood is licensed for 531 beds and is currently able to operate 350. Englewood, however, frequently operates under its 350-bed capacity. For example, the day before Englewood's President &

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[4] Plaintiff also sought to qualify Dr. Romano as an expert on capacity issues from the hospital operations perspective, including calculations of capacity or steps that a hospital could take to relieve capacity issues. Defendants challenged Dr. Romano's qualification regarding capacity issues, outside of the limited scope of how capacity challenges impact the quality of care. D.E. 264. Dr. Romano is a clinical practitioner. He does not have experience with healthcare system capacity constraints from the operational viewpoint. As a result, the Court grants Defendants' request to preclude Dr. Romano as an expert on operational capacity issues.

[5] Citations to "Tr." refer to the transcript from the seven-day evidentiary hearing in this matter.

Chief Executive Officer Warren Geller testified in this matter, Englewood's census was just 222 patients. Tr. at 847:20-848:16. As to payor mix, about half of Englewood's patients use government programs, such Medicare and Medicaid, while the other half have commercial insurance. Tr. at 849:14-18. Of the commercially insured patients, approximately 55% are Bergen County residents. The remaining 45% come from Hudson, Essex, Passaic, and Rockland counties, which all border Bergen County. Tr. at 850:2-6. About half of Englewood's revenue is generated from patients outside **[*10]** of Bergen County. Tr. at 851:3-5. Englewood's growth over the last several years has come from counties other than Bergen County. Tr. at 850:11-18.

Defendant HMH's flagship hospital, Hackensack University Medical Center ("HUMC"), is also located in Bergen County, approximately five miles from Englewood. HUMC is licensed for 781 beds and has 711 operational beds. Tr. at 1148:9-13. HUMC is the busiest hospital in New Jersey and more than 50% of HUMC's commercially insured patients come from outside of Bergen County. Tr. at 735:3-17; 783:10-14. HUMC is HMH's only hospital that performs complex tertiary and quaternary care, in addition to primary and secondary care. Tr. at 735:3-17. HUMC is considered an academic medical center. According to Robert C. Garrett, HMH's President & Chief Executive Officer, this means that in addition to providing complex tertiary and quaternary care, HUMC is focused on academics, research, and innovation. Tr. at 735:6-20. Nevertheless, there is a high overlap in the inpatient GAC services provided by HUMC and Englewood. [TEXT REDACTED BY THE COURT].

HUMC is currently adding a new tower to its hospital complex, which was described as a "modernization project" **[*11]** and was referred to during the hearing as the "Second Street" project. Tr. at 1150:23-1151:6. The Second Street project will (1) replace the currently 40-year-old operating room platform with larger operating rooms that can house equipment and technology used for complex tertiary and quaternary care; (2) convert existing medical-surgical ("med-surg") beds into private rooms; and (3) add twenty-two new intensive care unit ("ICU") beds. Tr. at 1151:6-18. HUMC started planning the Second Street project in 2012 and, at the time of the hearing, anticipated that it would be ready for partial occupancy in approximately 18 months. Tr. at 1151:21-25.

HMH also co-owns, with Ardent Health Services ("Ardent"), Pascack Valley Medical Center ("Pascack Valley"). Tr. at 769:6-9. Pascack Valley is the smallest acute care community hospital in Bergen County, providing primary and secondary care, Tr. at 57:12-19; 768:16-18, but not tertiary care. Tr. at 768:17-18.

Holy Name Medical Center ("Holy Name") is also in Bergen County. Tr. at 44:19-20. Holy Name is a Catholic sponsored community hospital that provides primary and secondary care services. Tr. at 47:2-6. At least 80% of Holy Name's inpatient admissions **[*12]** come from within Bergen County. Tr. at 52:18-21. Michael Maron, Holy Name's President & Chief Executive Officer, believes that this is because people want convenient, consistent care that is readily available. Tr. at 52:25-6. Englewood is approximately five miles northeast of Holy Name, and there is a significant overlap in the geographic range of patients that the two hospitals service. Tr. at 56:5-15. With the exception of Englewood's tertiary care offerings, the two hospitals offer virtually identical services and are roughly the same size. Tr. at 55:25-56:4; 57:17-18. HUMC is five miles west of Holy Name. Tr. at 57:4-5. Because of the overlap in services and location, Holy Name views Englewood and HUMC as its primary competitors. Tr. at 86:10-23; 87:19-25.

Valley Hospital Medical Center ("Valley") is another hospital in Bergen County. Valley is the second largest hospital in the county, and offers primary, secondary, and limited tertiary care. Tr. at 59:1-3. Valley Hospital is currently located in Ridgewood, New Jersey but is relocating to a new facility about two miles east, in Paramus, New Jersey. Tr. at 88:5-17. Valley's new location is a modernization project; [TEXT REDACTED **[*13]** BY THE COURT] Tr. at 88:13-14; 89:5-13. The project is nearing completion. The new construction will ultimately take Valley over five years to complete and is estimated to cost more than $750 million. Tr. at 449:13-23. Because of the location, Garrett believes that Valley's new hospital will make it a stronger competitor in the region. Tr. at 776:20-25.

Bergen New Bridge Medical Center ("New Bridge") is a government-run, county-owned hospital in Bergen County. New Bridge is predominately a long-term care facility for behavioral health but has a small acute care component that largely services its long-term care residents. Tr. at 59:20-60:3. New Bridge has a new management team that is investing in the facility and recently started to accept commercially insured patients. Tr. at 864:2-9.

2. Health Systems

As noted, HMH is the largest healthcare system in New Jersey. HMH was formed after Hackensack University Health Network and Meridian Health merged in 2016. Two additional large health systems play a significant role in the northern New Jersey marketplace, although neither has a hospital in Bergen County: RWJBarnabas Health ("RWJBH") and Atlantic Health System ("Atlantic"). RWJBH has numerous **[*14]** facilities throughout New Jersey, including Saint Barnabas Medical Center, an academic medical center in Essex County. Tr. at 1108:1-8. In 2017 and 2018, RWJBH was the market share leader within Bergen, Essex, Hudson, and Passaic Counties. DX3213-019.[6] According to Garrett, RWJBH is HMH's strongest competitor even though RWJBH does not have an inpatient hospital in Bergen County. Tr. at 774:23-12; 777:16-19. Atlantic has five hospitals: Morristown Medical Center and Chilton Medical Center, which are both in Morris County; Overlook Hospital in Union County; Newton Medical Center in Sussex County; and Hackettstown Medical Center in Warren County. Tr. at 434:1-10. Morristown Medical Center is also an academic medical center. Tr. at 1108:9-13. Although Atlantic does not have a hospital in Bergen County, it is affiliated with an urgent care facility in the county through a joint partnership. Tr. at 434:11-13; 436:17-437:7. [TEXT REDACTED BY THE COURT]

3. Non-Bergen County Hospitals

Turning to facilities outside of Bergen County, Palisades Medical Center ("Palisades") is in Hudson County, just south of the Bergen County line. Palisades is owned by HMH and provides primary and secondary care. **[*15]** Tr. at 768:16-18; 769:1-3. HMH also co-owns Mountainside Medical Center with Ardent. Tr. at 769:6-9. Mountainside is a community hospital in Essex County that provides primary and secondary care. Tr. at 768:16-18; 769:1-3. St. Joseph's Hospital and Medical Center is in Paterson, New Jersey and St. Joseph's Wayne Hospital is in Wayne, New Jersey. Wayne and Paterson are both in Passaic County, and both hospitals are within 10 miles of HUMC. Tr. at 775:17-25. St. Mary's General Hospital is an additional for-profit hospital in Passaic County. Tr. at 80:24-6.

Certain New York City hospitals are also relevant. New York Presbyterian, Hospital for Special Surgery ("HSS"), Mt. Sinai, and Memorial Sloan Kettering ("MSK") were mentioned most frequently during the hearing. Although no party denies that some New Jersey residents receive primary and secondary care at New York hospitals, the witnesses largely view these hospitals as providing high-end, specialty care (more complex tertiary and quaternary care) to New Jersey residents. Tr. at 73:20-74:5; [TEXT REDACTED BY THE COURT]; 397:1-10. As to outmigration - that is, New Jersey residents seeking medical care at a New York hospital, *see, e.g.* **[*16]** , Tr. at 767:10-11 - less than 30,000 New Jersey residents were discharged from a New York hospital in 2018. DX3601-16.

New York City hospitals are also establishing a physical presence in New Jersey, which the parties refer to as "front doors." MSK and HSS, for example, have outpatient facilities in Bergen County, and Mount Sinai has affiliations with Holy Name and Valley. Tr. at 779:20-780:13. Other New Jersey health systems, such as Atlantic, do the same. These outpatient facilities - the front doors - are intended to steer patients requiring inpatient care to an affiliated hospital. Tr. at 780:14-16; 780:21-25. The parties, however, failed to provide any evidence demonstrating that the outpatient facilities actually materially impact inpatient admissions.[7] In fact, [TEXT REDACTED BY THE COURT], stated that the number of patients that ultimately came to [TEXT REDACTED BY THE COURT] hospital for

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[6] On June 1, 2021, Defendants provided the Court with their list of exhibits that they seek to move into evidence. D.E. 332. The FTC provided its list on June 7, 2021, D.E. 340, and Defendants provided a supplemental list on June 9, 2021. D.E. 344. The parties also set forth a limited list of objections to documents on the exhibit lists. D.E. 331, 332, 344. The Court addresses the objections to PX1061, the Optimization Plans, and the Waiver Letters below. Otherwise, the Court did not rely on any of the documents for which there remain objections so the objections are moot. Those exhibits without objections in D.E. 332, 340 and 344 are admitted into evidence.

[7] Of course, there could be at least one other rational business reason for establishing outpatient facilities without regard to inpatient admissions: they are independently profitable. The parties, however, did not address this point, so the Court does not speculate.

inpatient care after visiting one of its [TEXT REDACTED BY THE COURT] facilities accounted for [TEXT REDACTED BY THE COURT] of [TEXT REDACTED BY THE COURT] total inpatient admissions over a 1.5-year period. [TEXT REDACTED BY THE COURT]. With respect to the number of patients who were initially **[*17]** treated at the Bergen County [TEXT REDACTED BY THE COURT] facility and received subsequent inpatient or outpatient care at [TEXT REDACTED BY THE COURT] hospital, [TEXT REDACTED BY THE COURT] indicated that the number was [TEXT REDACTED BY THE COURT] to [TEXT REDACTED BY THE COURT] utilization strategy. [TEXT REDACTED BY THE COURT].

The parties also consider physician practice groups to be a driver of inpatient admissions. For example, Geller appeared to attribute Englewood's overall growth to its expanding physician network, the Englewood Health Physician Network. Englewood's physician network is "robust," encompassing over 500 physicians in five different counties. In fact, [TEXT REDACTED BY THE COURT] of Englewood's revenue comes from its outpatient services. Tr. at 872:4. Moreover, these 500 physicians, who are fully integrated into the Englewood network, funnel care to Englewood's hospital. Tr. at 852:11-14; 853:6-12; 1311:1-10. Dr. Stephen Brunnquell, President of the Englewood Health Physician Network, explained that the physician network is also a "front door" to the hospital. Tr. at 1309:18-1; 1313:4-5.

B. Insurance Companies & Plans

Private (or commercial) insurance companies **[*18]** play a major role in the United States' healthcare system and are the payors at issue here. Within New Jersey, the four major commercial insurance companies, from largest to smallest, are Horizon Blue Cross & Blue Shield of New Jersey ("Horizon"), UnitedHealthcare ("United"), Aetna, and Cigna. Tr. at 1024:6-10. Within the commercial insurance sphere, each insurance company offers fully insured and employer-sponsored (or self-insured) plans. For a self-insured product, the employer bears the financial responsibility for the medical expenses that are incurred on behalf of its covered employees, and the employer typically pays the insurance company a fee to administer the plan. Tr. at 151:13-22; 1104:16-22. For a fully insured plan, the insurance company bears the risk if the medical expenses exceed the premium paid by the employer. Tr. at 151:23-152:5.[8]

Medical providers and facilities contract with insurance companies to be in the plan's "network." If a provider goes "out of network," the provider is no longer a participating provider in that insurance company's product or plan. Tr. at 1038:14-21. Each insurance company witness spoke to the importance of a network, which includes physicians, **[*19]** other providers, facilities (including hospitals), and other services that are offered to plan users. Each insurance company witness also testified that a network is "an integral component of the products" offered by the company. *See, e.g.*, Tr. at 152:13-25. Of critical importance is a network with a full scope of services and providers that are well-dispersed geographically. *See, e.g.*, Tr. at 153:19-23; 156:19-25; 335:24-336:4 (explaining that Aetna wants a "big network presence" that does not have any "holes"). Individual members, and therefore plan purchasers, also want access to care that is geographically convenient.[9] *See, e.g.*, Tr. at 155:9-15. If an insurance company does not provide an attractive network, the insurance company will not be able to sell the plan. *See, e.g.*, Tr. at 154:16-19.

At the same time, healthcare providers and facilities want to be in-network because, among other things, it increases their volume of patients. *See, e.g.*, [TEXT REDACTED BY THE COURT]. Patrick Young, HMH's President of Population Health, explained that from HMH's perspective, it is not a benefit for a provider to go out of network (or become non-participating). Young testified that if HMH went **[*20]** out of network with an insurance

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[8] When referring to commercial insurers herein, the Court does not distinguish between fully insured and self-insured plans, as the difference is immaterial to the Court's analysis.

[9] The Court notes that New Jersey has GeoAccess standards that apply to certain commercial and government plans. These standards generally require that an insurance company's network offers the requisite number of providers and facilities within a certain distance, time, and mileage of the insured population. Tr. at 330:2-10.

company, it would cause a significant financial hit for the organization due to lost revenue, and it would be disruptive to patients and physicians. Tr. at 1039:1-1040:4.

In New Jersey, insurance companies negotiate with health systems and hospitals on a statewide basis. This means that all of an insurer's plan members in New Jersey have access to in-network health systems' facilities and hospitals. At the same time, counties are important considerations for insurers in developing and selling a health plan. Bergen County is an important county because of its population size and affluence. FTC FOF ¶ 19. The relevant insurers have the following number of customers in Bergen County: United has approximately [TEXT REDACTED BY THE COURT] commercial members, Tr. at 161:13-15; Aetna has [TEXT REDACTED BY THE COURT] commercial members, Tr. at 341:9-11; and AmeriHealth has about 15,000 members, Tr. at 678:6-8. All insurers who testified indicated that they could not market a plan to Bergen County residents if the plan did not include a Bergen County hospital.

The Court heard a great deal of testimony about HMH's experience with commercial insurance companies, **[*21]** both from HMH's view and from the perspective of the insurance companies. HMH negotiates with commercial insurers "as a fully integrated network," that is, on a system-wide basis. Tr. at 1024:19-25. This means that HMH negotiates for a consistent (or the same) rate increase across all its facilities. The base rate of each facility, however, differs. Tr. at 1026:15-22. Accordingly, the actual rate charged by each specific HMH facility is not uniform across HMH's system although each facility's percentage rate increases are the same. In addition, the rates HUMC charges insurers for GAC services are substantially higher than the rates that Englewood charges. On an adjusted case-mix basis, [TEXT REDACTED BY THE COURT].[10] DX5001, ¶ 162.

The commercial insurance witnesses who testified in this matter largely described their negotiations with HMH as difficult. [TEXT REDACTED BY THE COURT], from [TEXT REDACTED BY THE COURT] believed that HMH's position during [TEXT REDACTED BY THE COURT] last negotiations with HMH in [TEXT REDACTED BY THE COURT] were "as close to take it or leave it as I've seen in the marketplace without much justification." [TEXT REDACTED BY THE COURT] further believed that **[*22]** HMH's most recent rate increases were [TEXT REDACTED BY THE COURT] than those of other health systems in New Jersey. [TEXT REDACTED BY THE COURT], explained that after [TEXT REDACTED BY THE COURT]'[TEXT REDACTED BY THE COURT] discussions for the [TEXT REDACTED BY THE COURT] contract with HMH hit a "stalemate," the final rates were only agreed to [TEXT REDACTED BY THE COURT]. In [TEXT REDACTED BY THE COURT] years with [TEXT REDACTED BY THE COURT] had never seen negotiations escalate in such a manner. [TEXT REDACTED BY THE COURT] stated that the ultimate rate was [TEXT REDACTED BY THE COURT] of what [TEXT REDACTED BY THE COURT] typically agrees to for similarly situated hospitals. [TEXT REDACTED BY THE COURT]

From HMH's perspective, Young stated that HMH never gets everything that it wants when negotiating with insurance companies and believes that the commercial insurance companies have significant leverage. Tr. at 1043:22-23; 1048:2-1050:2. Young also indicated that HMH never negotiates on a take-it-or-leave-it basis, Tr. at 1043:19-21, but an email provided by the FTC seems to suggest otherwise. PX1241. In the first paragraph of this email, which was sent by a HMH employee to [TEXT **[*23]** REDACTED BY THE COURT] on [TEXT REDACTED BY THE COURT], the HMH representative wrote: "[TEXT REDACTED BY THE COURT]." *Id.* [TEXT REDACTED BY THE COURT]" *Id.*

In addition to rates, the other sticking point in HMH's recent negotiations with private insurers involves language in certain contracts about rates after an HMH acquisition (the "Acquisition Clause"). The Acquisition Clauses predates HMH and appeared in legacy Meridian's contracts with certain commercial insurers. Through the Acquisition Clause, when HMH acquires an entity, the new facility moves to the same rates as HMH's similar facilities within a certain time frame. Tr. at [TEXT REDACTED BY THE COURT]; 1036:5-14. In other words, once HMH acquires a facility, that facility can charge insurers more than it used to, pursuant to the Acquisition Clause.

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[10] The case-mix index is used to compare the level of care provided at different hospitals and facilities. The higher the case-mix index, the higher the overall acuity, or complexity of care, provided at the facility. *See* Tr. at 191:8-15; 397:6-10.

After the FTC filed its opening brief in this matter pointing to the Acquisition Clause, HMH informed insurers that it was waiving the Acquisition Clause for the Englewood merger. Young was not aware of [TEXT REDACTED BY THE COURT], [TEXT REDACTED BY THE COURT], [TEXT REDACTED BY THE COURT]. [TEXT REDACTED BY THE COURT]. The Acquisition Clause has had a substantial financial impact **[*24]** on [TEXT REDACTED BY THE COURT] After HMH acquired JFK University Medical Center, it cost [TEXT REDACTED BY THE COURT] more per year; after HMH acquired Raritan Bay Medical Center, it cost [TEXT REDACTED BY THE COURT] more per year. [TEXT REDACTED BY THE COURT] As a result, during the [TEXT REDACTED BY THE COURT] negotiations, [TEXT REDACTED BY THE COURT] asked [TEXT REDACTED BY THE COURT]. [TEXT REDACTED BY THE COURT] testified that HMH [TEXT REDACTED BY THE COURT] The Acquisition Clause was also a major sticking point with [TEXT REDACTED BY THE COURT] negotiations. [TEXT REDACTED BY THE COURT], however, had [TEXT REDACTED BY THE COURT]. [TEXT REDACTED BY THE COURT]. When HMH previously acquired the Carrier Clinic, HMH and [TEXT REDACTED BY THE COURT] could not agree as to whether [TEXT REDACTED BY THE COURT]. The classification impacted [TEXT REDACTED BY THE COURT]. As a result, HMH [TEXT REDACTED BY THE COURT]. Ultimately, HMH's acquisition cost [TEXT REDACTED BY THE COURT] and additional [TEXT REDACTED BY THE COURT]. [TEXT REDACTED BY THE COURT].

Horizon is the largest insurer in New Jersey and provides both commercial and government-sponsored plans. Horizon's commercial plans account **[*25]** for approximately 60 % of its business in New Jersey. Tr. at 1092:8-1093:5. Although numerous insurance companies have had challenges with HMH, Horizon did not voice the same concerns and supports the proposed merger. DX1101. In fact, after the HMH and Englewood merger was announced, Allen Karp, Horizon's Executive Vice President of Healthcare Management and Transformation, sent Young a letter indicating that Horizon supported the merger.[11] DX1101. Karp did so at the request of HMH. Tr. at 1133:12-15.

In the letter, Karp explained that the merger allows Englewood to "focus on tertiary care for residents of Bergen County" and provide Englewood's patients with access to coordinated quaternary care within the HMH system. DX1101. Karp also stated that HMH's ability to expand quaternary care would "have the added benefit of keeping care in New Jersey." *Id.* Karp does not believe that the merger would increase HMH's bargaining leverage with Horizon. Tr. at 1103:16-24. At the same time, [TEXT REDACTED BY THE COURT]. Tr. at 1116:19-22. In addition, Karp is not aware what tertiary care will be provided at Englewood post-merger, or how HMH intends to keep quaternary care patients in New Jersey after **[*26]** the merger. Tr. at 1128:12-1129:5.

The Court does not give Karp's letter much weight. It was written at the request of HMH and while long on superlatives, it is short on supporting information or analysis.

C. The Proposed Merger

In April 2018, Englewood's Executive Committee and Board's outside counsel retained a consultant, The Chartis Group ("Chartis"), to assist with Englewood's strategic planning. Geller explained that he [TEXT REDACTED BY THE COURT] Tr. at 871:15-18; 384:6-9. Geller continued that Englewood had and has [TEXT REDACTED BY THE COURT] but it would be [TEXT REDACTED BY THE COURT]. Tr. at 871:21-25. Englewood also had [TEXT REDACTED BY THE COURT], and wanted an [TEXT REDACTED BY THE COURT]. Tr. at 872:3-19.

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[11] During the hearing, the FTC emphasized the fact that Horizon, HMH and RWJBH are co-owners of Braven Health, a new Medicare Advantage program. Tr. at 1131:12-1132:1; 1069:9-25. These entities share [TEXT REDACTED BY THE COURT] generated by Braven Health, with [TEXT REDACTED BY THE COURT]. Tr. at 1075:20-1076:1; 1131:21-23. This relationship creates an additional financial incentive for Horizon to keep patients at HMH's hospitals. The FTC also emphasized the fact that except for HSS, Horizon does not have any direct contracts with New York hospitals. Tr. at 1131:3-11. Again, this also creates a motive to support the merger that is unique to Horizon. Similarly, Defendants emphasized that Atlantic and United formed a competing physicians' practice group, which gives both United and Atlantic a motive to oppose the proposed merger. The Court ultimately gives the various relationships little weight as the evidence did not adequately establish how the insurers' motives resulted in slanted or biased testimony.

The Court also heard about Englewood's strategic planning process, which led to the proposed merger, from Sue Anderson, a Principal at Chartis. Tr. at 383:4-5. Chartis's work was divided into two phases; Anderson was highly involved in both. Tr. at 386:17-22.

In Phase I, Chartis looked at whether Englewood could achieve its strategic goals by itself or whether it needed a "stronger affiliation with another health system." Tr. at 386:23-387:3. Chartis presented its Phase **[*27]** I work to the Executive Committee in June 2018. PX2079. Chartis identified Englewood's key local competitors within Englewood's primary service area ("PSA")[12] : HMH accounted for 34% of inpatient discharges; Englewood for 15%; [TEXT REDACTED BY THE COURT]. No other New Jersey hospital in the region had a percentage of discharges larger than 7%. Tr. at 391:9-392-18; 06:14-16; PX2079-16. In addition, about 8% of patients in Englewood's PSA sought care at a New York facility but the outmigration was for relatively complex care. Tr. at 396:12-397:10.

At the time, Englewood and HMH had a limited relationship related to a Horizon narrow network insurance product.[13] PX2079-70. During its Phase I presentation, Chartis determined that the most likely future market scenario was that [TEXT REDACTED BY THE COURT]. Tr. at 389:9-399:10; PX2079-71-PX2079-72. Chartis identified other threats to Englewood's patient share, which included competition from New York health systems moving into the New Jersey arena (through "front doors") and the new capital projects at Valley and [TEXT REDACTED BY THE COURT] (*i.e.* Valley's new hospital and [TEXT REDACTED BY THE COURT]). PX2079-006. Ultimately, Chartis recommended **[*28]** that it would "be an opportune time for [Englewood] to explore [a] partnership opportunity, a strong affiliation." Tr. at 399:13-20. After Chartis presented its Phase I work, the Englewood Board [TEXT REDACTED BY THE COURT]. Tr. at 873:23-25.

In Phase II, Chartis helped Englewood find a partner. Chartis initially identified five potential partners: HMH; [TEXT REDACTED BY THE COURT]; [TEXT REDACTED BY THE COURT]; [TEXT REDACTED BY THE COURT]; and [TEXT REDACTED BY THE COURT]. Tr. at 399:22-400:12. Chartis met with all five, and Englewood representatives attended some of the meetings. Tr. at 400:13-15; 486:6-9.

Chartis also established a data room to enable Englewood and its potential partners to share information. Tr. at 401:10-16. When Englewood was first informed about the data room, Anderson suggested [TEXT REDACTED BY THE COURT] PX2311-002. Within the same email chain, an Englewood executive expressed concern over [TEXT REDACTED BY THE COURT] PX2311-001. Geller responded to this email with [TEXT REDACTED BY THE COURT] and then directed that the recipient have [TEXT REDACTED BY THE COURT]. *Id.*

During the hearing, however, HMH and Englewood downplayed the fact that they are competitors. **[*29]** *See, e.g.*, Tr. at 781:12-782:1 (Garrett explaining that HUMC only competes with academic medical centers in New Jersey and New York City); Tr. at 859:22-25 (Geller stating that Englewood does not compete with HUMC). HMH and Englewood's mantra during the proceeding was that they are complements rather than competitors. The email chain and other ordinary course documents discussed below, however, demonstrate otherwise. *See, e.g.*, PX2291-004 (in a Q&A document that Englewood drafted after the merger was announced, one of the questions was "For a long time, Hackensack has been a fierce but respected competitor. So how do we now become partners and colleagues?"). Accordingly, the Court finds that Englewood and HUMC do in fact compete for patients who receive the primary, secondary, and tertiary services provided at both hospitals and that they view themselves as competitors.

Chartis and certain Englewood Executive Committee members met with HMH representatives on November 26, 2018. After the meeting, Chartis compiled feedback that it had received from Englewood's representatives. Tr. at 487:11-16; PX2325. Comments included the following: "[TEXT REDACTED BY THE COURT]." PX2325 at 3.

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[12] By way of reference, HUMC defines a primary service area as the geographic area where 75% of inpatient discharges originate. Tr. at 1158:18-21. Englewood provided Chartis with information about its PSA but Defendants did not provide any evidence explaining how Englewood determined its PSA.

[13] Generally, a narrow network insurance product offers members access to fewer providers than the insurance company's standard offering. Tr. at 241:9-24.

Anderson **[*30]** explained that there was concern that [TEXT REDACTED BY THE COURT]. Tr. at 489:16-21. Another Englewood attendee commented that "[[TEXT REDACTED BY THE COURT]." PX2325 at 3.

As Phase II continued, [TEXT REDACTED BY THE COURT] withdrew from consideration. Tr. at 512:23-25; 874:15-22. [TEXT REDACTED BY THE COURT] provided a formal bid to Englewood, but the Englewood Board voted in January 2019 not move forward with [TEXT REDACTED BY THE COURT]. Tr. at 512:7-18; 874:23-875:7. Geller stated that Englewood rejected [TEXT REDACTED BY THE COURT] offer because [TEXT REDACTED BY THE COURT]. Tr. at 875:9-24. [TEXT REDACTED BY THE COURT] testified that Englewood was concerned that [TEXT REDACTED BY THE COURT] was not [TEXT REDACTED BY THE COURT]. [TEXT REDACTED BY THE COURT]. Next, in February 2019, and Englewood mutually decided not to move forward, Tr. at 490:10-19; 513:1-5, leaving HMH and [TEXT REDACTED BY THE COURT] as the two remaining potential partners.

Turning to HMH, as it was developing its proposal to Englewood in February of 2019, James Blazer wrote an internal email addressing Chartis's follow-up questions to HMH. PX1061-001. Blazer is the Chief Strategy Officer at HMH and "one of **[*31]** the key [HMH] executives that was involved with the transaction." Tr. at 823:9-12. In the email, Blazer wrote that HMH wanted to [TEXT REDACTED BY THE COURT]. The email continued that Englewood "[TEXT REDACTED BY THE COURT]." *Id.* Five days later, Garrett sent by email, a letter to Chartis responding to Englewood's follow-up questions. PX1042.[14] Blazer was copied on the email, and the letter used a similar structure and language as that in Blazer's email. *Id.* Garrett began the letter by explaining that a partnership will allow HMH to build on its successes and offer more advanced care. Garrett wrote that "HMH is confident that we can sustain or more likely grow EH's current high volume and increase its case mix index." *Id.* But he then stated that "a formal partnership would allow [Englewood] *to continue* to reap the benefits of the Horizon Omnia contract, as well as the Medicare Shared Savings Plan." *Id.* (emphasis added). In other words, HMH approached the Englewood negotiation not only with a kind word (potential benefits to Englewood) but also a gun (a threat to ending the affiliation with HMH).

On March 28, 2019, Chartis presented the offers from HMH and [TEXT REDACTED BY THE COURT] **[*32]** to the Executive Committee. In comparing the two entities as potential partners, Chartis noted that a "pro" of choosing HMH is that it would "[TEXT REDACTED BY THE COURT]" PX6004-009. Relatedly, a "con" for [TEXT REDACTED BY THE COURT] was that a partnership with [TEXT REDACTED BY THE COURT] " *Id.* As a "con" for HMH, Chartis indicated that "[TEXT REDACTED BY THE COURT]." *Id.*

Next, in reviewing the differences for clinical services in the two bids, the HMH offer contained several specific numerical commitments regarding the number of transfers and patients that HMH would send to Englewood and outlined certain intended capital improvement projects. The [TEXT REDACTED BY THE COURT] offer did not provide the same level of detail. *Id.* at 004. Anderson, however, explained that Englewood wanted [TEXT REDACTED BY THE COURT] from HMH [TEXT REDACTED BY THE COURT]. Accordingly, Englewood explicitly asked Chartis to raise this issue with HMH. Anderson did not recall asking [TEXT REDACTED BY THE COURT] for a similar level of detail and did not believe that Englewood asked for such information from [TEXT REDACTED BY THE COURT]. Tr. at 516:22-517:15; 529:1-16. Anderson explained that if Englewood **[*33]** had wanted similar detailed plans from [TEXT REDACTED BY THE COURT],." Tr. at 516:6-15. Geller, however, testified that Englewood had Chartis [TEXT REDACTED BY THE COURT]. Tr. at 876:17-877:15; *but see* DX0103 (Englewood's "deal asks" which does not include any questions about [TEXT REDACTED BY THE COURT] at Englewood). The Court credits Anderson's recollection. She was the point person on the deal asks, and the [TEXT REDACTED BY

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[14] The FTC introduced Blazer's email during its cross-examination of Garrett. Defendants objected to the email because Garrett was not copied on it. Tr. at 824:8-11. The FTC established that while Blazer was the point person for the merger transaction, Garrett had final sign-off. Tr. at 823:6-15; 824:14-21. Moreover, as noted, Garrett sent the letter to Chartis soon after the email. Given the timing of the two documents, the similarity in content, and Blazer and Garrett's roles, it is reasonable to infer that Garrett was aware of the contents of Blazer's email, PX1061, when Garrett wrote the letter. *See* *Egan v. Live Nation Worldwide, Inc., 764 F. App'x 204, 208-09 (3d Cir. 2019)* (explaining that the burden to authenticate a document under *Fed. R. Evid. 901* is "slight" and that a "party can meet its burden by making 'a prima facie showing of some competent evidence to support authentication'" (quoting *United States v. Turner, 718 F.3d 226, 232 (3d Cir. 2013)*)).

THE COURT] requested from HMH is consistent with [TEXT REDACTED BY THE COURT]. No such similar concerns were raised as to [TEXT REDACTED BY THE COURT].

Finally, [TEXT REDACTED BY THE COURT] intended to provide [TEXT REDACTED BY THE COURT] million in "fresh" capital within the [TEXT REDACTED BY THE COURT], with a total capital contribution of [TEXT REDACTED BY THE COURT] million over [TEXT REDACTED BY THE COURT]. HMH intended to provide [TEXT REDACTED BY THE COURT] in "fresh" capital, with a total capital contribution of [TEXT REDACTED BY THE COURT] over an [TEXT REDACTED BY THE COURT]. PX6004-006. Geller stated that on paper, the [TEXT REDACTED BY THE COURT] offer looked significant but that after the Board studied the offers, it determined that the HMH offer **[*34]** was better. With the [TEXT REDACTED BY THE COURT] offer, money that the Englewood Foundation[15] raised would decrease [TEXT REDACTED BY THE COURT]s contribution and [TEXT REDACTED BY THE COURT] that would boost Englewood's bottom line and balance sheet. Tr. at 882:11-883:10. But again, it appears that [TEXT REDACTED BY THE COURT] did not give [TEXT REDACTED BY THE COURT] because Englewood did not ask. As for the HMH offer, Geller explained that Garrett gave his commitment that [TEXT REDACTED BY THE COURT] and that this was ultimately put into the final agreement. Tr. at 883:11-884:-2.

Once Englewood chose HMH as its partner, the parties negotiated the precise terms of the merger. On September 23, 2019, HMH and Englewood entered into the Definitive Agreement (the "Agreement"), under which HMH will become the sole member and ultimate parent of Englewood. DX3800. The Agreement sets forth numerous specific commitments and provides a level of detail that is not typically seen in a merger agreement. Tr. at 744:15-18.

The Agreement states that Englewood "will play a critical role as a tertiary hub in the HMH Northern Region." DX3800, § 3.1. HMH agreed that Englewood would continue as a separate **[*35]** legal entity for at least 10 years with its own board of trustees. *Id.* HMH also agreed to provide Englewood with a $404,500,000 capital investment for specified projects (with 60% coming in the first 4 years) and $5,000,000 in operating funds per year for seven years, beginning three years after the closing date. *Id.*, § 3.5.2.

During the hearing, Defendants pointed to Exhibit C to the Agreement, entitled "Clinical Initiatives," as evidence of firm commitments that HMH was making to Englewood. *Id.*, Ex. C. There are 27 total commitments, but numbers 20-27 are "operational commitments" which require HMH to use its "best efforts" and to which the Englewood Trust[16] has no "right to enforce[.]" *Id.* Moreover, closer inspection of the first 19 "firm commitments" reveals that they, for the most part, do not promise much except to explore, assess, or collaborate on different issues, or make "regional" improvements. *Id.* There are, however, a few firm commitments: Englewood will become part of HMH's regional transfer center; Englewood will get a new robot; HMH [TEXT REDACTED BY THE COURT] at Englewood; and HMH's capital commitment will be earmarked for certain projects. *Id.* The non-enforceable operational **[*36]** commitments (20-27) address, among other things, actual increases in patient volume ([TEXT REDACTED BY THE COURT]). *Id.*

While Defendants touted increased inpatient admissions at Englewood as a result of the merger, the Agreement also contemplates the opposite effect. If Englewood's volume in certain service lines [TEXT REDACTED BY THE COURT], then Englewood's "Trust Board" has some limited remedies. *Id.*, §§ 3.2.1, 3.2.3. After a number of cumbersome steps and arbitration, the Trust Board can only require HMH to engage a healthcare consultant to develop a "further revised Action Plan" that has to be approved by the post-closing boards. *Id.* And if that revised plan is not properly implemented, then the Trust Board can return to arbitration after a meet-and-confer period. *Id.*

Garrett explained that with the merger, HMH plans to "optimize services between the two organizations" and convert Englewood to its tertiary hub in the northern New Jersey region. Tr. at 743:2-8. This conversion will alleviate "significant capacity issues at HUMC," and allow HMH to expand HUMC as a quaternary academic medical center

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[15] The Foundation is the philanthropic arm for Englewood Health. *See* About Us, Englewood Health Foundation, https://www.englewoodhealthfoundation.org/about-us/.

[16] The Englewood Trust is an entity that will be formed when the merger is consummated to enforce certain terms of the Agreement on Englewood's behalf. DX3800, at 1.

that provides the highest level of care in New Jersey. Tr. at 743:15-20; *see also* **[*37]** 763:3-9. Garrett further explained that there are specific commitments in the Agreement because "they're the basis of how we're going to transform care" and are the basis of the "optimization of services." Tr. at 743:25-744:5. According to Garrett, these commitments are "the centerpiece" of the merger so it was "important to put it right in the definitive agreement." Tr. at 745:12-14.[17]

After the Agreement was signed, Englewood and HMH formed multiple committees, which were overseen by the Steering Committee, to create a plan to implement the Exhibit C commitments upon consummation of the merger. Tr. at 1315:17-22. Garrett stated that the Steering Committee "met regularly" after the Agreement was signed but acknowledged that there was a "significant pause" due to the COVID-19 pandemic because "people's attentions were 100 percent dedicated to taking care of COVID patients." Tr. at 795:14-21. Mark D. Sparta, the President and Chief Hospital Executive at HUMC, believed that between March 2020 and March 2021, the surgical, physician and cardiac integration teams "[TEXT REDACTED BY THE COURT]" [TEXT REDACTED BY THE COURT]. Tr. at 1172:24-25. Dr. Brunnquell, President of the Englewood Health **[*38]** Physician Network, testified that as of October 2020, the clinical teams had stopped meeting, but the Steering Committee continued to do so. Tr. at 1329:8-19. Dr. Brunnquell also indicated that much of the planning work was suspended because the committees had done as much as they could do prior to the actual closing of the deal. Tr. at 1328:18-1329:4.

The initial work product from the Steering Committee was the first draft of the "HMH-Englewood Health Service Optimization Framework" (the "Optimization Plan"), dated February 26, 2021. Tr. at 794:9-10. A second draft was produced shortly thereafter. The most recent Optimization Plan is dated March 31, 2021. DX3601. By the time this document was produced, not only had discovery been underway in this matter, but several key witnesses had already been deposed. The Optimization Plan discusses "persistent capacity constraints" at HUMC that HMH cannot address without a merger with Englewood. DX3601-006, 007. Of course, the parties had already agreed to the merger in September 2019 so this after-the-fact justification is, at best, odd. For the reasons stated in the Analysis section below, the Court gives the Optimization Plan little weight. **[*39]** Nevertheless, the Court reviews below some of the statements in the Optimization Report in light of other evidence.

Sparta discussed the capacity challenges at HUMC. Sparta explained that the long-standing capacity problems stem from a shortage of med-surg beds in the facility, which are general adult hospital beds. This causes backups in the emergency department, operating rooms, and the intensive care unit, as patients in these department are typically moved to med-surg beds for continued care. Tr. at 1143:2-15; 1143:24-16; 1145:9-10; 1145:6-10. The average occupancy of med-surg beds at HUMC ranges between 90 to 94% of HUMC's actual capacity over the last four years. Tr. at 1144:19-22. The industry standard for hospital occupancy is 85%. Tr. at 1186:16-18.

Critically, HMH does not point to any ordinary course documents discussing HUMC's capacity challenges before Englewood sought a merger. Englewood, not HMH, initiated the process to achieve its strategic goals. Moreover, others in the industry were not aware of any severe capacity issues — HUMC never declined transfers and has not gone on divert in several years. *See, e.g.*, Tr. at 90:10-22 (Maron stating that he was not aware of capacity **[*40]** issues at HUMC, that HUMC had never turned away a transfer from Holy Name, and that he did not believe that HUMC's emergency department has gone on divert in the last eight or ten years); [TEXT REDACTED BY THE COURT] ([TEXT REDACTED BY THE COURT] explaining that [TEXT REDACTED BY THE COURT] was not aware of any severe capacity issues at HUMC and would have expected to hear about it if that were the case); Tr. at 1127:10-22 (Karp stating that he was not aware of any severe capacity issues at HUMC and that because of his position he would have expected that he would have known of such a problem).

The Optimization Plan states that in order to alleviate the capacity problems at HUMC, HMH plans to shift and redirect certain tertiary care from HUMC to Englewood. HMH plans to redirect non-complex tertiary cases to Englewood as soon as the merger is finalized and has identified a number of cases that can annually be redirected from HMH's other hospitals in the region, including HUMC. DX3601-011. While HUMC plans to transfer cases to

[17] [TEXT REDACTED BY THE COURT], the testimony of Anderson from Chartis suggested that [TEXT REDACTED BY THE COURT] was due to [TEXT REDACTED BY THE COURT]. PX6004-006.

Englewood on the first day that the merger becomes effective, HUMC does not currently do so because Englewood is a competitor and Englewood would lose the revenues **[*41]** of the transferred case. PX7004-189—PX7004-190. Although there is no legal impediment to such transfers,[18] HUMC has a legitimate business reason for not doing so. At the same time, the fact that such legitimate financial considerations are dispositive undercuts other claims by Defendants, such as Garrett's indication that HMH's strategy is "New Jersey First," that is, to improve healthcare for New Jersey residents, as Defendants indicated that capacity constraints can have a deleterious impact on care. Tr. at 768:4-9. If HMH's primary concern was New Jersey first, it seems that it would currently transfer patients away from HUMC to alleviate its capacity constraints.

In addition, several witnesses called into question the number of patients that HMH could transfer on its own accord. For example, Sparta explained that about 70% of HUMC's medical staff are not HUMC employees, so HUMC cannot control where the non-staff physicians admit their patients. Tr. at 1147:22-1148:6; *see also* Tr. at 123:22-124:7 (Maron explaining that hospitals do not refer patients to hospitals, physicians do). In addition, when HMH first started looking into the specific number of patients that it could commit to **[*42]** transferring to Englewood, Sparta stated in a March 24, 2019 email that "[[TEXT REDACTED BY THE COURT]." [TEXT REDACTED BY THE COURT]. At the hearing, Sparta explained that after he sent the email, HMH [TEXT REDACTED BY THE COURT]. Tr. at 1178:8-18. But notably, Sparta did not [TEXT REDACTED BY THE COURT] in his email. Finally, Defendants' expert witness in hospital operations, capacity, and strategic planning, Kevin C. "Casey" Nolan, also stated that because 80% of the physicians on staff at HUMC are independent, "it's very difficult for HUMC to dictate to them where they want to admit their patients." Tr. at 1215:10-17. Nolan acknowledged that "transfers, frankly, are a last resort." Tr. at 1215:16-17.

In addition, the Optimization Plan notes that annually, 50 NICU patients will be redirected from HUMC to Englewood. DX3601-011. But again, other testimony undercuts this representation. Geller conceded that Englewood needs a new, updated NICU to alleviate space and noise issues. Tr. at 915:10-20. And Brunnquell stated that Englewood's NICU is "an older unit" that "would not meet the current code." Tr. at 1321:7-9. Finally, Nolan explained that "[m]oms can and do shop for their physician **[*43]** and the hospital they want to deliver at and they've chosen HUMC, so the ability to transfer those patients is probably not very high." Tr. at 1215:1-4.

The Optimization Plan also states that the Second Street project (referred to as the "Helena Theurer Pavilion") "will not alleviate HUMC's capacity challenges." DX3601-008. Nevertheless, the construction project expands HUMC's existing footprint. The project will result in [TEXT REDACTED BY THE COURT] new operating rooms, and HUMC plans to [TEXT REDACTED BY THE COURT] operating rooms. Tr. at 1173:25-1174:9. The new tower will also have [TEXT REDACTED BY THE COURT] new ICU beds, and HUMC plans to [TEXT REDACTED BY THE COURT] of its existing ICU beds. Tr. at 1175:9-14. In addition, the tower will have space for [TEXT REDACTED BY THE COURT] additional ICU beds that can be added if the need arises. Tr. at 1175:15-18. Finally, the new tower will have [TEXT REDACTED BY THE COURT] new private med-surg beds, and HMH plans to [TEXT REDACTED BY THE COURT]. HUMC's plan to [TEXT REDACTED BY THE COURT] cuts against its capacity claims, as does the fact that it is not currently [TEXT REDACTED BY THE COURT].

Finally, Defendants tout the cost savings **[*44]** that will result from this merger. Neither the Steering Committee, nor HMH or Englewood independently did any work, outside of this litigation, to assess the cost savings that may be incurred by transferring patients to Englewood after the merger. Tr. at 796:19-25. Defendants also state that their plan to optimize care between the two hospitals will reduce the need for patients to seek services at the more expensive New York hospitals. Tr. at 766:4-21; DX3601-016.

As to cost savings from the merger, Defendants largely rely the testimony of Lisa Ahern, Defendants' expert witness on cost savings and efficiencies for healthcare provider transactions. Ahern identified eleven categories of cost saving categories that she anticipates will result from the merger. The first eight categories address cost savings caused by corporate restructuring, such as reducing staffing redundancies and streamlining the supply chain

[18] There was no evidence that HUMC or HMH would face perilous economic consequences if it transferred those case to Englewood.

between the two entities. Ahern referred to the remaining three categories as "ancillary services," and these are more patient "facing." Tr. at 1385:22-1386:10. Ahern opined that by four years after the merger closes, there will be $38 million in annual recurring efficiencies. **[*45]** Tr. at 1386:23-1387:2. Critically, however, Ahern failed to conduct any analysis as to what percentage of the identified cost savings would be passed on to commercial insurers. Tr. at 1402:16-18. Similarly, HMH has a history of mergers and acquisitions. The corporate restructuring cost savings should, to some degree, result from any merger or acquisition. But HMH failed to present any evidence of its historical performance as to the relevant cost savings being passed on to commercial insurers.

One final note, no party disputed that HMH, as a large health system, and HUMC, as a large academic center, are more desirable to insurers than Englewood. This fact is reflected in the large price differential for services between HUMC and Englewood; in other words, Englewood is not nearly as important to an insurer as HUMC. [TEXT REDACTED BY THE COURT].

The extensive expert testimony from economists is discussed below.

III. PROCEDURAL HISTORY

After HMH and Englewood entered into the Agreement, the FTC filed an administrative complaint against HMH and Englewood. Through the administrative complaint, the FTC alleges that if consummated, the proposed merger violates *Section 7 of the Clayton Act, 15 U.S.C. § 18*, and *Section 5 of the Federal Trade Commission Act ("FTC") Act, 15 U.S.C. § 45* **[*46]** . On December 3, 2020, five FTC Commissioners voted unanimously to authorize FTC staff "to obtain preliminary injunctive relief under *Section 13(b) of the FTC Act*." Plf. FOF ¶ 4. The FTC filed its Complaint in this matter the following day, December 4, 2020, seeking a temporary restraining order and preliminary injunction that enjoins the merger. D.E. 1. The same day, the parties entered into a stipulated temporary restraining order, through which HMH and Englewood agreed that they would not consummate the proposed merger until after the Court rules on the FTC's motion for a preliminary injunction. D.E. 4. Then, on March 22, 2021, pursuant to the parties' case management order, the FTC filed its motion for a preliminary injunction, which sought to preserve the status quo pending a full administrative proceeding on the merits. D.E. 133. From May 10 through May 19, 2021, the Court conducted an evidentiary hearing on the FTC's motion for a preliminary injunction and heard closing arguments on June 2, 2021.

IV. LEGAL STANDARD

Pursuant to *Section 13 of the FTC Act*, the FTC can file suit in district court seeking a preliminary injunction "to prevent a merger pending a FTC **[*47]** administrative adjudication '[w]henever the Commission has reason to believe that a corporation is violating, or is about to violate, *Section 7* of the Clayton Act.'" *FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 337 (3d Cir. 2016)* (quoting *FTC v. H.J. Heinz Co., 246 F.3d 708, 714, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)*). The standard for granting a preliminary injunction under the FTC Act is not the same as the standard used to grant injunctive relief under *Federal Rule of Civil Procedure 65*. Rather, a court should issue a preliminary injunction pursuant to *Section 13* "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." *15 U.S.C. § 53(b)*.

Under *Section 13(b)*, a court first considers the FTC's likelihood of success on the merits. *Penn State Hershey Med. Ctr., 838 F.3d at 337*. Next, the court weighs the equities to determine whether a preliminary injunction is in the public interest. "The question is whether the harm that the [Defendants] will suffer if the merger is delayed will, in turn, harm the public more than if the injunction is not issued." *Id. at 352*. Ultimately, in deciding whether to preliminarily enjoin a merger "doubts are to be resolved against the transaction." *Id. at 337*.

The FTC must show that it has a likelihood of success of demonstrating, during the administrative proceeding, that the proposed merger violates *Section 7* of the Clayton Act. **[*48]** *Id. at 337*. *Section 7* prohibits mergers where the effect "*may* be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18 (emphasis added). The definition of antitrust liability under Section 7 is "relatively expansive" as the language deals in "probabilities, not certainties." Penn State Hershey Med. Ctr., 838 F.3d at 337 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)). "To stop a merger, a Section 7 plaintiff ultimately must show that a 'substantial lessening of competition' is 'sufficiently probable and imminent.'" FTC v. Thomas Jefferson Univ., 505 F. Supp. 3d 522, 537 (E.D. Pa. 2020) (quoting United States v. Marine Bancorporation, Inc., 418 U.S. 602, 622, 623 n.22, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974)). Thus, at the preliminary injunction stage, the FTC does not need to establish that the proposed merger violates Section 7. Rather, the FTC "need only show that there is a reasonable probability that the challenged transaction will substantially impair competition." FTC v. Sysco Corp., 113 F. Supp. 3d 1, 22 (D.D.C. 2015) (quoting FTC v. Staples, Inc., 970 F. Supp. 1066, 1072 (D.D.C. 1997)).

Courts use a burden-shifting framework to determine whether a merger is likely to harm competition pursuant to Section 7. The FTC must first establish a *prima facie* case by demonstrating that the merger is anticompetitive. Penn State Hershey Med. Ctr., 838 F.3d at 337. If the FTC establishes its *prima facie* case, "it creates a presumption in favor of preliminary relief." Thomas Jefferson Univ., 505 F. Supp. 3d at 538. Next, to rebut the presumption, a defendant must show "either that the combination would not have anticompetitive effects or that the extraordinary effects of the merger will be offset **[*49]** by extraordinary efficiencies resulting from the merger." Penn State Hershey Med. Ctr., 838 F.3d at 337. If the defendant successfully rebuts the *prima facie* case, "the burden of production shifts back to the Government and merges with the ultimate burden of persuasion, which is incumbent upon the Government at all times." Id. at 337 (internal quotation omitted).

V. ANALYSIS & CONCLUSIONS OF LAW

A. Likelihood of Success

1. *Prima Facie* Case

To establish a *prima facie* case, the FTC must "(1) propose the proper relevant market and (2) show that the effect of the merger in that market is likely to be anticompetitive." Id. at 337-38.

a. Relevant Market

The relevant market includes two components: the product market and the geographic market. Id. at 338. Appropriate market definitions are "'critical' because a proposed merger's legality 'almost always depends upon the market power of the parties involved.'" Thomas Jefferson, 505 F. Supp. 3d at 539 (quoting FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 45 (D.D.C. 1998)). Thus, defining the proper relevant market is a fact-specific analysis. Here, the FTC defines the relevant product market as the cluster of inpatient GAC services offered by Englewood and HMH's Bergen County hospitals and sold to commercial insurers.[19] FTC FOF ¶¶ 13-16. Dr. Dafny, the FTC 's expert in healthcare and antitrust economics, explained that (1) 97% **[*50]** of patient admissions at both HUMC and Englewood are for overlapping services, and that (2) 85% of the service lines offered at HUMC or Pascack Valley are offered at Englewood, while 99% of Englewood's service lines are offered at HUMC or Pascack Valley. Tr. at 556:15-21. Defendants do not meaningfully challenge the relevant product market as defined by the FTC. Accordingly, the Court adopts the FTC. 's proposed relevant market, and focuses on the geographic market.

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[19] Although specific inpatient GAC services are not interchangeable, courts and parties look at these services together as a "cluster" when the competitive conditions are reasonably similar across services. *See* ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 565-66 (6th Cir. 2014); *see also* Penn State Hershey Med. Ctr., 838 F.3d at 338 (defining relevant product market at general acute care services sold to commercial payors).

"The relevant geographic market 'is that area in which a potential buyer may rationally look for the goods or services he seeks.'" Penn State Hershey Med. Ctr., 838 F.3d at 338 (Gordon v. Lewistown Hosp., 423 F.3d 184, 212 (3d Cir. 2005)). Moreover, the identified relevant market "is dependent on the special characteristics of the industry involved[.]" Thomas Jefferson, 505 F. Supp. 3d at 539 (internal quotations omitted). Courts and the FTC frequently use the hypothetical monopolist test ("HMT") to determine the relevant geographic market. Defendants do not challenge the FTC 's use of the HMT, instead they challenge the FTC 's application of the test. Specifically, Defendants contend that the FTC 's geographic market does not comport with commercial realities or the *Horizontal Merger Guidelines* (the "*Merger Guidelines*").[20]

An HMT **[*51]** analysis starts by selecting a narrow candidate market. Then,

> if a hypothetical monopolist could impose a small but significant non-transitory increase in price ("SSNIP") in the proposed market, the market is properly defined. If, however, consumers would respond to a SSNIP by purchasing the product from outside the proposed market, thereby making the SSNIP unprofitable, the proposed market definition is too narrow.

Penn State Hershey Med. Ctr., 838 F.3d at 338 (internal quotations omitted). A "SSNIP is typically about 5%." Penn State Hershey Med. Ctr., 838 F.3d at 338 n.1 (quoting *Merger Guidelines*, § 4.1.2). A relevant geographic market should not be broadly defined, and the HMT "is designed to ensure that candidate markets are not overly narrow." *Merger Guidelines*, § 4.

The healthcare industry is unique in antitrust cases because patients, the direct users of inpatient GAC services, do not pay hospitals for the services (with the exception of co-pays or other similar charges). Rather, "the healthcare market is represented by a two-stage model of competition." Penn State Hershey Med. Ctr., 838 F.3d at 342. At the first stage, medical providers, including hospitals, compete to be included in an insurance plan's hospital network. At the second stage, medical providers compete to attract individual members of an insurer's **[*52]** plan. Id. at 342; *see also* FTC FOF ¶ 5; Tr. at 935:13-25. Competition at the second stage involves non-monetary factors like quality and reputation. Tr. at 550:16-551:1. Moreover, "[p]atients are largely insensitive to healthcare prices because they utilize insurance, which covers the majority of their healthcare costs." Penn State Hershey Med. Ctr., 838 F.3d at 342. Accordingly, the Third Circuit has instructed that courts must focus their analysis on insurers, who are the actual payors. Id. The Circuit has recognized, however, that "[p]atients are relevant to the analysis, especially to the extent that their behavior affects the relative bargaining positions of insurers and hospitals as they negotiate rates." *Id.*; *see also* Tr. at 555:2-6 (Dafny explaining that patient preferences influence insurers' decisions when forming their networks). In other words, the first stage is not independent from the second stage as patients (insureds) influence decisions at the first stage. With this in mind, the Court focuses its attention on the first stage, with the understanding that the two stages cannot be completely divorced from each other. And, as noted, the Court is only focused on private (or commercial insurance) companies rather than government **[*53]** payors.

Here, Dr. Dafny explained that her candidate market is commercially insured patients in Bergen County. Tr. at 557:15-17. This means that any hospital that serves a resident of Bergen County is included as a market participant even if that hospital is not located in Bergen County. Tr. at 558:17-22. Dr. Dafny chose Bergen County as her candidate market for three principal reasons: (1) Englewood and HUMC are both located in Bergen County; (2) the vast majority of Bergen County residents receive care in Bergen County; and (3) Bergen County is an economically significant area for insurers. Tr. at 557:19-558:13.

The commercial insurers, including Horizon, testified that they cannot offer a marketable plan in Bergen County that does not include a Bergen County hospital. *See, e.g.*, Tr. at 165:19-22 (Nielsen testifying that United could not sell a marketable plan to Bergen County residents that did not include any Bergen County hospitals); Tr. at 339:14-23 (as to whether Aetna could sell a network without a Bergen County hospital, Wengel explained that "if you live and reside in a county and you don't have a hospital but maybe the competitor does, I think you'll lose those cases

[20] The *Merger Guidelines* are issued by the U.S. Department of Justice's Antitrust Division and the FTC. Although the *Guidelines* are not binding on this Court, "they are often used as persuasive authority." Penn State Hershey Med. Ctr., 838 F.3d at 338 n.2 (quoting Saint Alphonsus Med. Ctr.-Nampa Inc. v. Saint Lukes Health Sys., Ltd., 778 F.3d 775, 784 n.9 (9th Cir. 2015)).

nine **[*54]** times out of ten"); Tr. at 1119:22-1120:5 (Karp stating that he did not think Horizon could market a plan to residents and employers of Bergen County that did not have a Bergen County hospital). Consequently, these insurers would be forced to accept a SSNIP from a hypothetical monopolist of all Bergen County hospitals to continue competing in the county. This is even reflected in the insurers' testimony. *See* [TEXT REDACTED BY THE COURT] (explaining that [TEXT REDACTED BY THE COURT] would likely be forced to accept a reasonable price increase imposed by all hospitals serving Bergen County); Tr. at 1119:22-1120:10 (explaining that if all Bergen County hospitals increased rates a reasonable amount, Horizon would continue to sell plans in Bergen County provided that the increase was reasonable and fit within Horizon's budget). Accordingly, the Court finds that the FTC has sufficiently established that its proposed geographic market of Bergen County satisfies the HMT. FTC FOF ¶ 66.

Dr. Dafny performed a willingness to pay ("WTP") analysis to empirically test her conclusion that Bergen County satisfies the HMT. As Dafny explained, a WTP analysis provides numbers that serve to confirm that **[*55]** the candidate market, here Bergen County, satisfies the HMT. Tr. at 563:11-564:11. The WTP analysis examines the negotiating leverage that a hypothetical monopolist of Bergen County hospitals would have as to insurers. In performing the analysis, Dafny used a subset of hospitals that serve Bergen County residents, and her analysis showed a substantial increase in willingness to pay. Tr. at 563:11-564:15. Specifically, Dafny assumed that the hypothetical monopolist owned all hospitals in Bergen County, a subset of her candidate market (all hospitals that serve Bergen County residents). And her analysis indicated that an insurer's willingness to pay for a hypothetic monopolist of this subset increased by 65% when compared with the hospitals independently. As a result, Dafny believed that her geographic market satisfies the HMT. Tr. at 564:4:15. Dr. Dafny also performed a second WTP analysis that considered Bergen County hospitals vis-à-vis patients from Bergen County and its three surrounding counties. The WTP for this market is 49%, which is also more than a SSNIP. Tr. at 1511:17-1512:7.

Defendants challenge the FTC's proposed geographic market on several grounds. Defendants first maintain **[*56]** that the FTC fails to establish a relevant geographic market because it used customers, rather than suppliers, to define the area but failed to establish price discrimination. Defs. COL ¶ 8-13. Defendants rely on the *Merger Guidelines*, which provide as follows:

> In the absence of price discrimination based on customer location, the [FTC] normally define[s] geographic markets based on the locations of suppliers . . . . In other cases, notably if price discrimination based on customer location is feasible . . . the [FTC] *may* define geographic markets based on the location of customers.

Merger Guidelines, § 4.2 (emphasis added). Defendants contend that as a result, the FTC must establish price discrimination as a matter of law to support its proposed geographic market here.

Although often used as persuasive authority, the *Merger Guidelines* are not binding. *Penn State Hershey Med. Ctr., 838 F.3d at 338 n.2*. Moreover, Section 4.2 of the *Guidelines* does not use mandatory language. Consequently, price discrimination is not required as a matter of law. Importantly, the FTC has successfully used a patient-based market without evidence of price discrimination. *See, e.g.*, *St. Alphonsus Med. Ctr. - Nampa, Inc. v. St. Luke's Health Sys., Ltd., No. 12-560, 2014 U.S. Dist. LEXIS 182869, 2014 WL 4074466, at *7-8 (D. Idaho Jan. 24, 2014)*, *aff'd* *778 F.3d 775, 784-85 (9th Cir. 2015)*. The Court concludes that the lack of price discrimination here **[*57]** does not doom Bergen County as the relevant geographic market.

Defendants next contend that the FTC's geographic market does not reflect commercial realities. Defendants maintain that Bergen County is an arbitrary "political" boundary that plays no meaningful role in the first stage of hospital competition. Defs. COL ¶ 8. The Court would agree if a political boundary (such as a municipality, county, or state) were not otherwise supported by evidence. But here, the FTChas provided sufficient evidence to support a geographic market of Bergen County. Indeed, numerous courts have defined a relevant geographic market by county or other "political" boundary. *See, e.g.*, *Penn State Hershey Med. Ctr., 838 F.3d at 342* (concluding that the FTC "met its burden to properly define the relevant geographic market" as "the four-county Harrisburg area"); *Saint Alphonsus Med. Ctr.-Nampa Inc., 778 F.3d at 781, 84* (stating that district court did not err in finding that *one city* in Idaho was the relevant geographic market); *ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 565 (6th Cir. 2014)* (stating that there was no dispute that a *single county* was the relevant geographic market).

As noted, the critical inquiry is whether adequate evidence supports the FTC's proposed market. Here, the evidence reflects that commercial insurers treat Bergen County as a significant target **[*58]** within the larger New Jersey market. This was illustrated by testimony from representatives of United, Aetna, AmeriHealth, and Horizon. For example, Nielsen testified that when United looks at whether its plans are attractive to its members, it reviews coverage at a state-wide level but also "drills that down to the county level" to ensure that the plan is attractive to the specific county's members. Tr. at 161:20-23; *see also* Tr. at 180:2-6 (referring to Bergen County as a "[TEXT REDACTED BY THE COURT]"). In addition, AmeriHealth tracks its membership and sales in Bergen County and has specifically tried to grow its membership within the county. Tr. at 682:15-22; Tr. at 683:11-13. Ken Kobylowski, Senior Vice President for Provider Contracting & Network Operations for AmeriHealth testified that as AmeriHealth is trying to expand its business, Bergen County is an attractive market because it is such a densely populated county. Tr. at 683:11-18. Even Horizon, who supports the merger, conceded that Bergen County is an important county "because of the number of members that we have there and the population." Tr. at 1118:1-5. Moreover, as noted, the insurers testified that they could not **[*59]** offer a marketable plan to Bergen County residents that did not include a Bergen County hospital. *See, e.g.*, Tr. at 165:19-22 (Nielsen from United); 339:14-23 (Wengel as to Aetna); 1119:22-1120:5 (Karp as to Horizon).

Defendants argue that commercial insurers do not just look at Bergen County because all offer statewide plans. Defendants continue that no insurer offers only Bergen County plans and the providers do not ask for county only plans. *See* Defs. FOF ¶¶ 42-47. Thus, Defendants argue that because the actual commercial insurance plans do not align with the FTC's defined geographic market, the FTCfails to establish a relevant market. Tr. at 1664:4-1665:2. But Dr. Dafny explained that a relevant geographic market for antitrust purposes does not necessarily align with a consumer's understanding of a relevant market. Tr. at 592:1-17. In fact, in *Hershey*, the Third Circuit emphasized that "[t]he hypothetical monopolist test is exactly what its name suggests: hypothetical." *Penn State Hershey Med. Ctr., 838 F.3d at 344*. Moreover, economic significance does not need to be unique. Dr. Dafny recognized, and other insurers testified, that other counties and areas of New Jersey are also important markets, Tr. at 1508:10-19, but this **[*60]** does not mean that Bergen County is *not* important to insurers. Dr. Dafny explained that "there is nothing in [her] opinion that relies on Bergen County being the only county that an insurer is interested in targeting." Tr. at 632:10-12.

Next, Defendants argue that using Bergen County customers artificially excludes patients just outside of Bergen County and "distinguishes between Bergen County residents and nonresidents in a way that neither payors nor providers do." Defs. FOF ¶ 14. "Whatever market urged by the FTC, the other party can usually contend plausibly that something relevant was left out, that too much was included, or that dividing lines between inclusion and exclusion were arbitrary." *FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 202 (D.D.C. 2018)* (quoting 2B Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 530d (4th ed. 2014)). Defendants point to Englewood and HUMC's PSAs, which demonstrate that both hospitals serve individuals who reside outside of Bergen County, and the fact that HUMC and Englewood consider their reach to extend beyond Bergen County.[21] *See* DX5001, Exs. 8, 9. But looking at a hospital's PSA to determine a geographic market is viewing the market from the lens of the supplier, not the buyer. As discussed, the **[*61]** Third Circuit has instructed that courts must apply the HMT through the lens of the insurer. *Penn State Hershey Med. Ctr., 838 F.3d at 342*. In addition, although the Court recognizes that patients certainly can and do cross county lines for inpatient GAC care, the evidence demonstrates that, at least for Bergen County, most residents stay within the county for such care. Dr. Dafny calculated that more than 75% of Bergen County residents receive their inpatient GAC services at a hospital in Bergen County. PX8000, Fig. 25. As a result, focusing on Bergen County is likely to capture a "significant amount of potential harm."[22] Tr. at 622:2-24. Notably,

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[21] It is not clear if Garrett or Geller were even aware of HUMC or Englewood's PSAs before this litigation began. *See* Tr. at 806:11-18; Tr. at 908:1-25. If the top executives of the entities at issue here were not aware of this information in ordinary course, it is difficult to infer that payors were aware of the PSA for either entity or that it was relevant to payors' decisions when forming their networks.

[22] Defendants harp on Dr. Dafny's use of the word "significant" as a subjective and the fact that Dr. Dafny did not quantify the actual harm. Tr. at 622:10-15; 624:3-8. But Dr. Dafny's conclusion about "significant" harm is supported by data — that 75% of

Defendants' expert economist, Dr. Wu, did not disagree with Dr. Dafny's calculation about the number of Bergen County residents who received care within the County. Tr. at 980:3-14.

The concept that individuals prefer to receive care close to home was also recognized by the payors. For example, Karp explained that for emergency services and most elective in-patient services, patients will choose to go to the closest provider. Tr. at 1121:21-1122:1; *see also* [TEXT REDACTED BY THE COURT] testifying that a large proportion of [TEXT REDACTED BY THE COURT] Bergen County **[*62]** participants seek care within the county and that [TEXT REDACTED BY THE COURT] data demonstrates that [TEXT REDACTED BY THE COURT] Bergen County commercial participants accessed care at hospitals within the county). So, while the proposed market does exclude non-Bergen County residents, the case law recognizes that a geographic market is often imprecise. *See* *United States v. Conn. Nat'l Bank, 418 U.S. 656, 669, 94 S. Ct. 2788, 41 L. Ed. 2d 1016 (1974)* ("An element of 'fuzziness would seem inherent in any attempt to delineate the relevant geographic market.'" (*quoting* *United States v. Phila. Nat'l Bank, 374 U.S. 321, 360 n.37, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*)). Moreover, the exclusion is justified by the evidence.

Finally, Defendants critique Dr. Dafny's decision to start with Bergen County because Englewood and its "closest and largest" HMH rival, HUMC, are both in Bergen County. Defendants point out that Dafny did not form an opinion as to whom Englewood's closest rival is overall or who HUMC's closest rival might be. Thus, Defendants explain that Dafny's "first principal reason . . . boils down to the proposition that these two hospitals happen to be in the same county." Tr. at 1663:2-5. Defendants also contend that Englewood and HUMC are complements, not competitors. *See* Defs. FOF ¶ 85.

As noted, prior to the merger, HUMC and Englewood were competitors and viewed **[*63]** each other as such. More importantly, commercial payors viewed the two as competitors. For example, [TEXT REDACTED BY THE COURT] testified that [TEXT REDACTED BY THE COURT] considers HUMC to be the best possible alternative for Englewood because of the "tremendous amount of overlap" of services provided by the two facilities and geographic proximity. [TEXT REDACTED BY THE COURT]. Other insurers also consider the two hospitals to be competitors. *See, e.g.*, Tr. at 1116:23-25 (Karp agreeing that Englewood and HUMC are currently competitors). Even Garrett acknowledged that there were overlapping services between the two hospitals. Tr. at 782:2-13. Finally, according to Dr. Wu, across all inpatient GAC services, Englewood provides 73% of the same services that are offered at HUMC. DX5001, Ex. 4. The non-overlapping services account for only [TEXT REDACTED BY THE COURT] of HUMC's revenue. *Id.* This evidence undercuts Defendants' critique of Dr. Dafny's decision to use Bergen County as a candidate market.[23]

Defendants also challenge Dr. Dafny's application of the HMT. Defendants argue that although Dafny states that she considered hospitals that served individuals outside of Bergen County, **[*64]** in actuality, she only looked at hospitals within Bergen County when considering whether insurers would accept a SSNIP. Defs. COL ¶ 13. To determine whether a hypothetical monopolist would be able to impose a SSNIP, Dafny considered the insurer's testimony that Bergen County is significant and that they could not market a plan to Bergen County residents that did not include a Bergen County hospital. *See* PX8000-074. In addition, Dafny only used all Bergen County hospitals for her WTP analysis instead of all hospitals that serve Bergen County residents. *Id.* at 075. But Dr. Dafny explained that if this subset (Bergen County hospitals only) could "impose a SSNIP, then surely all the hospitals that are serving Bergen County could do so." Tr. at 564:4-7. As a result, and in light of the insurer testimony about accepting a SSNIP, Dafny believed that it was appropriate to extrapolate the results of her WTP with the subset to

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Bergen County residents receive care within the County. Further, Dr. Dafny characterized the harm as significant to indicate that it was enough *to continue with* (not end) her analysis as to whether Bergen County satisfied the HMT. Tr. at 622:19-24.

[23] In any event, the Third Circuit has found that true complements can nevertheless potentially run afoul of the antitrust laws. *See* *Penn State Hershey Med. Ctr., 838 F.3d at 334, 353-54* (granting preliminary injunction of proposed merger of academic medical center that specialized in complex services and a health system that focused on primary and secondary care).

the geographic market as a whole. Tr. at 563:21-564:15; 642:4-7. Defendants do not meaningfully challenge this decision,[24] and the Court finds that it is a reasonable inference.

If a hypothetical monopolist owned all the hospitals in Bergen County, then insurers **[*65]** could attempt to redirect their customers to nearby hospitals outside of the county (and even this scenario ignores the insurer's testimony that they cannot market a viable plan to Bergen County residents that does not include a Bergen County hospital). But if the hypothetical monopolist owned not only the hospitals in Bergen County but also the other nearby hospitals, then the monopolist would have greater leverage over the insurers because the insurers could not redirect their Bergen County customers to nearby, non-county hospitals. In other words, if a hypothetical monopolist also owned hospitals outside of Bergen County, then insurers would have even less choice in declining a SSNIP if they wanted a marketable plan for Bergen County residents.

Next, Defendants take issue with Dr. Dafny's confirmatory WTP analysis because it focused on stage two of hospital competition. The WTP model looks at the value that a hospital or health system adds to an insurer's network. PX8000-057, ¶ 117. As discussed, factors that are important in stage 2 inform stage 1 competition, which Dr. Wu acknowledges. Tr. at 990:15-21 (testifying that while the focus is on stage 1, stage 2 competition is "important" **[*66]** so that stage 2 must be analyzed as to how it affects stage 1). For example, if an insurer knows that individuals frequently choose Hospital A over Hospital B, that insurer would want Hospital A in its network because that hospital makes the network more desirable. Accordingly, stage 1 and stage 2 competition cannot be viewed in separate, isolated spheres. Even the Third Circuit recognizes that "[p]atients, of course, are relevant." *Penn State Hershey Med. Ctr., 838 F.3d at 343*. Therefore, the fact that elements of patient choice play a part of the WTP analysis is not fatal.

Thus, in sum, the FTC demonstrates that commercially insured patients in Bergen County is a relevant geographic market.

b. Anticompetitive Effects

After the relevant markets are determined, "a prima facie case is established if the plaintiff proves that the merger will probably lead to anticompetitive effects in that market." *Penn State Hershey Med. Ctr., 838 F.3d at 346* (quoting *Saint Alphonsus Med. Ctr.-Nampa, Inc., 778 F.3d at 785*). An anticompetitive effect means that the transaction would create an incentive for the merged parties to raise prices, lower quality, and innovate less. *See, e.g.*, *Saint Alphonsus Med. Ctr.-Nampa Inc., 778 F.3d at 786* (finding that high HHI and evidence demonstrating that merger would likely lead to increased reimbursement rates with high entry barriers for other entities sufficient **[*67]** to establish prima facie case). The *Merger Guidelines* state that market concentration, which is measured by the Herfendahl-Hirschman Index ("HHI"), is a useful indicator of the competitive effects of a merger. *Merger Guidelines*, § 5.3. "In determining whether the HHI demonstrates a high market concentration, we consider both the post-merger HHI number and the increase in the HHI resulting from the merger." *Penn State Hershey Med. Ctr., 838 F.3d at 346-47* (quoting *Horizontal Merger Guidelines*, § 5.3, at 18-19). An HHI above 2,500 in the post-merger market is considered "highly concentrated" and if the merger increases the HHI by more than 200 points it is "presumed to be likely to enhance market power." *Id.* (quoting *Merger Guidelines*, § 5.3, at 19). The FTC "can establish a prima facie case simply by showing a high market concentration based on HHI numbers." *Id.*

[24] Dr. Wu indicated that there is no actual evidence of price discrimination in Bergen County and that if more hospitals were considered, it does not seem possible that a hypothetical monopolist could raise prices for Bergen County residents. Tr. at 944:4-16. Putting aside the Third Circuit's remonstration that the HMT is *hypothetical*, Wu's analysis appears to ignore the commercial reality that the large majority of Bergen County residents do seek inpatient GAC services in Bergen County. Dr. Wu also challenged Dr. Dafny's HMT for focusing on hospitals rather than patients. Tr. at 943. The Court disagrees with this reasoning. The patients would be the appropriate focus in the opposite scenario — if an insurance company merger was being challenged and the resulting hypothetical monopolist had all of the commercially insured customers in Bergen County. Then the inquiry would be whether such an insurer monopolist could impose a SSNIP (meaning a larger discount for the monopolist) on the hospitals.

The FTC put forth evidence demonstrating that under a patient-based model, which is based on inpatient GAC discharges of Bergen County residents, the post-merger HHI is 2,835 and the change in HHI is 841.[25] PX8000-080, Fig. 15. The post-merger HHI is considered highly concentrated, and the increase is above 200, meaning that the merger is likely to enhance the merged entities' **[*68]** market power. In addition, HMH would control almost half of the market share in Bergen County post-merger. PX8000, Fig. 15. Consequently, the FTC satisfies is *prima facie* case based on this information alone.

Defendants respond that small adjustments to the geographic market eliminate the presumption of enhanced market power. Defs. COL ¶ 19. The *Merger Guidelines* state that "[w]here analysis suggests alternative and reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects, it is particularly valuable to examine more direct forms of evidence concerning those effects." *Merger Guidelines*, § 4. Defendants rely on a number of calculations performed by Dr. Wu to demonstrate that different candidate markets lead to very different competitive effect results. Wu compared the post-merger HHIs for three other "markets." DX5001, Ex. 16, 20. Wu, however, never proposed that any of the "markets" he looked to were a potential candidate market. Tr. at 952:25-953:26. And Wu conceded that before calculating market concentration, there "needs to be [] an appropriately defined market." Tr. at 49:13-15. Moreover, Wu's markets **[*69]** use patient flow data, which adopts the perspective of the hospitals; this approach has been rejected by the Third Circuit. *Penn State Hershey Med. Ctr., 838 F.3d at 340* ("But subsequent empirical research demonstrated that utilizing patient flow data to determine the relevant geographic market resulted in overbroad markets with respect to hospitals.").

But even if the Court were to accept any of Dr. Wu's markets as alternative candidate markets, direct evidence supports the conclusion that the merger will substantially lessen competition in Bergen County. *See Saint Alphonsus Med. Ctr.-Nampa, Inc., 778 F.3d at 788* (considering HHI and direct evidence of anticompetitive effect to determine that plaintiffs established their *prima facie* case); *H.J. Heinz Co., 246 F.3d at 717* (concluding that ordinary course documents and direct evidence regarding the market "bolstered" the FTC's market concentration statistics); *Sysco Corp., 113 F. Supp. 3d at 71-72* ("In summary, the FTC has bolstered its *prima facie* case with additional proof that the merger would harm competition[.]"). Using Englewood's information, Chartis calculated that HMH accounted for 34% of hospital discharges in Englewood's PSA and Englewood accounted for approximately 15% of discharges in its own PSA. PX2079-016. Englewood's PSA covers a large portion of Bergen County and small areas of Passaic, **[*70]** Hudson, and Rockland Counties. PX2079-015. Accordingly, after the merger, Englewood's data suggests that HMH will account for almost 50% of the market share in Englewood's PSA. HMH's ordinary course documents before this litigation identify Bergen County as HUMC's PSA. *See* PX1129-007, -051. The fact that HUMC and Englewood historically defined their PSA to include similar areas demonstrates that combining the two entities will eliminate a competitor in the county.

Many insurance companies also believe that the proposed merger will lead to anticompetitive effects, as illustrated by insurers' testimony and their ordinary course documents. For example, [TEXT REDACTED BY THE COURT] internal analysis, using [TEXT REDACTED BY THE COURT] claim data, indicated that together, HMH's Bergen County hospitals and Englewood would account for [TEXT REDACTED BY THE COURT] of [TEXT REDACTED BY THE COURT] commercial inpatient spend. [TEXT REDACTED BY THE COURT]. In addition, [TEXT REDACTED BY THE COURT] believed that post-merger, [TEXT REDACTED BY THE COURT] market share in Bergen County will go to HMH. [TEXT REDACTED BY THE COURT] testifying that under [TEXT REDACTED BY THE COURT] modeling and projections, **[*71]** if HUMC were to leave [TEXT REDACTED BY THE COURT] broad coverage network, [TEXT REDACTED BY THE COURT] of the patients who would have gone to HUMC would chose Englewood under a conservative assumption).

Defendants' ordinary course documents and testimony also demonstrate that HMH and Englewood are competitors. By way of example, as previously discussed, during Phase 2 of Chartis's work with Englewood, Chartis

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[25] Dr. Dafny also calculated HHI using a hospital-based approach, as a "sensitivity check," which also resulted in an HHI over 2,500 and a change in HHI greater than 200. Tr. at 647:7-648:22. The patient-based calculation is the more conservative of the two approaches. Tr. at 648:10-13.

set up a data room so Englewood could share documents with potential merger partners. When Englewood was first informed about the data room, an Englewood executive expressed concern with [TEXT REDACTED BY THE COURT]." PX2311-001. Geller responded to this email with [TEXT REDACTED BY THE COURT] and then directed the recipient [TEXT REDACTED BY THE COURT]. *Id.* Moreover, after meeting with HMH during phase 2 of Chartis's work, an Englewood Board member commented that "[TEXT REDACTED BY THE COURT]." PX2325 at 3. Finally, even after the merger was announced, Englewood acknowledged that "[f]or a long time, Hackensack has been a fierce but respected competitor." PX2291-004. And HMH indicates that once the merger is consummated, it can immediately transfer many cases to Englewood. Garrett, **[*72]** however, explained that presently, HMH has no incentive to transfer patients from HUMC because Englewood is a competitor. PX7004-189-90.

The FTC also relies on Dr. Dafny's diversion ratio calculations to further demonstrate that the merger will have an anticompetitive effect. This quantitative analysis assesses what other hospitals patients would choose if one hospital were not available. Tr. at 571:22-72:23. A "higher diversion ratio is indicative of closer competition between the parties." Tr. at 572:6-7. Dafny used a patient-choice model for a four-county area. Using this model, if Englewood were not available, more than 40% of its patients would use an HMH hospital, and almost 30% would choose HUMC. The next closest hospital was Valley, at 12%. Tr. at 573:9-18. If HUMC was not available, about 17% would go to Valley and approximately 10% would go to Englewood. Tr. at 574:1-7. Dafny explained that this quantitative analysis shows that HMH, and specifically HUMC, places a strong competitive constraint on Englewood, which affects Englewood's pricing and quality. Tr. at 574:20-23. Defendants maintain that the diversion ratio analysis focuses on stage 2 competition because Dafny's analysis **[*73]** did not capture price differences between HUMC and Englewood. Defs. FOF ¶¶ 98-99. As discussed, there is a large price difference between the two hospitals. *See* [TEXT REDACTED BY THE COURT]. But as also discussed, patients' preferences inform insurers' decisions when creating networks and negotiating rates, thus are relevant to stage 1. In fact, Dafny also relied on [TEXT REDACTED BY THE COURT] redirection analysis and [TEXT REDACTED BY THE COURT] termination analysis. Tr. at 575:11-21. Accordingly, while Dafny's diversion ratio analysis alone would not establish an anticompetitive effect, when viewed in combination with the HHI and direct evidence, the quantitative analysis further supports the FTC.

Dr. Dafny also calculated a "rough estimate" of the price impact of the merger at $31 million per year. To do so, Dafny used her patient-based WTP model, which quantified the impact of the acquisition on Defendants' bargaining leverage with insurers.[26] Plf. FOF ¶ 114. She based her calculation on information from a peer-reviewed paper, referred to during the hearing as the Garmon study. Tr. at 576:16-24. Defendants argue that Dafny's "rough estimate" is unreliable because it too is based **[*74]** on stage 2 considerations. Defendants also challenge her estimate because it was based on a single study and assert that Dafny did not use an appropriate coefficient. Defs. FOF ¶¶ 102-110.

Again, patient preferences impact and inform stage 1 negotiations. Turning to Defendants' critiques of the Garmon study, Dafny first noted that while she adopted the coefficient from the Garmon study, substantial literature supported the general proposition that "hospitals and hospital systems with higher willingness to pay command higher negotiated prices in the marketplace." Tr. at 577:12-14; *see also* 654:13-15. Dafny then explained that she selected the coefficient that only included mergers without variable cost savings. Dafny further indicated that she purposefully selected this coefficient to look at the price impact of the merger because she was "assessing the competitive effect absent mitigating factors, absent entry or efficiencies." Tr. at 1520:9-15. In other words, Dafny selected the category without variable cost savings because she accounted for such savings in her efficiencies analysis: "If I were to use an estimate that included all mergers, including those with cost savings, then I **[*75]** [would] be double counting because I would be having cost savings in my price effect and then cost savings potentially in the efficiencies analysis." Tr. at 1520:16-20. Defendants do not meaningfully challenge Dafny's explanation, and the Court finds it persuasive.

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[26] In addition to the patient-choice model, Dafny also calculated willingness to pay using a hospital-choice model. Tr. at 575-76. When considering all discharges in a four-county area, Dafny concluded that "the parties combined yields an increase in this willingness to pay of 10.1% per discharge." Tr. at 576:2-9. Dafny then estimated that the 10% increase caused a 5.7% price increase for transaction absent any cost efficiencies, and it would increase Englewood's price around 35%. Tr. at 576-78.

Defendants point out that the full sample of mergers in the Garmon study showed that there was no statistically significant relationship between changes in WPT and price, and that the Garmon study did not include any hospitals in New Jersey. Defs. FOF ¶¶ 108-09. Accordingly, Defendants point to Dr. Wu's analysis of New Jersey claims data, which allegedly demonstrates that the merger will not lead to higher prices. *Id.* ¶¶ 111-12. According to Wu, Garmon indicated that commercial claims information is "the ideal data" to evaluate potential price increases. Tr. at 964:15-22. Using this claims data, Wu concluded that there is no statistically significant relationship between price and hospitals' willingness to pay in Northern New Jersey. Tr. at 965:4-11. But even accepting Wu's conclusion, the direct evidence indicates otherwise.

Namely, the FTC points to the Acquisition Clauses as proof of a likely price impact. *See* Plf. FOF ¶¶ 116-17. When HMH **[*76]** acquires or merges with an entity, the Acquisition Clause permits HMH to raise rates at the new facility to match HMH's similar facilities. [TEXT REDACTED BY THE COURT]; 1036:5-14; 1083:14-21. In response, Defendants point to unsolicited letters that HMH sent to insurers stating that HMH would not enforce the Acquisition Clauses with respect to this merger (the "Waiver Letters"). *See* [TEXT REDACTED BY THE COURT]. HMH sent these letters after the FTC filed its opening briefing in this matter. As a result, the FTC contends that the letters "may lack the reliability necessary to be admitted under *Rule 803(6)*," the business records exception. D.E. 246 at 4.

The FTC does not identify any cases demonstrating that post-litigation created business records are inadmissible. Moreover, the Court is not aware of any evidentiary rule that bars a business record simply because it was created after litigation began. *See* *United States v. Casoni, 950 F.2d 893, 911 n.10 (3d Cir. 1991)* ("Thus, we are satisfied *Rule 803(6)* contains no general rule limiting admissible business records to those prepared *ante litem motam*."). Accordingly, the Court will not exclude the Waiver Letters. Rather, the critical issue is how much weight the Court should give this evidence. The Supreme Court has **[*77]** explained that post-acquisition evidence "tending to diminish the probability or impact of anticompetitive effects" can be considered but "the probative value of such evidence" is "extremely limited." *United States v. Gen. Dynamics Corp., 415 U.S. 486, 504, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974)* (internal citations omitted). Lower courts have determined that such evidence is "deemed of limited value whenever such evidence *could arguably* be subject to manipulation." *Chi. Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 435 (5th Cir. 2008)* (emphasis in original); *see also* *United States v. Aetna Inc., 240 F. Supp. 3d 1, 80-90 (D.D.C. 2017)* (giving less weight to business decision made after the merger was agreed to because the court determined that it was made to improve the defendant's litigation position).

As discussed, Young was not aware [TEXT REDACTED BY THE COURT], and after each acquisition [TEXT REDACTED BY THE COURT]. Tr. at 1083:14-21. [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] both sought to [TEXT REDACTED BY THE COURT] with HMH[TEXT REDACTED BY THE COURT]. The Acquisition Clause still appears in [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] contracts with HMH, although [TEXT REDACTED BY THE COURT] was able to [TEXT REDACTED BY THE COURT].[27] [TEXT REDACTED BY THE COURT]. Finally, Garrett explained that the clauses were intended to ensure that HMH hospitals were "paid fairly **[*78]** for the services that they delivered," Tr. at 787:4-9, and at his deposition in this matter, Young testified that with respect to the Acquisition Clauses, [TEXT REDACTED BY THE COURT] PX7026-148. Thus, until the FTC argued in its opening brief that the Acquisition Clauses are evidence of a likely price increase, HMH seemingly had no intention of waiving the Acquisition Clauses after it acquired Englewood. Yet, shortly after HMH learned of the FTC 's argument, it sent the Waiver Letters.

The Waiver Letters are a prime example of alleged business records that were created to bolster Defendants' litigation position. HMH [TEXT REDACTED BY THE COURT] and, just prior to the FTC's opening brief, Young effectively testified [TEXT REDACTED BY THE COURT]. And the Waiver Letters run contrary to HMH's own financial interest. As a result, the Court gives little weight to the Waiver Letters.[28] Even if the Court were to consider

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[27] The Court notes that [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] contracts were executed after the proposed transaction was announced, and [TEXT REDACTED BY THE COURT] negotiations for its current contract with HMH occurred after the announcement. [TEXT REDACTED BY THE COURT].

the Waiver Letters, they do not constitute binding contracts; Defendants point to no consideration given by the insurance companies in exchange for the waivers.[29]

More importantly, even if the Acquisition Clause was enforced, it would not change the Court's analysis. The critical inquiry, in the **[*79]** Court's view, is the impact that the merger will have on future negotiations with commercial insurers. To this end, HMH makes no representations about rate increases or nonprice terms for any future system-wide negotiations.[30] Because HMH has historically been able to negotiate higher rate increases than Englewood, the reasonable inference is that HMH will be able to do so after the merger (with the benefit of having added Englewood to its portfolio).[31] Accordingly, although the Waiver Letters may delay a price increase in the short term, as [TEXT REDACTED BY THE COURT] explained, HMH is "really just putting off the inevitable." [TEXT REDACTED BY THE COURT]

The Merger would also likely eliminate competition on a non-price level. As discussed, although Defendants downplayed the fact that they are competitors during the hearing, ordinary course evidence demonstrates that HMH and Englewood currently monitor each other's service offerings. For example, after Englewood advertised its use of a new technology as "first in the State," HMH expedited its approval process for the same technology due to concerns from an HMH physician about his ability to keep up with competitors. PX1205. Similarly, **[*80]** an Englewood employee noted that Englewood should market a new technology that HMH did not have "as this will give [Englewood] the edge." PX2358. Moreover, Garrett explained that HMH monitors competitors' quality ratings, which helps improve HMH's services. Tr. at 800:2-17. As part of this tracking, HMH looks at Englewood's ratings. PX1055. If Englewood and HUMC were no longer competitors, it would remove an incentive for both entities to continue to improve quality metrics and offer innovative medical technology. *See Merger Guidelines*, § 6.4 (explaining that "[c]ompetition often spurs firms to innovate" and that the FTC "may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtain its innovative efforts below the level that would prevail in the absence of the merger").

In fact, one of the concerns that Englewood raised as to potentially partnering with [TEXT REDACTED BY THE COURT] was that it would lead to *further* competition with HMH. As noted, on March 28, 2019, Chartis presented the offers from HMH and [TEXT REDACTED BY THE COURT] to the Executive Committee. In comparing the two entities as potential partners, Chartis noted **[*81]** that a "pro" of choosing HMH, "[TEXT REDACTED BY THE COURT] " PX6004-009. Relatedly, a "con" for was that a partnership with [TEXT REDACTED BY THE COURT] "[TEXT REDACTED BY THE COURT]" *Id.* The "[TEXT REDACTED BY THE COURT]" refers to future competition between HUMC and Englewood; likewise, the potential for [TEXT REDACTED BY THE COURT] indicates [TEXT REDACTED BY THE COURT], *i.e.*, direct competition resulting in more and/or improved services for patients.

Finally, Defendants contend that market responses from competitors will also constrain Defendants post-merger. Defs. COC ¶ 24. "[I]n certain cases, repositioning by other competitors may be sufficient to deter or counteract the

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[28] Defendants also argue that, based on Third Circuit precedent, the Court cannot consider private agreements or contractual language in conducting an antitrust analysis. The Court disagrees. The Third Circuit has clearly stated that private contracts cannot be considered in determining the relevant product market or the relevant geographic market. *Penn State Hershey Med. Ctr., 838 F.3d at 344* (citing *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 438-39 (3d Cir. 1997)*). But the Acquisition Clause is being considered as to anticompetitive effects, not in defining the relevant market.

[29] Defendants contend that the Waiver Letters are enforceable on equitable grounds. D.E. 313.

[30] [TEXT REDACTED BY THE COURT].

[31] Defendants also contend that adding Englewood will not increase HMH's leverage with commercial insurers. Defs. FOF ¶¶ 113-21. Dr. Dafny acknowledged that Englewood does not have much bargaining leverage when compared to HMH, Tr. at 1522:9-10, and unlike HUMC, no commercial insurer testified that it needed Englewood in its network to create a desirable network. However, Defendants conflate two separate issues. The first is whether HMH and HUMC are more important to insurers than Englewood. The answer to that inquiry is clearly yes. The second is whether adding Englewood to HMH will further increase HMH's leverage with insurers. The answer to that query is, based on the evidence, yes-subject to a final determination in the administrative action.

anticompetitive effects of a merger" *Penn State Hershey Med Ctr., 838 F.3d at 351*, but the repositioning must be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern," *Merger Guidelines*, § 9. Defendants' argument regarding competitors is not supported by the evidence.

Defendants argue that hospitals and health systems' use of front doors will mitigate against any price increase post-merger. Defs. FOF ¶¶ 127. But there is little to no evidence demonstrating that front doors actually **[*82]** have any impact on the inpatient market in Bergen County. The only evidence about the effectiveness of front door came from [TEXT REDACTED BY THE COURT]. Specifically, the number of patients that utilized [TEXT REDACTED BY THE COURT] Bergen County front door who were then subsequently treated at an [TEXT REDACTED BY THE COURT] was "[TEXT REDACTED BY THE COURT]" to [TEXT REDACTED BY THE COURT] utilization strategy. [TEXT REDACTED BY THE COURT]. Defendants also contend that after the merger, insurers will be able to steer patients away from HMH. But again, there is no evidence that insurers are likely to take this approach. The Court also has serious doubts that this would occur given the repeated testimony that Bergen County residents prefer to receive care close to home and that insurers need to include HUMC in their networks to remain marketable to Bergen County residents. Finally, potential competitors seeking to enter the Bergen County market face high entry barriers and costs. This is evidenced by HUMC's tower project and the new Valley hospital, both of which are multi-year and multimillion-dollar (actually hundreds of millions) projects. And while Garrett and Geller both opined **[*83]** that Valley's new location will increase competition, Defendants did not provide persuasive evidence to support these opinions. Finally, any new entry into the market would need to proceed through New Jersey's certificate of need process, which is time-consuming and expensive. FTC FOF ¶ 152.

As a result, the FTC demonstrates that the merger will likely create an anticompetitive effect. The FTC , therefore, establishes its *prima facie* case.

2. Rebuttal Evidence

To rebut the presumption that the merger is anticompetitive, Defendants must present evidence "that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition." *H.J. Heinz Co., 246 F.3d at 715*. The stronger the Government's *prima facie* case, the more evidence that Defendants must present to successfully rebut the presumption. *FTC v. Sanford Health, 926 F.3d 959, 963 (8th Cir. 2019)* (quoting *United States v. Baker Hughes, Inc., 908 F.2d 981, 991, 285 U.S. App. D.C. 222 (D.C. Cir. 1990)*). Defendants focus on three overarching procompetitive effects that they argue rebut the FTC's presumption: (1) upgrades to Englewood's physical plant and increased capacity; (2) expansion of the complex tertiary and quaternary care at HUMC; and (3) service optimization between the entities. Defendants maintain that these effects will lower costs and increase the quality of healthcare **[*84]** for the community.

Apart from the service optimizations that will be realized through the merger, Defendants frame their rebuttal arguments in terms of the procompetitive benefits of the merger. Defs. FOF ¶ 130, COL ¶¶ 25, 27. Defendants do not characterize these arguments as asserting an efficiencies defense. The FTC contends that there is "no distinction between a procompetitive benefit and an efficiency; rather efficiencies are cognizable only if they are procompetitive in nature." Plf. COL ¶ 43. Thus, the FTC treats Defendants' rebuttal case as invoking an efficiencies defense.

The Clayton Act itself does not expressly provide for an efficiencies defense nor has the Supreme Court formally addressed whether one exists. Although the Third Circuit has also not concluded that an efficiencies defense exists, other circuits have determined that the defense is cognizable. *Penn State Hershey Med. Ctr., 838 F.3d at 348*. Moreover, the *Merger Guidelines* recognize the defense. *Merger Guidelines*, § 10. Assuming that the defense is legally cognizable, it must meet several requirements. Among other things, the efficiencies must be "merger specific," which means "they must be efficiencies that cannot be achieved by either company alone." *Penn State Hershey Med. Ctr., 838 F.3d at 348* **[*85]** . The efficiencies must also be verifiable and not speculative. *Id.* This is a high bar, as "[t]he presumption of illegality may be overcome only where the defendants 'demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers.'" *Id.* (quoting *FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991)*).

However, "where the evidence of efficiencies in the relevant market will not support an outright defense to an anticompetitive merger, such evidence is relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition." *FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 151 (D.D.C. 2004)*; *see also* *FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054 (8th Cir. 1999)* ("We further find that although Tenet's efficiencies defense may have been properly rejected by the district court, the district court should nonetheless have considered evidence of enhanced efficiency in the context of the competitive effects of the merger.").

Whether the Court construes Defendants as invoking a formal efficiencies defense or as addressing the competitive effects analysis, Defendants fail to establish extraordinary procompetitive effects to offset Plaintiff's *prima facie* case.

a. Upgrades and Increased Capacity at Englewood

Englewood's goals in finding a strategic partner, and in choosing HMH specifically, were to increase its inpatient utilization and obtain capital for needed improvements to the hospital. HMH is providing significant capital that is specifically earmarked for Englewood through the merger, and Garrett explained that HMH intends to turn Englewood into "a leading provider of tertiary care in Northern New Jersey." Tr. at 743:5-8.

As noted, Defendants repeatedly pointed to the Agreement, specifically to HMH's "hard commitments" in Section 3 and Exhibit C, as evidence of HMH's **[*86]** plans to grow Englewood's utilization and improve its clinical offerings. *See* Tr. at 886:19-25; DX3800, Ex. C. But as noted, for many of the "hard commitments" (1 through 19), the commitments are to explore, assess, and collaborate on different issues or to make "regional" (not Englewood specific) improvements. DX3800, Ex. C. Moreover, as to the first 19 commitments in Exhibit C, Englewood is only permitted to arbitrate disputes, with a remedy of specific performance or the reimbursement of costs. *Id.*, §§ 3.2.5, 7.1.3.3. In addition, the commitments to increase Englewood's inpatient volume (certain of commitments 20-27) are not enforceable by Englewood.

Nevertheless, HMH is providing significant capital to Englewood for necessary improvements to its physical plant, including upgrades to the OR and the Heart Center of Excellence, and providing Englewood with a robot for Englewood's robotic urology services and [TEXT REDACTED BY THE COURT]. *Id.*, Ex. C, ¶¶ 3, 11, 15, 19. While not as comprehensive or firm as represented by Defendants during the hearing, the Court recognizes that these improvements to Englewood could likely amount to a procompetitive benefit to Bergen County, in that Englewood **[*87]** should be able to upgrade its facilities and equipment thereby offering a broader array of services for its patients. Dr. Gowrisankaran, Defendants' expert on industrial organization, economics, and econometrics in the healthcare industry, testified that his analysis of such capital investments indicated that they were likely to attract more patients. Tr. at 1246-45.[32]

b. Expansion of Complex Services at HUMC

Next, Defendants tout that the merger will allow HMH to expand the complex tertiary and quaternary care provided at HUMC. Defendants continue that this will reduce the outmigration of patients to New York, Defs. FOF ¶¶ 134, 140, which, in turn, helps the community in terms of cost of care and quality. To expand HUMC's services, HMH maintains that it needs to relieve capacity constraints and "[t]he merger will ease HUMC's capacity constraints by redirecting non-complex tertiary patients to Englewood." *Id.* ¶ 136. Defendants continue that HUMC does not have feasible alternatives to alleviate capacity constraints outside of the merger. *Id.* ¶ 137.

The Court has doubts as to several representations regarding HMH's need for the merger to realize its vision for HUMC. First, HMH indicates that **[*88]** it can transfer many cases to Englewood on day one, that is, before any

[32] For the reasons stated in note 37, the Court declines the FTC's invitation to analyze and compare the capital investment offered by [TEXT REDACTED BY THE COURT] to Englewood during their merger discussions.

capital contributions and resulting improvements to Englewood have been made. HUMC also claims that it has had capacity issues for a number of years. As a result, the FTC posed the question as to why HUMC has not previously transferred cases to Englewood to address its capacity issues. As discussed, in his deposition, Garrett stated that it did not presently make sense for HUMC to transfer patients to Englewood because Englewood is a competitor. PX7004-189—PX7004-90. And there was no indication that transferring such patients would place either HMH or HUMC in financial jeopardy. Garrett's response is illuminating because it reflects HMH's position that financial results are more important than its claimed concern for the community and patients, *i.e.*, "New Jersey First." The Court is not critical of this motive - HMH's financial interests are legitimate business considerations. However, this statement nevertheless undercuts Defendants' claims that New Jersey and its residents are the primary consideration.

Defendants also rely on the Optimization Plan to support the strategy to transfer patients to Englewood and **[*89]** to establish that HUMC faces capacity constraints. Among other things, the Optimization Plan identifies an initial estimate on the number and type of patients that can be transferred to Englewood. DX3601. Like the Waiver Letters, the FTC argues that the Optimization Plan was created after the FTC filed its complaint in this matter and contends that it "may lack the reliability necessary to be admitted under *Rule 803(6)*," the business records exception. D.E. 246 at 4.

The FTC argues that the Optimization Plan is not a business record and was created for this litigation. The FTC points to the fact that the document was not circulated until March 26, 2021, yet Defendants' capacity expert, among other of Defendants' experts, relied on the document extensively in his April 9, 2021, report. D.E. 246 at 4-5. Moreover, the first draft of the Optimization Report was only created on February 27, 2021. *Id.* at 8; *see also* DX3602.

Garrett explained that the Optimization Plan was the result of the efforts of nineteen planning teams that in combination met over 300 times. Tr. at 759:11-15. Defendants further explain that the information about transfers in the Optimization Plan was largely created through the **[*90]** work of the Transfer Team, which it appears, first began meeting in April 2020. *See* Defs. June 8, 2021, Ltr. at 1-2; DX3792-001. Defendants also identify several documents that allegedly illustrate the various committee work that started in April 2020 and led to the Optimization Plan. *See* Defs. June 8, 2021 Ltr.[33]

The Optimization Plan reads like an advocacy piece created for the current litigation.[34] As noted, Defendants represented that the purpose of the Steering Committee was to create a plan *to implement* the Exhibit C commitments upon consummation of the merger, but the Optimization Plan noticeably fails to do so. For example, despite the months of planning, the document contains no details as to how the merged entity intends to redirect cases to Englewood. Instead, the Optimization Plan largely repeats information in the Agreement. In fact, although the Optimization Plan identifies the number of cases HMH believes it can redirect from its other regional hospitals, the numbers for Palisades and Pascack Valley are actually less than the numbers contemplated in the Agreement. The number of patients for Englewood's cardiac surgery and robotics urology programs are the same as in the

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[33] Defendants submitted their June 8 letter with leave of Court, in response to questions that arose during closing arguments. While Defendants reference exhibits that were included in its exhibit list in the June 8 letter, they also rely on documents that were not on their exhibit list. Defendants sought leave to admit these additional exhibits into evidence. These new documents are not critical to Defendants' argument on this issue, nor are they pertinent to the Court's conclusion. As a result, the Court does not reach the request for leave to admit.

[34] In fact, the FTC also points out that statements from the Optimization Plan are word-for-word copies of statements made in a July 21, 2021 white paper that Defendants submitted to the FTC to support this merger. D.E. 246 at 6-7. Defendants counter that in actuality, the statements from the white paper were "derived from and consistent with their internal analysis and integration planning activities." D.E. 256 at 7. But the first draft of the Optimization Plan was not created until February 2021. Moreover, despite Defendants' position that the white paper was influenced by Defendants' integration planning activities, Defendants fail to point to any documents that support this statement. Even Defendants' additional documents identified in their June 8 Letter do not reflect that such work product existed. Tellingly, not a single document cited in the letter makes even passing reference HUMC's capacity constraints.

Agreement. **[*91]** Thus, rather than providing Defendants with a comprehensive plan to implement, the document reads as a sales pitch to justify the merger after the fact. The Court, therefore, admits the Optimization Plan but gives it little weight. To give the Optimization Plan any significant weight would merely invite future antitrust litigants to create similar documents.

Next, although Defendants maintain that HMH has no alternatives to relieve the capacity constraints at HUMC except to transfer patients to Englewood, Defendants gloss over the fact that HUMC is currently expanding capacity through the Second Street Tower project. In the Optimization Plan and throughout the hearing, Defendants repeatedly explained that the Second Street project "will not alleviate HUMC's capacity challenges." DX3601-008. But the construction project expands HUMC's existing footprint. Through the project, HUMC is building [TEXT REDACTED BY THE COURT] new operating rooms and plans to [TEXT REDACTED BY THE COURT] operating rooms. Tr. at 1173:25-1174:9. The new tower will also have [TEXT REDACTED BY THE COURT] new ICU beds and HUMC plans to [TEXT REDACTED BY THE COURT] of its existing ICU beds. Tr. at 1175:9-14. In addition, **[*92]** there is space for [TEXT REDACTED BY THE COURT] additional ICU beds that can be added if the need arises. Tr. at 1175:15-18. Finally, the new tower will have [TEXT REDACTED BY THE COURT] new private med-surg beds and HMH [TEXT REDACTED BY THE COURT]. Tr. at 1175:19-1176:2. If HUMC's capacity constraints were so severe, or the need to expand HUMC's tertiary and quaternary services were as acute as Defendants make them out to be, the Court questions why HMH is [TEXT REDACTED BY THE COURT]. At a minimum, HMH did not provide any adequate explanation as to this fact. Moreover, HMH planned *pre-merger* to expand certain quaternary service lines with the Tower project. PX1051. In addition, HUMC never gave a signal to insurers or competitors that it had severe capacity constraints; HUMC never declined a transfer and never went on redirect in the time leading up to the Agreement. Finally, HMH has three hospitals near HUMC: Pascack Valley (owned with Ardent), Palisades, and Mountainside (owned with Ardent). These three hospitals provide primary and secondary care. Pascack Valley is not at capacity, and there was no indication that either Palisades or Mountainside was at capacity. Nevertheless, **[*93]** HMH provided no reason as to why HUMC could not alleviate its capacity constraints to some degree through using one or more of the three.[35]

Dr. Gowrisankaran evaluated the procompetitive benefits of the proposed merger, finding nine benefits. Tr. at 1226:12-13. The first benefit was increased patient volume at Englewood. *Id.* at 1242:14-23. Gowrisankaran explained that payors would save money through transfers to Englewood and tertiary redirections from HUMC to Englewood. Gowrisankaran continued that payors would save because Englewood is cheaper than HUMC. Tr. at 1244:11-12. The Court agrees with Dr. Dafny that transfers or redirections from HUMC to Englewood are not an efficiency; instead the transfers/redirections are a voluntary decision by HUMC to give away profits. Tr. at 586:7-24. Not only is it a voluntary decision, but it is a decision that runs counter to HUMC and HMH's financial interest. Besides the transfers not being in HMH and HUMC's financial interest, there are also serious questions as to whether the number of projected transfers can be implemented. As noted, a large number of hospital referrals come from physicians not employed by the hospital; those physicians do not **[*94]** have to send their patients to Englewood. And HUMC is not reducing it tertiary service lines. Moreover, Gowrisankaran drew his transfer/redirection figures from the Optimization Plan, Tr. at 1283-84:13-20, of which the Court gives little weight for the reasons stated above.

Defendants also primarily rely on Dr. Gowrisankaran to quantify the benefits that would result from HUMC's increased quaternary services. HMH, however, glosses over the fact that it needs state approval to expand HUMC's quaternary service lines. Plf. FOF ¶ 162. At least with respect to hospitals obtaining tertiary capacity, this is an expensive and time-consuming process, and approval is not guaranteed. Tr. at 768:13-25; *see also* 93:4-19. And Gowrisankaran opined that there would be direct payor cost savings from quaternary care received in New Jersey versus New York. *See* Defs. FOF ¶ 146. But quaternary services are highly complex and infrequently performed, and Gowrisankaran's patient choice model, which he based[36] on HMH's [TEXT REDACTED BY THE COURT]

[35] In fact, when HMH acquired Pascack Valley, one of its stated reasons to reopen the facility was to serve as a pressure relief valve for overflow patients at HUMC. Tr. at 1437:25-4. But at the present time, Pascack Valley only operates at about 50% to 60% of its occupancy rate. Tr. at 1212:12-15.

recapture rate, amounts to [TEXT REDACTED BY THE COURT] patients. DX5002, Table 11A. Moreover, Gowrisankaran acknowledged that the actual reduced payor expenditures **[*95]** would be much less once he accounted for transfers from lower-priced New Jersey hospitals to HUMC. Tr. at 1287:11-18. In fact, Gowrisankaran found that [TEXT REDACTED BY THE COURT] would have reduced expenditures post-merger for quaternary services; [TEXT REDACTED BY THE COURT] would all have increased expenditures. Tr. at 1288-89:12-13.

c. Service Optimization

The final procompetitive benefit asserted by Defendants is cost-savings that will result from service optimization between the two entities.[37] For this benefit, Defendants rely on their expert Ms. Ahern, who calculated that the merger would result in $38 million in cost-savings efficiencies annually. Defs. FOF ¶ 150. Ahern, however, failed to account for the $439 million capital contribution by HMH, which would result in not reaching a net positive gain until thirteen years after the merger.[38] Tr. at 1529-30:24-15. Ms. Ahern recognized that HMH had a demonstrated track record of cost savings through past mergers and acquisitions. Dr. Gowrisankaran estimates that 50% of Ms. Ahern's amount would be passed through to payors. Tr. at 1529:24-15. While Gowrisankaran estimates that payers would see cost savings, there is no evidence that **[*96]** these cost savings will be realized. *Id.* ¶ 150. Critically, HMH has acquired other hospitals in New Jersey, including Palisades in 2016 and JFK in 2018, and Defendants provide no evidence that the cost-savings from service optimization between the prior merger entities was passed through to payors. Therefore, with history as a guide, the Court doubts that any costs savings HMH realizes will be passed through to payors.

d. Quality Improvements

Finally, the Court briefly addresses the alleged quality improvements that Defendants submit will be achieved at Englewood and HUMC after the merger. Dr. Meyer, Defendants' healthcare quality expert, testified that HMH has a history of being a leader in healthcare quality and a track record of improving the quality of care with its merger partners.[39] *Id.* ¶ 154. The Court also agrees that HMH's capital commitment will certainly permit Englewood to

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[36] The Court notes that Dr. Gowrisankaran utilized a patient-choice model for his analysis of the cost-savings that HMH will realize by capturing outmigration. The Court also notes that one of Dr. Wu's critiques of Dr. Dafny's analysis is that she improperly used a patient-choice model.

[37] Defendants frame this as an efficiency. Defs. FOF ¶¶ 27-29. The FTC argues that these service optimization efficiencies are not merger specific because they could also be achieved if Englewood chose a different merger partner, such as [TEXT REDACTED BY THE COURT]. *See* Plf. COL ¶ 46. An efficiency is merger specific if it "cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *H.J. Heinz Co., 246 F.3d at 722*. Thus, there is no legal requirement that Defendants must compare the efficiencies alleged here with those of a different hypothetical merger partner. And the FTC has cited no authority indicating that a court can consider other potential merger partners in conducting an efficiencies analysis. The merger specific inquiry focuses on the efficiencies that could theoretically be achieved by either merging entity alone, absent the merger.

[38] The Court is also concerned that neither Ms. Ahern nor anyone from her team, produced any notes, despite the fact that she interviewed more than 100 Englewood and HMH employees, because, according to Ahern, her team is well versed in the field of healthcare organizations and operations. Tr. at 140:6-1402:11. Yet, neither Ms. Ahern nor any of her team members claimed to have an eidetic memory. Further, no explanation was provided as to how Ms. Ahern was able to effectively incorporate her team's verbal work product into her final report. Absent an extraordinary and credible explanation, the Court cannot fathom how Ms. Ahern and her team were able to accurately synthesize over 100 interviews from memory alone.

[39] The FTC seeks to preclude Defendants from relying on certain portions of Dr. Meyer's report because Dr. Meyer destroyed notes from interviews that were incorporated into his report, in contravention of the Case Management Order. D.E. 248. The FTC seeks to exclude those portions of the report that relied on the destroyed notes under *Federal Rules of Civil Procedure 37(b)(2)(A)*. A court has broad discretion when imposing sanctions pursuant to *Rule 37(b)*. *Wachtel v. Health Net, Inc., 239*

upgrade and expand its facilities and equipment. This is a quality improvement. At the same time, Englewood is also a high-quality hospital. Tr. at 846:4-16. In fact, Dr. Romano, the FTC's expert on healthcare quality opined that "Englewood performs better than HUMC on some important measures." Tr. at **[*97]** 1435:22-23. In other words, even without HMH's capital infusion, Englewood still outperforms HUMC in certain areas. Consequently, although both hospitals (particularly Englewood) will likely see certain improvements in quality due to the merger, this merger is fundamentally different than, for example, a merger where a large successful health system acquires a small, failing hospital. Because Englewood and HUMC consistently perform well in multiple quality assessments, Defendants also fail to establish that any improvements in quality at either entity will be a sufficient procompetitive benefit.

In sum, Defendants do establish that improvements at Englewood will result in an adequate procompetitive benefit. In addition to a limited benefit of HUMC recapturing a small number of outmigration patients, Englewood should be able to expand and upgrade its physical plant, equipment, and services. But these benefits do not amount to extraordinary efficiencies that offsets the likely anticompetitive effect of the merger. Consequently, Defendants fail to rebut the FTC's *prima facie* case and the Court concludes that the FTC establishes a likelihood of success in demonstrating that the merger violates **[*98]** *Section 7* of the Clayton Act, or in other words, that "there is a reasonable probability that the challenged transaction will substantially impair competition." *Sysco Corp., 113 F. Supp. 3d at 22* (quoting *Staples, 970 F. Supp. at 1072*)).[40]

B. Weighing the Equities

"Although the Government's showing of likelihood of success creates a presumption in favor of preliminary injunctive relief, we must still weigh the equities in order to decide whether the merger would be in the public interest." *Penn State Hersey Med. Ctr., 838 F.3d at 352* (quoting *H.J. Heinz Co., 246 F.3d at 726*). The Court must determine whether the harm Defendants "will suffer if the merger is delayed will, in turn, harm the public more than if the injunction is not issued." *Id.* In addition, the Third Circuit has explained that although a court may consider the private equities, "they are not to be afforded great weight." *Id. at 352*.

The FTC contends that "[t]he principal equity in favor of issuance of the injunction is the public's interest in effective enforcement of the antitrust laws." Plf. FOF ¶ 50. If Defendants are allowed to proceed with the transaction, and then the administrative proceeding finds that the merger is unlawful, it will be difficult to unscramble the proverbial egg. *See id.* ¶ 50. Defendants argue that if the merger is enjoined it will "derail **[*99]** the Merger" and "deny[] the community of [the] significant healthcare benefits" of the expanded complex care at HUMC and tertiary care at Englewood. Defs. FOF ¶ 31. In arguing that the community will be denied the benefits of the changes to care, Defendants incorrectly focus on whether the merger is in the public interest. At this stage, the Court must determine whether the *injunction* is in the public interest. *Penn State Hershey Med. Ctr., 838 F.3d at 353*. As for Defendants' argument that the injunction will derail the merger, it is not a consideration endorsed by the Third Circuit. "We see no reason why, if the merger makes economic sense now, it would not be equally sensible to consummate the merger following a FTC adjudication on the merits that finds the merger lawful." *Id.* Accordingly, on balance the equities favor granting the injunction.

VI. CONCLUSION

F.R.D. 81, 84 (D.N.J. 2006). In this instance, although Dr. Meyer intentionally destroyed his notes, there is no evidence of bad faith. Accordingly, the Court denies the FTC's request.

[40] Even if the Court were to conclude that Defendants rebutted the FTC's *prima facie* case that the merger will be anticompetitive, the Court would conclude that the FTC appropriately meets its burden of persuasion to demonstrate a likelihood of success in establishing that the merger violates *Section 7*.

In sum, the FTC demonstrates a likelihood of success on the merits and the equities favor granting the injunction. Therefore, the Court preliminarily enjoins the proposed acquisition pending the outcome of the administrative proceeding. An appropriate Order accompanies this Opinion.

Dated: August 4, 2021

/s/ John Michael Vazquez

JOHN MICHAEL VAZQUEZ, U.S.D.J.

FWK Holdings, LLC v. Merck & Co. (In re Zetia (Ezetimibe) Antitrust Litig.)

United States Court of Appeals for the Fourth Circuit

May 6, 2021, Argued; August 4, 2021, Decided

No. 20-2184

Reporter

7 F.4th 227 *; 2021 U.S. App. LEXIS 23324 **; 110 Fed. R. Serv. 3d (Callaghan) 373

In re: ZETIA (EZETIMIBE) ANTITRUST LITIGATION.FWK HOLDINGS, LLC; CESAR CASTILLO, INC., individually and on behalf of all those similarly situated; ROCHESTER DRUG COOPERATIVE, INC., Plaintiffs - Appellees, v. MERCK & COMPANY, INC.; MERCK SHARP & DOHME CORPORATION; SCHERING PLOUGH CORPORATION; SCHERING CORPORATION; MSP SINGAPORE CO. LLC; GLENMARK PHARMACEUTICALS, LTD.; GLENMARK GENERICS INC., USA, Defendants - Appellants.

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. (2:18-md-02836-RBS-DEM). Rebecca Beach Smith, Senior District Judge.

In re Zetia (Ezetimibe) Antitrust Litig., 481 F. Supp. 3d 571, 2020 U.S. Dist. LEXIS 152380, 2020 WL 4917625 (E.D. Va., Aug. 21, 2020)

Disposition: VACATED AND REMANDED.

Core Terms

district court, generic, numerosity, class certification, joinder, class member, judicial economy, certify, impracticable, patent, class action, antitrust, factors, predominance, manufacturer, motivation, discovery, joined, magistrate judge, named plaintiff, brand-name, parties, launch, court's decision, join a party, judicial-economy, certification, analyzing, ezetimibe, questions

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN1[] **Standards of Review, Abuse of Discretion**

The court reviews a district court's decision to certify a class for abuse of discretion. But a district court per se abuses its discretion when it makes an error of law.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN2[] **Prerequisites for Class Action, Adequacy of Representation**

Before any class may be certified, *Fed. R. Civ. P. 23(a)* requires a district court to make the following determinations: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)*. A party seeking class certification must affirmatively demonstrate his compliance with the Rule, and must do so with evidentiary proof, And classes certified under *Rule 23(b)(3)* are only appropriate when (1) all of the prerequisites of *Rule 23(a)* are satisfied, (2) common questions of law or fact predominate over any questions affecting only individual class members, and (3) proceeding as a class is superior to other available methods of litigation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN3[] **Prerequisites for Class Action, Numerosity**

Fed. R. Civ. P. 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. *Fed. R. Civ. P. 23(a)(1)*. Though no specified number is needed to maintain a class action, as a general guideline, a class that encompasses fewer than 20 members will likely not be certified while a class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone. For the "gray area" cases between twenty and forty members, all the circumstances of the case should be taken into consideration in evaluating the impracticability of joinder.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN4[] **Prerequisites for Class Action, Numerosity**

The text of *Fed. R. Civ. P. 23(a)(1)* refers to whether the class is so numerous that joinder of all members is impracticable, not whether the class is so numerous that failing to certify presents the risk of many separate lawsuits.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN5[] **Class Actions, Certification of Classes**

The judicial-economy factor involves weighing the actual, practical difficulties of joining all of the potential class members by inquiring whether joinder would be expensive, time-consuming, and logistically unfeasible'. Otherwise, the judicial-economy factor would always favor class certification, which is simpler to manage than individual lawsuits. In fact, even compared to joinder, class certification will often be preferable from a judicial economy perspective. And in analyzing this factor, district courts should bear in mind *Fed. R. Civ. P. 23(a)*'s high standard, which asks whether a variety of factors make joinder not only uneconomical but also economically impracticable. *Fed. R. Civ. P. 23(a)(1)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

HN6[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23 places on plaintiffs the burden of presenting evidence that the putative class complies with Rule 23. And in presenting this evidence, plaintiffs must do more than simply show that litigating as a class—rather than joinder—would offer marginal economic benefits. True, impracticable does not mean impossible. But the impracticability standard recognizes that the class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN7[] Class Actions, Certification of Classes

True, impracticable does not mean impossible. But the impracticability standard recognizes that the class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

HN8[] Joinder of Parties, Permissive Joinder

As the Third Circuit stated in Modafinil—some parties being economically unmotivated to litigate via joinder is only one of many factors to consider in making an impracticability of joinder consideration.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN9[] Judges, Discretionary Powers

To be sure, the court gives district courts considerable discretion in making numerosity determinations. But district courts must provide a rigorous analysis to allow for meaningful appellate review on the numerosity factor. And that rigorous analysis must be premised on a correct understanding of Fed. R. Civ. P. 23(a)(1).

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN10[] Standards of Review, Abuse of Discretion

A district court abuses its discretion when it considers issues that have no place in the numerosity requirement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN11[] **Prerequisites for Class Action, Adequacy of Representation**

To establish U.S. Const. art. III standing of named plaintiffs during class certification under *Fed. R. Civ. P. 23* it is sufficient for standing purposes that the plaintiffs seek recovery for an economic harm that they allege they have suffered. Moreover, contesting a class representative's injury does not defeat typicality. To defeat class certification, a defendant must show some degree of likelihood a unique defense will play a significant role at trial.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN12[] **Prerequisites for Class Action, Commonality**

Fed. R. Civ. P. 23(b)(3) requires a showing that questions common to the class predominate. Predominance also applies to damages because the efficiencies of the class action mechanism would be negated if questions of individual damage calculations overwhelm questions common to the class. This does not mean, however, that damages must be susceptible of measurement across the entire class for purposes of *Rule 23(b)(3)*.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN13[] **Standing, Requirements**

In addition to establishing U.S. Const. art. III standing, private antitrust plaintiffs must also demonstrate antitrust standing. Antitrust standing often is critically important for the purpose of evaluating *Fed. R. Civ. P. 23(b)(3)*'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN14[] **Appellate Jurisdiction, State Court Review**

Failure to file a petition for permission to cross-appeal is a jurisdictional defect, barring consideration of any issue that may have been raised.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN15[] **Standing, Clayton Act**

Generally, only direct purchasers from an antitrust violator can sue for damages. Immediate buyers from the alleged antitrust violators can be construed as direct purchasers under the Clayton Act.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN16[] **Class Actions, Certification of Classes**

The court affords district courts substantial deference in certifying classes.

Counsel: ARGUED: Theodore J. Boutrous, Jr., GIBSON, DUNN & CRUTCHER LLP, Los Angeles, California, for Appellants.

Thomas M. Sobol, HAGENS BERMAN SOBOL SHAPIRO LLP, Cambridge, Massachusetts, for Appellee.

ON BRIEF: Eric J. Stock, New York, New York, Veronica S. Lewis, Ashley Johnson, Dallas, Texas, Samuel J. Liversidge, Christopher D. Dusseault, Bradley J. Hamburger, Daniel R. Adler, GIBSON, DUNN & CRUTCHER LLP, Los Angeles, California; Stephen E. Noona, KAUFMAN & CANOLES, P.C., Norfolk, Virginia, for Appellants Merck & Co., Inc.; Merck Sharp & Dohme Corp.; Schering-Plough Corp.; Schering Corp.; and MSP Singapore Co. LLC. Steven A. Reed, R. Brendan Fee, Zachary M. Johns, Jessica J. Taticchi, Philadelphia, Pennsylvania, Stacey Anne Mahoney, MORGAN, LEWIS & BOCKIUS LLP, New York, New York; Richard H. Ottinger, Dustin M. Paul, Jennifer L. Eaton, VANDEVENTER BLACK LLP, Norfolk, Virginia, for Appellants Glenmark Pharmaceuticals Ltd. and Glenmark Pharmaceuticals Inc., USA. Erin C. Burns, Hannah Schwarzchild, Bradley J. **[**2]** Vettraino, HAGENS BERMAN SOBOL SHAPIRO LLP, Cambridge, Massachusetts, for Appellee FWK Holdings, LLC and the Direct Purchaser Class. William H. Monroe, Jr., Marc C. Greco, Kip A. Harbison, Michael A. Glasser, GLASSER & GLASSER, P.L.C., Norfolk, Virginia, for Appellees FWK Holdings, LLC; César Castillo, Inc.; and Rochester Drug Co-Operative, Inc. John D. Radice, RADICE LAW FIRM, P.C., Princeton, New Jersey; Paul E. Slater, Joseph M. Vanek, David P. Germaine, Alberto Rodriguez, SPERLING & SLATER, P.C., Chicago, Illinois; Michael Roberts, Stephanie Smith, Karen Halbert, Will Wilson, ROBERTS LAW FIRM, P.A., Little Rock, Arkansas; Sharon K. Robertson, Donna M. Evans, COHEN MILSTEIN SELLERS & TOLL PLLC, New York, New York; Steve D. Shadowen, Matthew C. Weiner, HILLIARD & SHADOWEN LLP, Austin, Texas; Joseph H. Meltzer, Terence S. Ziegler, KESSLER TOPAZ MELTZER & CHECK LLP, Radnor, Pennsylvania, for Appellee FWK Holdings, LLC and the Direct Purchaser Class. Linda P. Nussbaum, NUSSBAUM LAW GROUP, P.C., New York, New York; Jayne A. Goldstein, SHEPHERD, FINKELMAN, MILLER & SHAH, LLP, Fort Lauderdale, Florida, for Appellee César Castillo and the Direct Purchaser Class. David F. Sorensen, Ellen **[**3]** T. Noteware, Nicholas Urban, BERGER MONTAGUE PC, Philadelphia, Pennsylvania; Barry Taus, Archana Tamoschunas, Kevin Landau, TAUS, CEBULASH & LANDAU, LLC, New York, New York; Peter R. Kohn, Joseph T. Lukens, Philadelphia, Pennsylvania, Bradley J. Demuth, FARUQI & FARUQI, LLP, New York, New York, for Appellee Rochester Drug Co-Coperative, Inc. and the Direct Purchaser Class.

Judges: Before NIEMEYER, FLOYD, and RUSHING, Circuit Judges. NIEMEYER, Circuit Judge, concurring.

Opinion by: FLOYD

Opinion

[*232] FLOYD, Circuit Judge:

A group of pharmaceutical buyers brought this class action against two manufacturers who allegedly reached an anticompetitive settlement in a patent dispute. Defendants-Appellants Merck[1] and Glenmark[2] challenge the district court's class certification order. Plaintiffs-Appellees are a class of direct purchasers of Merck's brand-name drug and Glenmark's generic version of that drug. The district court determined that the putative class of thirty-five purchasers satisfied the class certification requirements set forth in *Federal Rule of Civil Procedure 23*. We hold that the district court's numerosity analysis fell short in several respects, so we vacate the district court's order and remand for further proceedings.

I.

In the 1980s, Merck began **[**4]** developing a cholesterol-lowering drug. Eventually, Merck invented ezetimibe, patented and marketed under the name Zetia. Merck's patent was exclusive through April 2017, meaning that Merck had the exclusive right to develop ezetimibe through that date. In 2006, Glenmark sought FDA approval to market a generic version of Zetia, claiming that Merck's Zetia patent was "invalid or w[ould] not be infringed by the manufacture, use, or sale of" Glenmark's generic. *See* *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*.[3] As required by law, Glenmark notified Merck of its generic drug application. Merck promptly sued Glenmark for patent infringement. Glenmark did not contest that its proposed generic infringed on Merck's patent. Instead, Glenmark argued that Merck's patent was invalid. In 2010, Merck and Glenmark settled the patent dispute. The settlement agreement allowed Glenmark to launch its generic in December 2016—over four months before the expiration of Merck's exclusivity period.

Plaintiffs, on behalf of a small group of drug wholesalers that purchased Zetia directly from Merck, sued Merck and Glenmark under federal ***antitrust law***, alleging that the two companies conspired to inflate the drug's price. Plaintiffs' case drew parallels **[**5]** to the Supreme Court's decision in *FTC v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*, which concerned the anticompetitive settlement of a patent case. In *Actavis*, a brand-name manufacturer sued generic manufacturers for patent infringement. Under the parties' **[*233]** settlement agreement, the brand-name manufacturer agreed to a reverse payment in which it agreed to pay the generic manufacturers between $240 and $342 million to delay the launch of their generic products. *Id. at 144-45*. The FTC then sued both parties, alleging that the reverse payment was anticompetitive and therefore in violation of federal ***antitrust law***. *Id. at 145*. The Supreme Court agreed, holding that a "large and unjustified" reverse payment made "in return for staying out of the market" may give rise to antitrust liability. *Id. at 154, 158*.

In this case, Plaintiffs allege that Merck made a "reverse payment" by giving up its right to sell a generic version of ezetimibe for the six-month period after Glenmark introduced its own generic. Because Glenmark was the first to seek FDA approval for a generic ezetimibe, it had the near-exclusive right to sell a generic for 180 days after launching it. *21 U.S.C. § 355(j)(5)(B)(iv)*. The right is near-exclusive because the brand-name manufacturer can market a competing generic, called an "authorized **[**6]** generic," by essentially rebranding its brand-name drug and selling it at a lower price point. *In re Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 189 (3d Cir. 2020)*.

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[1] "Merck" refers to Defendants-Appellants Merck & Co., Inc.; Merck Sharp & Dohme Corp.; Schering-Plough Corp.; Schering Corp.; and MSP Singapore Co. LLC.

[2] "Glenmark" refers to Defendants-Appellants Glenmark Pharmaceuticals Ltd. and Glenmark Pharmaceuticals Inc., USA.

[3] Federal law gives competing drug manufacturers the opportunity to introduce generic versions of branded drugs. Generic manufacturers may obtain FDA approval through an abbreviated review process so long as the generic is a bioequivalent of the approved, brand-name drug.

Here, Merck chose to discount its branded drug rather than launch an authorized generic. Based on that decision, Plaintiffs allege that Merck must have agreed not to launch any authorized generic in exchange for ending the patent litigation between Merck and Glenmark. According to Plaintiffs, this agreement constitutes an anticompetitive "reverse payment." Without such an agreement, Merck and Glenmark would have settled the case by allowing Glenmark to launch its generic at least two years earlier than it actually did in December 2016. Had Glenmark's less expensive generic been available for those two years, the class would have spent billions less acquiring the generic ezetimibe instead of Merck's brand-name version.

Three entities sought to represent a class of all direct Zetia purchasers: FWK Holdings, LLC (FWK), Rochester Drug Co-Operative, Inc. (Rochester), and César Castillo, Inc. (Castillo). The thirty-two absent class members are all sophisticated companies with purportedly large claims, including the "Big Three" wholesalers—McKesson, AmerisourceBergen, and Cardinal Health—"who account **[**7]** for 97 percent of all class purchases." J.A. 1088.

Plaintiffs moved for class certification in November 2019. Merck and Glenmark opposed the motion, contending that the proposed class did not satisfy the requirements of *Federal Rule of Civil Procedure 23*. A magistrate judge issued a report and recommendation to certify the class in June 2020, to which Merck and Glenmark objected. In August 2020, the district court adopted the report, overruled all objections, and certified the class. Merck and Glenmark timely appealed.

II.

HN1[] "We review a district court's decision to certify a class for abuse of discretion." *EQT Prod. Co. v. Adair, 764 F.3d 347, 357 (4th Cir. 2014)*. But "[a] district court per se abuses its discretion when it makes an error of law." *Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 317 (4th Cir. 2006)*.

III.

HN2[] Before any class may be certified, *Rule 23(a)* requires a district court to make the following determinations:

(1) the class is so numerous that joinder of all members is impracticable;

[*234] (2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). "A party seeking class certification must affirmatively demonstrate his compliance with the Rule," **[**8]** *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*, and must do so with "evidentiary proof," *Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*. And classes certified under *Rule 23(b)(3)*—as is the case here—are only appropriate when (1) "all of the prerequisites of *Rule 23(a)* are satisfied," (2) "common questions of law or fact . . . predominate over any questions affecting only individual class members," and (3) "proceeding as a class [is] superior to other available methods of litigation." *EQT Prod., 764 F.3d at 357*. Merck and Glenmark argue that the district court's decision to certify the class ran afoul of several of these requirements. We consider each in turn.

A.

HN3[] *Rule 23(a)(1)* requires that a class be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. Though "[n]o specified number is needed to maintain a class action," *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 653 (4th Cir. 1967)*, "[a]s a general guideline, . . . a class that encompasses fewer than 20 members will likely not be certified . . . while a class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone," 1 *Newberg on Class Actions* § 3:12 (5th ed. 2021). For the "gray area" cases between twenty and forty members, J.A. 1916 (quoting J.A. 1081), "all the circumstances of the case should be taken into consideration" in evaluating the impracticability of joinder, *Ballard v. Shield of S.W. Va., Inc., 543 F.2d 1075, 1080 (4th Cir. 1976)*.

The district court conducted **[**9]** its numerosity analysis using the Third Circuit's "non-exhaustive list" of factors, which includes "judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, the financial resources of class members, [and] the geographic dispersion of class members." *In re Modafinil Antitrust Litig., 837 F.3d 238, 253 (3d Cir. 2016)* (vacating class certification in a reverse-payment case under *Rule 23(a)*'s numerosity requirement). The district court determined that the judicial-economy and geographic-dispersion factors favored class certification, though the latter "should be given relatively lower weight than the other factors." J.A. 1921. The court also explained that the "financial factor does not significantly inform the practicability assessment." J.A. 1922 (quoting J.A. 1090 (cleaned up)). Finally, the court concluded that the "ability and motivations of the class members to proceed via joinder weigh 'slightly' in favor of a finding that joinder is impracticable." J.A. 1920 (quoting J.A. 1086).

We commend the magistrate judge and district court for their careful and thorough adjudication of the class certification motion. But for the reasons explained below, we are compelled to conclude that the court rested its numerosity analysis on faulty **[**10]** logic.

For starters, the district court appears to have based its numerosity determination on its reasoning that "multiple *individual* trials" would result if the case proceeded without class status. *See* J.A. **[*235]** 1085 (emphasis added). ***HN4***[] But "the text of *Rule 23(a)(1)* refers to whether 'the class is so numerous that *joinder* of all members is impracticable,' not whether the class is so numerous that failing to certify presents the risk of many separate lawsuits." *Modafinil, 837 F.3d at 253*. The district court's numerosity analysis ran afoul of this important principle in two critical ways.

First, in the course of analyzing the judicial-economy factor, the district court adopted the magistrate judge's reasoning that "multiple individual trials . . . will essentially involve the same theories of liability and largely the same evidence," and that "[i]n such circumstances, proceeding in a class action is preferred as it greatly conserves judicial resources." J.A. 1085; *see* J.A. 1919 ("agree[ing] with the analysis in the [report and recommendation] on the judicial economy factor"). True, the district court minimized this aspect of the magistrate judge's analysis, noting that the magistrate judge "spen[t] just a single paragraph on the **[**11]** possibility that there could be some separate trials." J.A. 1918-19. But given the district court's conclusion that "judicial economy is the most persuasive of the numerosity factors," J.A. 1922, we are left in the dark as to whether this faulty logic played into the district court's numerosity analysis.[4]

When analyzing the judicial-economy factor on remand, the district court should consider whether judicial economy favors *either* a class action *or* joinder. *See* *Modafinil, 837 F.3d at 254* (noting that ***HN5***[] the judicial-economy factor involves weighing "'the actual, practical difficulties of joining all of the potential class members' by inquiring whether *joinder* 'would be expensive, time-consuming, and logistically unfeasible'" (emphasis added) (quoting 5 *Moore's Federal Practice* § 23.22)). Otherwise, the judicial-economy factor would always favor class certification, which is simpler to manage than individual lawsuits. In fact, even compared to *joinder*, class certification will often be preferable from a judicial economy perspective.[5]

Second, in analyzing the class members' ability and motivation to litigate, the district court again focused its analysis on the economics of individual suits. *See* J.A. 1920 (agreeing **[**12]** with the magistrate judge that the motivation factor favored certification, in part, given "*evidence from other cases regarding class members' motivation to pursue claims on their own*" (emphasis added)).[6] In considering the feasibility **[*236]** of pursing

[4] In a footnote, the district court suggested our precedent permits it to compare the practicability of a class to that of individual trials, noting that "the Third Circuit's statements in *Modafinil* are contrary to those of other courts, including the Fourth Circuit." J.A. 1919 n.9. We disagree. The district court's conclusion relied on *Ballard*, which observed in passing that individual suits could increase the volume of discovery. *See* *543 F.2d at 1080*. This comment, which is dicta, directly conflicts with the language of *Rule 23(a)(1)*. We therefore afford it no weight and do not consider it binding precedent.

[5] And in analyzing this factor, district courts should bear in mind *Rule 23(a)*'s high standard, which asks whether a variety of factors make joinder not only uneconomical but also economically *impracticable*. *Fed. R. Civ. P. 23(a)(1)*.

individual claims, the magistrate judge and district court seem to acknowledge yet adopt Plaintiffs' "assum[ption], without any evidence, that absent a class action, the[ ] smaller claimants would sue individually and thus bear the entire cost of litigation." J.A. 1089. This misconstrues the standard. Indeed, "there has been no showing that it would be uneconomical for [smaller claimants] to be individually joined as parties in a traditional lawsuit." *Modafinil, 837 F.3d at 259*. Plaintiffs must bring to bear some evidence to this effect—and the district court may not consider the economics of individual suits in analyzing this factor.[7]

HN9[] To be sure, we give "district courts considerable discretion in making numerosity determinations." *Id. at 249*. But district courts must provide a "rigorous analysis" to allow for meaningful appellate review on the numerosity factor. *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*. And that "rigorous analysis" must be premised on a correct understanding **[**13]** of *Rule 23(a)(1)*. Because the district court's numerosity analysis improperly looked to the impracticability of individual suits rather than joinder, we are compelled to conclude that legal error infected the court's class-certification decision. *See* *Modafinil, 837 F.3d at 249* ***HN10***[] ("A district court abuses [its] discretion . . . when it considers issues that have no place in the numerosity requirement."). We therefore vacate the district court's class-certification order.

B.

Merck and Glenmark raise two additional arguments related to class certification, which we can quickly resolve.

1.

First, Merck and Glenmark challenge the district court's adequacy determination, arguing that none of the named plaintiffs can adequately represent the class. We see no abuse of discretion here. We recognize that class counsel "is largely responsible for [named plaintiff] FWK's formation." J.A. 1103. But the district court found "no evidence in this case that either FWK or [its owner] have any current or prospective financial dealings with any of class counsel." J.A. 1106, 1925. The court did not abuse its discretion in finding that "the record in this case satisfactorily demonstrates FWK's adequacy to serve as class representative." J.A. 1105, **[**14]** 1925.

We also find no abuse of discretion in the decision that named plaintiff Rochester, despite its current Chapter 11 bankruptcy proceedings, still "share[s] common objectives and the same factual **[*237]** and legal positions" as other class members. *Ward v. Dixie Nat'l Life Ins. Co., 595 F.3d 164, 180 (4th Cir. 2010)* (quoting *Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 430-31 (4th Cir. 2003)*). Indeed, Rochester's bankruptcy status gives it a "strong interest" in recovering its "fairly substantial" $40.5 million in treble damages. J.A. 1122. The fact that Merck and Glenmark are two of Rochester's creditors does not change that interest.

Merck and Glenmark further argue that named plaintiff Castillo "lacks standing under Article III and the antitrust laws—which renders it an atypical class representative" because Castillo "could not have been injured by the

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[6] The district court made this finding despite noting that Plaintiffs "offered little case-specific and member-specific evidence that class members would not join the suit on their own." J.A. 1920. ***HN6***[] But *Rule 23* places on Plaintiffs the burden of "present[ing] evidence that the putative class complies with *Rule 23*." *See* *EQT Prod., 764 F.3d at 357*. And in presenting this evidence, Plaintiffs must do more than simply show that litigating as a class—rather than joinder—would offer marginal economic benefits. ***HN7***[] True, "[i]mpracticable does not mean impossible." *Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993)*. But the impracticability standard recognizes that "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, 564 U.S. at 348* (quoting *Califano v. Yamasaki, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)*). We see little evidence in the record to support this point, and we expect that the district court will require Plaintiffs to adduce such evidence on remand to establish impracticability.

[7] Notably underscoring the district court's analysis of this factor is the assumption that if even one party may be *unmotivated* to litigate their small-value claims, *Rule 23(a)(1)* is satisfied because joinder of "*all members*" would then be impracticable. *See* *Fed. R. Civ. P. 23(a)(1)* (emphasis added). But—***HN8***[] as the Third Circuit stated in *Modafinil*—some parties being economically *unmotivated* to litigate via joinder is only one of many factors to consider in making an impracticability of joinder consideration. *837 F.3d at 259* ("Even if it were uneconomical for some . . . of the[ ] individual plaintiffs to join the suit, the District Court must still determine whether, considering all the other relevant factors, class status . . . is appropriate here.").

claimed delay in the availability of a product it would not have bought anyway." Opening Br. at 47. But Merck's and Glenmark's argument as to Castillo is an injury question for the jury—not a question of standing. *See In re Deepwater Horizon, 739 F.3d 790, 803 (5th Cir. 2014)* (noting that ***HN11***[] to establish "Article III standing of named plaintiffs during class certification under *Rule 23*, . . . it [is] 'sufficient for standing purposes that the plaintiffs seek recovery for an economic harm that they allege they have suffered'" (quoting *Cole v. Gen. Motors Corp., 484 F.3d 717, 723 (5th Cir. 2007)*)). Moreover, contesting **[**15]** a class representative's injury does not defeat typicality—another argument made by Merck and Glenmark. *Beck v. Maximus, Inc., 457 F.3d 291, 300 (3d Cir. 2006)* ("To defeat class certification, a defendant must show some degree of likelihood a unique defense will play a significant role at trial."). Because Castillo will rely on the same common evidence as the class to prove its injury at trial, we see no abuse of discretion in the district court's adequacy finding as to Castillo.

Accordingly, we reject Merck's and Glenmark's contention that the district court abused its discretion in finding the named plaintiffs adequate class representatives.

2.

Second, Merck and Glenmark challenge the district court's predominance determination. ***HN12***[] "*Rule 23(b)(3)* requires a showing that *questions* common to the class predominate . . . ." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 459, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)*. Predominance also applies to damages "because the efficiencies of the class action mechanism would be negated if '[q]uestions of individual damage calculations . . . overwhelm questions common to the class.'" *Modafinil, 837 F.3d at 260* (alterations in original) (quoting *Comcast, 569 U.S. at 34*). "This does not mean, however, that damages must be 'susceptible of measurement across the entire class for purposes of *Rule 23(b)(3)*.'" *Id.* (quoting *Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 374 (3d Cir. 2015)*).

Merck and Glenmark argue that the district court erred **[**16]** in permitting Plaintiffs to use industry- and class-wide averages to prove injury for the purposes of Article III and antitrust standing. They contend that this method of proof swallows the predominance requirement. According to Merck and Glenmark, Plaintiffs predict their "averages-based approach will show that *most* class members suffered injury, but leave open the possibility that fact-specific inquiries may be necessary to prove that others are injured." Reply Br. at 21. The district court rejected these arguments, concluding that different forms of common proof could show antitrust injury to the class. The court explained that a reasonable jury could find that all class members would have purchased some generic form of the drug—rather than the **[*238]** more expensive brand—had a generic been available earlier. We agree.

HN13[] In addition to establishing Article III standing, private antitrust plaintiffs "must also demonstrate 'antitrust standing.'" *Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 310 (4th Cir. 2007)*. Antitrust standing "often is critically important for the purpose of evaluating *Rule 23(b)(3)*'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311-12 (3d Cir. 2008)*. But we find no issue with the practice of proving injury by class-wide **[**17]** averages, which the district court correctly characterized as "common." J.A. 1927. Moreover, even if some individualized-injury inquiry is ultimately required at trial for some defendants, common issues will still predominate. We therefore affirm the district court's predominance finding.

C.

Plaintiffs invite us to review the district court's dismissal of twenty-three companies.[8] But Plaintiffs never filed a cross-petition raising the issue. ***HN14***[] And "[t]he failure to file [a] petition for permission to cross-appeal . . . is a

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[8] ***HN15***[] Generally, "only direct purchasers from an antitrust violator can sue for damages." *Dickson v. Microsoft Corp., 309 F.3d 193 (4th Cir. 2002)*. When Glenmark began making the generic drug in December 2016, it sold the generic to its exclusive dealer Par at cost-plus-shipping. Plaintiffs allege that Par is therefore a co-conspirator, so the district court erred in dismissing the claims of the twenty-three companies who purchased generic ezetimibe from Par rather than from Glenmark. *See Apple Inc. v. Pepper, 139 S. Ct. 1514, 1521, 203 L. Ed. 2d 802 (2019)* (noting that "immediate buyers from the alleged antitrust violators" can be construed as direct purchasers under the Clayton Act (cleaned up)). *But see Ill. Brick Co. v. Illinois, 431 U.S. 720, 730-*

jurisdictional defect, barring" consideration of any issue that may have been raised. *Tranello v. Frey, 962 F.2d 244, 248 (2d Cir. 1992)* (citing *Myles v. Laffitte, 881 F.2d 125, 126 (4th Cir. 1989)*).

Accordingly, Plaintiffs waived any objection to the district court's dismissal of these companies. In the magistrate judge's recommendation that the district court certify the thirty-five-member class, the magistrate judge advised the parties "that failure to file timely objections" would "result in waiver of appeal from a judgment of this Court based on such findings and recommendations." J.A. 1142-43. Plaintiffs did not appeal the thirty-five-member class or argue the class should be a fifty-eight-person class that included the twenty-three dismissed companies. **[**18]** Failure to do so constitutes waiver.

Resisting this conclusion, Plaintiffs ask us to consider their waived challenge under our "pendant appellate jurisdiction." Resp. Br. at 46 (citing *Scott v. Fam. Dollar Stores, Inc., 733 F.3d 105, 110-11 (4th Cir. 2013)*). In *Scott*, we exercised pendant appellate jurisdiction in a *Rule 23(f)* appeal where the district court had previously denied leave to amend a complaint, but petitioners had failed to seek interlocutory review of the order denying the motion for leave to amend the complaint. *733 F.3d at 110-11*. We concluded that reviewing the leave-to-amend decision was "necessary to ensure meaningful review" and "inextricably intertwined" with an issue on appeal. *Id. at 111* (quoting *Rux v. Republic of Sudan, 461 F.3d 461, 475 (4th Cir. 2006)*). But in *Scott*, the district court declined to certify the class and denied as futile any amendment to the **[*239]** complaint in the same order. And the two questions were intertwined because they turned on the same legal issue.

By contrast, the *Rule 12(b)(6)* and class certification orders in this case stemmed from separate motions. Moreover, the questions of class certification did not turn on the question presented in the *Rule 12(b)(6)* order—namely, whether the twenty-three dismissed companies have antitrust standing. Accordingly, we decline Plaintiffs' invitation to exercise pendant appellate jurisdiction. **[**19]** *See* *EQT Prod., 764 F.3d at 364* (declining to exercise pendant jurisdiction in similar circumstances).

IV.

HN16[] We afford district courts substantial deference in certifying classes. This opinion does not change that deference. Rather, we simply require that the district court consider only those factors permitted by *Rule 23(a)*'s numerosity requirement and that the court conduct the requisite full-throated analysis. The judgment of the district court is

VACATED AND REMANDED WITH INSTRUCTIONS.

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is vacated. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with *Fed. R. App. P. 41*.

Concur by: NIEMEYER

Concur

NIEMEYER, Circuit Judge, concurring:

I am pleased to join the court's opinion. I write separately only to identify some factors that might be considered in determining "numerosity" under *Federal Rule of Civil Procedure 23(a)(1)*. *See* *Anderson v. Weinert Enters., Inc.,*

33, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977) (prohibiting an indirect purchaser from suing for overcharges passed on to it from an upstream dealer).

986 F.3d 773, 775 (7th Cir. 2021) ("Ample ink has been spilled discussing class action litigation and Federal Rule of Civil Procedure 23. Rare are the cases analyzing the Rule's numerosity requirement").

While a district court's nuanced discretion is especially important in determining whether a proposed class is "so **[**20]** numerous that joinder of all members is *impracticable*," Fed. R. Civ. P. 23(a)(1) (emphasis added), we have recognized that a definitive test has not been articulated to assist in the exercise of that discretion, *see* Kelley v. Norfolk & W. Ry. Co., 584 F.2d 34, 35 (4th Cir. 1978) (per curiam) (noting that "[t]here is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied"). Nonetheless, I believe we can point to a few nonexclusive factors that a district court might consider.

First and perhaps most important is simply the number of members defined to be in the class. Generally, courts have presumed that a class with more than 40 members is sufficiently numerous while a class that numbers 20 or fewer is presumably too small to certify. *See* 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.22[1][b] (3d ed. 2020); 1 William B. Rubenstein, *Newberg on Class Actions* § 3.12 (5th ed. 2021); *see also* Kennedy v. Va. Polytechnic Inst. & State Univ., No. 7-08-CV-00579, 2010 U.S. Dist. LEXIS 101491, 2010 WL 3743642, at *3 (W.D. Va. Sept. 23, 2010) ("A nationwide survey of federal court decisions signals that it is exceedingly rare to certify classes with less than 25 members. . . . [C]ourts seem much more willing to certify a class if it has more than 40 members" (citations omitted)). For me, a class fewer than even 30 members should be exceptional.

But other factors must be considered to give flesh **[**21]** to the numbers inquiry. Leading treatises have typically summarized the relevant factors as (1) judicial economy resulting from avoidance of joined or independent actions, (2) geographic dispersion of putative class members, and (3) the ability and motivation of class members to bring suit absent class certification. *See* Moore's, *supra*, § 23.22[1][a]; Rubenstein, *supra*, §§ 3.11, 3.12; *cf.* In re Modafinil Antitrust Litig., 837 F.3d 238, 253 (3d Cir. 2016). The weight to be given any relevant **[*240]** factor, however, will be influenced by the particular facts of the case. For example, geographic dispersion, or the lack thereof, may have extra importance when a putative class's members are either especially scattered or notably concentrated. *See, e.g.,* Anderson, 986 F.3d at 777 (noting that geographic dispersion cut against certification where "[a]ll but two of the class members lived within a 50-mile radius of the courthouse"). And class members' motivation gains importance where there is reason to believe that those members would otherwise refrain from a joint suit out of "fear of possible reprisals" by the defendant or for other reasons cutting both for and against certification. Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 653 (4th Cir. 1967) (en banc) (certifying a small class of Black physicians in an employment discrimination suit).

Judicial economy as a broad category **[**22]** appears to be the factor on which courts have relied most heavily. *See* Modafinil, 837 F.3d at 253-54 (stating that "both judicial economy and the ability to litigate as joined parties are of primary importance"); *see also* McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 427 (1st Cir. 2007) ("Among the primary rationales behind the class action mechanism are judicial economy and efficiency"). One aspect of judicial economy is docket management. *See* Modafinil, 837 F.3d at 257 ("[Judicial economy] primarily involves considerations of docket control, taking into account practicalities as simple as that of every attorney making an appearance on the record"). All members of a putative class suing on their own — even if joined under Rule 20 — will naturally place a greater strain on a district court than having just two or three class members represent the whole. *See* Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993); *see also* Rubenstein, *supra*, § 3.11 ("Where many individuals have similar claims, there may be a flood of litigation. With so many litigants proceeding individually, the courts would be overrun with claims. Yet the vast quantity of individual litigants makes joinder impracticable").

Another facet of judicial economy is courtroom space and correlated staffing. For example, more parties joined to an action means, in most cases, more attorneys, each of which **[**23]** must be present in court for hearings and conferences. In this case, there may be a substantial gap between the number of attorneys currently needed to represent the 3 named class representatives and the number that would be needed to represent 35 joined parties, if that many were to consent, even if one assumes that each joined party has only 2 or 3 attorneys present. A court could reasonably recognize the demands on physical space and staffing necessary to accommodate so many individuals. *See* Town of New Castle v. Yonkers Contracting Co., 131 F.R.D. 38, 41 (S.D.N.Y. 1990) ("[T]he impracticability of joinder is best seen by noting the difficulties involved in having thirty-five intervenors, all with their respective attorneys, attempt to go through the formal motions required for entrance into and participation in the suit" (cleaned up)).

As a further aspect of judicial economy, a district court may consider the differential in costs of discovery between a class action and an action with many joined parties. The court could consider whether, in the action of joined parties, "discovery would be repetitive and unduly expensive." *Ballard v. Blue Shield of S.W. Va., Inc., 543 F.2d 1075, 1080 (4th Cir. 1976)*. But while a district court may give weight to this consideration as to *future discovery*, it should not succumb to the sunk-cost fallacy **[**24]** and certify a class merely because a great deal of effort has *already been expended* ***[*241]*** in discovery. Noteworthy about discovery is the fact that it represents civil litigation's largest cost. *See generally* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, *84 Minn. L. Rev. 505 (2000)*; Nicholas M. Pace & Laura Zakaras, RAND Inst. for Civ. Just., *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (2012).

And an aspect of broader practicality, and also, perhaps, judicial economy, might relate to the ability to identify class members. *See Baltimore v. Laborers' Int'l Union of N. Am., 67 F.3d 293* [published in full-text format at *1995 U.S. App. LEXIS 27703*], at *1 (4th Cir. 1995) (unpublished table decision); *Ballard, 543 F.2d at 1080* (noting that "the number of [class members] and knowledge of their identity . . . should be considered"). It has been observed that if a "majority of the members of the proposed class were identified" by the court, and especially if those members "reside within an established jurisdictional boundary," joinder may be more practicable. *Baltimore, 67 F.3d at *1* [published in full-text format at *1995 U.S. App. LEXIS 27703*]. On the other hand, when absent class members "are not specifically identifiable," joinder might become more impracticable. *Doe v. Charleston Area Med. Ctr., Inc., 529 F.2d 638, 645 (4th Cir. 1975)*.

These factors are, to be sure, not exhaustive. But they exemplify the nature of what should be considered in determining the numerosity requirement **[**25]** of *Rule 23(a)(1)*. At bottom, "*all the circumstances* of the case should be taken into consideration" in a district court's numerosity analysis. *Ballard, 543 F.2d at 1080* (emphasis added). Moreover, an appellate court's review of a certification order should remain mindful that certification is ultimately determined by the district court — not the appellate court — and that it is the district court which will be saddled with the burdens that flow from a decision. *Cf. Brown v. Nucor, 785 F.3d 895, 922 (4th Cir. 2015)* (Agee, J., dissenting) (noting that this court "typically tread[s] lightly when reviewing a class certification decision").

Maralago Cay Homeowners Ass'n v. Mhc Operating

United States District Court for the Southern District of Florida

August 4, 2021, Decided; August 5, 2021, Entered on Docket

CASE NO: 21-80049-CV-MIDDLEBROOKS

Reporter
2021 U.S. Dist. LEXIS 248397 *; 2021 WL 6135181

MARALAGO CAY HOMEOWNERS ASSOCIATION, INC., Plaintiff, v. MHC OPERATING LIMITED PARTNERSHIP, et al., Defendants.

Subsequent History: Motion denied by *Maralago Cay Homeowners Ass'n v. Mhc Operating, 2021 U.S. Dist. LEXIS 248402, 2021 WL 6135182 (S.D. Fla., Aug. 30, 2021)*

Summary judgment granted by, Motion denied by, As moot, Judgment entered by *Maralago Cay Homeowners Ass'n v. MHC Operating Ltd. P'ship, 2021 U.S. Dist. LEXIS 196385 (S.D. Fla., Oct. 4, 2021)*

Costs and fees proceeding at, Motion granted by, in part *Maralago Cay Homeowners Ass'n v. Mhc Operating, 2022 U.S. Dist. LEXIS 33069 (S.D. Fla., Jan. 26, 2022)*

Core Terms

Antitrust, mobile home, rental amount, motion to dismiss, allegations, lawsuit, exempt, law firm, conspiracy, anti trust law, res judicata, anticompetitive, mobile home park, homeowners, rental

Counsel: [*1] For Maralago Cay Homeowners Association, Inc., on behalf of themselves, the class of current and former mobile homeowners in the Park and all others similartly situated, formerly known as Arrowhead Mobile Homeowners Association, Inc., Plaintiff: Daniel Wayne Perry, LEAD ATTORNEY, Law Office of Daniel Perry, Orlando, FL.

For MHC Operating Limited Partnership, Defendant: Jody Blouch Gabel, LEAD ATTORNEY, Lutz Bobo Telfair, Sarasota, FL; Mahlon Herbert Barlow , III, LEAD ATTORNEY, Tampa, FL; J. Allen Bobo, PRO HAC VICE, Lutz, Bobo & Telfair, P.A., Sarasota, FL; Ali Vakili Mirghahari, Sivyer Barlow & Watson P.A., Tampa, FL.

For Equity Lifestyle Properties, Inc., MHC Maralago Cay, L.L.C., Eric Zimmerman, Stanley Martin, Sydney Morris, Rene Scott, Beverly Sagehorn, Bertha Rodriguez, Milagros Rivera, j. allen bobo, Lutz, Bobo & Telfair, P.A., doing business as Lutz, Bobo, Telfair, Eastman & Bobo P.A., formerly known as Lutz, Webb & Bobo, P.A., Defendants: Ali Vakili Mirghahari, LEAD ATTORNEY, Sivyer Barlow & Watson P.A., Tampa, FL; Mahlon Herbert Barlow , III, LEAD ATTORNEY, Tampa, FL; J. Allen Bobo, PRO HAC VICE, Lutz, Bobo & Telfair, P.A., Sarasota, FL; Jody Blouch Gabel, Lutz Bobo Telfair, **[*2]** Sarasota, FL.

Judges: Donald M. Middlebrooks, United States District Judge.

Opinion by: Donald M. Middlebrooks

Opinion

ORDER ON MOTION TO DISMISS

THIS CAUSE comes before the Court upon Defendants'[1] Motion to Dismiss Amended Complaint, filed on March 11, 2021. (DE 23). The Motion is fully briefed. (DE 29; DE 31). For the following reasons, the Motion is denied.

I. BACKGROUND

On October 12, 2020, Plaintiff, a mobile homeowners association, filed this action in state court (DE 1-1); it was removed to this Court on January 11, 2021 (DE 1). Plaintiff brings this action "in its representative capacity on behalf of itself, and more than 1,000 current and former mobile homeowners in the Maralago Cay Mobile Home Park." (DE 15 at 3). Defendants include three business entities that own and operate the mobile home park, seven current and former agents of those entities, and one attorney and one law firm ("Law Firm Defendants"). (*Id.* at ¶¶ 8-17, 20-21). The Amended Complaint contains one claim for violations of the Florida Antitrust Act. (*Id.* at ¶¶ 61-74). It alleges that Defendants "conspired to eliminate discounting of lot rental amount[s] by ensuring that all park owners charged the same minimum price and used the same terms" **[*3]** by, among other actions, including a long-term agreement ("LTA") in park lot rental agreements. (*Id.* at ¶¶ 64-65). The Amended Complaint further maintains that "[t]his conspiracy, combination, or concert of action resulted in higher mobile home lot rental prices . . . than would have existed in a competitive market." (*Id.* at ¶ 2). Defendants raise several grounds for dismissal. (*See* DE 23).

II. LEGAL STANDARD

A motion to dismiss under *Rule 12(b)(6)* challenges the legal sufficiency of the allegations in a complaint. *See Fed. R. Civ. P. 12(b)(6)*. In assessing legal sufficiency, courts are bound to apply the pleading standard articulated in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* and *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. That is, "a complaint must . . . contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1289 (11th Cir. 2010)* (quoting *Twombly, 550 U.S. at 570*).

When reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and accept as true all of the plaintiff's factual allegations. *See Christopher v. Harbury, 536 U.S. 403, 406, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)*; *Erickson v. Pardus, 551 U.S. 89, 93-94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*. However, pleadings that "are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal, 556 U.S. at 679*. "[A] formulaic recitation **[*4]** of the elements of a cause of action will not do[.]" *Twombly, 550 U.S. at 555* (citation omitted). "Factual allegations must be enough to raise [the plaintiff's] right to relief above the speculative level[.]" *Id.* (citation omitted).

III. DISCUSSION

I will address in turn each ground for dismissal asserted by Defendants. Before doing so, I note that I strongly considered granting the Motion based upon the deficiencies in Plaintiff's Response, which in effect operate to waive several arguments. However, "parties cannot waive the application of the correct law," *Jefferson v. Sewon Am., Inc., 891 F.3d 911, 923 (11th Cir. 2018)*, and the arguments raised by Defendants do not warrant dismissal of the Amended Complaint under the facts as alleged by Plaintiff and the applicable law. As such, I will deny Defendants'

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[1] Plaintiff filed this action against an additional Defendant which had filed a separate Motion to Dismiss (DE 24). That Defendant has since been voluntarily dismissed from this action. (DE 41).

Motion to Dismiss notwithstanding Plaintiff's failure to provide meaningful substantive briefing on many of the legal issues raised in the Motion.

1. Res Judicata/Claim-Splitting Doctrine

Defendants first argue that the sole claim in this action is barred by res judicata and/or the claim-splitting doctrine because "[t]his is the second of two putative class actions filed by . . . [Plaintiff] within 11 months involving the same parties and same issues." (DE 23 at 1, 10-12). **[*5]**

Res judicata "is an affirmative defense that should be raised under *Rule 8(c)*[,] . . . [but] a party may raise a res judicata defense by motion rather than by answer where the defense's existence can be judged on the face of the complaint." *Concordia v. Bendekovic, 693 F.2d 1073, 1075 (11th Cir. 1982)* (citations omitted). There is no mention of any prior lawsuit in the Amended Complaint. And while Defendants attach the complaint from the prior lawsuit to their Motion, that exhibit alone fails to invoke the res judicata doctrine since it "does not indicate that the issue was actually litigated or that there has been a final judgment in the [prior] proceeding." *See id. at 1076*.

"Additional evidence, preferably a copy of the . . . court's records [from the prior lawsuit], is required in order to apply the doctrine of res judicata in the context of either a *Rule 12(b)(6)* motion to dismiss or a *Rule 56* motion for summary judgment." *Id.* Defendants did not attach such records. "As a general rule, a court in one case will not take judicial notice of its own records in another and distinct case even between the same parties, unless the prior proceedings are introduced into evidence." *Id.* (citations omitted). Thus, I reject Defendants' res judicata argument. However, should Defendants deem it **[*6]** appropriate to renew that argument on summary judgment, there appears to be a strong argument for applying the doctrine as to the Law Firm Defendants.

Nor does the record support application of the claim-splitting doctrine. "The claim-splitting doctrine: (1) 'requires a plaintiff to assert all of its causes of action arising from a common set of facts in one lawsuit,' and (2) applies where a second suit has been filed before the first suit has reached a final judgment." *Kennedy v. Floridian Hotel, Inc., 998 F.3d 1221, 1236 (11th Cir. 2021)* (citation omitted). Here, Defendants do not establish that the present lawsuit was filed before the prior lawsuit reached a final judgment. Therefore, Defendants' claim-splitting argument fails.

2. Antitrust Exemptions

Under the Florida Antitrust Act, "[a]ny activity or conduct exempt under Florida statutory or common law or exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter." *Fla. Stat. § 542.20*. On that basis, Defendants assert that the alleged misconduct is exempt from the Florida Antitrust Act. (DE 23 at 12-16). They first argue that "[t]he alleged anticompetitive conduct here (sharing pricing information) is exempt under the Florida Mobile Home Act . . . because it is **[*7]** regulated by and pursuant to the Act." (*Id.* at 12-13). "[A]ll regulation and control of mobile home lot rents in mobile home parks and all those other matters and things relating to the landlord-tenant relationship treated by or falling within the [Florida Mobile Home Act's] purview" are "preempted to the state." *See Fla. Stat. § 723.004(2)*.

For Defendants to succeed on this issue, I must accept their assertions that (1) the Florida Mobile Home Act's "mandate[ ] that rents . . . be 'reasonable' . . . operates as a cap" and "a price-fixing mechanism" that is "designed to reign in free-market forces, which is antithetical to the purpose of ***antitrust law***," and (2) it is "antithetical to ***antitrust law***" that the Florida Mobile Home "Act establishes a comprehensive and mandatory negotiation process that specifically *requires*[2] park owners to accumulate, compare and provide to an HOA's 'homeowners' committee' data on the rents charged at other, comparable parks." (*See* DE 23 at 3-5 (emphasis in original)).

[2] I note that this appears to be required only "[i]f an increase [in lot rental amount] is based upon the lot rental amount charged by comparable mobile home parks." *Fla. Stat. § 723.037(4)(b)1*.

However, I am not persuaded that what the Act does—namely, require reasonable rental amounts and require some level of disclosure and consideration of rental amounts of comparable mobile home parks—equates to price **[*8]** fixing. Although those aspects of the Florida Mobile Home Act are intended to ensure that the rental amounts charged are reasonable, it is untenable to argue that they necessarily result in or encourage price fixing. For example, Defendants point to no provision in the Florida Mobile Home Act that prohibits the lowering or discounting of rental amounts. Simply ensuring that the rental amounts are not unreasonably high cannot be construed as either regulation or authorization of price fixing. Nor am I convinced that applying the Florida Antitrust Act to Defendants' alleged price fixing would frustrate any provision of the Florida Mobile Home Act or conflict with any action taken under the Florida Mobile Home Act. Therefore, I reject Defendants' argument in this regard.

Turning to federal law, Defendants contend that the alleged misconduct is exempt under (1) the state-action immunity doctrine and (2) the implied preclusion doctrine. (*Id.* at 13-16). With respect to the latter, "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City, 452 U.S. 378, 388, 101 S. Ct. 2415, 69 L. Ed. 2d 89 (1981)* (citations omitted). Likewise, "given the **[*9]** fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.'" *F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 225, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013)* (citation omitted). "When determining whether the anticompetitive acts of private parties are entitled to immunity, we employ a two-part test, requiring first that 'the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'" *Id.* (citation omitted). "[W]here possible, 'the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another, rather than holding one completely ousted.'" *Nat'l Gerimedical Hosp. & Gerontology Ctr., 452 U.S. at 392* (citation omitted).

Defendants' arguments with regard to these doctrines likewise hinge on their assertion that the Florida Mobile Home Act effectively operates as a price-fixing mechanism because it requires reasonable rental amounts and requires some level of disclosure and consideration of rental amounts of comparable mobile home parks. Because I have rejected that assertion, I am not persuaded that Defendants have overcome the presumption against **[*10]** these antitrust exemptions. As a result, Defendants' Motion to Dismiss on grounds of antitrust exemptions is denied.

3. Unilateral Conduct

Defendants next claim that the alleged misconduct is unilateral and thus not actionable under the Florida Antitrust Act and, further, that the involvement of the Law Firm Defendants "cannot create the necessary combination to implicate ***antitrust law***." (DE 23 at 16-17). Under the Florida Antitrust Act, "[e]very contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." *Fla. Stat. § 542.18*. Similarly, *section 1* of the *Sherman Act* provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. "A *section 1* plaintiff must prove an agreement between two or more persons to restrain trade, because unilateral conduct is not illegal under *section 1*." *Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1545 (11th Cir. 1996)* (citations omitted).[3]

"Ordinarily, a corporation cannot conspire with its own directors, officers or employees." *Hackett v. Metro. Gen. Hosp., 422 So. 2d 986, 988 n.2 (Fla. 2d DCA 1982)*. Here, however, there are three business entity Defendants, and the Amended Complaint does not describe the precise relationship between all of them. Without such information, **[*11]** I decline to find that the entities "have a complete unity of interest" and therefore that their

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[3] The Florida Antitrust Act's construction provision provides: "It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes." *Fla. Stat. § 542.32*.

"coordinated activity . . . must be viewed as that of a single enterprise." *See* *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.

Further, with respect to the Law Firm Defendants, Defendants cite to *Am. Credit Card Tel. Co. v. Nat'l Pay Tel. Corp., 504 So. 2d 486, 488 (Fla. 1st DCA 1987)*, for the proposition that outside counsel falls within the general rule that a corporation cannot conspire with its agents. (DE 23 at 17). "However, an exception to this rule exists where, as here, the coconspiring corporate agents are alleged to have an independent personal stake in achieving the object of the conspiracy." *Hackett, 422 So. 2d at 988 n.2* (citations omitted). Here, Plaintiff alleges that one of the Law Firm Defendants, Defendant J. Allen Bobo, had "described existing statewide mobile home lot rental amounts as 'not high enough,' explaining that if lot rent increases were appropriately higher, . . . retiree mobile homeowners would be filing lawsuits all over the state." (DE 15 at ¶ 51). While it is presumably in the interest of the other Defendants to avoid lawsuits, Defendant J. Allen Bobo's statement indicates that he would benefit from an increase in the filing of lawsuits by mobile homeowners. I find this allegation sufficient at the motion-to-dismiss **[*12]** stage to plausibly allege that the Law Firm Defendants had an independent personal stake in increasing rental amounts through LTAs. Therefore, I reject Defendants' argument that Plaintiff only alleged unilateral conduct.

4. Statute of Limitations

Defendants also contend that Plaintiff's claim is time-barred because "[t]he LTA has been in use at Maralago since 2008." (DE 23 at 17-18). Claims brought under the Florida Antitrust Act are subject to a four-year statute of limitations. *See* *Fla. Stat. § 542.26(1)*. Defendants fail to recognize that "[s]uit may be brought more than four years after the events that initially created the cause of action . . . if the action is commenced within four years after the defendant commits (1) an overt act in furtherance of the antitrust conspiracy or (2) an act that by its very nature constitutes a 'continuing antitrust violation.'" *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 827-28 (11th Cir. 1999)* (citation omitted). "An act constitutes a 'continuing violation,' if it injures the plaintiff over a period of time. Even though the illegal act occurs at a specific point in time, if it inflicts 'continuing and accumulating harm' on a plaintiff, an antitrust violation occurs each time the plaintiff is injured by the act." *Id. at 828* (citation omitted). **[*13]** As such, "[w]hen an alleged antitrust conspiracy results in ongoing sales or the collection of payments over time, . . . each sale or payment constitutes a new 'act' that starts the running of the statute of limitations." *Bray v. Bank of Am. Corp., 784 F. App'x 738, 741 (11th Cir. 2019)* (citations omitted).

Here, Plaintiff alleges that the LTAs "harm competition by increasing prices for the mobile home lot rental amounts made subject to them" and that the individuals represented by Plaintiff "will continue to be harmed by paying supra-competitive lot rental amounts charged in Florida mobile home parks that they would not have paid in the absence of the conspiracy." (DE 15 at ¶¶ 71, 73). Therefore, each time that such a rental amount is collected pursuant to the LTAs, another antitrust violation occurs, thereby starting the running of the four-year limitations period again. Although some of the alleged misconduct that Plaintiff asserts supports its Florida Antitrust Act claim may fall outside of the limitations period, it is not apparent from the face of the Amended Complaint that no such rental amounts were collected within the four-year period preceding the filing of this action. Therefore, the Motion is also denied on the statute of limitations **[*14]** argument.

5. Anticompetitive Conduct

Finally, Defendants maintain that "[m]uch of the alleged conduct is not anticompetitive activity within the ambit of the Florida Antitrust Act." (DE 23 at 18). Even so, that does not require dismissal of the Amended Complaint, which clearly alleges that Defendants have engaged in anticompetitive behavior, such as imposing LTAs to "reduc[e] or eliminat[e] price competition" (*see, e.g.*, DE 15 at ¶ 64). I find such allegations sufficient to plausibly allege anticompetitive activity, and thus I do not view this argument as a basis for dismissing the Amended Complaint.[4]

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[4] I have also considered Defendants' arguments that Plaintiff's "conspiracy to monopolize" theory "has no foundation or place in this case" and that the Amended Complaint is "an improper shotgun pleading." (DE 23 at 2). However, I decline to analyze those

6. Other Grounds

I decline to consider the arguments raised in the recently dismissed Defendant's separate Motion to Dismiss, as Defendants request (*see* DE 23 at 1 n.1). Specifically, Defendants state that "[i]n the interests of brevity and marshalling the Court's resources, the grounds for dismissal raised by the [recently dismissed Defendant in its Motion to Dismiss] are hereby adopted by reference and incorporated herein." (*Id.*). That Motion is roughly twenty pages, while Defendants' own Motion is eighteen pages. "Absent prior permission of the Court, . . . a motion and its incorporated **[*15]** memorandum of law . . . shall [not] exceed twenty (20) pages[.]" *S.D. Fla. L.R. 7.1(c)(2)*. Defendants' request to adopt the arguments set forth in a twenty-page Motion on top of its eighteen-page Motion is contrary to the spirit of this Local Rule, and as such granting that request would serve neither the interest of brevity nor the interest of conserving judicial resources.

Moreover, several arguments in the recently dismissed Defendant's Motion are tailored specifically to that Defendant and thus do not squarely apply to the remaining Defendants. Nevertheless, Defendants fail to parse out which arguments apply to them and why, and I decline to do so on their behalf. Finally, I note that Defendants attempted to adopt that Motion before it was even filed, which further supports the inference that Defendants failed to determine whether the arguments raised therein were applicable to them. Therefore, I will deny Defendants' request to incorporate these additional arguments regarding dismissal of the Amended Complaint.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that Defendants' Motion to Dismiss Amended Complaint (DE 23) is **DENIED**.

SIGNED in Chambers at West Palm Beach, Florida, this 4th day of August, **[*16]** 2021.

/s/ Donald M. Middlebrooks

Donald M. Middlebrooks

United States District Judge

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here, as Defendants failed to set forth a cogent argument for either ground and, instead, only mentioned the grounds in passing. And although the Amended Complaint appears to suffer from several deficiencies, Defendants failed to sufficiently challenge the deficiencies by asserting arguments supported by the applicable law.

[Young v. Parry](#)

Superior Court of California, County of Orange

August 5, 2021, Decided

30-2019-01054426-CU-FR-CJC

Reporter
2021 Cal. Super. LEXIS 61026 *

Young v. Parry

Core Terms

demurrer, cause of action, leave to amend, Fraudulent, unfair business practice, Cross-Complaint, quotations, unfair, prong

Counsel: **[*1]** Jennifer Young, self represented Plaintiff, present telephonically.

William Young, self represented Plaintiff, present telephonically.

William Wang, from Liang Ly LLP, present for Cross - Complainant,Defendant(s) telephonically.

Judges: John C. Gastelum.

Opinion by: John C. Gastelum

Opinion

MINUTE ORDER

Tentative Ruling posted on the Internet.

Demurrer to Second Amended Cross-Complaint (SAXC)

The Court hears oral argument and confirms the tentative ruling as follows:

The Demurrer filed by Cross-Defendants William Young and Jennifer Young (the "Youngs") as to the First Cause Action for Fraudulent Concealment-Conspiracy and Third Cause of Action for Violation of *Business and Professions Code section 17200* of Cross-Complainant, Sean Parry's Second Amended Cross-Complaint ("SAXC") is SUSTAINED, without leave to amend as follows.

First COA (Fraudulent Concealment-Conspiracy): The Youngs correctly raise the point that the SAXC asserts a new theory of liability for fraudulent concealment-conspiracy. Per the Court's 1-19-2021 Minute Order, the Court "sustained with 20 days, *final* leave to amend" a prior demurrer to the First Amended Cross-Complaint of Sean Parry. (See ROA 165.) The prior demurrer to the First Amended Cross-Complaint involved two causes of action for Declaratory **[*2]** Relief and Violation of *Business and Professions Code section 17200*, and sustained the demurrer to that pleading, with leave to amend, as to *those* causes of action. The Court sustained the demurrer as to the claim for declaratory relief as it did not seek to declare future rights, and Parry did not plead an actual controversy involving justiciable questions concerning the legal rights or duties between the parties. (See ROA 165.)

An order sustaining a demurrer to a prior complaint with leave to amend grants a plaintiff leave to amend only the causes of action asserted in the prior complaint, not leave to add entirely new causes of action, unless the new cause of action directly responds to the court's reason for sustaining the earlier demurrer. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015.)

Here, the First Cause of Action for Fraudulent Concealment-Conspiracy does not directly relate to the

Court's reason for sustaining the earlier demurrer on the first cause of action for Declaratory Relief, and Parry is attempting to allege an entirely new cause of action which is beyond the scope of the Court's 1-19-2021 Minute Order. Thus, the demurrer as to the first cause of action is SUSTAINED, without leave to amend, without **[*3]** prejudice to a motion for leave to amend to assert new causes of action.

Third COA (Violation of *Business and Professions Code § 17200*): "*Business and Professions Code section 17204* restricts private standing to bring a UCL action to 'a person who has *suffered injury in fact* and has *lost money or property* as a *result* of the unfair competition.' [Citation.]" (*Jenkins v. JP Morgan Chase Bank, N.A. (2013) 216 Cal.App.4th 497, 521*, disapproved on other grounds by *Yvanova v. New Century Mortg. Corp. (2016) 62 Cal.4th 919, 929*.) To have standing, a party must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that the economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." (*Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 322*.) To prove the second element, the plaintiff must show that he actually relied on the allegedly deceptive or misleading statement. (*Shaeffer v. Califia Farms, LLC (2020) 44 Cal.App.5th 1125, 1137*, internal quotations and citations omitted.)

"The *UCL [Business and Professions Code section 17200 et seq.*] defines unfair competition as 'any unlawful, unfair or fraudulent business act or practice '' [Citation.]" (*In re Tobacco Cases* (2009) 46

Cal.4th 298, 311.) "A plaintiff alleging unfair business practices under [*Business and Professions Code Sections 17000, et seq.*] must state with reasonable particularity the facts supporting the statutory elements of the violation. (*Khoury v. Maly's of California, Inc. (1993) 14 Cal.App.4th 612, 619*.) The UCL borrows violations of other laws in proscribing unlawful **[*4]** business practices. (*Solus Industrial Innovations, LLC v. Superior Court (2018) 4 Cal.5th 316, 341*.)

The Fourth District Court of Appeal has consistently held "a plaintiff alleging an unfair business practice must show the defendant's conduct is tethered to an underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***. [Citations.]" (*Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 613*, internal quotations omitted ("*Graham*").) The fraud prong of the UCL may be shown if members of the public are likely to be deceived, and absent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL. (*Graham, supra, 226 Cal.App.4th at pp. 613-614*, internal citations and quotations omitted.)

Here, the gravamen of this claim appears to be that Cerritos deprived Parry of hundreds of thousands of dollars by misrepresenting and/or concealing the true purpose for which Cerritos was using the loaned money, i.e., in furtherance of the allegedly illegal car export scheme orchestrated by the Youngs and Cerritos. However, the allegations still do not indicate Cerritos duped Parry into loaning him money, but instead, that there existed some arrangement between Cerritos and Parry that Parry would loan Cerritos money for the **[*5]** car rental business. (SACC, ¶ 54.) Consequently, it does not appear Parry has standing as Parry does not allege facts showing that his harm was caused by the unfair business practice, i.e., an allegedly illegal car export scheme, let alone what the allegedly deceptive or misleading statement was as to Parry that constituted the unfair business practice. (*Shaeffer v. Califia Farms, LLC (2020) 44 Cal.App.5th 1125, 1137*.)

In addition, as noted by the Youngs, and not addressed by Parry, the SAXC does not allege Parry is a consumer or a competitor in this case. The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) "A UCL action is not an all-purpose substitute for a tort or contract action. Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property victims of these practices ... ." (*Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 609-610*, internal citations and quotations omitted ("*Graham*").)

Moreover, as to the unlawful prong, while the SAXC cites to specific federal and statute statutes allegedly violated, Parry does not allege how said violations **[*6]** caused Parry's economic injuries. As to the unfair prong, the SAXC does not show how the allegedly illegal car export scheme was unfair to Parry, nor does it allege that the Youngs' made any alleged misrepresentation and/or omission to Parry, or that Cerritos' alleged misrepresentation and/or omission to Parry about how the loaned money was being used is tethered to an underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***. (*Graham, supra, 226 Cal.App.4th at p. 613*, internal quotations omitted.) As to the fraudulent prong, the SAXC does not allege facts showing members of the public are likely to be deceived by Cerritos' alleged misrepresentation and/or omission to Parry, or that the Youngs owed Parry a duty to disclose. (*Id. at pp. 613-614*.)

As previously noted, the Court sustained the prior demurrer to Parry's cross-complaint with final leave to amend. **The demurrer as to the third cause of action is GRANTED, with final leave to amend within 20 days**.

Finally, the Court notes that for the first time in reply, the Youngs attempt to bring the demurrer as to the second cause of action. (Reply, 6:17-18; 8:15-9:6.) The Court **[*7]** disregards any demurrer to **the Second COA (Fraudulent Concealment**) as this ground for demurrer was not raised in the moving papers, and was raised for the first time in reply. (*Code Civ. Proc. § 430.60*; *Balboa Ins. Co. v. Aguirre (1983) 149 Cal.App.3d 1002, 1010*; *Jay v. Mahaffey (2013) 218 Cal.App.4th 1522, 1537-1538*.) Further, the Court notes that the second cause of action is not alleged against the Youngs.

The Court deems the demurrer on the grounds of uncertainty waived as this ground for demurrer was not argued or discussed in the moving papers. (*California Rules of Court, Rule 3.1113(a)*.)

Defendant to give notice.

Hendershot v. Southern Glazer's Wine & Spirits of Okla., LLLP

United States District Court for the Northern District of Oklahoma

August 9, 2021, Decided; August 9, 2021, Filed

Case No. 20-CV-0652-CVE-CDL

Reporter

2021 U.S. Dist. LEXIS 148676 *; 2021 WL 3501523

BRYAN HENDERSHOT, an individual f/d/b/a BOARDWALK DISTRIBUTION COMPANY, Plaintiff, v. SOUTHERN GLAZER'S WINE AND SPIRITS OF OKLAHOMA, LLLP d/b/a JARBOE SALES COMPANY; CENTRAL LIQUOR COMPANY, L.P. d/b/a RNDC OKLAHOMA; BEST BRANDS OF DELAWARE, L.L.C. d/b/a REPUBLIC NATIONAL DISTRIBUTING COMPANY; and BRIAN LIDJI, an individual d/b/a SOUTHERN GLAZER'S WINE & SPIRITS OF OKLAHOMA, Defendants.

Core Terms

alleges, brands, distributor, wine, spirits, conspiracy, retailers, top, competitors, defendants', monopoly, monopolize, antitrust, group boycott, anticompetitive, markets, relevant market, meetings, asserts, amended complaint, conspire, factors, liquor, motion to dismiss, effective date, license, entity, communications, deliveries, products

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

The court's function on a Fed. R. Civ. P. 12(b)(6) motion is not to weigh the evidence that the parties might present at trial, but to assess whether the plaintiff's complaint is legally sufficient to state a claim for which relief may be granted. To survive a motion to dismiss, a complaint must contain enough facts to state a claim to relief that is plausible on its face and the factual allegations must be enough to raise a right to relief above the speculative level. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. For the purpose of making the dismissal determination, a court must accept all the well-pleaded allegations of the complaint as true and must construe the allegations in the light most favorable to a claimant.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] Motions to Dismiss, Failure to State Claim

On a Fed. R. Civ. P. 12(b)(6) motion, a court need not accept as true those allegations that are conclusory in nature. Conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based. A motion to dismiss is properly granted when a complaint provides no more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN3[] International Aspects, Commerce With Foreign Nations

15 U.S.C.S. § 1 makes every contract, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations illegal. 15 U.S.C.S. § 1. The essence of a claim of violation of § 1 of the Sherman Act is the agreement itself. Only after an agreement is established will a court consider whether the agreement constituted an unreasonable restraint of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN4[] Cartels & Horizontal Restraints, Price Fixing

In order to state a claim under 15 U.S.C.S. § 1, a complaint must present enough factual matter, taken as true, to suggest that an agreement was made. Allegations of parallel business conduct, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts that tend to exclude independent self-interested conduct as an explanation for defendants' parallel behavior. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Such an allegation, without some further factual enhancement, stops short of the line between possibility and plausibility of entitlement to relief.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Elements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN5[] Conspiracy to Monopolize, Elements

In order to state a claim under 15 U.S.C.S. § 1, terms like "conspiracy," or even "agreement," are border-line: they might well be sufficient in conjunction with a more specific allegation. When the antitrust claim relies solely on circumstantial facts of parallel behavior, the conspiracy is not plausible if, in light of common economic experience, the alleged conduct is equally likely to result from independent action. Therefore, to overcome a motion to dismiss, plaintiff must show the existence of additional circumstances, often referred to as "plus" factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN6[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

In a viable complaint under 15 U.S.C.S. § 1, the plaintiff must allege, not only an injury to himself, but an injury to the market as well. Actual anticompetitive effects include, but are not limited to, reduction of output, increase in price, or deterioration in quality. However, there are some methods of restraint that are so inherently and facially anti-competitive that an elaborate and burdensome inquiry into a demonstrable economic impact on competition in a relevant market is not required.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN7[] **Horizontal Refusals to Deal, Boycotts**

Allegations supporting an inference of group boycott establish a per se violation of 15 U.S.C.S. § 1 and do not require the complaint to allege injury to the market. A group boycott exists where a group of competitors threaten to withhold business from third parties unless those third parties would help them injure their directly competing rivals. Group boycott can be based on a threat made by a single competitor if the complaint also alleges a horizontal agreement among those threatened to hurt a competitor of the retailer who made the threat. The court must then necessarily determine whether a horizontal agreement has been adequately alleged.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN8[] **Sherman Act, Claims**

Alleged violations of the federal antitrust laws cannot be based on defendants' efforts to amend the Oklahoma Constitution. No violation of the Sherman Act, 15 U.S.C.S. § 1, can be predicated upon mere attempts to influence the passage or enforcement of laws. The federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government. Private actors are immune from antitrust liability for petitioning the government, even when the private actors' motives are anticompetitive. This is the case because it is inappropriate to base liability on whether a petitioner has an anticompetitive motive, because that would unduly chill speech. This is referred to as Noerr—Pennington doctrine. Under this doctrine, defendants also cannot be held liable for injuries caused by the effects of such legislative amendment. First Amendment petitioning privileges would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subjected to antitrust liability for his success.

Constitutional Law > State Constitutional Operation

HN9[] **Constitutional Law, State Constitutional Operation**

According to the Oklahoma Supreme Court the plain language of Okla. Const. Art. 28A, § 2(A)(2) is not in conflict with the anticompetitive provisions of the Oklahoma Constitution. Accordingly, business transactions conducted pursuant to and in compliance with Okla. Const. Art. 28A do not, in and of themselves, constitute violations of ***antitrust law***.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN10[] **Sherman Act, Claims**

Because competitors' conduct of securing exclusive contracts with brands can be legitimate and unilaterally prompted by common perceptions of the market, a plaintiff must allege something more than merely parallel behavior to allege a violation of the Sherman Act, 15 U.S.C.S. § 1. Plaintiff must allege plus factors.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Types of Evidence > Circumstantial Evidence

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN11[] **Sherman Act, Claims**

To overcome a motion to dismiss a complaint alleging a violation of the Sherman Act, 15 U.S.C.S. § 1, plaintiff must show the existence of additional circumstances, often referred to as "plus" factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy. Plus factors can include a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, evidence of a high level of interfirm communications, e.g., whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy, as well as product uniformity; and whether the defendants have been uniform in their actions. Circumstantial evidence alone cannot support a finding of conspiracy when the evidence is equally consistent with independent conduct.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN12[] **Sherman Act, Claims**

Allegations of communications and meetings among conspirators can support an inference of agreement to allege a violation of the Sherman Act, 15 U.S.C.S. § 1, because they provide the means and opportunity to conspire. Courts have held that a high level of communications among competitors can constitute a plus factor which, when combined with parallel behavior, supports an inference of conspiracy. Facilitating practices may evidence the plus factors necessary to establish the inference of an agreement.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN13[] **Sherman Act, Claims**

A market in which sales power is concentrated in the hands of the few can also facilitate coercion to allege a violation of the Sherman Act, 15 U.S.C.S. § 1. Fewer minds' must meet in a concentrated market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN14[] **Actual Monopolization, Claims**

The offense of monopoly under § 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2, has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN15[] **Sherman Act, Claims**

Section 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2, prohibits attempts to monopolize any part of the trade or commerce among the several States.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN16[] **Sherman Act, Claims**

To state a claim under section 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2, plaintiff must allege: (1) a relevant market, comprised of geographic market and product market components; (2) a dangerous probability of successful monopolization in the relevant market; (3) the specific intent to monopolize the relevant market; and (4) some conduct in furtherance of the monopolization attempt. If the claim does not adequately allege these elements, it cannot survive dismissal.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN17[] **Sherman Act, Claims**

An important part of the analysis for a claim under § 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2, relates to the definition of the relevant market, which traditionally has two components: the product market and the geographic market. The relevant geographic market must be sufficiently defined so that the court understands in which part of the country competition is threatened. To assert an adequate geographic market, the area of effective competition must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN18[] **Sherman Act, Claims**

A relevant product market for a claim under § 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2, consists of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. Products have reasonable interchangeability if consumers treat them as acceptable substitutes. In order to evaluate whether one product would be an acceptable substitute for another, courts consider whether there exists cross-elasticity of demand and supply of the two products. Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN19[] **Sherman Act, Claims**

The essential elements of a private antitrust claim under § 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2, must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's Fed. R. Civ. P. 12(b)(6) motion.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN20[] **Sherman Act, Claims**

Monopolization under § 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2, is rarely found when the defendant's share of the relevant market is below 70%.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN21[] **Sherman Act, Claims**

The market shares of the defendants cannot not be aggregated to establish an attempt to monopolize under § 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2.

Counsel: [*1] For Bryan Hendershot, an individual, formerly doing business as, Boardwalk Distribution Company, Plaintiff: Laurence Lindsay Pinkerton, LEAD ATTORNEY, Pinkerton Law, P.C., Tulsa, OK.

For Southern Glazer's Wine and Spirits of Oklahoma, LLLP, doing business as, Jarboe Sales Company, Defendant: D Kent Meyers, Mary H (Molly) Tolbert, LEAD ATTORNEYS, Crowe & Dunlevy (OKC), OKLAHOMA CITY, OK; Alexandra Ashley Wendt, Norton Rose Fulbright US LLP, Dallas, TX.

For Central Liquor Company, L.P., doing business as, RNDC Oklahoma, Best Brands of Delaware, L.L.C., doing business as, Republic National Distributing Company, Defendants: Craig Alan Fitzgerald, LEAD ATTORNEY, Gable & Gotwals (Tulsa), TULSA, OK; Luke A. Schamel, LEAD ATTORNEY, Norton Rose Fulbright US LLP, Houston, TX; Richard Samson Krumholz, LEAD ATTORNEY, Alexandra Ashley Wendt, Norton Rose Fulbright US LLP, Dallas, TX; Robert Garner McCampbell, LEAD ATTORNEY, Gable Gotwals (OKC), OKLAHOMA CITY, OK; Robin D. Adelstein, LEAD ATTORNEY, Norton Rose Fulbright US LLP, New York, NY.

For Brian Lidji, an individual, previously named as, Brian Lidjl, doing business as, Southern Glazer's Wine & Spirits of Oklahoma, Defendant: D Kent Meyers, Mary **[*2]** H (Molly) Tolbert, LEAD ATTORNEYS, Crowe & Dunlevy (OKC), OKLAHOMA CITY, OK.

Judges: CLAIRE V. EAGAN, UNITED STATES DISTRICT JUDGE.

Opinion by: CLAIRE V. EAGAN

Opinion

OPINION AND ORDER

Before the Court is defendants' joint motion to dismiss (Dkt. # 47) plaintiff Bryan Hendershot's amended complaint (Dkt. # 41) pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. Plaintiff has filed a response (Dkt. # 53), and defendants filed a reply (Dkt. # 54).

I. BACKGROUND

Plaintiff is the former owner and operator of Boardwalk Distribution Company ("Boardwalk"), a sole proprietorship located in Tulsa, Oklahoma, that distributed wine, spirits, and beer to retailers in Oklahoma. Dkt. # 41, at 1. Plaintiff sold the assets of Boardwalk in mid-2020, but remained obligated to pay Boardwalk's debts. Id. Boardwalk has since ceased operations. Id. In his amended complaint (Dkt. # 41), plaintiff alleges that defendants, horizontal direct competitors of Boardwalk, conspired successfully to effectuate a group boycott of Boardwalk. Id. As a result, plaintiff states he suffered at least a $ 22 million loss. Id. at 2. Plaintiff asserts the following in support of that claim:

This case arises from a 2018 amendment to the Oklahoma Constitution: amendment 28A ("28A"). Prior to the passage of 28A, **[*3]** the sale of wine and liquor in Oklahoma operated on a three-tier system involving brands (which produced the wine or liquor), distributors (which purchased a brand's product at wholesale), and retailers (which sold the product to the public). Both in-state and out-of-state brands were permitted to sell their products in the state of Oklahoma to licensed distributors. Licensed distributors were required to be residents of Oklahoma. Oklahoma law required brands to sell their products to all Oklahoma distributors at the same price. Id. at 5. Distributors then sold and distributed those products to retailers. Id. With limited exceptions, retailers were the only entities allowed to sell alcohol to the public. Id.

Distributors that did not qualify as residents of Oklahoma, but that were seeking to sell alcohol in the state (e.g., national distributors), required a nonresident seller (NRS) license. *Okla. Stat. tit. 37A, § 2-135* (2020); *Okla. Stat. tit. 37, § 524* (2015) (repealed). Such a license, "authorize[d] the holder thereof to solicit and take orders for wine and spirits from the holders of licenses authorized to import the same into this state, and to ship or deliver, or cause to be shipped or delivered, wine and spirits into Oklahoma pursuant **[*4]** to such sales." *Okla. Stat. tit. 37A, § 2-135* (2020). Essentially, a nonresident seller acted as a broker for manufacturers by shipping wine or spirits into Oklahoma to be sold by a licensed Oklahoma distributor.

As of January 1, 2014, there were two dominant distributors of wine and spirits in Oklahoma: Central Liquor Company LP ("Central") and Jarboe Sales Company ("Jarboe"). Central and Jarboe both had relationships with national distributors in order to facilitate the sale of out-of-state brands to retailers within Oklahoma. Southern Glazer's Wine and Spirits, Inc. ("Southern Glazer's") worked primarily with Jarboe, and Republic National Distributing Company, LLC ("Republic") worked primarily with Central. Brian Lidjl d/b/a Southern Glazer's Wine & Spirits of Oklahoma was the non-resident seller (NRS) to Jarboe prior to October 1, 2018. Best Brands of Delaware, LLC, d/b/a Republic National Distributing Company was the NRS to Central.

In 2014, a third distributor emerged: Boardwalk. Dkt. # 41, at 5. Plaintiff attributes Boardwalk's ability to compete against the two major distributors to its increased services to retailers. Those services included making daily deliveries to any retailer in the state, and allowing **[*5]** retailers to place orders late in the day. Id. at 5-6. From 2014 to 2017, Boardwalk's sales revenues increased from $ 22.5 million to $ 97.6 million. Id. at 6. As Boardwalk realized an increase in sales, the market shares of both Central and Jarboe decreased.

Plaintiff alleges that an owner of Central, Brad Naifeh, acknowledged the increased competition Boardwalk created while having lunch with plaintiff prior to Naifeh's death in June 2018. At that lunch, plaintiff alleges that Naifeh handed him a note stating that if Boardwalk did not scale back delivery times to retailers, Central would lower its prices. Id. Plaintiff alleges that Boardwalk did not adjust its delivery practices after receiving that note, and that Central subsequently lowered its prices. Id. Plaintiff also alleges that, at a lunch in Oklahoma City in 2015, Naifeh told plaintiff that, after changes in the law, Boardwalk "would be reduced to selling beer in Northeast Oklahoma." Id. at 16.

In 2015, Jarboe and Central formed a lobbying and public relations entity referred to as The Institute for Responsible Alcohol Policy ("IRAP") to pursue legislative changes that would benefit Central, Jarboe, and their respective NRSs. **[*6]** Id. at 8-9. That same year, Oklahoma state senator Clark Jolly began to conduct meetings regarding revisions to Article 28 of the Oklahoma Constitution.[1] Id. at 8. Boardwalk was not invited to participate in

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[1] Plaintiff alleges that Senator Jolly was allied with Central and Jarboe and acted for their benefit. However, plaintiff makes no allegations supporting these contentions.

those meetings. Id. at 8. Naifeh, the primary spokesperson for Central, attended those meetings. Id. In one meeting, on May 27, 2015, plaintiff alleges Naifeh stated he wanted Republic to be able to buy into Central, which, at the time, was prohibited by law. Id.

The result of those legislative discussions was a proposed amendment that eliminated the requirement that brands sell to all distributors who wished to buy product. Id. at 9-10. Plaintiff alleges that prior to passage of 28A this change was not discussed openly in the legislative halls or outside them. Id. at 9.[2] Plaintiff explains that this amendment allowed brands represented by Republic and Southern Glazer's, through their NRSs, to sell exclusively to their respective Oklahoma distributors. Id. at 11.

The proposed amendment also sought to change the ownership requirements for Oklahoma distributors. The proposed amendment would allow a corporation, limited liability company, or similar business entity, otherwise prohibited from obtaining a distributor license **[*7]** in Oklahoma, to purchase up to a 50% ownership interest of an Oklahoma distributor.

The amendment was placed on the November 8, 2016 ballot, and it was subsequently passed. As a result, the amendment became effective on October 1, 2018 ("effective date").

Plaintiff alleges that, prior to the effective date, some person or entity (presumably defendants or their predecessors) obtained "letter[s] of designation" from brands, "whereby a [b]rand had to designate the entity it would sell to after the [effective date]." Id. at 13. Plaintiff alleges that "[c]onspirators," worked together to develop these letters "to avoid conflict among them over the nature of the [b]rand commitment, and to assist in the commitment." Id. Plaintiff alleges that, during these maneuvers, defendants discouraged brands from selling to Boardwalk. Id. at 12-13.

Plaintiff further alleges that this pre-amendment activity allowed defendants to obtain commitments from brands to sell wine and spirits only to Central and Jarboe, respectively. Id. at 12. Plaintiff argues that "[t]he alignment of [b]rands with either Republic-Central or Southern-Jarboe occurred not through competition, but from pre-existing relationships, and **[*8]** from leverage, or tacit leverage, derived from the [n]ational [d]istributors." Id. at 13. Plaintiff states that "[l]everage also arose because, if the [b]rand did not sell in Oklahoma to Republic-Central or Southern-Jarboe, the [b]rand knew it was exposed to its sales to or through [the corresponding national distributor] in other states being cut back or eliminated." Id. at 14.

On or about the effective date, Southern Glazer's Wines & Spirits, Inc. finalized a purchase of 49% interest in Jarboe. The purchase resulted in a new entity: Southern Glazer's Wine & Spirits of Oklahoma, LLLP d/b/a Jarboe Sales Company ("Southern-Jarboe"). Also on that day, Republic National Distributing Company LLC finalized a purchase of a 49% interest in Central. The purchase resulted in a new entity: Central Liquor Company L.P. d/b/a RNDC Oklahoma ("Republic-Central"). Id. at 11. At that time, Brian Lidjl d/b/a Southern Glazer's Wine & Spirits of Oklahoma became the non-resident seller to Southern-Jarboe and Best Brands of Delaware, LLC, d/b/a Republic National Distributing Company became the nonresident seller to Republic-Central.

Plaintiff states that the focus of the amended complaint is the conspiracy **[*9]** formed "after the passage of 28A" among the defendants. Id. at 12. Plaintiff specifically states the conspiracy was "to maintain and to secure [b]rands for their companies to sell to the exclusion of Boardwalk and to thereby force Boardwalk from competition with them through a group boycott in the distributor markets for wine and spirits in Oklahoma in violation of the *Sherman Act*, *15 U.S.C. § 1*, and to attempt to monopolize, and to monopolize the markets for wine and spirits in Oklahoma in violation of the Sherman Act, *15 U.S.C. § 2*." Id. at 12. According to plaintiff, "leverage power existed after passage of 28A, was known by the [c]onspirators to exist, and assured the development of the group boycott." Id. Plaintiff alleges that "the [c]onspirators met together after passage of 28A, and on belief discussed their efforts and sought to achieve an acceptable balance between them on wine and spirits to be represented by each. On belief, these meetings also included assessments of Boardwalk's status with any [b]rands representation." Id. at 13.

[2] The Court notes that the proposed amendment does contain the operative language.

Plaintiff further alleges that "[t]o enforce the group boycott, Southern-Jarboe, and on belief, Republic-Central, committed other anticompetitive actions, e.g., a retailer **[*10]** was told that, if he bought from Boardwalk, his delivery days by Southern-Jarboe would be cut back. Further, the [c]onspirators conspired and offered special deals and concessions to grocers to prelude Boardwalk from securing shelf space in their grocery stores." Id. at 16.

Plaintiff states "[t]he group boycott . . .enabled Republic-Central and Southern-Jarboe to control the distribution markets in Oklahoma for wine and for spirits (liquor), or at least 90 percent, or more, of them," and that "Southern-Jarboe and Republic-Central achieved and had a monopoly over distribution of all the top 100 Brands by volume sold in Oklahoma." Id. Plaintiff describes that "Southern-Jarboe is believed to have a monopoly over 14 of the top 25 [b]rands of wine and spirits, and Republic-Central is believed to have a monopoly over the other 11 of the top 25 [b]rands." Plaintiff contends that after the effective date, defendants have attempted to monopolize the product markets in Oklahoma, and have the power to do so. Id.

In support of the allegation, plaintiff submits anecdotal evidence of anticompetitive acts. According to plaintiff:

> A. One high-volume liquor store owner in south Oklahoma City swore under **[*11]** oath that "the two largest wholesalers significantly increased wholesale [prices] for wine and spirits — up by around 18% from before the new law was implemented, according to our numbers." This owner further swore under oath that his deliveries dropped from five days a week to two.
> B: After implementation of 28A an Edmond retailer swore under oath that Central failed to supply two of his best-selling items — McCormick Vodka 80-Proof and Jim Beam — for a period of two weeks. Southern-Jarboe he further swore increased his minimum order charge from $ 10 dollars for an order under $ 100 to $ 30 dollars for an order under $ 200, for no apparent reason.
> C. An El Reno retailer swore that, because of the monopolistic situation, [Republic-Central and Southern-Jarboe] controlled Route 66 Liquors' livelihood and "could easily put [it] out of business if they so desired."
>
> D. The situation post 28A's implementation was especially dire for rural retailers, who need consistent and frequent shipments to stay competitive. Shangri-La and Beverage Service operates a resort on Monkey Island near Afton, Oklahoma. It experienced fewer deliveries and lower product availability since 28A was implemented. Southern-Jarboe **[*12]** and Republic-Central are metropolitan-focused and only deliver to Shangri-La once a week, whereas prior to implementation of 28A, Boardwalk was willing to deliver multiple times a week.
> E. In the opposite corner of the state, an Altus liquor store owner swore by affidavit that his customers suffered because of "infrequent deliveries and poor customer service" from the two dominant wholesalers. For top brands, however, neither he nor Shangri-La [has] a choice.

Id. at 17-18. Plaintiff does not include the sworn statements with his amended complaint.

Plaintiff alleges that the amended complaint demonstrates that defendants have violated *15 U.S.C. §§ 1* and *2*.[3] Plaintiff specifically alleges that defendants have committed a per se violation of *§ 1*, and argues that Southern-Jarboe, or, in the alternative, Republic-Central, is attempting to monopolize the wine or spirits markets in Oklahoma. Id. at 19-20.

II. LEGAL STANDARD

HN1[] "The Court's function on a *Rule 12(b)(6)* motion is not to weigh the evidence that the parties might present at trial, but to assess whether the plaintiff's complaint is legally sufficient to state a claim for which relief may be granted." *Ramer v. Crain, No. 16-CV-754-JED-FHM, 2019 U.S. Dist. LEXIS 161949, 2019 WL 4602816, at *2 (N.D.*

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[3] Plaintiff also alleges that defendants' actions "constitute a violation of . . . the *Oklahoma Anti Trust Reform Act*," under *Okla. Stat. tit. 79, § 201 et seq.* That may be a true statement, if proven, but that does not state a claim for relief. Plaintiff does not state a separate count or claim based on Oklahoma statutory law. The Court will not infer one.

Okla. Sept. 23, 2019)[4] (citing Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1135 (10th Cir. 2014)). To survive a motion to dismiss, a complaint must contain **[*13]** enough "facts to state a claim to relief that is plausible on its face" and the factual allegations "must be enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 562. For the purpose of making the dismissal determination, a court must accept all the well-pleaded allegations of the complaint as true and must construe the allegations in the light most favorable to a claimant. Twombly, 550 U.S. at 555; Alvarado v. KOBTV, L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007); Moffett v. Halliburton Energy Servs., Inc., 291 F.3d 1227, 1231 (10th Cir. 2002).

HN2[] A court need not accept as true those allegations that are conclusory in nature. Erikson v. Pawnee Cnty. Bd. of Cnty. Comm'rs, 263 F.3d 1151, 1154-55 (10th Cir. 2001). "[C]onclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." Hall v. Bellmon, 935 F.2d 1106, 1109-10 (10th Cir. 1991). A motion to dismiss is properly granted when a complaint provides no "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." Id.

III. RESTRAINT OF TRADE

Plaintiff alleges that defendants have violated **[*14]** § 1 of the Sherman Antitrust Act. **HN3**[] Section 1 of title 15 of the United States Code makes "[e]very contract, . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations" illegal. 15 U.S.C. § 1. "The essence of a claim of violation of [s]ection 1 of the Sherman Act is the agreement itself." Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1082 (10th Cir. 2006). "Only after an agreement is established will a court consider whether the agreement constituted an unreasonable restraint of trade." Id. (quoting AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 232 (2d Cir.1999)).

HN4[] In order to state a claim under § 1, a complaint must present "enough factual matter (taken as true) to suggest that an agreement was made." Twombly, 550 U.S. at 556. "[A]llegations of parallel business conduct, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts that 'ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior.'" Id. at 552 (citations omitted). "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Id. "[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice." Id. Such an allegation, "without some further factual **[*15]** enhancement, . . . stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" Id. at 557. **HN5**[] "[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation . . ." Id. (quoting DM Rsch., Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 56 (1st Cir. 1999)). "[W]hen the antitrust claim relies solely on circumstantial facts of parallel behavior, the conspiracy is not plausible if in light of common economic experience the alleged conduct is equally likely to result from independent action." Llacua v. W. Range Ass'n, 930 F.3d 1161, 1175 (10th Cir. 2019). Therefore, to overcome a motion to dismiss, "plaintiff must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54 (2d Cir. 1987).

HN6[] In a viable complaint, "the plaintiff must allege, not only an injury to himself, but an injury to the market as well." Agnew v. Nat'l Collegiate Ath. Ass'n, 683 F.3d 328, 335 (7th Cir. 2012). "Actual anticompetitive effects

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[4] Unpublished decisions are not precedential, but they may be cited for their persuasive value. See ***Fed. R. App. 32.1***; ***10th Cir. R. 32.1***.

include, but are not limited to, reduction of output, increase in price, or deterioration in quality." *Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1339 (11th Cir. 2010)*. However, "[t]here are some methods of restraint that are so inherently and facially anti-competitive that an elaborate and burdensome inquiry into a demonstrable economic **[*16]** impact on competition in a relevant market is not required." *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 434 (6th Cir. 2008)* (citing *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*). These are known as per se violations. ***HN7***[] Allegations supporting an inference of group boycott establish a per se violation of *§ 1* and do not require the complaint to allege injury to the market.

A group boycott exists where "[a] group of competitors threaten[] to withhold business from third parties unless those third parties would help them injure their directly competing rivals." *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*. Group boycott can be based on a threat made by a single competitor if the complaint also alleges "a horizontal agreement among those threatened . . . to hurt a competitor of the retailer who made the threat." Id. The Court must then necessarily determine whether a horizontal agreement has been adequately alleged.

In their joint motion to dismiss (Dkt. # 47), defendants argue that plaintiff failed to state a claim under *§ 1*. Defendants state that plaintiff did not "plausibly allege an agreement in restraint of trade" and that plaintiff "fails to allege sufficient facts showing an agreement to boycott Boardwalk." Dkt. # 47, at 8. Specifically, defendants note that plaintiff's claim cannot rest on defendants' efforts to amend the Oklahoma constitution, **[*17]** as such claims are barred by federal law. Id. at 5.

Plaintiff responds, arguing that paragraphs 5-33 of the amended complaint show "openly concerted acts," Dkt. # 53, at 14, and that the group boycott is adequately alleged in paragraphs 35-50. Id. Plaintiff argues he satisfies the plus factor description of defendants' actions as "largely inconsistent with unilateral conduct but largely consistent with explicitly co-ordinated action." Id. at 13. Plaintiff further states that he stands on his allegations on group boycott, as made in paragraph 56 of the amended complaint. Id. Plaintiff finally argues that any application of the rule of reason analysis is not applicable in this case. Id.

A. Legislative Action

The Court agrees with the defendants that, insofar as paragraphs 5-33 detail the legislative lobbying efforts of defendants and their predecessors, they cannot form the basis of an antitrust violation. ***HN8***[] As an initial matter, violations of the antitrust laws cannot be based on defendants' efforts to amend the Oklahoma Constitution. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* ("[N]o violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."); *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; see also *City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 379-80, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)* ("The federal antitrust **[*18]** laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government."). "Private actors are immune from antitrust liability for petitioning the government, even when the private actors' motives are anticompetitive." *Sanders v. Brown, 504 F.3d 903, 912 (9th Cir. 2007)*. This is the case because "it is inappropriate to base liability on whether a petitioner has an anticompetitive motive, because that would unduly chill speech." Id. This is referred to as Noerr—Pennington doctrine. *Noerr, 365 U.S. at 135*; *Pennington, 381 U.S. at 669*. Under this doctrine, defendants also cannot be held liable for injuries caused by the effects of such legislative amendment. "*First Amendment* petitioning privileges would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subjected to antitrust liability for his success." *Greenwood Utils. Comm'n v. Miss. Power Co., 751 F.2d 1484, 1505 (5th Cir. 1985)*; see also *Sanders, 504 F.3d at 914*.

HN9[] According to the Oklahoma Supreme Court "the plain language of Article 28A, § 2(A)(2) is not in conflict with the anticompetitive provisions of the [Oklahoma] Constitution." *Inst. for Responsible Alcohol Pol'y v. State ex rel. Alcoholic Beverage L. Enf't Comm'n, 2020 OK 5, 457 P.3d 1050, 1057 (Okla. 2020)* (citing *Okla. Const. art. V, §*

44 & *§ 51*). Accordingly, business transactions conducted pursuant to and in compliance with 28A do not, in and of themselves, constitute violations of ***antitrust law***. Plaintiff is advised that exclusive contracts with brands are permitted in the post-amendment wine **[*19]** and spirits distribution schemes, and therefore allegations that exclusive contracts are in violation of *§§ 1* or *2* of the Sherman Act are without merit.

However, as noted by plaintiff in his response, such immunity extends only as far as the defendant's legislative efforts, i.e., defendants are protected only for their efforts to change the Oklahoma beverage laws to allow exclusive contracts. To the extent plaintiff alleges that, in addition to legislative discussions, there were also anti-competitive discussions or agreements among defendants not to pursue one another's brands, such allegations are not protected by the *Noerr-Pennington* doctrine. See, e.g., *Webb v. Utah Tour Brokers Association, 568 F.2d 670 (10th Cir. 1977)*.

B. Parallel Conduct

Although the Court will not consider any allegations that petitioning for 28A is violative of the Sherman Act, plaintiff alleges that other unlawful conduct occurred. The Court now assesses whether such conduct is evidence of an agreement.

Plaintiff asserts that the activities alleged in paragraph 36 require an agreement. Paragraph 36 alleges that "[l]eading up to 28A's implementation on the [effective date], each of Central and Jarboe and their respective NRSs solicited as necessary, and obtained commitments from [b]rands **[*20]** to sell wine and spirits only to Republic-Central, or to Southern-Jarboe, respectively after the [effective date]," and alleges in those efforts that both Central and Jarboe "discourage[d] the opportunity available to the [b]rands under 28A to sell to Boardwalk," when Cental and Jarboe "knew that a commitment from a [b]rand to Central or Jarboe, or to their successor entities, was a foregone conclusion, because of pre-existing sales relations." Dkt. # 41, at 12-13. Contrary to plaintiff's assertion, those allegations, although more specific than the others to which plaintiff points, do not suggest behavior that would require an agreement. Those actions do not demonstrate anything other than the natural business practice for each Oklahoma distributor to secure distribution contracts with brands with which a co-owner of each respective Oklahoma distribution company had already established exclusive national deals. "[N]othing . . . intimates that [this action] was anything more than the natural, unilateral reaction of each [defendant] intent on preserving its regional dominance. The complaint's general collusion premise fails to answer the point that there was no need for joint encouragement," **[*21]** as "each [defendant] had reason" to secure their own exclusive deals, "regardless of the other [defendant's] actions." *Twombly, 550 U.S. at 546-47*.

HN10[] Because competitors' conduct of securing exclusive contracts with brands can be legitimate and "unilaterally prompted by common perceptions of the market," a plaintiff must allege "something more than merely parallel behavior." *Id. at 554*. Plaintiff must allege plus factors.

C. Plus Factors

HN11[] As stated above, to overcome a motion to dismiss, "plaintiff must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54 (2d Cir. 1987)*. Plus factors can include "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, [] evidence of a high level of interfirm communications," *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013)*, (e.g., "whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy,") as well as "product uniformity; [and] whether the defendants have been uniform in their actions." *Hyland v. HomeServices of Am., Inc., 771 F.3d 310, 320 (6th Cir. 2014)*. "[C]ircumstantial evidence alone cannot support a **[*22]** finding of conspiracy when the evidence is equally consistent with independent conduct." Id.

Defendants allege that plaintiff asserts no plus factors. Dkt. # 47, at 10. In response (Dkt. # 53), plaintiff refutes this contention. Dkt. # 53, at 12-13. Plaintiff alleges that certain actions taken by defendants to secure exclusive contracts occurred prior to the effective date, specifically, the concerted acts of drafting letters of designation, along with defendants' meetings to achieve an artificial distribution of competing brands between the distributor defendants, constitute plus factors. Plaintiff also asserts that the allegations of price increases in combination with service cutbacks, and threats to retailers targeting Boardwalk's ability to compete, constitute sufficient allegations of plus factors. Id. at 13-14.

Plaintiff alleges in the amended complaint that defendants met to discuss dividing up brands per distributor; that defendants met frequently while lobbying for 28A and after its passage; and that defendants communicated frequently via an industry group they created (which excluded Boardwalk) during that process. Dkt. # 41, at 8-9. Plaintiff asserts that these allegations **[*23]** are sufficient to indicate a high level of interfirm communications. ***HN12***[] "Allegations of communications and meetings among conspirators can support an inference of agreement because they provide the means and opportunity to conspire." *SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 432 (4th Cir. 2015)*, as amended on reh'g in part (Oct. 29, 2015). "Courts have held that a high level of communications among competitors can constitute a plus factor which, when combined with parallel behavior, supports an inference of conspiracy." *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1033 (8th Cir. 2000)*. In SD3, LLC, plaintiff identified a meeting at which the alleged conspiracy was formed, as well as "phone calls, meetings, and discussions among the various conspirators." *801 F.3d at 432*. Those allegations, the court found, identified "a practice, not illegal in itself, that facilitates [an antitrust conspiracy] that would be difficult for the authorities to detect." Id. "Facilitating practices . . . may evidence the plus factors necessary to establish the inference of an agreement." Id. (quoting Sharon E. Foster, LIBOR Manipulation and Antitrust Allegations, *11 DePaul Bus. & Comm. L.J. 291, 304 (2013)*).

Here, although plaintiff does not allege the exact meeting at which the alleged conspiracy was formed, plaintiff does allege that there were multiple meetings between defendants from **[*24]** 2015 through 2018 and that during those meetings agreements not to compete with one another, in an effort create advantageous brand contracts and to exclude Boardwalk, were made. Such allegations are not based on lobbying for the passage of 28A, but rather are based on the simultaenous or subsequent anti-competitive agreement not to compete for brands associated with defendants' respective national distributors. See, e.g., *In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1123 (N.D. Cal. 2012)* (finding plaintiff successfully alleged that agreements among competitors not to compete for each others' employees were anticompetitive). As such, they are not barred by *Noerr*-*Pennington* and tend to show interfirm communications that establish the inference of an agreement.

Plaintiff also alleges that defendants' conduct of not pursuing contracts with each other's brands constitutes evidence of an agreement in restraint of trade. Dkt. # 53, at 22. This sort of conduct, without an express agreement, could be factually neutral, as it is the type of conduct that was alleged in *Twombly* (holding that a competitor's reticence to encroach on a competitor's territory was not evidence of collusion; instead it was the natural tendency of that formerly-monopolistic industry **[*25]** to "sit[] tight, expecting their neighbors to do the same thing." *550 U.S. at 568*.) However, here, plaintiff alleges that the conduct was accompanied by concerted acts to determine which brands would be exclusively sold by which distributor. Dkt. # 41, at 13. Further, the industry here is different from that in Twombly in that it was not a formerly government-sanctioned monopoly.

Plaintiff also alleges that price increases and simultaneous service cutbacks are indicative of a common motive to conspire. Dkt. # 53, at 21-22. Defendants do not offer a common economic rationale that would tend to refute plaintiff's allegation that price increases accompanied by service reductions by one firm should be rationally followed by price increases and service reduction by another firm. In a competitive market, one would assume that a competitor that was not able to adequately supply a retailer would become disfavored in short order and lose business to the other competitors, especially where other competitors were equipped to fill the demand created by the other distributor.

In reply (Dkt. # 54) to plaintiff's assertion these acts are evidence of a common motive to conspire, defendants assert that price increases **[*26]** (and, presumably, service cutbacks) or attempts to limit Boardwalk's access to shelf space "have nothing to do with the alleged parallel conduct—and thus do not suggest an agreement to boycott Boardwalk." Dkt. # 54, at 8. However, these maneuvers evince a common motive for boycotting Boardwalk. Defendants' alleged agreement not to compete for one another's brands would leave brands with the choice to either work solely with a distributor with national ties, or to jeopardize that relationship by rejecting the terms offered by that distributor and contract with Boardwalk and/or other smaller distributors. By artificially eliminating the only other major national distributor from the pool of competing distributors, brands had less leverage to make favorable contracts. Therefore, defendants arguably agreed to give each other artificially superior positions with brands, and by using those superior positions to push Boardwalk from retail stores, defendants' alleged actions in fact created the power to act in concert to raise prices and decrease service availability, while still maintaining each defendants' respective pre-Boardwalk distribution market share for wine and spirits.

Further, while **[*27]** plaintiff does not expressly point to the structure of the market for wine and spirits as a plus factor, plaintiff does state that defendants overwhelmingly dominate the market he alleged (top 100 brands by volume of both wine and spirits). ***HN13***[] "A market in which sales power is concentrated in the hands of the few can also facilitate coercion. Fewer 'minds' must 'meet' in a concentrated market." *SD3, LLC, 801 F.3d at 432* (finding the defendants' control of 85% of the market as a relevant plus factor). Here, plaintiff alleges that defendants have control over at least 90% or more of the market for distribution of wine and spirits. Dkt. # 41, at 16. Accordingly, the Court finds that the allegations of the concentrated structure of the market constitutes a plus factor.

Some of plaintiff's allegations suffer from a lack of precision regarding exactly who was part of one or more conspiracies at a given time and precisely when agreements were made to pursue the objectives of those conspiracies. However, the allegations of defendants' parallel conduct of securing exclusive brand contracts, while allegedly agreeing not to compete for each others' brands (Dkt. # 41, at 13), in conjunction with: i) allegations of high inter-firm **[*28]** communications (specifically the legislative meetings, and the creation of an industry group that excluded Boardwalk, a major competitor) (id. at 8-9); ii) allegations that both firms increased prices and decreased service availability after securing exclusive contracts with brands (id. at 17); iii) allegations that special deals were offered to preclude Boardwalk, and not others, from shelf-space[5] (id. at 16); and iv) the concentrated market structure apparent from the face of the amended complaint, push the conspiracy among defendants alleged in the complaint from possible to plausible.

IV. MONOPOLIZATION

Plaintiff also alleges that defendants have violated *§ 2* of the Sherman Antitrust Act, which prohibits attempted monopolization. *15 U.S.C. § 2*.[6] ***HN14***[] "The offense of monopoly under [*section 2*] has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

HN16[] To state a claim, plaintiff must allege: (1) a relevant market, comprised of geographic market and product market components; (2) a dangerous probability of successful **[*29]** monopolization in the relevant market; (3) the specific intent to monopolize the relevant market; and (4) some conduct in furtherance of the monopolization attempt. *United States v. AMR Corp., 335 F.3d 1109, 1113 (10th Cir. 2003)*; *Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 756 (10th Cir. 1999)*; *TV Commc'ns Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1025 (10th Cir. 1992)*; *Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 893 (10th Cir. 1991)*. If the claim does not adequately allege these elements, it cannot survive dismissal.

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[5] Because the Court finds there is more than one plus factor alleged, the Court finds a conspiracy has been alleged. As a result, although only one competitor is having been charged expressly with this conduct in the amended complaint, this action was likely taken in furtherance of the attempts to eliminate Boardwalk as a competitor, as part of the conspiracy.

[6] ***HN15***[] *Section 2* of the Sherman Antitrust Act prohibits "attempt[s] to monopolize ... any part of the trade or commerce among the several States . . . ."

In their joint motion to dismiss, defendants argue that plaintiff fails to allege a claim under *§ 2* for several reasons. Defendants assert plaintiff fails to plead a relevant market or that either Republic-Central or Southern-Jarboe has a monopoly within that market (or is likely to succeed becoming a monopoly). Dkt. # 47, at 7-8. Defendants state that plaintiff also fails to allege facts suggesting that either Southern-Jarboe or Republic-Central engaged in any "exclusionary conduct." Id. Defendants also argue that plaintiff cannot maintain a claim under *section 2* against both distributors "because only one firm can be a monopolist." Id. (citing *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*).

In response, plaintiff asserts that he has pled all elements of monopoly. Plaintiff asserts he has pled that defendants attempted to monopolize the "distributor product market for wine or the distributor product market for spirits (liquor), or both markets, in the state of Oklahoma and in any sub markets **[*30]** as may be discovered." Dkt. # 53, at 24-25. Plaintiff further notes that "[w]ine has a completely different manufacturing process from spirits, and the products in each separate market are largely interchangeable." Id. at 25. Plaintiff alleges defendants engaged in exclusionary conduct by alleging group boycott. Id. at 26. Finally, plaintiff alleges that his *§ 2* claim can proceed against bother Republic-Central and Southern-Jarboe in the alternative.

A. Relevant Market

HN17[] "An important part of the analysis relates to the definition of the 'relevant market,' which traditionally has two components: the product market and the geographic market." *Sky Angel U.S., LLC v. Nat'l Cable Satellite Corp., 947 F. Supp. 2d 88, 102 (D.D.C. 2013)*. "[T]he relevant geographic market must be sufficiently defined so that the Court understands in which part of the country competition is threatened." *Id. at 104*. To assert an adequate geographic market, "[t]he area of effective competition . . . must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*.

HN18[] "A relevant product market consists of 'products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.'" **[*31]** *PepsiCo, Inc. v. Coca-Cola Co., 114 F. Supp. 2d 243, 248 (S.D.N.Y. 2000)*, aff'd, *315 F.3d 101 (2d Cir. 2002)* (quoting *United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*). "Products have reasonable interchangeability if consumers treat them as 'acceptable substitutes.'" Id. (citing *Federal Trade Comm'n v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 45 (D.D.C. 1998)*). "In order to evaluate whether one product would be an acceptable substitute for another, courts consider whether there exists cross-elasticity of demand and supply of the two products." Id. "Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product." *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 227 (2d Cir. 1999)*.

Plaintiff has alleged a plausible geographic market, Oklahoma, where the markets for both wine and spirits are regulated by state licensing requirements, thus restricting market access to outside competitors.

With respect to the relevant product market, plaintiff asserts that both wine and spirits are interchangeable within their respective markets. Plaintiff also asserts that "[a]s of the time when statistics were last available, Southern-Jarboe and Republic-Central achieved and had a monopoly over distribution of all the top 100 [b]rands by volume sold in Oklahoma. More specifically, Southern-Jarboe is believed to have a monopoly over 14 of the top 25 [b]rands of wine and spirits, and Republic-Central is believed to have **[*32]** a monopoly over the other 11 of the top 25 [b]rands." Dkt. # 41, at 16.

In light of the allegations above, the Court finds that plaintiff has not alleged a relevant product market. To the extent plaintiff seeks to allege a new market in his *§ 2* claim (i.e., "the top 25 brands"), plaintiff fails to adequately do so. ***HN19***[] "The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's 12(b)(6) motion." *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988)*. Plaintiff's allegations do not meet that threshold for three main reasons. First, plaintiff does not specify how "the top 25 brands" were selected (By volume sold or by revenue? Is this nationally or within Oklahoma?). Next, plaintiff does not differentiate between the markets for wine and spirits when outlining the above "top 25" breakdown. Finally, plaintiff's allegations do not explain why he chose the top 25 as a cut off. As a result, the Court finds the allegations of the "top 25 brands" market are too vague and conclusory to adequately state a relevant market in which either defendant holds a monopoly.

B. Attempt to Monopolize

Even ignoring the deficiencies of plaintiff's "top 25" market definition, **[*33]** plaintiff's allegations still fail. Plaintiff alleges that, at most, Southern-Jarboe controls 56% of "top 25" alleged market. ***HN20***[] "[M]onopolization is rarely found when the defendant's share of the relevant market is below 70%." *Exxon Corp. v. Berwick Bay Real Est. Partners, 748 F.2d 937, 940 (5th Cir. 1984)*; see *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989)*. The Court does not find that this is one of the rare instances in which claims of monopoly survive below that threshold. Plaintiff does not allege that either distributor defendant has a growing market share that presents a danger of overtaking competitors. In fact, the allegations in plaintiff's complaint tend to demonstrate that defendants' respective market shares are not likely to change due to the *§ 1* agreement alleged.

If the Court instead relies on plaintiff's allegation that defendant distributors control 90% of the markets for wine and spirits (sold by volume in Oklahoma), plaintiff's claim still fails. ***HN21***[] "[T]he market shares of [the defendants] [cannot] not be aggregated to establish an attempt to monopolize." *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1018 (2d Cir. 1989)*. Therefore, the alleged 90% market share cannot be attributed to either defendant. Further, plaintiff has not alleged that either defendant holds a monopoly over the other (let alone in what proportion), and there is nothing to suggest that one **[*34]** or the other does. In support of this element, plaintiff provides nothing more than blanket allegations that either defendant has exclusive deals with some portion of the top 100 brands by volume in Oklahoma. Dkt. # 53, at 27-28. Such "bare assertions [are] too conclusory to plausibly establish market power in any context." *FTC v. Facebook, Inc., No. CV 20-3590 (JEB), 2021 U.S. Dist. LEXIS 119540, 2021 WL 2643627, at *12 (D.D.C. June 28, 2021)* (collecting cases). Without any evidence or allegations that either defendant has a dominant position in the market, plaintiff's claim cannot survive.

IT IS THEREFORE ORDERED that defendants' joint motion to dismiss (Dkt. # 47) is **denied** as to count 1, and **granted** as to count 2. Count 2 is hereby **dismissed**.

DATED this 9th day of August, 2021.

/s/ Claire V. Eagan

CLAIRE V. EAGAN

UNITED STATES DISTRICT JUDGE

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Midwest Renewable Energy v. Archer Daniels Midland Co.

United States District Court for the Central District of Illinois, Urbana Division

August 9, 2021, Decided; August 9, 2021, Filed

Case No. 20-CV-2212

Reporter

2021 U.S. Dist. LEXIS 150803 *; 2021 WL 3508684

MIDWEST RENEWABLE ENERGY, LLC, individually and on behalf of all others similarly situated, Plaintiff, v. ARCHER DANIELS MIDLAND COMPANY, Defendant.

Core Terms

prices, ethanol, antitrust, Terminal, alleges, sales, monopoly power, relevant market, anticompetitive, contracts, predatory, monopoly, motion to dismiss, depressed, effects, direct evidence, Derivatives, competitors, argues, products, anticompetitive conduct, low price, acquisition, recoupment, producers, willful

Counsel: **[*1]** For Midwest Renewable Energy LLC, individually and on behalf of all others similarly situated, Plaintiff: Andrew Stanley Szot, Marvin Alan Miller, MILLER LAW LLC, Chicago, IL; Benjamin M Jaccarino, Christopher Michael McGrath, Merrick Scott Rayle, Travis Harley Carter, LOVELL STEWART HALEBIAN JACOBSON LLP, New York, NY; Joshua H Grabar, GREENE CONSUMER LAW, Highland Park, IL.

For Archer Daniels Midland Company, Defendant: Stephen V D'Amore, LEAD ATTORNEY, Matthew Robert DalSanto, Reid Franklin Smith, Samantha M Lerner, WINSTON & STRAWN LLP, Chicago, IL.

Judges: COLIN S. BRUCE, UNITED STATES DISTRICT JUDGE.

Opinion by: COLIN S. BRUCE

Opinion

ORDER

Plaintiff, Midwest Renewable Energy, LLC, on behalf of all others similarly situated, filed a Class Action Complaint (#1) against Defendant Archer Daniels Midland Company ("ADM"), alleging that Defendant violated *Section 2* of the Sherman Antitrust Act, *15 U.S.C. § 2*. ADM filed a Motion to Dismiss (#14) on October 2, 2020. Plaintiff filed an Opposition to Defendant's Motion to Dismiss (#25) on October 23, 2020, and ADM filed a Reply in Support of its Motion to Dismiss (#43) on January 22, 2021.

For the following reasons, ADM's Motion to Dismiss (#14) is GRANTED.

I. BACKGROUND

The following background **[*2]** facts are taken from the allegations in Plaintiff's Complaint (#1). At this stage of the proceedings, the court must accept as true all material allegations in the Complaint, drawing all reasonable inferences therefrom in Plaintiff's favor. See *Lewert v. P.F. Chang's China Bistro, Inc., 819 F.3d 963, 966 (7th Cir. 2016)*.

This is a putative class action involving alleged unlawful conduct by ADM to obtain monopoly power to depress ethanol prices. The alleged conduct occurred at the Kinder Morgan terminal in Argo, Illinois ("Argo Terminal"). Trading for ethanol at the Argo Terminal during the "Market-on-Close" ("MOC") period from 1:00 P.M. to 1:30 P.M. each trading day determines the Chicago Benchmark Price created by S&P Global Platts ("Platts"). Platts' Chicago Benchmark Price sets the value of Chicago Ethanol Derivatives (i.e., ethanol futures contracts and options contracts traded on the Chicago Mercantile Exchange). Trades at the Argo Terminal are also used by the Oil Price Information Service ("OPIS") in its reports of daily Chicago OPIS Prices.

Plaintiff, the other proposed class members, and ADM all produce ethanol. They are competitors in the production and "First Level Sale"[1] of ethanol. Plaintiff and other ethanol producers make First Level Sales Contracts **[*3]** that specify prices in a formula based, in whole or in part, on Platts' Chicago Benchmark Prices, Chicago Ethanol Derivatives Prices, or Chicago OPIS Prices determined by sales at the Argo Terminal.

Prior to November 2017, ADM had been a predominant buyer of ethanol at the Argo Terminal. Plaintiff alleges that, from November 1, 2017, until an unknown date believed to be after September 4, 2019, ADM became a predominant seller at the Argo Terminal, flooding Argo with ethanol that it intentionally sold at uneconomically low prices in order to benefit its outsized short positions in ethanol derivatives.[2] The alleged conduct by ADM included uneconomically shipping ethanol to Argo when the prices at the Argo Terminal were already lower than those at other terminals; selling ethanol at the Argo Terminal for less than ADM's variable cost to produce or obtain the ethanol; selling during the MOC even when ADM did not have physical ethanol to deliver to satisfy the sales contracts; and aggressively reducing its prices during the MOC window to capture 90 to 100 percent of sales during that window.

Plaintiff alleges that ADM's conduct resulted in a decrease of ethanol prices at the Argo Terminal **[*4]** and an accompanying decrease in the Chicago Ethanol Derivative Prices determined by the daily MOC prices at the Argo Terminal. Plaintiff alleges that these price decreases produced substantial gains for ADM on its short positions in Chicago Ethanol Derivatives, sufficient to compensate ADM for its losses incurred at Argo.

Plaintiff alleges that it and other class members incurred losses when they sold ethanol pursuant to First Level Sales Contracts in which prices were based upon a formula incorporating the depressed MOC prices at the Argo Terminal.

II. DIMISSAL UNDER *RULE 12(B)(6)*

Under *Rule 8(a)(2) of the Federal Rules of Civil Procedure*, a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. In order to survive a motion to dismiss under *Rule 12(b)(6)*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

In assessing a motion to dismiss, the court must draw all reasonable inferences in favor of the plaintiff but need not accept as true any legal assertions, threadbare recitals of the elements of a cause of action, or conclusory statements. See *Vesely v. Armslist LLC, 762 F.3d 661, 664-65 (7th Cir. 2014)*.

III. ANALYSIS

Plaintiff's Complaint contains two counts: Monopoly **[*5]** and Attempted Monopoly, both in violation of *Section 2* of the Sherman Antitrust Act.

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[1] "First Level Sale" is the first sale of ethanol by a producer, as compared to the resale of ethanol by someone other than the producer.

[2] A short position is a trading position where a derivative investment earns money for a trader if the price of the underlying commodity decreases.

Private civil actions to enforce the Sherman Antitrust Act are allowed under the Clayton Act, *15 U.S.C. § 15*. *Sanner v. Board of Trade of City of Chicago, 62 F.3d 918, 926 (7th Cir. 1995)*. To recover under the Clayton Act, a plaintiff must first prove "antitrust injury," which is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

The offense of monopoly under *Section 2* of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

To demonstrate attempted monopoly, a plaintiff must prove "a dangerous probability of achieving monopoly power" as the first element, while still demonstrating anticompetitive conduct intended to achieve monopoly power as the second element. *Spectrum Sports v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.

In its Motion to Dismiss (#14), ADM argues that Plaintiff did not allege that it suffered an antitrust injury; Plaintiff did not adequately plead that ADM has achieved monopoly power or a dangerous probability of achieving monopoly power; and Plaintiff **[*6]** did not adequately plead that ADM engaged in anticompetitive conduct.

A. Antitrust Injury

In paragraph 14 of the Complaint, entitled "Antitrust Injury And Damages," Plaintiff alleges the following:

> Through the conduct alleged in this Complaint, ADM did artificially depress each of the following: prices, bids and offers in the Argo market; the OPIS Chicago Prices; the Chicago Benchmark Prices; and Chicago Ethanol Derivatives Prices. Plaintiff and Class Members made their First Level Sales at one or more of the depressed prices and, therefore, received less for their ethanol than they would have received in the absence of ADM's unlawful conduct.

ADM argues that these allegations do not constitute antitrust injury because antitrust injury is a loss that results "from acts that reduce output or *raise* prices." *Chicago Professional Sports v. NBA, 961 F.2d 667, 670 (7th Cir. 1992)* (emphasis added). ADM maintains that an antitrust injury cannot be premised on lower prices, as alleged in Plaintiff's Complaint.

The Seventh Circuit has held that a "plaintiff who wants something, such as less competition or higher prices, that would injure consumers, does not suffer antitrust injury." *U.S. Gypsum Co. v. Indiana Gas, Inc., 350 F.3d 623, 627 (7th Cir. 2003)*. Likewise, the Supreme Court has held:

> Antitrust injury does not arise for purposes **[*7]** of *§ 4* of the Clayton Act ... until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct, see *Brunswick, 429 U.S., at 487, 97 S.Ct., at 696*; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect.... Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339-40, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990) (emphasis in original).

Therefore, the injury alleged in Plaintiff's Complaint does not constitute an antitrust injury sufficient to support its claim under the Clayton and Sherman Antitrust Acts, unless Plaintiff alleges that ADM depressed prices below a predatory level. "Predatory pricing is a three-stage process: Low prices, followed by the exit of producers who can no longer make a profit, followed by monopoly prices." *Wallace v. International Business Machines Corp., 467 F.3d 1104, 1106 (7th Cir. 2006)*.

"To make out a predatory-pricing claim, the plaintiff must establish not only that the defendant has sold products below cost but also that exit from the market has occurred or is imminent, enabling the aggressor to recoup by setting monopoly prices that injure consumers." *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper, 462 F.3d 690, 695 (7th Cir. 2006)*; see also *Schor v. Abbott Laboratories, 457 F.3d 608, 613 (7th Cir. 2006)* ("[T]he Supreme Court [has] held that low prices **[*8]** are lawful, even if the seller has considerable market power, unless rivals have been driven out of the market and recoupment is either ongoing or imminent.").

In response to ADM's Motion to Dismiss, Plaintiff admits that it "does not seek to allege a traditional predatory pricing claim."

Plaintiff argues that ADM has been able to recoup its losses from below-cost sales of physical ethanol at the Argo Terminal not by raising prices after excluding other competitors, but rather through its gains on short positions in the ethanol futures market. The Seventh Circuit has held that, in the case of certain commodities, "[t]he futures market and the cash market ... are ... so closely related that the distinction between them is of no consequence to antitrust standing analysis." *Sanner, 62 F.3d at 929* (internal quotations omitted). Therefore, the court finds Plaintiff's theory of recoupment is sufficient at this stage, even if it does not follow the traditional predatory pricing scheme.

However, even accounting for Plaintiff's alternative theory of recoupment, the Complaint still does not contend that Plaintiff "has been knocked out of the market or is in imminent danger of leaving," or that other ADM competitors **[*9]** "tried and failed to enter the marketplace" or already "exit[ed] the market." *R.J. Reynolds Tobacco, 462 F.3d at 696*; *VBR Tours, LLC v. National Railroad Passenger Corp., 2015 U.S. Dist. LEXIS 4742, 2015 WL 225328, at *5 (N.D. Ill. Jan. 15, 2015)*. Rather, as indicated above, in paragraph 14 of the Complaint Plaintiff alleges that it and other proposed class members continued to make their sales, just at depressed prices.

The Complaint does contain boilerplate language alleging that ADM's manipulation of prices caused other market participants to face a "barrier to entry." But boilerplate language is not a sufficient allegation of antitrust injury. See, e.g., *VBR Tours, 2015 U.S. Dist. LEXIS 4742, 2015 WL 225328, at *5* ("[T]he complaint states that [defendant]'s ability to underprice its competitors has created an 'insurmountable' barrier to entry, chilling competition, yet [plaintiff] provides no example of a potential competitor who tried and failed to enter the marketplace, nor does it cite to on[e] example of an existing competitor exiting the market. In the absence of any such information, the Court is left with general statements that [defendant] will cause antitrust injury by reducing prices. General allegations of low prices are insufficient to state a claim.").

Plaintiff apparently suggests that a barrier to entry arose because ADM was violating the Commodity Exchange Act ("CEA"), *7 U.S.C. § 1 et seq.*, whereas competitors **[*10]** could not lawfully engage in similar conduct. In fact, Plaintiff's Complaint admittedly relies upon the complaint and other filings in *AOT Holding AG v. Archer Daniels Midland Co.*, case no. 19-CV-2240 (C.D. Ill.), which is a case brought pursuant to the CEA. Again, however, Plaintiff must allege *antitrust* injury, which is an "injury of the type the *antitrust* laws were intended to prevent." *Brunswick Corp., 429 U.S. at 489* (emphasis added); see also *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an anti-trust violation."). ***Antitrust law*** is "designed to protect consumers from producers, not to protect producers from each other." *Ehredt Underground, Inc. v. Commonwealth Edison Co., 90 F.3d 238, 240 (7th Cir. 1996)*. Here, Plaintiff may not rely on alleged violations of the CEA in order to allege antitrust injury sufficient to support its claims under the Clayton and Sherman Antitrust Acts.

Because the Complaint does not adequately allege antitrust injury, it is DISMISSED without prejudice.

B. Monopoly Power

As indicated above, to establish the first element of monopoly or attempted monopoly under *Section 2* of the Sherman Act, a plaintiff must show that a defendant either possesses monopoly power in the relevant market or that there **[*11]** is a dangerous probability of defendant achieving monopoly power.

ADM argues that, even if Plaintiff had alleged an antitrust injury, Plaintiff did not adequately plead that ADM has achieved monopoly power or a dangerous probability of achieving monopoly power.

A plaintiff may allege monopoly power in one of two ways:

> One is through direct evidence of anticompetitive effects. See *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986)* ("the finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis."). The other, more conventional way, is by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in the case.

Toys "R" Us, Inc. v. F.T.C., 221 F.3d 928, 937 (7th Cir. 2000). Plaintiff argues that it has properly alleged monopoly power by either means.

1. *Direct Evidence of Anticompetitive Effects*

Plaintiff maintains that its Complaint alleges direct evidence of anticompetitive effects. Specifically, the Complaint alleges that ADM acquired **[*12]** the power to depress prices at the Argo Terminal by 5 to 15 cents per gallon as compared to prices at other terminals, and decreased the Chicago Ethanol Derivative Prices and other Benchmark Prices that are determined by the daily MOC prices at the Argo Terminal.

However, as previously discussed, in the context of depressed prices "only predatory pricing has the requisite anticompetitive effect." *Atlantic Richfield Co., 495 U.S. at 339*. Because Plaintiff has not adequately alleged predatory pricing, the Complaint does not allege direct evidence of anticompetitive effects.

2. *Share of Relevant Market*

In paragraph 22 of the Complaint, Plaintiff proposes the following market: "the market for First Level Sales of ethanol made by ethanol producers (i) in the Argo market, or (ii) pursuant to First Level Sales Contracts in which the price term is expressly based, in whole or in part, upon a Formula Price."

ADM argues that Plaintiff does not define a plausible relevant market because the Complaint does not account for potential substitutes or interchangeable goods, such as sales based on non-Argo Terminal prices, resales by non-producers of ethanol and other middlemen, and sales of renewable fuels other than ethanol.

ADM is correct **[*13]** that, for purposes of Sherman Antitrust Act claims, a "market is defined by the reasonable interchangeability of the products and the cross-elasticity of demand for those products." *In re Dairy Farmers of America, Inc. Cheese Antitrust Litigation, 767 F.Supp.2d 880, 901 (N.D. Ill. 2011)*, citing *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394-95, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. Therefore, "the products in a market must have unique attributes that allow them to be substituted for one another, but make them difficult to replace with substitute products from outside the market." *In re Dairy Farmers of America, 767 F.Supp.2d at 901*.

However, "[b]ecause market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (7th Cir. 2001)*. District courts only dismiss antitrust claims based on inadequate market definition when "the alleged relevant market clearly does not encompass all interchangeable substitute products or when a plaintiff fail[s] even to attempt a plausible explanation as to why a market should be limited in a particular way." *Ploss v. Kraft Foods Group, Inc., 197 F.Supp.3d 1037, 1070-1071 (N.D. Ill. 2016)*; see also *In re Dairy Farmers of America, 767 F.Supp.2d at 901*.

Here, Plaintiff has plausibly explained the distinctive features of First Level Sales at the Argo Terminal and the related Argo-based pricing formulas incorporated into First Level Sales Contracts. For example, the Complaint alleges in paragraph 34:

> The Argo Terminal is a critical locus for the spot sale of ethanol, **[*14]** for price discovery in the broader U.S. ethanol market, and for transporting ethanol domestically and internationally to meet demand. Accordingly, Argo prices for ethanol influence and act as a price beacon for the prices of ethanol sold at other terminals, as

> well as the prices that First Level Sellers and other private parties negotiate in non-terminal ethanol sales contracts.

Therefore, the court finds that, at this stage, before procedural rules allow for fact-intensive inquiry, Plaintiff has adequately proposed a relevant market for purposes of the Sherman Antitrust Act.

Still, in its Complaint Plaintiff must also allege ADM's *share* of the relevant market. See, e.g., *Walter Kidde Portable Equipment, Inc. v. Universal Security Instruments, Inc., 669 F.Supp.2d 895, 902 (N.D. Ill. 2009)* (holding that allegation defendant controlled sixty-five percent of market is sufficient at pleading stage to establish market share); *American Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)* (describing defendant's control of two-thirds of the market as a "substantial monopoly"); *International Equipment Trading, Ltd. v. Illumina, Inc., 2018 U.S. Dist. LEXIS 136718, 2018 WL 3861575, *7 (N.D. Ill. Aug. 14, 2018)* (collecting cases).

In the Complaint, Plaintiff alleges that, after November 1, 2017, ADM captured 90 to 100 percent of sales during the half hour MOC window at the Argo Terminal. However, the proposed market is not limited to the MOC. The Complaint does not allege ADM's share of the relevant **[*15]** market, as defined in paragraph 22 of the Complaint.

Because the Complaint does not adequately allege either direct evidence of anticompetitive effects or ADM's share of the relevant market, it is DISMISSED without prejudice for these reasons as well.

C. Willful Acquisition of Power

The second element of a monopolization claim under *Section 2* of the Sherman Antitrust Act requires allegation of a defendant's "willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell, 384 U.S. at 570-71*. This element is also, at times, referred to simply as "anticompetitive conduct." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. ADM argues that, as with antitrust injury and direct evidence of anticompetitive effects, Plaintiff failed to allege anticompetitive conduct because Plaintiff alleges lower - not higher - prices.

With regard to the element of willful acquisition of power,

> [t]he precise boundaries of anticompetitive conduct are sometimes difficult to define, but as the Supreme Court put it, "[i]f a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory [or exclusionary]." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985)* **[*16]** (citation and internal quotation marks omitted).

Ploss, 197 F.Supp.2d at 1073.

Plaintiff's Complaint contains numerous allegations of uneconomic and financially irrational behavior by ADM, including shipping ethanol to Argo when prices at the Argo Terminal were already lower than those at other terminals; selling ethanol at the Argo Terminal for less than ADM's variable cost to produce or obtain the ethanol; selling during the MOC even when ADM did not have physical ethanol to deliver to satisfy the sales contracts; and purchasing ethanol at the Argo Terminal outside of the MOC for higher prices than it sold ethanol during the MOC.

Here, the allegations are of "conduct that, were it not intended to obtain or sustain monopoly power, would be uneconomic and irrational." *Ploss, 197 F.Supp.3d at 1073*, quoting *Shak v. JPMorgan Chase & Co., 156 F.Supp.3d 462, 487 (S.D.N.Y. 2016)*.

Therefore, the court finds that Plaintiff has adequately pled facts sufficient to allege that ADM pursued the willful acquisition of power.

IT IS THEREFORE ORDERED:

1) The Motion to Dismiss (#14) is GRANTED.

2) The Complaint (#1) is DISMISSED without prejudice. Plaintiff has 21 days to file an amended complaint, if it believes it can plausibly allege both antitrust injury and either direct evidence of anticompetitive effects or ADM's share **[*17]** of the relevant market. If it does not do so, the Complaint will be dismissed with prejudice.

3) This matter is referred to the Magistrate Judge for further proceedings consistent with this order.

ENTERED this 9th day of August, 2021.

/s/ Colin Stirling Bruce

COLIN S. BRUCE

U.S. DISTRICT JUDGE

Pluspass, Inc. v. Verra Mobility Corp.

United States District Court for the Central District of California

August 9, 2021, Decided; August 9, 2021, Filed

2:20-cv-10078-SB (SKx)

Reporter
2021 U.S. Dist. LEXIS 201843 *; 2021 WL 4775573

PlusPass, Inc. v. Verra Mobility Corp., et al.

Core Terms

alleges, toll, electronic, renter, laches, anticompetitive, geographic, relevant market, merger, judicial notice, antitrust, contracts, regional, argues, rental car, motion to dismiss, toll road, compete, tags, judicial estoppel, anti trust law, monopoly power, Sherman Act, competitors, post-merger, Reply, license plate, acquisition, third-party, technology

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss, a court generally must accept as true the factual allegations in the complaint.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] **Motions to Dismiss, Failure to State Claim**

Under Fed. R. Civ. P. 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility if the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN3[] **Motions to Dismiss, Failure to State Claim**

In resolving a Fed. R. Civ. P. 12(b)(6), a court must accept all well-pleaded factual allegations as true, but threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. That is, a pleading must set forth allegations that have factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Courts are not bound to accept as true a legal conclusion couched as a factual allegation. Assuming the veracity of well-pleaded factual allegations, a court next must determine whether they plausibly give rise to an entitlement to relief. There is no plausibility where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Public Records

HN4[] **Motions to Dismiss, Failure to State Claim**

A court generally may not consider material beyond the pleadings in ruling on a motion to dismiss. One exception is that a court may take judicial notice of undisputed facts contained in public records. See Fed. R. Evid. 201(b). Courts may also take judicial notice of documents incorporated by reference into the complaint.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN5[] **Motions to Dismiss, Failure to State Claim**

A court may take judicial notice of court records—including judicial rulings—but not of facts in those records that are subject to reasonable dispute. Just because a document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth. On a Fed. R. Civ. P. 12(b)(6) motion to dismiss, when a court takes judicial notice of another court's opinion, it may do so not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN6[] **Relevant Market, Geographic Market Definition**

A threshold step in any antitrust case is to accurately define the relevant market, which refers to the area of effective competition. The relevant market encompasses notions of geography as well as product use, quality, and description. ***Antitrust law*** requires allegation of both a product market and a geographic market.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN7[] **Relevant Market, Product Market Definition**

Market definition for an antitrust case is said to be a fact question. However, a court may dismiss a complaint when the complaint's relevant market definition is facially unsustainable. A definition is facially unsustainable where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN8[] **Relevant Market, Geographic Market Definition**

The relevant geographic market for an antitrust case includes the area of effective competition, or the area where buyers can turn for alternative sources of supply. A geographic market must correspond to the commercial realities' of the industry and be economically significant.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN9[] **Relevant Market, Product Market Definition**

Where a defendant competes does not define the market for an antitrust case. Indeed, the existence of a national market does not automatically preclude the existence of regional submarkets.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN10[] **Estoppel, Judicial Estoppel**

Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. When considering whether to apply the doctrine of judicial estoppel, the U.S. Supreme Court has stated that three factors should inform the court's analysis: (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party was successful in advancing its first position such that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled; and (3) whether asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Defenses

HN11[] **Clayton Act, Claims**

Illegal acquisition under Section 7 of the Clayton Act prohibits business acquisitions whose effect may be substantially to lessen competition, or tend to create a monopoly in a relevant market. 15 U.S.C.S. § 18. Under

Section 7, a plaintiff must first establish a prima facie case that a merger is anticompetitive. To establish a prima facie case under Section 7 of the Clayton Act, a plaintiff must first define the relevant market, and then establish that the proposed merger will create an appreciable danger of anticompetitive consequences.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN12[] **Standing, Requirements**

Antitrust injury is defined not merely as injury caused by an antitrust violation, but more restrictively as injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. In other words, antitrust laws are designed to protect competition, not competitors. An antitrust injury contains four elements: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. The U.S. Court of Appeals for the Ninth Circuit also imposes a fifth requirement, that the injured party be a participant in the same market as the alleged malefactors.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Environmental Law > Administrative Proceedings & Litigation > Defenses

HN13[] **Affirmative Defenses, Laches**

Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

HN14[] **Affirmative Defenses, Laches**

Laches is an affirmative defense, but a court may find laches at the pleading stage where it is clear on the face of the complaint that the plaintiff can prove no set of facts to avoid the defense.

Antitrust & Trade Law > Clayton Act > Claims

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Clayton Act > Scope

HN15[] **Clayton Act, Claims**

Courts have not created a presumption of laches because a merger has been consummated and typically only find a presumption of laches after the expiration of the statute of limitations. The limitations period for a Section 7 of the Clayton Act, 15 U.S.C.S. § 18, claim is four years.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN16[] **Sherman Act, Claims**

To state a claim under Section 1 of the Sherman Act, a plaintiff must allege (1) a contract, combination, or conspiracy between two or more entities; (2) in unreasonable restraint of trade; that (3) affects interstate commerce. 15 U.S.C.S. § 1. An exclusive dealing arrangement is an agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time. There is no set formula for evaluating the legality of an exclusive dealing agreement, but ***antitrust law*** generally requires a showing of significant market power by the defendant, substantial foreclosure, contracts of sufficient duration to prevent meaningful competition by rivals, and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects. Exclusive dealing will generally only be unlawful where the market is highly concentrated, the defendant possesses significant market power, and there is some element of coercion present.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN17[] **Actual Monopolization, Claims**

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. The second element of a § 2 claim is the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN18[] **Motions to Dismiss, Failure to State Claim**

It is axiomatic that on a motion to dismiss for failure to state a claim, the court must accept well-pleaded allegations as true.

Counsel: **[*1]** For PlusPass, Inc., Plaintiff: Danielle J. Healey, PRO HAC VICE, Fish and Richardson PC, Houston, TX; Joanna M Fuller, Fish and Richardson PC, Los Angeles, CA.

For Verra Mobility Corp., ATS Processing Services, Inc., Erroneously Sued As ATS Processing Services LLC, Defendants: Chelsea Dal Corso, LEAD ATTORNEY, DLA Piper LLP, Los Angeles, CA; John S. Gibson, LEAD ATTORNEY, DLA Piper LLP US, Los Angeles, CA; Julie Ann Gryce, LEAD ATTORNEY, DLA Piper US LLP, San Diego, CA; John R. Robertson, PRO HAC VICE, DLA Piper LLP US, Chicago, IL.

For Platinum Equity LLC, Defendant: Rachel Susan Brass, LEAD ATTORNEY, Gibson Dunn and Crutcher LLP, San Francisco, CA.

For The Gores Group LLC, Defendant: David Ramraj Singh, Eric A Rivas, Weil Gotshal and Manges LLP, Redwood Shores, CA.

Judges: STANLEY BLUMENFELD, JR., United States District Judge.

Opinion by: STANLEY BLUMENFELD, JR.

Opinion

CIVIL MINUTES - GENERAL

Proceedings: ORDER DENYING DEFENDANT'S MOTION TO DISMISS [DKT. NO. 61]

Plaintiff PlusPass, Inc. and Defendant Verra Mobility Corp. are each in the business of processing electronic toll payments for rental cars. In 2018, Defendant acquired the two dominant market competitors, consolidating them into an entity that controlled 95.5% **[*2]** of the rental car market post-merger. Plaintiff alleges that Defendant orchestrated the merger with the express goal of excluding Plaintiff and other competitors from the market using anticompetitive means. Plaintiff brings several claims under the antitrust laws, and Defendant has filed this motion to dismiss. (Mot., Dkt. No. 61.) Plaintiff has filed an opposition, and Defendant has filed a reply. (Opp., Dkt. No. 67; Reply, Dkt. No. 71.) For the reasons below, the Court **DENIES** the motion.

I. FACTUAL BACKGROUND

HN1[] On a motion to dismiss, a court generally must accept as true the factual allegations in the complaint. The factual background below is therefore taken from the operative pleading in this case.

A. History and Market Background

Numerous states across the country have large toll road networks requiring electronic payment of tolls; however, the United States does not have a single, interoperable national payment collection system. (Second Amended Complaint (SAC) ¶ 12, Dkt. No. 56.) For example, California toll road payments are administered by a single agency, but payments on Texas toll road networks are administered by several different systems that are interchangeable with one another. **[*3]** (*Id.* ¶ 13.) By contrast, some states group together using an interoperable regional system that enables processing in any of the participating locations. (*Id.*)

When a vehicle uses these toll roads, the electronic systems will bill the account holder of the vehicle—if the vehicle is not connected to an account, the registered owner is billed. (*Id.* ¶ 14.) This system poses a unique obstacle for rent-a-car companies (RACs), which own and register large numbers of vehicles in the RAC's name. (*Id.*) When the renter of a rental car incurs an electronic toll, the RAC is billed instead of the renter. (*Id.*) However, there is typically a "lag time" between the time the electronic toll is processed and the time the renter returns the vehicle. (*Id.*) To solve this problem, RACs turn to third-party administrators to provide services for payment, management, and collection of the tolls from the renters. (*Id.*) These third-party administrators contract with local or state regional toll authorities and register the RAC's fleet, paying for any tolls incurred by those vehicles. (*Id.* ¶ 15.) The third-party administrators use software integrated with the RACs to identify the toll and the renter and provide **[*4]** the RAC the billing information or bill the renter directly. (*Id.*) Third-party administrators also use certain devices such as radio-frequency identification or toll tags to track their fleet vehicles. (*Id.*)

Defendant and Plaintiff are both third-party administrators for electronic toll payments to RACs. (*Id.* ¶ 16.) For years, the two dominant market competitors were Highway Toll Administration, LLC (HTA) and American Traffic Solutions, Inc. (ATS). (*Id.* ¶ 2.) Starting in 2002 and 2004 respectively, HTA and ATS began offering their services and attracted RACs such as Enterprise, Alamo, National, and Hertz. (*Id.* ¶¶ 17-18.) HTA and ATS charged high prices for their services and billed renters the highest posted rate for tolls, regardless of the rate actually paid. (*Id.* ¶ 20.) These charges exceeded "any justifiable relationship to just profits" and resulted in a "kick-back" scheme to the RACs. (*Id.*) Ultimately, these high charges garnered significant negative press, complaints, and consumer lawsuits from renters. (*Id.* ¶ 21.) As a result, prices dropped for a short period due to competition between ATS and HTA. (*Id.*)

B. <u>Plaintiff Attempts to Enter the Market</u>

In 2013, Plaintiff saw an opportunity **[*5]** to enter the market and to challenge the structure of electronic toll payment administration by offering an inexpensive "direct-to-consumer" option—an app known as "PToll." (*Id.* ¶¶ 2, 22.) PToll allowed renters to use their smartphones to read the rental car license plate, which would then "move" the rental car to the Plaintiff's fleet for electronic toll payment for the duration of the rental. (*Id.* ¶ 23.) Plaintiff would pay the toll authority for any electronic tolls incurred and then charge the fees to the renter directly through the app. (*Id.*) This streamlined process alleviated administrative burdens on RACs and reduced costs for consumers. (*Id.*) Specifically, Plaintiff alleges that its patented app has two main advantages over the "legacy" systems created and offered by HTA and ATS. (*Id.* ¶¶ 24-25.) First, the app is more efficient and less costly for consumers and RACs, allowing direct billing and at a lower rate (15% above the actual toll fee) than those offered by HTA and ATS. (*Id.* ¶¶ 24, 26.) Second, the app's use of license plate reading technology coupled with machine learning obviates the need for RAC's employees to place and maintain toll tags on their vehicles by hand. **[*6]** (*Id.* ¶ 24.)

Plaintiff's app was first introduced in early 2012 and became publicly available in January 2013. (*Id.* ¶ 27.) Plaintiff saw initial success, starting in Texas and eventually gaining authorization from nine states including California, Colorado, Florida, Georgia, Illinois, Massachusetts, North Carolina, Texas, and Washington. (*Id.* ¶ 28.) Plaintiff expected continued growth in part due to its well-established leadership team, use of technology, and sufficient resources. (*Id.* ¶ 29.)

C. <u>Defendant Obtains HTA and ATS</u>

Plaintiff alleges that Defendant obtained monopoly power when it acquired HTA and ATS. (*Id.* ¶¶ 30-31.) To accomplish this merger, Defendant utilized an equity firm, Platinum Equity LLC, to acquire both HTA and ATS, which were then rebranded as the combined entity known as Verra Mobility LLC. (*Id.* ¶ 31.) Then, Platinum Equity LLC and another equity firm, The Gores Group, "raised hundreds of millions of dollars in capital and merged Verra Mobility LLC with a Special Purpose Acquisition Company ("SPAC"), named Gores Holding II to form [Defendant] - a publicly-traded company." (*Id.*) After this consolidation, Defendant now administers electronic toll payments for 95.5% **[*7]** of rental cars in the market. (*Id.* ¶ 32.)

D. <u>Defendant's Alleged Anticompetitive Activities</u>

Plaintiff alleges that, after obtaining a dominant market share, Defendant has wielded its monopoly power to thwart Plaintiff's entry into the market. (*Id.* ¶¶ 36-51.) Specifically, Defendant was able to acquire and maintain long-term contracts for 95% of rental cars in the market. (*Id.* ¶ 37.) These contracts—some lasting until 2024—were designed to foreclose rivals from entering the market by depriving them of the ability to gain enough customers to achieve economies of scale. (*Id.*) These contracts were also exclusive: the RACs using Defendant's services were precluded from using any other service or even testing other producer's services to evaluate it for potential inclusion in their business in the future. (*Id.* ¶ 38.) And RACs abided by these exclusivity provisions. (*Id.* ¶ 39.) Ultimately, the merger left RACs with no other competitive options. (*Id.* ¶ 40.)

As a practical matter, Defendant's activities have rendered the direct-to-consumer model a nonviable alternative. (*Id.* ¶ 41.) First, as noted above, the exclusive nature of Defendant's contracts with the RACs prevents them from using or promoting **[*8]** Plaintiff's app. (*Id.*) The only two alternatives the RACs offer are (1) using cash or (2) providing their own toll tags. (*Id.*) These are not true alternatives, however, as most toll roads do not accept cash payment, and it is impracticable for most renters (tourists) to obtain a toll tag. (*Id.*) Finally, simply "avoiding toll roads" is impracticable as in many places toll roads are the only available direct route. (*Id.*)

In addition to the exclusionary nature of Defendant's contracts, Plaintiff alleges that Defendant has engaged in other forms of anticompetitive subterfuge. First, Plaintiff alleges that Defendant has fraudulently registered its fleet vehicles with false license plates to prevent a consumer from utilizing Plaintiff's license-plate reading app. (*Id.* ¶¶ 44-45.) Second, Plaintiff alleges that Defendant has instructed its employees to obscure toll tag numbers and place deceptive stickers in their place. (*Id.* ¶ 46.) Third, Plaintiff alleges that Defendant has manipulated electronic tolling systems by unnecessarily updating its fleet registration information, which allows Defendant to "re-register" a vehicle, undermining Plaintiff's technology. (*Id.* ¶ 47.) Finally, Plaintiff **[*9]** alleges that Defendant has created a "copycat app" but has deliberately disabled it to limit renter choice. (*Id.* ¶ 49.) In sum, Plaintiff alleges that Defendant's acts are without justification and were instead designed solely to exclude Plaintiff and similar competitors from the market. (*Id.* ¶¶ 48, 50-51.)

II. LEGAL STANDARDS

A. Rule 12(b)(6)

HN2[] Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

HN3[] In resolving a Rule 12(b)(6), a court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678*. That is, a pleading must set forth allegations that have "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Courts "'are not bound to accept as true a legal conclusion couched as a factual allegation.'" **[*10]** *Id.* (quoting *Twombly, 550 U.S. at 555*). Assuming the veracity of well-pleaded factual allegations, a court next must "determine whether they plausibly give rise to an entitlement to relief." *Id. at 679*. There is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Id.*

B. Judicial Notice

HN4[] A court generally may not consider material beyond the pleadings in ruling on a motion to dismiss. *Cervantes v. City of San Diego, 5 F.3d 1273, 1274 (9th Cir. 1993)*. One exception is that a court may take judicial notice of undisputed facts contained in public records. *Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006)*; *see* *Fed. R. Evid. 201(b)*. Courts may also take judicial notice of documents incorporated by reference into the complaint. *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)*.

In support of its motion, Defendant asks the Court take judicial notice of 20 separate documents. (RJN, Dkt. No. 61-1.) These documents include filings from previous litigation in Texas (Exhibits 1-11), press releases (Exhibits 12-14), and other printouts from publicly available websites (Exhibits 15-20). Plaintiff opposes Defendant's RJN as to Exhibits 1-3, 5-9, 11, and 12-19, and Defendant has filed a reply. (RJN Opp., Dkt. No. 68; RJN Reply, Dkt. No. 72.) Among other reasons, Plaintiff objects on the ground that Defendant is inappropriately seeking judicial **[*11]** notice of the documents to rely on the truth of the facts contained therein in a premature attempt to raise a judicial estoppel defense. ***HN5***[] A court may take judicial notice of court records—including judicial rulings—but not of facts in those records that are subject to reasonable dispute. *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999 (9th Cir. 2018)* ("Just because [a] document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth."); *see* *Lee, 250 F.3d at 690* ("On a Rule 12(b)(6) motion to dismiss, when a court takes judicial notice of another court's opinion, it may do so not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity."). Accordingly, the Court takes judicial notice of the summary judgment ruling and the adjudicative facts not subject to dispute because of the limited purpose for which they are offered. As to the website printouts from unverified sources that are not incorporated by reference into the SAC, they are being offered for the truth of their content. Accordingly, Defendant's RJN is granted as to Exhibits 1-11 but denied as to Exhibits 12-19.

III. DISCUSSION

Defendant moves to dismiss **[*12]** Plaintiff's SAC in its entirety on two grounds: first, Defendant argues that Plaintiff offers a facially implausible market definition, which is fatal to the SAC; and second, Defendant argues that Plaintiff's claims are barred by the doctrine of judicial estoppel. (Mot. at 12-14.) In addition, Defendant moves to dismiss Plaintiff's individual claims for separate reasons. Defendant argues that Plaintiff's claim for illegal acquisition under *Clayton Act § 7* fails because Plaintiff has failed to plead antitrust injury and that the claim is also barred by laches. (*Id.* at 14-18.) Defendant next contends that Plaintiff's claims for exclusive dealing under *Sherman Act § 1* and illegal monopolization under Sherman Act *§ 2* are deficiently pleaded. (*Id.* at 18-25.) The Court addresses each argument in turn.

A. Market Definition

HN6[] "A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.'" *FTC v. Qualcomm Inc., 969 F.3d 974, 992 (9th Cir. 2020)* (quoting *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285, 201 L. Ed. 2d 678 (2018)*). "The relevant market encompasses notions of geography as well as product use, quality, and description." *Vesta Corp. v. Amdocs Mgmt. Ltd., 129 F. Supp. 3d 1012, 1023 (D. Or. 2015)*; *see* *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 n.4 (9th Cir. 2008)* ("***Antitrust law*** requires allegation of both a product market and a geographic market.").

HN7[] Market definition is said to be a fact question. *In re Se. Milk Antitrust Litig., 739 F.3d 262, 282-83 (6th Cir. 2014)*. However, a court **[*13]** may dismiss a complaint when "the complaint's 'relevant market' definition is facially unsustainable." *Newcal Indus., 513 F.3d at 1045*. A definition is "facially unsustainable" where "the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor." *Vesta Corp., 129 F. Supp. 3d at 1023*. Plaintiff defines the relevant product market as "the market for administration of electronic toll payment collection for rental cars." (SAC ¶ 54.) Defendant does not appear to challenge Plaintiff's product market definition. (Mot. at 12.) Defendant instead attacks Plaintiff's geographic market definition. (*Id.*) The Court thus focuses on the geographic market.

HN8[] The relevant geographic market includes the area of "effective competition," or the area "where buyers can turn for alternative sources of supply." *See Tanaka v. Univ. of S. California, 252 F.3d 1059, 1063 (9th Cir. 2001)*. A geographic market must "'correspond to the commercial realities' of the industry and be economically significant." *Brown Shoe Co. v. United States, 370 U.S. 294, 336, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. Plaintiff alleges that "[t]he relevant geographic market consists of the twenty-two **[*14]** states, the District of Columbia, and Puerto Rico that have electronic tolls for roads, bridges, or tunnels, or the regional submarkets therein of interoperable electronic toll payment systems." (SAC ¶ 57.) These regional submarkets include states, or groups of states that have agreements with agencies to handle payments using distinct systems such as "EZPass," "TxTag," or "FasTrak." (*Id.* ¶¶ 58a-g.)

Defendant argues that the geographic market definition is facially implausible because the market in which it operates and the location where the RACs can "turn for alternative supplies" points to a national market. (Mot. at 12-13.) Specifically, it argues that because HTA and ATS competed at a national level, the mere fact that Plaintiff was unable to compete at that level does not justify a segmented sub-market definition. (*Id.*) Defendant's argument misses the mark. *HN9*[] "Where [a defendant] competes does not define the market." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991)*. Indeed, the existence of a national market does not automatically preclude the existence of regional submarkets. *See* *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988)* (rejecting the choice to adopt a national market over a local market).

While Defendant may be successful enough to operate at a national level, Plaintiff's **[*15]** SAC offers sufficient detail to justify its more focused geographic definition. First, from the standpoint of the buyer, there is no true national market. Because there is no universal electronic toll collection system in the United States, toll authorities tend to utilize their own systems at the state or regional level. (SAC ¶ 58.) Second, as a practical matter, Plaintiff alleges that the market is appropriately defined because the RACs' customers tend to drive within a certain region. (*Id.* ¶ 59.) To support a localized market based on similar economic concerns, Plaintiff cites several cases finding similar allegations to be sufficient. (Opp. at 6.) For instance, in *Sidibe v. Health*, the plaintiffs alleged that the defendant was illegally "tying" geographic markets it defined based on zip code. *667 Fed. App'x 641, 642 (9th Cir. 2016)*. In a memorandum disposition, the Ninth Circuit reversed the district court's grant of summary judgment, finding that the plaintiff's geographic market definition was not inherently implausible. *Id. at 643*. Specifically, the court found sufficient allegations that customers within those zip codes were either unwilling or unable to obtain services outside of their zip code. *Id.* In reply, Defendant attempts **[*16]** to distinguish Plaintiff's cited cases on their facts, suggesting that because those cases involved inherently localized concerns such as hospitals and airports, a regional market was more appropriate. (Reply at 3.) The factual distinction is one without legal significance here and contradicts Plaintiff's allegation that renters' toll usage is tied closely to the region in which they rent.

In short, the Court cannot say based on the allegations in the SAC that Plaintiff's geographic market definition is inherently implausible. Accordingly, Defendant's motion to dismiss the SAC on this basis is denied.

B. Judicial Estoppel

Defendant contends that Plaintiff is judicially estopped from arguing that Defendant's contracts with the RACs prevent customers from using Plaintiff's app because Plaintiff previously sought and obtained a ruling that Defendant's agreements were non-exclusive.

HN10[] "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001)* (citations omitted). When considering whether to apply the doctrine of judicial estoppel, the Supreme Court has **[*17]** stated that three factors should inform the court's analysis: (1) whether the party's later position is "clearly inconsistent" with its earlier position; (2) whether the party was successful in advancing its first position such that "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or second court was misled'"; and (3) whether asserting the inconsistent position would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)* (citations omitted).

Defendant argues that all three factors are met. (Mot. at 14.) First, Defendant argues that Plaintiff (under its previous name, BancPass, Inc.) previously sued HTA in a district court in Texas (Texas Litigation) and inconsistently alleged that HTA's contracts with RACs did not prevent renters from using Plaintiff's app. (Mot. at 4, 14 (citing RJN, Ex. 10).) Plaintiff argues that it did not take an inconsistent position in that case because the Texas Litigation involved materially different agreements—i.e., the RACs' "downstream" agreements with its renters rather than the "upstream" post-merger agreements at issue here—and materially **[*18]** different issues. (Opp. at 23-24.) Reading the SAC in the light most favorable to Plaintiff, the Court cannot conclude at this point that Plaintiff is taking a "clearly inconsistent" position (and thus cannot conclude, under the second factor, that Plaintiff succeeded in advancing a position inconsistent with the one now presented). Finally, Defendant conclusorily asserts that allowing this suit would cause it prejudice. (*Id.*) Defendant's motion to dismiss the SAC on the ground of judicial estoppel is denied without prejudice to reconsideration at an appropriate stage of the litigation.

C. Clayton Act § 7

HN11[] Plaintiff's first cause of action is for illegal acquisition under *Section 7* of the Clayton Act, which prohibits business acquisitions whose effect "may be substantially to lessen competition, or tend to create a monopoly" in a relevant market. *15 U.S.C. § 18*. Under *Section 7*, Plaintiff "must first establish a prima facie case that a merger is anticompetitive." *Saint Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 783 (9th Cir. 2015)*. "To establish a prima facie case under *Section 7* of the Clayton Act, a plaintiff must first define the relevant market, and then establish that the proposed merger will create an appreciable danger of anticompetitive consequences." *California v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1118 (N.D. Cal. 2001)* (citing *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*).

Defendant challenges Plaintiff's *Section 7* claim on two grounds. **[*19]** First, that Plaintiff has failed to adequately allege antitrust harm flowing from the merger and thus lacks standing. (Mot. at 14-16.) Second, that Plaintiff's claim is barred by laches. (*Id.* at 16-18.)

1. Antitrust Injury

HN12[] "Antitrust injury is defined not merely as injury caused by an antitrust violation, but more restrictively as 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Glen Holly Entm't, Inc. v. Tektronix Inc., 343 F.3d 1000, 1007-08 (9th Cir. 2003)* (quoting *Brunswick Corp. v. Pueblo Bowl—O-Mat, Inc., 429 U.S. 477, 489 (1977)*). In other words, antitrust laws are designed to protect competition, not competitors. *Brunswick, 429 U.S. at 488*. An antitrust injury contains four elements: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999)*. The Ninth Circuit also imposes a fifth requirement, that "the injured party be a participant in the same market as the alleged malefactors." *Glen Holly Entm't, 343 F.3d at 1008* (internal quotations and citation omitted).

Defendant contends that no antitrust injury exists because the merger and corresponding increase in concentration did not fundamentally change Plaintiff's ability (or inability) to compete in the market. (Mot. at **[*20]** 15.) Stated differently, Defendant argues that Plaintiff is in the same position it has always been because it has an inferior business model. (*Id.*) Defendant's arguments largely ignore the post-merger allegations in the SAC. Here, Plaintiff alleges several forms of anticompetitive harm post-merger. For instance, Plaintiff alleges that by capturing 95.5% of the RACs in the market and binding them to exclusive dealing contracts, Defendant has prevented the RACs from negotiating better terms or seeking alternative options. (SAC ¶ 40.) But Plaintiff's allegations in the SAC do not rest entirely on Defendant's post-merger market power. Rather, Plaintiff also alleges that Defendant engages in several forms of anticompetitive activity, post-merger, that hampers Plaintiff's ability to compete. Defendant's activity such as altering toll tags, using false license plates, and manipulating the registration system has limited RAC choice, and ultimately limits consumer choice because the RACs may not use, test, or promote any other alternative. (*Id.* ¶¶ 41, 44-48.) Plaintiff alleges that but for these artificial barriers, it would grow in scale and compete at a national level. (*Id.* ¶¶ 59-60.) The **[*21]** allegations that Defendant's actions will lessen competition set forth in the SAC are sufficient to plead an antitrust injury.

2. Laches

As a remedy for its *Section 7* claim, Plaintiff is seeking divestiture. (*Id.* ¶ 73.) Defendant asserts that because Plaintiff has waited over three years to complain about the merger, its claim is barred by laches. ***HN13***[] "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States, 365 U.S. 265, 282, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961)*. Plaintiff's primary response is that laches cannot be decided at the pleading stage. (Opp. at 21-22.)

HN14[] Laches is an affirmative defense, but a court may find laches at the pleading stage "where it is clear [on the face of the complaint] that the plaintiff can prove no set of facts to avoid the [defense]." *Planet Drum Found. v. Hart, No. 17-cv-02676-JCS, 2017 U.S. Dist. LEXIS 156674, 2017 WL 4236932, at *7 (N.D. Cal. Sept. 24, 2017)* (citation omitted). Defendant has not shown that such a finding is appropriate at this point in the case here. Although Plaintiff's delay raises serious concerns about the propriety of divestiture, *see* *Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1234-36 (8th Cir. 2010)* (explaining the drastic nature and hardship of unwinding a merger), the Court cannot say on this undeveloped record that the remedy sought is barred by the doctrine of laches. ***HN15***[] Courts have not created **[*22]** a presumption of laches because a merger has been consummated and typically only find a presumption of laches after the expiration of the statute of limitations. *See* *Internet Specialties W., Inc. v. Milon-DiGiorgio Enterprises, Inc., 559 F.3d 985, 990 (9th Cir. 2009)* (suit filed within the applicable statute-of-limitations period creates a presumption against laches). The limitations period for a *Section 7* claim is four years. *See* *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp. and Electronics Corp., 518 F.2d 913, 928 (9th Cir. 1975)*, *disapproved of on other grounds by* *California v. Am. Stores Co., 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)*. Because this suit was filed within the limitations period, no presumption of laches applies. Accordingly, Defendant's motion to dismiss based on laches is denied without prejudice.

D. Sherman Act § 1

Plaintiff's third cause of action is for exclusive dealing in violation of *Section 1* of the Sherman Act. ***HN16***[] "To state a claim under *Section 1*, a plaintiff must allege (1) a contract, combination, or conspiracy between two or more entities; (2) in unreasonable restraint of trade; that (3) affects interstate commerce." *Pro Search Plus, LLC v. VFM Leonardo, Inc., No. SACV 12-2102-JLS ANX, 2013 U.S. Dist. LEXIS 169856, 2013 WL 6229141, at *5 (C.D. Cal. Dec. 2, 2013)* (citing *15 U.S.C. § 1*; *Am. Ad Mgmt., 92 F.3d at 788*). "An exclusive dealing arrangement is an agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time." *Id.* (quoting *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012)*).

"There is no set formula for evaluating the legality of an exclusive dealing agreement, but modern ***antitrust law*** generally requires a showing of significant market **[*23]** power by the defendant, substantial foreclosure, contracts of sufficient duration to prevent meaningful competition by rivals, and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects." *ZF Meritor, 696 F.3d at 271* (citations omitted). "Exclusive dealing will generally only be unlawful where the market is highly concentrated, the defendant possesses significant market power, and there is some element of coercion present." *Id. at 284* (citations omitted).

Analyzing the factors set forth in *ZF Meritor*, Plaintiff has adequately stated a claim for *de facto* exclusive dealing. First, Plaintiff alleges—and Defendant does not dispute that it possesses—monopoly power in the relevant market. (*See, e.g.*, SAC ¶ 88; Mot. at 18 (arguing mere possession of monopoly power not illegal).) Second, Plaintiff alleges that Defendant has exclusive contracts with virtually every RAC, controlling 95.5% of the market. (SAC ¶ 89.) Third, Plaintiff alleges these agreements are long term in nature, lasting a minimum of 5 to 7 years. (*Id.*) Fourth, Plaintiff alleges that these agreements eliminate competition, stifle innovation, reduce output and serve no procompetitive purpose. (*Id.* ¶¶ 90-91.) Finally, Plaintiff **[*24]** alleges that the RACs are left with no other viable, cost-effective alternatives and are thus forced to deal with Defendant against their self-interest. (*Id.* ¶¶ 42-43.) Accordingly, Defendant's motion to dismiss Plaintiff's exclusive dealing claim is denied.

E. Sherman Act § 2

Plaintiff's second cause of action is for illegal monopolization in violation of *Section 2* of the Sherman Act. ***HN17***[] "The offense of monopoly under *§ 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*). As noted above, Defendant does not dispute Plaintiff's allegations of monopoly power in the relevant market.

"The second element of a *§ 2* claim is the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak, 504 U.S. at 482-83* (internal quotations and citation omitted). Plaintiff alleges that Defendant acquired and maintains its monopoly by "consolidating long-term exclusive dealing agreements with rental car companies, enforcing those agreements, and engaging in anticompetitive conduct to undermine **[*25]** [Plaintiff's] technology and ability to compete." (SAC ¶ 78.) These allegations of exclusive dealing under *Section 1*, which the Court has already found adequately pleaded, may also support a claim under *Section 2*. *See, e.g., Pro Search Plus, LLC, 2013 U.S. Dist. LEXIS 169856, 2013 WL 6229141, at *9* ("For the reasons stated above, the Court finds that [Plaintiff] has adequately alleged a claim for *de facto* exclusive dealing, and therefore has alleged anticompetitive conduct."). Moreover, Plaintiff alleges that Defendant engages in other anticompetitive behavior to maintain its monopoly, including preventing RACs from "testing" or using "pilot programs" (SAC ¶ 38), interfering with Plaintiff's technology (*id.* ¶¶ 41, 45), and manually altering vehicle toll tags and license plates to eliminate competition (*id.* ¶¶ 45-48). ***HN18***[] While Defendant repeatedly disputes the veracity of these allegations, or offers its own explanation, it is axiomatic that the Court must accept well-pleaded allegations as true. *Iqbal, 556 U.S. at 678*. Accordingly, Defendant's motion to dismiss Plaintiff's illegal monopolization claim is denied.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion is **DENIED**. Defendant is to file an answer by August 20, 2021.

End of Document

Animal Sci. Prods. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.)

United States Court of Appeals for the Second Circuit

March 17, 2021, Argued; August 10, 2021, Decided

No. 13-4791-cv

Reporter
8 F.4th 136 *; 2021 U.S. App. LEXIS 23641 **

IN RE: VITAMIN C ANTITRUST LITIGATION; ANIMAL SCIENCE PRODUCTS, INC., THE RANIS COMPANY, INC., Plaintiffs-Appellees, v. HEBEI WELCOME PHARMACEUTICAL CO. LTD., NORTH CHINA PHARMACEUTICAL GROUP CORPORATION, Defendants-Appellants.

Subsequent History: US Supreme Court certiorari denied by *Animal Sci. Prods. v. Hebei Welcome Co., 2022 U.S. LEXIS 4295 (U.S., Oct. 3, 2022)*

Prior History: [1]** Appeal from the United States District Court for the Eastern District of New York. No. 1:06-md-1738 — Brian M. Cogan, Judge.

Animal Science Products, Inc. and The Ranis Company, Inc. (the "plaintiffs"), American purchasers of bulk Vitamin C, brought this class action alleging that four Chinese exporters of Vitamin C conspired to inflate prices and restrict supply in violation of the *Sherman Act, 15 U.S.C. § 1*, and the Clayton Act, *15 U.S.C. §§ 4*, *16*. The United States District Court for the Eastern District of New York (Trager, J.) denied the defendants' motion to dismiss on the basis of the act of state doctrine, foreign sovereign compulsion, and international comity. The district court (Cogan, J.) subsequently denied the defendants' motion for summary judgment on the same grounds, and the case proceeded to trial. All defendants settled other than Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei") and its parent company North China Pharmaceutical Group Corp ("NCPG"). Following a jury verdict of liability, the district court entered a trebled damages award of $147,831,471.03, plus interest, and permanently enjoined Hebei and NCPG from future anti-competitive behavior. The district court then denied Hebei and NCPG's renewed **[**2]** motion for judgment as a matter of law. In this case's first trip to our Court, we reversed. We held that the district court was bound to defer to the facially reasonable explanation of Chinese law submitted by the Ministry of Commerce of the People's Republic of China (the "Ministry"). According to the Ministry's explanation, Chinese law required the defendants to undertake the anticompetitive conduct at issue, and—accepting this explanation as reasonable under the circumstances—we concluded that such a "true conflict" between China's regulatory scheme and U.S. antitrust laws, in combination with other international comity factors, mandated dismissal of the plaintiffs' suit. The Supreme Court reversed, holding that we afforded too much deference to the Ministry's submissions, and remanded for us to carefully consider but not conclusively defer to the Ministry's views pursuant to *Rule 44.1 of the Federal Rules of Civil Procedure*. Applying the Supreme Court's instructions, we conclude once again that this case should be dismissed on international comity grounds. Giving careful consideration but not conclusive deference to the Ministry's views, we read the relevant Chinese regulations—as illuminated by contemporaneous administrative **[**3]** documents and industry reports—to have required the defendants to collude on Vitamin C export prices and quantities as part and parcel of China's export regime for Vitamin C. Balancing this true conflict between U.S. and Chinese law together with other established principles of international comity, we decline to construe U.S. ***antitrust law*** to reach the defendants' conduct. Accordingly, we REVERSE and REMAND with instructions to dismiss the case. Judge WESLEY dissents in a separate opinion.

Animal Sci. Prods. v. Hebei Welcome Pharm. Co. Ltd., 2005 U.S. Dist. LEXIS 38214 (E.D.N.Y., Dec. 22, 2005)

Core Terms

export, Chamber, Vitamin, comity, prices, coordination, Notice, anti trust law, minimum price, true conflict, district court, regulations, defendants', principles, Customs, commerce, foreign law, price-fixing, compulsion, violations, charter, amicus brief, manufacturers, volume, anticompetitive conduct, market price, Sherman Act, deference, controls, mandated

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Choice of Law

Civil Procedure > Appeals > Standards of Review > De Novo Review

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > Discretion Regarding Procedures

Evidence > Judicial Notice > Legislative Facts > Laws of Foreign States

Governments > Legislation > Interpretation

HN1[] **Conflict of Law, Choice of Law**

An appellate court reviews a district court's denial of a *Fed. R. Civ. P. 50* motion de novo, including its determination of foreign law under *Fed. R. Civ. P. 44.1*. As to whether a district court erroneously declined to dismiss an action on international comity grounds, an appellate court reviews relevant questions of statutory interpretation de novo.

Governments > Courts > Judicial Comity

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > Discretion Regarding Procedures

International Law > ... > Comity Doctrine > Areas of Law > Family Law

HN2[] **Courts, Judicial Comity**

Comity is both a principle guiding relations between foreign governments and a legal doctrine by which U.S. courts recognize an individual's acts under foreign law. It is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws. As a general matter, international comity takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law. To determine whether international comity principles require dismissal of a lawsuit, a court applies a multi-factor balancing test as set forth in Timberlane Lumber Company and revised in Mannington Mills.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Choice of Law

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > Discretion Regarding Procedures

Governments > Courts > Judicial Comity

HN3[] **Conflict of Law, Choice of Law**

To warrant dismissal on the basis of international comity, the two countries' legal demands must be irreconcilable. In other words, there must be a true conflict between U.S. law and that of the foreign nation to warrant dismissal of a claim pursuant to international comity.

International Law > Authority to Regulate > Anticompetitive Activities

HN4[] **Authority to Regulate, Anticompetitive Activities**

A defendant invoking foreign sovereign compulsion (FSC) must show that a foreign government's order compelled its business to violate American ***antitrust law***. In probing for bona fide compulsion, courts require defendants asserting FSC to show that non-compliance with foreign law portends a significant risk of substantial sanctions.

Governments > Courts > Judicial Comity

International Law > ... > Comity Doctrine > Comity Doctrine Procedures > Discretion Regarding Procedures

HN5[] **Courts, Judicial Comity**

As a matter of first principles, comity is characterized by respect for another country's sovereign authority within its borders, not by examination of whether such authority exerts duress-like pressure that leaves defendants little or no choice but to engage in the prohibited conduct. A a true conflict is present even where a foreign government grants defendants some discretion in choosing how to carry out the legally mandated conduct, so long as compliance with the laws of both countries is impossible. Foreign sovereign compulsion (FSC) by contrast, applies only to the scope of conduct actually compelled under threat of severe sanctions. Whereas FSC is a standalone basis for abstention, the finding of a true conflict is only one step, albeit a critical one, in a comity analysis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN6[] **Per Se Rule & Rule of Reason, Per Se Violations**

The Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. *15 U.S.C.S. § 1*. While the language is interpreted to outlaw only unreasonable restraints on trade, certain types of anticompetitive conduct are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are per se unlawful.

Governments > Legislation > Interpretation

HN7[] Legislation, Interpretation

In considering a statement on the meaning of another country's law, a court weighs the explanation's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.

Counsel: WILLIAM A. ISAACSON (Michael D. Hausfeld, Brian A. Ratner, Melinda R. Coolidge, James T. Southwick, Shawn L. Raymond, Katherine Kunz, Brent W. Landau, on the brief), BOIES, SCHILLER & FLEXNER LLP, Washington, DC, for Plaintiffs-Appellees.

JONATHAN M. JACOBSON (Daniel P. Weick, Justin A. Cohen, Scott A. Sher, Bradley T. Tennis, on the brief), WILSON SONSINI GOODRICH & ROSATI, P.C., New York, New York, for Defendants-Appellants.

CARTER G. PHILLIPS (Joel M. Mitnick, Kwaku A. Akowuah, on the brief), SIDLEY AUSTIN LLP, Washington, DC, for Amicus Curiae Ministry of Commerce of the People's Republic of China.

Judges: Before: CABRANES, WESLEY, and NARDINI, Circuit Judges. WESLEY, Circuit Judge, dissenting.

Opinion by: WILLIAM J. **[**4]** NARDINI

Opinion

[*140] WILLIAM J. NARDINI, *Circuit Judge*:

We consider this appeal, which arises from an antitrust action brought against Defendants-Appellants Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei"), North China Pharmaceutical Group Corporation ("NCPG"), and other entities incorporated under the laws of the People's Republic of China ("PRC" or "China") (together, "Defendants-Appellants"), on remand from the Supreme Court. *See* *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 201 L. Ed. 2d 225 (2018)*. Plaintiffs-Appellees Animal Science Products, Inc. and The Ranis Company, Inc. (together, "plaintiffs"), are U.S. purchasers of Vitamin C that allege Defendants-Appellants and others conspired to fix the price and supply of Vitamin C sold to U.S. companies on the international market in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*, and *Sections 4* and *16* of the Clayton Act, *15 U.S.C. §§ 4*, *16*.

This antitrust case is unusual in that the parties before us generally agree that the alleged anticompetitive conduct occurred. The dispute centers instead on "whether Chinese law required the Chinese sellers' conduct." *Animal Sci. Prods., 138 S. Ct. at 1875*. Thus, we must decide whether Chinese law made it impossible for the Defendants-Appellants to comply with U.S. ***antitrust law***, such that a so-called "true conflict" exists. This determination is critical **[**5]** because the existence of a true conflict, balanced in combination with other principles of international comity, may weigh against construing U.S. ***antitrust law*** to reach anticompetitive conduct occurring abroad.

We ultimately conclude that Chinese law required Defendants-Appellants to engage in price-fixing of Vitamin C sold on the international market. Defendants-Appellants thus could not comply with both Chinese law and U.S. ***antitrust law***. In light of this true conflict, we apply the remaining principles of international comity to balance the United States' interest in the enforcement of its antitrust laws abroad against the international comity concerns implicated when those laws conflict with the laws of China. We conclude that principles of international comity required the district court to dismiss this action. We therefore **REVERSE** the judgment and **REMAND** with instructions to **DISMISS** the complaint with prejudice.

I. BACKGROUND

For more than half a century, China has been a leading producer and exporter of Vitamin C.[1] In the 1970s, as China began to move into the competitive international **[*141]** economy under the general direction of the Communist Party of China, the Chinese government implemented **[**6]** various export controls to gain a competitive edge over other producers of Vitamin C on the international market. In the intervening years, the Chinese government continued to develop policies to retain its domestic producers' competitive advantage. In the 1990s, for example, following a price war between producers in China, the Chinese government facilitated industry-wide consolidation and implemented regulations to control the prices of Vitamin C exports. By 2001, Chinese suppliers had captured 60% of the global Vitamin C market.

Several years later, in 2005, plaintiffs filed this antitrust action. The original complaint named four defendants, all of which are entities incorporated under the laws of China: Hebei, Jiangsu Jiangshan Pharmaceutical Co. Ltd. ("Jiangshan"), Northeast Pharmaceutical Group Co. Ltd. ("Northeast"), and Weisheng Pharmaceutical Co. Ltd. ("Weisheng") (together, "defendants").[2] The plaintiffs later added as a defendant Hebei's holding company, NCPG.[3]

In the district court, the defendants moved to dismiss based on the foreign sovereign compulsion doctrine, the act of state doctrine, and principles of international comity. In an historic act—the first official appearance **[**7]** by the Chinese government in a U.S. court—China's Ministry of Commerce (the "Ministry") filed an *amicus curiae* brief and several other submissions in support of the motion to dismiss.[4] The district court rejected all three grounds for dismissal and denied the motion so as to permit discovery with respect to the defendants' assertion that the Chinese government compelled the actions constituting the basis of the antitrust violations. *In re Vitamin C Antitrust Litig., 584 F. Supp. 2d 546, 552 (E.D.N.Y. 2008)* (David G. Trager, *Judge*). The district court subsequently denied the defendants' motion for summary judgment, or, alternatively, a motion for a determination of foreign law under *Federal Rule of Civil Procedure 44.1*. *In re Vitamin C Antitrust Litig., 810 F. Supp. 2d 522 (E.D.N.Y. 2011)* (Brian M. Cogan, *Judge*).

In denying the defendants' motion for summary judgment, the district court again rejected application of the act of state doctrine and the foreign sovereign compulsion doctrine, *id. at 548-49*,[5] which it appeared to equate with the true conflict inquiry under an international comity analysis, *id. at 543*. The district court also concluded that there was no bar to the exercise of its jurisdiction due to international comity principles. *Id. at 542-44*.

After the district court denied the defendants' motion for summary judgment, Jiangshan settled the claims against it for $10.5 million. **[**8]** Jury trial began on February 25, 2013. On the eve of the jury's deliberations, **[*142]** Weisheng settled for $22.5 million and Northeast for $500,000. On March 14, 2013, the jury returned its verdict, finding the remaining defendants—Hebei and NCPG—liable in the amount of $54.1 million. After accounting for the settlement amounts and attorneys' fees, the district court entered a trebled damages award of $147,831,471.03 plus interest from the date of judgment, as well as a permanent injunction against future anticompetitive behavior.

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[1] We set forth here only those facts necessary to resolve the issues on appeal.

[2] The complaint also named Weisheng's affiliates Shijiazhuang Pharmaceutical (USA) Inc. and China Pharmaceutical Group, Ltd.

[3] As explained below, the other defendants settled before or during trial, and therefore only Hebei and NCPG brought this appeal.

[4] We discuss in detail the Ministry's submissions, four in total, later in our analysis. *See* Section III.C.3, *infra*.

[5] The district court determined that there had been no foreign sovereign compulsion because the defendants' anticompetitive conduct was voluntary, not compelled, and the defendants had not shown that they faced a risk of severe sanctions for noncompliance. *Id. at 554-58*. Further, even if Chinese law did involve some compulsion, it "assuredly did not compel all of defendants' illegal conduct," and therefore the defense did not extend to anticompetitive measures affirmatively adopted by the defendants. *Id. at 554*.

The district court denied Hebei and NCPG's renewed motion for judgment as a matter of law pursuant to *Rule 50(b) of the Federal Rules of Civil Procedure*. *In re Vitamin C Antitrust Litig., 1:06-md-1738, 2013 U.S. Dist. LEXIS 169083, 2013 WL 6191945 (E.D.N.Y. Nov. 26, 2013)*. In that ruling, the district court stated that it "stands by and reaffirms its prior rulings that Chinese law did not compel defendants to engage in antitrust violations, [and] that the doctrines of act of state and international comity do not bar plaintiffs' suit." *2013 U.S. Dist. LEXIS 169083, [WL] at *1*.

This Court reversed, finding that the district court erred, or "abused its discretion,"[6] by failing to abstain on international comity grounds in light of the Ministry's submissions showing a true conflict between U.S. ***antitrust law*** and Chinese export regulations for Vitamin C. *In re Vitamin C Antitrust Litig., 837 F.3d 175, 189 (2d Cir. 2016)*. In doing so, we held **[**9]** that when a foreign government directly participates in U.S. court proceedings by providing an official representation regarding the proper interpretation of its laws, the U.S. court is bound to defer to that interpretation so long as it is reasonable under the circumstances. *Id.* The Supreme Court then reversed, holding that our Court gave too much deference to the Ministry's submissions, and remanded for us to carefully consider the Ministry's views without giving them dispositive effect. *Animal Sci. Prods., 138 S. Ct. at 1873*.

II. STANDARD OF REVIEW

HN1[] We review the district court's denial of a *Rule 50* motion *de novo, see* *Legg v. Ulster Cty., 979 F.3d 101, 114 (2d Cir. 2020)*, including its determination of foreign law under *Rule 44.1*, *see* *Animal Sci. Prods., 138 S. Ct. at 1873*. As to whether the district court erroneously declined to dismiss this action on international comity grounds, we review relevant questions of statutory interpretation *de novo*. *See* *In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC, 917 F.3d 85, 101 (2d Cir. 2019)*, *cert. denied sub nom. HSBC Holdings PLC v. Picard, 140 S. Ct. 2824, 207 L. Ed. 2d 157 (2020)*.[7]

[*143] III. DISCUSSION

The central issue we address is whether the district court should have dismissed this antitrust action for reasons of international comity. As required by *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*, our comity analysis begins by asking whether Chinese law required defendants to engage in anticompetitive conduct that violated U.S. antitrust laws, such that a **[**10]** true conflict exists. As part of that inquiry, and pursuant to the Supreme Court's direction to us on remand, we carefully consider the statements from the Chinese government as to the proper interpretation of its laws and what requirements those laws imposed on the defendants.

We conclude that Chinese law required the defendants to engage in price-fixing of Vitamin C sold on the international market. Because defendants could not comply with both Chinese law and U.S. ***antitrust law***, there is a true conflict for international comity purposes. After balancing the United States' interest in adjudicating antitrust

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[6] *See* *United States v. Park, 758 F.3d 193, 199-200 (2d Cir. 2014)* (explaining that "abuse of discretion" is a "distinctive term of art that is not meant as a derogatory statement about the district judge whose decision is found wanting").

[7] As explained below, *see* Section III.A n.8, *infra*, we understand international comity to apply here as a form of prescriptive comity: "a canon of [statutory] construction" that may serve to "shorten the reach of a statute." *In re Picard, Tr., 917 F.3d at 100* (internal quotation marks omitted). In other contexts, international comity functions instead as a type of "adjudicative comity," "the so-called comity among courts," which "may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *Id.* (internal quotation marks omitted). Even were we to consider this case under the rubric of adjudicative comity—which principally applies when a district court has declined to exercise jurisdiction in deference to ongoing proceedings in a foreign court—we would in any event review that decision under an unusually rigorous abuse-of-discretion standard that leaves "little practical distinction between review for abuse of discretion and review *de novo*." *Id. at 102* (quoting *Hachamovitch v. DeBuono, 159 F.3d 687, 693 (2d Cir. 1998)*).

violations alleged to have harmed those within its jurisdiction with the PRC's interest in regulating its economy within its borders, we hold that principles of international comity required the district court to dismiss this action.

We start with the doctrine of international comity, paying particular attention to the true conflict standard established in *Hartford Fire, 509 U.S. at 799*.

A. International Comity

Defendants principally argue that the district court erred, at multiple intervals, in declining to dismiss this action under principles of international comity. ***HN2***[] Comity is both a principle guiding relations **[**11]** between foreign governments and a legal doctrine by which U.S. courts recognize an individual's acts under foreign law. *See In re Maxwell Commc'n Corp., 93 F.3d 1036, 1046 (2d Cir. 1996)*.[8] It is the **[*144]** "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws." *Hilton v. Guyot, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895)*. As a general matter, international comity "takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law." *In re Maxwell, 93 F.3d at 1048*. To determine whether international comity principles require dismissal of a lawsuit, we apply a multi—factor balancing test as set forth by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 614-15 (9th Cir. 1976)*, and then revised by the Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979)*. *See O.N.E. Shipping, 830 F.2d at 451* ("The comity balancing test has been explicitly used [by the Second Circuit]. ").[9]

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[8] As noted above, our application of international comity in this case involves "prescriptive comity"—a form of statutory interpretation—rather than the abstention-based doctrine of "adjudicatory comity." These are "two district legal doctrines," *In re Maxwell, 93 F.3d at 1047*, and although they "sometimes demand similar analysis, each asks a different question and is rooted in a different legal theory," *In re Picard, 917 F.3d at 101* (internal quotation marks omitted).

In *Hartford Fire*, the Supreme Court seemed to assume that international comity should be treated as an abstention doctrine. *See 509 U.S. at 798* (considering, but not deciding, "whether a court with Sherman Act jurisdiction should ever *decline to exercise such jurisdiction* on grounds of international comity." (emphasis added)). In dissent, Justice Scalia proposed an alternative analysis based on prescriptive comity: "Congress is generally presumed not to have exceeded . . . customary international-law limits" and therefore "statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *509 U.S. at 815* (Scalia, *J.*, dissenting). The Supreme Court's subsequent decision in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, cited Justice Scalia's dissent in *Hartford Fire* with approval, and it relied on this rule of prescriptive comity, based in statutory construction, which "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws [and] thereby helps the potentially conflicting laws of different nations work together in harmony." *542 U.S. 155, 164, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*.

In keeping with *F. Hoffman-La Roche*, we consider how Congress presumably intended courts to construe U.S. ***antitrust law*** "to avoid unreasonable interference with the sovereign authority of other nations." *Id; see also In re Maxwell, 93 F.3d at 1047* ("When construing a statute, the doctrine of international comity is best understood as a guide where the issues to be resolved are entangled in international relations."). That approach to understanding statutes is not of recent vintage—indeed, it has been here all along. As Chief Justice Marshall explained long ago in the case of the *Charming Betsy*, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy, 6 U.S. 64, 118, 2 L. Ed. 208 (1804)*.

[9] In *Timberlane*, the Ninth Circuit identified seven factors for courts to balance when considering when an extraterritorial assertion of jurisdiction is justified. *549 F.2d at 614*. In *Mannington Mills*, the Third Circuit expressed "substantial agreement" with *Timberlane*'s balancing test. *595 F.2d at 1297*. The court noted that "foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction" when foreign nations are involved. *Id. at 1296*. It then distilled those concerns into ten factors:

In applying this multi-factor balancing test, we are mindful of the Supreme Court's explanation in *Hartford Fire* that, ***HN3***[] to warrant dismissal on the basis of international comity, the two countries' legal demands must be irreconcilable. *509 U.S. at 799* (explaining that "[n]o conflict exists . . . where a person subject to regulation by two states can comply with the laws of both." (internal **[**13]** quotation marks omitted).[10] In other **[*145]** words, there must be a "true conflict" between U.S. law and that of the foreign nation to warrant dismissal of a claim pursuant to international comity.

Our analysis centers on the existence of a true conflict, but other international comity factors remain relevant. While the Supreme Court in *Hartford Fire* found "no need . . . to address other considerations" respecting international comity," *509 U.S. at 799*, our Circuit has favored the view that *Hartford Fire* did not mean to thereby extinguish the remaining comity factors *sub silentio*.[11] It is for this reason that we have described the "conflict between domestic and foreign law" as merely "an important criterion for a comity dismissal." *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384, 391 (2d Cir. 2011)*.

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(1) Degree of conflict with foreign law **[**12]** or policy;

(2) Nationality of the parties;

(3) Relative importance of the alleged violation of conduct here compared to that abroad;

(4) Availability of a remedy abroad and the pendency of litigation there;

(5) Existence of intent to harm or affect American commerce and its foreseeability;

(6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

(7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;

(8) Whether the court can make its order effective;

(9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; [and]

(10) Whether a treaty with the affected nations has addressed the issue.

Id. at 1297-98 (internal footnote omitted).

[10] In *Hartford Fire*, certain American insurance companies and their London-based reinsurers allegedly conspired to restrict the sale of reinsurance to the American insurance market unless designated terms more favorable to insurers were incorporated into standard insurance contracts. *Id. at 775-76*. The London reinsurers argued that holding them liable under U.S. ***antitrust law*** would "conflict significantly with British law," and the British Government, appearing as *amicus curiae*, concurred, asserting that "Parliament ha[d] established a comprehensive regulatory regime over the London reinsurance market and that the conduct alleged . . . was perfectly consistent with British law and policy." *Id. at 798-99*. The Court said this was insufficient to create a true conflict: "The fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct." *Id. at 799* (internal quotation marks and alteration omitted).

[11] In *In re Maxwell*, we noted that "*Hartford Fire* recognized that other concerns might be implicated if the context were different." *93 F.3d at 1050* (internal quotation marks omitted). We then concluded that a dispute over the applicability of the avoidance provision of the Bankruptcy Code was "significantly different from the circumstances confronting the Supreme Court in *Hartford Fire*" such that a full comity analysis was appropriate, even after finding a true conflict. *Id.*

In our prior opinion, we read *Hartford Fire* "narrowly," limiting its singular focus on the existence of a true conflict to that case's facts and considering the "remaining factors in the comity balancing test" even after concluding that a true conflict existed. *In re Vitamin C Antitrust Litig., 837 F.3d at 185*. The Supreme Court did not disturb this portion of our decision, and we maintain that approach here. *Accord* *In re Sealed Case, 932 F.3d 915, 931-32, 442 U.S. App. D.C. 378 (D.C. Cir. 2019)*; *see also* *United States v. Brodie, 174 F. Supp. 2d 294, 305 (E.D. Pa. 2001)* ("The Supreme Court did not purport [in *Hartford Fire*] to replace the multi-factor analysis of *Mannington Mills* and other cases.").

B. Distinguishing True Conflicts from Foreign Sovereign Compulsion

The true conflict requirement of *Hartford Fire* shares much in common with the foreign sovereign compulsion ("FSC") doctrine, and some courts (including the district court) have treated the two alike.[12] But we detect important distinctions between the FSC doctrine and the true conflict inquiry for **[**14]** international comity purposes. ***HN4***[] A defendant invoking FSC must show that a "foreign government's order . . . compelled [its] business to violate American ***antitrust law***." *Mannington Mills, 595 F.2d at 1293*.[13] In probing for **[*146]** bona fide compulsion, courts have required defendants asserting FSC to show that non-compliance with foreign law portends a significant risk of substantial sanctions.[14] Some courts have also required the party asserting the defense to act in good faith by "mak[ing] all efforts to comply with U.S. law," *Brodie, 174 F. Supp. at 300* & n.5, on the grounds that the foreign party is in the best position to "plead with its own sovereign for relaxation of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance" with U.S. law, *Société Internationale, 357 U.S. at 205*.[15]

In its discussion of international comity, the Court in *Hartford Fire* made no mention of sovereign compulsion or the coercive nature of sanctions available under foreign law, instead focusing entirely on whether foreign law, taken at face value, "requires [the defendants] to act in some fashion prohibited by the law of the United States." *509 U.S. at 799*. Exclusive attention to what foreign law facially requires makes sense in the context of international **[**15]**

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[12] *See, e.g.*, *In re Vitamin C Antitrust Litig., 810 F. Supp. 2d at 546* ("[A]bsent compulsion, dismissal on comity grounds is not warranted."); *Trugman-Nash, Inc. v. New Zealand Dairy Bd., Milk Prods. Holdings (N. Am.) Inc., 954 F. Supp. 733, 736 (S.D.N.Y. 1997)* ("[T]here is an actual and material conflict between American ***antitrust law*** and New Zealand law . . . sufficient to entitle defendants to invoke . . . foreign sovereign compulsion[] and international comity.").

[13] Courts have consistently declined to apply FSC absent genuine compulsion by the foreign sovereign. For example, the FSC defense was unavailable to American banks that induced Mexican officials in 1919 to grant them tax preferences and a commercial monopoly over sisal because, while the restraints on trade were "aided by discriminating legislation," the conspirators "by their own deliberate acts . . . brought about forbidden results within the United States." *United States v. Sisal Sales Corp., 274 U.S. 268, 276, 47 S. Ct. 592, 71 L. Ed. 1042 (1927)*. Similarly, FSC did not shield from antitrust liability companies who monopolized vanadium supply and fixed prices in Canada and the United States from 1933 to 1949 where there was "no indication that the [Canadian Government Metals] Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from [the plaintiff] be stopped." *Cont'l Ore Co., 370 U.S. at 706*. The fact that one defendant, appointed by the Canadian government to be exclusive wartime purchasing agent for vanadium, "was acting in a manner permitted by Canadian law" did not establish a basis for FSC, as there was "nothing to indicate that such law in any way compelled discriminatory purchasing." *Id. at 707*.

[14] *See, e.g.*, *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 211, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)* (excusing Swiss party's "failure to satisfy fully the requirements of [a] production order . . . because production of documents in Switzerland pursuant to the order of a United States court might violate Swiss laws" and thus subject the party to "criminal sanctions"); *United States v. First Nat. City Bank, 396 F.2d 897, 905 (2d Cir. 1968)* (refusing to excuse compliance with a grand jury subpoena when "risk of civil damages was slight and speculative"); *Brodie, 174 F. Supp. at 301* (rejecting FSC defense based on foreign "blocking statutes" designed to counteract U.S. Cuban Assets Control Regulations because it "would be very difficult for the Canadian or U.K. government to mount a prosecution under the blocking statutes" and there was no evidence of past enforcement); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1294 (D. Del. 1970)* (granting FSC defense where Venezuelan oil ministry "supervised concessionaires rigorously and conducted regular reviews of their sales policies," "promulgated rules regarding the sale of oil extracted there," and imposed "[s]anctions for violation of the rules includ[ing] suspension of the right to ship oil out of the country").

[15] *See also* *In re Sealed Case, 932 F.3d at 940* (affirming district court's civil contempt citation of Chinese banks for failure to comply with discovery order—notwithstanding Chinese law forbidding disclosure—because the banks had "not demonstrated good faith" and "the requested records [we]re essential to an investigation into a matter of national security" (internal quotation marks omitted)).

comity for several reasons. ***HN5***[] As a matter of first principles, "comity" is characterized by respect for another country's sovereign authority within its borders, not by examination of whether such authority exerts duress-like pressure that leaves defendants little or no choice but to engage in the prohibited conduct.[16] In focusing **[*147]** on the foreign state rather than the defendants, we consider primarily what the state as sovereign legislates—not the severity of the penalties the state imposes on non-compliance. Second, a true conflict is present even where the foreign government grants the defendants some discretion in choosing how to carry out the legally mandated conduct, so long as "compliance with the laws of both countries is . . . impossible." *Hartford Fire, 509 U.S. at 799*. FSC, by contrast, applies only to the scope of conduct actually compelled under threat of severe sanctions. *See Continental Ore, 370 U.S. at 706-07*. Third, whereas FSC is a standalone basis for abstention, the finding of a true conflict is only one step—albeit a critical one—in a comity analysis. A false equivalency of FSC and true conflict analysis would convert the "degree of conflict with foreign law" factor into the be-all and end-all of the international comity analysis, **[**16]** rendering mere surplusage much of that longstanding doctrine. Accordingly, our discussion of international comity does not feature consideration of the threat of compulsive sanctions. Instead, we look to the laws of each country in turn to determine whether, taking those laws at face value, a true conflict exists.

C. True Conflict Analysis

HN6[] The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. While this language has been interpreted to outlaw only unreasonable restraints on trade, *see, e.g., State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*, certain types of anticompetitive conduct are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality," *Nat. Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. "Price—fixing agreements between two or more competitors, otherwise known as horizontal price—fixing agreements, fall into the category of arrangements that are per se unlawful." *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. Thus, if Chinese law required defendants to enter into horizontal price—fixing agreements, "compliance with the laws of both countries [would be] impossible," *Hartford Fire, 509 U.S. at 799*, and there would be a true conflict.

We follow the Supreme Court's approach in *Hartford Fire* and begin our inquiry **[**17]** by asking whether Chinese law governing the Vitamin C industry, on its face, required defendants to engage in conduct that violates U.S. antitrust laws. We therefore scrutinize whether defendants *could have* sold and distributed Vitamin C while in compliance with both Chinese and U.S. ***antitrust law*** or "whether Chinese law required the Chinese sellers' conduct" in violation of U.S. ***antitrust law***. *Animal Sci. Prods., 138 S. Ct. at 1875*. As we explain below, it did. To determine what Chinese law required, we consider the "relevant material" and "source[s]." *See Fed. R. Civ. P. 44.1*; *Animal Sci. Prods., 138 S. Ct. at 1873*.[17]

[*148] 1. Chinese Law Facially Required Vitamin C Price-Fixing

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[16] *See F. Hoffmann-La Roche, 542 U.S. at 165* (recognizing that the application of U.S. ***antitrust law*** to foreign conduct "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs").

[17] *Rule 44.1* provides that "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." As the Supreme Court noted, "*Rule 44.1* frees courts 'to reexamine and amplify material . . . presented by counsel in partisan fashion or in insufficient detail.'" *Animal Sci. Prods., 138 S. Ct. at 1873* (quoting the Advisory Committee's Note on *Rule 44.1*'s adoption in 1966). The *Rule 44.1* materials relevant to this case—which we explore in detail in the remainder of this Section—include the Chinese regulations at issue, the charters of the Chinese agencies responsible for overseeing the export regime, internal industry records and trial testimony describing how that regime actually functioned, the Ministry's statements interpreting Chinese law, and China's representations to the World Trade Organization concerning its export controls on Vitamin C.

China's regulations for its Vitamin C industry evolved considerably between the founding of the Chamber of Commerce of Medicines & Health Products Importers & Exporters (the "Chamber") in 1989 and the filing of this antitrust action in 2005. In the early 1990s, the Ministry of Foreign Trade and Economic Cooperation (which is now known as the Ministry of Commerce, or the "Ministry") exercised near-total control over the "foreign trade and economic social organizations," also known as "chambers," which were responsible for the administration of export controls.[18] Once the Ministry ratified and registered each chamber, **[**18]** it provided "operation guidance" on matters such as the "development of foreign trade." App'x 3715. The 1991 Regime provided that the chambers "must accept the daily management by [the Ministry] or its authorized departments," and thus, that the Ministry was "directly responsible" for managing each chamber's daily activities and inspecting its records, including leadership candidates, personnel structure, budget, salaries, and meetings of representatives. App'x 3716-17. The Chamber, in its own right a governmental entity with the power to act with the force and effect of law, was one such entity under the Ministry's direct and active supervision.

Beginning in 1996, a price war among Chinese Vitamin C exporters led to industry consolidation among four major manufacturers, the original defendants in this action. *See* [In re Vitamin C Antitrust Litig., 584 F. Supp. 2d at 548](). In 1997, the Ministry and the PRC's State Drug Administration promulgated a "Notice Relating to Strengthening the Administration of Vitamin C Production and Export by Ministry of Foreign Trade and Economic Cooperation and State Drug Administration" (the "1997 Notice"). A primary objective of the 1997 Notice was to "promote the healthy development of Vitamin C export and **[**19]** maintain the interest[s] of [China] and [exporting] enterprises." Sp. App'x 298. Accordingly, the 1997 Notice provided that the "scale of Vitamin C production shall be strictly controlled." *Id.* These controls included production quotas set by the Ministry, a licensing system for all exporters, and, within the Chamber, the creation of a "Vitamin C Coordination Group"—later known as the Vitamin C Sub-Committee (the "Sub-Committee")—which was formally established in March 1998.[19]

[*149] The Sub-Committee's function was to "coordinate and administrate market, price, customer and operation order of Vitamin C export." Sp. App'x 318. The Sub-Committee was also required to "hold, periodically or otherwise, working meetings for Vitamin C export to exchange information, summarize and communicate experience, analyze and work out coordinated prices for Vitamin C export, [and] to supervise and inspect the implementation of such coordinated export prices set by the Sub-Committee and relevant business activities related to the enterprises." Sp. App'x 319. At these meetings, members would "discuss and set export coordinated price." Sp. App'x 320. Only Sub-Committee members were entitled to export Vitamin **[**20]** C. Members were obligated to comply with all regulations from the Ministry and the Sub-Committee, to "voluntarily adjust their production outputs according to changes of supplies and demands on international market" and to "[s]trictly execute export coordinate price set by the Chamber and keep it confidential." Sp. App'x 319-20. Violations of these obligations subjected a firm to "warning, open criticism[20] and even revocation of its membership." Sp. App'x 320. Members could withdraw only "subject to approval by the Sub-Committee's Council." Sp. App'x 319. And the "Council," an executive body created within the Sub-Committee composed of the four original defendants, was responsible for proposing annual quotas and coordinating prices under "urgent circumstances." Sp. App'x 321.

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[18] Pursuant to the Measures for Administration over Foreign Trade and Economic Social Organizations promulgated in 1991 (the "1991 Regime"), the Ministry oversaw the establishment of chambers dedicated to protecting Chinese national interests, including "the development of foreign trade and economy, the enhancement of the relationship between domestic and foreign enterprises and relevant organizations, and the order of foreign trade and economy." App'x 3713-14.

[19] Pursuant to the 1997 Notice, the Sub-Committee would hold regular meetings at which the Vitamin C firms would be expected to "timely formulate and adjust export coordination price" using a "specific method for coordination . . . formulated by the Chamber, and filed to [the Ministry] for record." Sp. App'x 299. All licensed Vitamin C exporters would be required to participate in the Sub-Committee and "strictly implement" its "coordination" of "Vitamin C export market, price and customers." *Id.* Any exporter selling Vitamin C at a below-coordination price would be penalized by reduction of its export quota or revocation of its export rights.

[20] "Open criticism" was a serious penalty in the Maoist system of governance. *See generally* JONATHAN SPENCE, THE SEARCH FOR MODERN CHINA (2001).

Beginning in 2000, another price war flattened Chinese Vitamin C export prices, and by 2001, the defendants succeeded in capturing about 60% of the global market for Vitamin C. *See* *In re Vitamin C Antitrust Litig., 584 F. Supp. 2d at 548*. In late 2001, after importing countries threatened anti-dumping lawsuits against China, the Chamber held a meeting with the Sub-Committee's Council and procured an agreement that **[**21]** "[t]he committed export volume as part of the industry self-discipline shall be strictly implemented." App'x 3880. To further "the self-discipline for Vitamin C export industry in 2002," total export volumes for each manufacturer would be recorded and "export enterprises that [we]re not in strict compliance with this requirement w[ould] be punished by [the] Sub-Committee." *Id.* Violations of "disguised low prices or exporting beyond given volume" would be punishable by a deduction of "five times of the export volume that is in violation . . . from the total allocated export volume of the violating manufacturer." App'x 3881.

In December 2001, China acceded to, or became a member of, the World Trade Organization ("WTO"). Both before and after its WTO accession, China "systematically overhauled existing laws, administrative regulations and department rules to comply with WTO rules and accession commitments."[21] In particular, China represented to the WTO that, beginning in January 2002, it "gave up export administration of . . . vitamin C."[22]

[*150] Thus, in 2002, to "adapt to the new situation of [China's] opening-up to the outside world" and to "earnestly perform the promises of [China's] entry to the WTO," the Ministry abolished the 1997 Notice. App'x 3886. In its place, the Ministry and the PRC's General Administration of Customs ("Customs") together promulgated a "Notice for the Adjustment of the Catalogue of Export Products Subject to Price Review by the Customs" (the "2002 Notice"). Sp. App'x 301. The stated purpose of the 2002 Notice, in replacing the 1997 Notice, was to "maintain the order of market competition, make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China's exports, promote industry self-discipline and facilitate the healthy development of exports." *Id.*

The 2002 Notice implemented a Price Verification and Chop[23] ("PVC") system that made certain export products, including Vitamin C, subject to price review by each import and export chamber rather than Customs.[24] Under this PVC regime, each chamber was required to submit "industry-wide negotiated prices" to Customs and the Ministry. Sp. App'x 302. This would make it "conducive for the chambers to coordinate **[**23]** export price and industry self-discipline," thereby "maintaining good export order" and "promoting the development of the industries and exports." *Id.* And, if required by the "drastically changing international market," Customs and the chambers could suspend PVC review for certain products "with the approvals of the [Sub-Committee] and filing with [Customs] and [the Ministry]." *Id.*

The Chamber amended its charter in March 2002. Under the new charter, members could "freely quit" the Chamber by written application, with no specified consequence. Sp. App'x 313. To punish violations of its charter or export

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[21] App'x 468 (quoting World Trade Organization, *Trade Policy Review Report by the People's Republic of China*, WT/TPR/G/161 at 12 (2006)).

[22] *Id.* (quoting World Trade Organization, *Statement by the Head of the Chinese Delegation on the Transitional Review of China by the **[**22]** Council for Trade and Goods*, G/C/W/441 (2002)).

[23] A **"**chop" is a seal recognized by Chinese customs officials indicating that an export contract or shipment conforms to the relevant rules and regulations.

[24] Later, in a 2003 Announcement, the Ministry explained that the PVC system involved three steps:

1. Exporters deliver contracts to the chambers for verification.

2. The chambers verify based on (i) industry-wide price agreements (filed with the Ministry) and (ii) relevant regulations of the Ministry and Customs. The chambers must affix a chop only to conforming export contracts.

3. Exporters declare to Customs with a chop on export forms and contracts.

SPA. 310-11. According to the 2003 Announcement, the chambers would treat PVC applications from exporters who were not members of the relevant chamber the same as PVC applications from those of chamber members. **SPA. 311**.

regulations, the Chamber was authorized to "circulate a notice of criticism, issue a warning or suspend the membership of this member, or in case of fairly serious violation in nature, . . . with the approval of the **[**24]** board of directors or the standing board of directors, deprive this member of its membership." Sp. App'x 313.

In June 2002, the Chamber delegated authority by administrative rule to the Sub-Committee to "coordinate and guide vitamin C import and export business as well as relevant activities" and "promote healthy development of vitamin C import and export trade" in compliance with all laws and regulations of the Ministry, Customs and the Chamber. Sp. App'x 325. The Sub-Committee also revised its charter, adding 11 non-manufacturer export trading companies and smaller manufacturers as member enterprises and recognizing its members' "[f]reedom to withdraw from the Subcommittee." Sp. App'x 326. The Council continued to serve as the "executive body" of the Sub-Committee, with members **[*151]** of the Council elected to four-year terms. Sp. App'x 328.

In 2003, the Chamber published a notice informing members that "industry agreed export prices [for Vitamin C]. . . have been revised" and that the "agreed prices are the minimum prices." 1:06-md-1738, Doc. 397-22 at 12 (the "2003 Notice"). The Chamber explained: "We put the limit on the floor prices but not the ceiling prices." *Id.*

Taken at face value, **[**25]** the applicable Chinese law during the relevant period—including both the PVC regime and the Chamber's 2002 delegation of price-coordination authority to the Sub-Committee—required the defendants, as Vitamin C manufacturers and exporters, to fix the price of Vitamin C sold on the international market.[25]

2. <u>Other Records Corroborate Chinese Law's Price-Fixing Requirement</u>

This understanding—that Chinese law on its face required the defendants to fix the price of Vitamin C exports—is consistent with other information in the record, such as materials that showcase the Chamber's role in coordinating the Chinese Vitamin C industry. Indeed, from its inception, the Chinese government created the Chamber to promote "the order of foreign trade and economy." App'x 3713-14. The 1997 Notice and original charter of the "Vitamin C Coordination Group" within the Chamber (which became the Sub-Committee) made explicit what sort of "order" the Chamber served to ensure: the "coordination" of "Vitamin C export . . . price" through regular meetings at which members would "discuss and set export coordinated price." Sp. App'x 299, 320. While the 2002 Notice delegated the Ministry's reviewing authority **[**26]** to the Chamber, its stated goal remained "maintaining good export order." Sp. App'x 302. How did the 2002 Notice accomplish that objective? By requiring the defendants "to coordinate export price and industry self-discipline" under the Chamber's auspices. *Id.* The Chamber then had to report these "industry-wide negotiated prices" to Customs and the Ministry. *Id.* Finally, the Chamber was authorized to affix a chop only to contracts that conformed to such "industry wide price agreements." *Id.* at 310-11. The ubiquitous references to "price coordination" in these regulations leave little doubt that the 2002 Notice instituted by the Ministry required the defendants to engage in price-fixing through the Chamber and Sub-Committee.

Administrative documents from the period corroborate this understanding of the Chamber's price-coordination role with respect to the Vitamin C industry. As described in a 2003 administrative publication, one of the Chamber's principal tasks was "[c]oordinating price." App'x 412. In the same publication, the Chamber noted that "the government and charter members" entrusted it with responsibility "to help the government manage the import and export of . . . Vitamin[] **[**27]** C." *Id.* at 418. Indeed, shortly after the promulgation of the 2002 Notice, the Chamber enacted an administrative rule tapping the Sub-Committee to "coordinate and guide Vitamin C import and export business as well as relevant **[*152]** activities." Sp. App'x 325. Then, as noted above, the Chamber published the 2003 Notice, informing member enterprises that "industry agreed export prices . . . have been revised" and that the "agreed prices are the minimum prices." 1:06-md-1738, Doc. 397-22 at 12.

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[25] While the district court reached the opposite conclusion based on (1) the apparent spottiness of enforcement during a specific period; (2) its surmise that the available sanctions were not sufficiently severe; and (3) the inference that the defendants were acting in their economic interest and thus did not need to be compelled, we find these issues largely beside the point because, as explained in Section III.B, *infra*, our decision is based on the *prima facie* conflict between U.S. law and Chinese law rather than the degree of compulsion defendants faced.

Contemporaneous industry records also strongly suggest that Chinese law, as established by the 2002 Notice and overseen by the Chamber, required price-fixing. [26] The Chamber kept track of each firm's export volume, revenue, and average price, and reminded its members that "agreements reached . . . during the [Vitamin C] coordination meeting . . . still have to be carried out strictly." *Id.*, Doc. 397-23 at 3.[27] The Chamber set minimum prices and deterred members from undercutting those prices with the threat of discipline via chop disqualification or, *in extremis*, loss of membership rights. This system maintained order by preventing price wars, which had devastated the export industry in the past. As Qiao **[**28]** Haili, director of the Chamber's Western Medicine Department and Secretary General of the Sub-Committee, wrote to the Ministry in 2003, the Chamber's "coordination of [Vitamin C] has yielded notable results: through industry self-regulation, prices of [Vitamin C] exports have increased significantly and thus have recovered economic losses for the country." App'x 2173. This success avoided the ills of "severe low-priced competition in order to sell" and "anti-dumping law suits." *Id.*

Sub-Committee meeting records from 2003 and 2004 also show that Vitamin C exporters recognized the minimum prices set by the Chamber as being non-negotiable, even as the Sub-Committee members were able to exercise some discretion in determining actual market prices by consensus. The firms' efforts to "set the floor price" for the market significantly higher—such as $9.20 per kilogram—were not always successful, but market prices generally remained well above the minimum export price of $3.35 per kilogram. *See id.*, Doc. 299-8 at 1-2; Doc. 397-2 at 106. These records also document the Chamber's coordination of export quotas, and internal reports from Jiangshan show that, under the Chamber's direction, representatives **[**29]** from the "four major [Vitamin C] manufacturers in Beijing" agreed to "limit production during the first half of 2004 in order to stabilize the market." App'x 2100.

Our dissenting colleague correctly observes that the Chinese government appears to have been less preoccupied with orchestrating the defendants' coordination of market prices as opposed to minimum prices. *See* Dissent at 5-7. It is true that the Chamber "put the limit on the floor prices but not the ceiling prices," 1:06-md-1738, Doc. 397-22 at 12; that is, the Chinese governmental agencies involved expressly mandated only the minimum price and did not set the actual market price for Vitamin C exports. Yet Chinese law further required the defendants to coordinate—that is, to fix—market **[*153]** prices for Vitamin C exports. The Chamber specifically delegated responsibility to the Sub-Committee to "coordinate and guide Vitamin C . . . export business" such that the Chamber could report "industry-wide negotiated prices" to Customs and the Ministry. Sp. App'x 302, 325.[28] Since the Sub-Committee's establishment, its members—the defendants—had been expected to "discuss and set export coordinated price," *id.* at 320, and now they were tapped **[**30]** to "monitor the implementation of self-disciplinary agreements within the industry," including "coordination plans," *id.* at 331. Thus, contrary to the dissent's conjecture, the defendants could not have complied with Chinese law simply by "independently setting their prices at or above the industry-coordinated minimum price . . . ." Dissent at 3. Coordination of *market* prices as well as *minimum* prices was fundamental to the PRC's Vitamin C export system.

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[26] We note that the U.S. Trade Representative reported similar findings to Congress in December 2003, concluding that "China maintains price controls on several products and services . . . in the form of either absolute mandated prices or specific pricing policy guidelines as directed by the government." App'x 1427. The Trade Representative reached the same conclusions in 2004 and 2006.

[27] The 2003 Notice from the Chamber did not include an agreed price for Vitamin C. But the Chamber clearly established minimum prices to which its members adhered. If a contract price term fell below the minimum price, the 2003 Notice instructed firms to "voluntarily convert the price term to be consistent with the agreed price term." 1:06-md-1738, Doc. 397-22 at 13.

[28] One of Jiangshan's executives, Wang Qi, testified that his company was "free to decide about prices above $3.35 [per kilogram] when that was the minimum price," and that "no one outside" the company "ordered" them to "charge prices higher than $3.35." App'x 1709-10. The dissent concludes from this evidence that colluding on prices above $3.35 per kilogram "was the defendants' choice, not their legal obligation." Dissent at 7. But Qi testified unambiguously that, throughout the relevant period, his company "communicated with other Chinese Vitamin C companies about increasing Vitamin C prices." App'x 1687. No one had to *order* Qi or Jiangshan to charge higher prices. The Chinese government's legal mandate was for Jiangshan and the other defendants, operating through the Chamber and its Sub-Committee, "to coordinate export price." Sp. App'x 302.

In practice, that system appears to have not always worked smoothly. As one defense expert explained, there were "occasions where agreements were not reached" on a market price because defendants "were mandated to engage in self-discipline to achieve basic policies, but had freedom in deciding the manner in which coordination was to be achieved consistent with national goals." App'x 325. For example, when the Chamber met with the four original defendants in November 2002, "[n]o consensus was reached about price at the meeting," such that while the "minimum price for export remain[ed] unchanged," each company was permitted to "provide price quote[s] based on its own judgment." 1:06-md-1738, Doc. 397-22 at 3. Even when consensus **[**31]** prices were reached, they were not always stable. According to an internal Jiangshan report, the Chamber met in June 2003 with six domestic manufacturers who "all agreed to set the floor price at 9.20 USD/kg, hoping to slow down the speed of market price falling." *Id.*, Doc. 299-8 at 1-2. Yet a few weeks later, "every manufacturer quoted prices lower than the floor price." *Id.* at 2. Future meetings returned to the question of a "[t]argeted price level" that would not "give[] profit room for western producers." *Id.*, Doc. 397-22 at 18. Nevertheless, while implementation may have imperfect, the instructions were clear: the Chinese government expected the defendants to agree on a profit-maximizing market price.

These marching orders came directly from the top. In his 2003 memo to the Ministry, Sub-Committee Secretary General Haili—directly appointed by the Ministry to be the "highest level official at the Chamber responsible for administering export regulation of vitamin C," App'x 685—requested "legislation to define the legal status of the chambers" and "support from relevant government departments to assist chambers of commerce in asserting their authority." App'x 2174. Haili apparently **[**32]** hoped these clarifying changes would ensure that the Chamber's "rules and regulations" for members not "simply become formality and only honest fellows will follow." **[*154]** *Id.* (internal quotation marks omitted). We understand this report and request to reflect Haili's understanding that the Ministry expected the Chamber to corral its members into participating in and adhering to the legally required coordination of market prices, to an extent not directly, or perhaps adequately, enforced through the PVC regime.

Consideration of all these records therefore supports our conclusion that the defendants faced a true conflict between U.S. ***antitrust law*** and the Chinese export regime's twin requirements of maintaining minimum prices and coordinating actual market price.

3. The Ministry's Submissions Regarding Chinese Law

To confirm our understanding about what Chinese law, taken at face value, required of the defendants, we "carefully consider" but do not defer conclusively to the Ministry's statement on the meaning of Chinese law. *Animal Sci. Prods., 138 S. Ct. at 1873*. ***HN7***[] In particular, we weigh that explanation's "clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority **[**33]** of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions." *Id. at 1873-74*. We first discuss the contents of the Ministry's submissions, then address the extent of our deference to their articulation of Chinese law under the standards supplied by the Supreme Court.

a. The Ministry's Submissions

The Ministry made four submissions in the district court.[29] The first was an *amicus curiae* brief in support of the defendants' motion to dismiss, submitted in June 2006 (the "Amicus Brief"). The Ministry submitted a subsequent statement in June 2008 (the "2008 Statement") in response to the plaintiff's briefing on the motion to dismiss. During discovery in 2008, the Ministry submitted a letter (the "2008 Letter") opposing a production request for

[29] China's embassy in Washington, DC, also sent a diplomatic note to the U.S. Department of State on April 9, 2014, requesting that it be permitted to join the Ministry in filing an amicus brief in our Court. *See* Diplomatic Note No. CE027/14 from the Embassy of the People's Republic of China to the State Department, Supreme Court J. App'x 782-83. "Diplomatic notes are used for correspondence between the U.S. Government and a foreign government. The Secretary of State corresponds with the diplomatic representatives of foreign governments at Washington, DC, U.S. embassies abroad, and foreign offices or ministries." United States Department of State, 5 Foreign Affairs Handbook 1 H-611(a). The Ministry filed its amicus brief in our Court on April 14, 2014. The Department of State has not filed a corresponding amicus brief.

confidential documents one defendant (Northeast) had exchanged with the Ministry and other governmental agencies. Finally, the Ministry submitted a statement in 2009 (the "2009 Statement") responding to statements made in the report issued by the plaintiffs' expert.

The Amicus Brief took the position that Chinese law required the defendants' conduct, such that both foreign sovereign compulsion and **[**34]** principles of international comity mandated dismissal of the antitrust action.[30] In explicating Chinese law, the Amicus Brief noted that "China's ongoing transformation from a state-run command **[*155]** economy to a market-driven economy" gave rise to terms and concepts such as "coordination" and "voluntary self-restraint" that a U.S. court would likely misunderstand. App'x 153. One such potential misunderstanding, fostered by the plaintiffs' allegations, was that the Chamber functioned within China's export economy as a mere "trade association" facilitating "the collusive actions of a cartel." App'x 155 (internal quotation marks omitted). Instead, the brief explained that the Chamber served "under the authority and direction of the Ministry and . . . Customs" as part of "a regulatory pricing regime mandated by the government of China" to stabilize its export market, promote profitability, and protect national interests. App'x 156-57.[31]

The 2008 Statement ratified the Amicus Brief as an accurate representation of the Ministry's official views, which the Ministry had actively participated in drafting and reviewing.[32] The 2008 Letter reiterated this position and explained that the **[**35]** Ministry, the Chamber and the defendants had entered into a written common interest agreement in the class action litigation.

The 2009 Statement recapitulated the Ministry's view that the defendants were "performing their obligations to comply with Chinese laws, rather than conduct on their own initiative." App'x at 650. The 2009 Statement acknowledged that "different regulatory measures may have been implemented in line with changes of circumstances at different times," but maintained that "[d]uring the relevant period . . . the Ministry required Vitamin C exporting companies to coordinate among themselves on export price and production volume." *Id.* at 650-51. The 2009 Statement further explained that the Chamber exercised delegated governmental authority over Chinese exporters of Vitamin C, who could neither "ignore these policies" nor "abstain from [mandated] coordination," which constituted "an integral part of the self-discipline process." *Id.* at 651-52. Finally, the 2009 Statement argued that China's statements to the WTO concerning **[*156]** the loosening of price controls on exports including Vitamin C were "irrelevant" because they were "made in a different context" and were "*general descriptions* ***[**36]*** . . . presented in [that] special context." *Id.* at 652. The 2009 Statement reasserted China's right as a sovereign nation

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30 The Amicus Brief argued that dismissal was warranted under the foreign sovereign compulsion doctrine because the anticompetitive conduct was compelled and under principles of international comity because of the "irreconcilable conflict between the requirements of U.S. ***antitrust law*** and the laws and policies of China." App'x 167-71, 173-75.

31 To explain how such price coordination worked in practice, the Amicus Brief canvassed the evolution of China's system of export controls, beginning with the 1991 Regime and concluding with the 2003 Announcement. The brief noted that the defendants were compelled to become participating members of the Sub-Committee and to implement its price coordination responsibilities. In describing previous regulatory phases such as the 1991 Regime and the 1997 Notice, the Amicus Brief sometimes used the present tense in ways that conveyed the impression that defunct regulations were still in effect. *See, e.g.*, App'x at 159 ("The Ministry's authority over the Chamber is plenary . . . ." (citing regulation from the 1991 Regime)); *id.* at 159-60 ("The Sub-Committee . . . is responsible for 'coordinating the Vitamin C export market, price and customers . . . .'" (quoting the Sub-Committee's 1998 Notice of Establishment)); *id.* at 167 ("Government entities policed defendants' compliance with the resulting prices and volume limits, and non-compliance would subject defendants to severe penalties . . . .") (citing the 1997 Notice and the 1998 Sub-Committee Charter alongside the 2002 Notice)). Yet the Amicus Brief stated clearly that the 2002 Notice "changed the way in which compliance with the Chamber's 'coordination' was confirmed by abolishing the [1997 Notice] and establishing a [PVC] system," which the brief identified as governing "throughout the Relevant Period." *Id.* at 164-65.

32 In particular, the 2008 Statement emphasized that the Ministry authorized and supervised the Chamber in performing the governmental function of "regulating, through consultation, the price of Vitamin C manufactured for export from China so as to maintain an orderly export." *Id.* The 2008 Statement contended that the plaintiffs' claims—which implicated the Ministry's direct administration of Vitamin C exports—should be addressed through diplomatic engagement rather than litigation.

to enact limited export regulations in furtherance of its "national goal of establishing a socialist market economy." *Id.* at 652-53.

b. Deference to the Ministry's Submissions

We carefully consider the Ministry's statement on the meaning of Chinese law as articulated in its submissions, in accord with the Supreme Court's instructions. As to the submissions' "clarity, thoroughness, and support," *138 S. Ct. at 1873*, each submission articulated a coherent view of Chinese law based on the relevant supporting regulations. Although in several places the Amicus Brief failed to clearly distinguish between China's prior regulatory regimes and its post-reform export controls under the 2002 Notice, this conflation weakens only the brief's argument for *compulsion* based on licensing restrictions and sanctions that were no longer applicable after 2001.[33] It does not undermine the Amicus Brief's otherwise reasoned explication of mandatory price coordination, and we find the Ministry's explanation of that aspect of the governing export regime helpful in locating an "irreconcilable conflict between the requirements of U.S. **[**37]** ***antitrust law*** and the laws and policies of China." App'x 173.

Next, the submissions' "context and purpose" give us some "cause for caution" in evaluating the picture painted of Chinese law. *138 S. Ct. at 1873*. All four submissions "offer[] an account in the context of litigation," *id.*, and the Ministry has unambiguously staked out a common interest with defendants. Indeed, the Amicus Brief candidly portrays one of China's objectives in designing export controls as promoting "the profitability of the industry"—a goal that would be severely hampered by enforcement of an approximately $148 million judgment. App'x 156. Yet it is significant that this litigation represents the first official appearance by the Chinese government in a U.S. court, and the Ministry's submissions bespeak broader principles of international comity informing China's interest in this litigation.[34] While we take the **[*157]** Ministry's account of compulsive regulation with more than a grain of salt due to China's interest in avoiding the imposition of U.S. antitrust penalties on Chinese companies operating in a "socialist market economy" under the vanguard direction of the Communist Party of China,[35] we nevertheless think it appropriate to give **[**38]** some weight to these invocations of international comity.

Third, we are especially mindful of the Ministry's presentation of China's official views given its "role and authority" in the Chinese legal system. *138 S. Ct. at 1873*. The plaintiffs have not challenged the Amicus Brief's identification of the Ministry as "a component of the State Council (the central Chinese government) and . . . the highest administrative authority in China authorized to regulate foreign trade, including export commerce," such that it is the

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[33] In particular, the Ministry's position on compulsion appears vulnerable with respect to the framework for the defendants' arrangement of actual market prices, often considerably in excess of the Chamber-mandated minimum price of $3.35 per kilogram. As we have explained, the PVC regime's enforcement scheme appears to have required only the latter price, whereas a consultative process among Chinese exporters yielded the additional price and volume coordination. Such coordination, while still clearly mandated by the Chinese government, does not appear to have been enforced with the "chop" in the same manner as the minimum price.

[34] *See* App'x 175 ("Insofar as China's sovereign policy decisions about how best to manage its economic transformation conflict with the policies embodied in U.S. antitrust laws, that conflict should be addressed 'through diplomatic channels,' and not through 'the unnecessary irritant of a private antitrust action.'" (quoting ***O.N.E. Shipping, 830 F.2d at 454***)); *id.* at 206 ("[T]he Chinese government respectfully submits that, to the extent the plaintiffs take issue with the Chinese government's sovereign actions over the conduct solely of its own citizens, that issue should not be addressed in the courts of the United States but rather through bilateral trade negotiations conducted by the executive branches of the respective sovereign nations involved consistent with recognized norms of international law and diplomacy."); *id.* at 653 ("China understands and believes that virtually all sovereign nations and regions (including the United States), proceeding from their own interests, have exercised various forms of government regulations over part of their private sector and certain industries. China's export regulations of Vitamin C at issue in this case are no different.").

[35] *See* ELIZABETH C. ECONOMY, THE THIRD REVOLUTION (2018); RICHARD MACGREGOR, THE PARTY (2d ed. 2013); *see generally* JOHN K. FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY (2d ed. 2006).

equivalent of "a cabinet level department in the U.S. governmental system." App'x 151. As such, the Ministry was able to convey "the views and understandings of certain PRC government agencies" with the benefit of active participation and line editing by officials in Beijing. App'x 205. We find it significant that a governmental agency in the Ministry's position has "attached great importance" to this litigation, as evident in its unprecedented appearance on behalf of the Chinese government and repeated filings as an amicus in the district **[**39]** court, this Court, and the Supreme Court. App'x 650. In considering the implications for international comity of applying U.S. ***antitrust law*** to conduct by Chinese companies forming an integral part of the Chinese export regime, we give considerable weight to this consistently salient presentation of official views by China's highest administrative authority on export commerce.

We find inconclusive "the transparency of the foreign legal system" factor, the next factor the Supreme Court has instructed us to consider. *138 S. Ct. at 1873*. While China's legal system is "something of a departure from the concept of 'law' as we know it in this country—that is, a published series of specific conduct-dictating prohibitions or compulsions with an identified sanctions system," *In re Vitamin C Antitrust Litig., 810 F. Supp. 2d at 550*, this ambiguity cuts both ways. On the one hand, a reasonable interpretation offered by the responsible governmental authority is especially helpful in understanding a system that would be difficult for a U.S. court—unversed in Chinese law—to piece together on its own. On the other hand, we are less inclined to trust the representations of a regime lacking transparency or democratic accountability, especially when the opaque nature of the **[**40]** regulations in question frustrates our ability to check the Ministry's account against an objective standard. We are nonplussed by what we perceive to be a double-edged sword of transparency, so—having addressed why it cuts in both directions—we do not assign it significant weight among the relevant factors when considering the deference due to the Ministry's submissions.

Finally, we are mindful of the Supreme Court's instruction that we consider the Ministry's "statement's consistency with [China's] past positions," given "the submissions made by the U.S. purchasers casting doubt on the Ministry's account of Chinese law." *138 S. Ct. at 1872-74*. In **[*158]** particular, we must assess the credibility of the Ministry's account of the 2002 Notice as compulsory in light of China's representation to the WTO in 2002 that it "gave up export administration of vitamin C." *Id. at 1871* (ellipsis omitted).

As an initial matter, we find that China's statement to the WTO and others like it adduced by plaintiffs—when read alongside the 2002 Notice and 2003 Announcement—are consistent with the notion that China was *loosening* price controls by delegating regulatory authority *from* the Ministry and Customs *to* the Chamber and Sub-Committee, not **[**41]** abandoning export regulations altogether. Thus, we cannot be confident whether China has in fact "ma[de] conflicting statements." *Id. at 1873*. But even assuming a material contradiction, we find it entirely plausible that China sought to exaggerate to the WTO its compliance with that organization's accession principles in becoming a WTO member. So too, we must consider the prospect that, in this litigation, the Ministry may have an incentive to exaggerate the compulsory nature of its Vitamin C export regime in avoiding application of U.S. ***antitrust law*** to the defendants' conduct. After all, the Ministry's 2009 Statement appears to invite such an interpretation by insisting that China's earlier representations to the WTO belonged to an entirely different, "special context." App'x 652.

Yet to the extent there is any contradiction in China's representations, that contradiction undercuts only the Ministry's argument that the 2002 Notice subjected *all* of the defendants' conduct to the kind of coercive control that would potentially implicate considerations of the FSC doctrine. But, as we explained above, our international comity analysis focuses on whether Chinese law, taken at face value, requires **[**42]** the defendants to act in a way that violates U.S. law. We think the persuasiveness of the Ministry's submissions regarding the specific requirement that Chinese export firms coordinate market prices as well as adhere to minimum prices remains intact. Thus, while the Chinese government may not have compelled market price coordination in the same fashion that it enforced minimum prices, our conclusion that the price-fixing feature of the 2002 Notice was nonetheless mandatory remains in place.

We therefore conclude that the Ministry's submissions, when afforded careful consideration, support our determination that Chinese law required the defendants—as members of the executive Council within the Sub-

Committee charged with "coordinat[ing] and guid[ing] vitamin C import and export business," Sp. App'x 325—to be directly responsible for implementing price controls.

c. Chinese Law Required the Defendants to Price-Fix, Making It Impossible for Them to Comply with U.S. ***Antitrust Law***

Taking Chinese law at face value, and having given careful consideration to the Ministry's statements about what the applicable laws required, we conclude that defendants were required to engage in price-fixing conduct **[**43]** violative of U.S. ***antitrust law***. Furthermore, because Chinese law "require[d]" the defendants "to act in [a] fashion prohibited by the law of the United States" in their role as leading Vitamin C export firms, it was impossible for them to "comply with the laws of both" countries. *Hartford Fire, 509 U.S. at 799*.[36]

[*159] The dissent contends, nevertheless, that the defendants could have exercised their "legal right" to "freely resign" from the Sub-Committee, relieving them of their obligation under Chinese law to fix prices, in violation of U.S. ***antitrust law***. Dissent at 4. Affording some deference to the Ministry's submissions, however, we conclude that the 2002 Notice mandated the defendants to engage in price-fixing regardless of whether they remained Sub-Committee members. As the Amicus Brief explained, "while the [Chinese] Government did not, itself, determine specific prices or quantities, it most emphatically did insist on those matters being determined *through industry coordination*." App'x 168. The Ministry originally appointed the defendants to the Sub-Committee as industry leaders responsible for overseeing that coordination. Although the revised Sub-Committee Charter provided its newly expanded membership **[**44]** with the right to "freely resign" through a "formal membership resignation process," App'x 2182-83, as China's only Vitamin C manufacturers[37] the defendants were key players in an industry which the Chinese government required to engage in "industry-wide" negotiations to further "industry self-discipline," Sp. App'x 302. As such, the defendants could check out of the Sub-Committee any time they liked, but—vis-à-vis the more general obligation to exchange information and coordinate on price and volume—they could never leave.[38] In short, as industry leaders tapped for key roles in China's vitamin C export regime, the defendants had no exit from the irreconcilable conflict between Chinese law and U.S. ***antitrust law***.

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[36] Our prior opinion deferred to the Ministry's submissions in finding that (1) vitamin C exporters were required to negotiate and agree upon an "industry-wide negotiated" price; (2) terms like "industry self-discipline" and "voluntary restraint" referred to the Chinese government's expectation that private firms engage in self-regulation with respect to agreed prices and quotas; and (3) such participation was mandatory even for non-members of the Sub-Committee. *837 F.3d at 190 & n.9*.

On remand, we have reached the first conclusion on the basis of the regulations themselves, as illuminated by contemporaneous industry records and trial testimony concerning the PVC regime. Because our analysis turns on the existence of a true conflict, we reach this conclusion in light of what Chinese law facially required rather than the Chinese regulatory program's track record of enforcement. Thus, we find a true conflict even though the defendants did not always reach or adhere to a coordinated market price.

On the second point, we find the Ministry's submissions worthy of deference, after careful consideration, insofar as they explain terms of art that are otherwise vague. *See, e.g.*, Sp. App'x 302 (Sub-Committee expected to "coordinate export price and industry self-discipline" to "assist in maintaining good export order"); 1:06-md-1738, Doc. 397-22 at 12 (an entity with contract price term below the minimum agreed export price is expected to "voluntarily convert the price term to be consistent with the agreed price term").

We address the third point next, in the text.

[37] *See* App'x 698 ("By the end of 2001, 21 companies remained in the vitamin C export business, of which four were manufacturers and the remainder were trading companies.").

[38] *See* The Eagles, Hotel California (Asylum Records, 1976); *see also* App'x 685, 701 (Sub-Committee Secretary General Haili described in his affidavit how, even after the 2002 reforms, "as a practical matter, no manufacturer could abandon participation in the Sub-Committee or the meetings that the Chamber called.").

Additional Relevant International Comity Factors

Having found a true conflict between Chinese and U.S. ***antitrust law***, we weigh that factor in combination with the other comity factors. *See* *Mannington Mills, 595 F.2d at 1297-98*.[39]

[*160] 1. Nationality of the Parties and Site of the Anticompetitive Conduct

The defendants are companies owned by Chinese nationals, located and headquartered in China and primarily doing business there. The anticompetitive conduct at issue took place among **[**45]** these companies in China. The international comity concerns attending extraterritorial enforcement of U.S. ***antitrust law*** therefore apply fully in this context. *See* *In re Maxwell, 93 F.3d at 1051-52*; *Bi v. Union Carbide Chemicals & Plastics Co., 984 F.2d 582, 586 (2d Cir. 1993)*; *Timberlane, 549 F.2d at 615*. Accordingly, that the nationalities of the parties and the location of the anticompetitive conduct are foreign weigh in favor of dismissal under international comity principles.

2. Effectiveness of Enforcement and Alternative Remedies

The judgment entered below would require collection from foreign defendants and enforcement of a permanent injunction abroad, which China may not tolerate.[40] If enforced, the trebled damage award and threat of future sanctions from violating a permanent injunction would be likely to deter defendants from future anticompetitive behavior. Yet it also seems likely that China will continue to set minimum prices. The consequences of enforcing the judgment are therefore uncertain.

As to alternative remedies, the parties have not brought to our attention any pending litigation in an international forum related to this case.[41] Recourse to the WTO or another international forum remains available to the United States.

Accordingly, these aspects of the comity **[**46]** inquiry do not weigh heavily either in favor of or against dismissal.

3. Foreseeable Harms to American Commerce

We find that harm to American commerce from China's export controls was foreseeable. The Ministry's Amicus Brief concedes that one goal of the 2002 Notice was to maximize "the profitability of the industry." App'x 156. The Chambers set price levels so as to "neither incur an anti-dumping lawsuit" nor concede "profit room for western producers." 1:06-md-1738, Doc. 397-22 at 18. Notably, the Chamber assumed that "[d]omestic anti-trust laws generally do not get involved in the foreign trade area." *Id.* Thus, the defendants actively sought to avoid U.S. liability while inflating profits at the expense of consumers, foreseeably including Americans such as the plaintiffs here. Yet the Ministry set that priority for the Chamber; the defendants did not act independently. Thus, because we find that harm to American commerce was foreseeable, even if we do not impute to the defendants any specific intent to harm American consumers, **[*161]** this factor likely weighs against dismissal for reasons of international comity.

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[39] We have condensed these factors somewhat and have omitted one factor—regarding the existence of an international treaty on point—which is not relevant here.

[40] Notably, Article 276 of the Civil Procedure Law of the People's Republic of China (2017) provides that "[i]f any matter in which a foreign court requests assistance would harm the sovereignty, security or public interest of the People's Republic of China, the [Chinese] court shall refuse to comply with the request." Similarly, Article 282 forbids Chinese courts from executing any foreign judgment which "contradicts the basic principles of the law of the People's Republic of China or violates State sovereignty, security or the public interest."

[41] There was litigation of a similar case in the Third Circuit, but that Court of Appeals did not have occasion to reach the issues we address in today's decision. *See* *Animal Sci. Prods., Inc. v. China Nat. Metals & Mins. Imp. & Exp. Corp., 702 F. Supp. 2d 320 (D.N.J. 2010)*, *vacated and remanded sub nom.* *Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011)*, *as amended* (Oct. 7, 2011).

4. Reciprocity

The parties have not brought to our attention any circumstances **[**47]** under which the U.S. Government mandates price-fixing by American export companies. Nonetheless, if U.S. companies fixed prices in the United States pursuant to such a policy and a Chinese party sued in China for a violation of Chinese law, the U.S. Government would undoubtedly expect the Chinese court to recognize as a valid defense that U.S. law required the American exporter's conduct. A Chinese court's refusal to consider that irreconcilable legal conflict as a basis for dismissing a civil action would be an affront to the United States, both because of the Chinese court's second-guessing of U.S. sovereignty over the American export industry and because that decision would set a precedent for foreign judgments against American companies acting in accord with requirements of the U.S. Government. This factor, therefore, weighs heavily in favor of dismissal on comity grounds.

5. Possible Effect upon Foreign Relations

The Ministry emphasizes that China "has attached great importance to" this case. App'x 650. In a brief filed in the Supreme Court, the Ministry stated

> The Ministry has been actively involved in this litigation since 2005. It first presented the Chinese government's authoritative **[**48]** interpretation of Chinese law in 2006, when it filed an *amicus* brief in the district court. It reaffirmed its position in supplemental submissions to the district court in 2008 and 2009, and in an *amicus* brief in the court of appeals in 2014. As both courts [] observed, this was 'historic.'

Brief of *Amicus Curiae* Ministry of Commerce of the People's Republic of China in Support of Respondents, No. 16-1220 (U.S.) at 1. It appears that China perceives this case as threatening its rights as a sovereign to enact and enforce regulations governing Chinese companies conducting business within China's borders.[42] We discern that China has already taken umbrage at the district court's treatment of its representations about the meaning and operation of its law. In our judgment, the enforcement of a sizeable damages award and permanent injunction against defendants is likely to prove a considerable further "irritant." App'x 175 (quoting *O.N.E. Shipping, 830 F.2d at 454*). On such matters, we generally assign considerable significance to the views of the U.S. Department of State, for the Constitution primarily entrusts foreign relations to the Executive Branch, and we are ill-equipped to assess the numerous, cross-cutting bilateral **[**49]** and multilateral issues properly informing such decisions. As the Department of State has not weighed in or otherwise signaled a view one way or another on this case, we are left somewhat in the dark.[43] Nonetheless, we remain cognizant of the Supreme Court's **[*162]** general observation—raised in the context of the presumption against extraterritoriality—that the Judiciary is understandably cautious not to "erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013)*. This presumption "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 136 S. Ct. 2090, 2100, 195 L. Ed. 2d 476 (2016)*. After all, "[t]he Judiciary does not have the institutional capacity to consider all factors relevant to creating a cause of action that will inherently affect foreign policy." *Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1940, 210 L. Ed. 2d 207 (2021)*.

Consequently, to the extent the record reflects protestations of the Chinese government at the application of U.S. ***antitrust law*** to Chinese companies implementing export policy in China, and no contrary view of the Executive Branch is expressed, this factor tips in favor of dismissal for reasons of international comity.

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[42] *See* App'x 175 (respecting "China's sovereign policy decisions about how best to manage its economic transformation"); *id.* at 206-07 (respecting "Chinese government's sovereign actions over the conduct solely of its own citizens"); *id.* at 653 (respecting "China's export regulations of Vitamin C at issue in this case").

[43] This should come as no surprise, as the Department of State generally "adheres to a policy that it does not take positions regarding, or participate in, litigation between private parties, unless required to do so by applicable law." *Société Nationale Industrielle Aérospatiale, 482 U.S. at 554 n.5* (Blackmun, *J.*, concurring in part and dissenting in part).

International Comity [50] Principles Favor Dismissal** [44]

Balancing these factors, we decline to construe U.S. ***antitrust law*** as reaching defendants' conduct in the circumstances presented here, and we conclude that principles of international comity warrant dismissal. The existence of a true conflict between Chinese and U.S. ***antitrust law***, Chinese nationality of all of the defendants, extraterritorial nature of **[*163]** the anticompetitive conduct, and potential impact upon foreign relations together strongly favor dismissal.[45] While the efficacy of enforcing a judgment is unclear, we acknowledge that enforcement could be salutary for the international Vitamin C market, especially given that economic harm to American consumers was foreseeable. The United States undoubtedly has a substantial interest in the uniform enforcement of its antitrust laws, including the deterrence value of treble damages against foreign companies whose anticompetitive conduct causes substantial and foreseeable economic injury to American consumers. Yet the U.S. Department of Justice has not brought criminal antitrust enforcement actions against these defendants, and the Department of State has not weighed in as an *amicus curiae* on either side of the **[**51]** issue.[46] There are also alternate means for the United States to vindicate those interests, such as through bilateral diplomatic efforts, multilateral discussions, trade proceedings in the WTO, or dispute resolution in another international forum. While

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[44] Defendants relied on two other closely related doctrines in defense of their conduct abroad, act of state and foreign sovereign compulsion, but we find it unnecessary to reach a decision as to the applicability of either doctrine in light of our international comity holding.

As to the act of state doctrine, because our analysis is centered on whether defendants were required under Chinese law to engage in anticompetitive conduct, we are concerned with whether China's regulatory regime was responsible for that conduct, not whether such a Chinese governmental mandate (if there was one) would itself be legal or valid. Accordingly, "the factual predicate for application of the act of state doctrine does not exist" here because "[n]othing in the present suit requires the Court to declare invalid, and thus ineffective as a rule of decision for the courts of this country the official act of a foreign sovereign." *W.S. Kirkpatrick, 493 U.S. at 405* (internal quotation marks and citation omitted). We are thus not called upon to express any view about the legality — under Chinese or international law — of the vitamin C export regime that the Chinese government implemented. Nor, by taking into account the Ministry's submissions to the district court, this Court, and the Supreme Court concerning the nature of Chinese law, do we sit in judgment of any official act of the Chinese government in formulating or transmitting those submissions. We merely afford those submissions careful consideration (but not conclusive deference) as we reach our conclusions about the reach of the U.S. ***antitrust law***.

As to foreign sovereign compulsion, we might be inclined to the view that Chinese law compelled at least part of the defendants' anticompetitive conduct with sufficient coercive force to trigger this doctrine. But there is good reason to proceed with caution in such a high-stakes arena fraught with uncertainty. To conclude that this action merits dismissal on foreign sovereign compulsion grounds, we would be required to predict the severity of sanctions defendants might have faced in China for noncompliance, as well as pass on whether the defendants acted in bad faith—or simply had no alternative—given that they did not petition Chinese authorities to harmonize their vitamin C export regime with U.S. ***antitrust law***. Yet we need not reach these vexed questions because international comity provides ample basis for declining to apply U.S. ***antitrust law*** to defendants' conduct in this case.

[45] *See* ***O.N.E. Shipping, 830 F.2d at 453*** (affirming dismissal of complaint for reasons of international comity where foreign sovereign's cargo reservation laws "were alleged to be at the core of" the anticompetitive harm).

[46] While the Office of the Solicitor General filed a brief in support of plaintiffs' petition for certiorari in the Supreme Court, that brief primarily addressed the question of what level of deference U.S. courts should extend to a foreign sovereign's statement of its own law. *See* *Brief for the United States as Amicus Curiae Supporting Petitioners, 138 S. Ct. 1865* (No. 16-1220), at 12-29. As the dissent observes, *see* Dissent at 9 n.4, the Solicitor General criticized our prior opinion in passing for giving "inadequate weight to the interests of the U.S. victims of the alleged price-fixing cartel and to the interests of the United States in enforcement of its antitrust laws," and "too much weight to China's objections to this suit," Brief for the United States at 20. But it is the Legal Adviser of the Department of State who expresses the Executive Branch's view on internationally significant cases and their ramifications for foreign relations. *See, e.g.,* *Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 296 (2d Cir. 2007)* (Korman, *J.*, concurring in part and dissenting in part). The Solicitor General's brief neither claimed to report the views of the Executive Branch or the Department of State in this respect, nor otherwise purported to represent that a decision one way or the other in this case might have any particular effect on foreign relations.

the stakes are high for both countries, we conclude that the United States' concern with extraterritorial enforcement of a private civil judgment under its antitrust laws is substantially diminished in these circumstances. In light of these considerations of international comity, we do not construe the Sherman and Clayton Acts to reach the present controversy.

IV. CONCLUSION

We therefore **REVERSE** the judgment of the district court, and **REMAND** with instructions to **DISMISS** the complaint with prejudice.

Dissent by: WESLEY

Dissent

WESLEY, *Circuit Judge*, dissenting:

Did "Chinese law require[] the Chinese sellers' conduct[?]" *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1875, 201 L. Ed. 2d 225 (2018)*. The majority never really answers. Instead, it improperly applies the doctrine of international comity to avoid a finding it cannot contest: that Chinese law did not require the defendants to fix prices above the minimum of $3.35/kg, which is what Hebei and NCPG (the "defendants") did. Because it was not impossible for **[**52]** the defendants to comply with both Chinese and U.S. law, this case should not be dismissed on international comity grounds. *See* *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*.

[*164] *Section 1* of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates, or with foreign nations." *15 U.S.C. § 1*. "[P]rice-fixing agreements are unlawful *per se* under the Sherman Act." *Arizona v. Maricopa Cty. Med. Soc., 457 U.S. 332, 345, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. It is well established that *§ 1* proscribes only concerted, not unilateral, action. *See* *Fisher v. City of Berkeley, Cal., 475 U.S. 260, 266, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)*. "Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under *§ 1* in the absence of agreement [with another, separate entity]." *Id.*

As a threshold matter, the plain text of the regulations and agency charter demonstrates Chinese law did not *require* the defendants to *coordinate* vitamin C prices and quantities at all. The 2002 Notice establishing the Price Verification and Chop ("PVC") system stated "the relevant chambers must . . . submit to [Customs] information on industry-wide negotiated prices." Sp. App'x 302. The 2003 Announcement explained "the Chambers shall . . . affix the . . . chop . . . to the export **[**53]** contracts at the blocks where the prices and quantities are specified" and "verify the submissions by the exporters based on the industry agreements." *Id.* at 310. The Vitamin C Subcommittee, "a self-disciplinary trade organization jointly established on [a] voluntary basis" to, *inter alia*, "coordinate and guide vitamin C import and export business," expressly gave members "[f]reedom to withdraw from the Subcommittee" in its amended 2002 Charter. *Id.* at 325-26. The 2003 Announcement acknowledged membership was optional, instructing the Chambers to "give [non-member exporters] the same treatment as to member exporters." *Id.* at 311. In other words, under the PVC regime, the defendants were not legally required to engage in any concerted action. They could have complied with Chinese law without violating the Sherman Act by resigning from the Subcommittee and thereby independently setting their prices at or above the industry-coordinated minimum price, abstaining from any "meeting of the minds" to agree on price.[1] *See* *Fisher, 475 U.S. at 267*.

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[1] The majority concludes that "[a]ffording some deference to the Ministry's submissions . . . the 2002 Notice mandated the defendants to engage in price-fixing regardless of whether they remained [Subcommittee] members." Maj. Op. at 54-55.

The Ministry and defendants do not dispute this conclusion. The Ministry explicitly agreed that "[u]nder the [Vitamin C Subcommittee's] 2002 Charter . . **[**54]** . [Subcommittee] membership was no longer necessary to export vitamin C." Ministry's Letter Br. at 5. Its argument that "through the PVC system . . . the Chamber . . . ensured that each manufacturer complied with the industry's price and volume restrictions," *id.*, does not amount to a violation of the Sherman Act. *See* *Fisher, 475 U.S. at 267* (holding that "the mere fact that all competing **[*165]** property owners must comply with the same provisions of the [city's rent control] [o]rdinance is not enough to establish a conspiracy among landlords"). The defendants concede members were able to freely resign, but contend they could not because they were members of the executive "Council" elected to four-year terms. *See* Appellants' Letter Br. at 3. However, there is no indication their status impeded their legal right to resign. Their argument they could not as "a practical matter," *id.*, is inapposite; we are concerned only with what Chinese law required.

Despite recognizing that members could resign from the Subcommittee, the Ministry avers that the PVC regime required the defendants to violate the Sherman Act. I do not think the Ministry's submissions merit deference under the Supreme Court's five-factor test. *See* *Animal Sci. Prods., 138 S. Ct. at 1873*. **[**55]** They lack sufficient "clarity, thoroughness, and support," *id.*, as they conflate China's 2002 PVC regime with its 1997 regime and fail to address salient issues such as the "suspension provision" of the 2002 Notice permitting "the customs and chambers [to] suspend export price review," Sp. App'x 302, and the right under the 2002 Charter to freely resign from the Vitamin C Subcommittee. The "context and purpose" factor, *Animal Sci. Prods., 138 S. Ct. at 1873*, cuts strongly against the Ministry; I do not see how this being the Chinese government's first official appearance in a U.S. court mitigates the fact that the Ministry has only taken this --as the majority recognizes--self-serving position for the first time in the context of this litigation. *See* Maj. Op. at 47-48. Its view conflicts with China's public representation to the World Trade Organization ("WTO") in 2002 that it "gave up export administration of . . . vitamin C," noted under the heading "any restrictions on exports through non-automatic licensing *or other means* . . . ." World Trade Organization, *Transitional Review under Art. 18 of the Protocol of Accession of the People's Republic of China*, G/C/W/438, at 2-3 (2002) (some emphasis omitted). Upon careful **[**56]** and respectful consideration, these deficiencies prevent me from finding the submissions worthy of deference.

Moreover, the record makes clear that Chinese law did not require the defendants to agree on prices above the minimum of $3.35/kg, which is what the defendants did. In a 2003 Notice informing "member enterprises" of the "industry[-]agreed export prices," the Chamber asserted "[t]he agreed prices are the *minimum prices*. We put the limit on the *floor prices* but not the *ceiling prices*." App'x 1934 (emphases added). Wang Qi, an executive of one of the original defendants that settled before trial, testified:

> Question: And when the minimum price for verification and chop was $3.35, the Chamber of Commerce did not care if your company sold Vitamin C at a price higher than $3.35; isn't that right?
>
> Answer (Qi): Correct. That is like a minimum price.
>
> Question: *You were free to decide about prices above $3.35 when that was the minimum price*?
>
> Answer (Qi): *Yes, when it's over they don't care*.
> . . .
>
> Question: And no one ordered you outside of your company to charge prices higher than $3.35 when that was the minimum price?
> . . . [(Qi asks to clarify question)]
>
> Answer (Qi): No.

However, the Ministry did not argue vitamin C exporters who were not members of the Subcommittee still needed to *coordinate* prices. In fact, both the Ministry and the majority emphasize that price coordination occurred through the Vitamin C Subcommittee. *See, e.g.*, App'x 159 (Ministry's 2006 amicus brief) ("Throughout the [r]elevant [p]eriod, the Chamber exercised its regulatory authority with respect to vitamin C exports through its Vitamin C [Subcommittee]."); Maj. Op. at 31 ("[T]he Chamber delegated authority by administrative rule to the [Subcommittee] to 'coordinate and guide vitamin C import and export business as well as relevant activities.'") (citation omitted).

Id. at 1709-10 (emphases **[**57]** added). Qi's testimony is consistent with the Ministry's and defendants' accounts. The Ministry described the PVC regime as "the minimum **[*166]** export price rule," explaining that "Chinese law imposed *minimum price thresholds* via PVC," Ministry's Letter Br. at 2, 4 (emphasis added), and "[i]f the price was at or above *the minimum acceptable price set by coordination* through the Chamber, the Chamber affixed a . . . 'chop,' on the contract," App'x 164 (emphasis added). This accords with the Ministry's consistent contention that China adopted the PVC system to "avoid anti-dumping sanctions imposed by foreign countries on China's exports," *id.*, also identified as a goal in the 2002 Notice. *See also* Appellants' Letter Br. at 4 ("The prices agreed on were up to the companies so long as they exceeded anti-dumping minima."). As a result, even if Chinese law required vitamin C exporters to coordinate in setting a price, it was only a minimum price; to collude on prices above that was the defendants' choice, not their legal obligation.

The majority acknowledges that "the [Subcommittee] members were able to exercise some discretion in determining actual market prices by consensus," Maj. Op. at 36, and **[**58]** that "the PVC regime's enforcement scheme appears to have required only the [minimum price of $3.35/kg]," *id.* at 47 n.33. Yet it surmises that "the additional price and volume coordination" above the minimum was "still clearly mandated by the Chinese government," without any support.[2] *Id.* Neither the defendants nor the majority proffer any evidence suggesting vitamin C exporters needed to agree on *every* price rather than just the minimum price. Instead, the defendants argue that "the price level established does not matter" because the Sherman Act prohibits price fixing *per se*. Appellants' Letter Br. at 6. However, international comity does not work that way.

International comity is a careful balancing act.[3] It requires "tak[ing] into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law." *In re Maxwell Commc'n Corp., 93 F.3d 1036, 1048 (2d Cir. 1996)*. Accordingly, "[w]hen there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 555, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987)* (Blackmun, *J.*, concurring). China's purpose in enacting the PVC regime, as characterized by the Ministry, **[**59]** was to "transition from a State-controlled economy" as it entered the WTO and to avoid anti-dumping sanctions. Ministry's Letter Br. at 3. Even accepting for argument's sake that Chinese law required the defendants to coordinate on a minimum price to achieve its concern about anti-dumping claims, applying comity for agreements above the minimum goes above and beyond accommodating the central interests of the foreign state.

Nothing in the international comity precedents implies a true conflict exists **[*167]** where only part of the defendants' conduct was required under foreign law. As the Supreme Court held in *Hartford Fire*, there is no true conflict if foreign law did not "require[] [defendants] to act in some fashion prohibited by the law of the United States" or if the defendants' "compliance with the laws of both countries" was possible. *509 U.S. at 799*. The phrase "act in some fashion" does not direct courts to ignore whether there exists a true conflict as to the defendants' actual conduct at issue. Indeed, as the majority recites repeatedly, the comity analysis looks to the "*degree* of conflict with foreign law," not simply whether there is any conflict period. *See* *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 614 (9th Cir. 1976)* (emphasis added).[4] Accordingly, **[**60]** even if the PVC regime

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[2] Indeed, if not for the PVC regime--instituted by the 2002 Notice and equated with "Chinese law" during the relevant period by the Ministry and defendants--it is unclear what "material or source" establishes that Chinese law required the defendants to fix prices above the minimum. *See* *Fed. R. Civ. P. 44.1*.

[3] Some scholars have raised concerns regarding the ten-factor balancing test applied by the majority to determine the extraterritorial reach of a federal statue, arguing that the Supreme Court has rejected this approach as unworkable. *See* *Brief for Professors of International Litigation as Amici Curiae Supporting Neither Party, Animal Sci. Prods., 138 S. Ct. 1865* (No. 16-1220), at 11-13. For my purpose here, I do not address whether the multi-factor balancing test should not be applied at all.

[4] Because I find there is no true conflict, I do not address the remaining comity factors. However, I note that the majority's analysis, which is very similar to our 2016 decision, was criticized by the Solicitor General "express[ing] the views of the United States" in its amicus brief in support of the second question presented in the plaintiffs' petition for a writ of certiorari to the

required the defendants to agree on a minimum price and the defendants could not have complied with the Sherman Act because it prohibits price fixing *per se*, comity does not demand that we set aside examining if their actual price-fixing conduct was required under Chinese law.

The defendants could have complied with Chinese law and the Sherman Act by: (1) exercising their legal right to resign from the Subcommittee and not participating in any conspiracy to set prices, or (2) not colluding on prices above the minimum, the only price needed to receive a chop. Given the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)*, this is not the "rare" case presenting "extraordinary circumstances" that **[**61]** warrants dismissal on the basis of comity, *see* *Brief for U.S. Gov't as Amicus Curiae, Animal Sci. Prods., 138 S. Ct. 1865* (No. 16-1220), at 19. I would affirm the judgment of the district court.[5]

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Supreme Court. *Brief for U.S. Gov't as Amicus Curiae, Animal Sci. Prods., 138 S. Ct. 1865* (No. 16-1220), at 1. The government remarked that we "gave inadequate weight to the interests of the U.S. victims of the alleged price-fixing cartel and to the interests of the United States in enforcement of its antitrust laws" and "gave too much weight to China's objections to this suit." *Id.* at 20. Instead, the government suggested "under the circumstances presented here, [defendants'] argument that Chinese law required them to engage in the challenged conduct might have been better analyzed under the rubric of the foreign sovereign compulsion doctrine rather than through a comity analysis." *Id.*

[5] Even if Chinese law required the defendants to agree on a minimum price, which I do not find, comity would not demand dismissal of the entire case. At the very least, I would vacate and remand for the district court to calculate damages based on prices that were above the minimum. *See* Appellees' Br. at 10 n.9 (explaining that "[p]laintiffs' damages expert 'calculated damages under the assumption that the Chinese government would have enforced a rigid price floor of $3.35 per kilogram'") (citation omitted).

St. Luke's Hosp. v. ProMedica Health Sys.

United States Court of Appeals for the Sixth Circuit

July 29, 2021, Argued; August 10, 2021, Decided; August 10, 2021, Filed

File Name: 21a0180p.06

No. 21-3007

Reporter

8 F.4th 479 *; 2021 U.S. App. LEXIS 23728 **; 2004 FED App. 0180P (6th Cir.) ***

ST. LUKE'S HOSPITAL d/b/a McLaren St. Luke's; WELLCARE PHYSICIANS GROUP, LLC, Plaintiffs-Appellees, v. PROMEDICA HEALTH SYSTEM, INC.; PROMEDICA INSURANCE CORPORATION; PARAMOUNT CARE, INC.; PARAMOUNT CARE OF MICHIGAN, INC.; PARAMOUNT INSURANCE COMPANY; PARAMOUNT PREFERRED OPTIONS, INC., Defendants-Appellants.

Subsequent History: Rehearing denied by, En banc *St. Luke's Hosp. v. Promedica Health Sys., 2021 U.S. App. LEXIS 27436 (6th Cir., Sept. 10, 2021)*

Motion granted by *St. Luke's Hosp. v. Promedica Health Sys., 2021 U.S. App. LEXIS 28615 (6th Cir., Sept. 20, 2021)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of Ohio at Toledo. No. 3:20-cv-02533. Jack Zouhary, District Judge.

St. Luke's Hosp. v. Promedica Health Sys., 510 F. Supp. 3d 529, 2020 U.S. Dist. LEXIS 249613, 2020 WL 8264106 (N.D. Ohio, Dec. 29, 2020)

Core Terms

provider, patients, competitor, healthcare, antitrust, network, rivals, anti trust law, in-network, contracts, offers, anticompetitive, Skiing, cancel, cancer, preliminary injunction, monopolist, compete, insurance company, monopoly, forcing, insured, plans, district court, do business, acquisition, attracting, parties, prices, resort

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

Four factors guide review of a district court's preliminary injunction: (1) the likelihood of success on the merits, (2) the threat of irreparable harm absent an injunction, (3) the risk of harm to others, and (4) the broader public interest.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Sherman Act > Claims

HN2[] **Actual Monopolization, Claims**

Section 2 of the Sherman Act makes it illegal to monopolize, or attempt to monopolize any part of the trade or commerce among the several States, or with foreign nations. *15 U.S.C.S. § 2*. By themselves, possessing monopoly power and charging monopoly prices do not violate *§ 2*. The Act targets the possession of monopoly power coupled with the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. The focus is on guarding the competitive process and on protecting the welfare of consumers, not on ensuring the economic fortunes of competitors. A monopolist's actions thus must harm the competitive process and thereby harm consumers, as mere harm to one or more competitors will not suffice.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN3[] **Sherman Act, Claims**

In some settings, *§ 2 of the Sherman Act, 15 U.S.C.S. § 2*, prohibits a company from refusing to contract—from refusing to deal—with another company. Just as the statute prohibits two companies from entering a contract that permits an anticompetitive monopoly, so it also prohibits a company from refusing to deal with another company in aid of such practices. Even so, refusal-to-deal claims face a steep and obstacle-laden climb. Courts start with the liberty-based assumption that individuals and companies may do business with whomever they please. As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN4[] **Actual Monopolization, Claims**

Under discrete circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2 of the Sherman Act, 15 U.S.C.S. § 2. The course of liability requires a showing that the monopolist's conduct is irrational but for its anticompetitive effect.

Governments > Courts > Authority to Adjudicate

HN5[] **Courts, Authority to Adjudicate**

As generalists, as lawyers, and as outsiders trying to understand intricate business relationships, judges have limitations in gauging when a refusal to deal will hurt competition as opposed to the expectations of a single competitor.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN6[] **Sherman Act, Claims**

A few questions inform the inquiry. Did the monopolist enter a voluntary course of dealing with its rival. Did the monopolist willingly sacrifice shortrun benefits in exchange for a perceived long-run impact on its smaller rival? If so, did the monopolist ignore efficiency concerns or act without valid business reasons? Answering "yes" to the above questions signals a potential § 2 of the Sherman Act, 15 U.S.C.S. § 2, problem. Answering "no" to any of them signals that the antitrust laws do not apply.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] **Standing, Requirements**

Forcing rivals to share—to continue doing business together—pushes the bounds of the court's expertise, and when it comes to fashioning an antitrust remedy in this area, caution is key.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN8[] **Grounds for Injunctions, Irreparable Harm**

As a general matter, a plaintiff's harm from the denial of a preliminary injunction does not count as irreparable if it is, or can be, fully compensable by monetary damages.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN9[] **Sherman Act, Claims**

Harming a competitor, even wishing to harm a competitor, by itself falls short of what *§ 2 of the Sherman Act, 15 U.S.C.S. § 2*, requires.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN10[] **Scope, Monopolization Offenses**

The mere possession of monopoly power is not only not unlawful; it is an important element of the free-market system, for the opportunity to charge monopoly prices—at least for a short period—is what attracts business acumen in the first place.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN11[] **Per Se Rule & Rule of Reason, Sherman Act**

Antitrust law concerns itself with the protection of competition, not competitors.

Antitrust & Trade Law > Sherman Act > Claims

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN12[] **Sherman Act, Claims**

Section 1 of the Sherman Act makes every contract in restraint of trade or commerce among the several States illegal. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN13[] **Standing, Requirements**

An antitrust plaintiff must do more than merely allege harm flowing from antitrust violations to meet the freestanding antitrust standing requirement. It must also show that the loss stems from a competition-reducing aspect or effect of the defendant's behavior. A plaintiff must seek to defend marketplace competition and not merely allege harm to its capacity as a competitor.

Counsel: ARGUED: Douglas E. Litvack, Christopher G. Renner, David M. Gossett, DAVIS WRIGHT TREMAINE, LLP, Washington, D.C., for Appellants.

David A. Ettinger, HONIGMAN LLP, Detroit, Michigan, for Appellees.

ON BRIEF: Douglas E. Litvack, Christopher G. Renner, David M. Gossett, DAVIS WRIGHT TREMAINE, LLP, Washington, D.C., Adam S. Sieff, DAVIS WRIGHT TREMAINE LLP, Los Angeles, California, Mark D. Wagoner, Matthew T. Kemp, Larry J. Obhof, SHUMAKER, LOOP & KENDRICK LLP, Toledo, Ohio, for Appellants.

David A. Ettinger, HONIGMAN LLP, Detroit, Michigan, Ron N. Sklar, HONIGMAN LLP, Chicago, Illinois, Denise M. Hasbrook, ROETZEL & ANDRESS, Toledo, Ohio, for Appellees.

Amanda L. Wait, Victor J. Domen, Jr., NORTON ROSE FULBRIGHT US LLP, Washington, D.C., Gerald A. Stein, NORTON ROSE FULBRIGHT US LLP, New York, New York, David E. Dahlquist, Kevin P. Simpson, WINSTON & STRAWN LLP, Chicago, Illinois for Amici Curiae.

Judges: Before: SUTTON, Chief Judge; COLE and READLER, Circuit Judges.

Opinion by: SUTTON

Opinion

[*482] [*2]** SUTTON, Chief Judge. In phase one of this dispute, our court affirmed the Federal **[**2]** Trade Commission's decision to block a merger of ProMedica Health System and St. Luke's Hospital in Lucas County, Ohio. As part of the unwinding of the merger, ProMedica and St. Luke's signed an agreement in which ProMedica's insurance subsidiary, Paramount, **[*483]** agreed to maintain St. Luke's as a within-network provider. But that contractual obligation came with a caveat: Paramount could drop St. Luke's if ownership of the hospital changed. The qualification came to fruition when a large healthcare company based in Michigan, McLaren Health, merged with St. Luke's. In response, Paramount ended its relationship with St. Luke's, removing the hospital from its provider network.

All of this prompted a second antitrust charge against ProMedica, this one by St. Luke's. It alleged that ProMedica's refusal to do business with it violated the antitrust laws. The district court preliminarily enjoined ProMedica from pulling the plug on the agreement. Because ProMedica had a legitimate business explanation for ending the relationship, St. Luke's is unlikely to show that ProMedica unlawfully refused to continue doing business with it. On top of that, it has little likelihood of establishing an irreparable **[**3]** injury given the option of money damages. For these reasons and those elaborated below, we vacate the preliminary injunction.

I.

A.

Typical economic transactions involve single buyers and single sellers and a straightforward price. Not so in the healthcare market. It includes a diverse cast of players for each treatment and variable, often unknown, prices.

Take account of the many potential sellers: individual doctors, physician practices, pharmacies, hospitals, and others. So too of buyers. Rarely is there just one of them, with state and federal governments, private insurance companies, and individuals all participating. Making **[***3]** matters more complicated, many players often take on more than one role, with healthcare companies and insurance companies frequently acting as sellers and buyers.

Pricing is unique too. Consumers rarely know the cost of any one procedure. And healthcare providers often charge different rates for care depending on who foots the bill. The federal government, for example, tends to pay less for services and procedures than do private insurance plans. Medicare and Medicaid rarely cover "providers' actual cost of services." *ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 561 (6th Cir. 2014)*.

Private health insurance stands in the middle **[**4]** of the healthcare market. Although some patients shop for health insurance on their own, most Americans receive coverage through their employers, a vestige of 1940s wage policies. Atul Gawande, *Is Health Care a Right*?, The New Yorker, Oct. 2, 2017, at 48. Employers thus negotiate rates with commercial insurance companies. If an employer is self-insured, it foots the cost of care itself and pays only administrative fees. If not, the insurance company covers the cost of care in exchange for a premium per covered employee.

Health insurance companies in turn contract with providers to set rates and bundle providers into "networks" that they can then market to employers. When insurance companies include as many providers as possible in their network, that adds flexibility and enhanced choice. But it costs more. When insurance companies include only a subset of providers in a narrow network, the opposite usually is true. An insurer "may be able to negotiate lower rates from providers for narrow network plans," which may then "enable the insurer to offer consumers lower premiums." R.49 at 11. Because narrow networks funnel more patient traffic to their contracted providers, insurance companies **[**5]** pay less **[*484]** for care and pass some of those savings on to employers and patients.

B.

Anchored by underappreciated Toledo, Lucas County has four main hospital systems: ProMedica, Mercy Hospitals, the University of Toledo Medical Center, and St. Luke's. *ProMedica, 749 F.3d at 562*. Two-thirds of Lucas County's patients have insurance through the government. *Id. at 561*. The rest receive insurance through private plans.

[*4]** ProMedica acts as a healthcare buyer and seller. As a seller, it holds a prominent place in the market. ProMedica's hospital system holds 56% of the county's market for "inpatient general acute care services" that are "offered to commercially insured patients." R.22-4 at 2.

As a buyer, ProMedica has a more modest position. It offers health insurance through a subsidiary, Paramount, which purchases healthcare from providers. Rather than include many hospitals in its network, Paramount employs a narrow-network strategy that steers patients toward ProMedica's hospitals. This vertically integrated approach allows Paramount to lower prices and permits ProMedica to recoup those savings down the line as a provider. Far from dominant in this market, Paramount competes alongside national insurers like Aetna and Anthem and **[**6]** regional insurers like Buckeye Insurance Group and Medical Mutual of Ohio. Paramount has "about 78,000 commercial members and fewer than 20,000 Medicare Advantage members" in the region. R.40 at 6.

St. Luke's, a healthcare seller located southwest of Toledo in the city of Maumee, has a smaller market share. Until recently, it operated as an independent community hospital, capturing roughly 10% of the local commercial market. *ProMedica, 749 F.3d at 562*. Mercy and the University make up the remainder.

Despite its size, St. Luke's has some comparative advantages. It offers premium care at competitive rates. And it operates in the wealthier southwestern portion of Lucas County, attracting a large number of privately insured patients. Those patients represent a critical revenue source for St. Luke's, offsetting the losses incurred from treating patients covered by government plans.

These twin advantages help to explain why ProMedica sought to merge with St. Luke's in 2010. After agreeing to join forces, ProMedica sought to integrate St. Luke's operation by melding back offices and transferring employees. Paramount, ProMedica's insurance arm, contracted with St. Luke's around this time to include the hospital as an **[**7]** in-network provider. The partnership proved lucrative. Paramount won over "major employers in the areas most served by St. Luke's," gaining over 10,000 covered individuals after adding St. Luke's to its **[***5]** provider network. R.22-7 at 2. ProMedica also continued to work with WellCare, the St. Luke's physician group.

Wary of ProMedica's market dominance and concerned about the downstream effects of market consolidation, the Federal Trade Commission objected to the merger. *ProMedica, 749 F.3d 559*. After an investigation, the Commission ordered ProMedica to divest St. Luke's. *ProMedica Health Sys., Inc., 2012-1 Trade Cas. 77840, 2012 WL 1155392, at *48 (F.T.C. Mar. 22, 2012)*. Our court rejected ProMedica's petition to overturn the order. *ProMedica, 749 F.3d at 561*.

C.

That brings us to the second, perhaps final, phase of this dispute. In 2016, the parties negotiated, and the Commission **[*485]** approved, a divestiture agreement establishing that Paramount would continue contracting with St. Luke's as an in-network healthcare provider. But the provision contained an out. If St. Luke's underwent "a Change in Control," Paramount could "immediately terminate" its contracts with the hospital and its physician group. R.32 at 19.

The arrangement initially worked well, so well that the parties re-upped the "mutually beneficial" contract two years later, **[**8]** extending it through 2023. R.22-8 at 2. For St. Luke's, the agreement guaranteed a steady stream of traffic from patients with Paramount insurance in the wealthier southwestern portion of the county.

Paramount benefited as well in obvious and not-so-obvious ways. The obvious: It could advertise St. Luke's as an in-network provider to private insurance customers, an easy way to boost revenue. The not-so-obvious: ProMedica generated revenue from patients who needed advanced care that St. Luke's could not provide. Keep in mind that not every hospital provides every kind of service. St. Luke's offers just primary and secondary services (think "basic medical and surgical" care), while ProMedica offers more sophisticated tertiary services like cardiothoracic surgeries and advanced cancer care. R.32 at 65. By maintaining St. Luke's as an in-network provider, Paramount could attract members who might go to St. Luke's for basic services but move to ProMedica's hospitals for more complex treatment. St. Luke's also allowed **[***6]** ProMedica to operate a cancer center on St. Luke's campus, giving ProMedica an "access point" in southwestern Lucas County. R.44 at 3.

This picture changed when McLaren Health **[**9]** Systems agreed to buy St. Luke's in October 2020. A large healthcare provider itself, McLaren "agreed to commit to at least $100 million in a capital investment in St. Luke's." R.22-5 at 2. ProMedica viewed McLaren St. Luke's as "a completely different type of competitor." R.43 at 2. McLaren offers complex cancer services that "compete directly" with ProMedica and could siphon off patients needing advanced care from ProMedica's hospitals. R.44 at 5.

With these considerations in mind, ProMedica ended its relationship with St. Luke's. The day after McLaren finalized its acquisition of St. Luke's, ProMedica terminated several agreements, including Paramount's agreement to include St. Luke's as an in-network provider and the ongoing relationship between ProMedica and the WellCare physician group at St. Luke's.

St. Luke's sued ProMedica, alleging that, by refusing to continue the contract, ProMedica violated the Sherman Act—mainly *§ 2* of the Act. St. Luke's also sought a preliminary injunction to prevent ProMedica from canceling its contracts with the hospital. ProMedica opposed the request for an injunction and filed a motion to dismiss the case. The district court denied ProMedica's motion **[**10]** to dismiss and granted St. Luke's motion for a preliminary injunction.

II.

A.

HN1[] Four factors guide our review of a district court's preliminary injunction: (1) the likelihood of success on the merits, (2) the threat of irreparable harm absent an injunction, (3) the risk of harm to others, and (4) the broader public interest. *A1 Diabetes & Med. Supply v. Azar, 937 F.3d 613, 618 (6th Cir. 2019)*. In this case, those inquiries largely boil down to two. Because St. Luke's has little chance of success on its antitrust claims and because St. Luke's has **[***7]** failed to establish a risk of irreparable **[*486]** harm, the district court should not have preliminarily enjoined ProMedica's termination of the contracts.

HN2[] *Section 2* of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*. By themselves, "possessing monopoly power and charging monopoly prices" do "not violate *§ 2*." *Pac. Bell Tel. Co. v. linkLine Comms., Inc., 555 U.S. 438, 447-48, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*. The Act targets "the possession of monopoly power" coupled with "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. The focus is on guarding the competitive process and on protecting **[**11]** the welfare of consumers, not on ensuring the economic fortunes of competitors. A monopolist's actions thus must "harm the competitive *process* and thereby harm consumers," as mere "harm to one or more *competitors* will not suffice." *United States v. Microsoft Corp., 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (per curiam).

HN3[] In some settings, *§ 2* of the Sherman Act prohibits a company from refusing to contract—from "refusing to deal"—with another company. Just as the statute prohibits two companies from entering a contract that permits an anticompetitive monopoly, so it also prohibits a company from refusing to deal with another company in aid of such practices. Even so, refusal-to-deal claims face a steep and obstacle-laden climb. Courts start with the liberty-based assumption that individuals and companies may do business with whomever they please. "As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *linkLine, 555 U.S. at 448*. This "presumption of freedom" has deep roots. Robert H. Bork, *The Antitrust Paradox* 344 (1978). Even the earliest *§ 2* cases note that the Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to **[**12]** exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*.

But generally and traditionally are not always and forever. ***HN4***[] Under discrete circumstances, "a refusal to cooperate with rivals can constitute anticompetitive conduct and violate *§ 2*." **[***8]** *Verizon Comms. Inc. v. Law Offs. of Curtis Trinko, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. The course of liability requires a showing that the "monopolist's conduct" is "irrational but for its anticompetitive effect." *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1075 (10th Cir. 2013)* (Gorsuch, J.); *see also* *Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 462 (7th Cir. 2020)*. Because separating "anticompetitive malice" from "competitive zeal" tries the most acute and fair-minded judges and because there is a rational explanation for most business conduct, far more claims are lost than won on this ground. *Trinko, 540 U.S. at 409*. ***HN5***[] "[A]s generalists, as lawyers, and as outsiders trying to understand intricate business relationships," judges have "limitations" in gauging when a refusal to deal will hurt competition as opposed to the expectations of a single competitor. *Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2166, 210 L. Ed. 2d 314 (2021)*.

HN6[] A few questions inform the inquiry. Did the monopolist enter a "voluntary . . . course of dealing" with its rival? *Trinko, **[*487]** 540 U.S. at 409*. Did the monopolist willingly sacrifice "shortrun benefits . . . in exchange for a perceived long-run impact on its smaller rival"? *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 611, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*; *see also* 3 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust*** ***[**13]*** ***Law*** P 651 (4th ed. 2015). If so, did the monopolist ignore "efficiency concerns," *Aspen Skiing, 472 U.S. at 610*, or act without "valid business reasons," *id. at 605*? Answering "yes" to the above questions signals a potential *§ 2* problem. Answering "no" to any of them signals that the antitrust laws do not apply. *Novell, 731 F.3d at 1074-75*; *see also* *FTC v. Qualcomm Inc., 969 F.3d 974, 993-94 (9th Cir. 2020)*; *New York v. Facebook, No. 20-3589, 2021 U.S. Dist. LEXIS 127227, 2021 WL 2643724, at *11 (D.D.C. June 28, 2021)*.

B.

One impediment to St. Luke's refusal-to-deal claim is that the parties' prior course of dealings demonstrates that ProMedica had a valid business reason for ending the contract. ProMedica and St. Luke's, and the Federal Trade Commission to boot, anticipated the possibility that St. Luke's might merge with another healthcare company, and as a result they agreed to give ProMedica the right to end the contract with St. Luke's under those circumstances. The "Change in Control" provision in the divestiture agreement—a contract St. Luke's signed and the Commission approved—allowed ProMedica to "immediately terminate" its ongoing arrangement **[***9]** with St. Luke's if St. Luke's were acquired. R.32 at 19. Possibilities became realities when McLaren acquired St. Luke's, and ProMedica exercised the contractual right St. Luke's gave it. St. Luke's knew from the beginning that its ability to maintain its status as an **[**14]** in-network provider might be affected if it were acquired by another company. The deal between ProMedica and St. Luke's was predicated upon the latter's status at the time of the contract. The two firms may have entered a "voluntary . . . course of dealing" in one sense, *Trinko, 540 U.S. at 409*, but it included a voluntary, mutually agreed, and government-approved basis for ending that course of dealing. In other words, ProMedica had a legitimate business reason from the outset to end this arrangement, as evidenced by the "Change in Control" clause.

In addition to this pre-approved exit ramp, other factors used to assess refusal-to-deal claims favor ProMedica's right to end Paramount's relationship with St. Luke's. Start by asking whether the evidence signals that ProMedica willingly forsook "short-term profits" by pulling out of its agreements. *Id.* Considerable record evidence shows how ProMedica could benefit from encouraging patients to seek care at ProMedica hospitals and from ProMedica's doctors rather than at St. Luke's and by extension at McLaren. Steve Cavanaugh, ProMedica's Chief Financial Officer, explained that after McLaren's acquisition, St. Luke's began offering "advanced care at McLaren hospitals" **[**15]** by "hundreds of specialists and primary care physicians." R.43 at 2-3. Those changes made "St. Luke's a completely different type of competitor," *id.* at 2, and the ProMedica system would "lose revenue if . . . forced to contract with McLaren," *id.* at 5. Others echoed the point, explaining that ending the relationship with St. Luke's would "bring revenue back to ProMedica," R.41 at 12, by ensuring that patients are "treated by ProMedica providers," R.47 at 8.

The one economist to analyze the market shared this perspective. He concluded that for "both commercial members and **[*488]** Medicare Advantage members, the increases in profit from ProMedica treating patients instead of St. Luke's likely are greater than the decreases in profit from lost Paramount enrollment." R.49 at 18.

Nothing in the record establishes that Paramount would suffer serious losses by cutting St. Luke's loose from its provider network. Paramount found that it did "not need St. Luke's in its network to offer an attractive plan to local employers." R.43 at 5. It suffered only "nominal" **[***10]** membership losses after canceling its in-network agreement with St. Luke's, and the decision produced "no material impact" on the bottom line. **[**16]** R.42 at 4. The only customer Paramount seems to have lost is St. Luke's itself, whose employees were insured through Paramount prior to McLaren's acquisition. Even if Paramount suffered limited losses by eliminating St. Luke's from its provider network, ProMedica reasoned that it would make up the difference by capturing more advanced-care patients who might otherwise go to McLaren for treatment.

Cancer care offers a good example of how the terrain shifted under ProMedica's feet once McLaren entered the scene. According to Dr. Lee Hammerling, ProMedica's Chief Academic Officer, ProMedica agreed to extend Paramount's in-network contract with St. Luke's "[i]n return" for a promise by St. Luke's to extend ProMedica's cancer center lease on the St. Luke's campus and to refrain from opening "a competing cancer center within five miles." R.44 at 4. But once McLaren purchased St. Luke's, it became likely that ProMedica's cancer center would take a hit. Hammerling expected "McLaren St. Luke's" to "begin referring its cancer patients" to McLaren facilities rather than to ProMedica. *Id.* at 5. Other ProMedica leaders expressed similar fears, exacerbated by the possibility that McLaren would open **[**17]** "a joint cancer center across from" St. Luke's. R.47 at 7. Cancer care captures the economic challenge ProMedica faced once St. Luke's became McLaren St. Luke's.

McLaren scrambled ProMedica's approach. Even if ProMedica and St. Luke's entered a "voluntary . . . course of dealing," *Trinko, 540 U.S. at 409*, the facts before us do not show that ProMedica willingly surrendered "short-run benefits" to undercut St. Luke's, *Aspen Skiing, 472 U.S. at 611*.

The answer to this last question takes us part of the way to answering the next question: Did ProMedica offer a "valid business reason" for its decision to cancel its ongoing contracts with McLaren St. Luke's? *Id.* at 599. St. Luke's, all agree, is no longer the "independent community hospital" we encountered in 2014. *ProMedica, 749 F.3d at 561*. McLaren has promised to invest $100 million into St. Luke's and "to assume $65 million of St. Luke's debt and $55 million of St. Luke's pension liability." R.22-5 at 2. Along with a capital infusion, McLaren has brought to the table facilities and healthcare offerings likely to siphon patient revenue from ProMedica. We cannot say ProMedica lacked "legitimate business purposes" in **[***11]** refusing to continue its contracts with a different competitor. 3B Areeda & Hovenkamp, ***Antitrust Law*** ¶ 772. **[**18]**

ProMedica did what many companies do when circumstances change. Reassessing the landscape after McLaren's acquisition is hardly "irrational but for its anticompetitive effect." *Novell, 731 F.3d at 1075*. A prior decision "to adopt one business model" did "not lock" ProMedica "into that approach and preclude adoption of" a different approach "at a later time." *Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1196 (10th Cir. 2009)*. That is hardly an unusual approach in the world of **[*489]** business or economics. "When my information changes," John Maynard Keynes reputedly quipped, "I change my mind. What do you do?" In a competitive market, businesses that do not tack when economic winds change are doomed to fail. The antitrust laws promote competition, not sclerosis.

Recall as well the relevant markets. While St. Luke's wishes to focus on ProMedica's 56% market share, it overlooks the reality that this refusal to deal involves ProMedica's insurance arm, Paramount. It is Paramount after all that removed St. Luke's from its provider network. Paramount has just a 17% market share in the relevant medical insurance market and must compete with the likes of Anthem, Aetna, Buckeye Insurance, Medical Mutual, and others. In this context, it is difficult to maintain that Paramount's contractually **[**19]** permitted refusal to deal will lead to any anticompetitive monopolies.

We also remain wary of differentiating the effects on the market between refusals to deal and mandates to deal, between facilitating competition and forcing cooperation. ***HN7***[] Forcing rivals to share—to continue doing business together—pushes the bounds of our expertise, and "[w]hen it comes to fashioning an antitrust remedy" in this area, "caution is key." *Alston, 141 S. Ct. at 2166*. If the record before us makes anything clear, it is that there is more change than continuity in the Toledo healthcare market. McLaren's entry into the market and capital infusions promise to alter products and services, and many ineffable incentives along the way. "[C]entral planners" we are not. *Trinko, 540 U.S. at 408*.

Although our estimation of St. Luke's chance of success anchors our decision, another preliminary injunction factor bolsters it. ***HN8***[] As a general matter, a "plaintiff's harm from the denial **[***12]** of a preliminary injunction" does not count as "irreparable" if it is, or can be, "fully compensable by monetary damages." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't, 305 F.3d 566, 578 (6th Cir. 2002)*; *see* *Teva Pharms. USA, Inc. v. Sandoz, Inc., 572 U.S. 1301, 1301-02, 134 S. Ct. 1621, 188 L. Ed. 2d 754 (2014)* (Roberts, C.J., in chambers). St. Luke's fails to meet that bar. Its complaint primarily emphasizes the loss of patients and market share. But economists can **[**20]** and do assess such injuries in monetary terms. Confirming the point, St. Luke's has asked for damages addressing those very losses. As for its other alleged less tangible economic injuries—harm to reputation and goodwill—they do not suffice at this fledgling stage of the case to warrant the rare remedy of forcing someone to do business with a competitor. Even in *Aspen Skiing*, it was the district court, not the Supreme Court, that granted an injunction, *472 U.S. at 598 n.23*, and it did so only after a jury trial on the merits. In this instance, St. Luke's has not shown that money damages would fail to compensate any antitrust injuries.

Other dynamics also give us pause. If Paramount's members in the southwestern portion of the county wish to go to St. Luke's as an in-network provider, they can push their employers to change course when businesses craft their health insurance plans for the upcoming enrollment season. St. Luke's has already advocated such an approach by publishing an open letter "urg[ing]" Paramount members "to consider choosing a plan that includes" St. Luke's and its physicians. R.22-18 at 2.

C.

St. Luke's hammers one chord in particular in rebuttal, the Supreme Court's decision in *Aspen **[**21]** Skiing*. But that case is "at or near the outer boundary of *§ 2* liability," *Trinko, 540 U.S. at 409*, and **[*490]** it does not apply by its own reasoning. *Aspen Skiing* involved a dispute between the defendant (a dominant ski resort that controlled three of four mountains in the area) and the plaintiff (a diminutive rival in control of the fourth mountain). *472 U.S. at 587-98*. The two rivals had teamed up to offer a joint pass for skiers hoping to use all four mountains. *Id. at 589-91*. After the defendant cut off the joint ticket offering, the plaintiff "tried a variety of increasingly desperate measures to re-create the joint ticket, even to the point of in effect offering to buy the defendant's tickets at retail price." *Trinko, 540 U.S. at 409*. The district court compelled the two to continue to offer a joint ticket, and on review the Supreme Court reasoned **[***13]** that the dominant resort failed "to offer any efficiency justification whatever for its pattern of conduct." *Aspen Skiing, 472 U.S. at 608*.

Aspen Skiing differs from today's case in more ways than one. ProMedica *has* offered an "efficiency justification" for its decision to back out of its agreements with St. Luke's. McLaren's acquisition changed the economic calculus of the prior relationship and prompted a course correction grounded in financial **[**22]** realities, not "anticompetitive malice." *Trinko, 540 U.S. at 409*. By the same token, ProMedica did not act solely to "avoid providing any benefit" to St. Luke's, *Aspen Skiing, 472 U.S. at 610*, but advanced its own interests as a competitor in the market. Imagine how *Aspen Skiing* would have turned out if the large resort made these decisions only after the small resort merged with another large resort. Such a different explanation for ending their cooperation, it is fair to think, would have led to a different outcome. A contrary approach might even have led to inklings of an antitrust *conspiracy* charge. Last, but hardly least, *Aspen Skiing* did not involve a preexisting agreement that permitted the resort to end its ongoing contracts. *Christy Sports, 555 F.3d at 1196*. The more one compares the two situations, the less flattering the comparison becomes to St. Luke's.

Also unhelpful is *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*. It concerned an electric utility's refusal to sell power at wholesale prices to municipalities. *Id. at 371*. The Court held that the utility violated *§ 2* by refusing to contract with certain cities, explaining that "[i]nterconnection with other utilities is frequently the only solution" to "the difficulties and problems of . . . isolated electric power systems" and that the utility refused to sell **[**23]** power "solely to prevent municipal power systems from eroding its monopolistic position." *Id. at 378*. Unlike municipalities hoping to buy power, McLaren St. Luke's does not depend wholly on ProMedica for treating patients as a healthcare provider. Other insurance companies continue to include St. Luke's as an in-network provider. The hospital can tell patients, indeed it already has told patients, to switch to those plans if they wish to continue going to St. Luke's for care. More, McLaren can enter the healthcare market and offer its own insurance plan to compete alongside Paramount's narrow network. Unlike industries requiring extensive infrastructure, new firms can easily enter the "market for medical insurance." *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins. Inc., 784 F.2d 1325, 1335 (7th Cir. 1986)*. **[***14]**

Otter Tail and *Aspen Skiing* each concerned small competitors that could not survive without the monopolist's help. By refusing to deal, the monopolists could starve their emaciated rivals out of the market. Thanks to McLaren, St. Luke's occupies a far different position. As in *Aspen Skiing*, the defendants in *Otter Tail* **[*491]** could not offer an efficiency rationale explaining their conduct. *See* Bork, *The Antitrust Paradox*, at 346. ProMedica has by contrast given sound explanations for **[**24]** refusing to continue dealing with its new, much larger rival: McLaren St. Luke's.

The district court's preliminary findings do not alter this conclusion. Because Paramount and St. Luke's renewed their contractual relationship in 2018 to run through 2023 and because Paramount's president said that including St. Luke's made Paramount "more attractive to employers," R.68 at 10, the district court thought it "abundantly clear" that ProMedica "would not suffer harm from a short-term continuation of these agreements," *id.* at 11. But the same contract, even as continued, permitted ProMedica to cancel it if St. Luke's were acquired. That cancellation option makes it difficult to draw the conclusion, factually or otherwise, that ProMedica necessarily would benefit financially from continuing the contract. By *all* of its terms, the contract would benefit ProMedica only as long as St. Luke's did not merge—and especially did not merge with an equal-sized competitor. The reality that ProMedica did not enter an unconditional five-year relationship with St. Luke's undermines the district court's conclusion that ProMedica would not suffer by continuing its relationship with St. Luke's, and it sets this **[**25]** case apart from the kind of refusal-to-deal claim *Aspen Skiing* allowed. *Christy Sports, 555 F.3d at 1196-97*.

St. Luke's insists that, because ProMedica *intended* to harm its economic prospects, ProMedica's conduct violates *§ 2*. To bolster the charge, St. Luke's emphasizes that ProMedica lacked any business justification to cancel its contracts with St. Luke's physician group as well as its contract with Paramount. This WellCare cancellation, St. Luke's thinks, shows that ProMedica acted only out of spite. But the markets for physician services and for general acute care are distinct, and the complaint targets the latter. ***HN9***[] More fundamentally, harming a competitor, even wishing to harm a competitor, by itself falls short of what *§ 2* requires. *Microsoft, 253 F.3d at 58*; *see also* *Facebook, 2021 U.S. Dist. LEXIS 127227, 2021 WL 2643724, at *11* (requiring more than "an intent to harm" to **[***15]** state a refusal-to-deal claim). Every shrewd businessperson, and every athlete and politician to boot, intends to beat her competitors. Just so for companies, the most strategic of which hope to squash the competition by delivering a superior product. ***HN10***[] "The mere possession of monopoly power . . . is not only not unlawful; it is an important element of the free-market system," for "[t]he opportunity to charge monopoly prices—at least **[**26]** for a short period—is what attracts 'business acumen' in the first place." *Trinko, 540 U.S. at 407*. That ProMedica might want to beat McLaren St. Luke's by delivering less expensive, vertically integrated healthcare in Lucas County is not a sign of market forces failing. It is just the opposite.

HN11[] ***Antitrust law***, remember, concerns itself "with the protection of competition, not competitors." *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; *Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd., 833 F.3d 680, 682 (6th Cir. 2016)*. True enough, Paramount's decision to cancel its contract with St. Luke's means that McLaren St. Luke's may see fewer patients—and thereby earn less revenue—in the short run. Competition is, after all, "a ruthless process." *Ball Mem'l, 784 F.2d at 1338*. Yet "the antitrust laws are not balm for rivals' wounds." *Id.* McLaren has its chance to compete in Lucas County by introducing new health **[*492]** insurance plans and by attracting Paramount members who may want the option to visit St. Luke's as an in-network provider. Forcing ProMedica to continue dealing with St. Luke's may even lessen incentives to compete—that's what happens with some antitrust conspiracies—an outcome antithetical to a central aim of ***antitrust law***.

Switching gears, St. Luke's alleges a violation of *§ 1 of the Sherman Act*, arguing that the "change in control provision in the divestiture agreement **[**27]** is anticompetitive and an illegal restraint of trade." R.1 at 60. We fail to see how. ***HN12***[] *Section 1* makes "[e]very contract . . . in restraint of trade or commerce among the several States . . . illegal." *15 U.S.C. § 1*. The "Change in Control" provision does not restrain trade; it does the opposite by allowing one party to back out of a cooperative venture in view of changed business circumstances. St. Luke's cannot "use the antitrust laws to sue a rival merely for vigorous or intensified competition." *NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007)* (en banc). Even if we were to subject the "Change in Control" provision to rule-of-reason analysis, St. Luke's has failed to meet its "initial burden to prove that the challenged restraint has a substantial anticompetitive **[***16]** effect." *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018)*. The provision at issue here allows ProMedica to compete more directly with McLaren St. Luke's. Promoting competition is what the antitrust laws seek to achieve, not what they seek to halt.

Surely St. Luke's does not suggest the divestiture agreement *itself* violated *§ 1*, for that would mean St. Luke's broke the antitrust laws by agreeing to it. Remember too that the Commission blessed the arrangement. How, then, does a provision allowing one party to back out of the arrangement restrain **[**28]** trade? St. Luke's offers no answer. Its arguments boil down to an assertion that ProMedica acted unilaterally to monopolize the market. "If that allegation states an antitrust claim at all, it does so under *§ 2*." *Trinko, 540 U.S. at 407*.

St. Luke's adds that ProMedica is "even more dominant today than in 2010, when the Commission and this Court found that ProMedica's efforts to eliminate competition with St. Luke's through a merger would be anticompetitive." Appellee's Br. at 15. But it is one thing for the Federal Trade Commission to stop a merger. It is quite another to force two rivals to continue to do business together even after both parties to the contract agreed they could end the relationship after a change in control. "If the law were to make a habit of forcing monopolists to help competitors . . . courts would paradoxically risk encouraging collusion between rivals." *Novell, 731 F.3d at 1073*.

The discerning reader might wonder whether St. Luke's complaint has established antitrust standing. ***HN13***[] We have said that an antitrust plaintiff must "do more" than merely allege harm flowing from antitrust violations to meet the freestanding antitrust standing requirement. *NicSand, 507 F.3d at 449*. It must also show that the loss "stems from a competition-*reducing* ***[**29]*** aspect or effect of the defendant's behavior." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. As we have made clear, a plaintiff must seek to defend "marketplace competition" and not merely allege harm to its "capacity as a competitor." *Indeck Energy Servs., Inc. v. Consumers Energy Co., 250 F.3d 972, 977 (6th Cir. 2000)*. One might fairly wonder whether

St. Luke's meets the bar, particularly because ProMedica's exercise of its contractual right seemingly promotes, rather **[*493]** than hampers, competition for general acute care services in the Toledo area. But we need not decide the question. We have before us only the district court's **[***17]** decision to grant a preliminary injunction. And antitrust standing—or the lack thereof—does not affect our jurisdiction to consider that issue. *NicSand, 507 F.3d at 449*.

ProMedica separately appeals the district court's decision not to award a bond pending this appeal. As both parties agree, the issue is moot in view of our decision to vacate the preliminary injunction.

St. Luke's tries to cast this narrative as a David versus Goliath story, forgetting that David competed ably in the end. Even on its own terms, the theory that ProMedica has long dominated the market and that its cancellation of the Paramount contracts is just one more mile marker on its road to monopolization does not work. As time has shown, St. **[**30]** Luke's has survived long enough to take on gigantic qualities of its own. The new *McLaren* St. Luke's by every measure is well-resourced and well-positioned to compete with ProMedica. If anything, ProMedica's cancellation may well prompt McLaren to enter the market sooner, and with more vigor, than it otherwise would. Our economic system and the antitrust laws are premised on the assumption that consumers will be better off for it.

We vacate the preliminary injunction.

[Dekker v. Vivint Solar, Inc.](#)

United States District Court for the Northern District of California

August 11, 2021, Decided; August 11, 2021, Filed

No. C 19-07918 WHA

Reporter

2021 U.S. Dist. LEXIS 151377 *; 2021 WL 3565428

GERRIE DEKKER, et al., Plaintiffs, v. VIVINT SOLAR, INC., et al., Defendants.

Prior History: *Dekker v. Vivint Solar, Inc., 2020 U.S. Dist. LEXIS 50984, 2020 WL 1429740 (N.D. Cal., Mar. 24, 2020)*

Core Terms

plaintiffs', restitution, unfair, amend, third amended complaint, translation, allegations, provisions, customers, revisions

Counsel: **[*1]** For Gerrie Dekker, Individually and on behalf of all others similarly-situated, Karen Barajas, as executor of the Estate of Thompson Bryson. Individually and on behalf of all others similarly-situated, Marlene Rogers, Individually and on behalf of all others similarly-situated, Daniel Thompson, Individually and on behalf of all others similarly-situated, Jae Chong, Individually and on behalf of all others similarly-situated, Marci Hulsey, Individually and on behalf of all others similarly-situated, Cindy Piini, Individually and on behalf of all others similarly-situated, Phyllis Runyon, Individually and on behalf of all others similarly-situated, Gennie Hilliard, Individually and on behalf of all others similarly-situated, Juan Bautista, Individually and on behalf of all others similarly-situated, Plaintiffs: Joshua David Boxer, Matthew John Matern, Matern Law Group, PC, Manhattan Beach, CA; Corey Benjamin Bennett, Matern Law Group, PC, San Francisco, CA.

For Vivint Solar, Inc., Vivint Solar Holdings, Inc, Vivint Solar Developer, LLC, Vivint Solar Provider, LLC, Defendants: Chet Alan Kronenberg, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, Los Angeles, CA.

Judges: WILLIAM ALSUP, UNITED STATES **[*2]** DISTRICT JUDGE.

Opinion by: WILLIAM ALSUP

Opinion

ORDER RE MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

In this action for unfair business practices, plaintiffs move for leave to file their third amended complaint. Because the standard for granting leave to amend is liberal, to the extent stated, plaintiffs' motion is **GRANTED IN PART** and **DENIED IN PART**.

Prior orders detail our facts (Dkt. Nos. 121, 140). In short, defendant Vivint Solar, Inc., in its various corporate forms, installs solar panels on customers' roofs and, at least as advertised, sells those customers the low cost, clean energy produced over a twenty-year term pursuant to their "power purchase agreement" ("PPA") (Second

Amd. Compl. ¶¶ 1-11). Plaintiffs allege, however, that Vivint's contract contains unlawful liquidated-damages clauses, provisions which impose harsh and unlawful penalties onto dissatisfied customers.

A recent order dated June 8, 2021, granted Vivint's motion for judgment on the pleadings as to an aspect of plaintiffs' *Section 17200* claim. Vivint's timely appeal of that order is now pending before our court of appeals (Dkt. No. 141). In the meantime, plaintiffs now move to amend their complaint in an attempt to rectify the deficiencies **[*3]** in their *Section 17200* claim and to add non-injunctive relief under *Section 17200* and the CLRA. This order follows full briefing and oral argument.

The lenient *Rule 15* standard, and not the elevated standard of *Rule 16*, governs here (Dkt. No. 131). *Rule 15* dictates that leave to amend shall be freely given when justice so requires, and so a district court considers: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff has previously amended the complaint. *Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004)*; *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*. "A motion to make an amendment is to be liberally granted where from the underlying facts or circumstances, the plaintiff may be able to state a claim." *DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987)*. As in a motion to dismiss, a complaint properly states a claim when the factual allegations permit a reasonable inference, not just speculation, that defendants are liable for the misconduct alleged. All factual allegations rate as true, but legal conclusions merely couched as fact may be disregarded. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

First, Vivint argues that plaintiffs' proposed amendments to their *Section 17200* claim do not address the deficiencies called out by the June 2021 order. California appellate courts have recently articulated several revised standards for "unfair" within the meaning **[*4]** of *Section 17200* in the wake of the Supreme Court of California's decision in *Cal-Tech Comms., Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 543 (Cal. 1999)*. Our court of appeals has consolidated the various standards a court should consider for a *Section 17200* unfairness-prong claim: (1) whether the underlying public policy violated by the challenged conduct is tethered to a specific constitutional, statutory or regulatory provision; (2) whether the challenged conduct significantly threatens or harms competition, including by threatening an incipient violation of an ***antitrust law*** or the policy or spirit of an ***antitrust law***; (3) whether the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers; or (4) whether the practice's impact on the victim outweighs the reasons, justifications and motives of the alleged wrongdoer. *See* *Doe v. CVS Pharmacy, Inc., 982 F.3d 1204, 1214-15 (9th Cir. 2020)*.

Plaintiffs have not meaningfully addressed their *Section 17200* claim alleging unfairness based on the contract-translation issue allegedly experienced by Mr. Bautista. Rather, the proposed third amended complaint only revises those allegations to describe the practice as "unconscionable" (Proposed Third Amd. Compl. ¶ 104). This does not suffice — plaintiffs have provided no explanation of how merely inserting the word "unconscionable" **[*5]** fulfills any of the standards articulated in *CVS*. This aspect of plaintiffs' unfairness-prong claim remains deficiently tethered to the dismissed Translation Act claim. *See* *Bothwell v. Abbott Laboratories, Inc. (In re Vaccine Cases), 134 Cal. App. 4th 438, 457-58, 36 Cal. Rptr. 3d 80 (Cal. Ct. App. 2005)*.

At the hearing, plaintiffs' counsel argued that the insertion of "unconscionable" connects the contract-translation unfairness claim with the subsequent, newly added paragraphs regarding Vivint's practice of imposing, or seeking to impose, various unfair provisions of the PPA. Specifically, plaintiffs cite: the PPA's unfair imposition of cumulative remedies; the PPA's unfair transfer provisions; and the PPA's unfair requirement for customers to pay for all electricity generated by the system (rather than just the electricity used by the consumer) (Proposed Third Amd. Compl. ¶¶ 105-07). These allegations, while otherwise legitimate, have no direct connection to the translation issues experienced by Mr. Bautista, where Vivint's salesperson allegedly conducted negotiations in Spanish and failed to provide a corresponding translation of the English contract to a potential customer with essentially no English proficiency. Instead, the newly added paragraphs solely concern the PPA itself, separate from any antecedent **[*6]** translation issue. While paragraphs 105 through 107 do not salvage the unfairness-prong claim as to the translation issue, they otherwise sufficiently allege Vivint imposed, or threatened to impose, oppressive and unethical provisions in the PPA.

Accordingly, plaintiffs' motion to amend to rectify the deficiencies of their *Section 17200* claim alleging unfairness based on the contract-translation issue experienced by Mr. Bautista is **DENIED**. However, leave to amend plaintiffs' unfairness-prong claim regarding the PPA's cumulative remedies, transfer provisions, and inequitable payments for generated electricity is **GRANTED.**

Second, Vivint challenges the new claims for damages and restitution under the CLRA as well as the claim for restitution under *Section 17200*. The proposed third amended complaint expressly limits those newly added requests to members of the "Translation Class, and those consumers like Plaintiff Dekker, who do not have arbitration agreements" with Vivint (*id.* at ¶¶ 110, 117). Vivint argues these revisions do not rectify deficiencies in the second amended complaint, that the revisions fail to meet the pleading standards of *Rule 8*, and that, for restitution specifically, the revisions fail to allege there **[*7]** is no adequate remedy at law (Opp. 6-8). Initially, while the June 2021 order certainly mandated that "the proposed amended complaint correct[] the deficiencies identified in [the] order," it by no means proscribed plaintiffs from amending in due course per *Rule 15*. Plaintiffs here, in fact, met the scheduling order's July 29 deadline to amend their pleadings (Dkt. No. 131). Vivint's next argument that the damages claim under the CLRA does not meet the pleading standards of *Rule 8* also fails. In the proposed third amended complaint, plaintiffs allege, for example, that Vivint imposed or sought to impose, unenforceable termination fees (Proposed Third Amd. Compl. ¶ 113-15). These and other allegations satisfy the *Rule 8* standard for the purposes of this motion.

Regarding restitution, our court of appeals recently held that "the traditional principles governing equitable remedies in federal courts, including the requisite inadequacy of legal remedies, apply when a party requests restitution under the UCL and CLRA in a diversity action." *Sonner v. Premier Nutrition Co., 971 F.3d 834, 844 (9th Cir. 2020)*. "The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937, 947 (Cal. 2003)*. Plaintiffs do not state or **[*8]** otherwise explain how damages are an inadequate legal remedy in their proposed third amended complaint. Plaintiffs also fail to differentiate their request for restitution from their request for damages. Because plaintiffs "fail[] to establish that [they] lack an adequate remedy at law," inclusion of a restitution claim is futile. *See Sonner, 971 F.3d at 844*.

Accordingly, plaintiffs' motion to amend to include a damages claim under the CLRA is **GRANTED**; plaintiffs' motion to amend to include a restitution claim under the CLRA and *Section 17200* is **DENIED.**

IT IS SO ORDERED.

Dated: August 11, 2021

/s/ William Alsup

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

N. Penn Towns, LP v. Concert Golf Partners, LLC

United States District Court for the Eastern District of Pennsylvania

August 12, 2021, Decided; August 12, 2021, Filed

CIVIL ACTION NO. 19-4540-KSM

Reporter

554 F. Supp. 3d 665 *; 2021 U.S. Dist. LEXIS 151684 **; 2021 WL 3562849

NORTH PENN TOWNS, LP, directly and as assignee of Philmont Country Club, Plaintiff, v. CONCERT GOLF PARTNERS, LLC, et al., Defendants.

Subsequent History: Related proceeding at *N. Penn Towns, LP v. Concert Golf Partners, LLC, 264 A.3d 377, 2021 Pa. Super. Unpub. LEXIS 2523, 2021 WL 4239034 (Sept. 17, 2021)*

Summary judgment granted by, in part, Summary judgment denied by, in part *N. Penn Towns, LP v. Concert Golf Partners, LLC, 2022 U.S. Dist. LEXIS 133994 (E.D. Pa., July 28, 2022)*

Prior History: *N. Penn Towns, L.P. v. Concert Golf Partners, LLC, 2020 Pa. Dist. & Cnty. Dec. LEXIS 4141 (Sept. 8, 2020)*

Core Terms

Concert, fraud claim, antitrust claim, Township, holes, golf, Defendants', alleges, parties, civil conspiracy, assigned, cleaned, capital improvement, assignee, omission, promise, motion to dismiss, interchangeable, products, relevant market, development approval, rule of reason, real estate, fails, Properties, antitrust, courts, cause of action, representations, asserts

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

In deciding a motion to dismiss under *Fed. R. Civ. P.12(b)(6)*, the Court must determine whether the complaint contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] Motions to Dismiss, Failure to State Claim

As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings. However an exception to the general rule is that a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment. Similarly, the Court may consider an indisputably authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document.

Business & Corporate Compliance > ... > Contracts Law > Breach > Breach of Contract Actions

Contracts Law > Remedies > Election of Remedies

HN3[] Breach, Breach of Contract Actions

Under Pennsylvania law, the gist of the "action doctrine" prevents a plaintiff from recasting ordinary breach of contract claims into tort claims. Pennsylvania courts and courts in this District have repeatedly recognized that the purpose of the doctrine is to maintain the distinction between the theories of contract and tort. Accordingly, the doctrine does not bar tort claims where the claims arise independently of the underlying contract, with the contract being merely collateral.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > Constructive Fraud

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > Intentional Fraud

HN4[] Fraud & Misrepresentation, Constructive Fraud

As it relates to fraud, fraud in the inducement claims are much more likely to present cases in which a social policy against the fraud, external to the contractual obligations of the parties, exists. Where the fraud concerns an act collateral to and not interwoven with the terms of the parties' contract, such as fraudulent inducement to enter the contract, courts have been less willing to bar claims However, where the pre-contractual statements that are the basis for the fraudulent inducement claim concern specific duties that are later outlined in the contract, courts have repeatedly dismissed such claims as sounding in contract and, thus, barred by the gist of the action doctrine. Courts have held that fraudulent inducement claims are not barred by the gist-of-the-action doctrine where the alleged fraud is collateral to the contract.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Scope

HN5[] Clayton Act, Claims

The Third Circuit has held that an assignment of an antitrust claim under *Section 4* of the Clayton Act, *15 U.S.C.S. § 15*, must be express.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN6[] Clayton Act, Claims

15 U.S.C.S. § 1 of the Sherman Act makes illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. To state a § 1 claim, a plaintiff must allege: (1) an agreement; (2) to restrain trade unreasonably. In turn, 15 U.S.C.S. § 4 of the Clayton Act provides a private right of action for plaintiffs seeking to allege an antitrust violation.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN7[] Sherman Act, Claims

The Supreme Court has repeated time and again that 15 U.S.C.S. § 1 of the Sherman Act outlaws only unreasonable restraints. An unreasonable restraint is one that inhibits competition in the relevant market.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN8[] Sherman Act, Claims

There are two tests for determining whether a practice restrains trade in violation of 15 U.S.C.S. § 1 of the Sherman Act: the rule of reason and the per se rule. Typically, courts determine whether a restraint violates 15 U.S.C.S. § 1 of the Sherman Act by applying the rule of reason.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN9[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Pursuant to *15 U.S.C.S. § 1* of the Sherman Act, under the "rule of reason," the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Courts consider specific information about the relevant business, the restraint's history, nature, and effect, and whether the businesses involved have market power. In applying this test, the court examines the competitive significance of the alleged restraint to determine whether it has an anti-competitive effect on the market and is an unreasonable restraint on trade. As the Supreme Court has explained, the rule of reason distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN10[] **Scope, Monopolization Offenses**

Pursuant to *15 U.S.C.S. § 1* of the Sherman Act, some types of restraints are deemed unlawful per se. The "per se rule" treats categories of restraints as necessarily illegal. As a result, if the per se rule applies, the court need not study the reasonableness of an individual restraint in light of the real market forces at work. In other words, the court conducts a truncated analysis if the restraint is per se illegal.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN11[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Pursuant to *15 U.S.C.S. § 1* of the Sherman Act, the per se rules of illegality are the exception to antitrust analysis and are only employed in certain recognized categories. The Supreme Court has cautioned that resort to per se rules is confined to restraints that would always or almost always tend to restrict competition and decrease output, such as horizontal agreements among competitors to fix prices or to divide markets. At bottom, a per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason. To that end, the Supreme Court has expressed reluctance to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious. The Supreme Court has also instructed that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN12[] **Sherman Act, Claims**

In order to state a Sherman Act claim under *15 U.S.C.S. § 1* a plaintiff must identify the relevant product and geographic markets and allege that the defendant exercises market power within those markets.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN13[] **Sherman Act, Claims**

Pursuant to *15 U.S.C.S. § 1* of the Sherman Act, the plaintiff bears the burden of defining the relevant product market. To determine whether the relevant market was adequately defined, the Court must first consider the extent to which the product is interchangeable with alternative products within the field. The term interchangeability implies that one product is roughly equivalent to another for the use to which it is put. It also means that while there might be some degree of preference for one product over the other, either would work efficiently. In addition, courts must consider the cross-elasticity of demand, which is defined as a relationship between two products, usually substitutes for each other, in which a price change for one product affects the price of the other. Ultimately, the outer boundaries of the market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN14[] **Sherman Act, Claims**

Pursuant to *15 U.S.C.S. § 1* of the Sherman Act, the Third Circuit has instructed that although in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers, there is no prohibition against dismissal of antitrust claims for failure to plead a relevant market. Accordingly, courts may find that a relevant market is legally insufficient and grant a motion to dismiss where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN15[] **Sherman Act, Claims**

Pursuant to *15 U.S.C.S. § 1* of the Sherman Act, courts routinely hold that a product market is insufficient if it is comprised of a single brand or a single entity.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN16[] **Actual Fraud, Elements**

Under Pennsylvania law, to state a prima facie case of fraud, a plaintiff must plead that the defendant made: (1) a false representation; (2) with knowledge of its falsity or recklessness as to whether it is true or false; (3) which was intended to make the plaintiff act; (5) that the plaintiff justifiably relied on the misrepresentation; and (6) that the plaintiff suffered damages as a proximate result of its reliance. A fraud claim based on an omission has the same elements as fraud, except that an omission is actionable as fraud only where there is an independent duty to disclose the omitted information. Fraudulent concealment has similar elements as fraud in the omission and likewise requires a plaintiff to show that the party that fraudulently concealed the information had a duty to speak.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Conditions Precedent

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN17[] **Heightened Pleading Requirements, Conditions Precedent**

Under *Fed. R. Civ. P. 9(b)*, a party alleging fraud or mistake must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. The Third Circuit has explained that to comply with *Rule 9(b)*, a plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > Intentional Fraud

HN18[] **Contract Conditions & Provisions, Integration Clauses**

Under Pennsylvania law, the parol evidence rule forbids admitting evidence of prior representations to fully integrated written agreements, even for claims of fraudulent inducement. Fraud in the inducement does not involve terms omitted from an agreement, but rather allegations of oral representations on which the other party relied in entering into the agreement but which are contrary to the express terms of the agreement.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN19[] **Nondisclosure, Elements**

Fraud in the omission and fraudulent concealment claims can only lie where there is a duty to disclose the omitted information. Under Pennsylvania law, the duty to speak exists only in limited circumstances, such as: (1) when there is a fiduciary, or confidential, relationship between the parties; (2) where one party is the only source of information to the other party or the problems are not discoverable by other reasonable means; (3) when disclosure is necessary to prevent an ambiguous or partial statement from being misleading; (4) where subsequently acquired knowledge makes a previous representation false; or (5) where the undisclosed fact is basic to the transaction.

Torts > ... > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty

HN20[] **Affirmative Duty to Act, Voluntary Assumption of Duty**

Where both the plaintiff and defendant are sophisticated business entities, entrusted with equal knowledge of the facts, the duty to speak does not arise.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

HN21[] **Contract Interpretation, Fiduciary Responsibilities**

Regarding the duty to speak, even if a confidential or fiduciary relationship did not exist, there may still be a heightened responsibility based on the dealings of the parties. Thus, one may justifiably rely on silence where there is no confidential relationship only if a specific relationship of trust has been developed with regard to a certain matter.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN22[] Actual Fraud, Elements

Under Pennsylvania law, an expressed intention to take a future action that does not actually comport with one's true state of mind at that time is a misrepresentation of existing fact and may serve as the basis for a fraud claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN23[] Motions to Dismiss, Failure to State Claim

Courts deny motions to dismiss where the plaintiff alleges that, from the outset, the defendant never intended to keep its promise to do something in the future.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN24[] Actual Fraud, Elements

A plaintiff must show that it justifiably relied on the false representation to state a fraud claim.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN25[] Actual Fraud, Elements

In deciding whether a plaintiff justifiably relied on the information for a fraud claim, a court may consider the degree of sophistication of the parties and the history of the negotiation process between them.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN26[] Actual Fraud, Elements

Although courts may consider the nature of the relationship between the parties when analyzing the justifiable reliance element of a fraud claim, the Pennsylvania Supreme Court has hesitated to find reliance justified where the party claiming reliance had an adequate opportunity to verify the allegedly fraudulent statements.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN27[] Actual Fraud, Elements

Regarding the justifiable reliance element of a fraud claim, statements as to the riskiness of developing and/or selling the Property are statements of value, and therefore are a part of trade talk and bargaining which customarily accompany negotiations for the sale of property.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN28[] **Civil Conspiracy, Elements**

To state a cause of action for civil conspiracy, a plaintiff must show: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage. A viable civil conspiracy claim also requires malice or intent to injure. Bald assertions that certain actions were malicious are insufficient; it must be alleged that the sole purpose of the conspiracy was to injure the Plaintiffs.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN29[] **Civil Conspiracy, Elements**

Courts routinely dismiss civil conspiracy claims where the plaintiff failed to allege that the defendants acted maliciously or acted with the sole intent to injure him or her.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN30[] **Breach of Contract Actions, Elements of Contract Claims**

To state a claim for breach of contract under Pennsylvania law, a plaintiff is required to plead: (1) the existence of a contract, including its essential terms; (2) a breach of duty imposed by the contract; and (3) resultant damages.

Counsel: [1]** For NORTH PENN TOWNS, LP, directly and as assignee of Philmont Country Club, Plaintiff: DAVID RYAN SCOTT, Kang Haggerty & Fetbroyt LLC, Philadelphia, Philadelphia, PA; KANDIS L. KOVALSKY, MICHAEL WEINERT, EDWARD T. KANG, KANG HAGGERTY & FETBROYT LLC, PHILADELPHIA, PA.

For CONCERT GOLF PARTNERS, LLC, PETER NANULA, CONCERT PHILMONT, LLC, CONCERT PHILMONT PROPERTIES, LLC, Defendants: WALTER WEIR, JR., LEAD ATTORNEY, GINA M. STOWE, SUSAN M. VERBONITZ, WEIR & PARTNERS LLP, PHILADELPHIA, PA.

For RIDGEWOOD REAL ESTATE PARTNERS, LLC, RIDGEWOOD PHILMONT, LLC, MICHAEL PLOTNICK, Defendants: CORY MITCHELL GRAY, LEAD ATTORNEY, GREENBERG TRAURIG LLP, FLORHAM PARK, NJ; GEORGE J. FARRELL, GREENBERG TRAURIG, PHILADELPHIA, PA; GINA M. STOWE, Weir & Partners LLP, Philadelphia, PA; GREGORY J. CASAS, GREENBERG TRAURIG LLP, AUSTIN, TX.

For JONATHAN GREBOW, Defendant: CORY MITCHELL GRAY, LEAD ATTORNEY, GREENBERG TRAURIG LLP, FLORHAM PARK, NJ; GEORGE J. FARRELL, GREENBERG TRAURIG, PHILADELPHIA, PA; GREGORY J. CASAS, GREENBERG TRAURIG LLP, AUSTIN, TX.

Judges: KAREN SPENCER MARSTON, J.

Opinion by: KAREN SPENCER MARSTON

Opinion

[*674] MEMORANDUM

Marston, J.

As part of the fallout of a botched real estate transaction, Plaintiff North Penn Towns, L.P. ("NPT"), **[**2]** directly and as assignee **[*675]** of Philmont Country Club ("PCC"), has sued Defendants Concert Golf Partners, LLC ("CGP"), Concert Philmont, LLC, Concert Philmont Properties LLC, and Peter Nanula (collectively, "the Concert Defendants") and Ridgewood Real Estate Partners, LLC ("Ridgewood"), Ridgewood Philmont, LLC, Jonathan Grebow, and Michael Plotnick (collectively, the "Ridgewood Defendants") for fraud, breach of contract, conspiracy, and violations of federal ***antitrust law***. (Doc. No. 1.)

The Concert Defendants and Ridgewood Defendants filed a joint motion to dismiss, arguing that NPT cannot bring claims as an assignee of PCC; that NPT fails to state an antitrust claim because it, among other things, does not define a relevant market in which competition has been harmed; and that NPT did not satisfy the heightened pleading standard for fraud claims. (Doc. Nos. 13, 21.) NPT opposed the motion. (Doc. Nos. 17, 22, 33.) The Court held oral argument on the motion on July 22, 2021.

For the reasons that follow, the Court grants in part and denies in part Defendants' motion.

I. Factual Background

A. PCC Decides to Sell Part of Its Property to Raise Money for Improvement Projects

PCC operated a member-owned **[**3]** country club ("Philmont Club") located in Huntington Valley, Pennsylvania.[1] (Doc. No. 1 at ¶ 28.) Founded in 1906, Philmont Club boasted many amenities, including two 18-hole golf courses (the "North Course" and the "South Course"), tennis courts, a swimming pool, and a clubhouse. (*Id.* at ¶ 29.) However, in the early 2000s, PCC "found itself in poor financial and physical shape." (*Id.* at ¶ 30.) Because it needed to raise money to improve Philmont Club's facilities, PCC decided to sell nine of the South Course's eighteen holes (the "Property") to a residential real estate developer. (*Id.* at ¶ 31.)

At first, PCC agreed to sell the Property to Toll Brothers, a homebuilder. (*Id.* at ¶ 32.) However, that arrangement quickly fell apart, and the Toll Brothers agreement was terminated in July 2014. (*Id.* at ¶ 33.)

B. NPT Enters the Picture and Agrees to Develop the Property

About a year later, in May 2015, PCC agreed to sell the Property to another homebuilder, NVR, Inc. (*Id.* at ¶ 34.) However, because NVR "does not engage in property development—that is, the process of taking raw land and readying it for home construction, including . . . grading the land and installing infrastructure such as sewer **[**4]** and electrical lines," NVR assigned the agreement of sale to NPT, a property developer. (*Id.* at ¶¶ 35-36.) The plan was for NPT to develop the Property into developed lots which NVR would then purchase from NPT. (*See id.* at ¶¶ 35-37.) NPT and NVR entered into a Lot Purchase Agreement ("LPA") to this effect on July 22, 2015. (*Id.* at ¶ 37.) The following day, July 23, NPT and PCC entered into an agreement of sale ("AOS"), pursuant to which PCC agreed to sell the Property to NPT. (*Id.* at ¶ 38; Doc. No. 1-1, Ex. 2.)

Taken together, under the AOS and LPA, NPT would first purchase the Property from PCC and then obtain development approvals from Lower Moreland township (the "Township"), develop the Property into individual development lots ("units"), and sell the units to NVR, who would ultimately construct the homes and **[*676]** sell them to consumers. (Doc. No. 1 at ¶ 39.)

Under the AOS, the purchase price for the Property was based on a per unit yield; each unit approved for development by the Township cost $75,308.64. (*Id.* at ¶ 40.) Although the final yield was uncertain, the AOS anticipated that the Township would approve 162 units, resulting in an anticipated purchase price of $12.2 million.

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[1] PCC is a non-profit corporation that owned and operated the country club also bearing the name Philmont Country Club. (Doc. No. 1 at ¶¶ 7, 28.)

(**[**5]** *Id.* at ¶ 41.) The AOS contemplated that, at minimum, the yield would be 150 units (*id.*) and, accordingly, the minimum purchase price for the Property was $11,296,296 (*id.* at ¶ 42).

C. Zoning Issues Emerge, Causing NPT and PCC to Repeatedly Amend the Agreement of Sale

The AOS also provided NPT with a 90-day due diligence period, during which NPT could conduct commercially reasonable studies on the Property and terminate the AOS for any reason. (*Id.* at ¶ 43.) During this time frame, NPT and PCC learned of recent changes to the Township's zoning regulations. (*Id.* at ¶ 44.) The impact of those regulations was that the Property could only yield a maximum of 105 units—far below the minimum yield of 150 units and anticipated yield of 162 units. (*Id.*)

Due diligence also revealed that the Property had high levels of mercury and arsenic due to decades of pesticide use, and these environmental conditions needed to be remedied before the Property could be developed. (*Id.* at ¶ 45.)

The zoning issues meant that NPT would essentially be purchasing the Property at the price of 150 units while only obtaining 105 units. (*Id.* at ¶ 46.) This arrangement "was not economically viable for NPT." (*Id.*) Furthermore, **[**6]** "selling the Property for a potential unit yield of only 105 units was not a viable option to solve [PCC's] financial issues." (*Id.* at ¶ 47; *see also id.* at ¶ 46 ("[T]he revenue from 105 units was not sufficient to serve [PCC's] purposes in selling the Property.").)

After the zoning issues emerged, NPT and PCC agreed to extend the due diligence period so that they could seek zoning relief from the Township. (*Id.* at ¶ 48.) NPT and PCC wanted the Township's permission to develop 162 or more units. (*Id.*) Accordingly, NPT and PCC amended the AOS eight times, ultimately extending the due diligence period to September 26, 2016. (*Id.* at ¶ 49; *see also* Doc. No. 1-1, Ex. 3.)

During the extended due diligence period, NPT engaged in extensive discussions with the Township about creating plans to develop the Property that the Township would find agreeable and which would warrant zoning relief to allow 162 or more units be developed. (*Id.* at ¶ 50.) However, the Township expressed concerns about the impact any development of the Property would have on the school system and roadway congestion. (*Id.* at ¶ 51.) NPT suggested making the development age-restricted (i.e., no residents under the age of 19 **[**7]** allowed) as well as making a $1 million contribution to roadway improvements to increase the unit yield. (*Id.* at ¶ 52.) NPT also suggested restricting 22 acres of PCC's property from further development, to meet the Township's open space requirements. (*Id.* at ¶ 53.)

NPT's suggestion to implement age restrictions raised new concerns—namely, to make an age-restricted development marketable, it must include a clubhouse, which would cost approximately $1.6 million to build. (*Id.* at ¶¶ 54-55.) Therefore, increasing the yield to 160 units or more would come at an additional cost of $2.6 million (the $1.6 million for the clubhouse coupled with the $1 million roadway contribution), **[*677]** plus the environmental remediation costs. (*Id.* at ¶ 56.)

On September 7, 2016, NPT, NVR, and PCC met to determine the allocation of the increased cost so that the parties could modify the AOS and LPA accordingly and move forward. (*Id.* at ¶ 57.) NPT and PCC reached an agreement in principle, pursuant to which PCC would provide NPT with (a) a $375,000 purchase price credit, which would be decreased if the clubhouse came in under budget, and (b) a potential price reduction of up to $151,543.20 depending on the number **[**8]** of units approved. (*Id.* at ¶ 58.) This agreement is encompassed in the proposed *Ninth Amendment* to the AOS. (*Id.* at ¶ 59; Doc. No. 1-2, Ex. 4.)

D. CGP Expresses Interest in a Potential Transaction with PCC

In the midst of these negotiations, on August 30, 2016, longtime PCC and Philmont Club member David Fields had a 35-minute phone call with Defendant Nanula, the sole member of CGP.[2] (Doc. No. 1 at ¶¶ 9, 60.) The pair spoke "about CGP potentially investing in the Philmont Club to assist [PCC] with its pressing financial needs." (*Id.* at ¶ 60.) After the call, Nanula emailed Fields, requesting information about Philmont Club, including "A summary of your current real estate deal and the Toll [Brothers] deal." (*Id.* at ¶ 61; Doc. No. 1-2, Ex. 5 at p. 14.)[3]

Fields called PCC's President, Glenn Meyer, and asked if Meyer would be interested in pursuing discussions with CGP. (Doc. No. 1 at ¶ 62.) Meyer indicated that he would. (*Id.*) Fields also forwarded Nanula's email to PCC's Treasurer, Sam Silverman. (*Id.* at ¶ 63; Doc. No. 1-2, Ex. 5.) On September 10, 2016, Silverman provided Nanula with the requested information and explained that "it would be easier to provide a summary of the NPT real estate deal **[**9]** verbally since [PCC] was 'in the process of receiving an amendment to the [AOS] that will better clarify the details.'" (Doc. No. 1 at ¶ 64; Doc. No. 1-2, Ex. 5 at p. 13.)

Nanula forwarded the information to CGP's Director of Acquisitions, Tom Moran, and sent several follow up questions to Silverman, which Silverman responded to. (Doc. No. 1 at ¶¶ 65-66; Doc. No. 1-2, Ex. 5 at pp. 10-12.) On September 19, 2016, Nanula requested additional information, including "any and all details on the pending NVR deal for the South Course acreage." (Doc. No. 1-2, Ex. 5 at p. 9; Doc. No. 1 at ¶ 67.) Nanula also stated that he would "work on a preliminary proposal to share [that] week" about CGP's potential investment in Philmont Club. (*Id.*)

That same day, Meyer and Nanula had a phone call, during which Meyer updated Nanula on the NVR/NPT deal and Nanula explained CGP's typical process for acquiring a country club. (*Id.* at ¶¶ 68-69.) Nanula also conveyed CGP's "preliminary terms" for purchasing Philmont Club. (*Id.* at ¶ 69.) The preliminary terms included: CGP would pay off PCC's debt, make a few million dollars' worth of capital improvements to Philmont Club, and use the proceeds from selling the Property **[**10]** for additional capital improvements. (*Id.* at ¶ 70.)

The next day, September 20, Moran provided Nanula with a preliminary analysis of Philmont Club's finances and Nanula replied,

> **[*678]** Plenty for now. This deal will be long and slow.
> They are under contract with our pals at NVR homes to sell off 9 of their 36 holes for $12.2m. Not sure how they would sell the club to us, and let us have the real estate upside. Trying for that. Enough work on the pro forma for now.

(*Id.* at ¶ 71; Doc. No. 1-2, Ex. 7 at p. 21)

E. Ridgewood Is also Interested in a Potential Transaction with PCC

In late 2014—shortly after the Toll Brothers deal fell apart—the Vice President of Ridgewood, Defendant Plotnick, began emailing Meyer to inquire whether PCC was interested in pursuing a potential transaction with Ridgewood. (*See id.* at ¶¶ 72-73 (alleging Plotnick emailed Meyer in December 2014, October 2015, and March 2016).) Meyer did not respond to Plotnick's inquiries. (*Id.* at ¶ 73.)

However, in mid-September 2016, Plotnick attended an industry conference, where he met John Brown, whose company, Brown Golf Management, had been hired by PCC to manage Philmont Club. (*Id.* at ¶ 74.) After Plotnick told Brown that Ridgewood was **[**11]** interested in becoming involved with Philmont Club (*id.* at ¶ 75; Doc. No. 1-3, Ex. 8), Brown introduced Plotnick to Meyer. Meyer and Plotnick then arranged for Plotnick and his colleague—

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[2] CGP is a golf course operator. (Doc. No. 1 at ¶ 125; *see also* Doc. No. 1-3, Ex. 15 at p. 34 ("Having invested in, operated, or made loans on 100+ properties, we pride ourselves on quickly and discreetly closing golf transactions on an all-cash basis from our committed funds.").)

[3] The Court adopts the pagination used by the CM/ECF docketing system.

Ridgewood's CEO, Defendant Grebow—to visit Philmont Club on September 27, 2016. (Doc. No. 1 at ¶¶ 76-78; Doc. No. 1-3, Exs. 8 & 9.)

F. NPT Terminates the AOS After PCC Refuses to Execute the Proposed Ninth Amendment

As noted above, during the September 7, 2016 meeting that NPT, PCC, and NVR attended to discuss the allocation of the new costs created by the age restriction, addition of a clubhouse, and roadway improvements, NPT and PCC reached an agreement in principle to move forward with the transaction.[4] (Doc. No. 1 at ¶¶ 57-59.) However, NPT and NVR did not reach a resolution on how to modify the LPA to account for those additional costs. (*Id.* at ¶ 79.)

While NPT and PCC worked towards memorializing the September 7, 2016 agreement in writing and NPT and NVR worked to modify the LPA, NPT and PCC executed the Seventh and *Eighth Amendments* to the AOS, both of which extended the due diligence period. (*Id.* at ¶ 80.) Under the *Eighth Amendment* to the AOS, the due diligence period was extended to September 26, 2016. (*Id.*)

On September 22, just days **[**12]** before the due diligence period was set to expire, Meyer and Silverman, on behalf of PCC, "were prepared to re-enter into a new agreement with NPT." (*Id.* at ¶ 81.) This agreement would have "similar terms to the AOS as intended to be modified by the terms of the *Ninth Amendment* should the AOS need to be terminated as a result of an inability to modify the LPA to address the issues with Unit yield." (*Id.*)

However, the following day, Meyer spoke to Plotnick for the first time, which prompted Meyer to reevaluate and change course. (*Id.* at ¶ 82.) Instead of moving forward with NPT, Meyer told PCC's counsel: "After further thought, we have decided to let the [AOS] expire and evaluate our position rather than continue to negotiate with NVR." (*Id.*; Doc. No. 1-3, Ex. 11 at p. 24.)

[*679] In the meantime, NPT and NVR reached an agreement on how to amend the LPA. (Doc. No. 1 at ¶ 83.) Accordingly, NPT executed the *Ninth Amendment* to the AOS and sent it to PCC for countersignature. (*Id.*) But PCC refused to execute the *Ninth Amendment*. (*Id.* at ¶ 84.) PCC's refusal to execute the *Ninth Amendment* left NPT with "no reasonable option but to terminate the AOS to save NPT's deposit money." (*Id.* at ¶ 85.) NPT terminated the AOS on September 26, 2016. (*Id.* at ¶ 86.)

*G. [**13] PCC Separately Talks to NPT, Ridgewood, and CGP about Selling the Property and/or Philmont Club, and After Expressing Interest, Ridgewood Backs Out of a Potential Transaction*

After NPT terminated the AOS, PCC pursued separate discussions with NPT, Ridgewood, and CGP about selling the Property and/or the entire Philmont Club. (*Id.* at ¶ 87.) At the time, NPT was unaware that PCC was also engaging in discussions with Ridgewood and CGP. (*Id.* at ¶ 88.)

On September 27, 2016—the day after the AOS terminated—NPT discussed the terms of the deposits it would render to PCC if PCC re-entered into the AOS. (*Id.* at ¶ 89; Doc. No. 1-3, Ex. 12 at p. 27.)

That same day, Meyer met with Plotnick and Grebow at Philmont Club to discuss Ridgewood's interest in the Property. (Doc. No. 1 at ¶ 90.) Plotnick and Grebow then expressed their intent to provide PCC with a proposal for the transaction. (*Id.* at ¶ 91; Doc. No. 1-3, Ex. 13 at p. 29.) But Ridgewood later changed its mind and told PCC that it was no longer interested in purchasing the Property, reasoning that the ability to obtain approvals for 162 units was speculative and the risks associated with the development of the Property were too high. (Doc. **[**14]** No. 1 at ¶ 92.) "In other words, Ridgewood expressed doubt that it, or any other developer, would be able to obtain sufficient confidence in the feasibility of the profitable development of the Property such that purchasing the Property could be justified." (*Id.* at ¶ 93.)

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[4] This agreement in principle was later memorialized in the proposed *Ninth Amendment* to the AOS.

H. CGP's Proposal to Buy Philmont Club

Meanwhile, PCC's financial condition continued to deteriorate. (*Id.* at ¶ 95.)

On November 1, 2016, Nanula provided PCC with a formal written proposal for CGP's purchase of Philmont Club in its entirety. (*Id.* at ¶ 94; Doc. No. 1-3, Ex. 14.) CGP proposed to (1) immediately pay off PCC's $1 million in debt, (2) make $4 million in capital improvements to Philmont Club, and (3) upon the sale of the Property, make an additional $5 million in capital improvements.[5] (Doc. No. 1 at ¶ 96; Doc. No. 1-3, Ex. 14.) CGP also promised that Philmont Club would "remain an exclusive private club with at least 27 holes [of golf] after the South Course real estate transaction." (Doc. No. 1-3, Ex. 14; Doc. No. 1 at ¶ 97.) "Nanula purposely crafted the proposal" so that the amount of cash PCC would receive from CGP "roughly align[ed]" with the amount that PCC would have received under the AOS it had with **[**15]** NPT and NVR. (Doc. No. 1 at ¶ 98.)

According to CGP, the advantage of selling Philmont Club to it instead of selling **[*680]** the Property to NPT was that CGP "would immediately purchase Philmont Club and worry about obtaining development approvals for the Property later," whereas a developer like NPT would only be "willing to pay full price for the Property upon obtaining development approvals which may never come." (*Id.* at ¶ 99.) CGP's website touts that the company "pride[s] [itself] on quickly and discreetly closing golf transactions on an all-cash basis." (*Id.* at ¶ 100; Doc. No. 1-3, Ex. 15.) In addition, one of CGP's main selling points was that it "only require[s] 30 days for due diligence and 5 days to close." (Doc. No. 1-3, Ex. 15; Doc. No. 1 at ¶ 100.)

After Meyer reviewed CGP's proposal, he responded to Nanula, "I thought upon closing the real estate transaction we would have the full proceeds of the sale available towards capital improvements but I'm only seeing $5M listed." (Doc. No. 1 at ¶ 101; Doc. No. 1-3, Ex. 16 at p. 36.) In response, Nanula explained that PCC had two choices: (1) they could either get the full proceeds of the sale of the Property, if a sale ever even **[**16]** occurred, "and bear all the risks and costs during the process" or (2) allow CGP to "rescue and fix the club now" "without taking any risk or bearing any cost at all." (Doc. No. 1-3, Ex. 16 at p. 36.) In other words, because the sale of the Property may never come to fruition, CGP crafted a proposal that "balanced out that risk by allowing CGP to recover some of its initial investment if the Property were sold." (Doc. No. 1 at ¶ 102; Doc. No. 1-3, Ex. 16 at p. 36 ("If we can pull this off, we could get back some of our initial risk capital from future real estate proceeds - maybe zero, maybe never - and this prospect allows us to be interested in PCC."); *see also* Doc. No. 1-3, Ex. 20 at p. 64 ("Sent Glenn a proposal yesterday . . . He wanted to explore how we could give the club 100% of all our real estate proceeds . . . I said no; about $5m is all we could afford to plow back. We are taking the risk in this scenario, not the club.").) This explanation was consistent with Nanula's position that: "We have to assume no real estate transaction might ever be possible, due to the environmental remediation vagaries and cost; the extensive infrastructure costs for the Philmont Ave. intersection **[**17]** project; and the Town approval uncertainties." (Doc. No. 1-3, Ex. 20 at p. 64; Doc. No. 1 at ¶ 103.)

I. PCC Sells Philmont Club to CGP, and Ridgewood Re-Enters the Picture

On November 17, PCC's Board of Directors voted to approve CGP's proposal. (*See* Doc. No. 1-3, Ex. 21 at p. 66.) That same day, Meyer sent a letter to PCC's membership, informing them of the terms of CGP's proposal to convert Philmont Club to a non-equity club, including the "Guarantee of maintaining 27 holes of golf after the South Course is sold." (Doc. No. 1 at ¶¶ 104-05; Doc. No. 1-3, Ex. 17 at pp. 48-49.)

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[5] Notably, Philmont Club was appraised in 2003 at $10.6 million solely as a country club (i.e., this figure did not take into account the possibility of selling the Property for development purposes). (*Id.* at ¶ 150.) Here, CGP promised PCC $10 million in debt payoff and capital improvements, meaning that "CGP's offer [in 2016] was not far removed from the appraised value of Philmont Club [in 2003]." (*Id.* at ¶¶ 150, 152.) NPT alleges that this shows that "Philmont Club was worth many millions of dollars more than what it was sold . . . for." (*Id.* at ¶ 151.)

The next month, on December 12, 2016, a townhall-style meeting was held at Philmont Club, and Nanula pitched PCC's membership on why they should accept CGP's offer and answered members' questions about the deal. (Doc. No. 1 at ¶ 106.) PCC and CGP's counsel proceeded to negotiate a proposed Purchase and Sale Agreement (the "PSA") and on January 19, 2017, PCC's Board of Directors voted to approve the PSA and scheduled a date for PCC's membership to vote on it. (*Id.* at ¶ 108.)

Because CGP insisted that the PSA be kept confidential, PCC members were only permitted to view the 50-page PSA in person at Philmont Club and **[**18]** were prohibited from reproducing the PSA or taking any notes on it. (*Id.* at ¶¶ 109-10.) As a result, PCC members could not obtain any independent **[*681]** legal advice on the PSA before voting on whether to sell Philmont Club to CGP. (*Id.* at ¶ 109.)

Meanwhile, on January 23, 2017, CGP incorporated Concert Philmont and Concert Philmont Properties as single purchase entities to make the purchase of Philmont Club. (*Id.* at ¶ 112.) In other words, CGP would not be purchasing Philmont Club directly. (*Id.*) Initially, CGP contemplated Concert Philmont Properties taking title to the Property and Concert Philmont taking title to the remainder of Philmont Club. (*Id.* at ¶ 113.)

On February 1, 2017, PCC's membership voted to approve the PSA and sell Philmont Club to CGP. (*Id.* at ¶ 114.) The PSA was executed on February 6, and closing took place around March 1. (*Id.* at ¶¶ 115-16.) The PSA included an integration clause, which stated: "This Agreement and the exhibits attached hereto represent the entire understanding of the agreement between the Parties with respect to the subject matter hereof, and supersedes the Letter of Intent, all other negotiations, understandings and representations, if any, made between **[**19]** such Parties." (Doc. No. 13-9 at p. 47, § 17.1.) Nanula signed the PSA on behalf of Concert Philmont and Concert Philmont Properties. (*See id.* at p. 55.)

Because it was more complicated to separate title to the Property from title to the remainder of Philmont Club than CGP had originally contemplated, the entirety of Philmont Club was conveyed to Concert Philmont. (*Id.* at ¶ 117.) Therefore, Concert Philmont owned Philmont Club in its entirety but intended to convey the Property to Concert Philmont Properties in the future. (*Id.* at ¶ 118.)

The following month, on March 2, 2017, Concert Philmont Properties and Ridgewood Philmont[6] entered into a Development Services Agreement (the "DSA"), which provided that Ridgewood Philmont would be responsible for obtaining development approvals for the Property as well as marketing and selling the Property to a developer. (*Id.* at ¶ 119.)

J. NPT Files Suit in State Court, and Discovery Reveals that Ridgewood and CGP Plotted Together to Acquire Philmont Club

On March 3, 2017, NPT initiated a lawsuit against CGP and PCC in the Montgomery County Pennsylvania Court of Common Pleas (Case No. 2017-04395) (the "Original Action"), alleging that CGP tortiously **[**20]** interfered with its contract with PCC and that PCC breached its contract with NPT. (*Id.* at ¶ 121.) Discovery revealed that, unbeknownst to PCC, CGP had engaged in several covert actions leading up to the sale of Philmont Club, including communicating at length with Ridgewood. (*See, e.g., id.* at ¶¶ 122-25, 128-31.) These revelations are discussed in turn below.

i. CGP and Ridgewood's Initial Interactions in Fall 2016

In September 2016, Nanula actually met Plotnick at the same industry conference where Plotnick met Brown. (*Id.* at ¶ 123.) During that conference, Plotnick and Nanula discussed the possibility of Ridgewood and CGP working

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[6] Ridgewood Philmont is an entity created by Ridgewood for the purpose of entering into the DSA. (*Id.* at ¶ 120.)

together on future country club acquisitions that would involve excess land that could be developed for residential purposes. (*Id.* at ¶ 124.)

Shortly thereafter, Plotnick and Grebow toured Philmont Club on September 27, 2016, and they decided to try to partner **[*682]** with a golf course operator, such as CGP, so as to better position Ridgewood to be able to purchase Philmont Club. (*Id.* at ¶ 125.)

Nanula kept in touch with Plotnick throughout this time. For example, on October 10, 2016, after Nanula spoke to Meyer at PCC, Nanula immediately turned around and called **[**21]** Plotnick. (*Id.* at ¶¶ 126-27.)

ii. Ridgewood and CGP Begin Exchanging Terms of a Proposed Deal

On October 21, 2016, Plotnick and Nanula began exchanging the terms of the deal that would eventually become the DSA (which was ultimately executed in March 2017). (*Id.* at ¶ 128; Doc. No. 1-3, Ex. 18 at p. 51.) Specifically, Plotnick proposed that in exchange for paying half of the costs of obtaining development approvals and finding a buyer for the Property, Ridgewood would receive half the sales of the Property above the costs of obtaining development proposals, plus $5 million. (Doc. No. 1 at ¶ 129; Doc. No. 1-3, Ex. 18 at p. 51.) Plotnick also suggested that $5 million from the sale of the Property be reinvested in Philmont Club as capital expenditures. (*See* Doc. No. 1-3, Ex. 18 at p. 51; Doc. No. 1 at ¶ 130.) Nanula eventually incorporated this suggestion into his November 1, 2016 proposal to PCC. (Doc. No. 1 at ¶ 131; Doc. No. 1-3, Ex. 14.)

After receiving Ridgewood's proposal, Nanula forwarded the email to Nick Cicero, a partner at Freestone Capital Management.[7] (Doc. No. 1 at ¶ 132; Doc. No. 1-3, Ex. 19 at pp. 55-56.) Nanula explained that CGP was in the early stages of trying to purchase **[**22]** Philmont Club and had received an initial proposal from Ridgewood. (Doc. No. 1-3, Ex. 19 at p. 56.) Nanula noted that Ridgewood had "been talking to [the] Club about buying the 9 holes for [redacted] but they need a credible golf operator to sell the members on this" and that he "told them to back off completely so I can buy the whole Club and then deal them in as our real estate partner." (*Id.*) However, Nanula wondered, "why do we need Ridgewood at all? They are not putting up any real capital at all here," and asked Cicero for his advice. (*Id.*; Doc. No. 1 at ¶ 134.)

Cicero agreed that the return Ridgewood would receive under the proposal "seems awfully high instead of just some set fee that is relatively nominal." (Doc. No. 1 at ¶ 135; Doc. No. 1-3, Ex. 19 at p. 54.) Acknowledging that Ridgewood had already expressed interest to PCC directly, Nanula responded, "Yes, but this firm is in advanced talks with club president about buying this 35 acre parcel from the club . . . So getting them to back off to a small fee will be difficult." (Doc. No. 1-3, Ex. 19 at p. 53; Doc. No. 1 at ¶ 137.) Ultimately, Nanula recognized that the proposed deal with Ridgewood was "[n]ot too shabby" and **[**23]** "juice[d] [CGP's] normal deal returns nicely." (Doc. No. 1-3, Ex. 19 at p. 56.)

iii. After CGP Submits Its Proposal to PCC, CGP and Ridgewood Continue to Discuss Working Together and a Potential Deal

On November 2, Nanula emailed Plotnick to bring him up to date on PCC's reaction to CGP's proposal to purchase Philmont Club. (Doc. No. 1 at ¶ 140; Doc. No. 1-3, Ex. 20 at p. 64.) Nanula explained that Meyer wanted the club to receive 100% of the real estate proceeds but that he put his foot down and "said no; about **[*683]** $5m is all we could afford to plow back," given that CGP is "taking the risk in this scenario, not the club." (Doc. No. 1-3, Ex. 20 at p. 64.) Nanula predicted that Meyer "may come back to you, and ask for $7m instead of $5m." (*Id.*) As a result, Nanula made the following request: "For now, I hope you guys will stand back, profess some concerns about the real estate risks, and just wait to see if I can strike a better deal for all of us here." (*Id.*) A few hours later, Nanula

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[7] Freestone Capital Management is the company responsible for managing the various entities that provided the financing for Concert Philmont's purchase of Philmont Club. (Doc. No. 1 at ¶ 132.)

sent a follow up email, stating that CGP "would only pursue the real estate angle with Ridgewood" and that he was "prepared to sign an agreement to that effect." (*Id.* at p. 63; Doc. No. 1-3, Ex. 21 at p. 68.) **[**24]**

Two days later, on November 4, Plotnick responded, "I completely understand what you are trying to do" and believed they had "the basis for a deal," with just a few minor tweaks. (Doc. No. 1-3, Ex. 21 at p. 68) Plotnick also suggested that Nanula get feedback from Meyer and PCC's Board before putting their agreement in writing. (*Id.*) Plotnick added, "In the meantime, we will continue to stand on the sidelines and let you do your thing. Keep me posted as to any progress made, and when you are closer to a deal with the club, we can paper our agreement." (*Id.*)

Accordingly, Ridgewood told Meyer/PCC that it was not interested in the Property anymore because of risks with the development. (*See* Doc. No. 1 at ¶¶ 92-93, 144.) Ridgewood failed to disclose, however, that Ridgewood and CGP knew each other and had been working together behind the scenes, plotting for Ridgewood to "stand back." (*Id.* at ¶ 144.)

Ridgewood and CGP continued to keep in touch as things moved ahead with CGP and PCC. For example, on November 19, two days after PCC's Board of Directors voted to accept CGP's proposal, Nanula told Plotnick that the Board "want[s] to move fast and get this closed asap." (Doc. No. 1-3, Ex. 21 **[**25]** at p. 66.) Nanula estimated that "the member vote will be 90%+ in favor." (*Id.*) Speaking of PCC's Board, Nanula surmised, "They need us, they want us, and they have capitulated in every respect. Now it is just a matter of executing." (*Id.*) At this point, given their success, Nanula decided it was time for Ridgewood and CGP to "paper our deal on the real estate opportunity." (*Id.*)

iv. PCC Decides Not to Pursue a Deal with NPT, Twice

All the while, PCC remained completely unaware that Ridgewood and CGP were working together on the deal behind its back. (*See generally* Doc. No. 1.)

Thus, in the fall of 2016, after Ridgewood and CGP both cast doubt on the feasibility of the Property development (Ridgewood when it told Meyer it was no longer interested and CGP when it explained why its proposal did not allow PCC to receive the full proceeds of any sale of the Property), PCC "decided to go with the sure thing—the sale of Philmont Club to CGP—rather than risk a sale to NPT failing to materialize months down the road" and refused to engage further with NPT or execute the *Ninth Amendment* to the AOS. (*Id.* at ¶¶ 84, 145; *see also id.* at ¶¶ 147-48 ("The doubt cast by Ridgewood and CGP on the viability of the development **[**26]** of the Property at a time when [PCC] had pressing financial challenges caused [PCC] to sell Philmont Club to Concert Philmont at a rate significantly lower than [PCC] otherwise would have sold it. Had it known that the doubts and concerns expressed by Ridgewood and CGP were contrived to get Philmont Club for a cheap price rather than at a cost based in reality, [PCC] would not have sold Philmont Club to Concert Philmont.").)

[*684] In December 2016—after PCC's Board approved CGP's proposal but before it approved the PSA—NPT approached PCC again about renewing the AOS, but to no avail. On December 20, 2016, NPT sent Meyer a revised proposal to buy the Property, which Meyer immediately forwarded to Silverman, stating, "Hot off the press. Not interested." (*Id.* at ¶ 146; Doc. No. 1-3, Ex. 22 at p. 72.) In short, Meyer did not give the proposal "any consideration" and PCC turned down NPT yet again. (Doc. No. 1 at ¶ 146.)

v. CGP Tries to Ensure that the Risks Regarding Developing the Property are Eliminated

As noted above, Nanula told Meyer that CGP had to "assume no real estate transaction might ever be possible" and asked Ridgewood to "profess some concerns about the real estate risks." (*Id.* at **[**27]** ¶ 153; Doc. No. 1-3, Exs. 16, 20.) Nonetheless, CGP wanted to minimize the risk it took when buying Philmont Club. (*See* Doc. No. 1 at ¶ 153.) Thus, CGP tried to buy time so it could "confirm that the Property could be developed." (*Id.*)

For example, even though CGP's website touted that the company "only require[s] 30 days for due diligence" (Doc. No. 1-3, Ex. 15), CGP pushed for a longer due diligence period on this transaction (*see* Doc. No. 1 at ¶¶ 154-55). On December 13, 2016, Moran asked Nanula, "Are we still going for a 60 day DD period here to better understand the real estate play? Which would push the close into late March?" (Doc. No. 1-4, Ex. 24 at p. 76.) Later that day, Moran stated, "Understood on the 45 day DD so early March close." (Doc. No. 1-4, Ex. 25 at p. 80.) "CGP never informed [PCC] that it was delaying closing to ensure that it could obtain development approvals for 160 or more Units on the Property and ensure that the Property could be sold." (Doc. No. 1 at ¶ 156.)

Then, on January 16, 2017, Nanula informed Ridgewood that the PSA was "moving along quickly," with an expected timeline of: PCC's Board of Directors' approval on January 18, PCC's members' approval on **[**28]** February 1, and a target closing date of February 28. (Doc. No. 1-4, Ex. 26 at p. 86.) Mindful of Ridgewood's role in obtaining development approvals for the Property, Nanula asked, "Does this give you guys enough time to get through environmental and Town meetings, or should I buy some more time on our closing." (*Id.*)

By January 20, 2017, Ridgewood had met with the Township's manager, who "[w]as thrilled that there was going to be one owner who wanted to integrate homes into club" and "[d]idn't flinch on the 160 units." (Doc. No. 1-4, Ex. 27 at pp. 88-89.) Grebow explained, "As expected they want the $1mm contribution for traffic. Standard 55 and over community — mentioned something about no kids under 19 allowed." (*Id.* at p. 89.) Notably, the Township "[w]ant[ed] to get the deal done." (*Id.*; *see also* Doc. No. 1-4, Ex. 28 at p. 92 (Nanula's email to CGP's Chief Operating Officer, Susan Dunnavant, stating "[T]he South Course real estate development is looking good for now; met with the Town this week, and they want to get this deal done with us.").)

A few days later, on January 24, 2017, Nanula told Ridgewood: "Town not wasting any time here. Good body language." (Doc. No. 1-4, Ex. 29 **[**29]** at p. 96.) Grebow responded, "Definitely great body language. Last step in DD is the environmental cost analysis. Our attorney went through things with the consultant today and we should have that in about 2 weeks." (*Id.* at p. 95.)

A couple of weeks later, on February 14, Nanula informed his colleagues that **[*685]** "Ridgewood came back optimistic about enviro remediation on the South Course, so we are a go on the real estate project. They say it will take 12-18 months to get through Penn DEP [Pennsylvania Department of Environmental Protection], and we should have our entitlements for 165+ 'carriage homes' within 24 months. Then we sell the nicely entitled 6[0] acre parcel to [a builder], and they start moving dirt and building homes about 2 years from now." (Doc. No. 1 at ¶ 165; Doc. No. 1-4, Ex. 30 at pp. 99-100.) Nanula then explained that the "big issue" was "dirt," since approximately 60,000 yards of the South Course dirt was "arsenic-infected" and may "need to be moved." (Doc. No. 1-4, Ex. 30 at p. 100.) Ridgewood "talk[ed] about putting it on the driving range and some berms to shield the new homes," but Nanula cautioned his team to carefully evaluate that plan. (*Id.* ("Ridgewood just **[**30]** wants to maximize our proceeds from selling the entitled parcel [redacted]; they are our partner on the land deal, so it makes sense they are focused on that. But they don't own any part of the Club and don't need to care about it. We need to make sure we end up with a great North Course and some other workable club facilities. So **<u>you</u>** will be telling **<u>them</u>** where that 60k yards of dirt goes.").) According to NPT, Nanula's email illustrates that by mid-February, "CGP had satisfied any concerns [it had] about the scope and cost of the environmental remediation." (Doc. No. 1 at ¶ 164.)

At bottom, NPT asserts that the email exchanges discussing the Town's desire to move the deal along and the environmental remediation plans show that the risks with the development of the Property that CGP and Ridgewood had "professed" concerns about "had, in fact, been confirmed to be non-existent." (*See id.* at ¶ 167.) Moreover, CGP and Nanula never told PCC how they had resolved the environmental remediation and Township approval issues. (*Id.*)

K. Contrary to its Proposal, CGP Never Intended to Keep 27 Holes of Golf at Philmont Club or to Spend $5 Million on Capital Improvements to the Club

NPT alleges that, **[**31]** in addition to CGP keeping its relationship with Ridgewood a secret,[8] CGP made other misrepresentations to PCC. (*See generally id.* at ¶¶ 170-182.)

First, even though CGP's November 1 proposal stated that "PCC will remain an exclusive private club with at least 27 holes after the South Course real estate transaction" (Doc. No. 1-3, Ex. 14 at p. 32), CGP emails illustrate that "CGP had no intention" to follow through on its promise (Doc. No. 1 at ¶ 170).

For example, on October 21, 2016—shortly before sending CGP's proposal to PCC— Nanula told Cicero that "[o]nly 18 or [sic] 27 holes truly needed for the membership." (Doc. No. 1-3, Ex. 19 at p. 56). Then, on December 8, 2016, Dunnavant asked Nanula whether CGP should "[g]o down to 18 hole [sic] immediately and maintain at levels that warrant the current higher level of dues" or "get North Course to sellable conditions and have South Course OK — Maybe do the public course?" (Doc. No. 1-4, Ex. 31 at p. 102.) The next day, December 9, CGP internally discussed turning the South Course into a **[*686]** "short course" of "3-6 holes" and "abandon[ing] the other 12-15 and kill[ing] off and re-grass[ing] these." (Doc. No. 1-4, Ex. 32 at p. 105.) **[**32]** And on December 9, after speaking to Meyer, Nanula emailed Dunnavant and Moran that Meyer was "OK with giving us carte blanche on the golf courses, so long as there is a great North Course." (Doc. No. 1-5, Ex. 33 at p. 107.) Nanula added, "[Meyer] doesn't understand what we will do with the $5-6k dues preview [sic] members who only get South Course access now, but that is our problem. There will be howling and lots of questions from the members, but we will stay flexible until we know what is best to do in terms of the South Course." (*Id.*)

At the town hall meeting the following day, when Nanula pitched PCC's membership, he never mentioned CGP's intent to reduce the number of holes of golf below 27. (Doc. No. 1 at ¶ 175.) Nor did he inform them of this "at any other time before the closing on the PSA." (*Id.*) Nanula also did not appear to change his mind on downsizing the number of holes of golf as the transaction proceeded: on March 1, 2017—the day Concert Philmont became owner of Philmont Club—Nanula told Dunnavant that they needed to consider "how the remaining 6-7 holes on the South Course will really work for our membership once remodeled" (Doc. No. 1-4, Ex. 34 at p. 109), "indicating **[**33]** that CGP planned to only maintain [24] to [25] holes of golf," not 27. (Doc. No. 1 at ¶ 176.)

Second, NPT alleges that CGP also misrepresented to PCC "the amount that would be spent on capital improvements." (*Id.* at ¶¶ 177-78.) In an internal November 21, 2016 email, Nanula wrote, "The wild ideas the Board has about a 'master plan for the North Course are probably way overblown, and we have huge capital needs in the clubhouse, HVAC, etc. You will see. We will want to 'nod' to some master plan elements so the members are excited about their North Course being updated a bit, but we want to spend the smallest dollars possible to get the maximum member impact." (Doc. No. 1-4, Ex. 35 at p. 114.) Then, on January 2017, Nanula complimented CGP's counsel for the "nicely vague" language in the PSA about the capital improvement projects CGP would undertake. (Doc. No. 1 at ¶ 181; Doc. No. 1-4, Ex. 36 at p. 118.) Nanula also shared with counsel a list of the initial capital projects that CGP "actually . . . planned" to undertake, which were "[n]ot to be shared with" PCC. (Doc. No. 1-4, Ex. 36 at pp. 117-18.)

In sum, according to NPT, "CGP never intended to expend the full $5,00,000 towards capital **[**34]** improvements that it promised to make upon the sale of the Property. Rather, CGP intended to expend a significantly smaller amount and keep the remainder as profit." (Doc. No. 1 at ¶ 180.)

L. The Limited Assignment Agreement Between PCC and NPT

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[8] To that end, PCC remained completely unaware that Ridgewood and CGP had even been communicating since September 2016. (*Id.* at ¶ 168.) Ridgewood and CGP never informed PCC of this fact, "much less that they had been working together to acquire Philmont Club and develop the Property since October 2016 at the latest." (*Id.*) In fact, Meyer first learned that Ridgewood and CGP had "teamed up on the development of the Property" during his deposition on July 25, 2018. (*Id.* at ¶ 169.)

On September 18, 2019—approximately two-and-a-half years after NPT sued PCC and CGP in state court—NPT and PCC entered into a Limited Assignment of Claims Agreement. (*See* Doc. No. 1-1, Ex. 1 at pp. 2-4.) Under the agreement, PCC (the Assignor) agreed to assign NPT (the Assignee)

> any and all claims, demands, and cause or causes of action of any kind whatsoever which Assignor has, may have, may have [sic], or may have had on or before March 1, 2017 against Concert Golf Partners LLC, Concert Philmont Properties, LLC, Concert Philmont, LLC, Peter Nanula, Ridgewood Real Estate Partners, Michael Plotnick, and Jonathan Grebow . . .

(*Id.*) In addition, the assignment agreement contained a categorical exclusion for all claims arising under the PSA:

> **[*687]** Assignee expressly acknowledges and agrees that Assignor is not assigning, and is specifically reserving to itself, any and all claims that it has against any/or all the Concert and Ridgewood Real Estate Partners, **[**35]** Michael Plotnick, and Jonathan Grebow under that certain Purchase and Sale Agreement dated February 6, 2017 by and among Philmont Country Club, Concert Philmont, LLC, and Concert Philmont Properties, LLC.

(*Id.*)

M. The Instant Case

Shortly thereafter, on October 1, 2019, NPT initiated this lawsuit against Concert Defendants and Ridgewood Defendants. (Doc. No. 1.) The claims fall into four categories: (1) antitrust, (2) fraud, (3) civil conspiracy, and (4) breach of contract. With the exception of one of the antitrust counts (Count II), NPT asserts all of the claims against Defendants as PCC's assignee.

Antitrust. NPT claims that CGP, Nanula, Ridgewood, Grebow, and Plotnick violated the Sherman Antitrust Act, *15 U.S.C. § 1*, by conspiring to "not compete against themselves in the purchase of Philmont Club, but rather, to work jointly to reduce the price" of the club and by providing PCC with "false information to cast doubt in [PCC's] mind about the viability of selling the Property to NPT or another developer and thereby positioning CGP as the only viable option for [PCC] to solve its financial issues." (Doc. No. 1 at ¶¶ 187-224 (Counts I & II).) NPT asserts its antitrust claims directly and as assignee. **[**36]** (*See id.*)

Fraud. NPT brings five fraud-related claims against various Ridgewood and Concert Golf Defendants. (*See id.* at pp. 32-43.) First, NPT alleges that Ridgewood, Grebow, and Plotnick committed fraud, based on Plotnick and Grebow's misrepresentations to PCC (namely, telling PCC that Ridgewood was not interested in developing the Property when it was, in fact, interested and had an agreement with CGP about obtaining development approvals). (*Id.* at ¶¶ 225-41 (Count III).) Second, NPT claims that CGP and Nanula aided and abetted Ridgewood's fraud by "actively encourag[ing]" Ridgewood to profess concerns about developing the Property and stand back. (*Id.* at ¶¶ 242-54 (Count IV).) Next, NPT brings a separate claim for fraud against CGP and Nanula based on CGP's statements to PCC that the ability to develop the Property was speculative and risky, that CGP would retain 27 holes of golf at Philmont Club after the transaction, and that CGP would spend $5 million in capital improvements. (*Id.* at ¶¶ 255-75 (Count V).) Fourth, NPT claims that Ridgewood, Grewbow, and Plotnick aided and abetted CGP's fraud. (*Id.* at ¶¶ 276-87 (Count VI).) Last, NPT asserts a fraudulent concealment claim against **[**37]** CGP, Nanula, Ridgewood, Grebow, and Plotnick, again based on their failure to disclose the fact that they were working together to acquire Philmont Club. (*Id.* at ¶¶ 288-99 (Count VII).)

Civil Conspiracy. NPT alleges that all Defendants conspired with each other to engage in anti-competitive behavior in violation of the Sherman Act and Clayton Act, for Ridgewood and CGP to "fraudulently express concerns about the ability to obtain development approvals and the risks associated with" developing the Property, and "for CGP to acquire Philmont Club at a drastically reduced rate," among other things. (*Id.* at ¶¶ 300-08 (Count VIII).)

Breach of Contract. Finally, NPT claims that Ridgewood breached its September 29, 2016 confidentiality agreement with PCC when it disseminated some of PCC's confidential financial information to **[*688]** third parties.[9] (*Id.* at ¶¶ 309-314 (Count IX).) Subsequently, the Ridgewood Defendants and Concert Defendants filed a joint motion to dismiss, arguing that NPT cannot bring claims as an assignee of PCC; that NPT fails to state an antitrust claim because it, among other things, does not define a relevant market in which competition has been harmed; and that NPT did not satisfy **[**38]** the heightened pleading standard for fraud claims. (Doc. Nos. 13, 21.) NPT opposed the motion. (Doc. Nos. 17, 22, 33.) The Court held oral argument on the motion on July 22, 2021.

II. Legal Standard

HN1[] In deciding a motion to dismiss under *Rule 12(b)(6)*, the Court must determine whether the complaint contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

HN2[] "As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings." *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)*. "However an exception to the general rule is that a document *integral to or explicitly relied* upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment." *Id.* (quotation marks and alterations omitted). Similarly, the Court "may consider an undisputably authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)*.

III. Discussion [**39]

In moving to dismiss, Concert Defendants and Ridgewood Defendants argue that:

- Counts I, III, IV, VI, VII, and VIII must be dismissed because NPT cannot assert those claims as an assignee;
- The antitrust claims (Counts I and II) must be dismissed because NPT fails to allege a violation of *Section 1* of the Sherman Act;
- The fraud and fraudulent concealment claims (Counts III, IV, V, VI, and VII) must be dismissed because NPT fails to demonstrate that any of the Defendants had a duty to speak or that NPT justifiably relied on the alleged false representations;
- The aiding and abetting fraud claims (Counts IV and VI) must be dismissed because NPT does not plead a viable fraud claim;
- The civil conspiracy claim (Count VIII) must be dismissed because it is based upon legally insufficient claims of antitrust violations and fraud and because NPT fails to plead malice;
- The breach of contract claim (Count IX) must be dismissed because NPT alleges no damages.

(Doc. No. 13-2.) We address each contention in turn.

[*689] *A. Assignment*

Defendants argue that NPT's complaint must be dismissed because (1) the claims NPT asserts as assignee "arise under" the PSA and therefore are barred by the express language of the **[**40]** Limited Assignment of Claims Agreement; (2) the PSA contained an anti-assignment clause; and (3) PCC did not expressly assign its antitrust claims to NPT, in contravention of Third Circuit law. (*See* Doc. No. 13 at pp. 11-13 & Doc. No. 21 at pp. 2-4.) For

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[9] Specifically, NPT alleges that, just days after signing the confidentiality agreement, Ridgewood transmitted PCC's financial information to ClubCorp and to Morningstar Golf & Hospitality, LLC. (*Id.* at ¶¶ 183-86.)

the reasons discussed below, the Court is unpersuaded by Defendants' arguments and denies Defendants' motion to dismiss on those grounds.

i. The Claims NPT Asserts as Assignee Do Not "Arise Under" the PSA

As noted above, in September 2019, NPT and PCC entered into a Limited Assignment of Claims Agreement. (*See* Doc. No. 1-1, Ex. 1 at pp. 2-4.) Pursuant to the agreement, PCC assigned NPT:

> any and all claims, demands, and cause or causes of action of any kind whatsoever which Assignor has, may have, may have [sic], or may have had on or before March 1, 2017 against Concert Golf Partners LLC, Concert Philmont Properties, LLC, Concert Philmont, LLC, Peter Nanula, Ridgewood Real Estate Partners, Michael Plotnick, and Jonathan Grebow . . .

(*Id.*) However, the agreement also contained a categorical exclusion for all claims arising under the PSA. To that effect, "[NPT] expressly acknowledge[d] and agree[d] that [PCC] [wa]s not assigning, and [wa]s **[**41]** *specifically reserving to itself*, any and all claims that it has against any/or all the Concert and Ridgewood Real Estate Partners, Michael Plotnick, and Jonathan Grebow *under that certain Purchase and Sale Agreement* dated February 6, 2017 by and among Philmont Country Club, Concert Philmont, LLC, and Concert Philmont Properties, LLC." (*Id.* (emphasis added).)

In their motion to dismiss, Defendants argue that the antitrust, fraud, and civil conspiracy claims that NPT asserts as assignee arise under the PSA and that those claims are reserved for PCC to bring itself. (Doc. No. 13-2 at pp. 11-12 ("The Complaint expressly states that, because of the Defendants' unlawful conduct, Concert Golf was able to 'obtain Philmont Club at an unfair and unjust price.' The Concert Defendants purchased Philmont Club pursuant to the PSA. Hence, NPT's claims in this case (with the exception of Count IX against certain Ridgewood Defendants) as assignee arise under the PSA, which [PCC] expressly reserved for itself.").)

In response, NPT argues that the claims they bring as assignee do not arise under the PSA because the claims all relate to actions taken *before* the PSA was executed. (Doc. No. 17 at pp. 16-18.) **[**42]** In addition, NPT states that the antitrust claims arise out the Sherman and Clayton Acts, not the PSA, and that the fraud claims "arise in tort." (*Id.* at p. 17.)

a. Fraud

At this stage in the litigation, the Court is not persuaded by Defendants' contention that the fraud claims arise under the PSA. Notably, Defendants fail to cite to any applicable case law to support their position. (*See* Doc. No. 13-2 at pp. 11-12 & Doc. No. 21 at p. 3.)

Although Defendants did not raise the gist of the action doctrine in their briefing, the Court finds the doctrine instructive, insofar as it sheds light on the distinction between claims sounding in tort versus in contract. ***HN3***[] Under Pennsylvania law, the gist of the action doctrine "prevents a plaintiff from recasting ordinary breach of contract claims into tort claims." *Investors Trust LC v. TD Bank, Civil Action No.* ***[*690]*** *11-1551, 2011 U.S. Dist. LEXIS 160608, 2011 WL 13141657, at *1 n.1 (E.D. Pa. May 26, 2011)*; *Weed v. Ally Fin. Inc., Civil Action No. 11-2808, 2011 U.S. Dist. LEXIS 96670, 2011 WL 3803719, at *4 (E.D. Pa. Aug. 26, 2011)*. Pennsylvania courts and courts in this District have repeatedly recognized that the purpose of the doctrine is "to maintain the distinction between the theories of contract and tort." *Invs. Tr. LC, 2011 U.S. Dist. LEXIS 160608, 2011 WL 13141657, at *1 n.1*; *Weed, 2011 U.S. Dist. LEXIS 96670, 2011 WL 3803719, at *4*; *see also* *eToll, Inc. v. Elias/Savion Advert., Inc., 811 A.2d 10, 14 (Pa. Super. Ct. 2002)*. Accordingly, the doctrine does not bar tort claims where the claims "arise independently of the underlying contract, with the contract being merely collateral." *Invs. Tr. LC, 2011 U.S. Dist. LEXIS 160608, 2011 WL 13141657, at *1 n.1*; *see also* *Weed, 2011 U.S. Dist. LEXIS 96670, 2011 WL 3803719, at *5*.

HN4[] As it relates **[**43]** to fraud, "fraud in the inducement claims are much more likely to present cases in which a social policy against the fraud, external to the contractual obligations of the parties, exists." *U.S. Claims, Inc. v. Saffren & Weinberg, LLP, Civil Action No. 07-0543, 2007 U.S. Dist. LEXIS 88022, 2007 WL 4225536, at *11 (E.D. Pa. Nov. 29, 2007)*; *see also* *CRS Auto Parts, Inc. v. Nat'l Grange Mut. Ins. Co., 645 F. Supp. 2d 354, 377-78 (E.D. Pa. 2009)* ("Where . . . the fraud concerns an act collateral to and not interwoven with the terms of the parties' contract, such as fraudulent inducement to enter the contract, courts have been less willing to bar claims . . . [However,] [w]here the pre-contractual statements that are the basis for the fraudulent inducement claim concern specific duties that are later outlined in the contract, courts have repeatedly dismissed such claims as sounding in contract and, thus, barred by the gist of the action doctrine."); *Morales v. Superior Living Prods., LLC, Civil Action No. 07-cv-04419, 2009 U.S. Dist. LEXIS 91578, 2009 WL 3234434, at *8 (E.D. Pa. Sept. 30, 2009)* ("Courts have held that fraudulent inducement claims are not barred by the gist-of-the-action doctrine where the alleged fraud is collateral to the contract. However, fraudulent inducement claims are barred by the gist-of-the-action doctrine where the claims relate to the performance of the contract.").

Here, the allegations make clear that NPT is asserting a fraud in the inducement claim on PCC's behalf. (*See generally* Doc. No. 1.) Namely, NPT alleges that but for Ridgewood and CGP's **[**44]** misrepresentations as to the riskiness of developing the Property, PCC would not have sold Philmont Club to Concert Defendants and entered into the PSA. (*See, e.g.*, Doc. No. 1 at ¶¶ 226-41 ("Michael Plotnick and Jonathan Grebow . . . told Meyer and [PCC] that . . . it was speculative that the Property could be developed and that there were significant risks involved in the development of the Property . . . Ridgewood knew its representations to be false and purposely made the misrepresentation to cause [PCC] to rely on it and agree to CGP's proposal instead of pursing other options, including a sale of Property to NPT."); *id.* at ¶¶ 256-75 ("CGP represented to [PCC] that obtaining development approvals for the Property would be difficult and speculative . . . [PCC] was harmed as a result of its reliance upon CGP's representations by way of selling Philmont Club to Concert Philmont for below market value.").)

The Court finds that the alleged fraud is collateral to the PSA and that the fraud claims do not relate to the performance of the PSA. Nowhere in the complaint does NPT plead that Concert Defendants did not purchase Philmont Club for the price agreed upon or that Concert Defendants **[**45]** otherwise did not follow through on promises they made in the PSA. (*See generally* Doc. No. 1.) *Cf.* *Morales, 2009 U.S. Dist. LEXIS 91578, 2009 WL 3234434, at *8* ("Because the . . . fraudulent **[*691]** misrepresentation claims and the fraud claim essentially allege that defendants failed to honor their alleged promise to deliver bathtubs manufactured by Superior in accordance with the parties' agreement, I conclude that those claims are related to the performance of the contract[.]"). Taken together, the Court concludes that NPT's fraud claims sound in tort and do not arise under the PSA.

b. Antitrust

Next, the Court holds that the antitrust claim NPT asserts as assignee is statutory in nature and arises out of federal ***antitrust law***, not under the PSA. *See* *Walgreen Co. v. Johnson & Johnson, 950 F.3d 195, 299 (3d Cir. 2020)* ("The statutory federal antitrust claims asserted in Walgreen's complaint are extrinsic to, and not 'rights under,' the Distribution Agreement."); *see also* *id. at 202* ("Walgreen is seeking to enforce a purely statutory right, not a substantive right originating from the Distribution Agreement").

c. Civil Conspiracy

Last, the Court concludes that the civil conspiracy claim does not arise under the PSA either. The civil conspiracy claim is based entirely on the fraud and antitrust allegations— specifically, NPT alleges **[**46]** that CGP, Nanula, Ridgewood, Grebow, and Plotnick conspired with each other to (1) violate the federal antitrust laws and (2) commit fraud, including making fraudulent misrepresentations as to the ability to obtain development approvals for the Property, so that CGP could acquire Philmont Club at a drastically reduced rate. (*See* Doc. No. 1 at ¶¶ 300-08.) Because the fraud and antitrust claims do not arise under the PSA—and the civil conspiracy claim is grounded entirely on allegations that Defendants committed fraud and violated federal antitrust laws—the civil conspiracy claim necessarily cannot arise under the PSA.

ii. The Limited Assignment Did Not Violate the PSA's Anti-Assignment Provision

Defendants argue that NPT is barred from bringing antitrust and state law claims as an assignee because the PSA included an anti-assignment provision and, therefore, PCC could not assign those claims to NPT. (Doc. No. 13-2 at pp. 12-13.) The anti-assignment clause states: "[N]either the Seller nor the Buyer may assign this Agreement *nor any of the rights and/or obligations under this Agreement* either directly, indirectly or by operation of law either prior to or after the Closing Date without **[**47]** the approval of the other Party, which approval will not be unreasonably withheld, delayed or conditioned." (Doc. No. 13-3 at p. 48, § 17.4 (emphasis added).)

As Defendants recognized during oral argument (Hr'g Tr. at 6:19-7:10), the Third Circuit recently rejected the notion that an anti-assignment clause can preclude an assignee from bringing a federal antitrust claim. *See* *Walgreen Co., 950 F.3d at 196, 199, 203* (considering "whether an assignment of federal antitrust claims is barred by a contract provision proscribing the assignment of any 'rights and obligations' under that contract" and determining that the answer was a resounding "no"). This is because the federal antitrust claims were "a product of federal statute and thus [we]re extrinsic to, and not rights 'under,' a commercial agreement." *Id. at 196*. So too here.

Defendants' argument that the anti-assignment clause prohibited PCC from assigning the common law fraud and civil conspiracy claims fails as well. This is because the anti-assignment clause *only* proscribes the assignment of claims *arising under the PSA*. But, for the reasons discussed **[*692]** above, the fraud and civil conspiracy claims do not arise under the PSA. Therefore, the anti-assignment clause is inapplicable.

iii. [48] PCC Expressly Assigned its Antitrust Claim to NPT**

Third, Defendants argue that PCC did not expressly assign its antitrust claims to NPT, rendering the assignment of that claim unenforceable. (Doc. No. 13-2 at p. 13.) We disagree.

HN5[] In *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp.*, the Third Circuit held that an assignment of an antitrust claim under *Section 4* of the Clayton Act, *15 U.S.C. § 15*, must be "express." *995 F.2d 425, 438-39 (3d Cir. 1993)* ("[W]e hold that only an express assignment of an antitrust claim can be valid."); *id. at 440* (holding that "any assignment of antitrust claims, as a matter of federal common law, must be an express assignment; general assignments, without specific reference to antitrust claims, cannot validly transfer the right to pursue those claims"). In that case, Gulfstream III Associates purchased an aircraft, which it resold to JB & A. Gulfstream then assigned its "rights, title and interest" in the aircraft and its purchase agreement with the manufacturer to JB & A. *Id. at 431, 437*. The Third Circuit held that the general assignment "of Gulfstream III's rights, title, and interest in" the aircraft and original purchase agreement did not suffice to assign its federal antitrust claims because it was not express. *Id. at 440* ("Gulfstream **[**49]** III Associates made no express assignment of its antitrust claims to JB & A[.]").

Six months after *Gulfstream*, the Third Circuit closely examined that decision and applied the *Gulfstream* rule that assignments must be express, this time in the context of a Racketeer Influenced and Corrupt Organizations ("RICO") claim. *Lerman v. Joyce Int'l, Inc., 10 F.3d 106, 111-12 (3d Cir. 1993)*. In *Lerman*, Litton had assigned "all of" LOPC's "causes of action, . . . claims and demands of whatsoever nature," and the Third Circuit held that this assignment was "'express' within the meaning of *Gulfstream*." *Id. at 112*; *see also* *In re Linerboard Antitrust Litig., 443 F. Supp. 2d 703, 712 (E.D. Pa. 2006)* ("[T]he *Lerman* Court held that an unambiguous and all-inclusive assignment of claims, even without specifying the types of causes of action assigned, satisfies the express assignment requirement."). In its analysis, the Third Circuit distinguished from the assignment at issue in *Gulfstream*:

> The wording of the assignment in this case contrasts sharply with that in *Gulfstream*. Here, Litton expressly assigned to Joye "all of" LOPC's "causes of action, . . . claims and demands of whatsoever nature." In *Gulfstream*, on the other hand, the purchase agreement made no reference to legal causes of action or claims. Rather, it referred only to Gulfstream III's **[**50]** "rights, title and interest" in the aircraft and the contract with the manufacturer. As a result of the wording used in the assignment at issue here, we believe that the concern underlying the express assignment rule adopted in *Gulfstream* is satisfied. The *Gulfstream* court appears to have been troubled by the difficulty of determining on a case-by-case basis whether an assignment such as the one in that case had been intended by the parties to transfer antitrust claims. The wording of the assignment in this case, however, could not reasonably lead to such difficulty. The assignment refers to Joye "all of" LOPC's "causes of action" and "claims of . . . whatsoever nature." This language is unambiguous and all-inclusive. Consequently, we hold that this assignment **[*693]** is "express" within the meaning of *Gulfstream*.

10 F.3d at 112.

Here, the Court concludes that PCC expressly assigned its federal antitrust claims to NPT in the Limited Assignment of Claims Agreement. Under the terms of that agreement, PCC assigned NPT "*any and all claims, demands, and cause or causes of action of any kind whatsoever* which Assignor has, may have, may have [sic], or may have had on or before March 1, 2017 against Concert Golf **[**51]** Partners LLC, Concert Philmont Properties, LLC, Concert Philmont, LLC, Peter Nanula, Ridgewood Real Estate Partners, Michael Plotnick, and Jonathan Grebow . . ." (Doc. No. 1-1, Ex. 1 at pp. 2-4.) This language is nearly identical to the assignment provision in *Lerman*, which the Third Circuit held to be "express" within the meaning of *Gulfstream. Compare id.*, *with Lerman, 10 F.3d at 112* ("The assignment refers to Joye 'all of' LOPC's 'causes of action' and 'claims of . . . whatsoever nature.'"). In addition, this language is distinguishable from the language that concerned the Third Circuit in *Gulfstream*. As the *Lerman* court noted, the purchase agreement in *Gulfstream* "made no reference to legal causes of action or claims" and "referred only to Gulfstream III's 'rights, title and interest' in the aircraft and the contract with the manufacturer." *See Lerman, 10 F.3d at 112*. In contrast, the language in the Limited Assignment of Claims Agreement unambiguously assigns *all* legal causes of action to NPT, with the exception of those that arise under the PSA, as discussed above.

Defendants' reliance on the Third Circuit's 2016 decision, *Wallach v. Eaton Corp.*, is unavailing. (*See* Doc. No. 13-2 at p. 13; Doc. No. 21 at pp. 1-3.) Citing **[**52]** to *Gulfstream*, the *Wallach* court noted that the Third Circuit has "long required that . . . assignments [of antitrust claims] be express." *837 F.3d 356, 366 (3d. Cir. 2016)*. However, Defendants are mistaken when they say that the holding of *Wallach* dealt with what constituted an express assignment. (*See* Doc. No. 21 at pp. 2-3 ("The Third Circuit [in *Wallach*] rejected the concept that an effective assignment of an antitrust claim is accomplished by a general assignment of 'all claims' or all 'causes of action' without specific reference to antitrust claims."); Hr'g Tr. at 8:2-10:1, 19:22-24.) As the *Wallach* court explicitly recognized, "*[a]t issue in this case . . . is not whether the assignment was express*. Rather, we are asked to determine whether an assignment of a federal antitrust claim must also reflect consideration to be valid." *837 F.3d at 366* (emphasis added); *see also id. at 371* ("In sum, we conclude that consideration has little role in advancing the goals of *Illinois Brick* and requiring it could affirmatively undermine one of them by, in certain circumstances, discouraging private enforcement of the federal antitrust laws. We therefore hold, consistent with the Second Restatement of Contracts, that consideration is not required **[**53]** under federal common law to give effect to an otherwise express assignment."); *id. at 361* ("[W]e hold that an assignment of a federal antitrust claim need not be supported by bargained-for consideration in order to confer direct purchaser standing on an indirect purchaser; such assignment need only be express, and that requirement was met here.").

The fact that the Third Circuit in *Wallach* never considered whether the assignment was express is further underscored by the court's analysis and the case's procedural history. First, unlike in *Gulfstream* and *Lerman*, in *Wallach*, the Third Circuit never mentioned the wording of the assignment. *See generally id.* Second, the district court had dismissed the action **[*694]** for lack of consideration and noted that the parties never disputed the fact that the antitrust claims were expressly assigned. *See id. at 363* ("Tauro . . . purchases trucks from R&R—a company that . . . expressly assigned Tauro its direct purchaser antitrust claims stemming from the alleged conspiracy between the OEMs and Eaten. Before the District Court, Appellees challenged the propriety and effect of this assignment, urging that it lacked bargained-for consideration . . . The District Court agreed **[**54]** and dismissed Tauro from the suit."); *see also* *Wallach v. Eaton Corp., 125 F. Supp. 3d 487, 493 (D. Del. 2015)*, *rev'd*, *837 F.3d 356 (3d. Cir. 2016)* ("Defendants do not dispute that 'an antitrust claim can be expressly assigned.' Instead, defendants allege that the purported assignment is legally invalid for lack of consideration.").

Because PCC expressly assigned its federal antitrust claims to NPT, we deny Defendants' motion to dismiss on this ground.

B. Antitrust Claims

Next, the Court addresses Defendants' argument that the two antitrust claims—Count I, which NPT brings directly, and Count II, which NPT asserts as assignee—must be dismissed for failure to state a claim. (Doc. No. 13-2 at pp. 13-20; Doc. No. 21 at pp. 4-8.)

HN6[] *Section 1* of the Sherman Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce[.]" *15 U.S.C. § 1*. To state a *Section 1* claim, a plaintiff must allege (1) an agreement (2) to restrain trade unreasonably. *Lifewatch Servs. Inc. v. Highmark Inc., 902 F.3d 323, 331 (3d Cir. 2018)*. In turn, *Section 4* of the Clayton Act provides a private right of action for plaintiffs seeking to allege an antitrust violation. *See, e.g., Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 81 (3d Cir. 2011)* ("*Section 4* of the Clayton Act . . . provides a private right of action for 'any person who shall be injured . . . by reason of anything forbidden in the antitrust laws." (cleaned up)); **[**55]** *Gorrio v. Corr. Officer Francis, Civil Action No. 2:19-1297, 2021 U.S. Dist. LEXIS 87570, 2021 WL 3023736, at *17 (W.D. Pa. May 7, 2021)* ("The Clayton Act provides a private right of action for violations of the Sherman Act."); *World Wrestling Ent., Inc. v. Jakks Pac., Inc., 425 F. Supp. 2d 484, 518 (S.D.N.Y. 2006)* ("[A] plaintiff alleging injury from an antitrust violation may seek damages only under *§ 4* of the Clayton Act, which authorizes private lawsuits . . .").

Defendants argue that Plaintiff's antitrust claims must be dismissed because (1) the complaint fails to establish an unreasonable restraint of trade, (2) the complaint fails to plausibly allege the existence of an agreement between Ridgewood and CGP, and (3) the complaint fails to allege an antitrust injury. (*See* Doc. No. 13-2 at pp. 14-23.) Because the Court finds that NPT fails to establish an unreasonable restraint of trade, we do not address the other two arguments.

i. Plaintiff Fails to Plead that Defendants Unreasonably Restrained Trade

HN7[] The Supreme Court "has repeated time and again that *§ 1* outlaws only unreasonable restraints." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. "An 'unreasonable' restraint is one that inhibits competition in the relevant market." *Lifewatch Servs. Inc., 902 F.3d at 335* (citation omitted).

HN8[] There are two tests for determining whether a practice restrains trade in violation of *Section 1* of the Sherman Act: the rule of reason and the *per se* rule. *See, e.g., Leegin, 551 U.S. at 885-86*. **[*695]** Typically, courts determine whether a restraint **[**56]** violates *Section 1* of the Sherman Act by applying the rule of reason. *See* *Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2151 (2021)* ("*NCAA*") ("Determining whether a restraint is undue for purposes of the Sherman Act 'presumptively' calls for what we have described as a 'rule of reason analysis.'"); *see also* *id. at 2155* ("Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which (again) we have described as a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's actual effect on competition." (cleaned up)).

HN9[] Under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin, 551 U.S. at 885-86* (cleaned up). Courts consider "specific information about the relevant business," "the restraint's history, nature, and effect," and "[w]hether the businesses involved have market power." *Id.* (cleaned up)); *see also* [NCAA, 141 S. Ct. at 2151, 2155](); [Eichorn v. AT & T Corp., 248 F.3d 131, 144-45 (3d Cir. 2001)](). "In applying this test, we examine the competitive significance of the alleged restraint to determine whether it has an anti-competitive effect on the market and is an unreasonable restraint on trade." [Eichorn, 248 F.3d at 145](). As the Supreme **[**57]** Court has explained, the rule of reason "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." [Leegin, 551 U.S. at 886]().

HN10[] Some types of restraints, however, "are deemed unlawful *per se*." *Id.* (cleaned up). The *per se* rule "treat[s] categories of restraints as necessarily illegal." *Id.* As a result, if the *per se* rule applies, the court need not "study the reasonableness of an individual restraint in light of the real market forces at work." *Id.* In other words, the court conducts a truncated analysis if the restraint is *per se* illegal.

Because of this, ***HN11***[] "the per se rules of illegality are the exception to antitrust analysis and are only employed in certain recognized categories." [Eichorn, 248 F.3d at 144](). The Supreme Court has cautioned that "[r]esort to *per se* rules is confined to restraints that would always or almost always tend to restrict competition and decrease output," such as "horizontal agreements among competitors to fix prices or to divide markets." [Leegin, 551 U.S. at 886](). At bottom, "a *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict **[**58]** with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason." [Id. at 886-87](). To that end, the Supreme Court has "expressed reluctance to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." [Id. at 887]() (cleaned up). The Supreme Court has also instructed that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Id.*

Here, NPT argues that the *per se* rule applies, and the Court need not conduct a rule of reason analysis. (Doc. No. 17 at p. 20.) In contrast, Defendants maintain that the rule of reason applies. (Doc. No. 13-2 **[*696]** at pp. 20-23; Doc. No. 21 at p. 6.) For the reasons discussed below, the Court finds that the rule of reason applies, and that Plaintiff fails to establish an unreasonable restraint of trade under the rule of reason.

a. Per Se Analysis

NPT alleges that Defendants engaged in bid-rigging,[10] a *per se* violation. (Doc. No. 17 at pp. 20-28; Doc. No. 22 at pp. 3-4.) *See* [SmithKline Beecham Corp. v. E. Applicators, Inc., No. CIV.A. 99-CV-6552, 2002 U.S. Dist. LEXIS 10061, 2002 WL 1197763, at *2 (E.D. Pa. May 24, 2002)]() ("Bid-rigging . . . falls within the ambit of a *per se* violation."). NPT claims **[**59]** that CGP and Ridgewood were competitors since they were both interested in purchasing either Philmont Club or the Property and that they agreed not to compete when Nanula asked Ridgewood to "stand back, profess some concerns about the real estate risks, and just wait to see if I can strike a

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[10] During oral argument, Plaintiff's counsel—for the very first time—attempted to distinguish between the two antitrust claims, arguing that they were premised on different *per se* violations. Specifically, counsel contended that the antitrust claim NPT brought as PCC's assignee was based on bid-rigging, while the antitrust claim NPT brought directly was based on illegal boycotting. (*See, e.g.*, Hr'g Tr. at 43:2-20, 57:7-22.) Any mention of illegal boycotting is conspicuously absent from the voluminous briefing done on this motion. (*See* Doc. Nos. 17 & 22.) As a result, the Court finds that Plaintiff waived its illegal boycotting argument. *See* [Tomasko v. Iran H. Weinstock, P.C., 357 F. App'x 472, 479 (3d Cir. 2009)]() (finding that "the specific objections that Weinstock raised for the first time at oral argument in the District Court have been waived"); [In re Corio, 371 F. App'x 352, 355 (3d Cir. 2010)]() (finding that the bankruptcy court did not abuse its discretion when it refused to consider an argument raised for the first time during oral argument); [Doherty v. Allstate Indem. Co., Civ. A. No. 15-05165, 2017 U.S. Dist. LEXIS 52795, 2017 WL 1283942, at *23 (E.D. Pa. Apr. 6, 2017)]() ("[B]ecause this argument was asserted for the first time in Doherty's reply and at oral argument, it is waived."); [McCowan v. City of Philadelphia, Civil Action No. 2:19-cv-03326-KSM, 2020 U.S. Dist. LEXIS 205909, 2020 WL 6485097, at *3 n.5 (E.D. Pa. Nov. 4, 2020)]() ("During oral argument, Defendants for the first time referred to the subpoena as a 'deep sea fishing' expedition . . . The Court does not consider Defendants' relevancy argument, which was raised for the first time at oral argument[.]").

better deal for all of us here" and Ridgewood agreed to "continue to stand on the sidelines and let [CGP] do [its] thing" and, therefore, they engaged in bid-rigging. (*See* Doc. No. 17 at pp. 22-24.)

To support its contention, NPT cites to *United States v. Portsmouth Paving Co.*, a Fourth Circuit decision that is non-binding on the Court, for the proposition that "[a]ny agreement between competitors pursuant to which contract offers are to be submitted to *or withheld* from a third party constitutes bid rigging per se violative of *15 U.S.C. section 1*." (*Id.* at p. 20 (citing *Portsmouth, 694 F.2d 312 (4th Cir. 1982)*).) However, NPT omits the footnote that immediately follows, which explains that "collusive bidding is an agreement between competitors *in a bidding contest* to submit identical bids or, by preselecting the lowest bidder, to abstain from all bona fide effort to obtain the contract." *Portsmouth, 694 F.3d at 325 n.18* (cleaned up) **[**60]** (emphasis added). Here, the complaint is devoid of any allegations that PCC had a bidding contest or auction for the sale of Philmont Club or the Property.[11]

The death knell for Plaintiff's argument that Defendants engaged in bid-rigging is its failure to cite to any analogous case law. *Accord* *Eichorn, 248 F.3d at 143* ("Acknowledging **[*697]** this judicial hesitance to extend the *per se* rule to new categories of antitrust claims, *we note there are no Supreme Court cases nor any federal cases that have applied the per se rule in similar factual circumstances*." (emphasis added)). Indeed, as Defendants aptly point out (Doc. No. 21 at pp. 5-6), NPT fails to cite to a single case where a court held that the defendants engaged in bid-rigging either (a) in absence of a competitive bidding process or (b) in connection with a one-time private sale of real estate (*see* Doc. No. 17 at pp. 20-21). As such, Plaintiff's cases are inapposite. *See* *United States v. Sargent Elec. Co., 785 F.2d 1123, 1124-25 (3d Cir. 1986)* (indictment charged electrical contractors with conspiring to rig bids for electrical construction work over the course of seven years); *United States v. Koppers, Inc., 652 F.2d 290, 291 (3d Cir. 1981)* (involving "a conspiracy to rig bids and allocate territories in the sale of road tar to the State of Connecticut and its subdivisions," where the State **[**61]** "solicited bids on an annual basis for the sale and application of road tar")*Portsmouth, 694 F.2d at 316, 325 n.18* (involving construction and surface paving contracts in the Tidewater region where the "conspirators would trade projects among themselves by agreeing to withhold bids or to submit artificially high 'complementary' bids on certain projects"); *Branta, LLC v. Newfield Prod. Co., 310 F. Supp. 3d 1166, 1177 (D. Colo. 2018)* (auction for sale of oil and natural gas assets where the selling parties "controlled the auction's rules for bidding and the identities and number of competitors allowed to participate in the auction"); *United States v. Flom, 558 F.2d 1179, 1182 (5th Cir. 1977)* (officers of companies that sold reinforcing steel bars for use in construction projects "met on a regular basis" to "allocate[] the business on upcoming construction contracts among their respective companies" and agreed that the "losing bidders" would submit "a complimentary bid, or no bid at all"); *United States v. Seville Indus. Mach. Corp., 696 F. Supp. 986 (D.N.J. 1988)* (involving bankruptcy auctions); *United States v. W.F. Brinkley & Son, 783 F.2d 1157, 1158 (4th Cir. 1986)* ("concern[ing] the 1979 bidding process for a portion of the Pasquotank River Supply Project," where "[t]he overall project was divided into several subprojects, each of which was to be awarded through a competitive bidding process"); *Williams v. Estates LLC, 1:19-CV-1076, 2020 U.S. Dist. LEXIS 30932, 2020 WL 887997, at *9 (M.D.N.C. Feb. 24, 2020)* (involving multiple foreclosure sales).

Because NPT fails to allege that Defendants engaged in behavior **[**62]** that was *per se* illegal, the Court now considers whether Defendants' conduct constituted an unreasonable restraint of trade under the rule of reason.

b. Rule of Reason Analysis

HN12[] "In order to state a Sherman Act claim under *§ 1* . . . a plaintiff must identify the relevant product and geographic markets and allege that the defendant exercises market power within those markets." *Queen City Pizza, Inc v. Domino's Pizza, Inc., 124 F.3d 430, 435 (3d Cir. 1997)*; *see also* *Lifewatch Servs. Inc., 902 F.3d at 337* ("A plaintiff bears the burden of defining both a relevant geographic and a relevant product market."). Defendants argue that under the rule of reason, the antitrust claims must fail because (1) NPT fails to define a relevant product

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[11] In its sur-reply, NPT argues that it is "illogical" to focus this narrowly on semantics. (*See* Doc. No. 22 at pp. 3-4.) But NPT fails to cite to any case law to support its argument that Defendants were engaged in a bidding contest given the facts at play here or that an "offer" versus a "bid" is a distinction without a difference.

market; (2) NPT fails to define a relevant geographic market; and (3) NPT fails to allege market power or anticompetitive effects. (Doc. No. 13-2 at pp. 20-23.)

HN13[] NPT bears the burden of defining the relevant product market. *See Queen City Pizza, Inc., 124 F.3d at 436*; *Lifewatch Servs. Inc., 902 F.3d at 337*. To **[*698]** determine whether the relevant market was adequately defined, the Court must first consider "the extent to which [the] product is interchangeable with alternative products within the field." *Mylan Pharma. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 436 (3d Cir. 2016)*. "The term interchangeability implies that one product is roughly equivalent to another for the use to which it is put. It also means that while there might **[**63]** be some degree of preference for one product over the other, either would work efficiently." *Id.* (cleaned up). In addition, courts must consider the "cross-elasticity of demand, which is defined as a relationship between two products, usually substitutes for each other, in which a price change for one product affects the price of the other." *Lifewatch Servs. Inc., 902 F.3d at 337* (cleaned up); *see also Queen City Pizza, Inc., 124 F.3d at 437-38* ("[P]roducts in a relevant market are characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market" (cleaned up)). Ultimately, "[t]he outer boundaries of the market are determined by the reasonable interchangeability of use or the crosselasticity of demand between the product itself and substitutes for it." *Queen City Pizza, Inc., 123 F.3d at 436*.

HN14[] "The Third Circuit has instructed that although in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers, there is no prohibition against dismissal of antitrust claims for failure to plead a relevant market." *Fresh Made, Inc. v. Lifeway Foods, No. Civ.A. 01-4254, 2002 U.S. Dist. LEXIS 15098, 2002 WL 31246922, at *5 (E.D. Pa. Aug. 9, 2002)* (cleaned up); *see also Queen City Pizza, Inc., 124 F.3d at 436*. Accordingly, courts may find that a relevant market is legally insufficient **[**64]** and grant a motion to dismiss "[w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor." *Queen City Pizza, Inc., 124 F.3d at 436-37* (collecting cases); *see also Lifewatch Servs. Inc., 902 F.3d at 337* ("A complaint may be properly dismissed if it defines the relevant market without reference to interchangeability or crosselasticity of demand or if it alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor." (cleaned up)); *Bldg. Materials Corp. of Am. v. Rotter, 535 F. Supp. 2d 518, 524 (E.D. Pa. 2008)* ("If a complaint fails to allege facts regarding substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating to cross-elasticity of demand, . . . a court may grant a *Rule 12(b)(6)* motion." (cleaned up)).

Fresh Made, Inc v. Lifeway Foods, Inc. is instructive. The plaintiff in that case manufactured, distributed, and sold certain "specialty dairy products, such as kefir, a fermented yogurt-style drink," and asserted **[**65]** that the relevant product market was "specialty Russian dairy foods, including kefir." *2002 U.S. Dist. LEXIS 15098, 2002 WL 31246922, at *5*. The court held that the plaintiff failed to plead a relevant product market because it did not reference the rule of reasonable interchangeability and cross elasticity of demand in its amended complaint; accordingly, it granted the defendant's motion to dismiss. *2002 U.S. Dist. LEXIS 15098, [WL] at *5-6* ("Fresh Made does not allege facts establishing that the market for specialty Russian dairy products, such as kefir, is distinct from the market for yogurt, other drinkable yogurt products, **[*699]** or from other dairy products in general. The amended complaint contains no allegations relating to the price of and/or demand for kefir and other specialty Russian dairy products relative to products in the larger dairy market as a whole. Fresh Made simply fails to allege whether there are reasonably interchangeable alternatives for its products."); *see also Bldg. Materials Corp. of Am., 535 F. Supp. 2d at 525* (granting motion to dismiss where the plaintiff defined the relevant product market as "asphalt shingle roof ridge vents" but failed to "explain why asphalt shingle roof ridge vents are distinct from the market for shingle roof ridge vents, roof ridge vents in general or any other roofing products," **[**66]** made "no reference to the price and/or demand for asphalt shingle roof ridge vents relate to the roofing products industry as a whole," and failed to "reference to the rule of reasonable interchangeability and the cross-elasticity of demand"); *Queen City Pizza, Inc., 124 F.3d at 432-33, 437-38* (holding that "ingredients, supplies, materials and distribution services used by and in the operation of Domino's pizza stores" did not constitute a relevant product market because "the dough, tomato sauce, and paper cups that meet Domino's Pizza, Inc. standards and are used by Domino's stores are interchangeable with dough, sauce and cups available from other suppliers and used by other pizza companies" and affirming the district court's dismissal of the complaint).

Here, the Court concludes that NPT failed to define a relevant product market. Noticeably absent from the complaint (or NPT's response brief or sur-reply) is any reference to the rule of reasonable interchangeability or the cross-elasticity of demand. (*See generally* Doc. Nos. 1, 17 & 22.) From the face of the complaint, it is unclear whether the relevant market is, for instance, country clubs, golf courses, or development properties, or how those are distinct from one another.

During **[**67]** oral argument, NPT argued that the relevant market was "a market of one." (Hr'g Tr. at 54:8-55:17.) However, this Court is unpersuaded by NPT's contention that Philmont Club alone constitutes a relevant product market under the rule of reason. ***HN15***[] To the contrary, courts routinely hold that a product market is insufficient if it is comprised of a single brand or a single entity. *See, e.g.*, *Satnam Distribs. LLC v. Commonwealth-Altadis, Inc., 140 F. Supp. 3d 405, 419 (E.D. Pa. 2015)* (noting that "[c]ourts routinely reject Sherman Act claims at the motion to dismiss stage where such claims involve single-brand or single-manufacturer products" and collecting cases); *Molinari v. Consol Energy Inc., No. 12cv1085, 2012 U.S. Dist. LEXIS 168171, 2012 WL 5932979, at *6 (W.D. Pa. Nov. 27, 2012)* (stating that "[c]ourts have frequently granted Motions to Dismiss in which the relevant market has been limited to a single entity" and collecting cases); *see also* *2012 U.S. Dist. LEXIS 168171, [WL] at *5* ("Cases in which dismissal on the pleadings is appropriate frequently involve . . . failed attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes." (cleaned up)).

For example, in *Right Field Rooftops, LLC v. Chicago Baseball Holdings, LLC*, the plaintiffs proposed a relevant product market of "live Cubs games," and the court held that the proposed market could not "stand because **[**68]** it comprise[d] a single brand product." *87 F. Supp. 3d 874, 886-87 (N.D. Ill. 2015)*. The court found that it was not plausible that there were "no interchangeable substitutes for live Cubs games," given that "the Cubs necessarily compete with other Major League Baseball teams, sporting events, and other live entertainment for revenue." *Id.* ("While the Court accepts that there are some die-hard **[*700]** Cubs fans that would never attend a White Sox game, that does not mean that Cubs games constitute their own market . . . [A]rguments of consumer preferences . . . fall short of rendering it plausible that there are no interchangeable substitutes for live Cubs games."); *see also* *Satnam Distribs. LLC, 140 F. Supp. 3d at 419* (concluding that the plaintiff "failed to carry its burden of alleging a plausible product market," where the proposed market was "the market for distribution of a single manufacturer's brands"); *Molinari, 2012 U.S. Dist. LEXIS 168171, 2012 WL 5932979, at *6* ("Plaintiff's Amended Complaint is void of any factual allegation that Consol is so unique as an employer . . . to constitute its own market."); *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063-64 (9th Cir. 2001)* (holding that the plaintiff "failed to identify an appropriately defined product market" where the proposed market was "UCLA women's soccer program" and reasoning that "[the plaintiff's] limitation of the relevant product market **[**69]** to a single athletic program is especially unavailing insofar as the very existence of any given intercollegiate athletic program is predicated upon the existence of a field of competition composed of other, similar programs").

The same logic applies with equal force here. When NPT identified "Philmont Club" as the relevant product market during oral argument, it failed to explain how Philmont Club is unique and why it is not interchangeable with any other country club. A close review of NPT's complaint also illustrates the lack of any allegation that Philmont Club is so unique as to constitute its own market.

NPT's reliance on *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* fails to move the needle. (*See* Hr'g Tr. at 54:22-25 ("We have an *Eastman Kodak* case which talks about [sic] a relevant market can be limited to one single brand.").) In *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, the Third Circuit outlined the limited circumstances in which *Kodak* applies. *124 F.3d at 439*; *see also* *Satnam Distribs. LLC, 140 F. Supp. 3d at 419* (explaining that courts permit claims that involve single-brand or single-manufacturer product markets "[o]nly in rare, fact-specific circumstances" such as "where customers were locked into purchasing a manufacturer's tying products, often aftermarket parts **[**70]** and services" as in *Kodak*). *Kodak* "held that the market for repair parts and services for Kodak photo-copiers was a relevant market because repair parts and services for Kodak machines are not interchangeable with the service and parts used to fix other copiers." Queen City Pizza, Inc., 124 F.3d at 439 (citation omitted).

In *Queen City Pizza*, the plaintiffs, Domino's franchisees, argued that Domino's violated the Sherman Act by requiring its franchisees to purchase its ingredients, supplies, and materials either directly from it or from an approved list of suppliers. *Id. at 433*. The plaintiffs proposed a relevant product market of "ingredients, supplies, materials and distribution services used by and in the operation of Domino's pizza stores" and argued that *Kodak* "support[ed] its proposed relevant market because it indicates that in some circumstances, a single brand of a product or service may constitute a relevant market." *Id. at 439*. The Third Circuit explained that the plaintiffs' interpretation of *Kodak* was too far-reaching and that, under *Kodak*, a single brand product may constitute a relevant market only "where the commodity is unique, and therefore not interchangeable with other products." *Id.* The Third Circuit found *Kodak* inapplicable **[**71]** to the case before it because "contractual restraints aside, the sauce, dough, and other products and ingredients approved for use **[*701]** by Domino's franchisees are interchangeable with other items available on the market." *Id.*

As in *Queen City Pizza*, this Court finds that *Kodak* is distinguishable because NPT has given no indication Philmont Club is "unique" and "therefore not interchangeable with other products" or entities. As noted above, NPT has given us no reason to conclude that Philmont Club is not interchangeable with other country clubs.

Because NPT fails to adequately plead a relevant product market, the Court does not address the other factors in the rule of reason test—namely, whether NPT defined a relevant geographic market or alleged market power or anticompetitive effects. *See, e.g.*, Bldg. Materials Corp. of Am., 535 F. Supp. 2d at 525 ("There is no need to examine the other factors in the rule of reason test because Rotter's counterclaim fails to state a relevant product market for antitrust purposes.").

Given NPT's failure to establish an unreasonable restraint of trade under either the *per se* rule or the rule of reason, the Court finds that NPT fails to state a claim under Section 1 of the Sherman Act and dismisses Counts I and II.

[72]** Having decided that the federal claims are subject to dismissal, we now turn to the state law claims—fraud, fraudulent concealment, aiding and abetting fraud, civil conspiracy, and breach of contract.[12]

C. Fraud and Fraudulent Concealment Claims

As assignee, NPT asserts fraud claims against Ridgewood, Grebow, and Plotnick (Count III) and CGP and Peter Nanula (Count V), which it bases on both alleged affirmative misrepresentations and omissions. NPT also brings a fraudulent concealment claim against CGP, Nanula, Ridgewood, Grebow, and Plotnick (Count VII) as PCC's assignee.

HN16[] Under Pennsylvania law, to state a *prima facie* case of fraud, a plaintiff must plead that the defendant made (1) a false representation, (2) with knowledge of its falsity or recklessness as to whether it is true or false, (3) which was intended to make the plaintiff act, (5) that the plaintiff justifiably relied on the misrepresentation, and (6) that the plaintiff suffered damages as a proximate result of its reliance. *Bucci v. Wachovia Bank, N.A., 591 F. Supp. 2d 773, 782 (E.D. Pa. 2008)*. A fraud claim based on an omission has the same elements as fraud, "except that an omission is actionable as fraud only where there is an independent duty to disclose the omitted **[**73]** information." *Id. at 783* (cleaned up). Fraudulent concealment has similar elements as fraud in the omission and likewise requires a plaintiff to show that the party that fraudulently concealed the information had a duty to speak. *See* *Marcum v. Columbia Gas Transmission, LLC, 423 F. Supp. 3d 115, 121 (E.D. Pa. 2019)* ("Plaintiffs must show: (1) [Defendant

[12] In their reply brief and during oral argument, Defendants argued that the Court should dismiss the state law claims for lack of supplemental jurisdiction. (*See* Doc. No. 21 at pp. 11-12; Hr'g Tr. at 15:4-7.) Defendants are wrong. NPT has pled facts showing that the Court can properly exercise *diversity* jurisdiction over this case. (*See, e.g.*, Doc. No. 1 at ¶¶ 2, 4-27; *accord* Hr'g Tr. at 82:19-83:1.)

caused] an omission; (2) the omission was material to the transaction at hand; (3) the omission was made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) the omission was made with the intent of misleading another into relying on it; (5) the plaintiff justifiably relied on the omission; and (6) the resulting injury was proximately caused by the reliance. In addition to those six elements, Plaintiffs must show a special **[*702]** relationship that would give rise to a duty to speak between them and the party that fraudulently concealed the information." (cleaned up)).

Defendants contend that the fraud and fraudulent concealment claims must be dismissed because (1) NPT fails to allege fraud with particularity; (2) the PSA was fully integrated and thus NPT cannot assert fraud claims against the Concert Defendants; (3) Defendants did not have a duty to speak; (4) some of the alleged misrepresentations **[**74]** are based on future promises and therefore are unactionable; and (5) NPT has failed to plead justifiable reliance. (Doc. No. 13-2 at pp. 24-32.) The Court addresses each argument below.

i. NPT Alleges Fraud with Particularity

HN17[] Under *Federal Rule of Civil Procedure 9(b)*, a party alleging fraud or mistake "must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*; *see also* *Frederico v. Home Depot, 507 F.3d 188, 200 (3d Cir. 2007)* ("Pursuant to *Rule 9(b)*, a plaintiff alleging fraud must state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the precise misconduct with which [it is] charged."). The Third Circuit has explained that to comply with *Rule 9(b)*, a plaintiff "must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation." *Id.*

Plaintiff has undoubtedly satisfied this standard here. With respect to false representations, NPT alleges that:

- In the fall of 2016, "Ridgewood told [PCC] that it was no longer interested in purchasing the Property as the ability to obtain approvals for 162 Units was speculative and the risks associated with **[**75]** the development of the Property were too high" (Doc. No. 1 at ¶ 92);

- On November 1, 2016, CGP and Nanula promised to make $5 million in capital improvements once the Property was sold (*id.* at ¶ 96);

- On November 1 and November 17, CGP and Nanula represented that they would retain at least 27 holes of golf at Philmont Club after the South Course was sold (*id.* at ¶¶ 97, 104);

- On November 2, CGP and Nanula represented to PCC that the sale of the Property may never occur and the terms of the proposal balanced out that risk (*Id.* at ¶ 102).

And as to the alleged omissions, NPT pled that:

- Beginning in October 2016, Ridgewood, CGP, Nanula, Plotnick, and Grebow worked closely together to acquire Philmont Club and develop the Property, yet never told PCC that they were teaming up (*see, e.g., id.* at ¶¶ 167-68); and

- By January 20, 2017, Ridgewood had met with the Township, the Township manager "didn't flinch at 160 units," and over the next month Ridgewood and CGP discussed the Township's positive "body language"—all while failing to tell PCC about this progress towards getting development approvals (*see, e.g., id.* at ¶¶ 159, 162-63, 167).

In sum, the complaint provides the who, what, where, **[**76]** and when of the alleged fraud and clearly puts Defendants on notice of the cause of action against them, which is all that *Rule 9(b)* requires. *See, e.g.,* *Kunkle v. Cmty. Health Sys. Prof'l Servs. Corp., CIV. No. 09-0208, 2009 U.S. Dist. LEXIS 149816, 2009 WL 10737883, at *1 (E.D. Pa. Apr. 22, 2009)* ("Although **[*703]** Plaintiff does not include quotes or exact dates, he does provide names, a general time-frame, and the substance of the allegedly fraudulent statements. This is sufficient to provide [the defendant] the notice it needs to begin to prepare its defense."); *cf.* *Int'l Strategic Cancer Alliance, LLC v.*

*Stichting Katholieke Universiteit, Civil Action No. 17-2024, 2017 U.S. Dist. LEXIS 172163, 2017 WL 4681789, at *6 (E.D. Pa. Oct. 18, 2017)* ("[T]he Complaint does not provide details regarding any specific representation made by Defendant, in terms of content, location, time, or speaker.").

ii. The PSA Does Not Bar NPT from Asserting Fraud Claims Against CGP and Nanula

Defendants' next argument is more complex, but similarly flawed. NPT brings its fraud claims as PCC's assignee, and Defendants contend that because the PSA was fully integrated, the parol evidence rule[13] bars NPT from relying on representations the Concert Defendants made to PCC prior to executing the agreement. (Doc. No. 13-2 at pp. 27-28.) Because prior misrepresentations form the entire basis for Plaintiff's fraud claims (i.e., but for Concert Defendants' representations that obtaining development approval would be risky and a sale of the Property **[**77]** may never transpire, PCC would not have entered into the PSA), the parol evidence rule would, in effect, proscribe Plaintiff from asserting any of its fraud claims (except for those against Ridgewood Defendants, who were not party to the PSA).

In response, NPT asserts that only Concert Philmont and Concert Philmont Properties are bound by the PSA and accordingly the PSA is of no moment since the fraud claims are asserted against *CGP* and *Nanula—not Concert Philmont or Concert Philmont Properties*. (Doc. No. 17 at pp. 33-24.) Defendants counter that because Nanula signed the PSA in his capacity as an agent of Concert Philmont and Concert Philmont Properties, "[i]t would conflict with agency principles" if NPT were allowed to bring the fraud claims against him and CGP (the agents) and not the principals. (Hr'g Tr. at 17:4-20; *see also* Doc. No. 21 at pp. 3-4 ("While they are not signatories to the PSA, both Nanula and Concert Golf were acting on behalf of Concert Philmont Defendants, the special purpose entities formed to acquire the Philmont Club, in negotiating the PSA. Agents of disclosed principals acting within the course and scope of their agency have no independent **[**78]** liability to those with whom they negotiate on behalf of their principal." (citations omitted)).)

Defendants are mistaken. In *Interwave Technologies, Inc. v. Rockwell Automatic, Inc.*, the court rejected a similar argument. *No. Civ.A. 05-398, 2005 U.S. Dist. LEXIS 37980, 2005 WL 3605272, at *14-19 (E.D. Pa. Dec. 30, 2005)*. That case involved a commercial dispute, where Interwave and its assignee sued defendants Rockwell Automatic, Inc. and Richard Ryan for breach of contract and fraudulent inducement. *2005 U.S. Dist. LEXIS 37980, [WL] at *1*. Rockwell had purchased nearly all of Interwave's assets **[*704]** pursuant to an Asset Purchase Agreement (the "APA"), and Ryan had acted as Rockwell's agent during the transaction but was not a party to the agreement himself. *See* *2005 U.S. Dist. LEXIS 37980, [WL] at *2* (explaining that Ryan "was Rockwell's chief negotiator and conduit of information between Rockwell and Interwave regarding the transaction between the parties that is the focal point of the litigation"); *2005 U.S. Dist. LEXIS 37980, [WL] at *19* (noting that Ryan was not a party to the APA). The plaintiffs alleged that Ryan and Rockwell fraudulently induced Interwave to enter into the APA, and the defendants moved to dismiss, arguing that the parol evidence rule and integration clause barred that claim. The APA's integration clause stated:

> This Agreement and the Confidentiality Agreement **[**79]** collectively constitute the entire agreement between the parties with respect to the subject matter hereof and thereof and this Agreement and the Confidentiality Agreement supersede all prior negotiations, agreements and understandings of any nature, whether oral or written, relating thereto.

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[13] ***HN18***[] Under Pennsylvania law, "[t]he parol evidence rule forbids admitting evidence of prior representations to fully integrated written agreements, even for claims of fraudulent inducement." *Berardine v. Weiner, 198 F. Supp. 3d 439, 444 (E.D. Pa. 2016)*. "Fraud in the inducement does not involve terms omitted from an agreement, but rather allegations of oral representations on which the other party relied in entering into the agreement but which are contrary to the express terms of the agreement." *Id.* Here, the complaint alleges that the CGP and Nanula committed fraud in the inducement by, *inter alia*, falsely representing that obtaining development approvals would be risky and that it would maintain 27 holes of golf—statements PCC then relied on in agreeing to enter into the PSA. (*See generally* Doc. No. 1.)

*2005 U.S. Dist. LEXIS 37980, [WL] at *15*.

Because the APA was fully integrated and Rockwell was a party to the APA, the court dismissed the fraudulent inducement claim against it. *2005 U.S. Dist. LEXIS 37980, [WL] at *19* ("Fully integrated contracts preclude fraudulent inducement claims. It is no different here. Therefore, Interwave's and Kall's claim of fraudulent inducement against Rockwell as a party to the APA will be dismissed."). However, the court allowed the fraudulent inducement claim against Ryan to proceed *because he was not a party to the APA. Id.* In its analysis, the court distinguished from two other cases that found that the integration clauses also applied to agents, observing that in those cases "the integration clauses, unlike here, specifically referred to the representations of the agents as barred." *Id.* (cleaned up); *see also* *Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 656 & n.7 (W.D. Pa. 1999)* (holding that the integration clause barred the plaintiff's fraud in the inducement claims against Compucare but did not bar those **[**80]** claims against Compucare's agent, who was not a party to the agreement).

We are persuaded by the rationale in *Interwave*. Here, the integration clause in the PSA provides:

> This Agreement and the exhibits attached hereto represent the entire understanding of the agreement between the Parties with respect to the subject matter hereof, and supersedes the Letter of Intent, all other negotiations, understandings and representations, if any, made between such Parties.

(Doc. No. 13-9 at p. 47, § 17.1.) This integration clause is nearly identical to the one in *Interwave*. Accordingly, if Plaintiff had asserted fraud in the inducement claims against Concert Philmont and Concert Philmont properties—who were parties to the PSA—then those claims would be dismissed. However, Plaintiff did not; rather, Plaintiff sued CGP and Nanula, who Defendants admit were not parties to the PSA. (*See* Doc. No. 21 at pp. 3-4; *see also* Doc. No. 13-9 at p. 56 (indicating that Nanula signed the PSA as agent of Concert Philmont and Concert Philmont Properties, not in his own capacity).) Because CGP and Nanula were not parties to the PSA, the integration clause does not apply to them and NPT's fraud claims against them survive **[**81]** the motion to dismiss.

iii. Defendants Did Not Have a Duty to Speak

NPT claims that CGP, Nanula, Ridgewood, Grebow, and Plotnick fraudulently failed "to inform [PCC] that they were working together towards purchasing Philmont Club and developing the Property" **[*705]** and "to inform [PCC] that Defendants were in active discussions with the Township about developing the Property and had confirmed that they would be able to finalize [the] development plans to not only develop the Property but to achieve a Unit yield in excess of 162." (Doc. No. 17 at p. 31.) Defendants argue that the fraud in the omission and fraudulent concealment claims must be dismissed because the Defendants had no duty to speak. (*See* Doc. No. 13-2 at pp. 28-30.)

HN19[] As noted above, fraud in the omission and fraudulent concealment claims can only lie where there is a duty to disclose the omitted information. *See* *Bucci, 591 F. Supp. 2d at 783* (cleaned up); *Marcum, 423 F. Supp. 3d at 121*; *Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 612 (3d Cir. 1995)*. Under Pennsylvania law, the duty to speak "exists only in limited circumstances," such as (1) "when there is a fiduciary, or confidential, relationship between the parties"; (2) where one party is the only source of information to the other party or the problems are not discoverable by other reasonable **[**82]** means; (3) "when disclosure is necessary to prevent an ambiguous or partial statement from being misleading"; (4) "where subsequently acquired knowledge makes a previous representation false"; or (5) "where the undisclosed fact is basic to the transaction." *Bucci, 591 F. Supp. 2d at 783*; *Duquesne Light Co., 66 F.3d at 611*; *see also* *Marcum, 423 F. Supp. 3d at 122* (explaining that the "duty to speak often arises in the home purchase setting where one party has unique knowledge"; for example "a seller who knows of a termite infestation has a duty to tell an unwitting buyer about it," and "when one party has a special vulnerability," such as neighbors who convinced an elderly and infirm 86-year-old neighbor to sell her house).

Here, NPT argues that Defendants had a duty to speak because the omissions were "basic to the transaction" (i.e., PCC would not have entered into the PSA had it known that the development approvals were forthcoming and/or that Ridgewood and CGP were working together) and that subsequently acquired knowledge rendered previous representations Defendants made to PCC false (i.e., after discussing development approvals with the Township, Defendants had confirmed they would be able to develop the Property). (*See* Doc. No. 17 at pp. 31-33.) We disagree.

HN20[] Where, as **[**83]** here, "both the plaintiff and defendant were sophisticated business entities, entrusted with equal knowledge of the facts," the duty to speak does not arise. *Bucci, 591 F. Supp. 2d at 783* (quoting *Duquesne Light Co., 66 F.3d at 612*); *see also* *Duquesne Light Co., 66 F.3d at 612* ("[T]here is virtually no Pennsylvania case in which a defendant has been held to have a duty to speak when both the plaintiff and defendant were sophisticated business entities, entrusted with equal knowledge of facts."); *Paramount Fin. Communs., Inc. v. Broadridge Inv. Commun. Sols., Inc., Civil Action No. 15-405, 2015 U.S. Dist. LEXIS 87622, 2015 WL 4093932, at *5 (E.D. Pa. July 7, 2015)* ("The parties have not cited any Pennsylvania cases imposing a duty to speak on sophisticated business entities, absent a special or fiduciary relationship, and the Court has found none."); *accord* *Marcum, 423 F. Supp. 3d at 122* (explaining that a special relationship giving rise to the duty to speak "generally does not arise in a typical, arms-length business transaction unless one party surrenders substantial control over some portion of its affairs to the other," which is "often described as requiring 'overmastering influence' on one side or 'weakness, dependence, or trust, justifiably reposed' on the other side." (cleaned up)).

[*706] The face of the complaint shows that PCC and Defendants were both sophisticated parties,[14] engaging in an arms-length transaction. *See* *Marcum, 423 F. Supp. 3d at 122* (dismissing fraudulent concealment claim where "Plaintiffs **[**84]** appear to be in a standard, armslength business relationship" and the plaintiffs failed to identify a basis for a fiduciary duty existing between the parties); *see also* *Paramount Fin. Communs., Inc., 2015 U.S. Dist. LEXIS 87622, 2015 WL 4093932, at *5* (concluding that the defendant had no duty to speak and granting motion to dismiss where the parties "ha[d] not entered into a fiduciary or special relationship" and where the claims arose "out of arms-length transactions between sophisticated parties: namely, the agreement between Plan Management, Miller, and Broadridge to enter into the Marketing Agreement and between Miller and BOSI to enter into the Stock Purchasing Agreement"); *accord* *Morton's Rest. Grp., Inc. v. Charest, No. CIV. A. 97-7013, 1998 U.S. Dist. LEXIS 17294, 1998 WL 767444, at *5 (E.D. Pa. Nov. 4, 1998)* (granting motion for summary judgment and finding no "duty to speak and, therefore, no fraud" where "Morton and Corsica were both represented by counsel and engaged in arm's length negotiations").[15]

Plaintiff fails to plead that the rezoning information was not reasonably discoverable to PCC or that Defendants had sole, or unequal, access to the Township. *See* *Duquesne Light Co., 66 F.3d at 612* (distinguishing from cases where the omitted information was "not discoverable by other reasonable means" and the defendant was "the only reasonable source of the information," **[**85]** and explaining that "[n]one of these cases is applicable to the situation present here, where the two parties are sophisticated business entities, with equal and ample access to legal representation. Superior information and better business acumen are legitimate advantages, which lead to no liability").[16]

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[14] The fact that PCC had amended its AOS with NPT eight times (and proposed a *ninth amendment*) underscores the fact that it is a sophisticated business entity.

[15] ***HN21***[] In *Morton's Restaurant Group, Inc. v. Charest*, the court stated that even if a confidential or fiduciary relationship did not exist, "there may still be a heightened responsibility based on the dealings of the parties." *1998 U.S. Dist. LEXIS 17294, 1998 WL 767444, at *5* ("Thus, one may justifiably rely on silence where there is no confidential relationship only if a specific relationship of trust has been developed with regard to a certain matter."). As in *Morton's*, NPT fails to allege that "a specific relationship of trust developed" between PCC and Defendants to give rise to a duty to speak.

[16] The sole case NPT relies on applies New York law and is inapposite. *See* *Zaccaro v. Shah, 746 F. Supp. 2d 508, 520, 522 (S.D.N.Y. 2010)* ("*Under New York law*, Shah, possessed a superior knowledge not readily available to Zaccaro as to the REIT's interest in purchasing AHA, had a duty to disclose that knowledge to Zaccaro to correct his mistaken belief that the REIT was not interested in purchasing AHA, particularly in view of Shah's prior statement that the REIT was not interest [sic] in purchasing the Hotel." (emphasis added)).

In addition, Plaintiff's allegation that Defendants "had confirmed that they would be able to finalize [the] development plans to not only develop the Property but to achieve a Unit yield in excess of 162 units"—one of the alleged omissions—is conclusory. None of the exhibits Plaintiff relies on in its complaint indicates that was the case. (*See* Doc. No. 1 at ¶¶ 159-63 (citing Exs. 27-29).) To the contrary, the emails show that, at most, CGP and Ridgewood believed that the Township was *enthusiastic* about the potential deal—not that Defendants had received *confirmation* that they would receive the zoning approvals. (*See* Doc. No. 1-4, Ex. 27 at p. 89 (noting that the meeting with the Township's manager "went well" and that the manager **[*707]** "[d]idn't flinch on the 160 units"); Doc. No. 1-5, Ex. 28 at p. 92 (noting that the Township "want[s] to get this deal done with us"); **[**86]** Doc. No. 1-6, Ex. 29 at pp. 95-96 (surmising that the Township was "not wasting any time here" and had "[g]ood body language").) Furthermore, documents from the Township indicate that the zoning approvals did not come to fruition until 2018—*a year after* PCC entered into the PSA with Concert Philmont and Concert Philmont Properties. (*See* Doc. No. 13-5 at pp. 1-9 (granting Concert Philmont's conditional use application on March 13, 2018 and amending the Township's zoning ordinance); *see also id.* at pp. 14-18 (letter dated September 13, 2018, in which the Township advised Grebow that the Township had approved the "Preliminary Land Development Plan . . . for an Active Adult Housing Development Consisting of 176 Units").) Accordingly, the evidence belies Plaintiff's assertion that Defendants subsequently acquired information from the Township on the zoning approvals that gave rise to a duty to speak.

Because Defendants did not have a duty to speak, the Court grants Defendants' motion to dismiss NPT's fraud in the omission and fraudulent concealment claims.

iv. NPT Can Establish Fraud in Connection with Future Promises

Turning back to affirmative misrepresentations, NPT alleges that CGP and **[**87]** Nanula committed fraud when they told PCC that they would retain 27 holes of golf and would spend $5 million in capital improvements. (*See* Doc. No. 1 at ¶¶ 258-59, 261-63 (Count V).) Defendants argue that Count V must be dismissed to the extent it is based on these representations, because they are promises to do something in the future and therefore are insufficient to establish a fraud claim. (Doc. No. 13-2 at pp. 30-31.)

Although Defendants correctly recite the general principle that "the breach of a promise to do something in the future is not actionable in fraud," *see* *Shoemaker v. Commonwealth Bank, 700 A.2d 1003, 1006 (Pa. Super. Ct. 1997)*, Defendants misstate the law when they argue that a future promise can *never* support a fraud claim (*see* Hr'g Tr. at 22:1-22). ***HN22***[] To the contrary, under Pennsylvania law, "an expressed intention to take a future action that does not actually comport with one's true state of mind at that time is a misrepresentation of existing fact and may serve as the basis for a fraud claim." *Giordano v. Claudio, 714 F. Supp. 2d 508, 518 (E.D. Pa. 2010)* (cleaned up); *see also* *Mellon Bank Corp. v. First Union Real Estate Equity & Mortg. Invs., 951 F.2d 1399, 1410 (3d Cir. 1991)*.

HN23[] Courts deny motions to dismiss where the plaintiff alleges that, from the outset, the defendant never intended to keep its promise to do something in the future. *See, e.g.,* *Giordano, 714 F. Supp. 2d at 519* (denying motion to dismiss the fraud counterclaim **[**88]** where the defendant alleged that the plaintiff promised to give the defendant authorship credit in an article and "did so knowing that he intended to omit [the defendant's] name as an author when he submitted the Article for publication"); *SSC Manager, LLC v. Venezia FC 1907 LP, Civil Action No. 17-1042, 2017 U.S. Dist. LEXIS 118294, 2017 WL 3225851, at *5-6 (E.D. Pa. July 27, 2017)* (denying motion to dismiss the fraud claim where the plaintiff pleaded sufficient facts to show that defendants' statements "may have been contrary to the speakers' present intention" and thus "fraudulent when made"); *cf.* *Rapid Circuits, Inc. v. Sun Nat'l Bank, Civil Action No. 10-6401, 2011 U.S. Dist. LEXIS 47231, 2011 WL 1666919, at *10 (E.D. Pa. May 3, 2011)* ("[T]he Court cannot identify any allegation that the Bank had no present intention to attempt to **[*708]** restructure the loans when that statement was made . . . Absent an allegation that Mr. Brehm falsely represented his (or the Bank's) present intention regarding any attempt to restructure the SBA loans when he allegedly made the statement, the claim for fraudulent misrepresentation based upon this statement must be dismissed."). Thus, the Court must determine whether NPT has adequately pleaded facts showing that, at the time CGP and Nanula promised to keep 27 holes of golf and to make $5 million in capital improvements, they "had no intention of following through" on those promises. *SSC Manager, LLC, 2017 U.S. Dist. LEXIS 118294, 2017 WL 3225851, at *5* ("[T]he crux of th[e] analysis is whether [the **[**89]** claimant] has adequately pleaded facts showing that, at the time these statements were made, the speaker had no intention on following through on them.").

Viewing all facts in the light most favorable to NPT and drawing all inferences in its favor, this Court concludes that NPT has met its burden. First, NPT has alleged that CGP had no intention to maintain 27 holes of golf at the time it made that promise. (*See* Doc. No. 1 at ¶ 171 ("[B]efore even making the pledge [to keep 27 holes of golf], Nanula had shared his opinion with Cicerco that "only 18 or [sic] 27 holes are truly needed"); ¶¶ 258-59 ("CGP represented to [PCC] that Philmont Club would retain 'at least 27 holes after South Course real estate transaction.' CGP never intended to abide by its representation it would maintain twenty-seven holes of golf.").) Likewise, the complaint pleads that at the time CGP promised to spend $5 million in capital improvement projects, it never intended to follow through with that promise. (*See id.* at ¶ 263 ("CGP represented to Philmont Club that it would make $5,000,000 in capital improvement projects upon the sale of the Property, but in reality, had no intention of expending the full $5,000,000.").) **[**90]** [17]

Because NPT alleges that CGP and Nanula never intended to follow through on their promise to keep 27 holes of golf or spend $5 million in capital improvements, it has adequately pled a misrepresentation of present fact and, therefore, we deny Defendants' motion to dismiss on that basis.

v. NPT Has Not Established Justifiable Reliance

As noted above, ***HN24***[] a plaintiff must show that it justifiably relied on the false representation to state a fraud claim. Defendants argue that NPT's fraud claims must fail because it has not shown justifiable reliance.[18] (*See* Doc. No. 13-2 at pp. 31-32.)

The Court must determine whether NPT justifiably relied on the following:

- Ridgewood's representation "that it was no longer interested in purchasing the Property as the ability to obtain approvals for 162 Units was speculative and the risks associated with the development of the Property **[*709]** were too high" (Doc. No. 1 at ¶ 92);

- CGP and Nanula's promise to make $5 million in capital improvements once the Property was sold (*id.* at ¶ 96);

- CGP and Nanula's promise to retain at least 27 holes of golf at Philmont Club after the South Course was sold (*id.* at ¶¶ 97, 104);

- CGP and Nanula's representation that **[**91]** the sale of the Property may never occur and the terms of the proposal balanced out that risk (*id.* at ¶ 102).

The Court considers the first and fourth statements together, since the crux of each is the same—namely, that Defendants told PCC that the ability to develop the Property and to obtain approvals from the Township was speculative and risky. (*See also* Doc. No. 52-2 at p. 4 (explaining that the basis for the fraud claims "is that

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[17] (*See also* Doc. No. 1-4, Ex. 35 at p. 114 ("The wild ideas the Board has about a 'master plan for the North Course are probably way overblown, and we have huge capital needs in the clubhouse, HVAC, etc. You will see. We will want to 'nod' to some master plan elements so the members are excited about their North Course being updated a bit, but we want to spend the smallest dollars possible to get the maximum member impact."); Doc. No. 1-4, Ex. 36 at p. 118 (complimenting CGP's counsel for the "nicely vague" language in the PSA about the capital improvement projects CGP would undertake).)

[18] Notably, in its response brief, NPT fails to cite to a single case to support its contention that PCC justifiably relied on Defendants' misrepresentations. (*See* Doc. No. 17 at pp. 34-35.)

Defendants falsely told [PCC] that obtaining development approvals would be difficult to obtain [sic] and purposely withheld from [PCC] that Defendants 'had confirmed that [they] would be able to obtain approvals for 160 or more Units on the Property and would be able to develop and sell the Property'").)

HN25[] "[I]n deciding whether the plaintiff justifiably relied on the information, a court may consider the degree of sophistication of the parties and the history of the negotiation process between them." *Boardakan Rest. LLC v. Gordon Grp. Holdings, LLC, Civil Action No. 11-5676, 2016 U.S. Dist. LEXIS 147298, 2016 WL 6213035, at *13 (E.D. Pa. Oct. 14, 2016)*; *see also* *Wittekamp v. Gulf & W., Inc., 991 F.2d 1137, 1144-45 (3d Cir. 1993)* ("We note further that as the President of Mac-Hemp and the former CEO of another company, and as a person having long business experience, [the plaintiff] was clearly a sophisticated party. . . . In light of his sophistication, as well as the absence **[**92]** of any special fiduciary or longstanding business relationship with [the defendant], giving him a basis for relying on representations made by [the defendant]; the questions that reading the past collective bargaining agreements and group health insurance documents should have raised in his mind; and the considerable amount of money involved, [the plaintiff] was wholly unjustified in" relying on the defendant's nondisclosures).

HN26[] Although courts may consider "the nature of the relationship between the parties" when analyzing the justifiable reliance element of a fraud claim, the Pennsylvania Supreme Court has "hesitate[d] to find reliance justified where the party claiming reliance had an adequate opportunity to verify the allegedly fraudulent statements." *Porreco v. Porreco, 571 Pa. 61, 811 A.2d 566, 571 (Pa. 2002)* (holding that the plaintiff's reliance on her husband's valuation of a ring and assets in the prenuptial agreement was not justifiable because "she had possession of the ring and was not impeded from . . . obtain[ing] an appraisal of the ring" and she "had sufficient opportunity to inform herself fully of the nature and extent of her own assets, rather than rely on [her husband's] statements"); *see also* *Moore v. Steinman Hardware Co., 319 Pa. 430, 179 A. 565, 566 (Pa. 1935)* ("It has many times been pointed **[**93]** out that a buyer or seller is not entitled to rely on such statements where he has an equal opportunity to ascertain the facts affecting the value of the thing to be sold."); *id.* ("Nor is there merit in the contention that the plaintiffs did not have equal opportunity to discover the facts relating to the value of the shares. As owners of a majority of the shares they controlled the corporation, upon whose assets the value of the shares depended. Obviously **[*710]** the corporate books and records were available to them for the purpose of determining that value. In any case, their status as shareholders clearly entitled them to an examination of the books in order to determine the value of their shares in connection with the proposed sale."); *Martinez v. Russo, No. 1943, 2000 Phila. Ct. Com. Pl. LEXIS 77, 2000 WL 33711034, at *3 (Pa. Commw. Ct. Aug. 8, 2000)* ("A party's right to rely on a false assertion of value is diminished further where the one supposed to rely on such statement has an equal opportunity to ascertain the facts on which such opinion might be based." (cleaned up)).

Here, PCC was a sophisticated business entity engaging in a transaction that involved over 200 acres of property and a considerable amount of money. PCC knew that Philmont Club had been appraised in 2003 for $10.6 million "solely **[**94]** as a country club (i.e., not factoring selling the Property for development purposes)." (Doc. No. 1 at ¶ 150; *see also* Doc. No. 1-4, Ex. 23.) PCC easily could have asked the Township if it intended on giving development approvals or amending its zoning regulations.[19] Nothing in the pleadings indicates that CGP or Ridgewood had sole access to the Township or an upper hand in obtaining information from the Township. Given the previous appraisal and the amount of money at stake—and the fact that PCC had sole possession of the property—PCC also could have asked another developer or golf course operator (outside of Ridgewood and CGP) for its opinion on the riskiness (or lack thereof) of developing the Property. Moreover, Plaintiff never claims that PCC engaged in prior real estate transactions with Defendants or had regular business dealings with Defendants,

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[19] In that vein, the complaint indicates that PCC knew by September 2016, that the Township was inclined to grant approval if certain conditions were met when NVR, NPT, and PCC were negotiating an amendment to the LPA and the proposed *ninth amendment* to the AOS. According to Plaintiff, NPT had extensive discussions with the Township to determine what development plans the Township would find favorable, including making a $1 million donation to the Township for roadway improvements and making the development age-restricted—the very same conditions that provided the basis for the eventual deal between CGP and PCC, the deal that CGP and Ridgewood indicated that the Township was enthusiastic about.

such that it would have a basis for trusting their representations.[20] *Cf.* [*Scaife v. Rockwell-Standard Corp., 446 Pa. 280, 285 A.2d 451, 455-56 (Pa. 1971)*] (finding that the jury could have concluded that the defendant "knowingly abused [the plaintiff's] confidence which would further justify [the plaintiff's] reliance," given that there was "evidence of continuous, business transactions between the corporations" and **[**95]** "close, personal relationships existed between the executives of both companies"); [*Silverman v. Bell Sav. & Loan Ass'n, 367 Pa. Super. 464, 533 A.2d 110, (Pa. Super. Ct. 1987)*] (concluding that the trial court correctly determined that the plaintiff's reliance was justified, given "the fact that [the plaintiffs] had engaged in numerous prior real estate transactions with Bell and, therefore, had a basis for trusting the **[*711]** representations made by Bell's employees").

HN27[] Moreover, statements as to the riskiness of developing and/or selling the Property are "statements of value," and therefore are "a part of 'trade talk' and bargaining which customarily accompany negotiations for the sale of property." *Moore, 179 A. at 566* (affirming the trial court's conclusion that there was no fraud where the plaintiff alleged that the defendant's president proposed purchasing her deceased husband's shares in the company at a rate of $300 per share and "fraudulently represented" during "negotiations" that the shares were "not worth more than he was offering"); *see also Binns*, 6 A.2d at 897, 899 (fraud claim not actionable where the plaintiff alleged that the defendant-company's treasurer said that the stock "was not worth any more than $10 a share"); *Martinez, 2000 Phila. Ct. Com. Pl. LEXIS 77, 2000 WL 33711034, at *3* ("Here, the entire basis for EMVEST's fraudulent misrepresentation claim is the **[**96]** false nature of the Defendants' statements about the Formed Steel share value prior to the execution of the Arbitration Award. However, even if Defendants' statements were inaccurate, EMVEST cannot rely on such 'trade talk' to support a claim for fraudulent misrepresentation."). Because NPT cannot rely on "trade talk" to support its fraud claim, the Court grants Defendants' motion to dismiss to the extent it is based on representations relating to the riskiness of the sale of the Property and/or obtaining development approvals.

NPT also has not shown that it justifiably relied on CGP and Nanula's assertion that they would keep 27 holes of golf. An email attached to Plaintiff's complaint suggests that Glenn Meyer, PCC's President, knew *before* the PSA was executed that Concert Defendants may reduce the number of holes to below 27. (*See* Doc. No. 1-4 at p. 107 ("Good news from Glenn Meyer. He is OK with giving us carte blanche on the golf courses, so long as there is a great North Course . . . He doesn't understand what we will do with the $5-6k dues preview members who only get South Course access now, but that is our problem. There will be howling and lots of questions from the members, **[**97]** but we will stay flexible until we know what is best to do in terms of the South Course.").)

However, the Court denies Defendants' motion to dismiss the fraud claim to extent the claim is based on CGP's statement that it would spend $5 million in capital improvements. Defendants have not addressed this in their briefing and the Court finds that, at the motion to dismiss stage, NPT has sufficiently alleged that PCC justifiably relied on CGP and Nanula's assertion that it would spend $5 million in capital improvements.

D. Aiding and Abetting Fraud Claims

i. Count IV

In Count IV, NPT first alleges that CGP and Nanula aided and abetted Ridgewood's commission of fraud by "actively encourag[ing] Ridgewood" to make false representations to PCC "regarding the speculation and risks

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[20] Plaintiff alleges that it justifiably relied on Ridgewood's representations because "Ridgewood is a professional real estate developer who purports to be knowledgeable in such matters." (Doc. No. 1 at ¶ 236; *see also id.* at ¶ 295 (claiming that PCC justifiably relied on Ridgewood representations because "Ridgewood represented itself as a professional real estate developer knowledgeable in development matters"). However, Plaintiff fails to cite to any case law indicating that a defendant's expertise or professional knowledge is, without more, sufficient to establish justifiable reliance, particularly when both sides to the negotiations are sophisticated business entities. Therefore, even when taking all allegations in the light most favorable to Plaintiff, we cannot find that PCC justifiably relied on Defendants' representations.

associated with the Property." (Doc. No. 1 at pp. 35-36.) In addition, NPT claims that CGP and Nanula "encouraged" Ridgewood to make fraudulent omissions, such as "neglect[ing] to inform [PCC] that Ridgewood and CGP were in communication about Philmont and were working together to acquire Philmont Club at a below market rate" and that "neglect[ing] to inform [PCC] that it was actively engaged in discussions with the **[**98]** Township prior to the closing of the PSA and that it had confirmed that it would be able to obtain approvals for 160 or more Units on the Property and would **[*712]** be able to develop and sell the Property." (*Id.* at ¶¶ 245-47.)

It is obvious that if there is no underlying fraud claim against Ridgewood, CGP cannot be said to have aided and abetted Ridgewood's fraud. *See* *The Roskamp Inst., Inc. v. Alzheimer's Inst. of Am., Inc., Civil Action No. 15-3641, 2015 U.S. Dist. LEXIS 144083, 2015 WL 6438093, at *10 (E.D. Pa. Oct. 23, 2015)* ("Plaintiffs in this case fail to allege an actionable underlying fraud that the Foundation could have aided and abetted . . . Absent a viable claim of fraud, the Foundation could not have aided and abetted any tort.").

Accordingly, because the Court has (a) dismissed NPT's fraud claims to the extent they are based on statements about the riskiness of developing the Property given Plaintiff's failure to show justifiable reliance and (b) has dismissed the fraud in the omission claims because Defendants had no duty to speak, Count IV must also be dismissed.

ii. Count VI

In Count VI, NPT alleges that Ridgewood, Grebow, and Plotnick aided and abetted CGP and Nanula's commission of fraud. (*See id.* at pp. 39-41.) NPT claims that CGP made fraudulent representations to PCC "regarding (1) the speculation and risks associated with the Property, **[**99]** (2) the number of holes of golf CGP would retain at Philmont Club, (3) and the nature and amount of the capital improvements CGP would make to Philmont Club. (*Id.* at ¶ 277.) NPT also alleges that CGP and Nanula committed fraud in the omission regarding their partnership with Ridgewood and their ongoing discussions with the Township. (*Id.* at ¶ 278.) Plaintiff then pleads, in a conclusory fashion, that the Ridgewood Defendants "actively encouraged CGP to make such statements and omissions." (*Id.* at ¶ 279; *see also id.* at ¶ 280.)

Again, this Court has dismissed NPT's fraud in the omission claims because Defendants had no duty to speak and has dismissed NPT's fraud claims to the extent they were based on statements about the riskiness of developing the Property and how many holes of golf Defendants would retain after the sale given Plaintiff's failure to show justifiable reliance. Accordingly, the only underlying fraud claim remaining—and thus the only fraud Ridgewood could have possibly aided and abetted—is based on CGP's representation that it would make $5 million in capital improvements.

But, missing from the complaint (or, for that matter, Plaintiff's response or sur-reply briefs) are **[**100]** any allegations that Ridgewood acted in concert with CGP or substantially assisted CGP in making misrepresentations as to how much money it would spend on *capital improvements* or what kind of projects it would undertake. (*See id.* at pp. 39-41; *see also id.* at ¶¶ 177-82.)[21] *See* *The Roskamp Inst., Inc., 2015 U.S. Dist. LEXIS 144083, 2015 WL 6438093, at *10* (explaining that under the Restatement, "a defendant is subject to liability for the tortious action of another if he (a) does a tortious act in concert with the other or pursuant to a common design with him, (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes **[*713]** a breach of duty to the third person"); *see also* *Marion v. Bryn Mawr Trust Co., No. 2470 EDA 2018, 2021 Pa. Super. LEXIS 60, 2021 WL 565481, at *3 (Pa. Super. Ct. Feb. 16, 2021)* (same). The allegations are either conclusory or focus on Ridgewood and CGP's communications about

[21] Nor do the exhibits on which NPT relies to show that CGP misrepresented the nature of the capital improvement projects it would undertake support NPT's argument. (*See* Doc. No. 1-4, Ex. 35 at pp. 114 (internal CGP email that did not include Grebow or Plotnick); Doc. No. 1-4, Ex. 36, at pp. 116-18 (email between CGP employees and CGP's counsel).)

what they should tell PCC about the Property's development potential. This is fatal to NPT's aiding and abetting claim. Therefore, the Court also dismisses Count VI for failure to state a claim.

E. Civil Conspiracy

Next, Defendants argue that Plaintiff's state law civil conspiracy **[**101]** claim must be dismissed because NPT has failed to state an underlying claim that Defendants could have conspired to commit (i.e., antitrust violations or fraud) *and* NPT failed to allege malice, an essential element of civil conspiracy. (Doc. No. 13-2 at p. 35.)

HN28[] To state a cause of action for civil conspiracy, a plaintiff must show: "(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage." *Morilus v. Countrywide Home Loans, Inc., 651 F. Supp. 2d 292, 312 (E.D. Pa. 2008)* (quotation marks and citations omitted); *see also Zafarana v. Pfizer, Inc., 724 F. Supp. 2d 545, 559 (E.D. Pa. 2010)*. A viable civil conspiracy claim also requires "malice or intent to injure." *Morilus, 651 F. Supp. 2d at 313*. "Bald assertions that certain actions were malicious are insufficient; it must be alleged that the '*sole* purpose of the conspiracy was to injure the Plaintiffs.'" *Id.* (citation omitted)); *see also Sarpolis v. Tereshko, 625 F. App'x 594, 601 (3d Cir. 2016)* ("Proof of malice is an essential part of a cause of action for conspiracy, and malice requires that the conspirators act with the sole purpose of injuring the plaintiff." (cleaned up)); *Barker v. Hostetter, Civil Action No. 13-5081, 2014 U.S. Dist. LEXIS 51688, 2014 WL 1464319, at *31 (E.D. Pa. Apr. 15, 2014)* ("[A] successful claim for civil conspiracy also requires that 'the *sole* purpose of the conspiracy is **[**102]** to injure the plaintiff,' not just that the plaintiff was injured." (citation omitted)); *Three Rivers Hydroponics, LLC v. Florists' Mut. Ins. Co., 2:15-cv-00809, 2018 U.S. Dist. LEXIS 20699, 2018 WL 791405, at *6 (E.D. Pa. Feb. 8, 2018)* ("Malicious intent requires that a defendant acted 'solely to injure' a plaintiff; injury that is incidental to another purpose, even if it appears 'selfish or unreasonable,' is not malicious." (citation omitted)). "A showing that the acts alleged were done to advance the defendant's business interests, such as to increase company profits, precludes a civil conspiracy claim, since this means injuring the plaintiff was not the *sole* purpose of the conspiracy." *Three Rivers Hydroponics, LLC, 2018 U.S. Dist. LEXIS 20699, 2018 WL 791405, at *6*.

HN29[] Courts routinely dismiss civil conspiracy claims where the plaintiff failed to allege that the defendants acted maliciously or acted with the sole intent to injure him or her. *See, e.g., Zafarana, 724 F. Supp. 2d at 559* ("Nowhere in Plaintiffs' Amended Complaint are Defendants alleged to have acted with an intent to harm Plaintiffs, much less that it was Defendants' sole intent to harm Plaintiffs. With these allegations, we cannot find that Plaintiffs have pled a cause of action for conspiracy under Pennsylvania law." (citation omitted)); *Barker, 2014 U.S. Dist. LEXIS 51688, 2014 WL 1464319, at *31* ("At no point in the Amended Complaint do Plaintiffs expressly state the sole purpose of the conspiracy was to injure them. Accordingly, **[**103]** the Court will grant the Motion to Dismiss Plaintiffs' civil conspiracy claim."); *Three Rivers Hydroponics, LLC, 2018 U.S. Dist. LEXIS 20699, 2018 WL 791405, at *6-7* (dismissing the plaintiff's civil conspiracy claim where the amended complaint alleged that the defendants conspired "to place company **[*714]** profits over its insured" and that the defendants acted "solely to increase company commissions and profits," and therefore "injuring the plaintiff was not the sole purpose of the conspiracy"); *accord Morilus, 651 F. Supp. 2d at 313* (granting motion for summary judgment on the defendant's counterclaim because the facts showed that the "plaintiffs were guided by personal interests separate and apart from any alleged desire to cause harm to Countrywide").

Here, NPT claims that PCC was injured by Defendants' conduct. (*See, e.g.*, Doc. No. 1 at ¶¶ 272-73; *id.* at ¶¶ 305-06 ("[PCC] was harmed as a result of the Defendants' conspiracy by way of selling Philmont Club to Concert Philmont for below market value. Because of the Defendants' conspiracy, Philmont Club was effectively sold for its value as a country club and not its value as a country club *and* a development parcel.").) But injury alone is insufficient to support a civil conspiracy claim; critically, NPT fails to allege that Defendants acted with the **[**104]** intent to injure PCC, let alone with the sole intent to injure PCC. Moreover, allegations in the complaint and emails NPT attaches to its complaint lead the Court to the very opposite conclusion—specifically, they show that Defendants were motivated by their own business concerns, not just the desire to injure PCC. (*See* Doc. No. 1 at ¶

137 ("Even with giving Ridgewood an 'awfully high' rate of return, Nanula noted that the sale of the Property '*[j]uices our normal deal returns quite nicely*.'" (emphasis added)); Doc. No. 1-3, Ex. 19 at pp. 54, 56; Doc. No. 1 at ¶ 140 (alleging that Nanula told Plotnick to "wait to see *if I can strike a better deal for all of us* here" (emphasis added)); Doc. No. 1-3, Ex. 20 at p. 64.) Given NPT's failure to adequately plead malice, the Court must dismiss the civil conspiracy claim.[22]

F. Breach of Contract

As assignee, NPT asserts a breach of contract claim against Ridgewood, claiming that Ridgewood breached its confidentiality agreement with PCC when Ridgewood disseminated PCC's confidential financial information to third parties, ClubCorp and Morningstar Golf & Hospitality, LLC. (Doc. No. 1 at ¶¶ 310-11; Doc. No. 1-4, Exs. 37, 38, 39 at pp. 127-34.)

HN30[] "To **[**105]** state a claim for breach of contract under Pennsylvania law, a plaintiff is required to plead: (1) the existence of a contract, including its essential terms, (2) a breach of duty imposed by the contract, and (3) resultant damages." *Clapps v. State Farm Ins. Cos., 447 F. Supp. 3d 293, 297 (E.D. Pa. 2020)* (cleaned up). Defendants argue that the breach of contract claim must be dismissed because NPT failed to plead that PCC suffered damages that were causally related to Ridgewood's breach. (Doc. No. 13 at pp. 35-36.)

We disagree. Here, NPT has pled that "[PCC] was harmed by Ridgewood's . . . breach of confidentiality agreement by way of having its financial information disclosed to third parties" and that "[PCC] is entitled to attorneys' fees from Ridgewood as a result of the breach." (Doc. No. 1 at ¶¶ 312-13.) The Court finds this sufficient at the motion to dismiss stage. *See* *Walsh v. Amerisource Bergen Corp., Civil Action No. 11-7584, 2014 U.S. Dist. LEXIS 82064, 2014 WL 2738215, at *4 (E.D.* ***[*715]*** *Pa. June 17, 2014)* (holding that the defendants sufficiently alleged that they suffered damages as a result of the plaintiff's breach of a confidentiality agreement because at minimum, they would be entitled to "nominal damages" if they prevailed on the counterclaim, since the contract provided that they would "be entitled to attorneys' fees and costs incurred in protecting their confidential information"); **[**106]** *AscellaHealth, LLC v. CRx Health Servs., LLC, Civil Action No. 14-5949, 2015 U.S. Dist. LEXIS 46313, 2015 WL 1573395, at *5 (E.D. Pa. Apr. 9, 2015)* ("CRx has alleged that Ascella . . . failed to maintain its confidential and proprietary information . . . [a]nd CRx alleges it suffered damages as a result of Ascella's alleged breach. While the allegations are thin, they contain sufficient factual content to draw a reasonable inference that a claim is plausible and, thus, the Court finds that they pass muster at this stage of the proceedings.").

IV. Conclusion

For the foregoing reasons, this Court dismisses the federal antitrust claims (Counts I and II) and the fraud in the omission and fraudulent concealment claims. The Court dismisses the fraud claim asserted against the Ridgewood, Plotnick, and Grebow (Count III). The Court also dismisses the fraud claim asserted against CGP and Nanula (Count V) to the extent it is based on representations about the riskiness of developing the Property or retaining 27 holes of golf, but the Court denies the motion to dismiss to the extent that claim is based on CGP's statement that it would spend $5 million in capital improvements. Next, the Court dismisses the aiding and abetting fraud claims (Counts IV & VI) and the civil conspiracy claim (Count VIII). Finally, the Court denies Defendants' motion **[**107]** to dismiss the breach of contract claim against Ridgewood (Count X).

An appropriate Order follows.

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[22] Because the Court finds that NPT failed to plead malice, the Court does not address Defendants' alternative argument—that NPT also failed to allege an underlying tort claim to support the civil conspiracy claim. However, the Court notes that the only remaining claim that could plausibly support the civil conspiracy claim is the fraud claim against CGP, to the extent it is based on the alleged misrepresentation that CGP would make $5 million in capital improvements.

ORDER

AND NOW, this 12th day of August, 2021, upon consideration of Defendants' Motion to Dismiss (Doc. No. 13), Plaintiff's response (Doc. No. 17), Defendants' reply (Doc. No. 21), Plaintiff's sur-reply (Doc. No. 22), Plaintiff's supplemental authority (Doc. No. 33), the parties' oral arguments on the motion, and the parties supplemental letter briefs (Doc. Nos. 50, 52), and for the reasons set forth in the Memorandum, it is hereby **ORDERED** that Defendants' motion is **GRANTED** with respect to Plaintiffs' federal antitrust claims (Counts I and II); the fraud in the omission and fraudulent concealment claims; the fraud claim asserted against Ridgewood, Plotnick, and Grebow (Count III); the fraud claim asserted against CGP and Nanula (Count V) to the extent it is based on representations about the riskiness of developing the Property or retaining 27 holes of golf; the aiding and abetting fraud claims (Counts IV and VI); and the civil conspiracy claim (Count VIII). Defendants' motion is **DENIED** with respect to the remainder of its arguments (i.e., the breach of contract claim against Ridgewood **[**108]** and the fraud claim asserted against CGP and Nanula to the extent it is based on CGP's representation about capital improvements).

IT IS FURTHER ORDERED that in light of the Court's decision, the stay currently in place (Doc. Nos. 20, 30, 40) is lifted, and a telephone conference to discuss scheduling and other pretrial matters is **SCHEDULED** for **August 31, 2021 at 9:00 a.m**. At least seven (7) days prior to the conference, the parties should submit a joint status report with proposed scheduling deadlines.

IT IS SO ORDERED.

/s/ KAREN SPENCER MARSTON

KAREN SPENCER MARSTON, J.

Utesch v. Lannett Co.

United States District Court for the Eastern District of Pennsylvania

August 12, 2021, Decided; August 12, 2021, Filed

CIVIL ACTION NO. 16-5932

Reporter

2021 U.S. Dist. LEXIS 151694 *; 2021 WL 3560949

JOHN UTESCH, et al., Plaintiffs, v. LANNETT COMPANY, INC., ARTHUR P. BEDROSIAN, MARTIN P. GALVAN, Defendants.

Subsequent History: Appeal terminated, 11/08/2021

Affirmed by Univ. of P.R. Ret. Sys. v. Lannett Co., 2023 U.S. App. LEXIS 9143 (3d Cir. Pa., Apr. 18, 2023)

Prior History: Utesch v. Lannett Co., 316 F. Supp. 3d 895, 2018 U.S. Dist. LEXIS 128219, 2018 WL 3629090 (E.D. Pa., July 31, 2018)

Core Terms

damages, Plaintiffs', quotation, marks, stock, predominance, class member, class certification, class action, misrepresentations, theory of liability, calculated, class period, out-of-pocket, inflation, reliable, prices, stock price, certification, methodology, class-wide, anticompetitive conduct, antitrust, expert testimony, securities fraud, proposed class, market price, price-fixing, investor, disclosures

Counsel: **[*1]** For UNIVERSITY OF PUERTO RICO RETIREMENT SYSTEM, Lead Plaintiff: LAWRENCE D. LEVIT, MATTHEW GUARNERO, MITCHELL M.Z. TWERSKY, TODD KAMMERMAN, LEAD ATTORNEYS, ABRAHAM FRUCHTER & TWERSKY LLP, NEW YORK, NY; DAVID M. PROMISLOFF, PROMISLOFF LAW, P.C., Malvern, PA; JEFFREY J. CIARLANTO, Profy Promisloff & Ciarlanto, P.C., Philadelphia, PA.

For JOHN UTESCH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiff: FRANCINE FRIEDMAN GRIESING, LEAD ATTORNEY, GRIESING LAW LLC, PHILADELPHIA, PA; JACOB A. GOLDBERG, LEAD ATTORNEY, THE ROSEN LAW FIRM, United Sta, JENKINTOWN, PA; DAVID M. PROMISLOFF, PROMISLOFF LAW, P.C., Malvern, PA; MICHAEL J. HYNES, HYNES KELLER & HERNANDEZ, Malvern, PA.

For LANNETT COMPANY, INC., ARTHUR P. BEDROSIAN, MARTIN P. GALVAN, Defendants: IAN M. COMISKY, LEAD ATTORNEY, BLANK ROME, LLP, PHILADELPHIA, PA; MATTHEW DAVID LEE, NATHAN HUDDELL, FOX ROTHSCHILD LLP, PHILADELPHIA, PA.

Judges: WENDY BEETLESTONE, UNITED STATES DISTRICT JUDGE.

Opinion by: WENDY BEETLESTONE

Opinion

In this proposed securities fraud class action against Defendants Lannett Company, Inc., Arthur P. Bedrosian (Lannett's former chief executive officer) and Martin P. Galvan (its former chief financial officer) (collectively, **[*2]** "Defendants"), Lead Plaintiff University of Puerto Rico Retirement System ("UPRRS") and Plaintiffs Ironworkers Locals 40, 361, and 417 Union Security Funds (collectively "Plaintiffs") assert securities fraud claims under *Section 10(b)* of the Securities Exchange Act of 1934 ("the Exchange Act") and *Rule 10b-5* against all Defendants, and claims against the individual defendants under *Section 20(a)* of the Exchange Act. *See* *15 U.S.C. § 78j(b)*; *17 C.F.R. § 240.10b-5*; *15 U.S.C. § 78t(a)*.

Plaintiffs now move to certify a class pursuant to *Federal Rules of Civil Procedure 23(a)* and *(b)(3)*, to be appointed class representatives, and for the appointment of class counsel. Both Plaintiffs and Defendants seek to exclude the opposing party's expert report for failure to comply with the standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. For the following reasons, the motions to exclude will be denied and the class certification motion will be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

During the presented class period - July 15, 2014, to October 31, 2017 - Plaintiffs allege that they purchased Lannett's common stock at prices that were artificially inflated because of Defendants' false and misleading statements concerning the pricing of generic drugs and investigations into price-fixing in the generic drug market.

Plaintiffs allege that anticompetitive conduct among Lannett's **[*3]** competitors caused price increases for five generic drugs which together accounted for most of Lannett's total annual sales from 2013 to 2016. Lannett publicly disclosed that it received a subpoena and interrogatories from the Connecticut Attorney General in connection with an investigation of anticompetitive conduct in the generic drug industry at the start of the class period in July 2014, and grand jury subpoenas in connection with a federal investigation in November and December 2014. However, say Plaintiffs, "[e]ven as it began to be revealed during the Class Period that several of Lannett's competitors were implicated in illegal price-fixing and anti-competitive conduct, Defendants assured investors that Lannett's past financial results were the product of competitive market forces; and, that the Company's pricing strategy and future results would not be impacted by regulatory scrutiny of anticompetitive conduct in the industry, or the threat of being implicated in any price-fixing or anticompetitive scheme." More specifically, Plaintiffs contend that Defendants' statements during the class period in public regulatory filings, press releases, and by the individual defendants **[*4]** during earnings calls and other public events were materially false or misleading in that: (1) "Defendants misrepresented to Class members that Lannett's growth was the result of competitive market forces that afforded an opportunity for Lannett's aggressive pricing campaign," whereas Lannett's price increases in actuality were caused by "extensive price-fixing schemes and anticompetitive conduct throughout that generic drug industry that directly implicated Lannett's competitors in markets for key Lannett products"; (2) "[a]s regulatory scrutiny into price-fixing and anticompetitive conduct increased, Defendants issued a series of misleading statements and omissions of material fact that misled Plaintiffs and Class members regarding the risk that Lannett would be implicated in price-fixing and anticompetitive conduct"; and, (3) Defendants' statements that the company had complied with the law in the pricing of its products "created the false impression that [] Lannett . . . had conducted a complete and thorough investigation as to whether Lannett engaged in anticompetitive conduct, and the risk that Lannett would be implicated in an action alleging anticompetitive conduct," but in **[*5]** actuality Lannett's "internal investigation was no[t] completed, and had a limited focus."

Throughout the class period, Lannett's stock price fell as information became public that revealed potential anticompetitive conduct in the generic drug industry and Lannett's potential exposure to liability. Plaintiffs allege that Lannett's stock value fell 13% in December 2014 after Lannett disclosed that it had received the federal grand jury subpoenas, and fell 26% following the publication of a *Bloomberg* article in November 2016 describing the possibility that criminal charges would be filed against pharmaceutical companies, including Lannett. At the close of the class period, on October 31, 2017, Lannett's stock price dropped 14% after the Connecticut Attorney General filed a complaint alleging a conspiracy among generic drugs makers, including Lannett, to engage in anticompetitive conduct and price-fixing.

Plaintiffs now move to certify the following damages class:

> All persons and entities who purchased or acquired the publicly traded common stock of Lannett Company, Inc. . . . during the period from July 15, 2014 and October 31, 2017, inclusive[,] . . . and who were damaged thereby. . . **[*6]** .[1]

II. LEGAL STANDARDS

"The class-action device is an exception to the rule that litigation is usually conducted by and on behalf of the individual named parties only. Accordingly, the party proposing class-action certification bears the burden of affirmatively demonstrating by a preponderance of the evidence her compliance with the requirements of *Rule 23*." *Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015)* (quotation marks and citations omitted). To proceed as a certified class action, "every putative class action must satisfy the four requirements of *Rule 23(a)* and the requirements of either *Rule 23(b)(1)*, *(2)*, or *(3)*." *Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 590 (3d Cir. 2012)* (citation omitted). Failure to satisfy any of these requirements precludes certification. *Danvers Motor Co. v. Ford Motor Co., 543 F.3d 141, 147 (3d Cir. 2008)*.

"*Rule 23* does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*. "Rather, a party must not only be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by *Rule 23(a)*," but "must also satisfy through evidentiary proof at least one of the provisions of *Rule 23(b)*." *Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (quotation marks and citation omitted). "A party's assurance to the court that it intends or plans to meet the requirements is insufficient." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 318 (3d Cir. 2008)* (citations omitted).

"Class certification is proper only if the **[*7]** trial court is satisfied, after a rigorous analysis, that the prerequisites of *Rule 23* are met." *Id. at 309* (quotation marks and citation omitted). In conducting this analysis, "the court cannot be bashful." *Marcus, 687 F.3d at 591*. "[T]he district court must make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties." *Hydrogen Peroxide, 552 F.3d at 307* (citations omitted).

Accordingly, the evaluation of whether a plaintiff has satisfied the requirements of *Rule 23* can, as necessary, "delve beyond the pleadings" to the factual record, *id. at 316* (quotation marks and citation omitted), and it is appropriate to "resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits - including disputes touching on elements of the cause of action," *Marcus, 687 F.3d at 591* (quotation marks and citation omitted). Indeed, as "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," rigorous analysis "frequently . . . entail[s] some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart, 564 U.S. at 351* (quotation marks and citation omitted). The merits of a plaintiff's claims may be considered, however, "only **[*8]** to the extent . . . that they are relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)* (citations omitted); *see also* *Sullivan v. DB Invs., Inc., 667 F.3d 273, 305 (3d Cir. 2011)* ("[A] district court has limited authority to examine the merits when conducting the certification inquiry").

In this case, as we shall see *infra*, there is some need to look into the merits of Plaintiffs' claims - specifically, the reliance element of a *Section 10(b)* and *Rule 10b-5* claim - thus, the prima facie elements of those claims are set forth here:[2] To recover damages for violations of *Section 10(b)* and *Rule 10b-5*, "a plaintiff must prove (1) a material

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[1] Excluded from the Class are Defendants, the officers and directors of Lannett, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Halliburton Co. v. Erica P. John Fund, Inc. ("Halliburton II"), 573 U.S. 258, 267, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014)* (quotation marks and citation omitted).

III. DISCUSSION

A. *Rule 23(a)* Pre-Requisites

"The requirements of *Rule 23(a)* are meant to assure both that class action treatment is necessary and efficient and that it is fair to the absentees under the particular circumstances." *Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 55 (3d Cir. 1994)*. To satisfy *Rule 23(a)*, the proponent of class certification must establish that (1) "the class is **[*9]** so numerous that joinder of all members is impracticable" (numerosity); (2) "there are questions of law or fact common to the class" (commonality); (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (typicality); and, (4) "the representative parties will fairly and adequately protect the interests of the class" (adequacy of representation). *Fed. R. Civ. P. 23(a)*. Defendants do not dispute that Plaintiffs have established numerosity and commonality, but do argue that Plaintiffs have failed to establish typicality and adequacy. Nevertheless, in the interests of completion, each requirement is considered below.

i. Numerosity

Although "[t]here is no minimum number of members needed for a suit to proceed as a class action," generally the numerosity requirement is satisfied if the named plaintiff demonstrates greater than 40 potential plaintiffs. *Marcus, 687 F.3d at 595* (citation omitted). "Mere speculation is insufficient," however, and "*Rule 23(a)(1)* requires the examination of the specific facts of each case." *Id. at 595-96* (quotation marks and citations omitted). The plaintiff need not "offer direct evidence of the exact number and identities of the class members[, b]ut in the absence of direct evidence, **[*10]** a plaintiff must show sufficient circumstantial evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition to allow a district court to make a factual finding." *Id. at 596*. Here, Lannett's common stock traded on the New York Stock Exchange, there were a minimum of 35.6 million shares of Lannett's common stock outstanding during the class period, and an average of approximately 12% of Lannett's outstanding shares were traded on a weekly basis during the class period. This is sufficient to establish by a preponderance of the evidence that there are greater than 40 persons in the proposed class who "purchased or acquired the publicly traded common stock of Lannett Company" during the class period, and therefore that "the class is so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*.

ii. Commonality

The commonality requirement of *Rule 23(a)(2)* demands that class members' claims "depend upon a common contention . . . of such a nature that it is capable of classwide resolution - which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart,*

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[2] In addition to these and the *Section 20(a)* claims, the Complaint also asserts that Defendants violated *Subsections (a)* and *(c)* of *Rule 10b-5*, which respectively make it unlawful to "employ any device, scheme, or artifice to defraud" and "engage in any act, practice, or course of business which operates . . . as a fraud." *17 C.F.R. § 240.10b-5(a)*, *(c)*. Claims under these subsections are referred to as "'scheme liability claims' because they make deceptive conduct actionable, as opposed to *Rule 10b-5(b)*, which relates to deceptive statements." *In re DVI, Inc. Sec. Litig., 639 F.3d 623, 643 n.29 (3d Cir. 2011)*, *abrogated on other grounds by Amgen, 568 U.S. at 465*. Plaintiffs' Motion and briefing in support of their Motion do not raise the scheme liability claim of the Complaint for class certification. Accordingly, this claim will not be certified for class treatment.

564 U.S. at 350. Rule 23(a)(2) "does not require identical **[*11]** claims or facts among class members." Marcus, 687 F.3d at 597 (quotation marks, brackets, and citation omitted). Instead, commonality is established "if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." Baby Neal, 43 F.3d at 56 (citations omitted). Here, the commonality requirement is satisfied. To succeed on their securities fraud claims Plaintiffs must establish that Lannett made material misrepresentations or omissions and did so with scienter. The inquiry would necessarily focus on Lannett's actions, and the answers to questions raised in the inquiry would be answered not from the perspective of each prospective class member, but from an examination of what Lannett did and said. The "classwide answers" to these questions lead inexorably to the conclusion that the commonality requirement of Rule 23(a) is met. Reyes v. Netdeposit, LLC, 802 F.3d 469, 482 (3d Cir. 2015) (citation omitted).

iii. Adequacy

Plaintiffs similarly meet Rule 23(a)'s adequacy requirement. "The principal purpose of the adequacy requirement is to determine whether the named plaintiffs have the ability and the incentive to vigorously represent the claims of the class." In re Cmty. Bank of N. Va. Mortg. Lending Pracs. Litig., 795 F.3d 380, 393 (3d Cir. 2015) (citation omitted). "[T]he linchpin of the adequacy requirement is the alignment of interests and incentives **[*12]** between the representative plaintiffs and the rest of the class." *Id.* (quotation marks and citation omitted). "The adequacy inquiry has two components designed to ensure that absentees' interests are fully pursued," In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 601-02 (3d Cir. 2009) (quotation marks and citation omitted): "(1) whether the representatives' interests conflict with those of the class and (2) whether the class attorney is capable of representing the class," Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 185 (3d Cir. 2001) (citations omitted).

Turning first to the adequacy of Plaintiffs' proposed class counsel, Abraham, Fruchter & Twersky, LLP: Plaintiffs have established that their counsel is "qualified, experienced, and generally able to conduct the proposed litigation," and is therefore adequate. Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 923 (3d Cir. 1992) (quotation marks and citation omitted). The law firm resumé of Plaintiffs' proposed class counsel illustrates that counsel has substantial experience in litigating securities fraud class actions. Furthermore, Plaintiffs' proposed counsel, appointed as lead counsel in this action in March 2017, has vigorously litigated the case including through opposition to motions to dismiss and in discovery disputes.[3]

The named Plaintiffs also establish that they have "the ability and the incentive to represent the claims **[*13]** of the class vigorously . . . and that there is no conflict between the individual's claims and those asserted on behalf of the class." Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988) (citations omitted).[4] Plaintiffs' and class members'

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[3] Rule 23(g) provides that "a court that certifies a class must appoint class counsel," and sets out a non-exhaustive list of factors governing the appointment of class counsel, including: (1) "the work counsel has done in identifying or investigating potential claims in the action"; (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action"; (3) "counsel's knowledge of the applicable law"; and, (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1). For the reasons set forth above, Abraham, Fruchter & Twersky, LLP, satisfies the criteria of Rule 23(g), and will be appointed class counsel.

[4] Defendants contend that adequacy is not established because both UPRRS and Ironworkers "lack even a basic understanding of the facts underlying this action" and defer to counsel in making decisions about the case. But, "[a] class representative need only possess a minimal degree of knowledge necessary to meet the adequacy standard." New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 313 (3d Cir. 2007) (quotation marks and citation omitted). The deposition testimony of Plaintiffs' designated Rule 30(b)(6) witnesses demonstrate that Plaintiffs understand the nature of their causes of action - to wit, that this is a class action lawsuit against Lannett and its executives premised on their false and misleading statements about drug pricing which caused investors, including Plaintiffs and class members, to lose money. There is no need for Plaintiffs to have mastered the factual and legal issues presented in the case to satisfy the adequacy requirement, because their representation of the class will be accomplished through adequate counsel. *See, e.g.,* Lewis v. Curtis, 671 F.2d 779, 789 (3d Cir. 1982), *abrogated on other*

interests are aligned in that they all purchased or acquired and lost money on Lannett's artificially inflated common stock during the class period.[5] Accordingly, adequacy is satisfied.

iv. Typicality

Defendants argue that the representative parties are not typical of the class because they are subject to unique defenses as to the element of reliance in their Section 10(b) claim. *See* Erica P. John Fund, Inc. v. Halliburton Co. ("Halliburton I"), 563 U.S. 804, 810, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011).

a. Unique Defense: Legal Precepts

On a motion for class certification, the proposed class representatives must meet the typicality requirements of Rule 23(a) by showing that the "claims or defenses" of proposed class representatives are "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This requirement "ensur[es] that the class representatives are sufficiently *similar* to the rest of the class - in terms of their legal claims, factual circumstances, and stake in the litigation - so that certifying those individuals to represent the class will be fair to the rest of the proposed class." Schering Plough, 589 F.3d at 597 (citations **[*14]** omitted). Accordingly, "a proposed class representative is not 'typical' under Rule 23(a)(3)" if (1) "the representative is subject to a unique defense" that (2) "is likely to become a major focus of the litigation." Id. at 598 (quotation marks and citation omitted).[6] As with typicality generally, the atypicality of a potential defense depends on "the attributes of the proposed representatives, the class as a whole, and the similarity between the proposed representatives and the class." Id. at 597. It is the defendant's burden to show that a unique defense defeats typicality. *See* Beck v. Maximus, 457 F.3d 291, 300 (3d Cir. 2006). Merely "seeking to disqualify the representative [by raising] a speculative defense" is insufficient to meet this burden. Id. at 301.

It is not necessary for a defendant to show that a prospective class representative is the *only* member of the proposed class who is subject to a "unique defense." Indeed, typicality may be defeated where a defense is "inapplicable to many members of the class." Schering Plough, 589 F.3d at 599. If, however, a defense is broadly applicable to the class, then the defense is not "unique or atypical" to the proposed representative and will not defeat certification. Id. at 598; *see also* 1 *Newberg on Class Actions* § 3:45 ("[A] defense will not defeat typicality

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grounds by Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991); *see also* In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, 273 (3d Cir. 2020).

[5] Defendants also contest adequacy on the grounds that UPRRS is underfunded, arguing that UPRRS's "precarious financial position raises serious concerns about potential conflicts of interest and whether it could represent the putative class if it is forced to declare bankruptcy or faces an immediate liquidity crunch." To preclude class certification, a conflict of interest "must be fundamental" and cannot be "unduly speculative." Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 184 (3d Cir. 2012) (quotation marks and citations omitted). "A fundamental conflict exists where some class members claim to have been harmed by the same conduct that benefitted other members of the class" and "touches the specific issues in controversy." *Id.* (quotation marks, brackets, and citations omitted). Although Defendants suggest that UPRRS's financial status could pressure UPRRS to settle the case, this does not constitute a fundamental conflict as the Third Circuit has defined it. Further, UPRRS has vigorously litigated the case since its appointment as lead plaintiff over four years ago. Potential adverse consequences of UPRRS's financial situation are speculative, and do not render UPRRS inadequate.

[6] One focus of the typicality inquiry is "the extent to which the proposed representative may face significant unique or atypical defenses to her claims." Id. at 597-98 (citation omitted). Even where a proposed class representative's claims are the same as those of class members, its individual factual circumstances may allow a defendant to assert a unique or atypical defense to the proposed representative's claims - that is, a "defense[] against it which would not be applicable to the class as a whole." Zenith Lab'ys, Inc. v. Carter-Wallace, Inc., 530 F.2d 508, 512 (3d Cir. 1976). If the proposed representative faces a defense that is unique to them, "the representative's interests might not be aligned with those of the class, and the representative might devote time and effort to the defense at the expense of issues that are common and controlling for the class." Schering Plough, 589 F.3d at 598 (quotation marks and citation omitted).

if **[*15]** . . . it applies to all members of the proposed class" because "the defense's application to the proposed class representative in that situation renders her situation typical of the rest of the class").

Regardless, only a defense that will become a "major focus" of the litigation precludes certification. *Beck, 457 F.3d at 300* (citations omitted). To pose a risk of becoming a "major focus," the defense must present a risk that the class representative will be preoccupied with litigating the defense to the detriment of litigating issues common to the class on behalf of absent class members. *See* *Schering Plough, 589 F.3d at 598*; *see also* *Beck, 457 F.3d at 301* (the "major focus" standard operates to "protect[] class members from a representative who is not focused on common concerns of the class"). Considerations in evaluating whether a defense will become a major focus of the litigation include whether the unique defense is unlikely to be meritorious; whether challenging the defense will impose exacting requirements on the proposed class representative; and, if meritorious, whether the defense would completely dispose of the proposed class representative's claims. *See* *Beck, 457 F.3d at 300* ("If a court determines an asserted unique defense has no merit, the defense will not preclude **[*16]** class certification"); *Zenith, 530 F.2d at 512* (defense could "divert much of [the plaintiff's] attention from the suit as a whole"); *Schering Plough, 589 F.3d at 599* (defense could "bar[]" the plaintiff from suing the defendant).

b. Unique Defense: Analysis

Plaintiffs' claims arise "from the same event, practice or course of conduct" as that of the class members and are "based on the same legal theory as the claims of the class." *Marcus, 687 F.3d at 598* (citation omitted). Plaintiffs' and class members' claims under *Sections 10(b)* and *20(a)* of the Exchange Act and *Rule 10b-5* arise from the same set of alleged misrepresentations, and the same set of allegations that they purchased Lannett's stock at artificially inflated prices and were injured when the stock price dropped after the alleged fraud was revealed. Accordingly, absent a finding that Defendants have defenses that are unique to the Plaintiff representatives, Plaintiffs are typical of the class. *See, e.g.,* *Hoxworth, 980 F.2d at 923 (3d Cir. 1992)* (typicality satisfied where plaintiffs' claim "for damages stemm[ed] solely from [defendant's] course of conduct" in violation of securities laws).

But Defendants, focusing on the reliance element of a cause of action for violations of *Section 10(b)* and *Rule 10b-5*, contend that Plaintiffs did not rely on the alleged misstatements and omissions alleged **[*17]** in the Complaint and therefore are susceptible to defenses that are atypical of the putative class. Specifically, Defendants contend that Plaintiffs' designated corporate representatives have admitted under oath at their depositions that Plaintiffs had no input on the decision to buy, hold, or sell Lannett common stock during the putative class period; rather, investment decisions were made by their investment managers without Plaintiffs' oversight or guidance. They further contend that the investment managers agreed that they placed no reliance on the alleged misstatements when making their investment decisions. Accordingly, Defendants' argument is that because Plaintiffs did not participate in the investment decisions and because Plaintiffs' investment managers did not rely on the alleged misrepresentations, Plaintiffs are not typical of the putative class they seek to have certified. As a preliminary matter, Plaintiffs respond by citation to two cases for the proposition that reliance on an investment manager or broker does not constitute a unique defense, as it is "quite likely" that other class members similarly relied on a manager or broker. *Pub. Emps.' Ret. Sys. of Miss. v. TreeHouse Foods, Inc., 2020 U.S. Dist. LEXIS 32586, 2020 WL 919249, at *5 (N.D. Ill. 2020)*; *Howard v. Liquidity Servs. Inc., 322 F.R.D. 103, 127 (D.D.C. 2017)*. Other than citing them, Plaintiffs **[*18]** make no argument and provide no rationale as to why this Court should adopt wholesale the holdings of these non-precedential out-of-circuit cases.

They do, however, persuade the Court that insofar as they are relying on a fraud-on-the market presumption of reliance, such presumption applies equally to all potential class members. To set the stage for this argument: In a securities fraud action, reliance on misrepresentations can be established directly or indirectly. A plaintiff can prove direct reliance by establishing that "they were aware of, and directly misled by, an alleged misrepresentation." *Semerenko v. Cendant Corp., 223 F.3d 165, 178 (3d Cir. 2000)* (citation omitted). A plaintiff also can prove reliance indirectly via the fraud-on-the-market theory, pursuant to which "a plaintiff in a securities action is generally entitled to a rebuttable presumption of reliance if he or she purchased or sold securities in an efficient market." *Id.* (citation omitted). As *Basic Inc. v. Levinson* explained, the premise of the fraud-on-the-market theory is that "in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business." *485 U.S. 224, 241, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988)* (quotation marks and citation **[*19]** omitted). Accordingly, in such a market, "[m]isleading statements will . . . defraud purchasers of stock even if the purchasers do not directly rely on the misstatements." *Id. at 241-42* (quotation marks and citation omitted). "An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a *Rule 10b-5* action." *Id. at 247*. Thus, where the fraud-on-the-market theory applies, "the court presumes . . . that the plaintiff actually relied on the market price of the security as an indicator of its value," and therefore that the plaintiff relied on the defendant's misrepresentations. *Semerenko, 223 F.3d at 178-79* (citation omitted).

"The fraud on the market theory of reliance, however, creates only a presumption, which a defendant may rebut by raising any defense to actual reliance." *Id. at 179* (citation omitted). "Any showing that severs the link between the alleged misrepresentation and . . . [the plaintiff's] decision to trade at a fair market price . . . [is] sufficient to rebut the presumption of reliance." *Basic, 485 U.S. at 248*. A party's presumptive **[*20]** reliance on misrepresentations can be rebutted "by showing that the investor would have purchased or sold the securities at [the market] price even with full knowledge of the misrepresentation, that the investor traded in the securities based on an actual belief that the market price was inaccurate, or that the investor's decision to trade was based on some factor other than the market price." *Semerenko, 223 F.3d at 179 n.7* (citations omitted). The defendant has the burden of persuasion to rebut presumptive reliance by a preponderance of the evidence. *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 141 S. Ct. 1951, 210 L. Ed. 2d 347, 2021 WL 2519035, at *7 (2021)*. If presumptive reliance is rebutted, then the "plaintiff would have to prove that he directly relied on the defendant's misrepresentation in buying or selling the stock." *Halliburton II, 573 U.S. at 269*.

Here, Defendants do not dispute that the fraud-on-the-market theory applies, and thus that class members are entitled to a rebuttable presumption of reliance.[7] Instead, they contend that the evidentiary record rebuts the presumption of reliance as to Plaintiffs UPRRS and Ironworkers and that they are therefore subject to unique defenses which render them atypical of the class. Plaintiffs of course argue otherwise. In evaluating each of their arguments, it is necessary to dip a toe into the merits **[*21]** of the matter.

1. Post-Disclosure Purchases

Defendants first argue that UPRRS and Ironworkers are subject to a unique defense because they purchased Lannett stock after "corrective disclosures," each of which are mentioned in the Complaint: (1) a July 16, 2014 regulatory filing disclosing Lannett's receipt of a subpoena and interrogatories from the Connecticut Attorney General regarding Lannett's pricing of a generic drug; (2) a November 6, 2014 regulatory filing disclosing a federal grand jury subpoena served on a Lannett executive arising out of an antitrust investigation of the pharmaceutical industry; (3) a December 8, 2014 regulatory filing disclosing Lannett's receipt of a federal grand jury subpoena arising out of the investigation; (4) a November 3, 2016 *Bloomberg* article concerning an ongoing federal antitrust investigation into price-fixing of generic drugs; and, (5) an October 31, 2017 complaint filed by the Connecticut Attorney General alleging a price-fixing conspiracy by generic drug makers. The records of UPRRS's and Ironworkers' transactions in Lannett stock establish that both purchased Lannett stock for the first time after the first three of these disclosures **[*22]** and purchased more stock after the fourth disclosure.

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[7] To invoke the *Basic* presumption of reliance, "a plaintiff must prove that: (1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between when the misrepresentations were made and when the truth was revealed." *Id. at 277-78* (citations omitted). Plaintiffs need not demonstrate materiality to establish that the fraud-on-the-market theory applies at class certification. *Amgen, 568 U.S. at 459-60*. Here, as to the remaining elements, Plaintiffs allege misrepresentations that were publicly known, including in public regulatory filings, press releases, and public statements, Plaintiffs purchased stock during the class period, and Lannett's common stock traded on a quintessential efficient market, the New York Stock Exchange. *See Oran v. Stafford, 226 F.3d 275, 282 (3d Cir. 2000)* ("[I]n an open and developed securities market like the New York Stock Exchange, the price of a company's stock is determined by all available material information regarding the company and its business"). Plaintiffs thus have satisfied the pre-requisites required to establish that the *Basic* presumption of reliance applies for purposes of class certification.

Defendants posit that the timing of these purchases rebuts the presumption of reliance for both Plaintiffs because their post-disclosure purchases are "strong evidence" that they would have, and did, purchase Lannett stock regardless of the alleged fraud. But, if after class certification Defendants try to rebut Plaintiffs' presumption of reliance based on the timing of Plaintiffs' stock transactions, the issues litigated will be broadly applicable to the class. The putative class includes all persons and entities that purchased Lannett stock from July 15, 2014, to October 31, 2017. The first three corrective disclosures occurred in the first six months of the class period, and the fourth corrective disclosure occurred approximately one year before the end of the class period. Because these disclosures were made early in or in the midst of the class period, many other class members likely will have purchased Lannett stock after these disclosures, just as Plaintiffs did. The question of whether the purchase of stock before or after a corrective disclosure defeats reliance is one that is salient across the class and is not unique to **[*23]** the named Plaintiffs.

2. Ironworkers' Investment Advisor

Defendants next argue that Ironworkers' presumption of reliance is rebutted because the testimony of the designated corporate representative of Ironworkers' investment manager, Snow Capital Management ("SCM"), proves that SCM would have decided to buy Lannett stock "even if the alleged misstatements had never been made." This argument, however, is countermanded by *Peil v. Speiser*, which explained that a party's failure to directly rely on misrepresentations fails to rebut the presumption of reliance because it "misses the point of the fraud on the market theory, under which a plaintiff may prevail even if he was entirely unaware of the alleged misrepresentations." *806 F.2d 1154, 1163 (3d Cir. 1986)*.

Defendants next argue that SCM's views were "atypical of the putative class" because SCM believed Lannett stock was undervalued due to concerns that Lannett would be implicated in price-fixing, whereas the Complaint alleges that Defendants' misrepresentations "created the false impression among investors . . . [that] there was no risk that Lannett would be implicated . . . [in] any illegal price-fixing scheme." Certainly SCM's corporate representative testified that **[*24]** after "spen[ding] considerable time" researching Lannett, SCM concluded that the market price of Lannett's stock was "cheap" because of "surrounding pressures that were possibly impacting the company's valuation," including "pricing erosion" - that is, decreasing drug prices - "in the generic industry" and "investigations by the Department of Justice and Attorney Generals . . . of various states into various generic drug manufacturers." But that some members of the class were focused on undervalued stock and others were not does not defeat *Basic*'s presumption of reliance which extends to "value investors," who "believe[] that certain stocks are undervalued or overvalued and attempt[] to 'beat the market' by buying the undervalued stocks and selling the overvalued ones." *Halliburton II, 573 U.S. at 273*. *Halliburton II* rejected the argument that value investors do not rely on the market price of a security because they "implicitly rel[y] on the fact that a stock's market price will eventually reflect material information," thereby allowing the investor to make a profit. *Id.* The value investor "tries to estimate *how* undervalued or overvalued a particular stock is, and such estimates can be skewed by a market price **[*25]** tainted by fraud." *Id. at 274*. "[T]o indirectly rely on a misstatement in the sense relevant for the *Basic* presumption, [the value investor] need only trade stock based on the belief that the market price will incorporate public information within a reasonable period." *Id.*

3. UPRRS's Investment Advisor

Defendants next argue that UPRRS's presumptive reliance is rebutted because the testimony of Roger Porter - the designated corporate representative of UPRRS's investment manager, Thompson, Siegel, and Walmsley ("TSW") - and internal e-mails between TSW employees prove that "TSW did not rely on the alleged misstatements or the integrity of the market price" in deciding to invest in Lannett stock. Defendants' first argument, that TSW invested in Lannett because it believed Lannett stock was undervalued, fails for the same reason set forth above.[8]

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[8] Porter testified that TSW has a "value shop" investment approach and tries "to buy companies for some value below their intrinsic value and hopefully sell them at their intrinsic value or above." As to TSW's purchase of Lannett stock, Porter testified

Similarly, Defendants' argument that the presumption is undercut because TSW did not directly rely on the statements of the individual defendants has no traction because, as discussed *supra*, arguments premised on a party's failure to directly rely on misrepresentations do not necessarily rebut the presumption of reliance. *See* Peil, 806 F.2d at 1163.[9]

Defendants next argue that UPRRS's **[*26]** presumptive reliance is rebutted because TSW would have invested in Lannett regardless of whether TSW knew that Lannett's price increases on generic drugs were the result of anticompetitive conduct in the generic drug industry, which the alleged fraud purportedly concealed. This argument is not supported by the record. For evidentiary support, Defendants point to June 2015 e-mails between Porter and TSW research analysts discussing the prospects of Lannett's stock - specifically, Porter explains that, in his opinion, the "real driver" for the growth in Lannett's stock would be management and acquisitions because "gross margins" on Lannett drugs "are clearly coming down." Although these e-mails are evidence that at least some TSW employees - Porter and the two research analysts - believed that Lannett's drug price increases would not be a continuing source of growth for the company, these e-mails do not discuss the suspected causes of Lannett's drug price increases, let alone attribute these price increases to anticompetitive conduct.

Defendants finally argue that UPRRS's presumptive reliance is rebutted because TSW "fully appreciated" the risk that Lannett would be implicated in government **[*27]** investigations and enforcement actions. In essence, Defendants argue that TSW saw through Defendants' alleged fraud but invested anyway, "sever[ing] the link between the alleged misrepresentation" and the "decision to trade at a fair market price." Basic, 485 U.S. at 248. Neither does the record support this argument. Defendants rely on a series of November 2016 e-mails in which two TSW research analysts and other TSW employees received a third-party research report that analyzed the risks posed by the Department of Justice's probe of price-fixing in the generic drugs market and identified subpoenas of persons at Lannett as an "unfavorable" factor in evaluating the strength of the government's case. The e-mails between the two TSW research analysts indicate that far from fully appreciating the risks, the employees dismissed the potential case as a "big overshoot" and questioned whether there was "enough circumstantial evidence to suggest that an illegal pricing action has taken place." This correspondence fails to show that TSW invested in Lannett despite knowing the risks that Lannett would be implicated in government investigations and enforcement actions.

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For the reasons set forth above, Defendants **[*28]** have not met their burden to show by a preponderance of the evidence that the named Plaintiffs are subject to a unique or atypical defense that is likely to become a major focus of the litigation. Because UPRRS and Ironworkers have satisfied each of the requirements of Rule 23(a), they will be appointed as representatives of the class. *See* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue . . . as representative parties" where Rule 23(a) pre-requisites are satisfied).

B. *Rule 23(b)* Requirements

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that TSW "took a position in Lannett . . . thinking that [it] had a favorable risk/reward relationship," explaining further that Lannett had "large cash position, a backlog of generic drugs that hadn't been approved yet, the opportunity to deploy their balance sheet for M&A opportunities," and other opportunities. As to potential "negatives" in investing in Lannett, Porter agreed that "one of the primary risks" included "price erosion" in the pricing of generic drugs.

[9] Further, the testimony cited by Defendants fails to establish that TSW did not directly rely on the misrepresentations of the individual defendants alleged in the Complaint. In this testimony, when asked if TSW "generally" relied on what Bedrosian said about Lannett, Porter testified that he "wouldn't say we rely" because "we really rely on ourselves" by "collect[ing] information" and "form[ing] our own risk/reward analysis." Porter then explained that TSW "listen[s]" to "management's discussions about risks and opportunities" and "factor that into our case." In other words, Porter confirmed that companies' management's statements are a factor in TSW's decision to trade in a security.

Having determined that Plaintiffs have established numerosity, commonality, adequacy and typicality as required by *Federal Rule of Civil Procedure 23(a)*, the question is now whether they can meet the requirements of *Rule 23(b)(3)*, to wit that (1) "questions of law or fact common to class members predominate over any questions affecting only individual members" (predominance); and, (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" (superiority). *Fed. R. Civ. P. 23(b)(3)*. In addition, the concept of ascertainability is an implied additional requirement of *Rule 23(b)(3)*, because "[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Marcus, 687 F.3d at 593*.

Here, Defendants do not **[*29]** dispute that Plaintiffs have established superiority and ascertainability. They do argue, however, that Plaintiffs have not established predominance specifically because they have failed to comply with the requirements of *Comcast Corp. v. Behrend, 569 U.S. 27, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*. First, however, again in the interest in clearing away the brush before reaching the core of that challenge, a quick analysis of the superiority and ascertainability requirements is warranted.

i. Superiority

"The superiority requirement [of *Rule 23(b)(3)*] asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 533-34 (3d Cir. 2004)* (quotation marks and citation omitted). The Rule provides a "nonexhaustive list of factors" relevant to evaluating the superiority of adjudication via class action, *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*, including: (1) "the class members' interests in individually controlling the prosecution or defense of separate actions"; (2) "the extent and nature of any litigation concerning the controversy already begun by or against class members"; (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and, (4) "the likely difficulties in managing a class action," **[*30]** *Fed. R. Civ. P. 23(b)(3)*.

Here, absent the class action device many potential claims would not be filed: Numerous potential plaintiffs with small damages claims would not be warranted in litigating a lengthy securities fraud action such as this, while others, who may have more at stake, would flood the courts with individual cases seeking damages on the same theory. Certainly, class members would have no ability to control the prosecution of separate actions. Further, concentration of the case in a class action would be an efficient use of limited judicial resources. Adjudication by class action presents no obvious manageability problems, as common questions of law and fact are central to each class member's claims. As such, a class action is superior to alternative methods for adjudicating the case.

ii. Ascertainability

To establish ascertainability, the proponent of class certification must prove by a preponderance of the evidence that "(1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Byrd, 784 F.3d at 163* (quotation marks and citations omitted). They need not "be able **[*31]** to identify all class members at class certification - instead, a plaintiff need only show that class members *can* be identified." *Id.* (quotation marks and citation omitted). Here, Plaintiffs propose a definite class relying on objective criteria: all persons and entities (excluding Defendants and their officers and directors) that purchased or acquired Lannett's publicly traded common stock from July 15, 2014, to October 31, 2017. Plaintiffs explain and Defendants do not dispute that class members can be identified using records of shareholder acquisitions. Thus, the ascertainability requirement is met.

iii. Preliminary Issues Concerning the Predominance Inquiry

Before determining whether Plaintiffs have satisfied the predominance requirement, two preliminary issues must be resolved: first, whether, as Defendants argue, the Supreme Court's decision in *Comcast v. Behrend, 569 U.S. 27, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* precludes certification here; and, second, whether the opinions of the parties' respective damages experts should be excluded for failure to satisfy the *Daubert* standard.

a. Applicability of *Comcast v. Behrend*

Defendants raise only one argument in their predominance challenge. Relying on *Comcast v. Behrend*, they argue that Plaintiffs fail **[*32]** to put forward a damages model that is consistent with their theory of liability. Contrary to Defendants' position, *Comcast* does not move the needle.

Comcast was an antitrust case, brought by subscribers to Comcast's cable-television services. *569 U.S. at 29-30*. These subscribers alleged that Comcast was engaged in a scheme to buy up competitor cable providers in Philadelphia and the surrounding area, which enabled the company to hold cable prices in this region at supra-competitive levels. *Id.*

The plaintiffs sought to certify a class under *Rule 23(b)(3)*. To establish predominance, the district court required plaintiffs to show both "(1) that the existence of individual injury resulting from the alleged antitrust violation (referred to as 'antitrust impact') was 'capable of proof at trial through evidence that [was] common to the class rather than individual to its members'; and (2) that the damages resulting from that injury were measurable 'on a class-wide basis' through use of a 'common methodology.'" *Id.* (quoting *Behrend v. Comcast Corp., 264 F.R.D. 150, 154 (E.D. Pa. 2010)*). The plaintiffs offered four theories of antitrust impact, only one of which - their so-called "overbuilder" theory - was accepted by the district court as capable of class-wide proof. *Id. at 31*. Under this **[*33]** theory, Comcast's conduct reduced competition from "overbuilders," companies that build competing cable networks in regions where an incumbent cable provider operates. *Id.*

The plaintiffs maintained that their damages could be measured on a class-wide basis, pursuant to a regression model which compared actual prices in the region affected by the alleged anticompetitive conduct with hypothetical prices in an unaffected region. *Id. at 32*. Importantly, the model purported to measure the cumulative effect of the plaintiffs' four antitrust impact theories on cable subscription prices, and was incapable of isolating damages attributable to plaintiffs' sole surviving liability theory. *Id.*

Neither the district court nor the Third Circuit saw this as a predominance-defeating issue, but the Supreme Court did. According to the Supreme Court, if the plaintiffs were to:

> prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable **[*34]** to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of *Rule 23(b)(3)*.

Id. at 35. The Court noted that "[f]or all we know, subscribers in Gloucester County may have been overcharged" not because of reduced overbuilder competition, but because of Comcast's "alleged elimination of satellite competition (a theory of liability that is not capable of class-wide proof)." *Id.* Because the plaintiffs' proposed damages model could not "bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, *Rule 23(b)(3)* [could not] authorize treating subscribers . . . as members of a single class." *Id. at 38*.

Lower courts have since spilt much ink attempting to decipher *Comcast*'s impact on the *Rule 23(b)(3)* predominance analysis. *See, e.g.*, Alex Parkinson, *Comcast Corp. v. Behrend and Chaos on the Ground*, *81 U. Chi. L. Rev. 1213, 1225-38 (2014)* (describing chaos among the lower courts as to *Comcast*'s implications). In *Neale v. Volvo Cars of North America, LLC*, the Third Circuit limited *Comcast* to its unique facts, finding the case "inapposite" to the predominance analysis in a products liability action. **[*35]** *794 F.3d 353, 374 (3d Cir. 2015)*. There, plaintiffs sought certification of six state-wide damages classes composed of consumers who alleged that

Volvo sold vehicles with a uniform design defect. *Id. at 357*. The district court granted the plaintiffs' request and Volvo appealed, arguing that certification was inappropriate under *Comcast*.

The Third Circuit disagreed, interpreting the *Comcast* decision thus: "Comcast held that an antitrust litigation class could not be certified because the plaintiffs' damages model did not demonstrate the theory of antitrust impact that the district court accepted for class action treatment." *Id. at 374*; *see also* *Suboxone, 967 F.3d at 270* (*Comcast* held "that class certification was inappropriate when a damages model reflected injury from four antitrust injuries, but only one viable theory of antitrust liability and injury remained in the case"). The court explained: "Because [the *Comcast* plaintiffs'] evidence could not translate the relevant legal theory of the harmful event into an analysis of the economic impact of that event, [the Supreme Court] determined that common questions could not predominate over individual ones." *Neale, 794 F.3d at 374* (quotation marks, italics, and citation omitted). In *Neale*, however, there was no question that the class **[*36]** members' damages flowed from the defendant's conduct that created the legal liability; thus, *Comcast* did not apply. *See id.*; *see also* *Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800 (7th Cir. 2013)* ("Unlike the situation in *Comcast*, there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a classwide basis; all members of the mold class attribute their damages to mold and all members of the control-unit class to a defect in the control unit").

Plaintiffs suggest that neither does *Comcast* apply to this securities action, where Plaintiffs propose to measure out-of-pocket damages based on the difference in the amount of artificial inflation in Defendants' stock price at the time of purchase and at the time of sale. There is some merit to this assertion: Unlike in *Comcast*, where the plaintiffs offered multiple different theories of how the defendant's conduct violated federal ***antitrust law***, here in this securities fraud case Plaintiffs (having toyed with various other theories during this litigation)[10] now focus on a single theory of liability - that the Defendants made material misrepresentations or omissions; that Defendants' misrepresentations artificially inflated Lannett's stock price; **[*37]** and the stock price declined when the truth emerged causing financial loss to Plaintiffs and the class. Although the Complaint alleges many misrepresentations about various, interrelated topics, because each of Defendants' alleged misrepresentations is part of their broader alleged concealment of the lack of competition in the generic drug market and the potential adverse consequences on Lannett's business, each misrepresentation is categorically part of the same, single theory. *See, e.g., In re Vivendi, S.A. Sec. Litig., 838 F.3d 223, 250 (2d Cir. 2016)* ("individual alleged misstatements . . . relat[ing] to different aspects of a larger problem" were part of "a network of interrelated lies, each one slightly distinct from the other, but all collectively aimed at perpetuating a broader, material lie").

Comcast is "inapposite" here because the numerical mismatch between damages model (one model) and liability theory (four theories) at issue in that case is not present here. To recap, the *Comcast* plaintiffs pursued four liability theories prior to certification, and their damages expert developed a model that calculated damages based on all four theories. The district court rejected three of these theories at class certification, after the damages **[*38]** model had been developed. This resulted in a mismatch between the sole theory of liability remaining at class certification and the damages model, which calculated damages as if all four liability theories remained. Here, at class certification, Plaintiffs advance a single theory of liability, as delineated by their proposed damages expert, Chad Coffman, thus:

> Defendants repeatedly issued materially false or misleading statements and financial results throughout the Class Period, even as the details of the pricefixing scheme under investigation came to light and as the investigation widened to include Lannett itself. The Complaint alleges that through a series of corrective disclosures, the market finally learned the truth about Lannett's fraudulent scheme, and once revealed, the price of Lannett Common Stock fell, harming investors who bought at inflated prices.

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[10] The Complaint does, at points, mention Lannett's potential involvement in anticompetitive conduct. However, to the extent that Plaintiffs' Complaint might have espoused a theory of liability that Lannett concealed its own involvement in anticompetitive conduct, this Court's May 15, 2019 Opinion put paid to that theory. *See* *Utesch v. Lannett Co., Inc., 385 F.Supp.3d 408, 417 n.4 (E.D. Pa. 2019)* ("Defendants' arguments as to this theory [went] without response from Plaintiffs, and therefore the theory [was] waived").

Coffman employed that theory in his expert report and testified unequivocally during the hearing on Defendants' motion to exclude his opinion that he did not incorporate Plaintiffs' prior theories of liability at any point in drafting his report. The issue that led to a mismatch between damages model and liability theory fatal **[*39]** to certification in *Comcast* - *i.e.*, that the expert damages opinion was prepared to measure damages for four different theories of liability, and could not disaggregate damages for the one remaining theory of liability after three theories were rejected - is, accordingly, not presented here. That said, the Supreme Court's explanation that "[t]he first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*" does have application to the predominance analysis which application will be explored *infra.* Comcast, 569 U.S. at 38 (quoting Federal Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011)).

b. *Daubert* Motions

Coffman's report focuses on whether the market for Lannett common stock was efficient during the class period and whether calculating damages is subject to a common methodology under Section 10(b) and Rule 10b-5. He concludes that the answer to both questions is yes. In response, Defendants submitted a report by Jennifer Marietta-Westberg ("the Marietta-Westberg Report") opining to the contrary that Coffman did not put forth a methodology for calculating damages on a class-wide basis in a manner consistent with Plaintiffs' **[*40]** theory of liability. Both parties argue that the other party's expert fails to satisfy the *Daubert* standard for the admission of expert evidence. Thus, before finally getting to the predominance analysis it is necessary to address the parties' respective *Daubert* motions.

1. Daubert Standard

Federal Rule of Evidence 702, which codified the *Daubert* standard and governs the admissibility of expert testimony, states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The *Daubert* standard "has three major requirements: (1) the proffered witness must be an expert, *i.e.*, must be qualified; (2) the expert must testify about matters requiring scientific, technical or specialized knowledge, *i.e.*, reliability; and (3) the expert's testimony must assist the **[*41]** [finder] of fact, *i.e.*, fit." United States v. Schiff, 602 F.3d 152, 172 (3d Cir. 2010) (quotation marks, brackets, and citation omitted). The party offering the expert must satisfy each requirement by a preponderance of the evidence. In re TMI Litig., 193 F.3d 613, 663 (3d Cir. 1999).

To satisfy the qualification requirement, an expert must possess "specialized knowledge regarding the area of testimony." Betterbox Comm'ns Ltd. v. BB Techs., Inc., 300 F.3d 325, 327 (3d Cir. 2002) (quotation marks and citation omitted). "The basis of this specialized knowledge can be practical experience as well as academic training and credentials." Waldorf v. Shuta, 142 F.3d 601, 625 (3d Cir. 1998) (quotation marks and citations omitted). The qualification requirement is interpreted "liberally," Pineda v. Ford Motor Co., 520 F.3d 237, 244 (3d Cir. 2008), and "a broad range of knowledge, skills, and training qualify an expert as such," In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 741 (3d Cir. 1994) (citation omitted). The expert need not "be the best qualified or . . . have the specialization that the court considers most appropriate," Pineda, 520 F.3d at 244, and "[i]f the expert meets liberal minimum qualifications, then the level of the expert's expertise goes to credibility and weight, not admissibility," Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 809 (3d Cir. 1997) (citation omitted).

To satisfy the reliability requirement, "the expert must have good grounds for his or her belief," not "subjective belief or unsupported speculation." Paoli, 35 F.3d at 742 (quotation marks and citation omitted). Expert opinion need not possess the "best foundation, **[*42]** or even . . . the best methodology or unassailable research. Rather, the test is whether the particular opinion is based on valid reasoning and reliable methodology." TMI, 193 F.3d at 665 (quotation marks and citation omitted). "The evidentiary requirement of reliability is lower than the merits standard of correctness," and Plaintiffs seeking introduction of expert evidence do not "have to prove their case twice - they do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are *correct*, they only have to demonstrate by a preponderance of evidence that their opinions are reliable." Paoli, 35 F.3d at 744. *Daubert* offers multiple factors to evaluate reliability, including, *inter alia*, "whether the method is generally accepted" and "the qualifications of the expert witness testifying based on the methodology." Id. at 742 n.8 (citations omitted). However, there is "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable," and the "reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 153, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (citation omitted).

The final requirement of Rule 702 demands **[*43]** that "expert testimony . . . fit the issues in the case." Schneider ex rel. Est. of Schneider v. Fried, 320 F.3d 396, 404 (3d Cir. 2003). "In assessing whether an expert's proposed testimony fits, we are asking whether the expert testimony proffered is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." Schiff, 602 F.3d at 173 (quotation marks, ellipses, and citation omitted). "[T]his is a question of relevance, and Rule 702, which governs the admissibility of expert testimony, has a liberal policy of admissibility if it has the potential for assisting the trier of fact." *Id.* (quotation marks and citations omitted). "The standard is not that high, but is higher than bare relevance." *Id.* (internal quotation marks and citation omitted). However, "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." Daubert, 509 U.S. at 591 (quotation marks and citations omitted).

Here, in addition to the questions regarding qualifications, reliability, and fit, there is an additional overlay - the expert's relevance to the class certification determination - that must be considered. Specifically, under *In re Blood Reagents Antitrust Litigation*, where a party relies on expert testimony to meet class certification requirements the **[*44]** court must evaluate any *Daubert* challenges to such expert testimony in deciding the class certification motion. 783 F.3d 183 (3d Cir. 2015). That is because the proponent of certification must satisfy Rule 23(b) with "evidentiary proof," and "[e]xpert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot . . . establish through evidentiary proof that Rule 23(b) is satisfied." Id. at 187 (quotation marks and citations omitted). Accordingly, "a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." *Id.* (quotation marks and citation omitted).

Blood Reagents sets out a two-step process for addressing *Daubert* challenges in the context of class certification proceedings. The first question to be answered is whether the "aspects of plaintiffs' expert testimony offered to satisfy Rule 23" are "critical to class certification." Id. at 187-88. If they are, then the Court turns to deciding whether the expert evidence is admissible under *Daubert.* Id. at 188. If they are not, there is no need to address the *Daubert* challenge in that the expert testimony **[*45]** would have no bearing on whether the class should be certified.

2. The Coffman Report

Defendants contend that Coffman's opinion fails to satisfy the *Daubert* standard because it is unreliable and fails to fit the facts of the case, but do not contend that he is unqualified to serve as an expert.

Coffman opines that although damages "calculations would likely depend, in part, on the completion of discovery, and full development of the case record, based on [his] expertise and experience in dozens of similar matters and understanding the nature of the claims in this case, . . . damages in this action are subject to a well-settled, common methodology that can be applied to the Class as a whole," to wit, the out-of-pocket damages methodology. Under this method, "damages are equal to the artificial inflation in the share price at the time of purchase minus the artificial inflation per share at the time of sale." After artificial inflation - that is, the increase in Lannett's stock price caused by the fraudulent misrepresentations - is "quantified on each day during the class period," calculating damages "for each class member is formulaic based upon information collected in the claims process," **[*46]** including the record of each class member's purchase and sale of a security.

In response to Defendants' *Daubert* motion to exclude Coffman's opinion, Plaintiffs, interestingly, contend that there is no need to go beyond the first step of the *Blood Reagents* analysis and that, accordingly, there is no need to decide the motion. Specifically, they suggest that Coffman's opinion is "helpful, but not critical to showing that damages can be calculated consistent with Plaintiffs' theory of liability,"[11] because the out-of-pocket damages method is widely recognized as standard in securities fraud cases. However, it cannot be presumed that *Rule 23* is satisfied merely because a case involves securities fraud claims. *See* *Hydrogen Peroxide, 552 F.3d at 322*. Something more is required and, in the absence of other evidence, the Coffman Report is critical to certification and must meet the *Daubert* standard.

Turning now to the *Daubert* analysis. As stated, it is not disputed that Coffman possesses the requisite specialized knowledge to be qualified as an expert. He holds advanced degrees in economics and public policy, is a certified chartered financial analyst, and has substantial experience in securities valuation and damages analysis. Specifically, **[*47]** he is currently president of Global Economics Group, which he founded in 2008 and which "specializes in the application of economics, finance, statistics, and valuation principles" in a variety of contexts, including securities litigation. He was previously employed for 12 years at Chicago Partners LLC, during which he conducted and managed analysis of securities valuation and damages. He testified during his deposition that he has served as an expert in between 50 and 100 securities class actions, and his resume reflects that he regularly serves as a damages expert in such cases.

With respect to the reliability requirement, that too is satisfied. Coffman's opinion that "damages in this action are subject to a well-settled, common methodology that can be applied to the Class as a whole" is based on his expertise and experience in dozens of similar matters, understanding of the nature of the claims in this case, and explanation of the out-of-pocket method. As noted, Coffman has ample experience as a damages expert in securities fraud cases. *See* *Paoli, 35 F.3d at 742 n.8* (recognizing that "the qualifications of the expert witness testifying based on the methodology" supports reliability). Further, he explains **[*48]** that the out-of-pocket method "has been applied in virtually every matter in which [he has] observed or participated in" as an expert, and correctly states that the out-of-pocket damages methodology is a "standard and well-accepted method for calculating class wide damages" for claims under *Section 10(b)*, as are at issue here. *See e.g.*, 7 Newberg on Class Actions § 22:81 (5th ed.) (explaining that "most courts utiliz[e] an 'out of pocket' damage measurement that similarly applies across the class" to calculate damages for *Section 10* and *Rule 10b-5* claims). Moreover, Coffman's report, deposition testimony, and testimony at the *Daubert* hearing clearly show Coffman examined and relied on the case-specific allegations of the Complaint in this matter.[12] Lastly, Coffman describes how the out-of-pocket method works,[13] including how damages are calculated (as the difference in the artificial inflation of Lannett's stock at the time of purchase and sale) across the class (that is, by calculating for each class member the difference in artificial inflation when they bought and sold Lannett stock using purchase and sale information gathered during the claims

[11] But this suggestion is directly contradicted by (1) other portions of their briefing in which they argue that "the Coffman Report demonstrates that damages in this action are capable of being calculated on a class-wide basis using the out-of-pocket damages methodology"; and, (2) that they offer no other "evidentiary proof" in support of this proposition.

[12] Defendants suggest that Coffman conducted no case-specific analysis in support of his opinion, making much of his testimony that the language of the damages section of the Coffman Report was "language [he'd] used before" in past cases and that the "language describing the out-of-pocket damages methodology and the rationale behind it . . . doesn't change from report to report." That Coffman is a frequent flyer in these kinds of cases in the context of this *Daubert* motion cuts in favor of his reliability rather than against it.

[13] Defendants argue that Coffman's opinion is unreliable because he does not propose a damages method, but instead offers only a definition of out-of-pocket loss. But he does more than that - he proposes a method of calculating damages on a class-wide basis. He also summarizes, albeit in general terms, the steps by which out-of-pocket losses would be calculated for the class (that is, by quantifying levels of inflation of Lannett's stock during the class period, then performing a "formulaic" calculation of class members' damages by subtracting the level of inflation of Lannett's stock at the time of each investor's sale from the level of inflation at the time of purchase). *See also, e.g.*, 4 Newberg on Class Actions § 12:5 (5th ed.) (listing "common methods" of proving class-wide damages, including a "formula derived from the facts of the case that can be applied generally to all class members").

process).[14] Coffman's experience, expertise, understanding of Plaintiffs' **[*49]** claims, and explanation of the out-of-pocket method render him reliable.[15]

Coffman's opinion also satisfies the fit requirement. In opining that damages "in this action are subject to a well-settled, common methodology that can be applied to the Class as a whole," the Coffman Report is squarely relevant to the dispute at issue: whether Plaintiffs have established by a preponderance of the evidence for purposes of certification that damages will be susceptible to class-wide measurement. It is therefore helpful for purposes of resolving "the particular disputed factual issues in the case." *TMI, 193 F.3d at 670* (citation omitted).

Because Coffman is qualified as a damages expert, and his opinion is reliable and fits with this case, Coffman's opinion meets the *Daubert* standard and Defendants' motion to exclude will be denied.

3. The Marietta-Westberg Report

Plaintiffs move to exclude Marietta-Westberg's opinion, contending that Marietta-Westberg is unqualified, her opinion is unreliable, and that it fails to fit the issues presented at class certification.

Marietta-Westberg opines that Coffman "has not put forth an appropriate methodology that can measure damages in a manner consistent **[*50]** with Plaintiffs' theory of liability." Specifically, she opines that Coffman has not adequately explained how Plaintiffs will calculate (1) the impact on Lannett's stock price of the alleged misrepresentations and corrective disclosures; (2) the impact on Lannett's stock price of Defendants' alleged risk-related misrepresentations (that is, misrepresentations of Lannett's risk of being implicated in government investigations and enforcement actions against anticompetitive conduct) and the materialization of these risks; and, (3) "time-varying inflation" (that is, how the level of fraudulent inflation of Lannett's stock varied during the class period). She further goes on to state that "there is reason to believe" that the drop in Lannett's stock price after the alleged corrective disclosures cannot be a "reliable measure" of the inflation in Lannett's stock because the drop is attributable to factors other than revelations of Defendants' alleged fraud.

However, her report challenges neither the use of the out-of-pocket method in this case nor that this method could be applied on a class-wide basis. To the contrary, she testified during the *Daubert* hearing that she "does not dispute **[*51]** the out-of-pocket method," but instead "disputes . . . the lack of detail in the damages method." In other words, her report does not challenge the central premise of Plaintiffs' argument for why predominance is satisfied as to damages - that is, because damages can be calculated on a class-wide basis using the out-of-pocket

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[14] Coffman concedes that Plaintiffs have more work to do to calculate damages using the out-of-pocket method. Specifically, his report explains, to calculate the level of inflation of Lannett's stock caused by Defendants' fraud, which is the "input" for the out-of-pocket method, Plaintiffs will have to perform a "detailed" analysis "informed by information learned in discovery." His report identifies multiple frequently-used methods and techniques to calculate artificial inflation and distinguish "confounding" sources of increases or decreases in a stock price from the impact of an alleged fraud. Although the Report does not identify the specific methods or techniques to be deployed here, the method of determining the inflation of Lannett's stock price caused by the alleged fraud is common to the class. Moreover, a plaintiff's "damages model does not need to be exact" at class certification. *In re Modafinil Antitrust Litig., 837 F.3d 238, 261 (3d Cir. 2016)* (citation omitted). Thus, Coffman need not support his opinion with a damages model specifying precisely how Plaintiffs will measure the price impact of the various misrepresentations and corrective disclosures alleged here, nor specify exactly how Plaintiffs will distinguish the impact of various other factors to be uncovered in discovery that may have affected Lannett's stock price during the class period.

[15] Defendants also challenge Coffman's opinion as unreliable and not fitting the case based on an event study model Coffman used to assess market efficiency for purposes of determining if the *Basic* presumption of reliance applies. Because, Defendants argue, this event study model can measure only the impact on Lannett's stock price of news specific to Lannett, and not the impact of news concerning Lannett's competitors, the event study model cannot support Coffman's damages opinion and does not fit the facts of the case. However, this event study is not the basis of Coffman's opinion: the Coffman Report's section on damages explicitly states that "[t]he event study [he] performed for th[e] report is for Market Efficiency purposes and is not an attempt at valuing artificial inflation" of Lannett's stock price.

method - but only raises issues regarding the details of how this method will be applied. Indeed, Marietta-Westberg concurred during the *Daubert* hearing that the artificial inflation of Lannett's stock price will "be determined based upon proof that is common to all class members," and similarly that an analysis of the drop in Lannett's stock price following alleged corrective disclosures would not differ as to particular Plaintiffs or class members. She is correct: each of the issues raised in her report concern a matter entirely common to the class, to wit, whether Plaintiffs will be able to accurately calculate how much of the increase or decrease in Lannett's stock price is attributable to Defendants' alleged fraud, and the revelation of that fraud, rather than other potential factors.

Although "[w]eighing conflicting expert testimony at the certification stage **[*52]** . . . may be integral to the rigorous analysis *Rule 23* demands," *Hydrogen Peroxide, 552 F.3d at 323*, "a court should not address merits-related issues beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof," *Harnish v. Widener Univ. Sch. of L., 833 F.3d 298, 305 (3d Cir. 2016)* (quotation marks and citation omitted). Undoubtedly at the merits stage of this litigation Marietta-Westberg and Coffman will go head-to-head regarding the viability of Plaintiffs' damages model. Certainly, the soundness of Coffman's analysis can be appropriately challenged at the merits stage of this litigation, but it is not necessary to address it here. *See, e.g., Amgen, 568 U.S. at 466* ("*Rule 23* grants courts no license to engage in free-ranging merits inquiries at the certification stage"). Because Plaintiffs' answers for these issues will be the same for each class member, their resolution is not necessary to determine if Plaintiffs have satisfied the predominance requirement.[16] Accordingly, because predominance - the sole disputed class certification requirement for which the Marietta-Westberg Report is offered - does not turn on her report, it is not critical to class certification, *see Blood Reagents, 783 F.3d at 187*, and therefore, Plaintiffs' *Daubert* challenge need not be addressed.

iv. Predominance

Now **[*53]** that the preliminary issues - the applicability (or rather non-applicability) of *Comcast v. Behrend* to this matter and the parties' respective *Daubert* motions - are resolved, what remains is to determine if Plaintiffs have shown that "questions of law or fact common to class members predominate over any questions affecting only individual members." *Fed. R. Civ. P. 23(b)(3)*.

Defendants do not dispute that predominance is satisfied as to Defendants' liability for Plaintiffs' claims. They do, however, argue that Plaintiffs have failed to establish that damages can be calculated consistent with Plaintiffs' theory of liability. Their challenge to predominance arises in the context of their discussion of the applicability of *Comcast*. And, while, as discussed supra *, Comcast* is distinguishable, its central and uncontroversial premise - that "[t]he first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*" - drives the predominance inquiry here. *Comcast, 569 U.S. at 38* (quotation marks and citation omitted)).

The predominance analysis "look[s] first to the elements of the plaintiffs' underlying claims and then, through the prism of *Rule 23*, undertake[s] a rigorous **[*54]** assessment of the available evidence and the method or methods by which the plaintiffs propose to use the evidence to prove those elements." *Reinig v. RBS Citizens, N.A., 912 F.3d 115, 128 (3d Cir. 2018)* (quotation marks, brackets, and citations omitted). "Because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *Hydrogen Peroxide, 552 F.3d at 311* (quotation marks and citations omitted).

[16] Further, to the extent that Marietta-Westberg is opining that Plaintiffs will be unable to prove that class members' losses were not "caused by factors other than the revelation of a misrepresentation" such as "changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events," this is squarely an issue of loss causation, and Plaintiffs need not prove loss causation at class certification. *Halliburton I, 563 U.S. at 812-813* (quotation marks and citations omitted).

"An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016)* (quotation marks, brackets, and citation omitted). If "proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Newton, 259 F.3d at 172*. However, if "the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues," the **[*55]** predominance requirement is satisfied. *Tyson Foods, 577 U.S. at 453* (quotation marks and citations omitted).

Because "the focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct," *Sullivan, 667 F.3d at 298*, "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud," *Amchem, 521 U.S. at 625* (citation omitted); *see also* *Sullivan, 667 F.3d at 297-300* (explaining that "the presence of . . . questions stemming solely from [the defendant's] asserted behavior" is an "apt illustration" of why predominance is "readily met" in cases alleging fraud (quotation marks and citations omitted)).

Plaintiffs have established by a preponderance of the evidence that the predominance requirement is satisfied as to damages. Here, they have adequately established that damages are susceptible to class-wide proof by showing that damages can be measured on a class-wide basis. As set out in the Coffman Report, Plaintiffs propose to calculate damages using a damages methodology that is applicable to the entire class: the out-of-pocket method. The Coffman Report explains how, after calculating the impact of Defendants' misrepresentations on Lannett's **[*56]** stock price, calculating damages under the out-of-pocket method is "formulaic" for each class member based on a simple calculation of the difference between the amount of fraud-induced inflation of Lannett's stock price at the time of purchase and sale. As Plaintiffs contend, calculating damages using the out-of-pocket method is standard in securities fraud class actions, and Defendants have not contended to the contrary. *See also, e.g., Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 297 (3d Cir. 1991)*; *Levy v. Gutierrez, 448 F.Supp.3d 46, 65 (D.N.H. 2019)* (explaining that "courts have found that Coffman's [out-of-pocket damages] methodology . . . provides a workable method for measuring damages" in securities fraud class actions, and collecting cases). Further, the out-of-pocket method is consistent with Plaintiffs' liability theory. As Plaintiffs explain, their theory of liability is that "Defendants' misrepresentations artificially inflated Lannett stock, and that the stock price declined when the truth emerged causing financial loss to those who purchased at inflated prices." Plaintiffs' proposal of the out-of-pocket method to measure this loss is consistent with their theory of liability.

Plaintiffs concede that calculating damages using the out-of-pocket damages method will require individual **[*57]** damages calculations based on the record of each class member's transactions in Lannett stock. Individual class members' damages will differ depending on when and how much Lannett stock they purchased or sold. However, such individualized damages calculations do not defeat predominance. *See, e.g., In re Cmty. Bank of N. Va., 418 F.3d 277, 305-06 (3d Cir. 2005)* ("Although the calculation of individual damages is necessarily an individual inquiry, . . . the necessity of this inquiry does not preclude class action treatment where class issues predominate" (citations omitted)). As it is undisputed that common issues will predominate as to Defendants' liability, and because Plaintiffs have adequately established that damages can be calculated on a class-wide basis and that the necessity of individualized damages calculations for each class member does not defeat predominance, the predominance requirement is satisfied.

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Accordingly, Plaintiffs have satisfied each of the superiority, ascertainability, and predominance requirements of *Rule 23(b)*, as well as each of the class action pre-requisites of *Rule 23(a)*. The case therefore may proceed as a certified class action.

IV. CONCLUSION

For the foregoing reasons, the *Daubert* motions will be denied, the motion for class certification **[*58]** will be granted, UPRRS and Ironworkers will be appointed class representatives, and Abraham, Fruchter & Twersky, LLP will be appointed class counsel. An appropriate order follows.

BY THE COURT:

/s/Wendy Beetlestone, J.

WENDY BEETLESTONE, J.

ORDER

AND NOW, this 12th day of August 2021, upon consideration of Plaintiffs University of the following: Puerto Rico Retirement System and Ironworkers Locals 40, 361 & 417 Union Security Funds' Motion for Class Certification (ECF No. 121), Defendants Lannett Company, Inc., Arthur P. Bedrosian, and Martin P. Galvan's Response thereto (ECF No. 156), and Plaintiffs' Reply in further support thereof (ECF No. 168); Plaintiffs' Motion to Exclude the Report and Testimony of Jennifer Marietta-Westberg (ECF No. 175), Defendants' Response thereto (ECF No. 180), and Plaintiffs' Reply in further support thereof (ECF No. 181); and, Defendants' Motion to Exclude the Opinions of Chad Coffman (ECF No. 177), Plaintiffs' Response thereto (ECF No. 179), and Defendants' Reply in further support thereof (ECF No. 182); and, following oral argument held on the Motion for Class Certification on May 24, 2021 (ECF No. 170) and a hearing on Defendants' Motion to Exclude on July **[*59]** 27, 2021 (ECF 191), for the reasons set forth in the accompanying Opinion entered this day, it is **HEREBY ORDERED** as follows:

1. Plaintiffs' Motion to Exclude (ECF 175) is **DENIED**;

2. Defendants' Motion to Exclude (ECF 177) is **DENIED**;

3. Plaintiff's Motion for Class Certification (ECF 121) is **GRANTED**, and the following class is **CERTIFIED** pursuant to *Federal Rule of Civil Procedure 23(b)(3)*:

    a. All persons and entities who purchased or acquired the publicly traded common stock of Lannett Company, Inc. ("Lannett" or the "Company") during the period from July 15, 2014 and October 31, 2017, inclusive (the "Class Period"), and who were damaged thereby (the "Class"). Excluded from the Class are Defendants, the officers and directors of the Company, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

4. Lead Plaintiff University of Puerto Rico Retirement System and Plaintiff Ironworkers Locals 40, 361 & 417 Union Security Funds are appointed as Class Representatives.

5. Lead Counsel Abraham, Fruchter & Twersky, LLP is appointed as Class Counsel pursuant to *Federal Rule of Civil Procedure 23(g)*.

BY THE COURT:

/s/Wendy Beetlestone, J.

WENDY [*60] BEETLESTONE, J.

End of Document

In re Xyrem (Sodium Oxybate) Antitrust Litig.

United States District Court for the Northern District of California, San Jose Division

August 13, 2021, Decided; August 13, 2021, Filed

Master File No. 20-MD-02966-LHK

Reporter

555 F. Supp. 3d 829 *; 2021 U.S. Dist. LEXIS 153343 **; 2021 WL 3612497

IN RE: XYREM (SODIUM OXYBATE) ANTITRUST LITIGATION. This Document Relates To: All Actions

Prior History: *In re Xyrem Sodium Oxybate Antitrust Litig., 2021 U.S. Dist. LEXIS 33772 (N.D. Cal., Feb. 22, 2021)*

Core Terms

generic, manufacturer, patent, FDA, Plaintiffs', acceleration clause, antitrust, settlements, Defendants', allegations, brand, license, motion to dismiss, Pharmaceuticals, launch, conspiracy, Counts, sales, no-AG, purchasers, estimate, cases, class plaintiff, market share, Drugs, prices, marketing, anticompetitive, lawsuits, royalty

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN1[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

Under the Hatch-Waxman Act, the first company that applies to produce an AB-rated generic (the first filer) receives a 180-day period of exclusivity during which no other non-AB-rated generic can compete with the brand-name drug.

Patent Law > Remedies > Damages > Infringer's Profits

HN2[] **Damages, Infringer's Profits**

A reverse payment settlement settles patent infringement litigation in a manner virtually unheard of outside of pharmaceuticals. Specifically, a reverse payment settlement requires the patentee to pay the alleged infringer, rather than the other way around. In exchange, the alleged infringer agrees not to produce the patented product for some time.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

HN3[] **Agriculture & Food, Federal Food & Drugs Act**

To receive Food and Drug Administration approval, a proposed Risk Evaluation and Mitigation Strategy (REMS) must balance (1) the need to evaluate and mitigate risk of a drug to ensure that the drug's benefits outweigh its risks; and (2) the potential burdens of REMS elements on patient access and the health care delivery system. A REMS can include a medication guide, patient package inserts, and/or restrictions on the distribution of the drug.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN4[] **Inequitable Conduct, Anticompetitive Conduct**

A reverse payment settlement is one wherein the patentee pays the alleged infringer, rather than the other way around. In exchange, the alleged infringer delays entry into the patentee's market. These reverse payment settlements are virtually unheard of outside of pharmaceuticals. Such settlements also sometimes violate the antitrust laws.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

HN5[] **Discharge & Payment, Time for Payments**

An acceleration clause is a type of most-favored-entry clause that allows a generic manufacturer to enter a market sooner if certain contingencies occur.

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN6[] **Adjudicative Facts, Facts Generally Known**

A trial court may take judicial notice of matters that are either generally known within the trial court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). Moreover, courts may consider materials referenced in the complaint under the incorporation by reference doctrine, even if a plaintiff did not attach those materials to the complaint.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN7[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 8(a)(2) requires a complaint to include a short and plain statement of the claim showing that the pleader is entitled to relief. A complaint that fails to meet this standard may be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Fed. R. Civ. P. 8(a) requires a plaintiff to plead enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. For purposes of ruling on a Rule 12(b)(6) motion, the court accepts factual allegations in the complaint as true and construes the pleadings in the light most favorable to the nonmoving party. The court, however, need not assume the truth of legal conclusions merely because they are cast in the form of factual allegations. Additionally, mere conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN8[] Motions to Dismiss, Failure to State Claim

If a court determines that a complaint should be dismissed, it must then decide whether to grant leave to amend. Under Fed. R. Civ. P. 15(a), leave to amend shall be freely given when justice so requires, bearing in mind the underlying purpose of Fed. R. Civ. P. 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities. When dismissing a complaint for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN9[] Judges, Discretionary Powers

Leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith. At the same time, a court is justified in denying leave to amend when a plaintiff repeatedly fails to cure deficiencies by amendments previously allowed. Indeed, a district court's discretion to deny leave to amend is particularly broad when a plaintiff has previously amended the complaint.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN10[] Agriculture & Food, Federal Food, Drug & Cosmetic Act

Under the Hatch-Waxman Act, the first company that applies to produce an AB-rated generic (the first filer) receives a 180-day period of exclusivity during which no other non-AB-rated generic can compete with the brand-name drug.

Trademark Law > ... > Infringement Actions > Defenses > Genericness

HN11[] Defenses, Genericness

A no-authorized generic (no-AG) agreement falls under Actavis's rule because it may represent an unusual, unexplained reverse transfer of considerable value from the patentee to the alleged infringer and may therefore give rise to the inference that it is a payment to eliminate the risk of competition. Indeed, no-AG agreements can in fact be more anticompetitive than a large cash payment for delay.

Trademark Law > ... > Infringement Actions > Defenses > Genericness

HN12[] Defenses, Genericness

Until generic production commences, no-authorized generic agreements are simply naked restraints on trade.

Energy & Utilities Law > Oil, Gas & Mineral Interests > Royalty Interests

HN13[ ] Oil, Gas & Mineral Interests, Royalty Interests

Courts have held that royalty payments may be effectively a kickback.

Patent Law > ... > Damages > Patentholder Losses > Reasonable Royalties

HN14[ ] Patentholder Losses, Reasonable Royalties

A common form of possible compensation in reverse settlements is a royalty structure. Specifically, a royalty structure may achieve the same effect as an explicit no-authorized (no-AG) generic commitment. This de facto no-AG agreement may be achieved when a result of the brand manufacturer launching an authorized generic would be that the generic company's obligation to pay royalties is reduced.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

Real Property Law > ... > Mortgages & Other Security Instruments > Transfers > Due on Sale Clauses

HN15[ ] Discharge & Payment, Time for Payments

Acceleration clauses plausibly cause anticompetitive harm as part of an alleged reverse payment scheme. Indeed, several courts have denied summary judgment against acceleration clause allegations despite various assertions of broad procompetitive justifications for such clauses.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN16[ ] Motions to Dismiss, Failure to State Claim

Plaintiffs' factual allegations must be accepted by a court as true and construed in the light most favorable to plaintiffs at the motion to dismiss stage.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN17[ ] Complaints, Requirements for Complaint

A plaintiff can meet Actavis's pleading standard without describing in perfect detail the world without the reverse payment, calculating reliably the payment's exact size, or preempting every possible explanation for it. For instance, non-cash payments are plausibly large and unjustified based on relatively general allegations. Payments may be sufficiently large because they allegedly are extremely valuable and exceed litigation costs saved through settlement. Similarly, reverse payments may be plausibly unjustified also because they exceed alleged litigation costs.

Antitrust & Trade Law > Sherman Act > Claims

HN18[] Sherman Act, Claims

Mere allegations of parallel conduct—even consciously parallel conduct—are insufficient to state a claim under § 1 of the Sherman Act. Plaintiffs must plead something more, some further factual enhancement, a further circumstance pointing toward a meeting of the minds of the alleged conspirators.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN19[] Conspiracy to Monopolize, Elements

An overarching conspiracy in the antitrust context plausibly exists when each defendant (1) had reason to know that other defendants were involved in the same broad project; and (2) had reason to believe that their own benefits derived from the operation were probably dependent upon the success of the entire venture.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Evidence > Types of Evidence > Circumstantial Evidence

HN20[] Conspiracy to Monopolize, Elements

A conspiracy by its very nature is a secretive operation, and it is a rare case wherein all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel. Even if a conspirator lacks awareness of much of a conspiracy, that ignorance is immaterial when the conspirator's acts were essential steps in a single scheme. Thus, an antitrust plaintiff may present direct or circumstantial evidence of a conspiracy.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN21[] Scope, Monopolization Offenses

An element of an overarching conspiracy is that defendants had reason to believe that their own benefits derived from the operation were probably dependent upon the success of the entire venture. Evidence of this shared belief includes economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action. When firms act unilaterally in non-collusive markets, the goal of any profit-maximizing firm is to obtain a monopoly by capturing an ever increasing share of the market. Analogously, in a competitive market, attempts to grow the pie by charging supra-competitive prices will be tempered by price competition as individual firms attempt to capture greater market share. By contrast, when firms in a market are able to coordinate their pricing and production activities, they can increase their collective profits and reduce consumer welfare by raising price and reducing output.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN22[] **Conspiracy to Monopolize, Elements**

Even at the summary judgment stage, courts have found it significant for inferring the existence of a conspiracy that each generic competitor agreed to an acceleration clause. It follows that acceleration clauses are even more potent evidence of a conspiracy to monopolize at the motion to dismiss stage.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN23[] **Inequitable Conduct, Anticompetitive Conduct**

Patent and antitrust policies are both relevant in determining the scope of the patent monopoly—and consequently ***antitrust law*** immunity—that is conferred by a patent.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN24[] **Defenses, Misuse**

Whether a particular restraint lies beyond the limits of a patent monopoly is a conclusion that flows from an analysis under the rule of reason, not the analysis's starting point.

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN25[] **Private Actions, Sherman Act**

The Ninth Circuit has instructed that, when analyzing the effect of agreements under the rule of reason, a court must give plaintiffs the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN26[] **Per Se Rule & Rule of Reason, Per Se Violations**

Sherman Act claims are examined under one of two distinct tests: per se violation or rule of reason. Under the per se test, agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality are found to be antitrust violations. For those activities not within the per se invalidity category, courts employ the rule of reason test.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN27[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8(d) expressly allows alternative statements of a claim or defense—regardless of consistency.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN28[] **Sherman Act, Claims**

To bring a federal antitrust claim, a private plaintiff must allege antitrust injury. 15 U.S.C.S. §§ 15 and 26. Antitrust injury is loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful. In turn, whether the plaintiffs' injury flows from the defendants' anticompetitive acts depends on common law principles of causation. Causation is an intensely factual question that should typically be resolved by a jury. Thus, once a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment—let alone a motion to dismiss—on the ground of absence of causation.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN29[] **Inequitable Conduct, Anticompetitive Conduct**

It is normally not necessary to litigate patent validity to answer an antitrust question.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN30[] **Inequitable Conduct, Anticompetitive Conduct**

A court, by examining the size of a challenged payment, may well be able in an antitrust case to assess its likely anticompetitive effects along with its potential justifications without litigating the validity of a patent. In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN31[] **Scope, Monopolization Offenses**

Monopoly exists when one firm controls all or the bulk of a product's output, and no other firm can enter the market, or expand output, at comparable costs.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN32[] **Inequitable Conduct, Anticompetitive Conduct**

It is normally not necessary to litigate patent validity to answer an antitrust question.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN33[] **Motions to Dismiss, Failure to State Claim**

Patent validity merely raises a disputed issue of fact that cannot be resolved on a motion to dismiss.

Governments > Legislation > Statute of Limitations > Time Limitations

HN34[] **Statute of Limitations, Time Limitations**

Remove the pay, remove the delay.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN35[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

Under the Noerr-Pennington doctrine, those who petition the government for redress are generally immune from antitrust liability. This right to petition extends to all departments of the Government, including the courts. However, Noerr-Pennington immunity does not apply if a governmental petition is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. This sham exception has two elements. First, the petition at issue must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Second, the petitioner's subjective motivation must have been to thwart competition.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN36[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The Ninth Circuit has held that whether something is a genuine effort to influence government action, or a mere sham for Noerr-Pennington purposes, is a question of fact. Thus, courts rarely award Noerr-Pennington immunity at the motion to dismiss stage.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN37[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

Passive government approval is insufficient for Noerr-Pennington immunity.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN38[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The Ninth Circuit has explained that in the context of a series of alleged sham proceedings, the question is not whether any one suit has merit, but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival. In such a context, the legal success of an occasional sham suit is irrelevant with regard to Noerr-Pennington immunity.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

HN39[] **Defenses, Experimental Use & Testing**

Under the Hatch-Waxman Act, the filing of a lawsuit triggers an automatic, 30-month stay of any Food and Drug Administration approval of an Abbreviated New Drug Application—regardless of a suit's outcome. Thus, the automatic, 30-month stay is a collateral injury the defendant's mere use of legal process invariably inflicts. From this collateral injury, a district court may conclude that in filing an objectively baseless lawsuit against the generic manufacturer, the brand name manufacturer was motivated not to assert a patent in good faith, but to impose expense and delay on the generic manufacturer to delay its entry into the drug market.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN40[] **Standing, Clayton Act**

Illinois Brick constrains the class of parties that have statutory standing to recover damages through antitrust suits. Pepper constrains that class of plaintiffs further by holding that Illinois Brick set forth a bright-line rule, which means that there is no reason to ask whether the rationales of Illinois Brick apply with equal force in every individual case.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN41[] **Standing, Clayton Act**

There is no reason to ask whether the rationales of Illinois Brick apply with equal force in every individual case to constrain the class of parties that have statutory standing to recover damages through antitrust suits. Courts should not engage in an unwarranted and counterproductive exercise to litigate a series of exceptions.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN42[] **Remedies, Damages**

When co-conspirators have jointly committed an antitrust violation, a plaintiff who is the immediate purchaser from any of the conspirators is directly injured by the violation.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN43[] **Standing, Clayton Act**

Courts should not engage in an unwarranted and counterproductive exercise to litigate a series of exceptions to Illinois Brick for parties that have statutory standing to recover damages through antitrust suits.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN44[] **Remedies, Damages**

The Illinois Antitrust Act provides that no provision of the Act shall deny any person who is an indirect purchaser the right to sue for damages.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN45[] **Remedies, Damages**

740 ILCS 10/7 provides that that no person shall be authorized to maintain a class action in any court of the State of Illinois for indirect purchasers asserting claims under the Illinois Antitrust Act, with the sole exception of the Attorney General of the State of Illinois.

Governments > State & Territorial Governments > Claims By & Against

HN46[] **State & Territorial Governments, Claims By & Against**

The current New Hampshire version of RSA 356:11 provides that any person may bring suit regardless of whether that person dealt directly or indirectly with the defendant. RSA 356:11(II).

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

Civil Procedure > ... > Summary Judgment > Supporting Materials > Memoranda of Law

HN47[] **Appeals, Appellate Briefs**

Arguments raised for the first time in a reply brief are waived.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN48[] **Purchasers, Direct Purchasers**

Both the Puerto Rico Supreme Court and the U.S. District Court for the District of Puerto Rico have not limited antitrust standing to direct purchasers. Rather, Puerto Rico's district court has expressly held that it is immaterial whether plaintiffs are direct or indirect purchasers.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN49[] **Remedies, Damages**

The Utah Antitrust Act allows a person who is a citizen of the State of Utah or a resident of the State to bring suit for antitrust injury. Utah Code Ann. § 76-10-3109(1)(a).

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN50[] **Standing, Requirements**

Unlike Article III standing, statutory standing considers whether a cause of action exists under a particular statute. Thus, it is often immaterial to Article III standing that class plaintiffs did not allege facts to show that they satisfied the statutory requirements of some states' antitrust laws. Those class plaintiffs may still have Article III standing to represent a class containing members who do satisfy those statutory requirements.

Counsel: **[**1]** For New York State Teamsters Council Health and Hospital Fund, 20-cv-4056, Plaintiff: Dena C. Sharp, LEAD ATTORNEY, Girard Sharp LLP, Interim Co-Lead Class Counsel, San Francisco, CA; Clark Craddock, Radice Law Firm, Princeton, NJ; Justin Nicholas Boley, Kenneth A. Wexler, Tyler Joseph Story, PRO HAC VICE, Wexler Wallace LLP, Chicago, IL; Scott M. Grzenczyk, Girard Sharp LLP, San Francisco, CA.

For Ruth Hollman, 20-cv-4056, 20-cv-6491, Plaintiff: Dena C. Sharp, LEAD ATTORNEY, Girard Sharp LLP, Interim Co-Lead Class Counsel, San Francisco, CA; Cory Gavin Lee, Law Offices of Robert W. Sink, El Segundo, CA; Diana Janik Zinser, PRO HAC VICE, Spector Roseman and Kodroff, P.C., Philadelphia, PA; John A. Macoretta, PRO HAC VICE, Spector Roseman & Kodroff, P.C., Philadephia, PA.

For City of Providence, Rhode Island, 20-4064, Plaintiff: Michael Morris Buchman, LEAD ATTORNEY, Motley Rice LLC, New York, NY; Guido Emerson Toscano, Jeff S Westerman, Westerman Law Corp, Encino, CA; Jacob Onile-Ere, Michelle C Clerkin, PRO HAC VICE, New York, NY; Dena C. Sharp, Girard Sharp LLP, San Francisco, CA.

For New York State Teamsters Council Health and Hospital Fund, 20-4064, Plaintiff: Dena C. Sharp, LEAD ATTORNEY, **[**2]** Girard Sharp LLP, Interim Co-Lead Class Counsel, San Francisco, CA; Daniel Evan Rubenstein, PRO HAC VICE, Radice Law Firm, Princeton, NJ; John Daniel Radice, PRO HAC VICE, Radice Law Firm, PC, Princeton, NJ; Justin Nicholas Boley, Tyler Joseph Story, PRO HAC VICE, Kenneth A. Wexler, Wexler Wallace LLP, Chicago, IL; Tom Lane Watts, Girard Sharp LLP, San Francisco, CA.

For Blue Cross and Blue Shield Association, as the Carrier for the Service Benefit Plan 20-4667, also known as, The "Federal Employee Program", a Federal Employee Health Benefits Act Plan, Plaintiff: Dena C. Sharp, LEAD ATTORNEY, Girard Sharp LLP, Interim Co-Lead Class Counsel, San Francisco, CA; Scott M. Grzenczyk, LEAD ATTORNEY, Girard Sharp LLP, San Francisco, CA; Bradley J. Vettraino, Jessica R. MacAuley, Lauren G. Barnes, Thomas M. Sobol, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Mark D Fischer, PRO HAC VICE, Rawlings and Associates, PLLC, La Grange, KY; Tom Lane Watts, Girard Sharp LLP, San Francisco, CA.

For Government Employees Health Association, Inc., Plaintiff: Dena C. Sharp, LEAD ATTORNEY, Girard Sharp LLP, Interim Co-Lead Class Counsel, San Francisco, CA; Jessica R. MacAuley, Lauren G. Barnes, **[**3]** Thomas M. Sobol, PRO HAC VICE, Bradley J. Vettraino, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Mark D Fischer, PRO HAC VICE, Rawlings and Associates, PLLC, La Grange, KY; Tom Lane Watts, Girard Sharp LLP, San Francisco, CA.

For UFCW Local 1500 Welfare Fund, on behalf of itself and all those similarly situated 20-4725, Plaintiff: Dena C. Sharp, LEAD ATTORNEY, Girard Sharp LLP, Interim Co-Lead Class Counsel, San Francisco, CA; Domenico Minerva, LEAD ATTORNEY, PRO HAC VICE, New York, NY; Gregory Asciolla, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; Karin Elizabeth Garvey, Robin van der Meulen, LEAD ATTORNEYS, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; Scott M. Grzenczyk, LEAD ATTORNEY, Girard Sharp LLP, San Francisco, CA; Jonathan Scott Crevier, Veronica M Bosco, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; Mary L. Russell, Fine, Kaplan and Black, R.P.C., Philadelphia, PA; Matthew Perez, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; Tom Lane Watts, Girard Sharp LLP, San Francisco, CA.

For A.F. of L. - A.G.C. Building Trades Welfare Plan, 21-00019, Plaintiff: Michael Morris Buchman, LEAD ATTORNEY, Michelle Catherine Clerkin, Motley Rice LLC, New York, NY; Kimberly **[**4]** Calametti Walker, PRO HAC VICE, Kimberly C. Walker, PC, Fairhope, AL; Thomas Matthew Loper, PRO HAC VICE, Loper Law LLC, Mobile, AL; Dena C. Sharp, Girard Sharp LLP, Interim Co-Lead Class Counsel, San Francisco, CA.

For Self-Insured Schools of California, 21-00020, Plaintiff: Joseph R. Saveri, LEAD ATTORNEY, Anupama K. Reddy, Christopher Kar-Lun Young, Steven Noel Williams, Joseph Saveri Law Firm, LLP, San Francisco, CA; Dena C. Sharp, Girard Sharp LLP, Interim Co-Lead Class Counsel, San Francisco, CA.

For United HealthCare Services, Inc., Plaintiff: Dena C. Sharp, LEAD ATTORNEY, Girard Sharp LLP, Interim Co-Lead Class Counsel, San Francisco, CA; Elizabeth V Kniffen, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason LLP, Mpls, MN; Abby Lauren Dennis, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC; Anjalee Meren Behti, Zelle LLP, Oakland, CA; Beko Osiris Ra Reblitz-Richardson, Boies Schiller Flexner LLP, San Francisco, CA; Edward Takashima, Boies, Schiller, and Flexner LLP, Los Angeles, CA; Eric W. Buetzow, Zelle LLP, San Francisco, CA; Hamish Hume, PRO HAC VICE, Boies Schiller Flexner, Washington, DC; Heather T. Rankie, Judith A. Zahid, Zelle LLP, Oakland, CA; Jennifer Duncan Hackett, **[**5]** John A. Carriel, PRO HAC VICE, James Robertson Martin, Zelle LLP, Washington, DC.

For Jazz Pharmaceuticals, Inc., Jazz Pharmaceuticals Ireland Limited, Defendants: Benjamin M Greenblum, Heidi K Hubbard, Stanley E Fisher, LEAD ATTORNEYS, PRO HAC VICE, Williams and Connolly LLP, Washington, DC; Alexander Steinway Zolan, Charles Luther McCloud, David John Ryan, Natalie Lauren Peelish, PRO HAC VICE, Teagan James Gregory, Williams and Connolly LLP, Washington, DC; Jeffrey E. Faucette, Skaggs Faucette LLP, San Francisco, CA; Monika Beata Jasiewicz, PRO HAC VICE, Williams and Connolly LLP, Washington, Di; Stephen Darren Andrews, Williams and Connolly LLP, Washington, DC.

For Jazz Pharmaceuticals PLC, Defendant: Benjamin M Greenblum, Heidi K Hubbard, Stanley E Fisher, LEAD ATTORNEYS, PRO HAC VICE, Williams and Connolly LLP, Washington, DC; Jeffrey E. Faucette, Skaggs Faucette LLP, San Francisco, CA; Stephen Darren Andrews, Williams and Connolly LLP, Washington, DC; Teagan James Gregory, Williams and Connolly LLP, Washington, DC.

For Hikma Pharmaceuticals PLC, Defendant: Jack E. Pace, III, LEAD ATTORNEY, PRO HAC VICE, White and Case LLP, New York, NY; Kathryn J. Mims, LEAD ATTORNEY, PRO HAC VICE, **[**6]** White and Case LLP, Washington, DC.

For Roxane Laboratories, Inc., Hikma Pharmaceuticals USA Inc., Eurohealth (USA), Inc., Hikma Labs Inc., West-Ward Pharmaceuticals Corp., Defendants: Jack E. Pace, III, LEAD ATTORNEY, PRO HAC VICE, White and Case LLP, New York, NY; Kathryn J. Mims, LEAD ATTORNEY, PRO HAC VICE, White and Case LLP, Washington, DC; Heather Marie Burke, White and Case LLP, Palo Alto, CA.

For Amneal Pharmaceuticals LLC, Lupin Pharmaceuticals Inc., Lupin Inc., Defendants: Devora Allon, Gilad Bendheim, LEAD ATTORNEYS, PRO HAC VICE, Kirkland and Ellis LLP, New York, NY; Jay P. Lefkowitz, LEAD ATTORNEY, PRO HAC VICE, Kirkland Ellis LLP, New York, NY; Michael John Shipley, LEAD ATTORNEY, Kirkland and Ellis LLP, Los Angeles, CA; Sara Shaw Tatum, PRO HAC VICE, Kirkland and Ellis LLP, New York, NY.

For Par Pharmaceutical, Inc., Defendant: Elizabeth Katharine McCloskey, Nicholas Samuel Goldberg, LEAD ATTORNEYS, Keker Van Nest & Peters LLP, San Francisco, CA; Benjamin Gardner Bradshaw, O'Melveny & Meyers LLP, Washington, DC; Brett Johnston Williamson, O'Melveny & Myers LLP, Newport Beach, CA; Monsura A. Sirajee, O'Melveny and Myers, Los Angeles, CA; Stephen Joel McIntyre, O'Melveny **[**7]** and Myers LLP, Los Angeles, CA.

For Lupin Ltd., Defendant: Michael John Shipley, LEAD ATTORNEY, Kirkland and Ellis LLP, Los Angeles, CA; Sara Shaw Tatum, PRO HAC VICE, Kirkland and Ellis LLP, New York, NY.

For Sun Pharmaceuticals Holdings USA, Inc, Sun Pharmaceuticals Industries, Inc., Defendants: Michael John Shipley, LEAD ATTORNEY, Kirkland and Ellis LLP, Los Angeles, CA.

For Watson Laboratories Inc, Teva Pharmaceuticals USA, Inc., Defendants: Amanda Haley Russo, LEAD ATTORNEY, Goodwin Procter LLP, Los Angeles, CA; Christopher T. Holding, PRO HAC VICE, Goodwin Procter LLP, Boston, MA.

For Jazz Pharmaceuticals Ireland Limited, Defendant: Alexander Steinway Zolan, Charles Luther McCloud, David John Ryan, Natalie Lauren Peelish, PRO HAC VICE, Williams and Connolly LLP, Washington, DC; Jeffrey E.

Faucette, Skaggs Faucette LLP, San Francisco, CA; Monika Beata Jasiewicz, PRO HAC VICE, Williams and Connolly LLP, Washington, Di.

For All Parties, Miscellaneous: Dena C. Sharp, LEAD ATTORNEY, Girard Sharp LLP, Interim Co-Lead Class Counsel, San Francisco, CA.

Judges: LUCY H. KOH, United States District Judge.

Opinion by: LUCY H. KOH

Opinion

[*836] ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Re: Dkt. No. 109

PUBLIC REDACTED [8] VERSION**

In this multidistrict litigation, two sets of plaintiffs allege that certain manufacturers of the drug sodium oxybate (brand name Xyrem) have violated federal and state antitrust laws. The first set of plaintiffs, the Class Plaintiffs, comprise the following coalition of putative class representatives: (1) A.F. of L. — A.G.C. Building Trades Welfare Plan; (2) Blue Cross Blue Shield Association; (3) City of Providence, Rhode Island; (4) Government Employees Health Association, Inc.; (5) New York State Teamsters Council Health and Hospital Fund; (6) Self-Insured Schools of California; (7) UFCW Local 1500 Welfare Fund; and (8) Xyrem patient Ruth Hollman.

The second set of plaintiffs comprises United HealthCare Services, Inc., which brings an individual action against the same Defendants as the Class Plaintiffs.

Defendants are (1) Jazz Pharmaceuticals Plc, Jazz Pharmaceuticals, Inc., and Jazz Pharmaceuticals Ireland Limited (collectively, "Jazz"); (2) Hikma Labs, Inc. (formerly known as Roxane Laboratories, Inc.), Hikma Pharmaceuticals USA Inc. (formerly known as West-Ward Pharmaceuticals Corp.), Eurohealth (USA), Inc., and Hikma Pharmaceuticals plc. (collectively, "Hikma"); and (3) **[**9]** Amneal Pharmaceuticals LLC, Par Pharmaceuticals, Inc., and Lupin Ltd, Lupin Pharmaceuticals Inc., and Lupin, Inc. (collectively, the "Later Generic Defendants").

Before the Court is Defendants' Motion to Dismiss Counts 1, 5-12, and 17 of the Consolidated Class Action Complaint and Counts 1, 5-9, and 11 of United Healthcare Services' Complaint. ECF No. 109 ("motion to dismiss" or "Mot."). Having considered the parties' briefing, the relevant law, and the record in this case, the Court GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss.

I. BACKGROUND

A. Factual Background

At issue in this antitrust case is the drug sodium oxybate. Sodium oxybate is older than aspirin. United HealthCare Services' Compl. ¶ 1, No. 21-CV-02710, ECF No. 1 **[*837]** ("UHS"). Since the 1960s, sodium oxybate has been a treatment for narcolepsy. *Id.* ¶ 2. In 2002, a drug company named Orphan Medical obtained Food and Drug Administration ("FDA") approval to market sodium oxybate as a treatment for cataplexy—the sudden loss of muscle control while awake—associated with narcolepsy. *Id.* Orphan Medical named this treatment Xyrem. *Id.*

In 2005, Defendant Jazz Pharmaceuticals, Inc. ("Jazz")[1] acquired Orphan Medical. *Id.* **[**10]** ¶ 3. The acquisition was unprofitable at first. *Id.* By 2009, Jazz was on the verge of bankruptcy. *Id.* Jazz responded by replacing its management team and allegedly "embark[ing] on a multifaceted scheme to dramatically increase the price of Xyrem." *Id.* As Jazz's co-founder and Chief Executive Officer ("CEO") Bruce Cozadd stated publicly, Jazz had "substantial pricing power" because "nothing else [] does what [Xyrem] does. There is no substitute." *Id.* ¶ 111 (quoting Final Transcript, Jazz Pharmaceuticals Inc. at LCM Annual Healthcare Conference (Nov. 17, 2010), https://tinyurl.com/y4lchnrs). As Jazz's CEO further stated, "there's really no competition" for Xyrem. *Id.* ¶ 4 (quoting Conference Call Transcript; Jazz Pharmaceuticals, Inc. at Piper Jaffray Health Care Conference, Jazz Pharmaceuticals (Nov. 30. 2011), https://investor.jazzpharma.com/node/12191/html).

To reinforce Xyrem's market power, Jazz filed for and obtained three families of patents. UHS ¶ 80. None of the patents claim the active pharmaceutical compound in Xyrem (sodium oxybate) because the sodium oxybate was discovered long ago. *Id.* ¶ 81. Jazz instead patented (1) certain formulations and methods of treatment; (2) a drug distribution system; and (3) certain methods of administrating sodium oxybate. *Id.* ¶¶ 81-93. These patents had or have expiration dates between December 2019 and March 2033. *Id.*

Xyrem's lack of competition allowed Jazz to raise its price. Based largely on Xyrem price increases, Jazz's stock price grew about 5,000% from its 2009 low to November 2010 price of over $50 per share. *Id.* ¶ 111. Specifically, according to a Bloomberg report in May 2014, the price of Xyrem increased about 841% from 2007 through 2014. Consolidated Class Action Compl. ¶ 188, ECF No. 62 ("CAC"). These price increases boosted **[**11]** Jazz's profits because gross margins on Xyrem were over 90%. *Id.* ¶ 149.

The profitability of Xyrem did not go unnoticed. Between July 2010 and November 2017, nine manufacturers of generic drugs sought to enter Xyrem's market before the expiration of Xyrem patents. CAC ¶¶ 148, 183 (listing generic manufacturers). Specifically, these generic drug manufacturers filed Abbreviated New Drug Applications ("ANDAs") seeking FDA approval to manufacture, market, and sell generic drugs that would be bioequivalent to Xyrem. *Id.* ¶¶ 148, 183. As a general matter, bioequivalent generic drugs are called "AB-rated" generics or commonly just "generics." UHS ¶ 47.

More than 11 years have passed since the first ANDA was filed on July 8, 2010. CAC ¶ 148. To date, however, no AB-rated generics for Xyrem are on the market. CAC ¶ 3. Nor will any AB-rated generic be on the market until at least December 31, 2025 if Plaintiffs' allegations prove true. CAC ¶ 453. Instead, the generic drug companies have allegedly agreed to sell only "authorized" generics from January 1, 2023 until at least December 31, 2025. *Id.* These authorized generics will merely **[*838]** comprise *Xyrem*, manufactured by *Jazz*, that is *relabeled* and marketed **[**12]** by the generic drug companies. CAC ¶ 5 (citing FDA, *FDA List of Authorized Generic Drugs* (July 1, 2021), https://www.fda.gov/drugs/abbreviated-new-drug-application-anda/fda-list-authorized-generic-drugs).

The Court describes this alleged series of events below in three parts. First, the Court summarizes the general difference between AB-rated generics and authorized generics. Second, the Court recounts nine ANDAs to manufacture, market, and sell an AB-rated generic version of Xyrem. Lastly, the Court outlines Jazz's allegedly anticompetitive scheme which successfully prevented generic entry into the market for sodium oxybate as a treatment for narcolepsy.

1. Structure of the generic market: "AB-rated" generics vs. "authorized" generics

As relevant here, a generic drug may be either an "AB-rated" generic or an "authorized" generic. An AB-rated generic is commonly called simply a "generic drug." *See FDA List of Authorized Generic Drugs, supra* (cited by CAC ¶ 5 & n.7). AB-rated generics are deemed by the FDA to be bioequivalent to the brand name drug. UHS ¶ 47; *accord* FDA, *Orange Book Preface* (41st ed. Jan. 1, 2021), https://www.fda.gov/drugs/development-approval-

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[1] Unless otherwise noted, the Court uses "Jazz" to refer to Defendants Jazz Pharmaceuticals, Inc., Jass Pharmaceuticals Ireland Limited, and/or Jazz Pharmaceuticals Public Limited Company. *See, e.g.*, UHS ¶ 3 n.1 (same naming convention).

process-drugs/orange-book-preface **[**13]** (detailing AB rating). Even so, AB-rated generics differ from the brand name drug in two ways. First, despite their bioequivalence, AB-rated generics "may have certain minor differences from the brand-name product, such as different inactive ingredients." *FDA List of Authorized Generic Drugs, supra*.

Second and most important, AB-rated generics are "developed and made by a company other than the company that makes the brand-name drug." *Id.* When a company enters a market with an AB-rated generic, the generic typically captures about 90% of the branded drug's sales within one year—and sells for about *15%* of the brand name drug's price. UHS ¶ 51; *accord* FTC, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions* at 8 (Jan. 2010) (finding same). ***HN1***[] Under the Hatch-Waxman Act, the first company that applies to produce an AB-rated generic (the "first filer") receives a "180-day period of exclusivity" during which "no other [non-AB-rated] generic can compete with the brand-name drug." *Federal Trade Commission ("FTC") v. Actavis, Inc., 570 U.S. 136, 143-44, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*.

An authorized generic ("AG"), by contrast, "is essentially a brand-name drug *produced by a brand manufacturer* but *marketed* under a generic label." *In re Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 380 (D. Mass. 2013)* (emphasis added). "Other than the fact that [an AG] does not have the brand name on its label, it **[**14]** is the exact same drug product as the branded product." *FDA List of Authorized Generic Drugs, supra*. Thus, unlike AB-rated generics, AGs are marketed and sold "either by the brand manufacturer itself" or "another company *with the brand company's permission*." *Id.* (emphasis added); UHS ¶ 61 (same).

Importantly here, it is far more common that a third party markets an AG (with the brand manufacturer's permission) than the brand manufacturer doing so itself. For instance, the FTC has found that "out of 119 AG launches from 2001 to 2008, *only one* was distributed by a brand drug company without generic marketing." *In re Intuniv Antitrust Litig. ("Intuniv"), 496 F. Supp. 3d 639, 671 (D. Mass. 2020)* (emphasis added) (citing FTC, *Authorized Generic Drugs: Short-Term Effects & Long-Term Impact* (2011) ("FTC 2011 AG Study")); *see also* CAC ¶ 87 n.36 (same **[*839]** study). Moreover, at least one court has credited research that "out of the 529 AG launches since 2009 . . . only two were distributed by a brand company without generic expertise." *Intuniv, 496 F. Supp. 3d at 671*. In short, it is rare for a brand manufacturer to market and sell its own AG. Brand manufacturers instead tend to license marketing/relabeling rights to a third party.

Regardless of who markets them, AGs and AB-rated generics compete. AGs in fact enjoy an opportunity for competition that other **[**15]** generics lack. That unique opportunity is an AG's ability to compete with an AB-rated generic that is protected by the *Hatch-Waxman Act*'s 180-day period of exclusivity during which no other AB-rated generic can compete. AGs are thus the "only potential source of generic price competition during the first-to-file generic manufacturer's 180-day exclusivity period." CAC ¶ 99. Typically, this competition between an AG and a first-filer's AB-rated generic "reduc[es] the revenues generated by the first-filer's generic product by 40-52% during the 180-day exclusivity period." UHS ¶ 62 (citing FTC 2011 AG Study at iii). The competition also reduces generic prices by about 15%. CAC ¶ 99 (citing IMS Consulting, *Assessment of Authorized Generics in the U.S.* (2006), http://208.106.226.207/downloads/IMSAuthorizedGenericsReport 6-22-06.pdf). Drug purchasers benefit as a result.

In sum, AB-rated generics are manufactured and sold by generic drug manufacturers—and for about 15% of the brand name drug's price. AGs, by contrast, are often manufactured by the brand manufacturer itself because AGs are simply the brand name drug but relabeled. AGs are then marketed as a "generic" only with the brand manufacturer's **[**16]** permission (or, rarely, by the brand manufacturer itself). Lastly, when AB-rated generics and AGs compete during the first filer's 180-day exclusivity period, that competition lowers generic drug prices by about 15%.

2. From 2010 through 2017, first Hikma and then Later Generic Defendants apply to manufacture, market, and sell a generic version of Xyrem.

In July 2010, Defendant Hikma Labs, Inc. ("Hikma") submitted an Abbreviated New Drug Application ("ANDA") to manufacture, market, and sell an AB-rated generic version of Xyrem.[2] *Id.* ¶ 148. Under the Hatch-Waxman Act's procedures for generic drug applications, Hikma's ANDA certified that Jazz's Xyrem patents were either "'invalid or w[ould] not be infringed by the manufacture, use, or sale' of the drug described in the [ANDA]." *Actavis, 570 U.S. at 143 (2013)* (quoting *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*) (summarizing ANDA process); *accord, e.g.*, CAC ¶ 149 (alleging same). This type of certification by a generic manufacturer against the patents of the brand-name manufacturer is called a "Paragraph IV certification." CAC ¶ 149.

Paragraph IV certifications have three important features, as detailed by the United States Supreme Court in *FTC v. Actavis*. The Court applies those features to the facts **[**17]** of this case. First, Hikma's Paragraph IV certification statutorily infringed Jazz's Xyrem patents. *Actavis, 570 U.S. at 143* (citing *35 U.S.C. § 271(e)(2)(A)*); ***[*840]*** *accord, e.g.*, CAC ¶ 150 (listing five patents).

Second, if Jazz responded with an infringement suit within 45 days, the FDA would be statutorily bound to "withhold approving the generic, usually for a 30-month period, while the parties litigate patent validity (or infringement) in court." *Actavis, 570 U.S. at 143*. This statutory delay would hinder Hikma and future ANDA filers alike. That is, if Jazz's suit against Hikma—the first to file an ANDA for generic Xyrem—were to settle, a subsequent "generic that files a [P]aragraph IV after learning that the first filer has settled will (if sued by the brand-name) have to wait out a stay period of (roughly) 30 months before the FDA may approve its application, just as the first filer did." *Id. at 155*.

Third, if Hikma were to "overcome any patent obstacle and bring the generic to market," Hikma's generic would be the exclusive AB-rated generic for 180 days. *Id.* "[T]his 180-day period of exclusivity can prove valuable, possibly 'worth several hundred million dollars.'" *Id. at 144* (quoting Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem* ***[**18]*** , *81 N.Y.U. L. Rev. 1553, 1579 (2006)*); *accord, e.g.*, UHS ¶ 44 (alleging same). "The 180-day exclusivity period, however, can belong only to the first generic to file." *Actavis, 570 U.S. at 144*.

In sum, "[t]hese features together mean that a reverse payment settlement with the first filer (or . . . all of the initial filers) 'removes from consideration the most motivated challenger, and the one closest to introducing competition.'" *Id. at 155* (quoting Hemphill, *supra*, at 1586). As explained below in Section I-A-3, ***HN2***[] a "reverse payment settlement" settles patent infringement litigation in a manner "virtually unheard of outside of pharmaceuticals." *Actavis, 570 U.S. at 155*. Specifically, a reverse payment settlement "requires the patentee to pay the alleged infringer, rather than the other way around." *Id. at 141*. In exchange, the alleged infringer agrees "not to produce the patented product" for some time. *Id.*

After Hikma's 2010 ANDA, eight other generic manufacturers filed ANDAs between 2012 and 2017. CAC ¶ 183. Each submitted a Paragraph IV certification that Jazz's Xyrem patents were invalid or would not be infringed. *Id.*

3. Jazz's alleged anticompetitive scheme

In response to these ANDAs, Jazz allegedly schemed to preserve its multi-billion-dollar Xyrem monopoly. CAC ¶¶ 148-292; UHS ¶¶ 98-223. Jazz's alleged scheme **[**19]** had three main parts that operated in roughly chronological but overlapping order: (a) abuse of an FDA drug safety program called "Risk Evaluation and Mitigation Strategy"; (b) sham litigation; and (c) reverse payments to four of the generic manufacturers. The Court describes each part of the scheme below.

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[2] Unless otherwise noted, the Court uses "Hikma" to refer to Defendants Hikma Labs, Inc. (formerly known as Roxane Laboratories, Inc.), Hikma Pharmaceuticals USA Inc. (formerly known as West-Ward Pharmaceuticals Corp.), Eurohealth (USA), Inc., and/or Hikma Pharmaceuticals plc. *See, e.g.*, CAC ¶ 2 n.2 (same naming convention). The Hikma entities acquired the original ANDA applicant for the generic version of Xyrem—Roxane Laboratories, Inc.—in 2016. UHS ¶ 17.

a. Jazz's alleged Risk Evaluation and Mitigation Strategy ("REMS") abuse

In general, the FDA may require that risky drugs implement a safety program called a Risk Evaluation and Mitigation Strategy ("REMS"). CAC ¶ 163; *see also* FDA, *FAQs about REMS* (Jan. 26, 2018), https://www.fda.gov/drugs/risk-evaluation-and-mitigation-strategies-rems/frequently-asked-questions-faqs-about-rems . REMS are proposed by a drug's manufacturer and then approved by the FDA. CAC ¶ 163. ***HN3***[] To receive FDA approval, a proposed REMS must balance (1) "the need to evaluate and mitigate risk of a drug to ensure that [the drug's] benefits outweigh its risks"; and (2) "the potential burdens of REMS elements on patient access and the **[*841]** health care delivery system." *Id.* "A REMS can include, *inter alia*, a medication guide, patient package inserts, and/or *restrictions on the distribution* of the drug." UHS ¶ 56 (emphasis added). **[**20]**

Most importantly here, the FDA ordinarily requires all manufacturers of a particularly risky drug—including the drug's generic manufacturers—to share one REMS. UHS ¶ 120; *see also* FDA, *Office of Surveillance & Epidemiology, Development of a Single, Shared System (SSS) Risk and Evaluation Mitigation Strategy* (Oct. 28, 2020) (detailing shared REMS requirement). Yet a "single, shared system" REMS has the potential for abuse. For instance, because REMS can restrict access to and distribution of a drug, the FDA has expressed concern that brand manufacturers abuse REMS to "delay the entry of generics." UHS ¶ 58 (quoting FDA Commissioner Scott Gottlieb, *FDA In Brief: FDA affirms its commitment to efficient adoption of Risk Evaluation and Mitigation Strategy plans and to making sure they do not impede generic drug development* (Apr. 4, 2019), https://tinyurl.com/y4je3kau). The annual cost of REMS abuse is about $13.3 billion according to one estimate: $5.2 billion from the federal government, $5.8 billion from private insurance companies, $1.8 billion from consumers, and $500 million from small payors such as state and local governments. UHS ¶ 60 (citing Alex Brill, *Unrealized Savings from the* ***[**21]*** *Misuse of REMS and Non-REMS Barriers*, Matrix Global Advisors (Sept. 2018), https://tinyurl.com/y272qvlb).

Here, Plaintiffs allege that Jazz abused the FDA's REMS process. CAC ¶¶ 165-73; UHS ¶¶ 54-60, 98-101, 112-13, 118-37. This alleged abuse resulted in FDA approval of Jazz's allegedly anticompetitive REMS: a REMS that mandates dispensing all Xyrem and Xyrem generics through a single centralized pharmacy, Express Scripts Specialty Distribution Services, Inc. ("Express Scripts"). CAC ¶ 287.

According to Plaintiffs, Jazz's alleged abuse of the REMS process spanned nearly seven years beginning in late August 2008. *Id.* ¶ 166. From late August 2008 through February 2015, Jazz took allegedly inconsistent and dilatory positions before the FDA on Xyrem's distribution restrictions. At first, Jazz advocated for a single-pharmacy distribution protocol in its REMS. UHS ¶ 55. In August 2009, however, Jazz "submitted a REMS proposal that would, among other things, remove the restriction to a single pharmacy and instead allow certification of multiple pharmacies." *Id.* ¶ 98.

Yet in "early 2011"—months after the FDA rejected Jazz's application to allow Xyrem as a fibromyalgia treatment—Jazz again reversed **[**22]** course and proposed a single-pharmacy REMS. *Id.* ¶ 100, 112. In the words of Jazz's CEO, "any generic company—[Hikma] included—will have a difficult time setting up their own distribution system that, A, doesn't infringe our intellectual property, and B, would successfully accomplish the goals of this REMS." UHS ¶ 40 (quoting Bruce Cozadd, Conference Call Tr. at Piper Jaffray Health Care Conference (Nov. 30, 2011), https://tinyurl.com/y5m5rb7n).

The FDA initially resisted Jazz's single-pharmacy REMS. In December 2013, "the FDA informed Jazz that the Agency was requiring a modification to the REMS under the FDA's statutory authority which, among other things, would have removed the single pharmacy restriction." UHS ¶ 127. Jazz formally disputed this FDA decision. *Id.* ¶ 132. By June 2014, the FDA had denied Jazz's dispute, and Jazz had further appealed to FDA's Director of the Office of New Drugs. *Id.* ¶ 132.

However, on February 27, 2015, the FDA approved Jazz's REMS application. **[*842]** *Id.* ¶ 135 (citing Letter from Billy Dunn, FDA Director of Neurology Products, to Jazz Pharmaceuticals (Feb. 27, 2015) (UHS Ex. C) ("FDA Dunn Letter")). In doing so, the FDA criticized Jazz's "repeated, lengthy **[**23]** delays" and Jazz's inconsistent position on whether "a single pharmacy is critical to the safe use of Xyrem." FDA Dunn Letter at 3. The FDA later recounted its reluctant approval of Jazz's REMS in a January 17, 2017 memorandum from Dr. Trueman W. Sharp, Deputy Director of the FDA's Office of Generic Drugs, to the manufacturers who had applied to make generic Xyrem (*i.e.*, filed ANDAs).

In that memo, the FDA wrote that it had approved Jazz's REMS to halt the "significant drain on [FDA] resources posed by the dispute." UHS ¶ 135 (quoting Memorandum from Trueman Sharp, Deputy Director for the Office of Generic Drugs, FDA, to ANDAs for sodium oxybate oral solution products, *et seq.* ("Sharp Memo") (Jan. 17, 2017) (UHS, Ex. B)). Even though it had approved Jazz's REMS, the FDA doubted both (1) the objective merits of Jazz's REMS; and (2) Jazz's subjective motivations in proposing a single-pharmacy REMS. As to the objective merits, the FDA reiterated concerns by Dr. John K. Jenkins, Director of the Office of New Drugs. Specifically, Dr. Jenkins noted the uniquely exclusionary nature of Xyrem REMS and its "burdens on patient access and the healthcare delivery system":

> Our action approving the **[**24]** REMS submitted by Jazz *should not be construed or understood as agreement* with Jazz that limiting dispensing to a single pharmacy is the only way to ensure that the benefits of Xyrem outweigh the risks under *section 505-1* of the FD&C Act. We continue to be concerned that limiting the distribution of Xyrem to one pharmacy *imposes burdens on patient access and the healthcare delivery system. No other currently approved REMS* requires a sponsor to limit dispensing to a single pharmacy.

Sharp Memo at 8 (emphasis added). As for subjective motivations, the FDA expressly "note[d] the inconsistent position Jazz has taken on [REMS safety]"—an inconsistency which "suggest[ed] [Jazz's] *knowledge* that this aspect of its REMS *could have the effect of preventing generic competition*." *Id.* at 26; *accord* at 12 (reiterating "Jazz's awareness that Xyrem REMS could have the effect of blocking or delaying approval of generic version of Xyrem"); UHS ¶ 136 (quoting same).

Generic manufacturers allegedly shared the FDA's fear that Jazz's REMS would block competition. After the FDA approved Jazz's REMS application in February 2015, generic manufacturers argued to the FDA that Jazz refused to negotiate in good faith to share **[**25]** access to Jazz's REMS. UHS ¶ 140; *see, e.g.*, CAC ¶¶ 200-08, 223, 227. A single, shared REMS is ordinarily required by the FDA for all versions of a risky drug—including AB-rated generics manufactured by generic manufacturers. CAC ¶ 73. Sharing a REMS entails co-administrating a safety system that gathers documentation on prescribers, dispensers, and patients. *Id. Id*. Here, that safety system also included the requirement that Xyrem and its generics be distributed exclusively through Express Scripts. CAC ¶ 287.

On January 17, 2017, in response to generic manufacturer's allegations, the FDA waived the single-pharmacy requirement for generic versions of Xyrem. In issuing this waiver, the FDA reiterated generic manufacturer's allegations that "Jazz ha[d] engaged in a strategy that 'entails serial attempts to impose unreasonable contractual terms and conditions on the ANDA [filers] while concurrently issuing self-serving statements to FDA **[*843]** and the ANDA [filers] about Jazz's commitment to the process." UHS ¶ 207 (quoting Sharp Memo at 11). The FDA then found that the "burden of creating a single, shared system outweighs the benefits." Sharp Memo at 13 (capitalization omitted). Among the burdens **[**26]** were Jazz's "obvious incentives" "to delay generic competition [] by failing to agree on [single, shared system] REMS terms." *Id.* at 17. The FDA thus concluded that allowing ANDA applicants to proceed with their own drug distribution systems would "remove a barrier to generic products coming to market." *Id.*

Among the ADNA applicants listed on the FDA's January 17, 2017 memo were Hikma and Amneal. Sharp Memo at 1; *accord* UHS ¶ 201. Yet, to date, at least Hikma has allegedly no plans to develop an alternative to Jazz's REMS. CAC ¶ 223. The reason, Plaintiffs allege, is that Hikma would contractually forfeit its lucrative reverse settlement with Jazz if Hikma tried to compete with Jazz. *Id.* ¶ 219; UHS ¶ 169. In fact, sometime after Jazz and Hikma settled their patent litigation, Jazz's CEO allegedly said on an earnings call that although "Hikma has a license to launch its [AB-rated] generic product as of July 1, 2023, [Hikma] will not longer have the right to sell an AG product through the Xyrem REMS if [Hikma] elects to do so." CAC ¶ 219 & n.66 (quoting earnings call; no date provided).

b. Jazz's alleged sham patent litigation against generic manufacturers

Sham patent litigation comprised **[**27]** the second part of Jazz's alleged monopolistic scheme. According to Plaintiffs, Jazz filed many meritless patent infringement cases against drug manufacturers who had filed ANDAs to market generic versions of Xyrem. CAC ¶¶ 150-61; UHS ¶¶ 104-09, 121-26, 133-34, 139, 151-52, 155-57. These cases were allegedly brought in a vicious cycle. Jazz would allegedly "assert a patent position, glean defenses to that position in the litigation, file new 'follow-on' patents, and then file a new lawsuit asserting those patents." Opp'n at 5 (citing CAC ¶¶ 155-61; UHS ¶¶ 104-09).

Among others, the targets of Jazz's suits included (1) Hikma, the filer of the first generic Xyrem ANDA; and (2) three other manufacturers who filed ANDAs after Hikma. Those three other manufacturers (the "Later Generic Defendants") were Amneal Pharmaceuticals LLC ("Amneal"), Par Pharmaceuticals, Inc. ("Par"), and Lupin Ltd, Lupin Pharmaceuticals Inc., and Lupin, Inc. (together, "Lupin"). CAC ¶ 2 n.2; UHS ¶¶ 20-23. Jazz sued Hikma for patent infringement *nine* times between November 2010 and August 2016. CAC ¶¶ 151-62 (detailing suits). Also, between at least December 2012 and November 2017, Jazz brought more than eight other **[**28]** suits against the Later Generic Defendants and five other later generics. *Id.* ¶¶ 183-85 (listing suits).

Pursuant to the Hatch-Waxman Act, each lawsuit automatically stayed the FDA's approval process for generic Xyrem ANDAs by approximately 30 months. CAC ¶ 185; *see generally* *Actavis, 570 U.S. at 143, 155* (explaining stay required by *21 U.S.C. § 355(j)(5)(B)(iii)*). These 30-month stays were statutorily automatic "irrespective of the[] [lawsuits'] prospects of success." CAC ¶ 185. Indeed, some of Jazz's asserted patents were eventually invalidated. In March 2017, the Patent Trial Appeal Board ("PTAB") invalidated as obvious one of Jazz's three asserted families of patents relating to REMS.[3] UHS ¶¶ 151- **[*844]** 57. The Federal Circuit affirmed the PTAB invalidity rulings. *Id.* ¶ 157 (citing *Jazz Pharms., Inc. v. Amneal Pharms., LLC, 895 F.3d 1347 (Fed. Cir. 2018)*).

c. Jazz's reverse payment settlements with first-filer Hikma and then Later Generic Defendants Par, Lupin, and Amneal

Lastly and most significantly, Plaintiffs allege that Jazz settled its patent cases with each Generic Defendant (Hikma, Amneal, Par, and Lupin) by way of unlawful "reverse payment" settlements. ***HN4***[] As the Supreme Court explained in *FTC v. Actavis*, a reverse payment settlement is one where "the patentee [] pay[s] the alleged infringer, rather than the other **[**29]** way around." *Actavis, 570 U.S. at 141*. In exchange, the alleged infringer delays entry into the patentee's market. *Id.* These reverse payment settlements (or "reverse settlements" for short) are "virtually unheard of outside of pharmaceuticals." *Id. at 155* (quoting 1 Herbert Hovenkamp, Mark D. Janis, Mark A. Lemley, and Christopher R. Leslie, *IP and Antitrust* § 15.3 & n.161 (2d ed. Supp. 2011)). Such settlements also "sometimes violate the antitrust laws." *Id. at 141*.

Plaintiffs allege that Jazz's reverse settlements with each Generic Defendant violated the antitrust laws. CAC ¶¶ 209-76; UHS ¶¶ 161-210. According to Plaintiffs, the value of these settlements was in the hundreds of millions of dollars for first-filer Hikma and the tens of millions of dollars each for Later Generic Defendants Par, Lupin, and Amneal. CAC ¶¶ 229-38, 255, 262, 269-70; UHS ¶¶ 179-83, 206. In exchange for making these large reverse payments, Jazz allegedly delayed generic entry into the Xyrem market. *See, e.g.*, CAC ¶ 275-76. The alleged result has been supra-competitive prices and lower output. CAC ¶ 276.

Although Jazz's settlements allegedly all delayed generic entry, the settlements with Hikma versus the Later Generic Defendants conveyed value in somewhat **[**30]** different ways. In the Jazz-Hikma agreement, Jazz licensed Hikma as the exclusive third-party marketer of an authorized generic ("AG") version of Xyrem between at least January 1, 2023 and July 1, 2023. CAC ¶¶ 110, 221 & n.67. This Hikma AG would be (1) Xyrem manufactured by Jazz that (2) Hikma would relabel and market as a Hikma product that (3) Jazz's REMS pharmacy, Express

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[3] The invalidated REMS patents claimed methods of tracking drug prescriptions in a computer database. CAC ¶¶ 141-44.

Scripts, would distribute. *See, e.g.*, UHS ¶ 223 (alleging purchases "would follow the same route as Xyrem" and that Hikma will not take delivery); Hikma License Agreement §§ 1.3, 1.24, ECF No. 111-2 (providing that Hikma's AG will not bear Jazz's trademarks, such as the name Xyrem).

To incentivize this alleged "no-AG" agreement and convey further value to Hikma, Jazz made primarily the following three alleged reverse payments.

• First, Jazz promised not to license AG to any third party other than Hikma between at least January 1, 2023 and July 1, 2023. CAC ¶¶ 110, 221 & n.67.

• Second, Jazz created a royalty structure of escalating payments from Hikma to Jazz that undermined Jazz's economic interest in marketing its own AG. CAC ¶ 231.

• Third, the Jazz-Hikma agreement contained an "acceleration clause." *Id.* ¶ 232. **[**31]** ***HN5***[] An acceleration clause is a type of most-favored-entry clause that allows a generic manufacturer to enter a market sooner if certain contingencies occur. CAC ¶¶ 120-24 (citing Keith M. Drake & Thomas G. McGuire, *Generic Entry Before the Agreed-Upon Date in Pharmaceutical Patent Settlements*, 16 J. Competition L. & Econ. 188, 188 (2020) **[*845]** (available on Lexis+)). In the Jazz-Hikma agreement, the acceleration clause allegedly allowed Hikma to immediately market Hikma Authorized Generic ("AG") if (1) a generic version of Xyrem were to market itself without Jazz's permission; or (2) anyone were to successfully invalidate or render unenforceable Xyrem's unexpired patent claims. CAC ¶ 225; *accord* Hikma AG Agreement § 2.8, ECF No. 110-14 (acceleration provisions). According to Plaintiffs, acceleration clauses like Hikma's deter generic entry by warning potential entrants that they will face competition if they actually enter. *Id.* ¶¶ 123-24 (citing congressional testimony and Drake & McGuire, *supra*). The prospect of competition reduces the expected payoff of breaking up any collusive scheme. *Id.* ¶ 123.

Together, these parts of the Jazz-Hikma agreement were allegedly "designed to, and do[] have, the effect that during at least the first six months of entry (before **[**32]** subsequent generics were allocated a slice of the market in their own separate pay-for-delay agreements, as discussed below [in Section III-B]), the Hikma AG would be the only authorized generic." *Id.* ¶ 221. The alleged estimated value to Hikma of the Jazz-Hikma agreement is over $480 million just in the first six months after Hikma launches its AG. CAC ¶ 237 (estimating $480 million to $540 million); UHS ¶ 181 (estimating $705 million). Jazz's market capitalization also jumped by about $785 million after the Jazz-Hikma agreement was partially disclosed on April 6, 2017—a jump that Plaintiffs allege is attributable to investors' expectations that Xyrem would face reduced generic competition. UHS ¶ 185; CAC ¶ 246.

Jazz's settlements with the Later Generic Defendants made primarily the following three alleged reverse payments, as detailed in formerly confidential contracts that Defendants attached to their instant motion to dismiss:[4]

• First, Jazz made multi-million-dollar cash payments to each Later Generic Defendant—ostensibly for Jazz's avoided litigation costs. *See* Opp'n at 13 (citing Par Settlement Agreement § 3, ECF No. 110-15 (Ex. 4); Lupin Settlement Agreement § 3, ECF No. 110-17 **[**33]** (Ex. 7); Amneal Settlement Agreement § 3, ECF No. 110-19 (Ex. 10)).

• Second, Jazz allegedly gave each Later Generic Defendant a limited license to sell a constrained supply of AG. Each license (1) began only after the expiration of Hikma's 180-day exclusivity period in July 2023; (2) was

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[4] Defendants filed a request for judicial notice on April 22, 2021. ECF No. 111. Defendants seek judicial notice of (1) the contracts between Jazz, Hikma, and the Later Generic Defendants, which are incorporated by reference in the CAC and UHS complaint; (2) public filings with the Securities and Exchange Commission ("SEC"); and (3) an FTC blog post cited in CAC ¶ 110 n.48. Plaintiffs have not opposed Defendants' request. ***HN6***[] The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*. Moreover, courts may consider materials referenced in the complaint under the incorporation by reference doctrine, even if a plaintiff did not attach those materials to the complaint. *Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)*. Accordingly, the Court GRANTS Defendants' request for judicial notice, ECF No. 111.

capped at a low-single-digit market share; and (3) required a royalty payment, as a percentage of sales, that increased over time. *See, e.g.*, Lupin AG Agreement § 1.27, 5, ECF No. 110-18 (Exh. 8).

[*846] • Third, Jazz's agreements with each Later Generic Defendant contained acceleration clauses like the acceleration clause in the Jazz-Hikma agreement discussed above. *See, e.g.*, CAC ¶¶ 253, 260, 267 (alleging acceleration clauses); Section III-A-2-b-iii, *infra* (analyzing Jazz-Hikma acceleration clause and acceleration clauses generally).

Plaintiffs estimate the value to the Later Generic Defendants of these agreements to be in the tens of millions of dollars. CAC ¶¶ 255, 262, 269-70; UHS ¶¶ 193, 198, 205, 206. As with the Jazz-Hikma agreement, Jazz's agreements with Par, Lupin, and Amneal allegedly "will not increase overall output, reduce price, or increase consumer choice." UHS ¶ 207. Rather, the agreements **[**34]** will allegedly "merely substitute Par, Lupin, and Amneal as the sellers of millions of dollars' worth of Xyrem for the sole purpose of paying them to delay market entry of less expensive generic sodium oxybate, preserving Jazz's massive monopoly profits in exchange for doling out a small slice of them to Par, Lupin, and Amneal." *Id.*

In Plaintiffs' telling, Jazz executives publicly alluded to these anticompetitive effects on at least two occasions. At a conference on December 4, 2019, Jazz's CEO stated that "in terms of *dynamics on price*, it's — th[e] [market] is *not what you would think of as a generic free for all*" because of the "*very limited volumes*" for Par, Lupin, and Amneal. CAC ¶ 273 (emphasis added by Plaintiffs).

Similarly, on November 14, 2018, a senior Jazz executive explained that "after th[e] the 6-month exclusivity period for the first-filer [Hikma], 3 of the second filers [allegedly Par, Lupin, and Amneal] get to come again with a limited generic. And they are *limited to low single-digit volume* of the previous year Xyrem sales. So again, relatively *low incursion on Xyrem* here." *Id.* ¶ 274 (emphasis added).

Plaintiffs allege that because of all these agreements, Jazz has **[**35]** avoided judicial scrutiny of its (invalid and unenforceable) patents to this day. *See, e.g.*, CAC ¶ 278; UHS ¶ 172. Indeed, Jazz remains the sole supplier of sodium oxybate even though Hikma filed its ANDA in July 2010—more than 11 years ago. CAC ¶¶ 296, 307; UHS ¶ 237.

B. Procedural History

This is a multidistrict litigation with two operative complaints across nine actions. One action is an individual action brought by Plaintiff United HealthCare Services, Inc., which "serve[s] some 70 million individual insureds" as "the largest single health insurance carrier and services provider in the United States." UHS ¶ 7. The remaining actions are putative class actions brought by Class Plaintiffs, a coalition of four types of plaintiffs:

• Labor unions' health plans or welfare benefits funds, namely A.F. of L. — A.G.C. Building Trades Welfare Plan, New York State Teamsters Council Health and Hospital Fund, and UFCW Local 1500 Welfare Fund. These labor unions' funds bought or reimbursed Xyrem for their members.

• Associations of companies that provide health plans, namely Blue Cross Blue Shield Association and Government Employees Health Association. Together, these associations provide health **[**36]** benefits to more than 107 million people nationwide.

• Government entities, namely the Self-Insured Schools of California and the City of Providence, Rhode Island. These entities pay bought or reimbursed Xyrem for their employees and retirees.

[*847] • Xyrem patient Ruth Hollman, who has used Xyrem since 2009.

CAC ¶¶ 10-25.

This case's chronology is as follows. On December 16, 2020, the Judicial Panel on Multidistrict Litigation transferred six putative class actions to this Court. ECF No. 1. Two more putative class actions were transferred on January 4, 2021, followed by another putative class action on January 26, 2021. ECF No. 2, 38. On January 27, 2021, one of the nine transferred actions was voluntarily dismissed without prejudice in accordance with a tolling agreement. ECF No. 39. This dismissal left eight putative class actions.

On February 22, 2021, the Court appointed Interim Co-Lead Class Counsel and Plaintiffs' Steering Committee. ECF No. 59. For Interim Co-Lead Class Counsel, the Court appointed Dena Sharp of Girard Sharp LLP and Michael Buchman of Motley Rice LLC. For Plaintiffs' Steering Committee, the Court appointed Jessica R. MacAuley of Hagens Berman Sobol Shapiro LLP; Karin **[**37]** Garvey of Labaton Sucharow LLP; Joseph Saveri of Joseph Saveri Law Firm, Inc.; Kenneth Wexler of Wexler Wallace LLP; Clark Craddock of the Radice Law Firm; John Macoretta of Spector Roseman & Kodroff PC; and Mark Fischer of Rawlings & Associates, PLLC.

On March 8, 2021, the plaintiffs in the eight putative class actions (together, the "Class Plaintiffs") filed one of the operative complaints: the Consolidated Class Action Complaint ("CAC"). ECF No. 62. Class Plaintiffs comprise (1) A.F. of L. — A.G.C. Building Trades Welfare Plan; (2) Blue Cross Blue Shield Association; (3) City of Providence, Rhode Island; (4) Government Employees Health Association, Inc.; (5) New York State Teamsters Council Health and Hospital Fund; (6) Self-Insured Schools of California; (7) UFCW Local 1500 Welfare Fund; and (8) Ruth Hollman. CAC ¶¶ 10-25. Class Plaintiffs assert 17 claims against Defendants under both federal and state antitrust laws. CAC ¶¶ 352-518.

Defendants comprise three sets of entities known as (1) Jazz; (2) Hikma; and (3) the Later Generic Defendants. Each set of Defendants specifically comprises the following:

- The first set includes Jazz Pharmaceuticals Plc, Jazz Pharmaceuticals, Inc., **[**38]** and Jazz Pharmaceuticals Ireland Limited (together, "Jazz"). CAC ¶ 1; UHS ¶ 3 n.1. Jazz owns patents that claim aspects of Xyrem and its use. CAC ¶ 80.
- The second set of Defendants—which together are known as "Hikma"—includes Hikma Labs, Inc. (formerly known as Roxane Laboratories, Inc.), Hikma Pharmaceuticals USA Inc. (formerly known as West-Ward Pharmaceuticals Corp.), Eurohealth (USA), Inc., and Hikma Pharmaceuticals plc. CAC ¶ 2 n.2; UHS ¶ 18. Hikma was the first to file an ANDA to market a generic version of Xyrem. CAC ¶ 2; UHS ¶ 101.
- The third set of Defendants includes Amneal Pharmaceuticals LLC ("Amneal"), Par Pharmaceuticals, Inc. ("Par"), and Lupin Ltd, Lupin Pharmaceuticals Inc., and Lupin, Inc. (together, "Lupin"). CAC ¶ 2 n.2; UHS ¶¶ 20-23. These Defendants were among the generic manufacturers who filed ANDAs after Hikma. CAC ¶ 183. Together, Amneal, Par, and Lupin are known as the "Later Generic Defendants." Collectively with Hikma, they are known as the "Generic Defendants."

On March 19, 2021, the Court noted that the CAC—which sets forth 17 causes of action against 12 Defendants—is unmanageably large. ECF No. 66. The Court **[*848]** thus ordered Class Plaintiffs and Defendants **[**39]** to jointly identify "10 selected causes of action" to be litigated through resolution. ECF No. 66 at 2. Class Plaintiffs and Defendants filed their joint notice identifying 10 selected causes of action (the "Selected Claims") on March 29, 2021. ECF No. 81. The Selected Claims are the following:

- CAC Count 1 — Violation of *15 U.S.C. § 1* (against Jazz and Hikma)

CAC Count 5 — Violation of *15 U.S.C. § 1* (against all Defendants)

- CAC Count 6 — Violation of *15 U.S.C. § 2* (against Jazz)
- CAC Count 7 — Conspiracy and Combination in Restraint of Trade Under State Law (against Jazz and Hikma)
- CAC Count 8 — Conspiracy and Combination in Restraint of Trade Under State Law (against Jazz and Amneal)
- CAC Count 9 — Conspiracy and Combination in Restraint of Trade Under State Law (against Jazz and Lupin)
- CAC Count 10 — Conspiracy and Combination in Restraint of Trade Under State Law (against Jazz and Par)
- CAC Count 11 — Conspiracy and Combination in Restraint of Trade Under State Law (against all Defendants).
- CAC Count 12 — Monopolization and Monopolistic Scheme Under State Law (against Jazz)

- CAC Count 17 — For Declaratory and Injunctive Relief for Violations of *Sections 1* and *2 of the Sherman Act*, *15 U.S.C. §§ 1*, *2*, and *Section 16 of the Clayton Act*, *15 U.S.C. §§ 1-2*, *26* (against all **[**40]** Defendants)

Meanwhile, on March 24, 2021, Plaintiff United HealthCare Services, Inc. ("United") informed the Court that United's individual action against the same Defendants would soon be transferred to the instant multidistrict litigation. ECF No. 78. In response on March 30, 2021, the Court ordered the parties to address the overlap between (1) United's claims and (2) the Selected Claims. ECF No. 82. On April 2, 2021, United represented that its claims "largely overlap with the class action claims and advance materially the same theories of liability." ECF No. 84 at 1. United thus agreed to initially litigate through resolution only the claims that overlap with the Selected Claims. *Id.* at 2. United's complaint ("UHS") is at Case No. 21-CV-02710-LHK, ECF No. 1.

Accordingly, on April 7, 2021, the Court "order[ed] that U[nited] shall initially litigate only the Selected Claims. . . . After the resolution of the Selected Claims, the Court will discuss with U[nited] and [Class Plaintiffs] the remaining causes of action." ECF No. 85. United's claims relationship to the Selected Claims are as follows:

- UHS Count 1 overlaps with CAC Count 1 — Violation of *15 U.S.C. § 1* (against Jazz and Hikma)

- UHS Count **[**41]** 5 overlaps with CAC Count 5 — Violation of *15 U.S.C. § 1* (against all Defendants)

- UHS Count 6 overlaps with CAC Count 6 — Violation of *15 U.S.C. § 2* (against Jazz)
- UHS Counts 8 and 9 overlap with CAC Count 11 — Conspiracy and Combination in Restraint of Trade Under State Law (against all Defendants). However, UHS Count 9 is limited to the extent it overlaps with the Class Plaintiffs' Selected Claims.
- UHS Count 7 overlaps with CAC Count 12 — Monopolization and Monopolistic Scheme Under State Law (against Jazz)

[*849] • UHS Count 11 overlaps with CAC Count 17 — For Declaratory and Injunctive Relief for Violations of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, and *Section 16* of the Clayton Act, *15 U.S.C. §§ 1-2*, *26* (against all Defendants)

On April 22, 2021, Defendants filed the instant motion to dismiss the Selected Claims. ECF No. 109 ("motion to dismiss" or "Mot."). On May 20, 2021, Class Plaintiffs and United (together, "Plaintiffs") filed their consolidated opposition to Defendants' motion to dismiss. ECF No. 129 ("Opposition" or "Opp'n"). Defendants filed their reply on June 10, 2021. ECF No. 130 ("Reply").

II. LEGAL STANDARD

A. Motion to Dismiss Under *Rule 12(b)(6)*

HN7[] *Rule 8(a)(2) of the Federal Rules of Civil Procedure* requires a complaint to include "a short and plain statement of the claim showing that the pleader is **[**42]** entitled to relief." A complaint that fails to meet this standard may be dismissed pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. The United States Supreme Court has held that *Rule 8(a)* requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). For purposes of ruling on a *Rule 12(b)(6)* motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. The Court, however, need not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th Cir. 2011)* (per curiam) (internal quotation marks omitted). Additionally, mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson, 355 F.3d 1179, 1183 (9th Cir. 2004)*.

B. Leave to Amend

HN8[] If a court determines that a complaint should be dismissed, **[**43]** it must then decide whether to grant leave to amend. Under *Rule 15(a) of the Federal Rules of Civil Procedure*, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of *Rule 15* to facilitate decisions on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)* (en banc) (alterations and internal quotation marks omitted). When dismissing a complaint for failure to state a claim, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Id. at 1130* (internal quotation marks omitted).

HN9[] Accordingly, leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008)*. At the same time, a court is justified in **[*850]** denying leave to amend when a plaintiff "repeated[ly] fail[s] to cure deficiencies by amendments previously allowed." *See Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 892 (9th Cir. 2010)*. Indeed, a "district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1058 (9th Cir. 2011)* (quotation marks omitted).

III. DISCUSSION

Plaintiffs purchase or provide reimbursement **[**44]** for Xyrem nationwide. CAC ¶¶ 10-25 (Class Plaintiffs); UHS ¶¶ 6-10 (United HealthCare Services). Plaintiffs allege that Jazz has overcharged for Xyrem and will continue to do so. UHS ¶ 5. Specifically, Plaintiffs allege that Jazz has unlawfully blocked generic entry into the Xyrem market through at least July 1, 2023. CAC ¶ 6. Plaintiffs thus seek treble damages and injunctive relief under federal and state antitrust laws, including *Sections 1* and *2* of the Sherman Act (*15 U.S.C. §§ 1* and *2*). Because Plaintiffs bring at least 17 claims against 12 Defendants, only 10 claims (the "Selected Claims") will be initially litigated through resolution. *See* Section I-B, *supra* (detailing Selected Claims).

Defendants move to dismiss the Selected Claims on six grounds. First, Defendants argue that Jazz's settlements with Hikma and each of the Later Generic Defendants (Amneal, Par, and Lupin) are not unlawful reverse settlements under *FTC v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. Second, Defendants argue that Plaintiffs inadequately plead an overarching antitrust conspiracy or unlawful market allocation. Third, Defendants argue that Plaintiffs fail to allege antitrust injury. Fourth, Defendants argue that Plaintiffs' monopolization claims under *Sherman Act § 2* are barred by the *Noerr-Pennington* ***[**45]*** doctrine. Fifth, Defendants argue that Plaintiffs lack antitrust standing to pursue damages for violations of federal ***antitrust law***. Lastly, Defendants argue that Plaintiffs' state law claims fail.

Ultimately, the Court mostly denies Defendants' motion to dismiss. The Court dismisses, however, the following four allegations or claims: (1) Plaintiffs' allegation that Defendants' market allocations are per se violations of the antitrust laws; (2) Plaintiffs' allegations against Jazz's citizen petitions to the FDA; (3) Plaintiffs' federal claims for damages; and (4) some claims brought under the laws of Illinois and Utah. Below, the Court analyzes the six asserted grounds for dismissal in turn. Each section of analysis begins with a header, which lists the Counts of the CAC and UHS complaint at issue in that section.

A. Plaintiffs adequately plead unlawful reverse payments to Hikma (CAC Counts 1 and 7; UHS Counts 1, 5, and 8) and the Later Generic Defendants (CAC Counts 8-10; UHS Counts 5, 7, and 8).

Defendants argue that Plaintiffs inadequately plead that Jazz made unlawful reverse payments to Hikma and the Later Generic Defendants. As to Hikma, Defendants argue that Jazz's settlement was **[**46]** not a "no authorized generic" agreement ("no-AG" agreement). Specifically, although Jazz promised that Hikma would be the exclusive third-party licensee of AG, Jazz could theoretically compete with Hikma AG by marketing a Jazz AG. As for the Later Generic Defendants, Defendants argue that Jazz did not make reverse payments to Amneal, Par, or Lupin.

To provide context for the parties' arguments, the Court first describes the difference between a generic manufactured by a generic drug company ("AB-rated generic") and a "generic" that is identical to—and often manufactured and distributed **[*851]** by—the brand name drug company ("authorized generic"). The Court then analyzes the Jazz-Hikma agreement followed by Jazz's agreements with the Later Generic Defendants.

1. Background: "authorized generics" are often just the brand name drug made by the brand name manufacturer—but relabeled.

The Court first recounts the background on the generic drug market set forth in Section I-A-1, *supra*. As relevant here, a generic drug may be either an "AB-rated" generic or an "authorized" generic. An AB-rated generic is commonly called simply a "generic drug." *See FDA List of Authorized Generic Drugs, supra* (cited **[**47]** by CAC ¶ 5 & n.7). AB-rated generics are deemed by the FDA to be bioequivalent to the brand name drug. UHS ¶ 47; *accord* FDA, *Orange Book Preface* (41st ed. Jan. 1, 2021), https://www.fda.gov/drugs/development-approval-process-drugs/orange-book-preface (detailing AB rating). Even so, AB-rated generics differ from the brand name drug in two ways. First, despite their bioequivalence, AB-rated generics "may have certain minor differences from the brand-name product, such as different inactive ingredients." *FDA List of Authorized Generic Drugs, supra*.

Second and most important, AB-rated generics are "developed and made by a company other than the company that makes the brand-name drug." *Id.* When a company enters a market with an AB-rated generic, the generic typically captures about 90% of the branded drug's sales within one year—and sells for about *15%* of the brand name drug's price. UHS ¶ 51; *accord* FTC, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions* at 8 (Jan. 2010) (finding same). ***HN10***[] Under the Hatch-Waxman Act, the first company that applies to produce an AB-rated generic (the "first filer") receives a "180-day period of exclusivity" during which "no other [non-AB-rated] generic can compete with the brand-name drug." **[**48]** *Federal Trade Commission ("FTC") v. Actavis, Inc., 570 U.S. 136, 143-44, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*.

An authorized generic ("AG"), by contrast, "is essentially a brand-name drug *produced by a brand manufacturer* but *marketed* under a generic label." *In re Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 380 (D. Mass. 2013)* (emphasis added). "Other than the fact that [an AG] does not have the brand name on its label, it is the exact same drug product as the branded product." *FDA List of Authorized Generic Drugs, supra*. Thus, unlike AB-rated generics, AGs are marketed and sold "either by the brand manufacturer itself" or "another company *with the brand company's permission*." *Id.* (emphasis added); UHS ¶ 61 (same).

Importantly here, it is far more common that a third party markets an AG (with the brand manufacturer's permission) than the brand manufacturer doing so itself. For instance, the FTC has found that "out of 119 AG launches from 2001 to 2008, *only one* was distributed by a brand drug company without generic marketing." *In re Intuniv Antitrust Litig. ("Intuniv"), 496 F. Supp. 3d 639, 671 (D. Mass. 2020)* (emphasis added) (citing FTC, *Authorized Generic Drugs: Short-Term Effects & Long-Term Impact* (2011) ("FTC 2011 AG Study")); *see also* CAC ¶ 87 n.36 (same study). Moreover, at least one court has credited research that "out of the 529 AG launches since 2009 . . . only two were distributed by a brand company without generic expertise." *Intuniv, 496 F. Supp. 3d at 671*. In short, it is rare for a brand manufacturer **[**49]** to market and sell its own AG. Brand manufacturers instead tend to license marketing/relabeling rights to a third party.

[*852] Regardless of who markets them, AGs and AB-rated generics compete. AGs in fact enjoy an opportunity for competition that other generics lack. That unique opportunity is an AG's ability to compete with an AB-rated generic that is protected by the Hatch-Waxman Act's 180-day period of exclusivity during which no other AB-rated generic can compete. AGs are thus the "only potential source of generic price competition during the first-to-file generic manufacturer's 180-day exclusivity period." CAC ¶ 99. Typically, this competition between an AG and a first-filer's AB-rated generic "reduc[es] the revenues generated by the first-filer's generic product by 40-52% during the 180-day exclusivity period." UHS ¶ 62 (citing FTC 2011 AG Study at iii). The competition also reduces generic prices by about 15%. CAC ¶ 99 (citing IMS Consulting, *Assessment of Authorized Generics in the U.S.* (2006), http://208.106.226.207/downloads/IMSAuthorizedGenericsReport 6-22-06.pdf). Drug purchasers benefit as a result.

In sum, AB-rated generics are manufactured and sold by generic drug manufacturers—and **[**50]** for about 15% of the brand name drug's price. AGs, by contrast, are often manufactured by the brand manufacturer itself because AGs are simply the brand name drug but relabeled. AGs are then marketed as a "generic" only with the brand manufacturer's permission (or, rarely, by the brand manufacturer itself). Lastly, when AB-rated generics and AGs compete during the first filer's 180-day exclusivity period, that competition lowers generic drug prices by about 15%.

2. Plaintiffs adequately allege that the Jazz-Hikma agreement contains an implicit "no-AG" agreement (CAC Counts 1 and 7; UHS Counts 1, 5, and 8).

With the above background in mind, the Court returns to the case at hand. The Court starts by analyzing the Jazz's settlement with Hikma (the "Jazz-Hikma agreement"). Plaintiffs argue that the Jazz-Hikma agreement contains an implicit "no-AG" agreement. Specifically, this alleged "no-AG" agreement is that Jazz will not sell an authorized generic of Xyrem for "at least the first six months that Hikma is eventually on the market" with the Hikma AG, which is Jazz's Xyrem under the label of Hikma AG. *E.g.*, CAC ¶ 221.

The parties do not dispute that if the Jazz-Hikma agreement is in fact **[**51]** a "no-AG" agreement, it warrants antitrust scrutiny under the Supreme Court's *Actavis* framework for reverse payments. *See, e.g., Impax Labs., Inc. v. FTC, 994 F.3d 484, 494 (5th Cir. 2021)* (holding same and collecting cases); Mot. at 13 (not disputing that no-AG agreements "may trigger scrutiny under *Actavis*"). ***HN11***[] A no-AG agreement "falls under *Actavis*'s rule because it may represent an unusual, unexplained reverse transfer of considerable value from the patentee to the alleged infringer and may therefore give rise to the inference that it is a payment to eliminate the risk of competition." *King Drug Co. of Florence v. Smithkline Beecham Corp., 791 F.3d 388, 394 (3d Cir. 2015)*. Indeed, as the leading antitrust treatise has explained, no-AG agreements "can in fact be more anticompetitive than a large cash payment for delay." Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles & Their Application* ¶ 2045 (updated May 2021).

Defendants argue, however, that "this is not a 'no-AG' case." *Id.* For support, Defendants note that the Jazz-Hikma agreement "explicitly reserves Jazz's right to launch a Jazz AG." *Id.*

The Court addresses this defense of the Jazz-Hikma agreement in two parts. To start, the Court summarizes the leadup to **[*853]** the Jazz-Hikma agreement and the agreement's alleged "no-AG" effect. The **[**52]** Court then analyzes what allegedly evidences and incentivizes the no-AG agreement: at least three alleged reverse payments from Jazz to Hikma. These reverse payments suggest that Jazz "has serious doubts about [its] patent[s]' survival" and "in turn[] suggests that the payment[s]' objective is to maintain supracompetitive prices to be shared among [Jazz] and [Hikma] rather than face what might have been a competitive market." *Actavis, 570 U.S. at 157*.

a. Alleged background and effect of Jazz-Hikma agreement

The Court summarizes (i) Hikma's allegedly impending entry into the sodium oxybate market in Spring 2017; and (ii) how the Jazz-Hikma agreement replaced Hikma's impending manufacture of a new sodium oxybate generic with Hikma's mere resale of Jazz's Xyrem under Hikma's label. The alleged effect of this Jazz-Hikma agreement was to perpetuate Jazz's Xyrem monopoly. *See, e.g.*, UHS ¶¶ 172-85 (alleging harms).

i. Hikma's impending entry into Xyrem market in Spring 2017

Plaintiffs allege that in Spring 2017, Hikma's entry into Jazz's market was impending. CAC ¶ 209; UHS ¶ 161. Specifically, on January 17, 2017, the FDA granted Hikma final approval of its ANDA: Hikma's application to "manufacture, market, and sell **[**53]** an AB-rated generic version of Xyrem." CAC ¶¶ 148, 278.

This final approval was the culmination of nearly seven years of battle. Hikma's predecessor company, Roxane, had filed Hikma's ANDA in July 2010. *Id.* at ¶ 148. Jazz had fought back. Among other things, Jazz had (1) sued Roxane/Hikma nine times for patent infringement; and (2) received the FDA's reluctant permission to limit the distribution of sodium oxybate oral solutions (*i.e.*, Xyrem and any generics) to a single pharmacy. *See* Section I-A-1 and 2, *supra* (detailing lawsuits and alleged abuse of FDA's REMS process). Yet by January 17, 2017, Jazz's Xyrem monopoly was allegedly at risk in two ways.

First, Jazz's Xyrem patents appeared vulnerable. Starting in July 2016—and continuing through March 2017—the Patent Trial and Appeal Board invalidated many Xyrem patents during *inter partes* review. CAC ¶ 197. Meanwhile, other patent litigation was still proceeding. In particular, "Hikma's challenge to Jazz's remaining Xyrem patents was set for trial only a few weeks away." CAC ¶ 209.

Second, on January 17, 2017, Hikma had received FDA approval to circumvent Jazz's single-pharmacy REMS. CAC ¶¶ 208-09. In issuing this approval, the FDA reiterated **[**54]** generic manufacturers' allegations that "Jazz ha[d] engaged in a strategy that 'entails serial attempts to impose unreasonable contractual terms and conditions on the ANDA [filers] while concurrently issuing self-serving statements to FDA and the ANDA [filers] about Jazz's commitment to the process." *Id.* at 207 (quoting Sharp Memo at 11). The FDA then found that the "burden of creating a single, shared system outweighs the benefits." Sharp Memo at 13 (capitalization omitted). Among the burdens were Jazz's "obvious incentives" "to delay generic competition [] by failing to agree on [single, shared system] REMS terms." *Id.* at 17. The FDA therefore concluded that allowing Hikma to proceed with its own drug distribution system would "remove a barrier to generic products coming to market." *Id.*

In sum, by Spring 2017, Hikma's launch of an AB-rated generic was allegedly impending. Hikma had received FDA approval of its ANDA and alternative distribution strategy that circumvented Jazz's single-pharmacy REMS. Moreover, trial on Xyrem's **[*854]** remaining patents was "weeks away." CAC ¶ 209. Thus, Hikma could either launch (A) after potentially prevailing at trial; or (B) before a final litigation outcome. **[**55]** *See generally, e.g., In re Lipitor Antitrust Litig., 868 F.3d 231, 241 (3d Cir. 2017)* (describing generic manufacturer's option to launch "at risk" during ongoing litigation). Either way, Hikma's "manufacture, market[ing], and s[ale] of an AB-rated generic version of Xyrem" did not seem far off. CAC ¶ 126.

An alleged chain of events would follow Hikma's launch of an AB-rated generic. Jazz would likely launch an AG to compete with Hikma during Hikma's 180-day exclusivity period. CAC ¶ 210. Then after that six-month period, other generic manufacturers would presumably enter the market. CAC ¶¶ 183, 195-96 (listing other ANDA filers and two settlements). In fact, as of January 2017, six ANDA filers allegedly were maintaining their patent cases against Jazz. *Id.* The expected outcome of all this competition would be the price of sodium oxybate oral solution—a treatment for narcolepsy—dropping about 85%. *See* Section III-A-1, *supra* (summarizing average price drop upon entry of AB-rated generic).

ii. Jazz-Hikma agreement delays Hikma's entry; Hikma instead resells Jazz's sodium oxybate as Hikma's AG

On April 5, 2017, Hikma and Jazz settled their patent litigation by way of an allegedly unlawful reverse settlement, which Plaintiffs call the "Jazz-Hikma agreement." **[**56]** UHS ¶¶ 163-64. As a result, Hikma did not "manufacture, market, [or] sell an AB-rated generic version of Xyrem." CAC ¶ 148. Nor has Hikma done so to date.

Plaintiffs allege that the Jazz-Hikma agreement was, in part, memorialized in three interdependent documents executed contemporaneously: (1) a "Settlement Agreement"; (2) a "License Agreement"; and (3) and an "AG Agreement." UHS ¶ 164. The Settlement Agreement between Jazz and Hikma was partially disclosed in Jazz's April 5, 2017 Form 8-K. CAC ¶ 215 (citing Jazz Pharmaceuticals plc, Form 8-K at 2 (Apr. 5, 2017)). Jazz and Hikma allegedly agreed to keep the other two documents secret. UHS ¶ 164. In response to Plaintiffs' instant lawsuit, however, Defendants have attached the Hikma License Agreement and Hikma AG Agreement to the instant motion to dismiss.

Under this "Jazz-Hikma agreement," Jazz granted Hikma the right to sell an authorized generic version of Xyrem for an initial term of six months starting on January 1, 2023. *Id.* Specifically, Hikma agreed to buy Xyrem *from Jazz*—through *Jazz's* REMS—and resell that Xyrem under the label of a Hikma AG. UHS ¶ 167. Sales of this Hikma AG are also distributed through Xyrem's single pharmacy, **[**57]** Express Scripts. *Id.* In fact, Plaintiffs allege that Hikma would never take delivery of its AG from Jazz. *Id.*

In short, on April 5, 2017, after nearly seven years of trying to bring an AB-rated generic to market, Hikma agreed to buy and relabel Xyrem rather than manufacture a generic version of Xyrem. By agreeing to this, Hikma delayed its allegedly impending entry into Jazz's market over six years until at least July 1, 2023 (*i.e.*, the end of the six month term for Hikma's AG). CAC ¶ 214. That impending entry had been supported by (1) the possible vulnerability of Xyrem's patents; and (2) the FDA approving Hikma's plan to distribute through a pharmacy other than Express Scripts. *See* Section III-A-2-a-i, *supra* (detailing same).

In Plaintiffs' view, Hikma would not have agreed to Jazz's plan without a compelling economic reason. CAC ¶ 218. The key reason alleged here is that Jazz made a "no-AG" commitment to Hikma. That is, **[*855]** during at least the first 180 days that Hikma AG would be on the market, Jazz allegedly promised that Jazz would not license any other company to market an AG. CAC ¶ 215. The Hikma AG Agreement attached to Defendants' motion to dismiss confirms Jazz's commitment. ***[**58]*** *See* Hikma AG Agreement § 2.2, ECF No. 110-14 (Jazz promising not to "grant[] a license or sublicense to a Third Party to market an Authorized Generic" for approximately six months). Jazz would instead be content to (1) supply the Xyrem that Hikma would advertise and relabel as Hikma AG; and (2) receive an escalating royalty on sales, as analyzed in III-A-1-b-ii, *infra* (analyzing royalty structure).

With no competition from another AG for at least 180 days, Plaintiffs allege that Hikma could sell its AG at a supra-competitive price—and kick back some supra-competitive profits to Jazz. CAC ¶¶ 215, 239. In fact, Plaintiffs estimate Hikma's sales using the typical market share captured by AGs within 180 days of launch. The resulting estimate is that Hikma AG will generate over $480 million in sales between January 1, 2023 and July 1, 2023 alone. *See* CAC ¶ 237 (estimating $480 million to $540 million); UHS ¶ 181 (estimating $705 million).

If proven, this alleged "no-AG agreement transfers the profits the patentee would have made from its authorized generic to the settling generic." *King Drug, 791 F.3d at 405*. The no-AG agreement thus "may represent an unusual, unexplained transfer of value from the patent holder to **[**59]** the alleged infringer and may therefore give rise to the inference that it is a payment to eliminate the risk of competition." *King Drug, 791 F.3d at 394*.

In fact, as the leading antitrust treatise has explained, no-AG agreements "can in fact be more anticompetitive than a large cash payment for delay." Areeda & Hovenkamp, *supra*, ¶ 2045. The reason is that no-AG agreements replace "a generic duopoly" with a "a generic monopoly," which results in "higher prices." *King Drug, 791 F.3d at 394*. Here, the Jazz-Hikma agreement ensures that Hikma AG is the only "generic" for 180 days. Furthermore, Hikma AG is simply relabeled Xyrem manufactured by Jazz. The no-AG agreement thus allows Jazz to maintain its monopoly in exchange for sharing some monopolistic profits with Hikma. ***HN12***[] Put simply, "until generic *production* commences," no-AG agreements are "simply naked restraints on trade." Areeda & Hovenkamp, *supra*, ¶ 2045 & nn.186-87.

b. Alleged reverse payments from Jazz to Hikma

In short, the alleged no-AG agreement "uses valuable licensing in such a way as to induce a patent challenger's delay." *King Drug, 791 F.3d at 406*. Yet as the parties note, Jazz's alleged "no-AG" agreement had an explicit caveat. Jazz's written agreement merely promised not to "grant[] a license or sublicense to a Third Party to market an Authorized Generic." Hikma AG Agreement **[**60]** § 2.2, ECF No. 110-14. Jazz still reserved its right to market its *own* Jazz AG. *See* Hikma License Agreement §§ 1.14, 2.4, ECF No. 111-2 (expressly retaining rights to

"Market," defined as "use, advertise, market, sell, or offer to sell"). That is, at least under Jazz's written agreements, there theoretically could be two AGs between January 1, 2023 and July 1, 2023: Hikma AG and Jazz AG. Defendants thus argue that Plaintiffs fail to plausibly allege the existence of a no-AG agreement between Jazz and Hikma. Mot. at 14.

The Court disagrees. Plaintiffs plausibly allege the existence of an implicit or *de facto* no-AG agreement between Jazz and Hikma. As circumstantial evidence of an implicit no-AG agreement, Plaintiffs rely on explicit parts of the Jazz-Hikma agreement. **[*856]** These parts of the Jazz-Hikma agreement allegedly (1) disincentivize Jazz from marketing its own AG; and (2) further compensate Hikma in order "to maintain supracompetitive prices to be shared among the patentee [here, Jazz] and the challenger [here, Hikma] rather than face what might have been a competitive market." *Actavis, 570 U.S. at 157*.

Plaintiffs specifically identify three parts of the Jazz-Hikma agreement that disincentivize a Jazz AG and **[**61]** convey value to Hikma. The first is Jazz's promise not to license Jazz's AG through any third party for six months. The second is the royalty structure, which escalates kickbacks from Hikma to Jazz to undermine Jazz's economic interest in competing to sell Jazz's own AG. The third is the Jazz-Hikma agreement's "acceleration clause," a type of most-favored-entry clause that allows Hikma to sell AG immediately if (1) a generic version of Xyrem were to market itself without Jazz's permission; or (2) anyone were to successfully invalidate or render unenforceable Xyrem's unexpired patent claims. *See* Hikma AG Agreement § 2.8, ECF No. 110-14 (acceleration provisions). In Plaintiffs' view, the acceleration clause deters potential generic entrants by triggering competition if they actually enter.

Together, these parts of the Jazz-Hikma agreement were allegedly "designed to, and do[] have, the effect that during at least the first six months of entry (before subsequent generics were allocated a slice of the market in their own separate pay-for-delay agreements, as discussed below [in Section III-A-2]), the Hikma AG would be the only authorized generic." CAC ¶ 221. The alleged estimated value **[**62]** to Hikma of the Jazz-Hikma agreement is over $480 million just in the first six months after Hikma launches its AG (which is relabeled Xyrem made by Jazz). CAC ¶ 237 (estimating $480 million to $540 million); UHS ¶ 181 (estimating $705 million). Jazz's market capitalization also jumped by about $785 million after the Jazz-Hikma agreement was partially disclosed on April 6, 2017—a jump that Plaintiffs allege is attributable to investors' expectations that Xyrem would face reduced generic competition. UHS ¶ 185; CAC ¶ 246. Ultimately, in exchange for Hikma delaying its AB-rated generic, Jazz has allowed Hikma to relabel and sell Jazz Xyrem as Hikma AG.

Below, the Court details the three parts of the Jazz-Hikma agreement that disincentivize a Jazz AG and convey value to Hikma.

i. Reverse payment 1 of 3: Delay on third party licensing

First, Jazz promised not to license its AG through any other third party for Hikma's first 180 days selling Hikma AG—which, as stated, would simply be Jazz Xyrem but relabeled. This no *third-party* licensing period spans at least January 1, 2023 and July 1, 2023. CAC ¶ 6; *accord, e.g.*, Hikma License Agreement § 2.4 (expressly noting that Jazz's rights "specifically **[**63]** exclud[e] granting a license or sublicense to a Third Party for an Authorized Generic" for the "Initial Sales Period"); Hikma AG Agreement § 1.27 (defining Initial Sales Period as six-months from AG Launch Date). Jazz reserved the theoretical option of marketing and labeling an AG itself. Yet, as Plaintiffs plausibly allege, it is highly unlikely that Jazz would launch its own AG. Evidencing this *de facto* no-AG agreement are (1) Jazz's statements on its in-house manufacturing capacity; and (2) industry custom.

Jazz's statements suggest that its in-house manufacturing capacity is limited. Consequently, products that are manufactured by Jazz—including Xyrem, Hikma AG, and the Later Generic Defendants' AGs—must largely share the same limited **[*857]** output of sodium oxybate oral solution. *See* Section III-A-3, *infra* (detailing Jazz's licensing AGs to Later Generic Defendants). Statements to this effect are in Jazz's annual report (SEC Form 10-K) and the Jazz-Hikma AG Agreement. Specifically:

• Jazz's latest annual report shows that Jazz currently does not sell any AGs. Rather, "Jazz currently only sells branded (commercialized) products in the United States." CAC ¶ 221 n.67 (citing Jazz Pharmaceuticals **[**64]** plc, 2020 Annual Report (Form 10-K) at 6-11 (Feb 23, 2021)). As the FTC has found, "if [a] brand company does not market generics in the United States," a commitment from the brand manufacturer not to use a third party to distribute an authorized generic for a period of time . . . could have the same effect as an *explicit* no-AG agreement." FTC, *Overview of Agreements Filed in FY 2016: A Report by the Bureau of Competition* at 2 (May 2019) (emphasis added) ("2019 FTC Report").

• Jazz's annual report also states that Jazz's "ability to develop and supply products in a *timely and competitive* manner *depends primarily on third party suppliers* being able to meet our ongoing commercial and clinical trial needs for [active pharmaceutical ingredient], other raw materials, packaging materials and finished products." CAC ¶ 221 n.67 (quoting Annual Report at 16). Thus, by Jazz's own admission, Jazz would need to "depend[] primarily on third party suppliers" to develop and supply a new product such as a generic version of Xyrem. *Id.* Supplying an AG in-house would not be "timely and competitive." *Id.*

• The Jazz-Hikma AG Agreement further evinces Jazz's manufacturing constraints. Jazz and Hikma explicitly **[**65]** planned for the possibility of a supply shortage. Hikma AG Agreement § 3.3 contains a provision titled "Allocation if Supply Shortage." The provision allocates sodium oxybate between Jazz and Hikma in the event of "a shortage of any materials" or "insufficient [Drug Enforcement Administration] quota to Manufacture [Hikma]'s requirements for the [Hikma] Authorized Generic." *Id.*

Given these documents, it is plausible that Jazz cannot manufacture enough sodium oxybate to supply Xyrem, Hikma AG, *and* a theoretical Jazz AG—let alone those three labels *plus* the three additional AGs that Jazz will begin to supply for Amneal, Par, and Lupin on July 1, 2023. *See* Section III-A-3, *infra* (detailing Jazz's settlements with Later Generic Defendants). In other words, Jazz's statements suggest that Jazz only manufactures enough for its Xyrem label.

Industry custom confirms that Jazz likely faces manufacturing constraints. It is not customary in the pharmaceutical industry for a brand manufacturer (such as Jazz) to launch its own AG. CAC ¶¶ 87, 110, 221 n.67 (citing FTC studies). Indeed, the FTC has found that "[t]he *most common* form of possible compensation" in settlements between brand and generic manufacturers **[**66]** "is a commitment from the brand manufacturer *not to use a third party* to distribute an authorized generic for a period of time, such as during first-filer exclusivity." 2019 FTC Report at 2. These commitments often "have the same effect as an explicit no-AG commitment." *Id.*; *see* CAC ¶ 110 (citing same). Specifically, the FTC has found that "out of 119 AG launches from 2001 to 2008, *only one* was distributed by a brand drug company without generic marketing." *In re Intuniv Antitrust Litig. ("Intuniv"), 496 F. Supp. 3d 639, 671 (D. Mass. 2020)* (emphasis added) (citing FTC 2011 AG Study); **[*858]** *see also* CAC ¶ 87 n.36 (citing FTC 2011 AG Study). Moreover, at least one court has credited research that "out of the 529 AG launches since 2009 . . . only two were distributed by a brand company without generic expertise." *Intuniv, 496 F. Supp. 3d at 671*. Thus, it is at least plausible that Jazz—like almost all other brand drug companies—would not launch its own AG. All told, Plaintiffs plausibly allege that Jazz's promise to not license Jazz's AG through a third party for six months functioned to delay *any* Jazz AG for six months.

Defendants also fail to show that Jazz has the marketing expertise or economic incentive to sell an AG. Empirically, brand name manufacturers almost never launch their own AG. *See* *Intuniv, 496 F. Supp. 3d at 671* (citing **[**67]** FTC 2011 AG Study and other research). Instead, brand name manufacturers generally rely on companies that specialize in generic drugs to market an AG. *Id.* Here, at the motion to dismiss stage, it is plausible that Jazz would follow prevailing industry practice and not launch a Jazz AG.

In sum, it is plausible that Jazz's agreement to delay licensing Jazz AG through a third party delayed Jazz's ability to compete with Hikma and the other Generic Defendants. That delay would give Hikma at least a 180-day monopoly on the only Xyrem "generic"—specifically, an authorized generic manufactured by Jazz, but marketed by Hikma. The result will be "simply a horizontal market division" between Hikma (which will sell Jazz's Xyrem marketed as Hikma AG) and Jazz (which will sell Xyrem but no Jazz AG). Areeda & Hovenkamp, *supra*, ¶ 2045. This plausible no-AG agreement would constitute a transfer of value from Jazz to Hikma. *See, e.g.,* *Impax Labs.,* 994 F.3d at 494 (holding same and collecting cases); Areeda & Hovenkamp, *supra*, ¶ 2045 (arguing that no-AG agreements "can in fact be more anticompetitive than a large cash payment for delay").

ii. Reverse payment 2 of 3: Escalating royalty payments

Second, Plaintiffs allege escalating royalty payments from Hikma to Jazz that undermine Jazz's economic **[**68]** interest in selling its own AG. For support, Plaintiffs cite the royalty structure in the Hikma AG Agreement, one of the three contracts that partially constitute the Jazz-Hikma agreement. *See* Opp'n at 10-11 (citing Hikma AG Agreement § 5.2.1); *see also, e.g.*, UHS ¶ 166 (alleging that Hikma agreed to pay a "meaningful royalty" that increases with sales); CAC ¶ 231 (same). Under this AG Agreement, Hikma will pay increasingly higher percentages of revenue to Jazz as Hikma's market share increases. Specifically, Hikma will pay (1) a [TEXT REDACTED BY THE COURT] royalty on sales up to [TEXT REDACTED BY THE COURT] market share; (2)a [TEXT REDACTED BY THE COURT] royalty on incremental sales up to [TEXT REDACTED BY THE COURT] market share; (3) a [TEXT REDACTED BY THE COURT] royalty on incremental sales up to [TEXT REDACTED BY THE COURT] market share; (4) a [TEXT REDACTED BY THE COURT] royalty on incremental sales up to [TEXT REDACTED BY THE COURT] market share; (5) and a [TEXT REDACTED BY THE COURT] royalty on incremental sales up to a [TEXT REDACTED BY THE COURT] market share. Hikma AG Agreement § 5.2.1.

In turn, Hikma's market share is defined as Hikma's percentage of total units sold by **[**69]** Jazz and Hikma. *Id.* ¶¶ 1.53, 1.55, 5.2.1. Hikma takes "market share" as it sells more bottles of Hikma AG. Conversely, as Jazz sells bottles of its branded product (*i.e.*, Xyrem) or a theoretical Jazz AG, Hikma's market share and incremental royalty rate decrease. In sum, the more AG that Hikma sells, the more Hikma pays Jazz. All the while, Hikma AG is merely relabeled Xyrem that is manufactured by Jazz.

Plaintiffs allege that this royalty structure discourages Jazz from launching an AG in three ways. First, if Jazz were to **[*859]** launch its own AG, the resulting price competition would lower prices for all sodium oxybate products—branded and generic. *See, e.g.*, CAC ¶¶ 96-98 (citing, *e.g.*, Ernst R. Berndt et al., *Authorized Generic Drugs, Price Competition, and Consumers' Welfare*, 26 Health Affairs 790, 796 (2007)). Second, Jazz's competing AG would reduce Hikma's market share and selling price. In turn, that competition from Jazz would reduce Hikma's incremental royalty rate, Hikma's sales, and Hikma's royalty payments to Jazz. *See, e.g.*, UHS ¶¶ 61-63 (citing, *e.g.*, FTC 2011 AG Study). Third, a Jazz AG would cannibalize sales of Jazz's more profitable Xyrem-branded product. *See, e.g.*, CAC **[**70]** ¶ 83 (alleging that generics are "50% to 80% (or more) less expensive than their brand counterparts"). In fact, the FTC's 2011 AG Study found that within six months after the launch of a generic, the market share of the branded drug is "less than 20 percent." FTC2011 AG Study at 67; *see* CAC ¶ 91 (quoting same).

The Court agrees that Plaintiffs' allegations as to escalating royalties are plausible. Supporting this conclusion are findings by other courts and the FTC. ***HN13***[] Courts, for their part, have held that royalty payments may be "effectively a kickback." *FWK Holdings LLC v. Shire PLC, No. 16-CV-12653-ADB, 2017 U.S. Dist. LEXIS 224737, 2017 WL 11449668, at *8 (D. Mass. Oct. 10, 2017)*. In *FWK Holdings*, for instance, the court found plausible the allegation that "royalty payment[s] . . . both incentivized [the brand name manufacturer] not to launch an AG and evidence[d] the substantial value [the generic manufacturer] secured through the no-AG agreement." *Id.* Similarly, in *Intuniv*, the court held at summary judgment that royalty payments by a generic manufacturer could "effectively incentivize [the brand name manufacturer] to stay out of the generic market." *496 F. Supp. 3d at 670*. The *FWK Holdings* and *Intuiniv* courts thus rejected the argument that "a royalty payment cannot form the basis of a reverse payment claim." *2017 U.S. Dist. LEXIS 224737, [WL] at *9*; *accord* *Intuniv, 496 F. Supp. 3d at 670* (rejecting **[**71]** argument that "there is no evidence that the royalty provision acted as an enforcement mechanism for an implicit no-AG agreement"). That failed argument is the same argument Jazz makes against Plaintiffs' royalty allegations here. *See* Reply at 8 (arguing that "royalties are not 'reverse payments'").

HN14[] The FTC, for its part, has found that a "common form of possible compensation" in reverse settlements is a "royalty structure" like the one here. 2019 FTCReport at 2. Specifically, a royalty structure "may achieve the same effect as an explicit no-AG commitment." *Id.* This *de facto* no-AG agreement may be achieved where a result of the "brand [manufacturer] launch[ing] an authorized generic" would be that "the generic [company]'s obligation to pay royalties is reduced." *Id.*

Here too, if Jazz were to launch its own AG, Hikma's royalty obligations to Jazz would decrease. *See, e.g.*, UHS ¶¶ 61-63 (summarizing allegations). The reason, as discussed above, is the following chain of events plausibly triggered by a Jazz AG. A Jazz AG would plausibly (1) take market share from Hikma AG, which is merely relabeled Jazz Xyrem; and (2) compete on price with Hikma AG. Lowering Hikma AG market share would **[**72]** reduce Hikma's incremental royalty rate. Price competition would lower the prices of Hikma AG, the Jazz AG, and Xyrem—thereby potentially reducing the revenue of all three products. Together, lower incremental royalty rate and lower Hikma AG revenue would reduce Hikma's royalty payments. *Id.*

In sum, Plaintiffs plausibly allege that the Jazz-Hikma agreement's escalating royalty structure incentivized Jazz to delay its own AG.

[*860] iii. Reverse payment 3 of 3: Acceleration clause

Third, Plaintiffs allege that the Jazz-Hikma agreement contains a type of most-favored-entry clause called an "acceleration clause" or "poison pill," which hinders entry by later generics. *See, e.g.*, CAC ¶ 120, 225; UHS ¶ 177 (describing Hikma acceleration clause). The acceleration clause allows Hikma to immediately launch its AG if (1) a generic version of Xyrem were to market itself without Jazz's permission; or (2) anyone were to successfully invalidate or render unenforceable Xyrem's unexpired patent claims. CAC ¶ 225 (quoting alleged clause); *accord* Hikma AG Agreement § 2.8 (acceleration clause). Otherwise, the Jazz-Hikma agreement provides that Hikma may launch Hikma AG, which is relabeled Jazz Xyrem, on January **[**73]** 1, 2023. Hikma AG Agreement § 1.5.

This acceleration clause adds value to Hikma in two ways. First, the clause plausibly disincentivizes other generic manufacturers from litigating their patent claims and coming to market as soon as possible. *Id.* The clause has this anticompetitive harm because, if another generic manufacturer successfully enters the market, that manufacturer immediately faces competition from Jazz's Xyrem and Hikma AG. Competition reduces a prospective entrant's expected profits. *E.g., Musical Instruments, 798 F.3d at 1193 n.8*. The prospective entrant is less likely to enter as a result.

For instance, as the head of one of the world's largest generic manufacturers testified to Congress on March 31, 2009, acceleration clauses are "the primary anticompetitive aspects of settlements." Protecting Consumer Access to Generic Drugs Act of 2009: Hearing on H.R. 1706 Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. on Energy & Commerce, 111th Cong., at 228 (Mar. 31, 2009) (statement of Bernard Sherman, CEO, Apotex, Inc.; CAC ¶ 123 (quoting same). Specifically, the CEO of Apotex testified:

> At first blush, the acceleration of [a generic's] entry into the market . . . may sound like a good **[**74]** outcome for consumers because it expedited access to the generic. However, *no subsequent filer is going to take up the patent fight knowing it will get nothing if it wins*. Consumers are the biggest losers under this system. . . . Weak patents that should be knocked out will remain in place, unduly blocking consumer access to generics. . . . And settlements that delay consumer access to the generic will, in turn, increase.

111th Cong., at 218 (emphasis changed); CAC ¶ 123 (quoting same). In short, acceleration clauses may "very substantially diminish[], if not altogether eliminate[], the incentive for later generic filers to enter" before the scheduled entry date protected by the clause. *In re Loestrin 24 Fe Antitrust Litig. ("Loestrin"), 261 F. Supp. 3d 307, 333 (D.R.I. 2017)* (crediting allegation at motion to dismiss); *In re Loestrin 24 Fe Antitrust Litig. ("Loestrin"), 433 F. Supp. 3d 274, 321 (D.R.I. 2019)* (same at summary judgment).

Second, Hikma's acceleration clause—coupled with acceleration clauses in each of Jazz's agreements with the Later Generic Defendants (*see* Section III-A-3, *infra*)—plausibly operates as a cartel enforcement mechanism. *See* Hikma AG Agreement § 2.8 (acceleration clause); Par AG Agreement § 2.7 (same); Lupin AG Agreement § 2.7.1, ECF No. 110-18 (same); Amneal AG Agreement § 2.7.1, ECF No. 110-20 (same).

The acceleration clauses so operate **[**75]** by creating a "powerful threat": the "threat of reversion to competitive behavior." Robert C. Marshall & Leslie M. Marx, *The Economics of Collusion: Cartels and Bidding* ***[*861]*** *Rings* at 136 (2012). As explained by economists Robert Marshall and Leslie Marx, reversions to competitive behavior deny firms collusive profits and are thus well-documented as "punishment for deviations from collusion." *Id.* (citing Congressional testimony and economic studies).

Here, the acceleration clauses allow Hikma, Amneal, Par, and Lupin to revert to competitive behavior (*i.e.*, quickly market an AG) if *any* generic manufacturer defects from the alleged scheme to delay and restrain generic output. These acceleration clauses allegedly all function like the Hikma clause just described. CAC ¶¶ 225, 232, 253, 260, 267; UHS ¶¶ 177, 188, 191, 196, 203 (describing acceleration clauses). Specifically, each Later Generic Defendant contractually received a default launch date of July 1, 2023 for their AGs. CAC ¶¶ 250, 257, 264. That default launch date coincides with the end of Hikma's exclusive licensing period for Hikma's AG. However, if a third party sells a generic without Jazz's permission before July 1, 2023, Hikma **[**76]** and each Later Generic Defendant may immediately start selling its AG to compete with that unauthorized entrant. *See* Par AG Agreement § 2.7 (acceleration provision); Lupin AG Agreement § 2.7.1 (same); Amneal AG Agreement § 2.7.1 (same). Consequently, any unauthorized generic entrant faces the unprofitable prospect of immediately competing with Hikma, Amneal, Par, and Lupin.

All told, the Hikma acceleration clause has plausibly deterred generic entry. Indeed, this conclusion tracks research on the empirical result of acceleration clauses in the pharmaceutical industry. Health economists Thomas G. McGuire and Keith M. Drake have found that acceleration clauses have never promoted earlier generic entry where, as here, the first-filer (Hikma) has retained its 180-day period of exclusivity. Keith M. Drake & Thomas G. McGuire, *Generic Entry Before the Agreed-Upon Date in Pharmaceutical Patent Settlements*, 16 J. Competition L. & Econ. 188, 188 (2020) (available on Lexis+); *see* CAC ¶ 124 (citing same); *see generally* *Actavis, 570 U.S. at 144* (summarizing 180-day period of exclusivity under Hatch-Waxman Act). Specifically, "[a]mong the 54 cases in which the first filer retained sole rights to the 180-day exclusivity period, there were no cases of early generic **[**77]** entry. In other words, there were no cases in which the first-filer's entry was accelerated, and there were no cases in which a different generic entered before the entry date set in the first-filer's settlement." Drake & McGuire, *supra*, at 194.

HN15[] Accordingly, like other courts analyzing acceleration clauses at the motion to dismiss stage, the Court holds that acceleration clauses plausibly cause anticompetitive harm as part of an alleged reverse payment scheme. *See, e.g.,* *In re Sensipar Cinacalcet Hydrochloride Tablets Antitrust Litig., No. 19-CV-1460-LPS, 2020 U.S. Dist. LEXIS 223786, 2020 WL 7022364, at *6 (D. Del. Nov. 30, 2020)* (denying motion to dismiss because "acceleration provision [] could be proven to constitute value transferred"); *Loestrin, 261 F. Supp. 3d at 334* (same because acceleration clause is "cognizable as a component of a complex settlement agreement"); *Staley v. Gilead Scis., Inc., 446 F. Supp. 3d 578, 610 (N.D. Cal. 2020)* (same because acceleration clause, also known as a most favored entry clause, limits "entry, *i.e.*, when competition is allowed into a market"). Indeed, several courts have denied *summary judgment* against acceleration clause allegations despite "various [assertions of] broad procompetitive justifications" for such clauses. *Loestrin, 433 F. Supp. 3d at 321*; *see, e.g.,* *In re Namenda Indirect Purchaser Antitrust Litig., No. 15-CV-6549-CM, 2021 U.S. Dist. LEXIS 110081, 2021 WL 2403727, at *26, *29 (S.D.N.Y. June 11, 2021)* (denying summary judgment based on "potential **[*862]** anticompetitive impact from [] acceleration clause").

Defendants respond that Jazz's acceleration clauses failed to actually deter generic entry. Reply at **[**78]** 8-9. For support, Defendants note that after Jazz and Hikma settled, between nine to 18 months passed before the Later Generic Defendants settled with Jazz. *Id.* at 9 (citing CAC ¶¶ 249, 263; UHS ¶¶ 190, 199). Thus, in Defendants' view, the Later Generic Defendants should have settled sooner if Jazz's acceleration clauses in fact deterred generic entry.

Defendants' argument lacks merit for three reasons. First, Plaintiffs allege—and Defendants do not dispute—that "several other generics [] abandoned their challenges to the Xyrem patents" after the Hikma settlement. CAC ¶ 247 & n.68 (citing settlements with Wockhardt Bio AG, Ranbaxy Laboratories Limited, and Ranbaxy Inc.). These generic manufacturers plausibly abandoned their patent challenges because the acceleration clauses "very substantially diminished, if not altogether eliminated," the expected payoff from entering the Xyrem market with an AB-rated generic. Loestrin, 261 F. Supp. 3d at 333 (crediting same reasoning). Thus, even if Jazz's acceleration clauses failed to *completely* deter all potential generics, the clauses at least plausibly deterred some generics.

Second, Defendants cite only one authority for the proposition that continued litigation requires dismissal **[**79]** of acceleration clause allegations—and that authority is inapposite. Mot. at 26. Specifically, Defendants cite *In re Actos End Payor Antitrust Litig., No. 13-CV-9244-RA, 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at *15 (S.D.N.Y. Sept. 22, 2015)*, *aff'd in part, vacated in part*, 848 F.3d 89 (2d Cir. 2017). There, the district court relied on at least two grounds absent here. The first ground was that "[s]ignificantly, [p]laintiffs d[id] not allege that the [g]eneric [d]efendants shared in the [brand name manufacturer]'s monopoly profits by charging supracompetitive prices when they entered the market." *Actos, 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at *15*. Here, by contrast, Plaintiffs allege in detail that Hikma—along with the other Generic Defendants—"shar[ed] supra-competitive pricing of Xyrem products." CAC ¶ 259; *see, e.g., id.* ¶¶ 190 (graph of allegedly supra-competitive pricing history), 273-75 (quoting Jazz CEO discussing elevated prices, "very limited volumes," and successfully avoiding "a generic free for all").

Actos's other inapposite ground for dismissal was that, as of 2015, "no other court ha[d] found an acceleration clause to constitute a reverse payment." *Actos, 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at *16*. "In fact," the *Actos* court reasoned, "acceleration clauses were pleaded as an alleged 'payment' in *In re Loestrin*, but th[at] [c]ourt summarily rejected plaintiffs' **[**80]** theory." *Id. n.13* (citing *In re Loestrin 24 Fe Antitrust Litig., 45 F. Supp. 3d 180, 191 (D.R.I. 2014)*, *vacated and remanded*, 814 F.3d 538 (1st Cir. 2016)). Since 2015, however, many courts have denied motions to dismiss or summary judgment because "acceleration provision[s] [] could be proven to constitute value transferred" in a reverse payment scheme. *In re Sensipar, 2020 U.S. Dist. LEXIS 223786, 2020 WL 7022364, at *6*; *see, e.g., In re Namenda Indirect Purchaser Antitrust Litig., 2021 U.S. Dist. LEXIS 110081, 2021 WL 2403727, at *26, *29* (denying summary judgment based on "potential anticompetitive impact from [] acceleration clause"). For instance, the *Loestrin* case on which the *Actos* court relied was vacated and remanded by the First Circuit. *See In re Loestrin 24 Fe Antitrust Litig., 814 F.3d 538 (1st Cir. 2016)*. Then, both on remand and at summary judgment, the *Loestrin* court which had erroneously dismissed the acceleration clause allegations allowed them to proceed to trial. *See In re Loestrin 24 Fe Antitrust Litig., 261 F. Supp. 3d* ***[*863]*** *at 334* (denying motion to dismiss on remand); *In re Loestrin 24 Fe Antitrust Litig., 433 F. Supp. 3d at 321* (denying summary judgment). Thus, both the factual and legal premises of *Actos* are inapplicable here. Jazz's acceleration clauses plausibly convey value as part of an alleged reverse payment scheme.

Lastly, Defendants' argument threatens to create an antitrust loophole at the motion to dismiss stage. Under Defendants' reasoning, a generic manufacturer need only let a lawsuit sit idle for several months to defeat any allegation that an acceleration clause deterred generic entry. Similarly, a generic manufacturer **[**81]** could litigate feebly so that it intentionally fails to trigger any acceleration clause. *Cf., e.g., Miller & Lux v. E. Side Canal & Irrigation Co., 211 U.S. 293, 303, 29 S. Ct. 111, 53 L. Ed. 189 (1908)* (identifying and criticizing a collusive lawsuit); *IP and Antitrust* § 3.03 & n.155 (same in patent context). Thus, the time lapsed on a lawsuit should be insufficient to show whether an acceleration clause deterred the vigorous prosecution of that lawsuit.

In sum, Plaintiffs have plausibly alleged at least three reverse payments in the Jazz-Hikma agreement: (1) Jazz's six-month delay on third-party licensing; (2) the escalating royalty structure for Hikma's AG sales; and (3) an acceleration clause that deters generic entry and enforces collusion among all Defendants. The alleged estimated value to Hikma of the Jazz-Hikma agreement is over $480 million just in the first six months after Hikma launches its AG. CAC ¶ 237 (estimating $480 million to $540 million); UHS ¶ 181 (estimating $705 million). This is more than enough to support a reverse payment claim under *Actavis. See, e.g., Actavis, 570 U.S. at 145* (reversing dismissal of claims challenging payments as small as $12 million to one defendant); *Impax, 994 F.3d at 494* (affirming reverse payment claim against payment that increased generic's profits by $24.5 million). Accordingly, **[**82]** the Court denies Defendants' motion to dismiss Plaintiffs' reverse payment claims (CAC Counts 1 and 7; UHS counts 1, 5, and 8).

3. Plaintiffs adequately allege that Jazz's settlements with the Later Generic Defendants contain reverse payments (CAC Counts 8-10; UHS Counts 5, 7, and 8).

Plaintiffs also allege that the Later Generic Defendants (Par, Lupin, and Amneal) received large unjustified payments from Jazz. These reverse payments took three forms. First, Jazz made multi-million-dollar cash payments to each Later Generic Defendant—ostensibly for Jazz's avoided litigation costs. *See* Opp'n at 13 (citing Par Settlement Agreement § 3, ECF No. 110-15 (Ex. 4); Lupin Settlement Agreement § 3, ECF No. 110-17 (Ex. 7); Amneal Settlement Agreement § 3, ECF No. 110-19 (Ex. 10)). Jazz paid [TEXT REDACTED BY THE COURT] to Par, Lupin, and Amneal respectively. *See* Par Settlement Agreement § 3; Lupin Settlement Agreement § 3; Amneal Settlement Agreement § 3.

Second, Jazz gave each Later Generic Defendant a limited license to sell a constrained supply of AG. Specifically, each license (1) began only after the expiration of Hikma's 180-day exclusivity period in July 2023; (2) was capped at a low-single-digit **[**83]** market share; and (3) required a royalty payment, as a percentage of sales, that increased over time. *See, e.g.*, Lupin AG Agreement § 1.27, 5, ECF No. 110-18 (Exh. 8).

Third, Jazz's agreements with each Later Generic Defendant contained acceleration clauses like the acceleration clause in the Jazz-Hikma agreement discussed above. *See, e.g.*, CAC ¶¶ 253, 260, 267 (alleging acceleration clauses); Section III-A-2-b-iii, *supra* (analyzing Jazz-Hikma acceleration **[*864]** clause and acceleration clauses generally). The acceleration clauses appear in the contracts that Defendants have attached to their motion to dismiss. *See, e.g.*, Par AG Agreement § 2.7; Lupin AG Agreement § 2.7.1; Amneal AG Agreement § 2.7.1.

Plaintiffs estimate the value to the Later Generic Defendants of these agreements to be in the tens of millions of dollars. CAC ¶¶ 255, 262, 269-70; UHS ¶¶ 193, 198, 205, 206. In exchange for these reverse payments, Plaintiffs allege that the Later Generic Defendants agreed to (1) surrender their patent challenges; and (2) delay and limit the entry of generic versions of Xyrem. *See* CAC ¶¶ 247-46 (allegations of quid pro quo). Had the Later Generic Defendants not entered reverse settlements, the **[**84]** Later Generic Defendants would have allegedly entered the market long before 2023. UHS ¶ 188.

Defendants offer two arguments for dismissing the reverse payment allegations against the Later Generic Defendants, but neither is persuasive. Defendants first argue that Jazz did not make any reverse payments to the Later Generic Defendants. Instead, in Defendants' telling, "Jazz's agreements with the Later Generic[] [Defendants] simply permit those companies to enter the market before patent expiry, first with volume-limited AG sales and then with full entry 2.5 years later."

This first argument mischaracterizes ***HN16***[] Plaintiffs' factual allegations, which the Court must accept as true and construe in the light most favorable to Plaintiffs at the motion to dismiss stage. *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. Those allegations, as detailed above, are that Jazz (1) paid each Later Generic Defendant millions of dollars; (2) gave each Later Generic Defendant a limited license to sell a constrained supply of AG; and (3) agreed to acceleration clauses that disincentivized entry by any generic and served as a cartel enforcement mechanism. The value of each of Jazz's agreements with the Later Generic Defendants is allegedly "at least" in **[**85]** the "tens of millions of dollars." *E.g.*, CAC ¶¶ 255, 262, 269-70; UHS ¶¶ 193, 198, 205, 206. Moreover, Jazz's alleged cash payment of "many millions of dollars" to a generic manufacturer is what the *Actavis* Court described as the paradigmatic reverse payment. *Actavis, 570 U.S. at 140*. Defendants are thus wrong that Plaintiffs have not alleged any "payments." Mot. at 19.

Defendants' other argument is that, even if Plaintiffs have alleged reverse payments, those payments are not "large" and "unexplained." Mot. at 19. Specifically, in Defendants' view, "[t]here is simply no way to plausibly value the volume-limited AG sales provisions." This argument fails on two independent grounds. To start, the volume-limited AG licenses are only one of the three forms of reverse payment summarized above. Defendants thus ignore the alleged cash payments and acceleration clauses—either of which may constitute actionable reverse payments. *See Actavis, 570 U.S. at 140* (discussing cash payment); Section III-A-1-a, *supra* (discussing acceleration clauses).

In addition, Defendants' demand for a more precise valuation of non-cash payments (such as the AG licenses) is unjustified. ***HN17***[] As the Third Circuit recently explained in reversing a district court's dismissal **[**86]** of a reverse payment claim, a plaintiff can meet *Actavis*'s "pleading standard without describing in perfect detail the world without the reverse payment, *calculating reliably the payment's exact size*, or preempting every possible explanation for it." *FTC v. AbbVie Inc, 976 F.3d 327, 356 (3d Cir. 2020)* (emphasis added), *cert. denied*, *No. 20-1293, **[*865]** 141 S. Ct. 2838, 210 L. Ed. 2d 951, 2021 U.S. LEXIS 3233, 2021 WL 2519407 (U.S. June 21, 2021)*. The Third Circuit has found, for instance, that non-cash payments are plausibly "large" and "unjustified" based on relatively general allegations. *Id. at 357*. Payments may be sufficiently "large" because they allegedly are "extremely valuable" and exceed litigation costs saved through settlement. *Id.* Similarly, reverse payments may be plausibly "unjustified" also because they exceed alleged litigation costs. *Lipitor, 868 F.3d at 261*; *accord* *AbbVie, 76 F.3d at 355-56* (summarizing *Lipitor*'s holdings).

Here too, Plaintiffs allege non-cash payments that are both extremely valuable and exceed alleged litigation costs. *E.g.*, CAC ¶ 269. Specifically, Plaintiffs plausibly estimate that *each percent* of market share allocated to the Generic Defendants represents about $13.5 million per year: a calculation based on Xyrem's annual sales discounted by 10% for price competition even in an allegedly collusive market. CAC ¶ 270. Jazz allegedly allocated several percentage points **[**87]** of market share to each Later Generic Defendant. *See, e.g.*, Lupin AG Agreement § 1.27, 5; CAC ¶ 264 (alleging same). The resulting estimate of value is $13.5 million multiplied by each percent of market share—*i.e.*, "tens of millions of dollars" to each Later Generic Defendant. *E.g.*, CAC ¶ 269. At this early stage in the litigation, this estimate is sufficient. Again, as the Third Circuit has warned, Plaintiffs need not "calculat[e] reliably the payment's exact size." *AbbVie Inc, 976 F.3d at 356*.

B. Plaintiffs adequately plead an overarching antitrust conspiracy (CAC Counts 5 and 11; UHS Counts 5, 7, and 8) that unlawfully allocates the Xyrem market (CAC Counts 8-10; UHS Counts 5, 7, and 8).

Defendants' second ground for dismissal is that Plaintiffs fail to plead either (1) an overarching antitrust conspiracy; or (2) an unlawful horizontal market allocation. The Court agrees that the alleged market allocation is not per se unlawful, but otherwise disagrees with Defendants here. Below, the Court analyzes Plaintiffs' allegations of conspiracy followed by market allocation.

1. Plaintiffs adequately allege an overarching conspiracy among all Defendants.

Defendants argue that "Plaintiffs' allegations of bilateral litigation **[**88]** settlements between Jazz and each individual Generic Defendants do not plausibly allege an overarching conspiracy." Mot. at 23. For support, Defendants cite the rule that ***HN18***[] "mere allegations of parallel conduct—even consciously parallel conduct—are insufficient to state a claim under *§ 1* [of the Sherman Act]." *Id.* (quoting *In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1193 (9th Cir. 2015)*). "Plaintiffs must plead 'something more,' 'some further factual enhancement,' a 'further circumstance pointing toward a meeting of the minds' of the alleged conspirators." *Musical Instruments, 798 F.3d at 1193* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 560, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). Applying this rule to reverse payment cases, Defendants concede that Plaintiffs plead an overarching conspiracy if Plaintiffs plausibly show that "each generic had an understanding about the nature of the conspiracy and its scope—which would include that there was more than just a bilateral conspiracy between each generic and the brand." Mot. at 23 (alterations omitted) (quoting *Staley v. Gilead Scis., Inc. ("Gilead II"), No. 19-CV-02573-EMC, 2020 U.S. Dist. LEXIS 167071, 2020 WL 5507555, at *7 (N.D. Cal. July 29, 2020)*).

Plaintiffs show what Defendants concede would constitute an overarching conspiracy. ***HN19***[] As the *Gilead II* Court explained, an overarching conspiracy plausibly **[*866]** exists where, as here, each Defendant (1) "had reason to know" that other Defendants were involved in the same "broad project"; and (2) "had reason to believe **[**89]** that their own benefits derived from the operation were probably *dependent upon the success of the entire venture*." *Gilead II, 2020 U.S. Dist. LEXIS 167071, 2020 WL 5507555, at *8* (emphasis in original) (quoting

United States v. Briscoe, 896 F.2d 1476, 1505 (7th Cir. 1990)). The Court addresses each element of the plausible conspiracy in turn.

a. Each Defendant plausibly had reason to know that other Defendants were involved in the same "broad project" to allocate the market.

As to shared knowledge of the same "broad project," each Defendant had reason to know—or actually knew—that Jazz was allegedly allocating the market for Xyrem and its generics. This knowledge stemmed from, at a minimum, public information on Jazz's response to generic manufacturers' public ANDAs. *See, e.g.*, CAC ¶¶ 149-151 (detailing Hikma ANDA and Jazz's lawsuits), 183 (detailing other generics' ANDAs for generic version of Xyrem). In quick succession, Jazz settled its long-running patent lawsuits with Hikma, Par, Lupin, and Amneal.

Starting with Hikma, Jazz's response was to publicly allocate "limited volume[s]" to ensure "relatively low incursion on Xyrem." UHS ¶ 209 (quoting Jazz healthcare conference call on Nov. 14, 2018 and Jazz's Dec. 4, 2019 presentation). This public allocation started with the Jazz-Hikma agreement. Jazz partially **[**90]** disclosed the agreement in an August 5, 2017 securities filing. CAC ¶ 213 (citing https://www.sec.gov/Archives/edgar/data/1232524/000123252417000134/jazzq22017ex101.htm). The next day, Jazz's stock trading volumes spiked about five times their rolling average, and Jazz's market capitalization increased about 9% ($785 million). *Id.* ¶¶ 241-43. The jump in trading volume and Jazz's equity value reflected the high public impact of the Jazz-Hikma settlement. *Id.* ¶¶ 243-46.

Then, "over the course of 2018, [] Jazz worked a series of anticompetitive reverse payment settlements with the three remaining serious challengers to the Xyrem patents [*i.e.*, the Later Generic Defendants]." *Id.* ¶ 248. Each settlement halted the potential manufacture, marketing, and sale of an AB-rated generic manufactured by each Later Generic Defendant. In exchange, the settlements licensed each Later Generic Defendant the right to sell a limited quantity of authorized generic ("AG"). Each AG, like Hikma AG, would be simply brand name Xyrem manufactured by Jazz and then *relabeled* by each Later Generic Defendant.

The first such settlement was with Par in January 2018. *Id.* ¶ 249. Jazz allocated Par "'a low single digit **[**91]** percentage' of Xyrem sales volume during the calendar year preceding the entry date of the Par AG," and protected that allocation with an acceleration clause. *Id.* ¶¶ 250, 253; *accord, e.g.*, Par AG Agreement § 1.28, ECF No. 110-16 (sealed percentage); *see* Section III-A-2-b-iii (discussing acceleration clauses). Importantly, at the time Par entered this settlement, Par was plausibly aware of the Jazz-Hikma agreement that had recently increased Jazz's public equity value by 9%. *Id.* ¶ 250.

Next, in June 2018, Lupin settled with Jazz. Lupin's settlement paralleled Par's settlement. Jazz allocated Lupin "'a low single digit percentage' of Xyrem sales volume" and shielded that allocation with an acceleration clause. CAC ¶¶ 257, 260; *accord, e.g.*, Lupin AG Agreement § 1.27 (sealed percentage). Lupin was also allegedly aware of the Jazz-Hikma and Jazz-Par agreements. CAC ¶ 259; UHS ¶ 197.

Lastly, in October 2018, Amneal settled with Jazz. Amneal's settlement also mirrored the others in its market allocation **[*867]** and acceleration clause. CAC ¶¶ 264, 267; *accord, e.g.*, Amneal AG Agreement § 1.30, ECF No. 110-20 (Ex. 11) (sealed percentage). Likewise, Amneal was plausibly aware of Jazz's similar agreements **[**92]** with the other Generic Defendants that had occurred just months before. CAC ¶ 266. In fact, in patent litigation, a judge ordered Jazz to disclose Jazz's agreements with Hikma and two other generic manufacturers to Amneal. *See* Letter Order at 4, Jazz Pharms., Inc. v. Amneal Pharms., LLC, No. 13-CV-00391-ES-JAD, 2017 U.S. Dist. LEXIS 183344 (D.N.J. Nov. 6, 2017), ECF No. 411 (ordering disclosure of "settlement / license agreements").

Given Jazz's public and tightly sequenced settlements of longstanding patent cases, Defendants "had reason to know" that other Generic Defendants were involved in the same "broad project" of market allocation. *Gilead II, 2020 U.S. Dist. LEXIS 167071, 2020 WL 5507555, at *8* (quoting *Briscoe, 896 F.2d at 1505*). Indeed, by November 2018, a senior Jazz executive was publicly boasting of Jazz's limited output allocations to Hikma and "3 of the second filers"—plausibly Par, Lupin, and Amneal. CAC ¶ 274 (quoting Nov. 14, 2018 conference call). In Jazz's telling, those three second filers "are limited to low single-digit volume of the previous year Xyrem sales" so that "again," like with the Hikma settlement, "relatively low incursion on Xyrem" would result. *Id.* (quoting same). Similarly, by December 2019, Jazz CEO Bruce Cozadd was publicly stating that "the other couple folks **[**93]** with authorized generics have very limited volumes. So in terms of dynamics on price, it's - this is not what you would think of as a generic free for all." *Id.* ¶ 273 (quoting Dec. 4, 2019 presentation); UHS ¶ 208. These public statements underscore the likelihood that Jazz and the Generic Defendants shared a common understanding.

Nonetheless, Defendants insist that Plaintiffs fail to plead sufficient knowledge because Plaintiffs fail to "explain[] how each Generic Defendant conceivably was made aware of the terms of its competitors' litigation settlements with Jazz." Mot. at 24; Reply at 14. This argument overstates Plaintiffs' burden at the motion to dismiss stage. ***HN20***[] A "conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 183 (2d Cir. 2012)* (altered to include full quotation) (quoting *United States v. Snow, 462 F.3d 55, 68 (2d Cir. 2006)*) (reversing dismissal of antitrust claims). Even if a conspirator lacks "awareness" of much of a conspiracy, that ignorance is "immaterial" where, as here, the conspirator's acts "were essential steps in a single scheme." *United States v. Downing, 297 F.3d 52, 57 (2d Cir. 2002)* (quoting *United States v. Benjamin, 328 F.2d 854, 864 (2d Cir. 1964)* (Friendly, J.)). Thus, an antitrust plaintiff may present "direct **[**94]** *or circumstantial* evidence" of a conspiracy. *Anderson News, 680 F.3d at 183* (emphasis in original) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*). Plaintiffs present such evidence here through (1) Jazz's public statements, Jazz's public conduct, and the stock market's response; and (2) the co-dependent economic incentives described next.

b. Defendants plausibly had reason to know that other Defendants were involved in the same "broad project" to allocate the market.

HN21[] The other element of an overarching conspiracy is that Defendants "had reason to believe that their own benefits derived from the operation were probably *dependent upon the success of the entire **[*868]** venture*." *Gilead II, 2020 U.S. Dist. LEXIS 167071, 2020 WL 5507555, at *8* (emphasis in original) (quoting *Briscoe, 896 F.2d at 1505*). Evidence of this shared belief includes "economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." *Musical Instruments, 798 F.3d at 1194*. When firms act unilaterally in non-collusive markets, "the goal of any profit-maximizing firm is to obtain a monopoly by *capturing an ever increasing share* of the market." *State of Ill., ex rel. Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1481 (7th Cir. 1991)* (emphasis added). Analogously, "[i]n a competitive market, attempts to grow the pie by charging supracompetitive prices will be tempered by *price competition* as individual firms attempt to capture **[**95]** greater market share." *Musical Instruments, 798 F.3d at 1195* (emphasis added). By contrast, "[w]hen firms in a market are able to coordinate their pricing and production activities, they can increase their collective profits and reduce consumer welfare by raising price and reducing output." *Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 896 (9th Cir. 2008)* (citing John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, *20 Yale J. on Reg.. 269, 311 (2003)*).

Jazz's agreements with each Generic Defendant incentivized lower output and higher prices—the opposite of competitive behavior. The Jazz-Hikma agreement did so in two ways. To start, the Jazz-Hikma agreement plausibly delayed any Jazz AG for at least six months, thereby delaying any price competition between Jazz AG, Hikma AG, and Xyrem. Next, the agreement created a royalty structure that will charge Hikma a royalty rate that increases with Hikma's market share. This escalating royalty structure (1) disincentivizes output because "market share" is defined in terms of unit volume (*e.g.*, number of bottles); and (2) incentivizes higher prices because Jazz and Hikma can boost revenue while keeping volume low by raising prices. *See* Section III-A-2, *supra* (analyzing Jazz-Hikma agreement); *see generally, **[**96]** e.g., Crystal Semiconductor Corp. v. TriTech Microelectronics Intern., Inc., 246 F.3d 1336, 1359 (Fed. Cir. 2001)* ("[C]onsumers will almost always purchase fewer units of a product at a higher price than at a lower price . . . ."). Supra-competitive prices are the result. *See, e.g., Actavis, 570 U.S. at 157* (discussing pharmaceutical collusion "to maintain supracompetitive prices").

Similarly, the Later Generic Defendants' agreements also limited each Later Generic Defendant to a low single-digit market share as defined by total units sold—again incentivizing higher prices because volumes were capped. *See* Sections III-A-3 and III-B-2, *supra* (analyzing agreements with Later Generic Defendants). The Later Generic Defendants' Agreements also immediately paid each Later Generic Defendant millions in cash to cease potentially meritorious patent challenges. These payments of "many millions of dollars" to a generic manufacturer are paradigmatic reverse payments. *Actavis, 570 U.S. at 140*.

Furthermore, *all* the agreements contained an acceleration clause. *See* CAC ¶¶ 225, 232, 253, 260, 267; UHS ¶¶ 177, 188, 191, 196, 203 (describing acceleration clauses). The acceleration clauses plausibly function as a cartel enforcement mechanism. *See* Section III-A-1-a, *supra* (detailing acceleration clauses). They do so by threatening a "reversion to competitive **[**97]** behavior"—*i.e.*, immediate entry by Hikma, Amneal, Par, and Lupin—if certain market events were to occur. Specifically, the acceleration clauses allow every Generic Defendant to immediately market their AG if (1) a generic version of Xyrem were to **[*869]** market itself without Jazz's permission; or (2) anyone were to successfully invalidate or render unenforceable Xyrem's unexpired patent claims. CAC ¶ 225; UHS ¶¶ 191, 196, 203; *accord, e.g.*, Hikma AG Agreement §§ 1.5.5, 2.8 (acceleration clause); Lupin AG Agreement § 1.4 (same). Thus, if any Generic Defendant were to try to seize more profit than its agreement with Jazz provides, that Generic Defendant would immediately face profit-crushing competition from the other Generic Defendants.

Such "penalt[ies]" for "firms exceeding their agreed upon shares" are cartel mechanisms that "give the firms a disincentive to steal sales from one another." Areeda & Hovenkamp, *supra*, ¶ 2006 & n.5. In other words, the Generic Defendants are bound together through mutually assured competition, if not mutually assured destruction. ***HN22***[] Thus, "[e]ven at the summary judgment stage," courts have "found it significant for inferring the existence of a conspiracy that each generic competitor" agreed to **[**98]** an acceleration clause. *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC, No. 15-CIV-6549-CM, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *31 (S.D.N.Y. Dec. 26, 2018)* (citing *In re Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d 231, 254 (D. Mass. 2014)*, *aff'd*, *842 F.3d 34 (1st Cir. 2016)*). It follows that acceleration clauses are even more "potent" evidence of a "conspiracy to monopolize" at the motion to dismiss stage. *Id.* (denying motion to dismiss).

In sum, Jazz's agreements with each Generic Defendant included "economic actions and outcomes that are largely inconsistent with unilateral conduct." *Musical Instruments, 798 F.3d at 1194*. It is thus plausible that Defendants "had reason to believe that their own benefits derived from the operation were probably *dependent upon the success of the entire venture*." *Gilead II, 2020 U.S. Dist. LEXIS 167071, 2020 WL 5507555, at *8* (emphasis in original) (quoting *Briscoe, 896 F.2d at 1505*). Accordingly, Plaintiffs have plausibly pled an overarching conspiracy to allocate the Xyrem market. In fact, if Jazz's agreements had not settled patent lawsuits, they would be "condemned as per se unlawful." *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1063 (9th Cir. 2015)*.

2. Plaintiffs adequately allege that Jazz's settlements with the Later Generic Defendants are market allocation agreements (CAC Counts 8-10; UHS Counts 5, 7, and 8) under the rule of reason.

Despite the plausible overarching conspiracy just described, Defendants also argue that Plaintiffs "fail to state a claim for unlawful horizontal market allocation." Mot. at 20. Specifically, Defendants argue that Jazz's volume-limited **[**99]** licenses are "generally exempt from antitrust scrutiny" because they merely exercise Jazz's patent rights. *Id.*

The Court disagrees. Granting Defendants a "general[] exempt[ion]" from antitrust scrutiny would contravene binding precedent. ***HN23***[] In *Actavis*, the Supreme Court squarely held that "patent and antitrust policies are both relevant in determining the 'scope of the patent monopoly'—and consequently ***antitrust law*** immunity—that is conferred by a patent." *Actavis, 570 U.S. at 148*. In fact, even before *Actavis*, "the [Supreme] Court ha[d] struck down overly restrictive patent licensing agreements—irrespective of whether those agreements produced supra-patent-permitted revenues." *Id. at 150*. ***HN24***[] Thus, "[w]hether a particular restraint lies 'beyond the limits of the patent monopoly' is a *conclusion* that flows from [an] analysis" under the rule of reason, "not [the analysis's] starting point." *Id. at 149* (emphasis in original).

[*870] Ninth Circuit precedent emphasizes the light burden Plaintiffs bear at the motion to dismiss stage. ***HN25***[] The Ninth Circuit has instructed that, when analyzing the effect of agreements under the rule of reason, "we must give plaintiffs 'the full benefit of their proof without tightly compartmentalizing the various factual **[**100]** components and wiping the slate clean after scrutiny of each.'" *In re Nat'l Football League's Sunday Ticket Antitrust Litig. ("NFL Sunday Ticket"), 933 F.3d 1136, 1152 (9th Cir. 2019)* (quoting *City of Long Beach v. Standard Oil Co., 872 F.2d 1401, 1404-05 (9th Cir. 1989)*, *opinion amended on denial of reh'g*, *886 F.2d 246 (9th Cir. 1989)*), *cert. denied sub nom. Nat'l Football League v. Ninth Inning, Inc., 141 S. Ct. 56, 208 L. Ed. 2d 291 (2020)*. Applying this standard in *NFL Sunday Ticket*, the Ninth Circuit reversed the dismissal of claims that "defendants' interlocking agreements reduce[d] [] output" and raised prices. *Id. at 1155, 1158*.

Here too, Jazz's volume-limited licenses are plausibly anticompetitive market allocations that reduced output and raised prices. These licenses, as detailed in Section III-A-2 above, gave each Later Generic Defendant a limited right to sell a constrained supply of AG. Specifically, each license (1) began only after the expiration of Hikma's 180-day exclusivity period in July 2023; (2) was capped at a low-single-digit market share; and (3) required a royalty payment, as a percentage of sales, that increased over time. *See, e.g.*, Lupin AG Agreement § 1.27, 5, ECF No. 110-18 (Exh. 8). These licenses were also paired with acceleration clauses that plausibly deterred generic entry. *See* Section III-A-2-b-iii, *supra* (analyzing Jazz-Hikma acceleration clause and acceleration clauses generally). Giving Plaintiffs "the full benefit of their proof," the effect of this licensing scheme **[**101]** was anticompetitive. *NFL Sunday Ticket, 933 F.3d at 1152* (quoting *City of Long Beach, 872 F.2d at 1404-05*). Indeed, in December 2019, Jazz's CEO boasted that "in terms of dynamics on price, it's - th[e] [market] is not what you would think of as a generic free for all" because of the "very limited volumes" for Par, Lupin, and Amneal. CAC ¶ 273 (emphasis omitted).

Furthermore, the authorities Defendants cite largely support *Plaintiffs*' position. Mot. at 20. Defendants cite three cases to argue that Jazz's licensing agreements are "generally exempt from antitrust scrutiny." Yet those cases subjected licensing agreements to rule of reason antitrust scrutiny. *See In re Humira (Adalimumab) Antitrust Litig., 465 F. Supp. 3d 811, 838 (N.D. Ill. 2020)* (applying the rule of reason); *In re Zetia Ezetimibe Antitrust Litig., No. CV 2:18-MD-2836, 2019 U.S. Dist. LEXIS 59469, 2019 WL 1397228, at *20 (E.D. Va. Feb. 6, 2019)* (same), *report and recommendation adopted as modified*, *400 F. Supp. 3d 418 (E.D. Va. 2019)*; *In re Novartis & Par Antitrust Litig., No. 18-CV-11835-AKH, 2019 U.S. Dist. LEXIS 138133, 2019 WL 3841711, at *4 (S.D.N.Y. Aug. 15, 2019)* ("[C]ase law uniformly supports the application of *Actavis* and the rule of reason approach to" market allocation claims). Defendants also cite the treatise *IP and Antitrust* to further argue against antitrust scrutiny of Jazz's licensing agreements with Generic Defendants. Yet that same treatise warns that "fears of competitive harm grow" where, as here, "the licensor [*i.e.*, Jazz] is itself a manufacturer" and licenses to other manufacturers. Herbert **[**102]** Hovenkamp, Mark D. Janis, Mark A. Lemley, Christopher R. Leslie, and Michael A. Carrier, *IP and Antitrust* § 32.01 (updated Nov. 2020).

Defendants are correct as to one point they make for the first time on reply, however. Reply at 11. Nothing supports United's allegations that Jazz's licensing agreements are per se violations of the Sherman Act. ***HN26***[] Sherman Act claims are examined "under one of two distinct tests: **[*871]** per se violation or rule of reason. Under the per se test, 'agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality' are found to be antitrust violations. For those activities not within the per se invalidity category, courts employ the rule of reason test." *Eichorn v. AT & T Corp., 248 F.3d 131, 138 (3d Cir. 2001)*, as amended (June 12, 2001) (quoting *Nat'l Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*). Here, as to allegations that Defendants have allocated a patented drug market, "case law uniformly supports the application of *Actavis* and the rule of reason approach." *In re Novartis & Par Antitrust Litig., 2019 U.S. Dist. LEXIS 138133, 2019 WL 3841711, at *4* (collecting cases). Plaintiffs' per se allegations are few but do exist in United's complaint. *See* UHS ¶¶ 263, 292 (alleging "per se violations" of the Sherman Act and Minnesota ***Antitrust Law***). Because the inapplicability **[**103]** of the per se rule is clear here, the Court considers the argument that Defendants raise on reply and dismisses United's per se allegations against Defendants' market allocation scheme. Class Plaintiffs do not appear to make per se claims.

In sum, Defendants are wrong that Jazz's volume-limited licenses are "generally exempt from antitrust scrutiny." Mot. at 20. Those licenses receive antitrust scrutiny under the rule of reason. Accordingly, the Court grants in part and denies in part Defendants' motion to dismiss Plaintiffs' market allocation claims. Specifically, the Court only dismisses United's market allocation claims to the extent they allege that Jazz's licenses are antitrust violations per se. Lastly, because such per se allegations are legally futile, the Court dismisses them with prejudice. *See* *Leadsinger, 512 F.3d at 532*.

3. Count 5 of the CAC and the UHS Complaint adequately notify Defendants of the challenged misconduct.

Next, Defendants briefly argue that Count 5 of both the CAC and UHS complaint "fail to articulate the conduct they challenge" in three ways. Mot. at 22. First, Count 5 of the CAC—which is pleaded "against all Defendants," CAC ¶ 380—supposedly confuses Defendants because it "simply **[**104]** refer[s] to the individual patent litigation settlements entered into by each Defendant." Mot. at 22. Second, Count 5 of the UHS complaint supposedly confuses Defendants because it pleads not only an overarching conspiracy, but also four bilateral conspiracies "in the alternative." *Id.* (citing UHS ¶¶ 262-64). Third, Defendants argue that UHS Count 5 impermissibly "bring[s] [UHS] Counts 2, 3, and 4 back into the litigation" in violation of the Court's order limiting the number of claims to be initially litigated. *Id.* n.13 (citing Case Management Order, ECF No. 66 filed on March 19, 2021).

None of these arguments has merit. The Court addresses each in turn. To start, as summarized above, the complaints detail Defendants' alleged agreements and their alleged anticompetitive effects. *See, e.g.*, Section III-B-1, *supra* (summarizing alleged conspiracy); CAC ¶¶ 209-76; UHS ¶¶ 161-223 (alleging same). It thus strains credulity for Defendants to argue that they lack "'an idea of where to begin' in defending themselves." Mot. at 22 (quoting *Kendall v. Visa USA, Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*). ***HN27***[] Second, *Federal Rule of Civil Procedure 8(d)* expressly allows "alternative statements of a claim or defense"—"regardless of consistency." *Accord, e.g., Molsbergen v. United States, 757 F.2d 1016, 1018 (9th Cir. 1985)* (holding same).

Lastly, Plaintiffs did **[**105]** not violate the Court's March 19, 2021 Case Management **[*872]** Order ("CMO") or any other order. That CMO ordered the Class Plaintiffs and Defendants to select 10 claims to initially litigate through resolution. ECF No. 66 at 2. Then, on March 24, 2021, United informed the Court that United's individual action against the same Defendants would soon be transferred to the instant multidistrict litigation. ECF No. 78. In response on March 30, 2021, the Court ordered the parties to address the overlap between (1) United's claims and (2) the Selected Claims. ECF No. 82.

On April 2, 2021, United represented that its claims "largely overlap with the class action claims and advance materially the same theories of liability." ECF No. 84 at 1. United thus agreed to initially litigate through resolution only the claims that overlap with the Selected Claims. *Id.* at 2. One of the claims that United publicly noticed was "Count 5" of its complaint, which had been filed on March 18, 2021 in Case No. 21-CV-02710-LHK, ECF No. 1. On April 7, 2021, the Court adopted United's proposal on which of United's claims should be first litigated through resolution. ECF No. 85. That adopted proposal included UHS Count 5. **[**106]** All told, Defendants have received fair notice of Plaintiffs' conspiracy claims.

C. Plaintiffs adequately plead antitrust injury (CAC Counts 1, 5, 6, and 12; UHS Counts 1, 5, 6, and 11).

Defendants' third ground for dismissal is that Plaintiffs inadequately plead antitrust injury. ***HN28***[] For context, to bring a federal antitrust claim, a private plaintiff must allege "antitrust injury." *15 U.S.C. §§ 15*, *26* (*Clayton Act §§ 4*, *16*); *see* Areeda & Hovenkamp, *supra*, ¶ 335 (summarizing antitrust injury requirement). Antitrust injury is "loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*). In turn, whether Plaintiffs' injury "flows from" Defendants' anticompetitive acts depends on "common law principles of causation." *Pac. Shores Properties, LLC v. City of Newport Beach, 730 F.3d 1142, 1169 (9th Cir. 2013)* (quoting

Mead v. Retail Clerks International Asso., 523 F.2d 1371, 1376 (9th Cir. 1975)). "Causation is an intensely factual question that should typically be resolved by a jury." Id. at 1168. Thus, "once a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand *summary judgment*"—let alone a motion to dismiss—"on the ground of absence of causation." *Id.* (emphasis added) (quoting BCS Servs., Inc. v. Heartwood 88, LLC, 637 F.3d 750, 758 (7th Cir. 2011)).

Despite the lenient standard set forth above, **[**107]** Defendants make two arguments why "the complained-of-settlement agreements" did not cause Plaintiffs antitrust injury. Mot. at 10. Defendants first argue that "Plaintiffs fail to allege the Generic Defendants would have surmounted Jazz's patent portfolio." *Id.* at 10. Defendants next argue that, because the Later Generic Defendants may start to sell AGs in July 2023, the Jazz's settlements with the Later Generic Defendants will not prolong the period of supra-competitive prices. *Id.* at 12. As explained below, neither argument is persuasive.

1. Plaintiffs need not allege how the Generic Defendants would have prevailed in the patent litigations.

Defendants first argue that because Jazz's patents are allegedly valid, no injury stems from the challenged settlement **[*873]** agreements. Mot. at 10. Specifically, Defendants argue that Plaintiffs have inadequately pled that "'the outcome of the patent litigation [between the Generic Defendants and Jazz] was reasonably certain to favor' the Generic Defendants." Mot. at 11 (quoting United Food & Com. Workers Loc. 1776 & Participating Emps. Health & Welfare Fund v. Teikoku Pharma USA, Inc. ("Lidoderm"), 74 F. Supp. 3d 1052, 1072 & n.25 (N.D. Cal. 2014)). Defendants thus argue that regardless of the settlement agreements, Jazz's patents block the Generic Defendants from selling generic Xyrem. In short, the strength of Jazz's **[**108]** patents supposedly "act as an independent bar to Plaintiffs' claims of antitrust injury." *Id.*

HN29[] The Court disagrees. As the United States Supreme Court has held—and the Fifth Circuit and unanimous California Supreme Court have confirmed—"it is normally not necessary to litigate patent validity to answer the antitrust question." Impax Lab'ys, Inc. v. FTC, 994 F.3d 484, 495 (5th Cir. 2021) (quoting Actavis, 570 U.S. at 157); *accord, e.g.,* In re Cipro Cases I & II, 61 Cal. 4th 116, 187 Cal. Rptr. 3d 632, 348 P.3d 845, 870-71 & n.19 (Cal. 2015) (quoting and holding same); Herbert Hovenkamp, Mark D. Janis, Mark A. Lemley, Christopher R. Leslie, and Michael A. Carrier, *IP and Antitrust* § 16.01 & nn.276.44-49 (updated Nov. 2020) (collecting cases). Indeed, the case Defendants quote, *Lidoderm*, only reiterates this holding. In *denying* a motion to dismiss, *Lidoderm* held that a court "do[es] not need analyze the validity of the patents in the settled litigation in order to find the allegations adequate to meet the rule of reason." Lidoderm, 74 F. Supp. 3d at 1072.

Actavis explained why. There, the Supreme Court reasoned that "even a *small* risk of [patent] invalidity" often results in a reverse payment that "likely seeks to prevent the risk of competition"—a "consequence constitut[ing] the relevant anticompetitive harm." Actavis, 570 U.S. at 157 (emphasis added). ***HN30***[] Thus, "a court, by examining the size of the [challenged] payment, may well **[**109]** be able to assess its likely anticompetitive effects along with its potential justifications *without litigating the validity of the patent*." Id. at 158 (emphasis added). "In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all *without forcing a court to conduct a detailed exploration of the validity of the patent* itself." *Id.* (emphasis added).

Here, the alleged reverse payments are plausibly large and unexplained. The Court analyzes the reverse payment to Hikma first, followed by the reverse payments to the Later Generic Defendants.

Plaintiffs estimate that the value to Hikma from the Jazz-Hikma agreement is over $480 million just in the first 180 days after Hikma launches its AG (which is relabeled Jazz Xyrem). CAC ¶ 237 (estimating $480 million to $540 million); UHS ¶ 181 (estimating $705 million). During at least those 180 days, Hikma AG will be the only generic version of Xyrem on the market. Furthermore, in addition to being manufactured by Jazz, Hikma AG will be distributed by Jazz's pharmacy, Express Scripts. Hikma and Jazz will thus share a "horizontal market division"—*i.e.*, an agreement among direct competitors to split the **[**110]** market—while Hikma AG is the only generic. Areeda & Hovenkamp, *supra*, ¶ 2045; *see generally, e.g.,* California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1137 (9th

Cir. 2011) (defining horizontal market division). In fact, because Jazz is the only manufacturer under the Jazz-Hikma agreement, Hikma and Jazz's market division is worse than a duopoly. "***HN31***[] *Monopoly* exists when one firm controls **[*874]** all or the bulk of a product's output, and no other firm can enter the market, or expand output, at comparable costs." Areeda & Hovenkamp, *supra*, ¶ 403 (footnote omitted). Hikma and Jazz simply share Jazz's monopoly for at least 180 days.

Plaintiffs value Hikma's share of this monopoly at over $480 million based on the typical market share and price of generic drugs. As to market share, Plaintiffs allege that the Hikma AG—as the only generic—will capture approximately 80% to 90% of Xyrem sales. CAC ¶ 91, 237 (citing FTC 2011 AG Study); UHS ¶ 181. That is a plausible market share for a sole generic. *See, e.g., Lidoderm, 74 F. Supp. 3d at 1071* (holding same and citing FDA study); Victor E. Schwartz et al., *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When the Harm was Allegedly Caused by Generic Drugs Has Severe Side Effects*, *81 Fordham L. Rev. 1835, 1848 (2013)* ("[T]he generic version of a drug, on average, seizes 80 percent of brand-name drug sales within six months of the loss of **[**111]** patent protection."). As for price, Plaintiffs allege that "Hikma can price its generic product at a smaller discount (20%) to the branded price." UHS ¶ 181. This price difference is also plausible. "The first generic to enter the market typically costs 10 to 25 percent less than the branded drug; those discounts grow to between 50 and 80 percent once other generics enter." *Impax, 994 F.3d at 488*. Together, these market share and pricing assumptions value Hikma's settlement between $480 million and $540 million—even if Xyrem sales stay flat at approximately $1.5 billion and fail to grow through 2023. CAC ¶ 237. If, by contrast, "one conservatively assumes 8% annual increases" in Xyrem sales, Hikma's settlement is worth about $705 million. UHS ¶ 181; *see also* Jazz Form 10-K for 2020, at 76 (reporting 6% annual growth in Xyrem net sales); Jazz Form 10-K for 2019, at 63 (reporting 17% annual growth in Xyrem net sales).

Yet it is immaterial whether the $480 million or $705 million estimate is more accurate. Even the lower estimate is more than enough to suggest that Jazz and Hikma "likely s[ought] to prevent the risk of competition" by shielding potentially invalid patents. *Actavis, 570 U.S. at 157*. The reason, as the *Actavis* Court **[**112]** explained, is that "[a]n unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market." *Id.* Applying this analysis, both the *Actavis* Court and other courts have found that reverse payments in the tens of millions state an antitrust injury. *See, e.g., Actavis, 570 U.S. at 145* (payments of $12 million, $60 million, and $171-270 million); *Impax, 994 F.3d at 494* (payment of $24.5 million). Accordingly, the Jazz-Hikma payment of over $480 million more than suffices.

Jazz's payments to the Later Generic Defendants are similarly suspect. The payments included (1) millions in cash; (2) a license to sell AG at a supra-competitive price; and (3) and acceleration clauses that enforce supra-competitive pricing. *See* Section III-A-2 (detailing reverse payments to Later Generic Defendants). The valuation of the license component alone is in the tens of millions. Specifically, Plaintiffs estimate that "every one percent of brand sales allocated in 2023"—the start of the **[**113]** licensing period—represents between $13.5 million to $19.8 million in sales. CAC ¶ 270 (estimating $13.5 million); UHS ¶ 206 (estimating $19.8 million). The range of the estimate depends on whether Xyrem sales stay flat or grow through 2023—the same plausible assumption from the Hikma settlement. *Id.* In any event, Jazz allocated **[*875]** each Later Generic Defendant several percentage points of the Xyrem market. *See, e.g.*, Lupin AG Agreement § 1.27, 5 (sealed low-single-digit percentage). Thus, the resulting value of each Later Generic Defendant's settlement is "at least [] tens of millions of dollars." CAC ¶¶ 255, 262, 269-70; UHS ¶¶ 193, 198, 205, 206. Again, these are "large and unexplain[ed] payment[s] exceeding any reasonable estimate of saved litigation costs." UHS ¶¶ 193, 198, 205, 206; *accord, e.g., Actavis, 570 U.S. at 145* (reversing dismissal of alleged $12 million reverse payment); *Impax, 994 F.3d at 494* (estimating average litigation costs to be "in the $5-$10 million range").

In sum, Plaintiffs have plausibly alleged reverse payments that, under *Actavis*, "suggest that [Jazz] has serious doubts about the patent[s]' survival." *Actavis, 570 U.S. at 157*. Accordingly, Plaintiffs need not detail how the Generic Defendants would have prevailed in the patent **[**114]** litigations. Rather, Plaintiffs' reverse payment allegations are enough to plead an antitrust injury. ***HN32***[] In short, "it is normally not necessary to litigate patent validity to answer the antitrust question." *Impax, 994 F.3d at 495*.

To argue otherwise, Defendants rely on two inapposite court of appeals cases. Mot. at 11. In *In re Wellbutrin XL Antitrust Litigation*, the Third Circuit relied on two factual findings at *summary judgment*. *868 F.3d 132, 169 (3d. Cir. 2017)*. First, the record at summary judgment showed that "assignor estoppel would have prevented [the generic] from arguing that the [] patent was invalid or that the patent was unenforceable because of inequitable conduct." *Id.* Second, an expert witness's "*unrebutted analysis*" showed that the generic "would only have a 20% chance of winning [its infringement] suit." *Id.* (emphasis added). The instant case is different. Here, Plaintiffs' detailed allegations at the motion to dismiss stage do not face an undisputed factual record of assignor estoppel or a mere 20% chance of prevailing in a patent infringement suit. *Wellbutrin* is thus inapposite. *See also, e.g., In re Effexor Antitrust Litig., 337 F. Supp. 3d 435, 452 (D.N.J. 2018)* (denying judgment on the pleadings and distinguishing *Wellbutrin* on similar grounds).

Defendants' other case, *In re Nexium (Esomeprazole) Antitrust Litigation, 842 F.3d 34 (1st Cir. 2016)*, is even less apt. **[**115]** There, "upon the conclusion of plaintiffs' case in chief" at a *jury trial*, the district court saw "no evidence" that the brand manufacturer's patents were invalid. *Id. at 63*. The district court thus "requir[ed] some evidence of the patents' invalidity or non-infringement before allowing the plaintiffs to pursue an at-risk launch theory." *Id.* The First Circuit affirmed this trial requirement. *Id.* In affirming, the First Circuit expressly distinguished "allegations of antitrust injury at the *Rule 12(b)(6)* stage." *Id. at 62-63*. The First Circuit further cited two other cases where courts of appeals rejected arguments like Defendants' arguments here. *See In re Cardizem CD Antitrust Litig., 332 F.3d 896, 900 (6th Cir. 2003)* (holding that ***HN33***[] patent validity "merely raises a disputed issue of fact that cannot be resolved on a motion to dismiss"); *Andrx Pharms., Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 809, 347 U.S. App. D.C. 178 (D.C. Cir. 2001)* (rejecting argument that pending patent infringement suit blocks claim of anticompetitive delay).

Accordingly, at the motion to dismiss stage, Plaintiffs need not allege how the Generic Defendants would have prevailed in the patent lawsuits against Jazz.

2. Plaintiffs adequately plead that the Later Generic Defendants caused antitrust injury.

Defendants' other argument against antitrust injury also lacks merit. **[*876]** This argument, which spans only one paragraph **[**116]** in Defendants' 35-page motion, is that Jazz's settlements with the Later Generic Defendants will not prolong the period of supra-competitive prices allegedly caused by the Jazz-Hikma agreement. Mot. at 12. Defendants reason that the period of higher prices "is alleged to exist only between January 1, 2023 and July 1, 2023"—the 180 days during which Jazz has explicitly agreed that Hikma AG will be the sole third-party AG. *Id.* After July 1, 2023, Jazz will have the option to license an AG to other third parties, and Hikma will have the option to manufacture, market, and independently distribute an AB-rated generic. *Id.* (citing CAC ¶ 218; UHS ¶¶ 165-69). Defendants thus argue that, by the time the Later Generic Defendants begin to sell AGs in July 2023, the Jazz and Hikma generics will have reduced prices to competitive levels. *Id.*

Defendants' argument fails for two reasons. First, it ignores another competitive harm: if the Later Generic Defendants had not settled, they could have launched an AG or AB-rated generic *before* July 2023. Specifically, the Later Generic Defendants could have launched earlier in at least three ways. First, the Later Generic Defendants could have reached an alternative **[**117]** settlement with an earlier entry date and no reverse payments. *See, e.g., Actavis, 570 U.S. at 158* (describing such settlements). Second, the Later Generic Defendants could have pursued—and prevailed in—their patent litigation. *See id. at 154-55* (describing same). Third, the Later Generic Defendants could have launched their AB-rated generics at risk while simultaneously pursuing patent litigation. *See, e.g., In re Glumetza Antitrust Litig., No. 19-CV-05822-WHA, 2021 U.S. Dist. LEXIS 87085, 2021 WL 1817092, at *3 (N.D. Cal. May 6, 2021)* (describing same).

The other reason Defendants' argument fails is that Plaintiffs plausibly allege that all Defendants were engaged in an overarching conspiracy to allocate the market for Xyrem and its generics. *See* Section III-B-2, *supra* (detailing alleged conspiracy). In this conspiracy, Defendants "ha[ve] reason to believe that their own benefits derived from the operation [are] *probably dependent upon the success of the entire venture*." *Gilead II, 2020 U.S. Dist. LEXIS 167071, 2020 WL 5507555, at *8* (emphasis in original) (quoting *Briscoe, 896 F.2d at 1505*). Price competition and increased output would plausibly doom the venture. *See* Section III-B-2, *supra* (analyzing, *e.g.*, single-digit market share allocations and acceleration clauses as cartel enforcement mechanisms). Thus, Jazz and Hikma lack an incentive to engage in the price competition that Defendants posit.

In short, Plaintiffs plausibly **[**118]** allege how Jazz's reverse payment settlements with the Later Generic Defendants delayed generic competition that otherwise would have occurred, thereby injuring consumers and entities, such as Plaintiffs, who pay for Xyrem. *See* Section III-A-2 and 3, *supra* (detailing reverse payments and market allocations); Section III-B, *supra* (detailing conspiracy). ***HN34***[] "Remove the pay, remove the delay." *Glumetza, 2021 U.S. Dist. LEXIS 87085, 2021 WL 1817092, at *14*. Accordingly, Plaintiffs have adequately pled that Jazz's settlements caused antitrust injury.

D. *Noerr-Pennington* doctrine does not require dismissal of Plaintiffs' monopolization claims under *Sherman Act § 2* (CAC Count 6 and UHS Count 6).

As their fourth ground for dismissal, Defendants contend the *Noerr-Pennington* doctrine requires dismissal of Plaintiffs' monopolization claims under *Sherman Act § 2*. The Court first summarizes the *Noerr-Pennington* doctrine and its exception for sham litigation. The Court **[*877]** then analyzes Defendants' *Noerr-Pennington* argument.

HN35[] "Under the *Noerr-Pennington* doctrine, 'those who petition the government for redress are generally immune from antitrust liability.'" *AbbVie, 976 F.3d at 359-60* (quoting *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc. ("PRE"), 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*). This "'right to petition extends to all departments of the Government,' including the courts." *Id.* (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*). However, *Noerr-Pennington* ***[**119]*** immunity does not apply if a governmental petition is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Id.* (quoting *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*). This sham exception has two elements. First, the petition at issue "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* (quoting *PRE, 508 U.S. at 60-61*). Second, the petitioner's "subjective motivation" must have been "to thwart competition." *Id.* (quoting *Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 556, 134 S. Ct. 1749, 188 L. Ed. 2d 816 (2014)*).

The sham exception is further strengthened by Ninth Circuit precedent. ***HN36***[] "The Ninth Circuit has held that 'whether something is a genuine effort to influence government action, or a mere sham for *Noerr-Pennington* purposes, is a question of fact." *Sonus Networks, Inc. v. Inventergy, Inc., No. 15-CV-0322-EMC, 2015 U.S. Dist. LEXIS 97748, 2015 WL 4539814, at *2 (N.D. Cal. July 27, 2015)* (original alterations omitted) (quoting *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1253 (9th Cir. 1982)*). Thus, "courts rarely award *Noerr-Pennington* immunity at the motion to dismiss stage." *AbCellera Biologics Inc. v. Berkeley Lights, Inc., No. 20-CV-08624-LHK, 2021 U.S. Dist. LEXIS 123839, 2021 WL 2719264, at *6 (N.D. Cal. July 1, 2021)* (quoting *Sonus Networks, 2015 U.S. Dist. LEXIS 97748, 2015 WL 4539814, at *2*).

With this framework in mind, the Court analyzes Defendants' *Noerr-Pennington* arguments below. Defendants' three arguments are that *Noerr-Pennington* immunizes (1) Jazz's REMS-related petitioning to the FDA; (2) Jazz's allegedly sham citizen petitions to the FDA; and (3) Jazz's allegedly sham litigation **[**120]** against generic manufacturers. The Court finds that *Noerr-Pennington* does not immunize Jazz's REMS-related petitioning or Jazz's allegedly sham litigation. As for Plaintiffs claims against Jazz's allegedly citizen petitions to the FDA, however, the Court finds those claims time-barred.

The Court notes that Defendants also moved to dismiss Plaintiffs' "product hop" allegations as not actionable under *Sherman Act § 2*. Mot. at 29-30. The product hop allegations, in brief, are that Jazz has launched a new product (called Xywav) that extends Xyrem's patents and further deters the entry of any AB-rated generic. *See, e.g.*, UHS ¶¶ 2, 210, 230, 236. In their opposition, Plaintiffs clarified that the product hop allegations do not constitute a "viable standalone" claim. Thus, on reply, Defendants no longer sought to dismiss the product hop allegations after. Opp'n at 29 n.11 (clarifying product hop); *see* Reply (no longer mentioning product hop). Accordingly, the Court need not address the product hop allegations. *See, e.g., Maciel v. Cate, 731 F.3d 928, 932 n.4 (9th Cir. 2013)* (holding that "failing to address [an argument] in [ ] reply brief" forfeits the argument).

[*878] 1. Jazz's REMS-related petitioning is not entitled to *Noerr-Pennington* immunity at the motion [121] to dismiss stage**.

Defendants first argue that "Jazz's REMS-related petitioning to the FDA" is immune because Jazz prevailed before the FDA. Mot. at 28. Specifically, Defendants note that the FDA approved Jazz's petition for a single-pharmacy REMS, under which only Express Scripts may dispense Xyrem. *Id.* Defendants therefore assert that their REMS petitions were not "objectively baseless" under the first element of the sham exception to *Noerr-Pennington*.

The Court disagrees. Although Defendants are correct that "a *successful* action self-proves its [objective] reasonableness," Defendants' REMS petitions are not "successful" on the allegations here. *U.S. Futures Exch., L.L.C. v. Bd. of Trade of the City of Chicago, Inc., 953 F.3d 955, 963 (7th Cir. 2020)* (emphasis in original). The FDA expressly held that its approval of Jazz's REMS "should not be construed or understood as agreement with Jazz." Memorandum from Trueman Sharp, Deputy Director for the Office of Generic Drugs, to ANDAs for sodium oxybate oral solution products, *et seq.* ("Sharp Memo") (Jan. 17, 2017) (UHS, Ex. B). Rather, the FDA approved Jazz's REMS to halt the "significant drain on [FDA] resources posed by the dispute, and the fact that the outcome of Jazz's challenge to the [FDA]'s legal authority to require a modification to **[**122]** a 'deemed REMS' had the potential to affect only a small number of drug products." Sharp Memo at 7-8. ***HN37***[] Such "[p]assive government approval is insufficient" for *Noerr-Pennington* immunity. *A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 251 (3d Cir. 2001)*.

Moreover, as Plaintiffs note, the FDA expressly doubted both (1) the objective merits of Jazz's REMS; and (2) Jazz's subjective motivations in proposing a single-pharmacy REMS. As to the objective merits, the FDA reiterated concerns by Dr. John K. Jenkins, Director of the Office of New Drugs. Specifically, Dr. Jenkins noted the uniquely exclusionary nature of Xyrem REMS and its "burdens on patient access and the healthcare delivery system":

> Our action approving the REMS submitted by Jazz *should not be construed or understood as agreement* with Jazz that limiting dispensing to a single pharmacy is the only way to ensure that the benefits of Xyrem outweigh the risks under *section 505-1* of the FD&C Act. We continue to be concerned that limiting the distribution of Xyrem to one pharmacy *imposes burdens on patient access and the healthcare delivery system. No other currently approved REMS* requires a sponsor to limit dispensing to a single pharmacy.

Sharp Memo at 8 (emphasis added). As for subjective motivations, the FDA **[**123]** expressly "note[d] the inconsistent position Jazz has taken on [REMS safety]"—an inconsistency which "suggest[ed] [Jazz's] *knowledge* that this aspect of its REMS *could have the effect of preventing generic competition*." *Id.* at 26 (emphasis added). The FDA reiterated this antitrust concern elsewhere in the Sharp Memo by again noting "Jazz's awareness that Xyrem REMS could have the effect of blocking or delaying approval of generic version of Xyrem." *Id.* at 12; UHS ¶ 136 (quoting same). Accordingly, Plaintiffs plausibly allege that Jazz's REMS-related petitioning to the FDA meets the sham exception to *Noerr-Pennington* immunity.

2. Plaintiffs' sham citizen petition allegations are time-barred.

Defendants next challenge Plaintiffs' allegations that Jazz filed "'baseless' citizen petitions with the FDA in an effort to slow **[*879]** down the ANDA review and approval process." Mot. at 29 (citing CAC ¶¶ 175-178; UHS ¶¶ 114-117). In Defendants' view, these allegations should be dismissed on two independent grounds. The first ground is *Noerr-Pennington* immunity. *Id.* The second ground is that Plaintiffs' claims are time-barred. *Id.*

The Court need not reach *Noerr-Pennington* immunity because the Court agrees—and **[**124]** Plaintiffs implicitly concede—that Plaintiffs' citizen petition allegations are time-barred. The challenged citizen petitions were filed and addressed by the FDA in 2012. *See, e.g.*, CAC ¶¶ 175-81 (detailing timeline). As Defendants note, "[t]he longest conceivable limitations period for Plaintiffs' claims is six years (*see* *Me. Rev. Stat. tit. 14, § 752*; *Wis. Stat. § 133.18(2)*), meaning that the time for Plaintiffs to file any such claim ran in 2018." Mot. at 29. Plaintiffs fail to respond to this argument. *See* Opp'n 28-29 (failing to mention statute of limitations); Reply at 16-17 (noting failure to respond). Nor do Plaintiffs argue that equitable tolling may apply. Plaintiffs "ha[ve] forfeited this argument by failing to address it in [their] reply brief." *Maciel, 731 F.3d at 932 n.4*; *see also, e.g.,* *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp., 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011)* (collecting cases holding same). Plaintiffs have thus conceded that their citizen petition allegations are time-barred.

Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' citizen petition allegations. "Because th[ese] [allegations] [are] time-barred, leave to amend [] would be futile." *Castillo v. Countrywide Home Loans, Inc., No. 10-CV-03538-LHK, 2010 U.S. Dist. LEXIS 120238, 2010 WL 4704429, at *4 (N.D. Cal. Nov. 12, 2010)*; *accord* *Toro v. Centene Corp., No. 19-CV-05163-LHK, 2020 U.S. Dist. LEXIS 191368, 2020 WL 6081738, at *5 (N.D. Cal. Oct. 14, 2020)* (collecting cases holding same). The Court thus dismisses with prejudice Plaintiffs' citizen petition allegations.

3. Plaintiffs adequately plead the [125] sham litigation exception to *Noerr-Pennington* immunity**.

Defendants again invoke *Noerr-Pennington* immunity against allegations that Jazz's serial patent infringement lawsuits abused the court system. Mot. at 30-31; *see also* Section I-A-2, *supra* (detailing sham litigation allegations). Specifically, Defendants argue that Plaintiffs' allegations "fail on the first prong" of the sham litigation exception: objective baselessness. Mot at 31. For support, Defendants rely on *International Longshore & Warehouse Union v. ICTSI Oregon, Inc., 863 F.3d 1178, 1188-89 (9th Cir. 2017)*, and *Kaiser Foundation Health Plan, Inc. v. Abbott Laboratories, Inc., 552 F.3d 1033, 1044, 1046 (9th Cir. 2009)*. Reply at 16.

The Court disagrees with Defendants. In fact, both of Defendants' cited cases show that Plaintiffs have adequately pleaded the sham litigation exception to *Noerr-Pennington* immunity. The Court addresses each case in turn. In *International Longshore, 863 F.3d at 1187*, the Ninth Circuit gave nuance to the usual rule for objective baselessness. ***HN38***[] Specifically, the Ninth Circuit explained that "[i]n the context of a *series of alleged sham proceedings*, [] 'the question is *not whether any one suit has merit*[,] but whether they are *brought pursuant to a policy* of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.' In such a context, the legal success of an occasional sham suit is irrelevant." *Id.* **[**126]** (emphasis added) (quoting *PRE, 508 U.S. at 60-61*).

Here, Plaintiffs allege "a series of alleged sham proceedings" against generic manufacturers to delay generic entry. *Id.* Specifically, Jazz allegedly brought cyclical litigation in which Jazz would "assert a **[*880]** patent position, glean defenses to that position in the litigation, file new 'follow-on' patents, and then file a new lawsuit asserting those patents." Opp'n at 5 (citing CAC ¶¶ 155-61; UHS ¶¶ 104-09). For instance, Jazz sued Hikma for patent infringement *nine* times. CAC ¶¶ 151-62 (detailing suits). Jazz also brought at least eight other suits against Later Generic Defendants and five other later generics. CAC ¶¶ 183-85 (listing suits). Yet by March 2017, the Patent Trial Appeal Board ("PTAB") had invalidated as obvious one of Jazz's three asserted families of patents relating to REMS.[5] UHS ¶¶ 151-57.

Moreover, Jazz's lawsuits were plausibly "brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *Int'l Longshore, 863 F.3d at 1187* (quoting *PRE, 508 U.S. at 60-61*). This type of anticompetitive policy is incentivized by "the ANDA context," as the Third Circuit recently explained. *AbbVie, 976 F.3d at 361*. ***HN39***[] Under the Hatch-Waxman Act, the filing of a lawsuit **[**127]** triggers an "automatic, 30-month stay" of any FDA approval of an ANDA—regardless of a suit's outcome. *Id. at 340,*

[5] The invalidated REMS patents claimed methods of tracking drug prescriptions in a computer database. CAC ¶¶ 141-44.

361; *accord* Actavis, 570 U.S. at 143 (explaining same). Thus, "[t]he automatic, 30-month stay is a collateral injury the defendant's mere use of legal process invariably inflicts." AbbVie, 976 F.3d at 361. From this "collateral injury," a district court may conclude that "in filing an objectively baseless lawsuit against [the generic manufacturer], the [brand name manufacturer] w[as] motivated not to assert a patent in good faith, but to impose expense and delay on [the generic manufacturer] to delay its entry into the [drug] market." Id. at 371.

Plaintiffs allege that Jazz exploited this 30-month stay to delay generic entry. Namely, Plaintiffs allege that each of Jazz's lawsuits—"irrespective of their prospects of success—triggered automatic 30-month stays, running from the date Jazz received the generic manufacturer's paragraph IV notice letter." CAC ¶ 185. These lawsuits began in November 2010 with Hikma's ANDA, CAC ¶ 151, and continued at least through November 2017 with a later generic manufacturer's ANDA. CAC ¶ 183. Jazz's lawsuits thus imposed a stay on ANDA approvals through at least mid-2020 (*i.e.*, 30 months from November 2017). Indeed, **[**128]** as of today, more than a decade later, there is no generic version of Xyrem. *E.g.*, UHS ¶ 5 (alleging monopoly through "at least 2023"). All told, Plaintiffs' allegations show that under *International Longshore*, it is plausible that Jazz brought lawsuits pursuant to an anticompetitive policy. *See* Int'l Longshore, 863 F.3d at 1187.

Defendants' other main case is Kaiser Foundation, 552 F.3d 1033. There, the Ninth Circuit rejected the sham litigation exception as to 17 infringement suits. Id. at 1046. Yet those 17 suits were, on their face, much more meritorious than Jazz's lawsuits here. Of the 17 suits in *Kaiser Foundation*, the patent holder "won seven." *Id.* Of the remaining ten suits, six were resolved in a published opinion by the Federal Circuit in light of intervening Supreme Court precedent. Id. at 1047. The last four suits either involved "a question of first impression" or a treaty provision that "had not been the subject of prior interpretation." Id. at 1046-47 (quoting In re Terazosin Hydrochloride Antitrust Litig., 335 F. Supp. 2d 1336, 1359 (S.D. Fla. 2004)).

[*881] Here, by contrast, Jazz did not prevail in any of its patent suits. To the contrary, the PTAB invalidated as obvious one of Jazz's three asserted families of patents relating to REMS. UHS ¶¶ 151-57. Nor is there any indication that Jazz's suits involved legal issues of first impression or issues subject to intervening **[**129]** Supreme Court precedent. On the pleadings and briefing here, Jazz's suits plausibly involved one overarching purpose: imposing the "crushing burden" of litigation and the 30-month automatic stay to delay generic entry into the Xyrem market. Kaiser Found., 552 F.3d at 1046 (quoting USS-POSCO Industries v. Contra Costa County Building & Construction Trades Council, 31 F.3d 800, 810-11 (9th Cir. 1994)). This is a harm that the sham litigation exception to *Noerr-Pennington* aims to prevent. *See, e.g.,* AbbVie, 976 F.3d at 371 (affirming that lawsuits were "an anticompetitive weapon" under the sham exception). Plaintiffs thus adequately plead the sham litigation exception to *Noerr-Pennington* immunity.

In sum, *Noerr-Pennington* doctrine does not require dismissal of Plaintiffs' monopolization claims under Sherman Act § 2. The Court therefore denies Defendants' motion to dismiss CAC Count 6 and UHS Count 6 on this ground.

E. Plaintiffs inadequately plead federal antitrust standing for damages (CAC Counts 5, 6, and 12; UHS Counts 1, 5, 6, and 11).

As noted in background Section I-B, Plaintiffs purchase or provide reimbursement for Xyrem nationwide. However, according to Defendants, Plaintiffs' federal antitrust claims for damages fail because "Plaintiffs are *indirect* purchasers who lack [antitrust] standing." Mot. at 31 (emphasis added). For support, Defendants rely on Apple Inc. v. Pepper, 139 S. Ct. 1514, 203 L. Ed. 2d 802 (2019). In *Pepper* ***[**130]*** , the United States Supreme Court held that "[its] decision in *Illinois Brick* established a *bright-line rule* that authorizes suits by direct purchasers but *bars suits by indirect purchasers*." 139 S. Ct. at 1520 (emphasis added) (citing Illinois Brick Co. v. Illinois, 431 U.S. 720, 746, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)). Defendants note that "Plaintiffs do not allege—nor can they—that they purchased Xyrem from any named Defendant and therefore cannot claim to be direct purchasers. Rather, Plaintiffs purchased Xyrem from a non-party, Express Scripts." Mot. at 32. Express Scripts is the exclusive pharmacy for Xyrem. *See* Section I-A-3-a (summarizing Jazz REMS). Thus, in Defendants' view, *Illinois Brick* and *Pepper* bar Plaintiffs' federal antitrust claims for damages.[6]

HN40[] The Court agrees with Defendants. *Illinois Brick* "constrain[s] the class of parties that have statutory standing to recover damages through antitrust suits." *Del. Valley Surgical Supply Inc. v. Johnson & Johnson, 523 F.3d 1116, 1120 (9th Cir. 2008)*. *Pepper* constrains that class of plaintiffs further by holding that *Illinois Brick* set forth a "bright-line rule," which "means that there is no reason to ask whether the rationales of *Illinois Brick* 'apply with equal force' in every individual case." *Pepper, 139 S. Ct. at 1524* (quoting *Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 216, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*).

Plaintiffs offer three arguments in response, but none is persuasive on the pleadings here. **[**131]** The first argument is that Plaintiffs' federal damages claims must survive because "[t]he rationale underlying **[*882]** *Illinois Brick* was to promote private antitrust claims, not discourage them." Opp'n at 33. The Supreme Court rejected a purposivist argument just like this in *Pepper*. Again, the *Pepper* Court held that ***HN41***[] "there is no reason to ask whether the rationales of *Illinois Brick* 'apply with equal force' in every individual case." *Pepper, 139 S. Ct. at 1524* (quoting *UtiliCorp, 497 U.S. at 216*). The *Pepper* Court further stressed that "[w]e should not engage in 'an unwarranted and counterproductive exercise to litigate a series of exceptions.'" *Id.* (quoting *UtiliCorp, 497 U.S. at 216*). Following *Pepper*, this Court cannot explore whether Plaintiffs' "individual case" might qualify for some novel exception to *Illinois Brick*'s direct purchaser rule. *Id.*

Plaintiffs' second argument relies on *In re National Football League's Sunday Ticket Antitrust Litigation ("NFL Sunday Ticket"), 933 F.3d 1136 (9th Cir. 2019)*, *cert. denied sub nom. Nat'l Football League v. Ninth Inning, Inc., 141 S. Ct. 56, 208 L. Ed. 2d 291 (2020)*. According to Plaintiffs, *NFL Sunday Ticket* allows antitrust damages claims to proceed whenever Plaintiffs allege an antitrust conspiracy. Opp'n at 33 (citing *NFL Sunday Ticket, 933 F.3d at 1156-58*). Plaintiffs overread *NFL Sunday Ticket*. That case merely applied the settled co-conspirator exception to *Illinois Brick*. ***HN42***[] "[W]hen co-conspirators have jointly committed the antitrust violation, a plaintiff **[**132]** who is the immediate purchaser from any of the conspirators is directly injured by the violation." *NFL Sunday Ticket, 933 F.3d at 1157*.

Here, there is no allegation that any Plaintiff directly bought Xyrem from any Defendant. Instead, Plaintiffs allege that they buy Xyrem through Express Scripts—"the sole specialty central pharmacy through which Xyrem is distributed." Opp'n at 32 (CAC ¶¶ 288-291; UHS ¶¶ 211-212). Express Scripts is not a Defendant, let alone an alleged co-conspirator in the conspiracy detailed in Section III-B-2, *supra. NFL Sunday Ticket* is thus inapposite.

Third and most significantly, Plaintiffs argue that Express Scripts is "owned or controlled" by Jazz. Opp'n at 29 (quoting *Illinois Brick, 431 U.S. at 736 n.16*). Such "owne[rship] or control[]" would allow Plaintiffs to sue Jazz (and its co-conspirators) for damages. *Illinois Brick, 431 U.S. at 736 n.16*. Yet Plaintiffs fail to show ownership and control here. Plaintiffs instead rely on distinguishable cases which, if applied here, would violate the Supreme Court's rule that "[w]e should not engage in 'an unwarranted and counterproductive exercise to litigate a series of exceptions.'" *Pepper, 139 S. Ct. at 1524* (quoting *UtiliCorp, 497 U.S. at 216*); *accord UtiliCorp, 497 U.S. at 216* ("The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the [*Illinois* ***[**133]*** *Brick*] rule."). Neither Plaintiffs' in-circuit authority or out-of-circuit authority is availing. The Court addresses each set of authority in turn.

Plaintiffs cite two Ninth Circuit cases finding ownership or control. In those cases, the alleged antitrust violator actually owned the direct purchaser at issue. Specifically, in *Royal Printing Co. v. Kimberly Clark Corp.*, the Ninth Circuit held that "*Illinois Brick* does not bar an indirect purchaser's suit where the direct purchaser is a *division* or *subsidiary*." *621 F.2d 323, 326 (9th Cir. 1980)* (emphasis added); *see* Opp'n at 30 (citing same). *Freeman v. San Diego Ass'n of Realtors* accordingly held that "*Royal Printing* applies because the associations [(*i.e.*, the antitrust defendants] own [the direct purchaser]." *322 F.3d 1133, 1146 & n.12 (9th* ***[*883]*** *Cir. 2003)*; *see* Opp'n at 29-30

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[6] The Ninth Circuit has held, and Defendants do not dispute, that "*Illinois Brick* doesn't apply to equitable relief." *Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1145 (9th Cir. 2003)*; *accord* Reply at 17 (not disputing same).

(citing same). Here, by contrast, there is no allegation that Express Scripts is a division or subsidiary of any Defendant.

Plaintiffs' three out-of-circuit cases—which are district court cases predating *Pepper*—are also inapposite. *See* Opp'n at 30 (citing cases). In *Kentucky v. Marathon Petroleum Co.*, plaintiffs' sufficient allegations included that (1) the direct purchaser was in "economic unity" with defendant; and that (2) defendant, as **[**134]** a petroleum refiner, "control[ed] certain of its direct-purchaser retailers through contractual provisions that waive the ability of those retailers to bring antitrust suits on their own." *2018 U.S. Dist. LEXIS 165270, 2018 WL 4620621, at *10-11 (W.D. Ky. Sept. 26, 2018)*. Similarly, in *In re Mercedes-Benz Antitrust Litigation*, the leasing agent that stood between plaintiffs and defendants was "said to be a subsidiary" of a defendant. *157 F. Supp. 2d 355, 366 (D.N.J. 2001)*.

Here, by contrast, Plaintiffs do not allege that Express Scripts is in "economic unity" with a Defendant, let alone a subsidiary of a Defendant. Nor do Plaintiffs allege that Jazz controls Express Scripts "through contractual provisions that waive the ability of [Express Scripts] to bring antitrust suits." *Id.* at *11. To the contrary, the Jazz-Express Scripts Master Services Agreement[7] provides that "[Express Scripts] shall have sole discretion over the management and oversight of its Personnel," and will "reasonably consult" with respect to Jazz's "personnel recommendations." Jazz-Express Scripts Pharmacy Master Services Agreement § 2.7 (July 1, 2017), https://www.sec.gov/Archives/edgar/data/1232524/000123252417000134/jazzq22017ex102.htm. This provision belies Plaintiffs' assertion that Jazz controls Express Scripts.

Plaintiffs' last **[**135]** out-of-circuit case is *In re Lorazepam & Clorazepate Antitrust Litigation, 202 F.R.D. 12, 25 (D.D.C. 2001)*. There, the direct purchasers at issue were *plaintiffs*' agents. *Id.* Specifically, the *Lorazepam* plaintiffs had each "execute[d] a written agreement appointing [the direct purchaser] as its agent." *Id.* (emphasis omitted) (quoting plaintiffs' affidavit). Here, by contrast, the issue is whether Express Scripts is a *Defendant's* agent. Moreover, there is no allegation that Jazz executed a written agreement expressly appointing Express Scripts as its agent.

All told, none of Plaintiffs' cited authority is persuasive. ***HN43***[] The Court therefore must heed the Supreme Court's rule that "[w]e should not engage in 'an unwarranted and counterproductive exercise to litigate a series of exceptions'" to *Illinois Brick*. *Pepper, 139 S. Ct. at 1524* (quoting *UtiliCorp, 497 U.S. at 216*). Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' federal antitrust claims for damages. However, because granting Plaintiffs leave to amend would not be futile, cause undue delay, or unduly prejudice Defendants, and Plaintiffs have not acted in bad faith, the Court dismisses with leave to amend Plaintiffs federal antitrust claims for damages. *See* *Leadsinger, 512 F.3d at 532*.

F. Plaintiffs' state law claims survive Defendants' motion to dismiss (CAC Counts 7-12; [136] UHS Counts 7-9)**.

Lastly, Defendants briefly argue that Plaintiffs' state law claims fail on three grounds. Mot. at 34-35. First, Defendants argue that the state law claims fail on the merits for the same reason that the federal claims purportedly fail on the merits. Second, Defendants argue Illinois, New **[*884]** Hampshire, Connecticut, Puerto Rico, and Utah have adopted *Illinois Brick*'s bar against lawsuits by indirect purchasers. Third, Defendants argue that Plaintiffs lack Article III standing within Hawaii, North Dakota, Vermont, Wyoming, and Puerto Rico.

The Court addresses each asserted ground for dismissal in turn. Ultimately, the Court dismisses just a few of Plaintiffs' state law claims. Specifically, the Court dismisses (1) state law claims to the extent they rely on the already dismissed sham citizen petition allegations; (2) Class Plaintiffs' class claims under Illinois law; and (3) Class Plaintiffs' individual claims under Utah law.

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[7] The Jazz-Express Scripts Master Services Agreement is incorporated by reference in UHS ¶ 213, which cites the agreement and links to it in full.

1. Plaintiffs' state law claims do not fail on the merits.

First, Defendants argue that Plaintiffs' state law claims fail on the merits. For support, Defendants note that the merits of the state law claims rise and fall with the federal claims. Mot. at 34. Plaintiffs **[**137]** do not dispute this. Opp'n at 33. As detailed in this order, however, only one of Plaintiffs' federal antitrust claims fail on the merits: Plaintiffs' sham citizen petition allegations are time-barred. *See* Section III-D-2, *supra* (analyzing and dismissing with prejudice citizen petition allegations).

Accordingly, as to Defendants' motion to dismiss Plaintiffs' state law claims on the merits, the Court grants the motion just on the sham citizen petition allegations. Because those allegations are time-barred and dismissed with prejudice, they cannot support Plaintiffs' state law claims. Otherwise, the Court denies Defendants' motion to dismiss Plaintiffs' state law claims on the merits.

Having addressed Defendants' argument against the merits of the state law claims, the Court now turns to Defendants' next argument: that indirect purchasers such as Plaintiffs cannot bring suit under some state laws.

2. Plaintiffs can largely bring indirect purchaser claims under state law.

Second, Defendants argue that because Plaintiffs lack direct purchaser standing under *Illinois Brick*, Plaintiffs cannot bring claims under state laws that bar indirect-purchaser suits. Mot. at 35; *see* Section III-E, *supra* ***[**138]*** (analyzing *Illinois Brick*). Those laws include the antitrust statutes of Illinois, New Hampshire, Connecticut, Puerto Rico, and Utah. *See* Reply at 19 (not disputing Plaintiffs' arguments for Florida and Massachusetts law). Given the parties' perfunctory briefing here, the Court briefly addresses each state's law in turn.

a. Illinois: Class Plaintiffs cannot maintain class claims.

HN44[] The Illinois Antitrust Act provides that "[n]o provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages." Opp'n at 43 (quoting *740 Ill. Comp. Stat. Ann. 10/7*). At first glance, this provision seems to foreclose Defendants' argument that only direct purchasers may bring suit. However, Defendants cite a proviso immediately following the general statement that Plaintiffs cite. ***HN45***[] This proviso provides that "that *no person* shall be authorized to maintain a class action in any court of this State *for indirect purchasers* asserting claims under this Act, with the sole exception of this State's Attorney General." *740 Ill. Comp. Stat. Ann. 10/7*.

On the cursory briefing here, the Court agrees with Defendants. In particular, the Court is persuaded by the detailed analysis of its sister court in *Lidoderm, 74 F. Supp. 3d at 1083*. There, United States District Judge William **[**139]** Orrick III explained why the class action limitation in the Illinois Antitrust Act is in fact "intertwined with Illinois substantive rights and remedies." *Id. at 1084* (citing *In re Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 677* ***[*885]*** *(E.D. Pa. 2010)*. Because that class action limitation is substantive, it displaces *Federal Rule of Civil Procedure 23*'s usual allowance of class actions in diversity actions. *Id.* (distinguishing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)*). Judge Orrick therefore dismissed the *Lidoderm* plaintiffs' Illinois Antitrust Act claims. *Id.*

Applying *Lidoderm*'s holding here, Class Plaintiffs cannot maintain their class claims against Defendants under Illinois law. By contrast, as an individual plaintiff, United may proceed with any indirect purchaser claim under Illinois law.

b. New Hampshire: Plaintiffs' claims survive.

Defendants' argument as to New Hampshire is meritless. Defendants argue that "[t]he New Hampshire Supreme Court expressly adopted the *Illinois Brick* rule against indirect purchaser suits in *Minuteman, LLC v. Microsoft Corp., 147 N.H. 634, 795 A.2d 833, 838 (N.H. 2002)*," a case which construed *N.H. Rev. Stat. § 356:11* (1995). Reply at 19. Yet Defendants fail to mention that effective January 1, 2008, New Hampshire superseded *Minuteman* by statute. ***HN46***[] The current version of *N.H. Rev. Stat. § 356:11* provides that "any person" may bring suit "*regardless of whether that person dealt directly or indirectly with the defendant*." *N.H. Rev. Stat. § 356:11(II)* (adding emphasis **[**140]** on new statutory text). Defense counsel—who include at least 16 lawyers across six major law firms—should have brought this statutory revision to the Court's attention. In short, Plaintiffs' claims under New Hampshire law may proceed.

c. Connecticut: Plaintiffs' claims survive.

Defendants' argument as to Connecticut law also lacks merit. In their motion to dismiss, Defendants' only support for its conclusory argument against Connecticut (as well as Florida, Illinois, Massachusetts, and Puerto Rico) was one citation—in a footnote—to a 2015 case from this district. Mot. at 35 & n.20 (citing *In re Lidoderm Antitrust Litig., 103 F. Supp. 3d 1155, 1163-64 (N.D. Cal. 2015)*). Yet as Plaintiffs correctly noted in their opposition, Connecticut passed a law abrogating any *Illinois Brick* requirement in October 2017. *See Health Care Providers—Pharmacists—Confidential or Privileged Information*, 2017 Conn. Legis. Serv. P.A. 17-241 (S.B. 445) (West) (providing that an antitrust defendant "[m]ay not assert as a defense that the defendant did not deal directly with the person on whose behalf the action is brought" (codified at *Conn. Gen. Stat. Ann. § 35-46a(1)*)).

On reply, Defendants failed to acknowledge another misleading omission of an intervening change in law. Instead, Defendants proffered a new argument: **[**141]** that Connecticut's statutory amendment is not retroactive. Reply at 20. Defendants cite only *Spinner Consulting LLC v. Stone Point Cap. LLC, 623 B.R. 671, 678 (D. Conn. 2020)*, *aff'd on other grounds*, *843 F. App'x 411 (2d Cir. 2021)*, for this retroactivity point.

Spinner is unpersuasive. In *Spinner*, the challenged conduct ceased before 2018. *Spinner, 623 B.R. at 675, 677*. Here, by contrast, Plaintiffs allege that Jazz's anticompetitive agreements will maintain Jazz's unlawful monopoly "through at least January 1, 2023." CAC ¶ 296. ***HN47***[] Regardless, "[a]rguments raised for the first time in a reply brief are waived." *E.g., McReynolds v. Merrill Lynch & Co., 694 F.3d 873, 889 n.9 (7th Cir. 2012)*. Thus, Plaintiffs' Connecticut law claims may proceed.

d. Puerto Rico: Plaintiffs' claims survive.

To argue that Plaintiffs' Puerto Rico law claims should be dismissed, Defendants **[*886]** cite one case: *Staley v. Gilead Sciences, Inc. ("Gilead I"), 446 F. Supp. 3d 578, 626-28 (N.D. Cal. 2020)*. There, United States District Judge Edward Chen surveyed the conflicting district court authority on whether Puerto Rico allows indirect purchaser suits. Following several district courts and colleague Judge Orrick from this district, Judge Chen concluded that Puerto Rico has adopted the *Illinois Brick* rule. *Id. at 628* (citing *United Food & Com. Workers Loc. 1776 & Participating Emps. Health & Welfare Fund v. Teikoku Pharma USA, Inc., 74 F. Supp. 3d 1052, 1086 (N.D. Cal. 2014)*). Judge Chen thus held that Puerto Rico law bars indirect purchaser suits.

The Court respectfully disagrees with Judges Chen and Orrick on this question. ***HN48***[] As some district courts have recognized, both the **[**142]** Puerto Rico Supreme Court and the U.S. District Court for the District of Puerto Rico have not limited antitrust standing to direct purchasers. *See, e.g., In re Zetia (Ezetimibe) Antitrust Litig., 400 F. Supp. 3d 418, 433 (E.D. Va. 2019)* (holding same); *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC, No. 15-CV-06549-CM, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *23 (S.D.N.Y. Dec. 26, 2018)* (same). Rather, Puerto Rico's district court has expressly held that "it is immaterial whether Plaintiffs are direct or indirect purchasers." *Rivera-Muniz v. Horizon Lines Inc., 737 F. Supp. 2d 57, 61 (D.P.R. 2010)* (citing *Pressure Vessels of P.R., Inc. v. Empire Gas de P.R., 137 D.P.R. 497, 509-18, 1994 Juris P.R. 144 (1994)*). For support, the *Rivera-Muniz* Court cited the Puerto Rico Supreme Court's decision in *Pressure Vessels*. There, the Puerto Rico

Supreme Court held, somewhat circumspectly, "that the plaintiff need not establish anything beyond a factual causal relation between the injury and the violation" to have antitrust standing under Puerto Rico law. *Pressure Vessels, 137 P.R. Dec. 497* (English translation; no pincite).

Following Judge Orrick, Judge Chen found *Pressure Vessels* inapposite because it did not expressly discuss *Illinois Brick. Gilead I, 446 F. Supp. 3d at 627*. Judge Chen thus found *Rivera-Muniz* unpersuasive because it appeared to overread *Pressure Vessels*, a Puerto Rico Supreme Court case. *Id.*

By contrast, the Court finds that *Pressure Vessels* did address *Illinois Brick*. Even though the *Pressure Vessels* Court did not cite *Illinois Brick* itself, it did cite and criticize four United States Supreme Court cases that explicitly applied **[**143]** *Illinois Brick. See Pressure Vessels, 137 P.R. Dec. 497* (citing *Kansas v. Utilicorp United, Inc., 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*; *Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*; *Associated General Contractors v. Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*; and *Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 98 S. Ct. 584, 54 L. Ed. 2d 563 (1978)*). In *UtiliCorp*, for instance, the U.S. Supreme Court strictly barred indirect purchaser suits "even assuming that any economic assumptions underlying the *Illinois Brick* rule might be *disproved* in a specific case." *UtiliCorp, 497 U.S. at 217* (emphasis added). Thus, the Puerto Rico Supreme Court was almost certainly aware of *Illinois Brick* when the Puerto Rico Supreme Court held—contrary to *Illinois Brick*—that an antitrust plaintiff "need not establish anything beyond a factual causal relation between the injury and the violation." *137 P.R. Dec. 497, 1994 Juris P.R. 144*.

If the Court's reading of *Pressure Vessels* is correct, then the Court must also hold that indirect purchaser standing is allowed under Puerto Rico law. *See Vazquez-Filippetti v. Banco Popular de Puerto Rico, 504 F.3d 43, 48 (1st Cir. 2007)* (holding that the First Circuit is bound by **[*887]** the Puerto Rico Supreme Court in diversity cases). Yet even if the correct reading of *Pressure Vessels* is unclear, what is clear is that the Court owes "deference to the local district judges of Puerto Rico on matters of Puerto Rican law." *Rodriguez v. Escambron Dev. Corp., 740 F.2d 92, 96 (1st Cir. 1984)* (collecting cases). In *Rivera-Muniz*, the Honorable Gustavo Gelpí—the Chief Judge of the U.S. District Court for the District of Puerto Rico and present nominee to the U.S. Court of Appeals for the First Circuit—held **[**144]** that indirect purchasers have standing under Puerto Rico law. *See Rivera-Muniz, 737 F. Supp. 2d at 61* ("[I]t is immaterial whether Plaintiffs are direct or indirect purchasers.").

In sum, given the Court's own reading of *Pressure Vessels* and the deference owed to Judge Gelpí's *Rivera-Muniz* decision, the Court holds that indirect purchasers have antitrust standing under Puerto Rico law. Thus, Plaintiffs' Puerto Rico claims may also proceed.

e. Utah: Class Plaintiffs can maintain class claims, but not individual claims.

HN49[] The Utah Antitrust Act allows "[a] person who is a *citizen of this state or a resident of this state*" to bring suit for antitrust injury. *Utah Code Ann. § 76-10-3109(1)(a)* (emphasis added). Defendants argue that because no Plaintiff is a citizen or resident of Utah, Plaintiffs' claims under Utah law must be dismissed. Mot. at 35.

The Court agrees in part as to Class Plaintiffs, but entirely disagrees as to United. Informing this conclusion is the Fourth Circuit's recent decision *Mayor & City Council of Balt. v. Actelion Pharms. Ltd., 995 F.3d 123 (4th Cir. 2021)*. There, the Fourth Circuit synthesized a twopart approach for evaluating, at the motion to dismiss stage, the standing of class plaintiffs who cannot "satisfy the statutory requirements of the laws of the States they are invoking." *Id. at 133-34*. The Fourth Circuit explained **[**145]** that, on the one hand, these class plaintiffs "may not seek relief for their *own* injuries under those States' statutes." *Id.* (emphasis added). On other hand, these class plaintiffs have standing to assert "*class members*' claims" on behalf of class members who *can* satisfy states' statutory requirements. *Id.* (emphasis in original); *accord, e.g., In re Asacol Antitrust Litig., 907 F.3d 42, 50 (1st Cir. 2018)* (holding same and collecting court of appeals precedent); *Langan v. Johnson & Johnson Consumer Companies, Inc., 897 F.3d 88, 93 (2d Cir. 2018)* (same). Thus, it was reversible error for the *Actelion* district court to dismiss the class plaintiffs' class claims. *Actelion Pharms., 995 F.3d at 134*. The Fourth Circuit held that the district court should have delayed concerns about class treatment to the class certification stage. *Id.*

The Court follows the Fourth Circuit's approach here. Because Class Plaintiffs do not personally satisfy the citizenship or residency requirement of the Utah Antitrust Act, Class Plaintiffs "may not seek relief for their own injuries under" the Utah Antitrust Act. *Id.* Yet Class Plaintiffs' class claims on behalf of Utah citizens or residents "need not be stricken or disregarded." *Id.*

United, for its part, has asserted claims of its UnitedHealthcare Plans affiliate assignors, including "UnitedHealthcare of Utah, Inc." Opp'n at 34 (citing **[**146]** UHS ¶ 10, Ex. A). Defendants do not argue that this Utah assignor-plaintiff would be inadequate. Reply at 20. Thus, United's claim under Utah law may proceed.

In sum, the Court grants Defendants' motion to dismiss Class Plaintiffs' (1) class claims under Illinois law; and (2) individual claims only under Utah law. The Court otherwise denies Defendants' motion to **[*888]** dismiss Plaintiffs' other state law claims. Moreover, because granting Class Plaintiffs leave to amend would not be futile, cause undue delay, or unduly prejudice Defendants, and Class Plaintiffs have not acted in bad faith, the Court grants the Class Plaintiffs leave to amend the dismissed claims. *See Leadsinger, 512 F.3d at 532*.

3. Plaintiffs have Article III standing.

Finally, Defendants argue that Plaintiffs lack Article III standing to bring claims under the laws of five jurisdictions: Hawaii, North Dakota, Vermont, Wyoming, and Puerto Rico. Mot. at 35. Defendants reason that Plaintiffs have failed to allege that any Plaintiff "paid for and/or provided reimbursement for Xyrem in" those five jurisdictions. Mot. at 35.

The Court disagrees. Defendants have conflated Article III standing with so-called "statutory standing." ***HN50***[] As the Fourth Circuit explained in *Actelion Pharmaceutical* ***[**147]*** , "unlike Article III standing, statutory standing considers 'whether a cause of action exists under a particular statute.'" *Actelion Pharms., 995 F.3d at 134* (quoting *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97, 118 S. Ct. 1003, 140 L. Ed. 2d 210 & n.2 (1998)*). Thus, it is often immaterial to Article III standing that class plaintiffs "did not allege facts to show that they satisfied the statutory requirements of" some states' antitrust laws. *Id.* Those class plaintiffs may still have Article III standing to represent a class containing members who *do* satisfy those statutory requirements. *Id.* Several other circuits have held the same. *See In re Asacol Antitrust Litig., 907 F.3d at 49-50* (holding same); *Langan, 897 F.3d at 93* (same); *Morrison v. YTB Int'l, Inc., 649 F.3d 533, 536 (7th Cir. 2011)* (same).

Here too, Class Plaintiffs have Article III standing to represent individuals affected by Xyrem overcharges in at least the five jurisdictions that Defendants challenge. Whether Class Plaintiffs are typical representatives of such individuals—or whether all these individuals together satisfy *Rule 23(b)(3)* predominance—is a question for class certification. *See Actelion Pharms., 995 F.3d at 134* (deferring same to class certification).

As to United, Defendants' standing argument is inapposite. United, as a third-party payor, paid for and/or provided reimbursement for United members "in all 50 states, the District of Columbia, and Puerto Rico." UHS ¶¶ 7-9. United therefore has Article III standing where its **[**148]** members transacted with a pharmacy to obtain Xyrem. *See In re Suboxone Antitrust Litig., 64 F. Supp. 3d 665, 695 (E.D. Pa. 2014)* (collecting cases). Defendants do not argue otherwise. In short, Plaintiffs have adequately pleaded Article III standing.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion to Dismiss Counts 1, 5-12, and 17 of the Consolidated Class Action Complaint and Counts 1, 5-9, and 11 of United Healthcare Services' Complaint. ECF No. 109. Specifically, the Court GRANTS the motion to dismiss the following with prejudice:

- In UHS Counts 5, 7, and 8: United's market allocation claims to the extent they allege that Jazz's licenses are antitrust violations per se.

• In CAC Count 6; UHS Count 6; and any related state law Counts (CAC Counts 7-12; UHS Counts 7-9): Plaintiffs' allegations against Jazz's citizen petitions to the FDA.

The Court GRANTS the motion to dismiss the following with leave to amend:

• In CAC Counts 5, 6, and 12; UHS Counts 1, 5, 6, and 11: Plaintiffs' federal antitrust claims for damages.

[*889] • In CAC Counts 7-12; UHS Counts 7-9: Class Plaintiffs' class claims under Illinois law and individual claims under Utah law.

The Court DENIES the motion to dismiss as to all remaining claims.

Should Plaintiffs **[**149]** elect to file one consolidated amended complaint curing the deficiencies identified herein, Plaintiffs shall do so within 30 days of the date of this order. Failure to meet the 30-day deadline to file an amended complaint or failure to cure the deficiencies identified in this order or Defendants' motion to dismiss will result in dismissal of the deficient claims with prejudice. Plaintiffs may not add new causes of action or parties without leave of the Court or stipulation of the parties pursuant to *Federal Rule of Civil Procedure 15*. Plaintiffs are directed to file redlines comparing the CAC and UHS complaint to any amended complaint as an attachment to Plaintiffs' amended complaint.

IT IS SO ORDERED.

Dated: August 13, 2021

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

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Posada v. Cultural Care, Inc.

United States District Court for the District of Massachusetts

August 13, 2021, Decided; August 13, 2021, Filed

Civil No. 1:20-cv-11862-IT

Reporter
554 F. Supp. 3d 309 *; 2021 U.S. Dist. LEXIS 153230 **; 2021 WL 3604884

KAREN MORALES POSADA, AMANDA SARMENTO FERREIRA GUIMARAES, WILLIANA ROCHA, and SARA BARRIENTOS, individually and on behalf of all others similarly situated, Plaintiffs, v. CULTURAL CARE, INC., a Massachusetts Corporation, Defendant.

Subsequent History: Affirmed by, in part, Appeal dismissed by, in part *Posada v. Cultural Care, Inc., 66 F.4th 348, 2023 U.S. App. LEXIS 10215, 2023 WL 3088814 (1st Cir. Mass., Apr. 26, 2023)*

Motion granted by, Motion denied by *Posada v. Cultural Care, Inc., 2023 U.S. Dist. LEXIS 106061 (D. Mass., June 20, 2023)*

Core Terms

pair, host, sponsors, regulations, counts, state law, per day, conflict preemption, sovereign immunity, preempted, weekly, motion to dismiss, named plaintiff, derivative, preemption, training, argues, minimum wage, wage law, instructions, attended, federal government, federal regulation, allegations, preemptive, antitrust, deceptive, practices, Visitor, records

Counsel: **[**1]** For Karen Morales Posada, individually and on behalf of all others similarly situated, Plaintiff: David Hollis Seligman, LEAD ATTORNEY, Towards Justice, Denver, CO; Alexander N. Hood, PRO HAC VICE, Towards Justice, Denver, CO; H. Clara Coleman, PRO HAC VICE, Nichols Kaster, PLLP, Minneapolis, MN; Matthew C. Helland, PRO HAC VICE, Nichols Kaster, LLP, San Francisco, CA; Peter Rukin, PRO HAC VICE, Rukin Hyland & Riggin LLP, Oakland, CA.

For AMANDA SARMENTO FERREIRA GUIMARAES, WILLIANA ROCHA, Plaintiffs: David Hollis Seligman, Towards Justice, Denver, CO; Matthew C. Helland, Nichols Kaster, LLP, San Francisco, CA.

For Cultural Care, Inc., a Massachusetts Corporation, Defendant: Harvey J. Wolkoff, LEAD ATTORNEY, Gavin Frisch, Matthew Mazzotta, Quinn Emanuel Urquhart & Sullivan, LLP, Boston, MA.

Judges: Indira Talwani, United States District Judge.

Opinion by: Indira Talwani

Opinion

[*312] MEMORANDUM AND ORDER

TALWANI, D.J.

Plaintiffs Karen Morales Posada, Amanda Sarmento Ferreira Guimaraes, Williana Rocha, and Sara Barrientos are foreign nationals who participated as *au pairs* in the federal *au pair* program (under the J-1 Exchange Visitor Visa Program). Sec. Amend. Compl. ("SAC") ¶¶ 7-10 [#43]. Defendant Cultural Care, Inc. ("Cultural **[**2]** Care") sponsored Plaintiffs, coordinated their immigration process, and placed them with a host family. Id. at ¶¶ 3-4, 31, 50, 60, 71, 84. Plaintiffs allege that Cultural Care, through its failure to adequately pay them and to provide certain disclosures, has violated the *Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq.*, and New York, California, New Jersey, and Illinois minimum wage, overtime and wage statement laws. Plaintiffs also allege that Cultural Care has engaged in deceptive trade practices.

Their complaint includes fourteen separate counts. Counts 1-11 allege, as *Rule 23* class actions, violations of California, New York, New Jersey, and Illinois minimum wage, overtime, and wage statement laws. SAC ¶¶ 123-47 (counts 1-4), 84 (class definition counts 1-3), 148-63 (counts 5-7), 91 (class definition counts 5-7), 164-71 (counts 8-9), 98 (class definition counts 8-9), 172-82 (counts 10-11), 105 (class definition counts **[*313]** 10-11). Counts 12-13 allege, as a collective action on behalf of the named plaintiffs and any similarly situated individuals in the three years prior to filing this suit, violations of the FLSA for failure to pay minimum wages and failure to pay overtime. Id. at ¶¶ 183-212 (counts), 120 (collective action class definition). **[**3]** Finally, Count 14 alleges, as a *Rule 23* class action on behalf of the named plaintiffs and all individuals who were sponsored by Cultural Care and worked as *au pairs* in the states of New York, Illinois, New Jersey, Connecticut, and Washington during "any portion of the period commencing during the applicable statute of limitations prior to the filing of this action through the entry of final judgment in this action," that Cultural Care engaged in deceptive trade practices in violation of the consumer protection laws of aforementioned states. Id. at ¶¶ 213-17 (count), 112 (class definition).

Pending before the court is Cultural Care's Motion to Dismiss [#66] for lack of subject matter jurisdiction and for failure to state a claim.[1] Cultural Care argues that it is entitled to derivative sovereign immunity (asserted via *Rule 12(b)(1) of the Federal Rules of Civil Procedure*), that the wage and employment laws allegedly violated are preempted by federal regulations (asserted via *Rule 12(b)(6)*), and that Plaintiffs failed to allege facts establishing either that Cultural Care "employs" *au pairs* or that Cultural Care engaged in any deceptive practices (both also asserted via *Rule 12(b)(6)*). Def's Mem. 2-3 [#67].

For the following reasons, the Motion to Dismiss [#66] DENIED as to Counts 1 through 13 and GRANTED IN PART and DENIED IN PART as to Count 14.

I. Background

A. Overview of Federal Statutes and Regulations

The *au pair* program is a part of the J-1 Exchange Visitor Program through which foreign nationals can come live and study in the United States. *22 C.F.R. § 62 et seq.* (general program regulations); id. at *§ 62.31* (*au pair* program specific regulations). To be eligible to receive a J-1 visa, a person must be:

> an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program . . . for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training . . . .

8 U.S.C. § 1101(a)(15)(J). The *au pair* program is open to foreign nationals between the ages of 18 and 26 and allows such individuals to reside in the United States with an American host family for up to **[**5]** two years, where

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[1] Plaintiffs' Motion to Certify a Collective Action [#98] and Cultural Care's Motion to Strike Pre-Certification **[**4]** Consents [#114] are also pending and will be addressed in a separate order.

they provide childcare services and complete coursework at a local college or university. 22 C.F.R. § 62.31(a), (c)(1), (d), (o).

Exchange Visitor Program Sponsors are "legal entit[ies] designated by the Secretary of State to conduct an exchange visitor program." Id. at § 62.2. Organizations must apply to the Department of State (the "State Department") to become sponsors. Id. at § 62.5. If an applicant meets "all the statutory and regulatory requirements," **[*314]** the State Department may grant designation via a letter specifying what activities the applicant may undertake. Id. at § 62.6(a), (c). Designation can last up to two years, id. at § 62.6(b), 62.7(d), and sponsors can apply for redesignation in advance of the expiration. Id. at 62.7. Sponsors are responsible for choosing, in accordance with the regulatory eligibility rules, who participates in the *au pair* program. Id. at 62.4. Sponsors also have certain financial, insurance, and reporting obligations. Id. at § 62.8-15.

Sponsors designated by the Department of State to conduct an *au pair* exchange program have additional responsibilities, including limiting the *au pair's* initial participation to one year; requiring the *au pair* to register for and attend educational programs; **[**6]** and maintaining a record of monthly (or more frequent) contacts with each *au pair* and host family. 22 C.F.R. § 62.31(c).

The *au pair* specific regulations also require sponsors to provide the *au pair* and the host family documentation about: the *au pair* program rules, a participant's host family and the surrounding community, the participant's educational institution, travel arrangements, and the State Department's "written statement and brochure" about the program. Id. at 62.31(f), (i).[2] Sponsors must also select and screen host families in accordance with State Department criteria. Id. at § 62.31(e), (h). And there are specific *au pair* program monitoring and reporting obligations. Id. at 62.31(c)(5)-(9), (l), (m).

Of particular relevance here, the regulations address *au pair* wages and hours in a few places. First, *au pair* sponsors are specifically charged with limiting the number of hours per day and per week that the *au pair* participant is obligated to provide child care services. Id. at 62.31(c). The sponsor may not place an *au pair* with a host family unless the family signs a written agreement limiting the obligation to provide child care services for the *au pair* to ten hours per day and forty-five hours per week. Id. at 62.31(e)(5). **[**7]** Sponsors also must require that *au pair* participants "[a]re compensated at a weekly rate based upon forty-five hours of child care services per week and paid in conformance with the requirements of the Fair Labor Standards Act as interpreted and implemented by the United States Department of Labor." Id. at 62.31(j)(1). The regulations make the aforementioned hourly limitations binding on sponsors and require that *au pairs* receive at least one and a half days off each week, one full weekend off each **[*315]** month, and two weeks of paid vacation. Id. at § 62.31(j)(2)-(4). In 2009, when the federal minimum wage increased to its current rate, see 29 U.S.C. § 206(a)(1)(C), the State Department issued a notice indicating that in its view a weekly stipend of $195.75 complies with the federal minimum wage rate of $7.25/hour based on crediting room and board as 40% of an *au pair*'s compensation.[3]

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[2] Cultural Care asks the court to take judicial notice of what it claims is a copy of the State Department brochure. Courts can take judicial notice of information from an official government website that is "not subject to reasonable dispute." *Gent v. CUNA Mut. Ins. Soc'y, 611 F.3d 79, 84 n.5 (1st Cir. 2010)* (citing *Denius v. Dunlap, 330 F.3d 919, 926-27 (7th Cir. 2003)*) (taking judicial notice of information on the CDC website). The brochure, filed as an exhibit to Cultural Care's motion, appears on a webpage with a government domain (https://j1.state.gov) and thus seems to be from a government website. Def's Mem. 9 [#67]. The webpage only contains the brochure, so it is not possible to confirm that the brochure is current. Plaintiffs, however, also cite to the brochure in their memorandum opposing the motion to dismiss, Pl.'s Mem. 3 n.1 [#78], so it appears they do not contest the authenticity of the document. It is therefore appropriate for the court to take judicial notice. See *Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993)* ("Ordinarily . . . consideration of documents not attached to the complaint . . . is forbidden, unless the proceeding is properly converted into one for summary judgment . . . . However, courts have made narrow exceptions for documents the authenticity of which are not disputed by the parties . . . .") (citation omitted); *O'Hara v. Diageo-Guinness, USA, Inc., 306 F. Supp. 3d 441, 457 (D. Mass. 2018)*, on reconsideration, *370 F. Supp. 3d 204 (D. Mass. 2019)*.

[3] Cultural Care asks the court to take judicial notice of two documents, Wolkoff Decl. Exs. B, C [#68], that Cultural Care claims are notices issued in 2007 and 2009 by the State Department in which the department calculated the minimum weekly stipend

B. *Factual Allegations*

As alleged in the Second Amended Complaint [#43] and the incorporated documents, the facts are as follows.

According to the State Department, each year approximately 3,100 *au pairs* work in California, 2,500 *au pairs* work in New York, 1,700 *au pairs* work in New Jersey, and 1,100 *au pairs* work in Illinois, and Cultural Care, a sponsor **[**8]** under the federal program, sponsors the visas for at least 10% of these *au pairs*. Id. at ¶ 13. *Au pairs* sponsored by Cultural Care typically work at least forty hours per week and fifty weeks per year. Id. at ¶ 14. Cultural Care instructs host families to pay a weekly stipend of at least $195.75. Id. at ¶¶ 17, 21, 23. Cultural Care advertises the annual cost to a host family for an *au pair* as $19,553.25, comprised of $9,570 in fees to Cultural Care and $9,983.25 in payment to *au pairs*. Id. at ¶ 17. Cultural Care has distinct instructions for Massachusetts host families, who are told the following:

> **Paid weekly to your au pair:**
> Au pairs who live with a host family in Massachusetts are entitled to a weekly payment directly from their host family, that is at least the greater of either:
> • The minimum federal stipend of $195.75[1]
>
> • The MA minimum wage ($12.75/hour in 2020) times the number of hours the au pair is on duty for the week up to 40. If the au pair works between 41-45 hours during a week, you must pay time-and-a-half for the hours worked over the 40 hour limit. You may be able to deduce from the weekly pay to your au pair under the MA minimum wage laws for a meal credit of up to $42 **[**9]** per week and/or a lodging credit of up to $35 per week if you determine all state requirements for these credits are met.

Id. at ¶ 20 (content of footnote omitted in the original). Cultural Care does not have unique payment instructions for host families in any other state, stating instead that the minimum *au pair* stipend calculation "is based on a weekly stipend of at least $195.75[1] paid to your au pair for 51 weeks, including 2 weeks of paid vacation." Id. at ¶ 21 (content of footnote omitted in the original). Cultural Care provides the Massachusetts instructions because, "[o]n December 2, 2019, the U.S. Court of Appeals for the First Circuit issued its decision that host families must comply with Massachusetts labor laws applicable to domestic workers, including the Massachusetts Domestic Workers' *Bill of Rights*." Id. at ¶ 19.

Cultural Care communicates with *au pairs* regarding their maximum work hours, the performance of their job duties, and other terms and conditions of their employment. Id. at ¶ 24. It also retains the **[*316]** right to terminate an *au pair*'s assignment to a host family (upon a finding, to be made exclusively by Cultural Care, that an *au pair* has been unable to perform his or her duties **[**10]** for an extended period of time), to reassign an *au pair*, to determine that a host family's home is unsuitable, to terminate a host family's participation in the program, and to mediate disputes between *au pairs* and host families. Id. at ¶ 24.

Cultural Care specifically requires: (1) that if the host family has an infant less than three months old in the home, a parent or other responsible adult shall be present at all times, and a parent or responsible adult shall stay in the home for the first three days of an *au pair*'s assignment; (2) that the *au pair*'s schedule be limited to 45 hours per week, with a maximum of 10 hours per day and no more than 5.5 days per week of work, and failure to comply will result in Cultural Care terminating the host family from the program; (3) that the host family notify Cultural Care immediately if there is a change in the composition of the family and if there are any incidents involving law enforcement; (4) that any adults residing in the host family's home be screened by Cultural Care; (5) that the *au pair* perform only childcare services and light housework relating to childcare services (host families may not ask *au pairs* to do general housekeeping **[**11]** or heavy chores); (6) that the host family provide automobile insurance for *au pairs* who drive; (7) that the *au pair* contact Cultural Care if the family wishes to take the *au pair* out of the

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payments owed to *au pair*s under the federal minimum wage. Def's Mem. 12 [#67]. Plaintiffs reference the notices in their memorandum opposing the motion to dismiss and do not contest their authenticity. Pl.'s Mem. 26 [#78]. The court therefore finds it appropriate to take judicial notice of both documents. See *Watterson, 987 F.2d at 3*.

country on vacation; and (8) that the host family notify Cultural Care if the *au pair* needs medical attention. Id. at ¶ 24.

Cultural Care also retains the right to reject any *au pair* application for any reason it deems advisable and to end an *au pair*'s placement if the *au pair* engages in conduct that Cultural Care believes is not in the best interest of the program. Id. at ¶¶ 25-26. Cultural Care does not provide wage statements to *au pairs* with information about pay, deductions, and withholdings. Id. at ¶ 18. Cultural Care also does not retain records of hours worked, breaks taken, or the specific value of room and board provided for Plaintiffs and other *au pairs*. Id. at ¶ 27. Cultural Care does keep records of meetings between *au pairs* and their regional points of contact and documents regarding immigration and visa status. Id. at ¶ 28. Cultural Care requires all *au pairs* it places to attend four days of training prior to their placement. Id. at ¶ 29. The training is uncompensated, and until recently **[**12]** took place in Tarrytown, New York. Id. at ¶¶ 29, 30.

Plaintiff Karen Morales Posada ("Morales Posada") has been an *au pair* since January 2019. Id. at ¶ 7. She worked in New York from January 2019 until December 2019, and since January 7, 2020, she has been working in San Francisco, California. Id. Morales Posada attended three days of training in New York conducted by Cultural Care upon her arrival in the United States. Id. at ¶ 33. For roughly her first six months Morales Posada was paid $200 per week for every week worked and usually worked about 8.5 hours per day, five days a week (42.5 hours per week). Id. at ¶¶ 34-35. In one of those six months she worked two hours on the weekend on top of her usual 42.5 hours during the week. Id. at ¶¶ 35-36. For the second six months Morales Posada was also paid $200 per work week along with $50 for transportation. Id. at ¶ 39. During this period, she usually worked about eleven hours per day on Monday, Wednesday, and Friday and 8.5 hours a day on Tuesday and Thursday (fifty hours total). Id. at ¶ 40. From January 2020 through the start of the COVID-19 pandemic in March 2020, Morales Posada worked about forty hours per week. Id. at ¶ 45. From **[**13]** the start of the pandemic **[*317]** through the filing of the complaint, except for June 2020 when Morales Posada worked fewer hours while her host family's children attended camp, on "many days she worked 10 hours straight with no breaks." Id. at ¶¶ 45-46. She did receive "marginally more" payment during this period. Id. at ¶ 45. During this period she worked roughly forty-nine hours per week. Id. Cultural Care has not maintained any time records for her work, nor has Cultural Care provided any pay statements. Id. at ¶¶ 48-49.

Plaintiff Amanda Sarmento Ferreira Guimaraes ("Guimaraes") has been an *au pair* since September 2018, working in Utah from September 2018 through October 2018, and then in New York since October 2018. Id. at ¶ 8. Guimaraes attended "three or four" days of training in New York conducted by Cultural Care. Id. at ¶ 53. She has been paid $200 per week for every week worked since starting as an *au pair*. Id. at ¶ 54. From about September 2018 to September 2019, Guimaraes worked about nine hours per day, five days a week (forty-five hours). Id. at ¶ 55. From about September 2019 to November 2020, she worked about 6.5 hours a day, five days a week (32.5 hours). Id. at ¶ 56. From **[**14]** about November 2020 through the filing of the complaint here, she worked about nine hours a day, five days a week (forty-five hours). Id. at ¶ 57. She has never received any pay statements. Id. at ¶ 59.

Plaintiff Williana Rocha ("Rocha") has worked as an *au pair* in New Jersey since January 2020. Id. at ¶ 9. Rocha participated in three to four days of training in New York conducted by Cultural Care. Id. at ¶ 62. She was initially paid $195.75 for every week worked. Id. at ¶ 64. After about nine months, the weekly amount was rounded to $200 and from January 1, 2020, through filing the complaint she received $250 per week. Id. at ¶ 64. From January 2020 through March 2020 (i.e. the onset of the pandemic), she usually worked about seven hours per day, five days a week (thirty-five hours). Id. at ¶ 65. From the start of the pandemic through filing the complaint here she worked 8.5 hours per day, five days a week (forty-two hours). Id. at ¶ 66. Cultural Care has not kept time records regarding Rocha's work, and she has not received any pay statements from Cultural Care. Id. at ¶ 69.

Plaintiff Sara Barrientos ("Barrientos") has been an *au pair* in Illinois since August 2018. Id. at ¶ 10. Barrientos **[**15]** attended a "several day" training conducted in New York by Cultural Care. Id. at ¶ 71. From August 2018 through April 2020, setting aside a two-week period at the beginning of the month, she was paid $200 per week for every week worked. Id. at ¶¶ 72, 74. She usually worked about ten hours per day, five days a week (fifty hours). Id. at ¶ 75. She "occasionally" worked a few hours on the weekend for which she "might" have been paid an extra $10 per hour. Id. at ¶ 77. From April 2020 to through June 2020, she was paid $200 for every week worked and usually worked six hours per day, five days a week (thirty hours). Id. at ¶ 80. Cultural Care has not kept time records regarding Barrientos's work, and she has not received any pay statements from Cultural Care. Id. at ¶¶ 82-83.

Morales Posada, Rocha, Guimaraes and Barrienots had their J-1 visa—which allows each to work as an *au pair*—sponsored by Cultural Care. Id. at ¶¶ 7-10.

II. Standard of Review

A. *12(b)(1) Standard*

Rule 12(b)(1) is the "proper vehicle for challenging a court's subject-matter jurisdiction . . . ." *Valentin v. Hospital Bella Vista, 254 F.3d 358, 362 (1st Cir. 2001)*. Federal courts are courts of limited jurisdiction, **[*318]** so federal jurisdiction is never presumed. *Viqueira v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998)*. The party asserting jurisdiction has the burden of **[**16]** demonstrating the existence of federal jurisdiction. Id. A court should treat all well-pleaded facts as true and provide the plaintiff the benefit of all reasonable inferences. *Fothergill v. United States, 566 F.3d 248, 251 (1st Cir. 2009)*. Dismissal is appropriate only when the facts alleged in the complaint, taken as true, do not support a finding of federal subject matter jurisdiction. Id. A challenge to the court's subject matter jurisdiction must be addressed before addressing the merits of a case. See *Acosta-Ramirez v. Banco Popular de P.R., 712 F.3d 14, 18 (1st Cir. 2013)* ("Federal courts are obliged to resolve questions pertaining to subject-matter jurisdiction before addressing the merits of a case").

B. *12(b)(6) Standard*

In evaluating a motion to dismiss, this court assumes "the truth of all well-pleaded facts" and draws "all reasonable inferences in the plaintiff's favor." *Nisselson v. Lernout, 469 F.3d 143, 150 (1st Cir. 2006)*. To survive dismissal, a complaint must contain sufficient factual material to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations . . . [f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly, 550 U.S. at 555* (citations omitted). "A claim has facial plausibility when the pleaded factual content allows the court to **[**17]** draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. In ruling on a motion to dismiss, "a judge can mull over 'documents incorporated by reference in [the complaint], matters of public record, and other matters susceptible to judicial notice.'" *Lydon v. Local 103, Int'l Brotherhood of Elec. Workers, 770 F.3d 48, 53 (1st Cir. 2014)* (quoting *Giragosian v. Ryan, 547 F.3d 59, 65 (1st Cir. 2008)*) (alteration in original).

III. Discussion

A. *Derivative Sovereign Immunity*

Cultural Care argues, under *Rule 12(b)(1)*, that the court lacks subject matter jurisdiction over all fourteen counts alleged in Plaintiffs' complaint because Cultural Care is entitled to derivative sovereign immunity. Def's Mem. 18-22 [#67]. *Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18, 60 S. Ct. 413, 84 L. Ed. 554 (1940)*, is the wellhead for derivative sovereign immunity doctrine. The plaintiff in the case was a landowner whose property had been damaged by flooding that occurred as a result of a private construction contractor's work, and the Court held that the contractor was protected from suit by sovereign immunity because it had been hired by the federal government. Id. at 20-21. Yearsley and its progeny dictate that to receive this kind of protection a private party must be performing exactly as expressly directed by the government. See *Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 166-68, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016)*; *Cunningham v. Gen. Dynamics Info. Tech., Inc., 888 F.3d 640, 646-48 (4th Cir. 2018)*.

Unlike the parties that successfully invoked derivative sovereign immunity **[**18]** in *Yearsley* and *Cunningham*, Cultural Care was not hired by the government to perform certain tasks; it voluntarily decided to apply to be a sponsor organization and operate an *au pair* program, and a condition of doing that was complying with **[*319]** the applicable regulations. Cultural Care is thus more akin to a company operating in a heavily regulated industry, like a bank, than a contractor hired by the government to perform a specific task. Cf. *City of Worcester v. HCA Management Co., Inc., 753 F.Supp. 31, 37-38 (D. Mass. 1990)* ("The Supreme Court has long held that, pursuant to sovereign immunity, a private company which contracts with the federal government to perform the duties of the government will not be held liable for its actions on behalf of the government." (emphasis added)).

Cultural Care repeatedly emphasizes that it exists only because of, and subject to, the comprehensive commands of the federal government. The regulations, however, make clear that sponsors may be entities that have been operating for some time in other lines of business: there are regulations specifically addressing the financial information required from established entities applying to become sponsors. *22 C.F.R. § 62.5(c)(3)(i)*. True, the concept of an exchange visitor program "sponsor" is a creation of federal **[**19]** regulations, but this is not uncommon. For example, the concept of an "authorized dispenser" is created by federal regulations governing prescription drug distribution. See *21 C.F.R. § 209.2*. And the fact that sponsors must run *au pair* programs in accordance with exhaustive and detailed regulations is much like the situation of a federally chartered bank. See *12 C.F.R. § 5.20*. Cultural Care's arguments amount to saying that it operates in a heavily regulated area and therefore should have derivative sovereign immunity, a principle that is far broader than the court can accept. Accordingly, Cultural Care is not entitled to derivative sovereign immunity.[4]

B. *Preemption*

Cultural Care argues, under *Rule 12(b)(6)*, Plaintiffs' state law class action claims—Counts 1-11 and 14—are preempted by federal law and regulations via field preemption and conflict preemption. Def's Mem. 22-28 [#67]. In an earlier action, Cultural Care asked the court to determine that Massachusetts wage and hour laws were preempted and could not be enforced against Cultural Care or its host families. *Capron v. Off. of Att'y Gen. of Massachusetts, 944 F. 3d 9, 13 (1st Cir. 2019)*. In that case, Cultural Care did not develop its argument as to sponsors, however, and focused instead on host families. *Id. at 20 n.5*. The First Circuit held that state **[**20]** wage regulations are not preempted as applied to host families, *id. at 43-44*, but left open the separate question of whether state wage laws were preempted as applied to sponsor organizations as not properly before it and premature. *Id. at 20 n.5*. Cultural Care's preemption arguments here now seek to have this question addressed.

1. Field Preemption

In cases of field preemption, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined **[*320]** must be regulated by its exclusive governance." *Arizona v. United States, 567 U.S. 387, 399, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012)*. "[W]hether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme." *Hillsborough Cnty. v. Automated Med. Lab'ys., Inc., 471 U.S. 707, 714, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)*. Even when no conflict exists between state and federal law, "[t]he intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Arizona, 567 U.S. at 399* (quoting *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)*). This is determined by considering the totality of the circumstances. *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of*

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[4] Cultural Care's claim of derivative sovereign immunity as to the FLSA claims fails for the additional reason that the FLSA waives sovereign immunity by permitting suits against public agencies. *29 U.S.C. § 216(b)* (applying the FLSA's penalties to provision to any "employer"), *§ 203(d)* (defining "employer" to include public agencies). Cultural Care says that because *au pairs* are not employed by the State Department it cannot be sued under this provision. Def's Reply Mem. 1-2 [#86]. But Cultural Care's argument for derivative sovereign immunity is premised on the idea that it is standing in the shoes of the government by acting as a sponsor organization. Def's Mem. 18. [#67]. It cannot then argue that it is not standing in the shoes of the government where the government has waived sovereign immunity.

Mass./R.I., Inc., 507 U.S. 218, 224, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993). Federal regulations—as **[**21]** opposed to statutes—can have preemptive effect when they are within the promulgating agency's delegated authority. See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153-54, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982)

Cultural Care points out that unlike host families, sponsors have extensive reporting, insurance, *au pair* selection, *au pair* monitoring, and host family selection obligations. See 22 C.F.R. § 62.31. But nothing in those regulations suggest an intent to displace state wage and hour laws.

The *au pair* program's circuitous history supports this conclusion. In 1986 the U.S. Information Agency ("USIA") piloted the program under the Fulbright-Hays Act, Pub. L. No. 87-256 § 102, 75 Stat. 527 (1961) (codified at 22 U.S.C. § 2452). Capron, 944 F.3d at 15. The pilot ended after two years due to the USIA's misgivings about the statutory legitimacy of the program, but Congress then passed "special legislation" to authorize the program on a temporary basis. Id. The GAO, at Congress's behest, then issued a report concluding that the program was not authorized by the Fulbright-Hays Act, id. at 15-16, but Congress authorized the program on a temporary basis in targeted legislation that did not provide much elaboration. Cultural Care, Inc. v. Off. of Att'y Gen. of Massachusetts, No. 16-CV-11777-IT, 2017 U.S. Dist. LEXIS 120649, 2017 WL 3272011, at *4 (D. Mass. Aug. 1, 2017). Eventually, in 1997 Congress removed the temporary nature of the authorization, but the Act that did so is cursory and simply removes the time limit on the authorization. 2017 U.S. Dist. LEXIS 120649, [WL] at *5 (citing Act of Oct. 1., **[**22]** 1997, *Pub. L. No. 105-48, 111 Stat. 1165 (1997)*).

This history certainly offers no indication of preemptive intent; it does not suggest anything more than a very limited intent that the program continue to operate. And while regulations can have preemptive effect, the agency must be acting within its statutory authority if promulgating preemptive regulations. See de la Cuesta, 458 U.S. at 154**.** The court finds nothing in the extremely limited statutory history here that would give the current administrator of the *au pair* program, the State Department, the authority to preempt state wage regulation.

Even setting that aside, the First Circuit's comprehensive analysis of the specific *au pair* program regulations reveals no intent by the State Department—or its precursor the USIA—to displace state wage regulation in any context, see Capron, 944 F.3d at 29-44, and Cultural Care **[*321]** has introduced no new evidence of agency preemptive intent that the First Circuit did not consider. Although the *au pair* program arguably touches on the peculiarly federal arena of foreign affairs, the First Circuit has observed that ensuring *au pairs* are adequately paid probably does not jeopardize any significant foreign affairs objectives. Id. at 26. Put another way, the federal government has a strong interest in seeing **[**23]** that the *au pair* program is run according to its specifications, but there is nothing to suggest that interest is adverse to requiring sponsors to be jointly liable with host families for ensuring *au pairs* are paid in accordance with state minimum wage laws.

Cultural Care briefly argues that preemption is particularly appropriate where state law is invoked "in an area there has been a history of significant federal presence." Def's Mem. 23 [#67] (quoting United States v. Locke, 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000)). The *au pair* program has only been authorized on a permanent basis since 1997. See Cultural Care, 2017 U.S. Dist. LEXIS 120649, 2017 WL 3272011, at *5. That is hardly history of a significant presence, and employment is usually regarded a matter of "quintessentially local concern." Capron, 944 F.3d at 24.

2. Conflict Preemption

Conflict preemption may occur "where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Arizona, 567 U.S. at 399 (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)). In passing on a conflict preemption claim, the court may not engage in a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," because "such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" Chamber of Commerce of the United States v. Whiting, 563 U.S. 582, 607, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011) (quoting Gade v. Nat'l Solid Wastes Mgm't Ass'n, 505 U.S. 88, 111, 112 S. Ct. 2374, 120 L. Ed. 2d 73

(1992) (Kennedy, **[**24]** J., concurring in part and concurring in judgment). "[A] high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." Id. (quoting Gade, 505 U.S. at 110).

"Conflict preemption is particularly difficult to show when 'the most that can be said about the state law is that the direction in which state law pushes behavior is in general tension with broad or abstract goals that may be attributed to . . . federal laws.'" Fitzgerald v. Harris, 549 F. 3d 46, 53 (1st Cir. 2008) (quoting L.H. Tribe American Constitutional Law § 6-26, at 487 (2d ed.1988)). Nevertheless, "[a] direct, facial contradiction between state and federal law is not necessary to catalyze an 'actual[ ]conflict' within the doctrinal parameters of the Supremacy Clause . . . ." KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42, 49 (1st Cir. 1999) (quoting Securities Industry Asso. v. Connolly, 883 F.2d 1114, 1118 (1st Cir. 1989)).

Cultural Care's conflict preemption argument is premised on there being significant federal interests. Def's Mem. 26-28 [#67]. As noted above, there is no history of a significant federal presence, and the First Circuit has rejected the idea that applying state wage laws to *au pairs* impedes the government's foreign affairs interests. Capron, 944 F.3d at 26. The rest of Cultural Care's argument focuses heavily on the idea that complying with fifty different state wage laws would be expensive and burdensome **[**25]** for sponsors. Def's Mem. 27 [#67]. Complying with state wage laws would no doubt impose new, and perhaps significant, costs on Cultural Care. **[*322]** "But . . . possible increased costs do not stand as an obstacle sufficient to meet the high threshold required for conflict preemption." Cultural Care, 2017 U.S. Dist. LEXIS 120649, 2017 WL 3272011, at *8. And there is no inconsistency with the federal regulations that require compliance with the FLSA given that the FLSA sets a floor for wages. 29 U.S.C. § 218(a); Capron, 944 F.3d at 34 (noting the "expressly floor-setting" nature of the FLSA).

The only actual conflict Cultural Care identifies is that state employment laws generally prohibit age and national origin discrimination while the *au pair* regulations require selection based on those characteristics. Def's Mem. 28 [#67]. But the First Circuit has already rejected that exact argument, id. at 25 n.9, and there is no reason to believe that the logic does not apply equally in the context of sponsor organizations. Cultural Care's preemption argument, as to both field and conflict preemption, fails.

C. *Whether Cultural Care "Employs" Au Pairs*

Cultural Care next argues, under Rule 12(b)(6), that Plaintiffs did not adequately allege that Cultural Care "employs" *au pairs* because merely following federal regulations—as **[**26]** Cultural Care argues is the full extent of its role and the full extent of Plaintiffs' allegations—does not make it an employer. Def's Mem. 28-29 [#67]. Though there is some support for the idea that merely following regulations does not make an organization an employer, the principle is not applicable here given the extent of Cultural Care's alleged activities.

A comparison to Cultural Care's two supporting citations bears this out. The more recent case, Ivanov v. Sunset Pools Mgmt. Inc., involved plaintiffs who came to the United States to work as lifeguards and subsequently sued both the lifeguard company they worked for and the recruiting agency they worked with to arrange their immigration paperwork and initial travel arrangements. 567 F. Supp. 2d 189, 190-91 (D.D.C. 2008). The court found the recruiting agency was not liable as an employer because it was essentially implementing regulations, but the agency exercised much less control than Cultural Care does over the employees. First, the agency exercised no discretion in determining where to place to the plaintiffs; it was the lifeguard company that "interviewed and hired" the plaintiffs. Id. at 196. Cultural Care, in comparison, allegedly retains full discretion of whether to **[**27]** end an *au pair*'s placement, SAC ¶ 24(j), whether to end an *au pair*'s participation in the program entirely, id. at ¶ 26, and whether to permit their participation in the first place. Id. at ¶ 25. And the full discretion Cultural Care allegedly exercises in these areas goes beyond the explicit requirements of the relevant regulations. See 22 C.F.R. § 62.4, 62.10(a). The plaintiffs in Ivanov also paid the recruiting agency, 567 F.Supp.2d at 196, but here Cultural Care allegedly receives payment from the host family in exchange for the placement—and arguably services—of an *au pair*.

The other citation is from California state court and is cited for the proposition that "where the method of performing a task is dictated by . . . regulations imposed by the government, the principal is not exercising the manner and means of control as an employer." Sw. Research Inst. v. Unemployment. Ins. Appeals Bd., 81 Cal. App. 4th 705, 709, 96 Cal. Rptr. 2d 769 (2000). But as noted above Cultural Care does exercise authority beyond those required by federal regulations. In addition to the distinctions noted above, sponsors must ensure that host families are U.S. citizens, are fluent in English, have passed background checks, and have enough financial **[*323]** resources to be hosts. 22 C.F.R. § 62.31(j). But Plaintiffs allege that Cultural Care retains the exclusive right to determine—for reasons **[**28]** not necessarily dictated by these regulatory stipulations—that a host family isn't suitable and to remove the family from the program. SAC ¶ 24(c) [#43]. Sponsors must have local regional counselors that report "unusual or serious situations or incidents involving either the *au pair* or the host family." 22 C.F.R. § 62.31(l)(3). Yet Cultural Care requires host family to notify Cultural Care if an *au pair* needs medical attention, a category that is not co-extensive with "serious situations or incidents." And finally, Cultural Care retains discretion on what to instruct host families to pay *au pairs*, though it is limited at the lower end by required compliance with the FLSA. 22 C.F.R. § 62.31(j)(1). Cultural Care's policies, as alleged by Plaintiffs, are clearly designed to enforce the government's regulations, but they are also broader than is strictly required by the regulations.

The court's finding is in line with the conclusions of other courts that have examined this issue. A California state court has rejected Cultural Care's challenge to its employer status under California wage law. Kudlacz v. Cultural Care, Inc., Case No. CGC-20-584567, Slip. Op. p. 3. (Cal. Sup. Ct. Sept. 3, 2020) Helland Decl. Ex. 1 at 12-13 [#78-2]. A **[**29]** magistrate judge from the District of Colorado also rejected a challenge to Cultural Care's status as an employer of *au pairs* at the motion to dismiss stage. Beltran v. Interexchange, Inc, No. 14-CV-03074-CMA-KMT, 2016 U.S. Dist. LEXIS 21065, 2016 WL 695967, at *10 (D. Colo. Feb. 22, 2016), report and recommendation adopted in part, rejected in part, 176 F. Supp. 3d 1066 (D. Colo. 2016). And the Beltran court considered Ivanov in detail and arrived at the same answer as this court, emphasizing Cultural Care's ability to end an *au pair*'s assignment and the defendant's lack of ability to fire the plaintiffs in Ivanov. Id. at 9-10. There is no good reason to break from this trend.

D. *Deceptive Practices Claim*

Cultural Care argues, under Rule 12(b)(6), that Count 14, the deceptive practices claims, should be dismissed because Plaintiffs failed to include the specific consumer protection laws that Cultural Care allegedly violated. Def's Mem. 29-30 [#67]. But it is not necessary to cite the specific provision allegedly violated. Skinner v. Switzer, 562 U.S. 521, 530, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (2011); Johnson v. City of Shelby, 574 U.S. 10, 135 S. Ct. 346, 346, 190 L. Ed. 2d 309 (2014); Saintcome v. Tully, 296 F. Supp. 3d 377, 382 (D. Mass. 2017). Cultural Care's citation to the contrary is once again distinguishable, as the plaintiffs in that case, Galvin v. U.S. Bank, N.A., 852 F.3d 146, 160 (1st Cir. 2017), merely claimed a violation of a contractual provision prohibiting violating "applicable law"; this is of course noticeably less specific than the claims asserted here.

Cultural Care also **[**30]** complains that Plaintiffs asserted violations of Washington and Connecticut consumer protection law but none of the named plaintiffs worked in those states. Plaintiffs do not dispute that they did not work in those states, but argue that it is not necessary to have a named plaintiff in each jurisdiction whose laws were allegedly violated, relying on In re Asacol Antitrust Litig., 907 F.3d 42, 49-50 (1st Cir. 2018). Asacol does not establish such a broad principle. The case was an antitrust class action brought under the antitrust laws of twenty-five states and the District of Columbia. Id. at 46. The plaintiffs used state antitrust laws because they were suing a drug manufacturer but had purchased the relevant drug from intermediaries; federal antitrust laws bar such actions, but all twenty-six states had laws allowing such actions. Id. The plaintiffs **[*324]** noted that all "twenty-six jurisdictions . . . generally interpret[ed] state law restraints on anticompetitive activity consistently with federal courts' interpretation of federal ***antitrust law***." Id.

The First Circuit rejected the defendant's Article III standing challenge to the inclusion of unnamed plaintiffs who made purchases outside the states where the named plaintiffs made purchases. Id. at 47-51. This superficially **[**31]** supports Plaintiffs' argument, but the plaintiffs in Asocal argued—and the court agreed—that the state laws were "parallel" to each other. Id. at 49. The court rejected the standing challenge because it was convinced the named plaintiffs would adequately protect the interests of unnamed plaintiffs, and it was convinced because of the parallelism of the state laws. Id. at 49-50. Plaintiffs here made no such allegation of parallelism in their complaint, nor did they allege that any *au pairs* sponsored by Cultural Care were placed in Connecticut or Washington. Legal theories need not be fully fleshed out in complaints, see Skinner, 562 U.S. at 530, but the allegations here are insufficient to allow the named Plaintiffs to bring the claims on their own behalf under Connecticut or Washington consumer protection law or to establish standing for unnamed plaintiffs from Connecticut and Washington for claims under those state laws.

IV. Conclusion

For the forgoing reasons: Cultural Care's Motion to Dismiss [#66] is DENIED as to Counts 1 through 13, GRANTED regarding the Connecticut and Washington elements of Count 14, and DENIED as to the rest of Count 14.

IT IS SO ORDERED.

August 13, 2021

/s/ Indira Talwani

United States District Judge

Ned Elka v. Anklive V.johnson & Johnson

Superior Court of California, County of Alameda

August 16, 2021, Decided; August 16, 2021, Filed

RG20062734

Reporter

2021 Cal. Super. LEXIS 66551 *

NED ELKA V ANKLIVE Plaintiff,JOHNSON & JOHNSON, et. al. Defendants

Core Terms

motion in limine, talc, asbestos, Defendants', FDA, parties, cancer, products, RESERVED, exposure, talcum powder, workers' compensation, discontinued, regulation, Cosmetic, articles, probative value, mesothelioma, ovarian, memo, limited purpose, fallopian tube, references, proffers, appears, prejudicial, expert testimony, punitive damages, causation, sales

Judges: **[*1]** Jeffrey S. Brand.

Opinion by: Jeffrey S. Brand

Opinion

MOTIONS IN LIMINE -TENTATIVE RULINGS

TENTATIVE RULINGS - MOTIONS IN LIMINE

These tentative rulings and thoughts are issued in advance of argument on all parties' motions *in limine* set for 08/18/2021 at 8:30 AM in Department 22 (via Bluejeans.)

PLAINTIFF

1.Plaintiffs Motion in Limine No. 1 to Preclude Personal Attacks on Counsel While Characterizing J&J as "Good People" - GRANTED IN PART AND RULING RESERVED IN PART

Plaintiffs Motion in Limine No. 1 seeks to Preclude Personal Attacks on Counsel While Characterizing J&J as "Good People." The Court will not make rulings based on hypothetical evidence. To that extent, the motion is premature and ruling is RESERVED.

That said, the Court offers the following as guidance to the parties:

Arguments that "appeal primarily to passion or prejudice" of the jurors are improper. *Garcia* v. *ConMed Corp.* (2012) 204 CaLApp¶* 144.

The parties are reminded that *Cal. Evi. Code 780* limits the means by which the credibility of a witness may be attacked, including its limits on the use of character evidence. *See* *Sec. 780(e)*. *Cal Evi. Code Secs. 1100-1103* limits the use of character evidence more generally.

Expressions of sympathy, gratuitous references to family members, and intimations that counsel are unethical and solely involved in **[*2]** the litigation for financial gain are inadmissible. The Court agrees with the sentiments of the Court in *Schmitz* that "you are not going to be trying this case against plaintiffs lawyers." Plaintiffs brief p. 9 *citing Schmitz* Transcript 146:25-147:6. In sum, Counsel shall not impugn each other's motives.

In its opposing brief, Defendants' counsel argue that "the appropriate course for Plaintiff is to object to questions, argument and evidence as these issues arise, so that the Court has a proper context in which to analyze and rule upon the objection." Defendants' brief at p. 3. As a general rule, that is true, however, sometimes it is difficult to "unring" a bell. Thus, these guidelines are offered in the spirit of avoiding needing to confront these issues after the fact.

No definitive ruling on any evidence is made here, but the parties are cautioned to heed these guidelines and to request guidance from the Court where concern about specific questions and argument exist. The Court is confident that counsel will sense when they are about to cross the line.

2.Plaintiffs Evidence Motion in Limine No. 2 to Exclude Personal-Use Testimony by Defendants' Witnesses - GRANTED

Plaintiff seeks **[*3]** to exclude "personal use" testimony from at least 7 J&J witnesses, most notably Dr. Hopkins, J&J's corporate representative witness "on the general topic of talc powder," and Dr. Nicholson, who joined J&J in 2006 and "now focuses on women's health." All have testified at deposition to their own or their family's use of J&J talcum powder, presumably to demonstrate that it is safe.

Plaintiff contends that these witnesses may lack foundation to testify to the safety of J&J talcum powder. Plaintiff further contends that even if a proper foundation exists, personal use testimony is irrelevant and its probative value is substantially outweighed by its prejudicial value, diverting jurors from complex expert testimony needed to resolve the factual issues here and necessitating undue expenditure of time to explore the witness' knowledge regarding asbestos, family and health histories and potential areas of bias attendant to the witness' testimony.

Defendants contend that the testimony is relevant to rebut plaintiffs allegation of "secret knowledge" on the part of J&J executives regarding the "deadly" consequences of talcum powder usage. Defendants further contend that the evidence is directly **[*4]** relevant to rebut claims for punitive damages and its requisite mental states, and, at a minimum, to rehabilitate the credibility of defense witnesses. Finally, defendants claim that Plaintiff exaggerates the prejudicial impact of testimony relating to personal use.

Cal. Evi. Code Secs. 210 and *350* sets a low bar to determine whether evidence is relevant ("any tendency in reason.") That said, the court finds that the proffered personal-use testimony would be of minimal, if any, probative value. Moreover, each account of personal use to demonstrate the product's safety raises multiple questions, including the foundation of the user to make such claims, the medical history of the user, and a user's training, if any, to warrant such an opinion - too many questions to be answered and inferences to be drawn to merit the admissibility of testimony that at best has marginal relevance. In sum, the Court finds that the probative value of "personal use" evidence is substantially outweighed by its prejudicial value.

The Court emphasizes that it is particularly concerned about the degree to which such anecdotal testimony would distract from and confuse the jury with regard to the difficult scientific evidence it will inevitably **[*5]** encounter. The stakes in this action for all parties are simply too great to divert the jury's focus with testimony that amounts to random accounts of personal use by corporate personnel and their families - a risk that the Court finds cannot be obviated by a limiting instruction.

3.Plaintiffs Motion in Limine No. 3 to Exclude Argument that Jurors Should use their Subjective Experience in Place of Scientific Evidence as it Relates to Disease Rates and Causation - GRANTED IN PART AND RULING RESERVED IN PART

Plaintiffs Motion in Limine No. 3 seeks to Exclude Argument that Jurors Should Use Their Subjective Experience in Place of Scientific Evidence As It Relates to Disease Rates and Causation. At bottom, Plaintiffs *In Limine Motion* No. 3 expresses concern that such arguments will make an end run around the rules of evidence, permitting improper opinion evidence (e.g. a claim by defendants that there should be an "epidemic" of mesothelioma,) consideration of evidence by the jury that is extraneous to the record, and the improper use of "common sense" to the exclusion of the complex expert testimony that will be presented in this case.

Defendants contend that Plaintiffs motion is "nothing **[*6]** more than a strategic attempt to preclude Defendants from pointing to evidence which disproves the most critical element of their case - causation."

The Court will not make rulings based on hypothetical evidence. To that extent, the motion is premature and ruling is reserved. The Court in *O'Hagan* v*Johnson & Johnson* (RG19019699), however, articulated the principle that also controls here: Any discussion of the incidence of mesothelioma or ovarian cancer and talc use will be based on evidence offered at trial and not on jury awareness from other sources.

The Court will not bar defendants from proving their case based on admissible evidence, including admissible expert evidence to prove its theses that plaintiffs tumors are not ovarian cancer or mesothelioma. In ruling on this motion, the Court makes no findings as to whether any proffered evidence is admissible, particularly expert testimony. Such determinations will depend on the Court's rulings on other motions in limine and on rulings made at trial.

The Court will not permit end runs around the rules of evidence to permit improper opinions as feared by plaintiffs, including the "epidemic" example cited in its brief, or the improper use **[*7]** of notions of "commonsense." The Court's ruling in *Prudencio v. Johnson & Johnson* (RG20061303) is applicable here: "Any argument that there should be widespread mesothelioma because talc use is so common is precluded unless Defendants offer evidence or make a supported offer of proof to that effect."

4.Plaintiffs Motion in Limine No. 4 to Exclude Argument and Evidence that Cosmetic Talc is "FDA Approved." GRANTED IN PART AND RULING RESERVED IN PART

Plaintiffs Motion in Limine No 4 is titled "Plaintiffs Motion in Limine No. 4 to Exclude Argument and Evidence that Cosmetic Talc is "FDA Approved," yet Plaintiff s brief in support, spends most of its time discussing whether talcum powder is "regulated" by the FDA. In fact, Plaintiff seeks the exclusion of any argument or evidence that talcum powder is "approved" or "regulated" by the FDA. There is a difference and the Court addresses both.

Approval

There appears to be no disagreement whether the FDA requires pre-approval of talcum power. It does not. *See* Plaintiffs brief at pp. 5-6 and Defendants' agreement with that proposition at pp. 1-2 of its opposition. As such, no party is to reference FDA approval of talcum powder during voir dire, **[*8]** in opening statements, argument or the presentation of testimonial or documentary proof, absent leave of the Court.

Regulation

Whether the FDA "regulates" talcum power is a more complicated question. There seems to be general agreement among the parties that the FDA has not regulated talcum powder in the past. Plaintiffs brief cites numerous discovery responses and past trial testimony where Defendants appear to concede that the FDA does not regulate talcum powder. *See e.g.* sworn Answers to Interrogatories in *Gambino* "Johnson's Baby powder is not an FDA regulated product." Plaintiffs brief, Exhibit 4 at p. 7. *See also*: Testimony Dr. John Hopkins: "[T]he FDA has never regulated the cosmetic talc industry." (Deposition testimony 8/15/17 at 10:20-11:15.)

Defendants maintain, however, that the FDA has the "authority" to regulate talcum powder, even if it has never done so in the past. The FDA web site states: "The FDA monitors for potential safety problems with cosmetic products on the market and takes action when needed to protect public health." The web site also states: "The two most important laws pertaining to cosmetics marketed in the United States are the Federal Food, Drug, and Cosmetic **[*9]** Act (FD&C Act) and the Fair Packaging and Labeling Act (FPLA). FDA regulates cosmetics under the authority of these laws." *See:* https://www.fda.gov/cosmetics/cosmetic-ingredients/talc and https://www.fda.gov/cosmetics/cosmetics-laws-regulations/fda-authority-over-cosmetics- how-cosmetics-arenot-fda-approved-are-fda-regulated.

Plaintiff contests Defendants' broad assertions regarding the FDA's regulatory authority over talcum power, citing to FDA authority stating "cosmetic products and ingredients, with the exception of color additives, do not have to undergo FDA review or approval before they go on the market." Plaintiff s brief at pp. 5-6.

Based on the current state of the record, it appears that the FDA does have some regulatory authority over talcum power. That said, the current state of the record does not give Defendants *carte blanche* to reference such regulatory authority or to admit evidence relating to it. Questions remain:

To what extent does the statutory authority of the FDA permit regulation of talcum powder beyond the question of "color additives?"

What is the specific evidence relating to FDA regulation of talcum powder being proffered and what is its relevance?

Is it being **[*10]** offered as reliance testimony relating to an expert's opinion? If so, are there *Sargon* or *Sanchez* reasons to bar its admissibility?

Is it being offered for another reason?

The Court will not make rulings based on hypothetical evidence. To that extent, the motion is premature and ruling is reserved pending a review of any specific proffer relating to such regulation.

The Court cautions both parties as follows:

There shall be no reference to FDA *approval* or *regulation* during voir dire, in opening statements, argument or the presentation of testimonial or documentary proof, absent leave of the Court.

A large portion of Plaintiffs brief appears to relate to alleged misconduct on the part of the talcum powder industry with regard to "hiding" information from the FDA and/or making misrepresentations. Such evidence shall not be referred to in *voir dire*, opening statement, or through testimonial or documentary proof absent leave of the Court.

5.Plaintiffs Motion in Limine No. 5 to Exclude Argument and Evidence Regarding Plaintiffs Abortion History and Sexual History - RULING RESERVED

Plaintiffs Motion in Limine No. 5 seeks to exclude evidence of Plaintiffs abortion and sexual histories, evidenced **[*11]** primarily by her medical records while being treated by Dr. Franz Theard. The medical records contain entries regarding plaintiffs examination for sexually transmitted diseases, information regarding abortion and other personal information regarding family planning. *See* Plaintiffs Exhibit 1. Ruling on the motion is RESERVED.

Plaintiffs and Defendants each paint with too broad a brush. Plaintiff: "Any such evidence would be irrelevant at this trial." Plaintiffs brief at p. 4. Defendants: "Plaintiff has put her reproductive and gynecologic health at issue in this case, including the cause of her fallopian tube tumor." Missing from the discussion is an analysis of whether a specific prior abortion or sexually transmitted disease has a tendency in reason (*Cal. Evi. Code Secs. 210*,*350*) to prove or disprove the allegations herein regarding ovarian cancer and mesothelioma, and, that the probative value is not substantially outweighed by its prejudicial impact. (*Cal. Evi. Code 352*.)

That inquiry will require a demonstration by defendants that Plaintiffs sexual and/or abortion histories are medically relevant to the case. Absent such a showing, the evidence will be excluded. The Court will be cognizant of the potential for prejudice of **[*12]** such highly charged topics and the privacy rights of the Plaintiff and factor that into solving the relevance equation. Pending that inquiry, perhaps in a 402 hearing, the Court orders the following:

The parties are to meet and confer to determine whether stipulated redactions might resolve the problem raised by Plaintiffs motion in limine.

No party shall reference Plaintiffs sexual or abortion history during voir dire, opening statements, argument or the presentation of testimonial or documentary proof, absent leave of the Court.

6.Plaintiffs Motion in Limine No. 6 to Exclude Argument and Evidence that the Plastic Products Plaintiff and her Coworkers Made and Packaged were Sex Toys; and Request to File Additional MIL - RULING RESERVED

It appears that Plaintiff claims exposure to talcum powder from two sources: (1) Personal use and bystander exposure; and, (2) workplace exposure, specifically while working at a plant that manufactured "sex toys" where talcum powder was used in the packaging process. Plaintiffs Motion in Limine No. 6 seeks to exclude graphic evidence of those products and their written descriptions (e.g. "ayana cyberskin pussy and ass") on grounds of relevance (*Cal. Evi. Code Secs. 210*,*350*) and that **[*13]** their prejudicial value substantially outweighs their prejudicial value (*Cal Evi. Code Sec. 352*.) Ruling is RESERVED on the motion.

The Court cannot make a final ruling at this time. The Court is inclined to make severe redactions to the documents because of the inflammatory nature of the descriptors. That said, the Court can envision a need for some indication of the nature of the items to fully inform the jury of the amount of talc exposure that might have occurred during the course of Plaintiffs employment.

The parties are to meet and confer to determine whether stipulated redactions might resolve the problem raised by Plaintiffs motion in limine.

The Court orders that no party shall reference or publish the images or language at issue here during voir dire, in opening statements, argument or the presentation of testimonial or documentary proof, absent leave of the Court.

7.Plaintiffs Motion in Limine No. 7 to Preclude Defense Expert Opinion, Argument, or Reference to Speculative Alternative Exposures to Asbestos - Ruling Reserved

Ruling reserved. Briefing incomplete.

JOINT DEFENSE

1.Joint Defense Motion in Limine No. 1 - To Exclude all Evidence of and References to Other Claims, Lawsuits and Verdicts - RULING [*14] RESERVED

Joint Defense Motion in Limine No. 1 seeks to exclude all evidence of and references to other claims, lawsuits and verdicts against any of the defendants. Defendants posit the blanket statement that "[L]awsuits filed against Defendants or any…related company…on wholly unrelated products are wholly irrelevant," and that "[c]laims in other cases are not proof that Defendants' cosmetic talc products were defective, contaminated (or) caused disease"…"in this case."

The Court's response to these assertions is simply this: It depends. Surely, evidence that is not relevant or violates *Cal. Evi. Code Sec. 352* should be excluded as should evidence that seeks to inflict punishment against those who are strangers to the action. Defendants' brief at pp. 3-4 and 7, *citing* *Phillip Morris USA v. Williams (2007) 549 U.S. 346,353-354*.

On the other hand, relevant evidence, the prejudicial value of which does not outweigh its probative value, perhaps in conjunction with the mandate of *Evi. Code Sec. 1101(b)* (admissibility of evidence for a limited purpose,) may very well make the evidence Defendants seek to preclude admissible.

The Court will not make rulings based on hypothetical evidence. To that extent, the motion is premature and ruling is RESERVED.

The Court, however, provides the following guidance **[*15]** proffers of proof from other cases or other past incidents:

The proffer should be made outside the presence of the jury with as much advance notice as possible.

The admissibility of "other act" evidence is ultimately a multi-pronged analysis in which the proffering party must demonstrate the relevance of the limited purpose and its reliability (i.e. that it does not violate hearsay rules.)

The Court is particularly concerned with reference to "other act" evidence during voir dire and opening statements. The parties are cautioned that they are not to reference such evidence without leave of the Court. The Court may order individual voir of jurors to the extent that the topic of other cases or other potentially prejudicial issues may taint the jury panel as a whole.

To the extent such proof is admissible, the Court will entertain suggestions from the parties as to how particular testimony might be tailored to minimize its prejudicial impact. For example, witnesses who have testified in prior cases may be cross-examined regarding that testimony and it may be necessary to put that testimony into context without bringing out the facts of that case, the parties or the results.

The Court notes **[*16]** that references to products of any particular defendant not at issue in this case likely will be deemed inadmissible absent plaintiff opening the door to its admissibility.

2.Joint Defense Motion in Limine No. 2 - To Exclude all Evidence and Expert Testimony Regarding Dr. Moline's Article Entitled "Mesothelioma Associated with the Use of Cosmetic Talc" and Dr. Kradin's Article Entitled "Malignant Mesothelioma Following Repeated Exposures to Cosmetic Talc: A Case Series of 75 Patients" - DENIED

Defendants' Joint Motion in Limine No. 2 seeks to exclude all evidence of and expert testimony regarding an article co-authored by Dr. Moline, "Mesothelioma Associated with the Use of Cosmetic Talc," and an article authored by Dr. Karkin entitled "Malignant Mesothelioma Following Repeated Exposures to Cosmetic Talc: A Case

Series of 75 Patients." It appears that Plaintiff will seek to admit the articles through their experts as evidence on which they reasonably relied in forming their opinions.

Defendants' motion asserts that the Court should exercise its discretion to exclude any reference to or testimony about the articles pursuant to the Supreme Court's seminal ruling in *Sargon Enter. Inc. v. University of Southern California* 2012) 55 Cal.¶ 747 (In its "gatekeeper" **[*17]** capacity, trial courts must exclude opinions premised upon assumption, conjecture, guesses, or surmise. *Id.* at 771-72.) In support of its contentions, Defendants argue that the articles cannot be reasonably relied upon by experts because they (1) involve a "case series of individuals," all of whom are plaintiffs in lawsuits alleging talcum powder induced cancers, (2) are not the product of "impartial research" or sufficient investigation, (3) are merely "compilations and regurgitations of plaintiffs' experts' opinions regarding other plaintiffs in other litigation," (4) consist of opinions never before articulated until the authors were involved in litigation, (5) make unsubstantiated claims that talc was the sole cause of the plaintiffs' cancers, (6) were not peer reviewed, (7) rely on depositions taken by counsel and were based on limited materials provided by plaintiffs' counsel, and, (8) fail to consider alternative exposures to commercial asbestos.

Plaintiff paints an entirely different portrait of the articles contending that (1) they were peer reviewed, (2) the exposure data is reliable because it was taken under oath at depositions, and, (3) reliance on "case series reports" **[*18]** do not do not make the articles unreliable, *citing* *Davis v. Honeywell (2016) 245 Cal.App.4th 477,491*.

It is well-settled law that experts can cite to and comment on the sources they rely on during direct examination and "may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treaties, etc." *See: People* v *Veamatahau* (2020) 9 Ca.App.5th 16, 25, *citing Sargon, supra*. That said, such reliance is not without its limits and the Court's "gatekeeper" responsibilities require it to keep from the jury opinions which it deems unreliable and lacking in the intellectual rigor of an expert in the particular field.

The Court's gatekeeper role, however, is circumscribed:

The trial court's preliminary determination whether the expert opinion is founded on sound logic is not a decision on its persuasiveness. The court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies. Rather, it conducts a "circumscribed inquiry" **[*19]** to "determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid." (Imwinkelried & Faigman, *supra*, 42 Loyola L.A. L.Rev. at p. 449.) The goal of trial court

gatekeeping is simply to exclude "clearly invalid and unreliable" expert opinion. (Black et al., *Science and the Law in the Wake* o/Daubert: *A New Search for Scientific Knowledge* (1994) *72 Tex. L.Rev. 715, 788*.) In short, the gatekeeper's role "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *(Kumho Tire Co. v. Carmichael, supra, 526 U.S. atp. 152,119 S.Ct. 1167*.)

Based on the current state of the record, the Court finds that the Moline and Kardin studies may be reasonably relied upon by experts and presented to the jury as such. To be sure, Defendants' make serious points about the studies' lack of reliability, points that can be brought out on cross examination and which the jury can give the weight it deems appropriate. Neither study, however, is so "clearly invalid and unreliable" that it should be excluded.

The Court notes, however, that in **[*20]** its use of the articles, the experts relying on them must give a top level summary of their findings, such as "a study of X individuals with (mesothelioma or ovarian cancer) that the authors believe used talc and are not aware of other potential causes." By DENYING on Defendants' Joint Motion in Limine No. 2 the Court makes no findings regarding other objections, which may preclude the articles' admissibility, objections which may be the subject of other motions in limine or which Defendants may make at trial.

3.Joint Defense Motion in Limine No. 3 - Expert: to Exclude all Evidence, Testimony of Argument that Fibrous Talc or "Asbestiform Talc" Causes Mesothelioma

Briefing is incomplete.

4.Joint Defense Motion in Limine No. 4 - To Exclude all Evidence, Argument or Reference to the Interagency Working Group on Asbestos in Consumer Products - RULING RESERVED

Joint Defense Motion in Limine No. 4 seeks to Exclude All Evidence, Argument or Reference to the Interagency Working Group on Asbestos in Consumer Products. In 2018, the Food and Drug Administration (FDA) formed the Interagency Working Group on Asbestos in Consumer Products (IWGACP), consisting of 38 experts versed in the subject matter, **[*21]** to discuss and provide recommendations regarding terminology and definitions related to asbestos, to develop "a robust analytical protocol for detecting asbestos," and to promote data reporting and analysis. The work of the IWGACP is preliminary and a work-in-progress, as reflected in a 08/19/2020 FDA statement that the IWGACP continues to "evaluate the scientific literature and public feedback to the docket" and should any recommendations be made, the IWGACP will follow "the public notice and comment process."

Defendants anticipate that Plaintiffs experts - Drs. Compton and Longo - will seek to reference the discussions of the IWGACP as a basis for their expert opinions, since both have made presentations to the IWGACP. Defendants do not point to any specific portion of the IWGACP proceedings that it seeks to exclude, whether it is statements made at meetings, minutes of meetings or an Executive Summary of Proceedings issued on 01/06/2020. Rather, Defendants blanketly seek to exclude any such reference. The Court will not make rulings based on hypothetical evidence. To that extent, the motion is premature and ruling is RESERVED.

The Court Offers the following regarding the manner in **[*22]** which rulings relating to any specific portion of the work of the IWGACP will be made:

Plaintiff should notify the Court as soon as possible regarding portions of the IWGACP materials that it seeks to introduce to avoid unnecessary interruptions to the jury. The Court recognizes that Plaintiff will not be fully able to anticipate how it may use the IWGACP materials because it appears that Defendants' experts, Drs. Brandli and Sanchez, also have been involved in IWGACP proceedings, and, the proceedings may be relevant on cross examination to attack their credibility pursuant to *Cal. Evi. Code Sec. 780*.

The Court is unlikely to find any of the material admissible for its truth. No hearsay exception appears to be applicable, including *Cal. Evi. Code Sec. 1280*, the public records exception, since the work of the IWGACP is preliminary and, at this stage, is unlikely to meet *Sec. 1280*'s trustworthiness requirement.

More likely, is consideration of the evidence as a proper basis for an expert's opinion or for impeachment.

The Court will be cognizant of its "gatekeeper" functions pursuant to *Sargon,* particularly in light of the preliminary nature of the IWGACP's work and the possibility that a jury might give IWGACP's utterances undue weight because **[*23]** of the government imprimatur that attaches to it.

Should any portion of the IWGACP's work be admitted as reliance testimony, the parties should be mindful of the admonitions of *People v. Coleman (1985) 38 Cal.3d 69,92*, quoting *Grimshaw v. Ford Motor Company (1981) 119 Cal.App.3d, 757, 788-789* regarding the impropriety of presenting hearsay testimony to the jury through an expert. *See also People* v. *Sanchez* (2016) 52 Cal.4* 953.

The parties should take care not to misrepresent any IWGACP material given that is at best preliminary recommendations of a working group of scientists.

5.Joint Defense Motion in Limine No. 5 - Expert: to Exclude Certain Opinions and Testimony from Plaintiffs Experts, or Alternatively, for an Evidence Code Section 402 Hearing (Placeholder) Supplement/Update to Joint Defense Motion in Limine No. 5 - Expert: to Exclude Certain Opinions and Testimony From Plaintiffs Experts, or Alternatively, for an Evidence Code Section 402 Hearing (Placeholder)

Placeholder motions regarding various experts not yet fully briefed.

AND I

1.J&J Defendants' Motion in Limine No. 1 - Exclude All Evidence Regarding Chinese Talc - GRANTED

J&J's Motion in Limine No. 1 seeks to Exclude All Evidence Regarding Chinese Talc. The ruling on this motion is considered in conjunction with the Court's ruling on J&J Motion in Limine No.2 regarding **[*24]** J&J's decision to discontinue the sale of talccontaining powder in the U.S. and Canada. Both rulings involve the applicability of the California Supreme Court's decision in *International Harvest v. Ault (1974) 13 Cal.3d 113*. In addition, both rulings discuss the relevance of Chinese talc and the confusion and consumption of time that may occur by its introduction into evidence. A summary of the rulings on both motions is provided at the conclusion of the Court's ruling on J&J's Motion in Limine No. 2.

Defendants contend it is uncontested that Chinese talc was not used in the U.S. until 2003, years after Plaintiffs alleged last exposure, and, as such, has "zero relevance" on the issues of notice and punitive damages. With regard to the issue of notice, Defendants note that since its use began *after* post plaintiffs final alleged exposure, it is, by definition, irrelevant. Defendants similarly contend that the timing of Chinese talc's first use also makes it irrelevant on the issue of punitive damages because it does not relate to plaintiffs case, but rather to general allegations of malice of others in violation of the United States Supreme Court's holding in *State Farm Mut. Auto Ins. Co. v. Campbell (2003), 538 U.S. 408*. Defendants also contend that even if there is some marginal relevance to **[*25]** evidence relating to Chinese talc in J&J products, its probative value is substantially outweighed by its prejudicial value.

Plaintiff contends that Chinese talc sales after its introduction in 2003 is relevant on an *Ault* theory to demonstrate a design defect and feasibility of correcting the defect. Plaintiff also argues that it is admissible on the issue of punitive damage because J&J knew "that its dangerous product should be completely discontinued, but the defendant instead [sold] it… in other countries." Plaintiffs brief at p. 5.

The Court finds that J&J's use of Chinese talc after 2003 is inadmissible. Plaintiff seeks to have it both ways, positing two theories regarding the admissibility of the Chinese talc: Either it demonstrates a design defect and feasibility *if Defendants'* expert's testimony is credited by the jury (Dr. Sanchez' expected testimony that it *did not* contain asbestos;) or, it is relevant to punitive damages if *Plaintiffs* expert's testimony is credited by the jury (Dr. Longo's expected testimony that it *did* contain asbestos and therefore shows reprehensible conduct by J&J's continuing to sell a product containing asbestos.)

The Court can envision the need to give conflicting **[*26]** limiting instructions to the jury to ensure that the evidence is used for a proper limited purpose. The risk of confusion is significant, and not worth incurring, particularly given that other significant evidence is likely available to Plaintiff on both issues: J&J's discontinuation of the sale of talc containing asbestos and its subsequent reliance on the sale of a corn starch alternative to demonstrate design defect and feasibility; and, on the issue of punitive damages, J&J's continuing to sell existing inventory of talc containing asbestos in the U.S. and Canada despite its having "discontinued" such sales. *[See* discussion J&J's Motion in Limine No. 2.) The Court also notes the 7 year gap between Plaintiffs last alleged exposure and the introduction of Chinese talc into J&J's product line, further bolsters the Court's finding that any marginal relevance of J&J's use of Chinese talc is substantially outweighed by its prejudicial value, including the manner in which it might mislead and confuse the jury.

2.J&J Defendants' Motion in Limine No. 2 to Exclude all Evidence of and References to J&J's Decision to Discontinue Talc-Based Johnson's Baby Powder in the U.S. and Canada - DENIED [*27]

J&J Defendants' Motion in Limine No. 2 seeks to exclude all Evidence of and References to J&J's Decision to Discontinue Talc-Based Johnson's Baby Powder in the U.S. and Canada. Defendants' motion is rooted in considerations of lack of relevance and prejudice. J&J argues that (1) the decision to suspend such sales in May 2020 occurred almost 15 years after the alleged exposure here and at a time when Johnson's Baby Power contained "Chinese talc" rather than the "Vermont talc" found in the product at the time of the alleged exposure, (2) the decision was based solely on business considerations (a "portfolio assessment" made during the pandemic) and not for health or safety-related reasons thereby, obviating the applicability of *International Harvest v. Ault (1974) 13 Cal.3d 113*, and (3) the prejudicial impact of such evidence would substantially outweigh its probative value (*Cal. Evi. Code Sec. 352*.)

Defendants' contentions are not persuasive and its motion to exclude such evidence is DENIED. The starting point is the California Supreme Court's analysis in *Ault*, involving a motorcycle accident in which a gearbox failed. The Court held that *Cal. Evi. Code Sec. 1151*, which generally bars proof of subsequent repairs for the policy reason of promoting such repairs, did not bar the admissibility **[*28]** of a subsequent design change of the gearbox from aluminum to a malleable iron to enhance its strength. The Court opined that "[T]hat the history and purpose of *section 1151…was* not intended to apply to cases found on the theory of strict liability in a products liability action." *Ault, supra, at 118*.

The *Ault* Court explained:

When the context is transformed from a typical negligence setting to the modem products liability field, however, the 'public policy' assumptions justifying this evidentiary rule are no longer valid. The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. In the products liability area, the exclusionary rule of *section 1151* does not affect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability. In short, **[*29]** the purpose of *section 1151* is not applicable to a strict liability case and hence its exclusionary rule should not be gratuitously extended to that field. *Ault, supra, at 120*.

Ault's reasoning has been applied in the context of products alleged to cause cancer (See *Sailer v. Crown Cork & Seal Co., Inc. (2010) 187 Cal.App.4th 1220*,) as well as in the negligence context to show that a dangerous product was negligently designed. *See* *Barker v. Lull Engineering Co. (1978) 20 Cal.3d 413, 431*.

Defendants argue that *Ault* is in inapplicable because "that case concerned only 'subsequent repairs' and 'improvements' or changes to a product and the interplay of Code of Civil procedure (sic) *section 1151*; specifically whether changes in a vehicle gearbox.. *.after the plaintiff's accident* could be utilized at trial in his products liability action." Defendants read *Ault* too narrowly. Here, as in *Ault*, a product (J&J's talcum powder) arguably contained a "design defect" (fiber-like materials from asbestos) which, Plaintiff argues, prompted J&J to discontinue the sale of talcum power and to substitute its com starch product which did not contain the design defect - just as the substitution of malleable iron for aluminum obviated the design defect in *Ault*.

Defendants counter that a design defect had nothing to do with the discontinuation of the sale of its talc product. Indeed, **[*30]** that may be accurate, but it is a finding that should be made by the jury and not taken from its province by the Court's ruling on a motion *in limine*.

The 15-year time lapse from Plaintiff's alleged last exposure until the date the baby powder was discontinued, does not alter the Court's conclusion. In fact, the alleged exposure occurred when asbestos fiber-like materials were in the J&J product and a change was made to remove those materials. The length of time between the exposure and the change may support J&J's argument that the change was made for purely business purposes, an argument J&J may make to the jury. It will be for the jury to give it the weight it deems appropriate. The time gap, however, does not preclude the jury from considering the evidence.

The Court also finds that the prejudice caused by the admission of evidence that J&J discontinued its talcum powder product does not substantially outweigh its probative value. First, defendants' argument that confusion will result because the jury might "infer that the J&J Defendants believe talcum powder products pose a health risk" is not the point. The issue is not defendants' belief but whether, in fact, the products did **[*31]** cause a health risk. The evidence of the discontinuation of sales is relevant on that issue.

Finally, with respect to Defendants' concern about the admission of discontinuation evidence leading to a "lengthy side show," the Court is confident that Defendants will be able to produce evidence to support its "business-related" contentions within reasonable limits.

The record also demonstrates that J&J did not discontinue all sales sales of powder containing talc with asbestos. It appears that remaining inventory was left on the shelves and J&J continued selling it after the "discontinuation" was implemented. In addition, there is evidence that that J&J continued to sell talc containing asbestos in other countries. Plaintiff argues that the continued sale of remaining inventory *and* the sale of the product in other countries at a time when J&J was aware of its dangerous, are admissible to demonstrate the reprehensible nature of J&J's conduct to prove punitive damages.

With regard to the former - remaining inventory, the Court finds that it may very be admissible to prove punitive damages. With regard to sales to other countries, however, the Court reserves ruling. The Court has serious concerns **[*32]** about the time it may take to prove such foreign sales, the confusion it may cause the jury, and the constitutional issues raised by the admission of such evidence. *See:* *State Farm Mut. Auto Ins. Co. v. Campbell (2003) 538 U.S. 408,422*.

J&J's Motions in Limine No. 1 and No. 2 - A Summary

Because J&J's motions in limine Nos. 1 and 2 raise similar issues, sometimes in the same context and at times in other contexts, the Court provides this summary of its rulings.

Evidence that J&J sold products in the U.S. containing Chinese talc 7 years after plaintiffs last alleged exposure *is inadmissible* at this point in the proceedings.

Evidence that J&J discontinued the sale of its talc products in the U.S. and Canada *is admissible* pursuant to *Ault*

Evidence that J&J continued to sell existing inventory in the U.S. and Canada *after* it "discontinued" sales in the U.S. and Canada *is admissible* on the issue of punitive damages.

Evidence that J&J sold asbestos containing talc in "other countries" *may be admissible* on the issue of punitive damages, but the Court has serious questions regarding the degree to which it will confuse the jury and the time it will take to present such proof. Ruling is reserved on the issue.

3.J&J Defendants' Motion in Limine No. 3 - Evidence: to Exclude [*33] Evidence and Argument that J&J Defendants Improperly Marketed or Targeted Consumers Based on Demographic Characteristics - GRANTED IN PART AND DENIED IN PART

J&J's Motion in Limine No. 3 seeks to exclude Evidence and Argument that J&J Improperly Marketed or Targeted Consumers Based on Geographic Characteristics. Two documents appear to be at issue in this motion: An 08/05/1992 memo entitled "Johnson's Baby Powder" with the headings "Major Opportunities" and "Major Obstacles," each section containing bullet points. The second is a 07/14/2004 document entitled "SHOWER TO SHOWER@ Task Force - BP Brainstorm," listing 3 "challenges" with multiple bullet points under each. Plaintiffs brief in opposition seems to suggest its intent to introduce both documents at trial, each of which is related to the promotion of sales of J&J products and contain references to particular racial, ethnic and gender constituencies.

J&J argues that the documents "have nothing to do" with the issues at bar and will be used by counsel to enflame the jury by suggesting that J&J defendants are racist and sexist. Plaintiff counters that the documents are relevant to demonstrate J&J's placing profits over safety and **[*34]** do not demonstrate or suggest any bias on the part of J&J: "[The] jury should gain a full appreciation of the extent to which J&J, motivated by profit rather than sexism or racism, forcefully promoted its sales of talc powder while knowing about the cancer risk to all consumers." Plaintiff s brief at p. 4.

Both sides cite the Court's previous orders on similar motions, J&J to the order in *O'Hagan v. Johnson and Johnson*, RG19019699 and Plaintiffs to *O'Hagan, Prudencio* v. *Johnson and Johnson*, RG20061303, and *Reyes* v. *Johnson & Johnson*, RG20005239. The Court believes that those orders in combination reach the proper balance and ORDERS that Defendant's motion is GRANTED IN PART and DENIED IN PART.

As a preliminary matter:

Each document, or for that matter any document raising the "targeting" issue must be viewed individually and in its own context. Thus, at trial, the portions of the documents redacted here may be revisited should changed circumstances warrant their admission

The Court finds that Plaintiff may properly use the memos to argue that J&J's placed profits over safety. To do so, however, it is not necessary to include *racial and ethnic* references that may enflame jurors and suggest **[*35]** racism and sexism when, in fact, even plaintiff disclaims that either motivated the writing of the memos. As to those references, the Court finds that the probative value is substantially outweighed by their prejudicial value.

Therefore, should Plaintiff seek to use either document:

Racial and ethnic references shall be redacted as follows: Item 2. In its entirety under "Major Opportunities" in the 8/5/1992 memo; and, specific references to African American and Hispanic users of J&J products in the 7/14/2004 memo. The Court will review redacted versions of the memo prior to their being referred to by any party.

The references that affect only one gender may remain.

The Court expects that all parties will be mindful of the difficult judgment calls necessary to ensure a fair and unbiased trial, free of unwarranted racial, ethnic and gender-based innuendo throughout the trial. The Court's redactions seek to achieve that delicate balance.

4.J&J Defendants' Motion in Limine No. 4 to Exclude Certain Testimony of Plaintiffs Proffered Testing Experts—or, Alternatively, for an Evidence Code Section 402 Hearing - 402 HEARING ORDERED

J&J Defendants' Motion in Limine No. 4 to Exclude Certain Testimony **[*36]** of Plaintiffs Proffered Testing Experts (specifically Drs. Longo and Compton) or, in the alternative, for an Evidence Code *Section 402* hearing for the Court to determine whether admission of the experts' testimony violates the mandate of *Sargon Enterprises, inc.* v. *University of Southern California* (2012) 55 Cal.4th 747.

The Essence of the Debate

The debate between Plaintiffs experts, Drs. Longo and Compton, and Defendants' expert, Dr. Sanchez, in its most general terms, centers around (1) definitions of asbestos and terms such as "cleavage," "mineral" fragments and elongated fibers, (2) whether "bundles" are present which, according to J&J, denote "a hallmark of true asbestos," and (3) whether Dr. Longo "has now developed a new methodology by which he claims to find chrysotile asbestos in every talc mine and essentially in every talc bottle," as J&J contends.

Defendants contend that Plaintiffs experts "use various 'counting criteria' contained in regulations and testing methodologies as an improper substitute for a definition of asbestos, that the experts "falsely" attemto to make it appear that the mineral strucrure they are finding J&J talcum powder contain "bundles," which are the true hallmarks **[*37]** of asbestos (Dr. Longo's "fake bundles,") and, that Dr. Longo has "now developed a new methodology by which he claims to find chrysotile asbestos in ever talc mine and essentially in every talc bottle."

Plaintiffs counter that Drs. Longo and Compton are well qualified experts relying on "generally accepted testing procedures" to which Defendants "mystifyingly" demand that Plaintiff add a "fourth step," and that Plaintiffs experts "follow the very criteria" of various governmental agencies and academic organizations" and followed "protocols as set out in the published methodologies." In addition, Plaintiff contends that Defendants' objection is based on counsel's opinions rather than expert evidence and that it is the results of the application of the methodology, rather than the methodology itself, to which Defendants' actually object.

Sargon

In *Sargon*, the Supreme Court defined the trial court's "gatekeeper" role with respect to the admissibility of expert testimony "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterized the practice of an expert in the relevant field." **[*38]** *Sargon, supra*, at 772. In its "gatekeeper" capacity, trial courts must exclude opinions premised upon assumption, conjecture, guesses, or surmise. *Id.* Presumably that role includes ensuring that the Kelly/Frye "general acceptance of [a] new technique in the relevant scientific community" is met. *Id.*

The trial court's gatekeeper role, however, is not without its limits. It "does not involve choosing between competing expert opinions" and is not a "partisan checkpoint" for the exclusion of expert testimony. Rather, the role seeks to exclude "clearly invalid and unreliable expert opinion…that fails to meet minimum qualifications for admission." *Sargon, supra, at 771-772. See also: Davis v. Honeywell International Inc. (2016) 245 Cal.App.4th 477,492*.

Findings

The Court finds that the opinions of Drs. Longo and Compton are not the stuff of "assumption, conjecture, guesses, or surmise" or that their testimony violates the principle of general acceptance within the scientific community as set forth in Kelly/Frye. Drs. Longo and Compton are well-qualified experts in their field and engaged in a scientific debate with Defendants' experts (most notably Dr. Sanchez) regarding very complicated scientific principles, which have been reviewed by, commented on and written about by innumerable scientists, government **[*39]** agencies, and academic organizations. The proper finder of fact in this instance is the jury not the Court through a motion in limine or a 402 hearing.

In reaching its conclusions, the Court notes:

It has reviewed the declarations of Drs. Longo and Compton and concludes that a prima facie showing has been made that they are qualified to testify in this matter. The Court will make its final determination when Plaintiff offers them at trial.

The methodology used by Dr. Longo to reach his conclusions - the heavy liquid concentration method aka the "Blount method" - meets Kelly/Frye standards in that it has been critiqued in academic journals and appears to have been adopted by the International Organization of Standards (ISO.) The same appears to be true with respect to Dr. Longo's application of the peer-reviewed three-step TEM method to determine the presence of asbestos, a process apparently recommended by government agencies and the ISO.

Defendants' submitted 38 exhibits in support of their motion to exclude, but none of them appear to be declarations of experts refuting the methodologies propounded by Plaintiff s experts. Rather they are primarily articles and transcripts of prior testimony **[*40]** of Longo and Compton which, to the extent they are admissible evidence at trial, may be considered by the jury to determine the weight to be given to Drs. Longo and Compton or to Dr. Sanchez in this quintessential "battle of experts."

The court emphasizes that in making its findings it makes no final determination other than Drs. Longo's and Compton's testimony should not be excluded through a motion in limine or a 402 hearing. Pursuant to Sargon's "gatekeeper" mandate, the Court declines to find that the testimony of either is so "clearly invalid and unreliable" that it should be excluded. At trial, Defendants may cross-examine Drs. Longo and Compton, subject to objections by Plaintiff s counsel, with the considerable fodder they have to counter the opinions of each. Similarly, at trial, Defendants may object to testimony as they deem fit, and the Court will make rulings contemporaneous with any objection.

6J&J Defendants' Motion in Limine No. 5 - Expert: to Exclude Dr. Egilman's Unsupported Causation Opinion Regarding Ms. Vanklive's Fallopian Tube Tumor—or, Alternatively, for an Evidence Code Section 402 Hearing

AND

7.J&J Defendants' Motion in Limine No. 6 - Expert: to Exclude Dr. Smith's [*41] Unsupported Causation Opinion Regarding Ms. Vanklive's Fallopian Tube Tumor - RULING RESERVED PENDING ORAL ARGUMENT

The Court considers J&J Defendants Motions in Limine 5 and 6 together as they each revolve around whether evidence of Drs. Egilman and Smith's "Causation Opinion(s) Regarding Ms. VanKlive's Fallopian Tube Tumor" should be excluded.

Dr. Egilman

With respect to Dr. Egilman, J &J argues that any claim that "Defendants' alleged asbestos-contaminated talc products" "caused (Plaintiffs) fallopian tube tumor" is "nothing more than sheer speculation and conjecture," and should be excluded as irrelevant and violative of *Cal. Evi. Code 352* (the probative value is substantially outweighed by the prejudicial value.)

Defendants explain that "it is undisputed that (Plaintiff) does not have ovarian cancer," *(emphasis* Defendants,) but was diagnosed with "endometrioid adenocarcinoma of the right fallopian tube" in 2017. J&J concludes that Plaintiff cannot produce any evidence that J&J talc products caused the adenocarcinoma of the right fallopian tube, including 6 articles referenced by Dr. Egilman at his deposition in support of his diagnosis. As such, Dr. Egilman's opinion, must be excluded under *Sargon* ***[*42]*** *Enter., Inc.* v. *University of Southern California* (2012) 55 Cal.4th 747,753 and Cal. Evi. Code Sec. 801.

Plaintiff takes a polar opposition position, observing that Dr. Egilman will not offer an opinion that Plaintiff has fallopian tube cancer, characterizing that assertion as a "fabrication." Rather, Plaintiff claims that Ms. VanKlive's "treating physicians have diagnosed her with pleural mesothelioma, peritoneal mesothelioma, and endometrioid adenocarcinoma *of the ovary (ovarian cancer.)" (Emphasis* the Court's.) According to Plaintiff, it is these three diagnoses, which are not subject to any genuine dispute. Plaintiff characterizes Defendants' claim that there is no dispute that Plaintiff does not have ovarian cancer as "extraordinary."

Plaintiff posits that Dr. Egilman has testified at deposition and will testify at trial "Plaintiff s endometrioid adenocarcinoma is an *ovarian* cancer," a form of cancer that "can…originate in the fallopian tube before spreading to the ovary." *[Emphasis* Plaintiff s.) Concludes Plaintiff: "[T]he entire motion is premised on a fabricated 'anticipation' that Dr. Egilman 'will attempt' at trial to testify that Plaintiff has fallopian tube cancer."

With regard **[*43]** to the articles Dr. Egilman produced at his deposition, Plaintiff states that he only presented evidence relating to "fallopian tube cancer" because Defendants requested that he do so, "despite (Dr. Egilman's) express opinion that Plaintiff has ovarian cancer." According to Plaintiff, Ms. VanKlive "has ovarian cancer and it is the J&J Defendants who have failed to come forward with any evidence to the contrary."

Dr. Smith

Both sides make virtually the same arguments with regard to Dr. Smith (J&J Defendants In Limine Motion No. 6.) With regard to Dr. Smith, additional arguments are made regarding his qualifications to testify to ovarian cancer and the materials he relied on to form his opinions. Nonetheless, the essence of the arguments is the same.

A 402 Hearing

It is a tangled web of diagnoses and charges and countercharges that the parties weave. Based on the evidence currently in the record, the Court is inclined to rule that the causation issue is for the jury to sort out, including the testimony of Drs. Egilman and Smith to help solve the equation. Perhaps the scheduled oral argument on this motion will confirm that conclusion.

Should it not provide clarity, however, the Court and **[*44]** ultimately the jury would benefit from a 402 hearing exploring assertions made by both parties, including:

Defendants' claims that the experts intend to testify to an unsupported diagnosis of endometrioid adenocarcinoma of the right fallopian tube, and, that the correct diagnosis of Plaintiff s cancer is "a rare Wolffian tumor that originated in the fallopian tube and metastasized to her pleural and peritoneal cavities; she does not have mesothelioma." *See* footnote 3, Defendants' brief at p. 2.

Plaintiffs claims that neither doctor intends to present a diagnosis of endometrioid adenocarcinoma of the right fallopian tube, that there is no evidence to rebut Plaintiffs ovarian cancer diagnosis other than "attorney argument in a single footnote" regarding a rare Wolffian tumor, and, that

"ovarian cancer epidemiology applies to all epithelial ovarian tumors regardless of whether they originate in the epithelium of the fallopian but, because the point of origination has no bearing on the classification of an epithelial ovarian cell type." Plaintiffs brief at p. 6.

VANDERBILT

1.Defendant Vanderbilt Minerals, LLC's Motion in Limine No. 1 to Exclude Prior Vanderbilt Worker Claims and Allegations [*45] - RULING RESERVED

Background

Defendant Vanderbilt Minerals, LLC's Motion in Limine No. 1 seeks to exclude reference to and evidence of prior Vanderbilt workers' compensation claims relating to asbestos in talc. In the typical asbestos case, workers' compensation claim evidence consists of documents from the Workers' Compensation Appeals Board and from the administrative tribunal below regarding the particular claim, whether it be a complaint, a transcript, or findings of the administrative trial court or the WCAB. This court has often excluded such evidence, finding the information fragmentary and incomplete, lacking context, often confusing, and failing to indicate who in the company may have been aware of the proceedings and its results.

Here it is unclear precisely what evidence Plaintiff seeks to introduce. Vanderbilt's brief implies that it expects Plaintiff to offer all of the records of workers' compensation proceedings for at least 10 workers. Plaintiffs exhibits attached to its brief in opposition, however, only refer to a chart of 10 workers and transcript testimony, primarily focusing on the high incidence of mesothelioma related illness at Defendants' Gouverneur mine.

As noted **[*46]** below, the Court cannot make a final determination on this motion without knowing precisely what evidence Plaintiff seeks to introduce. That said, to the extent the evidence consists of a chart relating to 10 workers, it is unique and different from the evidence generally offered by plaintiffs relating to workers compensation claims.

The chart was prepared by Vanderbilt and chronicles the history of 10 workers who apparently had, or were suspected of having mesothelioma-related diseases, resulting from their work at Vanderbilt's mine. The chart was presented during the deposition of Vanderbilt's corporate representative Matthew Stewart, and details Name, Date of Birth, Date of Hire, End Date of Employment, Years Employed, Year of Death, "Years Between … Work and Death (Latency)," whether there was a worker's compensation case, "Diagnosis Basis," "Questions Regarding Meso Diagnosis," Employment History at Defendant, Prior Employment History, Potential Asbestos Exposure, "Smoker," Autopsy, Medical Details, and "Rubin Comments." By the Court's count, it appears that for 5 of the workers there was company confirmation of an asbestos-related disease (Pike, McIntosh, Labow, Malbauf, and Gaumes,), **[*47]** for 3 there was not (Hosmer, Evans and Rice,) and for 2 it was not discernable whether or not the disease was related to talc containing asbestos (Smith and Bickford.) All of the workers had exposure to Vanderbilt's talc mined from the Gouverneur Talc Mine in New York. Vanderbilt brief at p. 13.

Vanderbilt claims that the evidence relating to workers' compensation claims is inadmissible for a variety of reasons, including a lesser burden of proof at a workers' compensation hearing than exists in a civil trial and different purposes that the company may have in defending a worker's compensation claim relative to a civil trial, the lack of discovery and incentive to investigate at a workers' compensation hearing, the difference in Ms. VanKIive's work environment relative to the conditions experienced by workers at the Gouverneur mine, and various evidentiary objections, including hearsay, inadmissible character evidence (*Cal. Evi. Code 1101(a)*), improper proof of settlement or compromise barred by *Cal. Evi. Code Sec. 1152(a)*, and, "undisclosed expert testimony." Defendant also contends that admission of the evidence would violate New York privacy laws.

Plaintiff counters that the evidence is admissible for the limited purposes of demonstrating **[*48]** knowledge, causation and punitive damages, *citing* *Cal. Evi. Code Sec. 1101(b)* and *In re Asbestos Related Cases (1982 N.D. Cal.) 543 F.Supp. 1152* as to notice, *Aultv. International Harvester Co. (1974) 13 Cal.3d 113,121-1223* as to causation, and *Izell* v. *Union Carbide Corporation* (2014) 231 CaLApp¶* 962 and, *State Farm Mat. Automobile Ins. Co. v. Campbell (2003) 538 US 408* as to punitive damages.

Discussion, Guidance and Orders

Regardless of the universe of evidence Plaintiff contemplates introducing to prove the prior workers' compensation claims, they are almost certainly *not* admissible for the truth of the assertions contained there. Rather, the records would be admissible, if at all, for a proper limited purpose. Whether evidence of the WC claims is admissible to prove such a limited purpose (e.g. notice and awareness of the dangers of asbestos) is a "question of fact" within the discretion of the trial court. *In re Related Asbestos Cases 543 F.Supp. 1152,1155 (1982)*.

As noted, it is impossible for the Court to rule on this motion at this time, given the lack of specificity of the precise records that Plaintiff intends to produce. Perhaps the Court has missed something in the briefing, and welcomes guidance as to precisely what evidence Plaintiff intends to introduce.

Thus, as next steps, the Court provides the following guidance to the parties and makes the following orders:

Plaintiff is ORDERED to provide defendant and the Court the precise materials **[*49]** it intends to offer at trial regarding workers' compensation claims by 08/27/2021. To the extent there are no additional materials other than those attached to Plaintiffs brief in opposition, Plaintiff should so state.

The Court makes no final determinations at this time regarding the admissibility of any workers' compensation evidence until it and Defendants have had the opportunity to review all of Plaintiff s proffers.

The Court *might* admit redacted portions of the chart for the limited purpose of notice. The circumstances regarding the chart's preparation are not clear to the Court and will likely be determinative as to whether any portion of the chart is admissible. If the chart was prepared solely in preparation for Stewart's deposition, it would militate against its admissibility. If, on the other hand, Vanderbilt prepared it prior to this litigation out of concern that its product might contain asbestos, it may dictate a different result. If it were the latter, it might be akin to a statement of a party. This is *not* to say that the Court would admit the document for its truth under *Cal. Evi. Code Sec. 1220*, but rather, the Court would do so solely for a limited purpose with an appropriate limiting instruction. **[*50]** (In this regard the Court notes that Vanderbilt's objection on *Cal. Evi. Code Sec. 1152* grounds is not persuasive. By its terms, *Sec. 1152* envisions admission of evidence for limited purposes that do not undermine the policy objectives of the statute.]

The Court does not find persuasive Plaintiffs argument that any workers' compensation evidence should be admissible for any limited purpose other than notice. As Plaintiff notes, notice does not require a showing of "similarity," however, proof of causation demands a greater showing of similarity, albeit not a showing of "identical" conditions. It seems to the Court that Plaintiff cannot have it both ways, particularly given the complicated causation issues confronting the Court and ultimately the jury as presaged by these motions *in limine*. To the extent that workers' compensation evidence is admissible, the jury will be instructed that they cannot use such evidence to prove causation.

As the Court reviews the documents, it will consider carefully the dictates of *Cal. Evi. Code Sec. 352*, whether it be relating to documents from the administrative proceedings or those prepared by Vanderbilt.

Finally, any evidence relating to expert testimony present in this motion, such as that of Linda Dell, **[*51]** will judged on the basis of the admissibility of criteria applicable to the admission of any expert testimony and will not be bootstrapped into evidence along with evidence of workers' compensation evidence that might be admissible.

2.Defendant Vanderbilt Minerals, LLC's Motion in Limine No. 2 to Exclude Evidence and Testimony Vilifying Vanderbilt For Exercising its First Amendment Right to Petition the Government for a Proper Definition of Asbestos - RULING RESERVED

Background

Defendant Vanderbilt Minerals, LLC's (Vanderbilt) Motion in Limine No. 2 seeks to Exclude Evidence and Testimony Vilifying Vanderbilt For Exercising its First Amendment Right to Petition the Government for a Proper Definition of Asbestos. Specifically, Vanderbilt objects to the admission of any evidence of or references to efforts that it lobbied OSHA to change its definitions regarding asbestos, which Vanderbilt claimed were overbroad and failed to distinguish between fibers in "asbesti-form or non-asbesti-form habit."

Vanderbilt contends that such evidence will only serve to "vilify" Vanderbilt in its efforts to insure accuracy in OSHA definitions relating to asbestos, and, furthermore, is in admissible under the Supreme Court's decisions **[*52]** in *E.R.R*.

Railroad Presidents Conference v. Noerr Motors Freight, Inc. (1960) 365 U.S. 127 and United Mine Workers v. Pennington (1965) 365 U.S. 127,81 S.Ct. 523, which considered together have become known as the "Noerr-Pennington doctrine.

Plaintiffs opposition brief confirms that it intends to introduce at least 4 items of evidence relating to agency regulation of asbestos and Vanderbilt's efforts to change them:

A February 1974 inter-office memo discussing the effect of OSHA regulations on the New York talc industry.

A second 1974 memorandum that expresses concern that Vanderbilt's products "may be classified as asbesti-form and would come under the OSHA asbestos standards for manufacture and use even if we are able to sustain our petition to OSHA that (the) tremolite is non-asbesti-form."

A third 1974 memo regarding Vanderbilt's presentations to OSHA, NIOSH, FDA, and MESA, which states that the information provided the agencies "are based on something less than the truth." The memo's author concludes: "I find it difficult to believe that they (Vanderbilt) could be so grossly misinformed as to what their materials really are."

A June 1986 letter from Vanderbilt's industrial hygienist Dr. Gamble to NIOSH regarding Vanderbilt's efforts to change non-asbesti-form OSHA definitions and a subsequent entry in the Federal Register indicating **[*53]** that NIOSH was distancing itself from Dr. Gamble's opinions which "are not supported by data."

Plaintiffs cite *Hernandez v. Amcord, Inc. (2013) 215 Cal.App.4th 669*, arguing that Defendants misconstrue *Noerr-Pennington* and that the evidence is admissible pursuant to *Hernandez* for any one of a number of limited purposes.

The Noerr-Pennington Doctrine and Herandez v. *Amcord Inc. Noerr-Pennington* involved anti-trust actions brought under the Sherman Act. In *Noerr*, the Court held as a matter of substantive federal ***antitrust law*** that industry-wide lobbying efforts by the railroads to pass legislation "designed to destroy the trucking industry as a competitor" could not serve as a basis to find a violation of the Act." (*Noerr, supra, at 131-132*.) Citing the First Amendment's guarantees of the rights of to free speech and to petition the government, the Court concluded that the Sherman Act could not prohibit trade associations from attempting to persuade the Congress or the Executive Branch to pass laws or take actions that might involve a restraint of trade. *Pennington* held similarly: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *(Pennington, supra*, at 670) The doctrine is applicable in negligence and products liability cases. *Theme Promotions, Inc. v. New Am. Mktg FSI (9th Cir. 2008) 539 F.2nd 1046,1058*.

By contrast, the California **[*54]** Court of Appeal in *Hernandez, supra*, held that lobbying efforts by a defendant in an asbestos case *might* be admissible and that the *Noerr/Pennington* doctrine might not be a bar. The *Hernandez* Court distinguished a situation where there was a substantive claim that lobbying efforts constituted a substantive violation of a law versus a situation where the lobbying efforts were being offered for a limited purpose such as knowledge of the dangers of asbestos. The former implicated the *Noerr-Pennington* doctrine while the latter required the application of evidentiary rules. *Noerr/Pennington* was a substantive rule; *Hernandez* an evidentiary rule.

In so holding, *Hernandez* did not break new ground. In *Pennington*, the United States Supreme Court similarly noted that "It would still be within the province of the trial judge to admit this evidence [of efforts to influence public officials], if he [or she] deemed it probative and not unduly prejudicial, under the 'established judicial rule of evidence…"

Thus, in *Hernandez*, the Court of Appeal reversed and remanded, in part, because the trial misconstrued the *Noerr/Pennington* doctrine and failed to engage in a relevance analysis under the Cal. Evidence Code. The

Hernandez court opined: "The trial court's reliance on **[*55]** the Noerr-Pennington doctrine to exclude evidence in this negligence/strict liability case is a misapplication of the doctrine … because the trial court made no analysis of this evidence [lobby efforts to create exemptions laws banning asbestos] pursuant to Evidence Code *sections 350*,*352* or any other relevant section of the Evidence Code." At 680-681.

In their analyses here, both Plaintiffs and Defendants miss the mark. *Noerr/Pennington* is not necessarily a bar to the admissibility of the lobbying evidence Plaintiffs intend to proffer, and *Hernandez* is not a mandate that all lobbying evidence is admissible. Rather, its admissibility is dependent on an exercise of the court's discretion in applying relevance provisions of the California

Evidence Code, including weighing the probative value of the lobby evidence relative to its prejudicial value.

The Court Reserves Ruling on Vanderbilt's Motion in Limine No. 2 The parties have not argued the admissibility of Plaintiffs proffers in the context set forth here. As such, it is premature for the Court to rule. Defendants are entitled to the opportunity to respond to arguments that the evidence is admissible for the limited purposes Plaintiff claims in its brief. Defendants **[*56]** need to be more specific in its contentions that even if relevant, the admissibility of lobbying evidence violates *Cal. Evi. Code Sec. 352* in the context of Plaintiffs specific proffers. Thus, ruling is reserved on Vanderbilt's Motion in Limine No. 2 until such time as the specific positions of the parties with respect to the particular proffers are fully articulated and considered by the Court.

Pending such rulings, the parties are ordered not to make any references to lobbying efforts by J-MM during jury selection, opening statements or trial absent an offer of proof and leave of the Court. Should the Court conclude that application of relevance standards bars evidence of lobbying evidence during Plaintiffs' case-in-chief, Plaintiffs may be permitted to introduce such evidence on cross examination or in rebuttal should the Court find that Defendants open the door to its admissibility.

WHITTAKER

1.Defendant Whittaker Clark & Daniels, Inc.'s Motion in Limine to Preclude Memoranda from Heinz Eiermann and Robert Schaffner, both Deceased - GRANTED

Defendant Whittaker Clark & Daniels, Inc.'s Motion in Limine No. 1 seeks to Preclude Memoranda from Heinz Eiermann and Robert Schaffner, both Deceased. Eiermann and Schaffner **[*57]** were both employed by the FDA during March of 1976. On March 18, 1976, Eiermann, the FDA's Associate Director for Technology, authored a memo in which he criticized the talc industry's CFTA for the quality of data that it submitted, opining "it does not offer much assurance that cosmetic talcs are adequately tested."

On March 19,1976, Schaffner, the FDA's Acting Director, Bureau of Foods, apparently commented on Eiermann's memo, noting that although the "companies have done some work," the CFTA's "work has not been terribly extensive, and based on the work to date we probably could not say with certainty that the industry is adequately handling the problem." Schaffner concludes: "Therefore, Mr. Eiermann recommends and I concur that a proposed regulation be drawn up stating essentially that talc would be asbestos free when examined by using x-ray diffraction and differential thermal analysis." There is also handwriting in the margin of the Schaffner memo, which states: "Agree. Please coordinate with compliance." The handwriting appears to be initialled by Schaffner.

The Court is inclined to exclude both memos as hearsay and to deny Plaintiffs request that it be admitted pursuant to *Cal. Evid. Code Sec. 1280*'s **[*58]** public records exception to the hearsay rule. The Court is concerned that the exception itself is not satisfied in that the memo lack sufficient indicia of trustworthiness demanded by the explicit language of *Sec. 1280*.

Even if *Sec. 1280*'s requirements are met, the Court is extremely concerned that the prejudice the memo's admission would engender substantially outweighs its probative value. The assertions are damaging, but not spelled out with any specificity. In addition, the criticism is leveled at CFTA and not any member company. It appears impossible to determine Defendants' responsibility, if any, for the deficiencies detailed by Eiermann and

Schaffner. Eiermann and Schaffner are deceased. It appears that it would fundamentally unfair to admit the memoranda and that their prejudicial impact substantially outweighs it probative value and should be barred pursuant to *Cal. Evi. Code Sec. 352*.

2.Defendant Whittaker Clark & Daniels, Inc.'s Motion in Limine to Preclude Admission of, Reliance Upon and Reference to the Four Photographs Depicting Various Packaging Produced in Discovery - 402 HEARING ORDERED

Defendants' authentication, relevance and hearsay objections to the admissibility may be explored through the testimony of **[*59]** a witness to authenticate the photographs and provide information regarding their probative value. In its opposition brief, Plaintiff suggests that percipient witness and Plaintiffs supervisor, Mr. Lima, might be such a witness. The photographs are not to be referred to in *voir dire* or opening statements or in any matter absent an order of the Court.

VPN'S

1.1Defendant The Vons Companies, Inc.'s Motion in Limine No. 2 to Exclude Reference to Newspaper Writings and Media Reports About Talc Litigation [Evidence] - GRANTED IN PART AND DENIED IN PART

Defendant The Vons Companies, Inc.'s Motion in Limine No. 2 seeks to Exclude Reference to Newspaper Writings and Media Reports About Talc Litigation. Vons Companies and Safeway have settled, but the motion is relevant to all parties in this litigation. J&J had joined Vons in this motion. At oral argument, the parties are to clarify which articles are actually in question now that the retailers have settled.

Generally, the Court intends to GRANT the motion with respect to the actual introduction of the articles. Presumably, however, Plaintiffs have a witness who will describe information available in the popular press who may generally relate articles **[*60]** that describe litigation and controversies for the limited purpose of establishing what was known or knowable without going into the detailed contents of those articles that are accusatory against any particular defendant. Otherwise the actual contents of the articles are likely hearsay and should not be shared with the jury. The Court shares the concern of this Court in O'Hagan with the prejudicial impact of the articles and its conclusion that "modern day reports on similar litigation would seem to be unduly prejudicial and presumptively not admissible."

The Court will provide a more detailed analysis once the actual articles in question are identified.

Dated: 08/16/2021

/s/Jeffrey S. Brand

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Top Agent Network, Inc. v. Nat'l Ass'n of Realtors

United States District Court for the Northern District of California

August 16, 2021, Decided; August 16, 2021, Filed

Case No. 20-cv-03198-VC

Reporter
554 F. Supp. 3d 1024 *; 2021 U.S. Dist. LEXIS 154201 **; 2021 WL 3616480

TOP AGENT NETWORK, INC., Plaintiff, v. NATIONAL ASSOCIATION OF REALTORS, et al., Defendants.

Prior History: Top Agent Network, Inc. v. Nat'l Ass'n of Realtors, 2020 U.S. Dist. LEXIS 125623 (N.D. Cal., July 16, 2020)

Core Terms

listings, antitrust, buyers, sales, sellers, listing service, subscribers, off-MLS, consumers, anticompetitive, competitors, marketing, alleges, membership, platform, offers, Pool, anti trust law, licensed, harms, real estate agent, brokerage, prices, local chapter, subscription, benefits, network, top, home sale, properties

Counsel: **[**1]** For Top Agent Network, Inc., Plaintiff: Tobias George Snyder, LEAD ATTORNEY, Paul Timothy Llewellyn, Lewis & Llewellyn LLP, San Francisco, CA.

For National Association of Realtors, California Association of Realtors, Inc., San Francisco Association of Realtors, Defendants: Ethan Glass, LEAD ATTORNEY, Quinn Emanuel Urquhart & Sullivan, LLP, Washington, DC; Michael Domenic Bonanno, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP, Washington, DC; Peter Joseph Benson, William Anthony Burck, PRO HAC VICE, Quinn Emanuel Urquhart and Sullivan, LLP, Washington, DC; Samantha Zuba Scanlan, Washington, DC.

Judges: VINCE CHHABRIA, United States District Judge.

Opinion by: VINCE CHHABRIA

Opinion

[*1026] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE

Re: Dkt. No. 81

The National Association of Realtors ("NAR") and its local chapters operate listing services through which people can buy and sell homes. The listings can be accessed by any licensed real estate agent who pays the subscription fee. NAR has adopted a rule to prevent its subscribers from withholding available properties from the listing service—if you are marketing a property in any way, you need to include it on the local listing service so that all other agents **[**2]** can see it. If you don't, you will lose access to the listing service.

A relatively new company called Top Agent Network ("TAN") offers a competing listing service. But it only makes the service available to a small minority of agents—ones that the company has deemed "top agents." These TAN members are also subscribers to NAR's listing service. TAN wants its members to be able to list properties on its own service without also being required to list them on NAR's service. It has sued NAR, claiming that NAR's policy violates the antitrust laws.

The lawsuit is dismissed with prejudice. It may well be that NAR's policy has anticompetitive effects. But it is not anticompetitive to the extent that it prevents members of an exclusive listing service like TAN from concealing listings from NAR's subscribers while simultaneously benefitting from access to NAR's service. Indeed, it is TAN's business model that would, if it succeeded, have anticompetitive effects on the real estate market. Thus, although the policy presumably causes real estate agents to be less interested in using TAN's service and becoming TAN members, this is not the type of harm that the antitrust laws are designed to prevent. **[**3]**

I

Unless otherwise noted, the facts described in this section come from the well-pled allegations in the complaint, materials incorporated by the complaint, or materials subject to judicial notice.

A

Selling a home requires finding the right match between an available home and a willing buyer. This involves a certain amount of cooperation: sellers' agents and buyers' agents need to be able to exchange information about what their clients are looking for in a given transaction. Since the 1800s, local realtors' associations have **[*1027]** organized forums for this kind of information exchange. While the process has evolved with time and technology—from in-person meetings to online data platforms—the basic concept remains the same. Real estate agents representing home sellers publish information about homes available for sale, and agents representing home buyers search through that information to find homes that might suit their clients' needs.

Today, the vast majority of home sales occur on the local "multiple listing service" ("MLS") run under the purview of the National Association of Realtors. Founded in 1908, NAR is a trade association of licensed real estate agents that serves as a national umbrella **[**4]** organization for state and local chapters. Typically, the local chapter will run the MLS for that region. The MLS is essentially a subscription-based online database of properties listed for sale in a particular geographic region. Nearly all active licensed real estate agents in the country pay for access to the MLS in their region. They can either just pay a subscription fee or choose to join as a full-blown member—either way, they must also agree to abide by the rules and policies imposed by NAR and its local chapters. Although there are "independent" or non-NAR affiliated listing services, any given geographic market is typically dominated by the MLS.[1] And in markets where the MLS dominates, around 90% of homes in that market will be sold on the MLS. It is therefore important for real estate agents to subscribe to their local MLS—it's how they are able to share listings with all the other agents in their market. As the complaint explains it, putting a home on the MLS "generally puts a listing before the most eyeballs the fastest." The San Francisco Association of Realtors, the second defendant in this case, operates the "SFARMLS" covering the San Francisco area.

While the local affiliates **[**5]** actually operate the MLS for their area, NAR promulgates rules and policies through a "Handbook" that all local chapters are required to enforce. Those rules control everything from the process for negotiating buyers' agents' commissions to how the MLS can share data with consumer-facing websites like Zillow, Trulia, and Redfin. Local chapters can, to some extent, also add their own rules. For example, a common requirement is that owners make listed properties available for showing to any subscribing buyers' agent. The thrust of many of the rules is that they create and maintain an open marketplace: once a sellers' agent posts a listing, it becomes publicly available to all subscribing agents (and, when listings are syndicated, anyone with a web browser), and any buyers' agent has an opportunity to pursue that home for their client.

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[1] Throughout this ruling, the term "MLS" will be used to refer to NAR-affiliated platforms, while independent platforms will be described as "alternative" or "private" listing services or just "listing services."

B

Founded in 2010, Top Agent Network is a for-profit company that describes itself as a "private, member-only community open to the top ten percent of agents by sales volume." For those members, TAN offers a competing listing service. While the MLS is available to any licensed agent willing to pay the subscription fee, TAN's model is to attract an "elite" **[**6]** membership by promising an opportunity to deal exclusively with other highly productive agents. TAN's current membership is approximately 10,000 agents (compared to 1.4 million NAR members), and those agents are **[*1028]** involved in roughly $165 billion in home sales every year.

Specifically, TAN offers its member agents two avenues for engaging in home sales. The first is simply a service closely analogous to the NAR-affiliated MLS. For home sellers who want their home marketed to a fairly large pool of buyers without opening themselves to the completely public market of the MLS and without being required to follow NAR's various rules, listing on TAN might provide a more palatable alternative. In addition to having a significantly smaller and selective membership, TAN does not syndicate its listings data to consumer websites like Redfin.

Second, for sellers and buyers who want an even more private experience, TAN offers a "matchmaking" service. Through this service, a seller's agent can inform TAN that the agent has a client looking to sell a home in a given price range, while at the same time buyers' agents let TAN know what range their clients are looking in. TAN then pairs off the seller's **[**7]** agent with a buyer's agent looking in the right range, and the two agents can negotiate a potential sale directly. That means sales can be made without ever listing the home at all.

The reason some home sellers might prefer using services like TAN's rather than listing their home on the MLS is the same as the reason many want to use the MLS: the publicity. Homeowners who prefer not to broadcast the fact that they are selling or don't wish to publicize pictures of their home might prefer to engage a seller's agent who will go about finding a buyer more quietly. Generally speaking, this can be done by circulating the listing only to other agents within the same real estate agency or brokerage, or by the agent reaching out informally to buyers' agents in their personal network. Homes sold through these more private channels are referred to as "off-MLS sales." Essentially, TAN is offering a platform for a select group of agents to conduct off-MLS sales for their clients.

But not all of the $165 billion-worth of annual sales involving TAN's member agents occur on TAN's platform. In San Francisco and beyond, TAN's members also subscribe to their local NAR affiliate. As the complaint explains, **[**8]** the vast majority of home sellers still want their homes to be listed on the MLS where it can be readily viewed by the largest possible pool of potential buyers. That makes it nearly impossible for any agent to earn a living without access to the MLS, and TAN's member agents are no exception. Indeed, the way an agent becomes a "top agent" who can qualify for TAN is through success on the MLS. TAN's members are people who have leveraged access to the information on the MLS to drive a high volume of sales. Rather than giving up that access, TAN agents continue to view and post most listings on the MLS while selectively placing some homes exclusively on TAN's platform—out of reach of the vast majority of agents.

C

According to the complaint, NAR has long been wary of agents engaging in off-MLS sales. In 2015, the trade association commissioned a consulting firm to undertake a "threat assessment." This was the inception of "The D.A.N.G.E.R. Report: Definitive Analysis of Negative Game Changers Emerging in Real Estate." The Report zeroed in on a key feature of NAR's financial structure: the organization is almost entirely reliant on subscription fees and membership dues. To stay afloat, NAR **[**9]** needs to retain as many agents as it can by making sure its services are worth the annual fees. But that's difficult to do, **[*1029]** because it turns out that the vast majority of licensed real estate agents are not terribly productive. The Report used a variety of unflattering terms to describe this mass of agents, ranging from "unproductive" to "technically unsophisticated" to "not so good." The upshot is that a disproportionately large segment of NAR's dues and fees come from agents who are not making more than a handful of sales per year, and who have difficulty coping with any new market innovations or technological developments. If those agents were prevented from making even the few sales that they currently make, they would likely drop their NAR subscriptions.

One major threat to those unproductive agents (and, in turn, to NAR) is the rise of off-MLS sales. To the "not so good" agents, off-MLS sales are a way for their competitors to unfairly hide listings from everyone on the MLS. And in fact, as more listings are kept off the MLS and placed on services like TANs, it becomes harder for less productive agents to catch the occasional opportunity to close a deal. The reason NAR is able **[**10]** to attract and retain those agents is that the MLS offers them relatively simple "one-stop shopping"—all the information they need, available in one place. And because NAR needs their subscription fees to stay afloat, the threat that off-MLS sales pose to unproductive agents is also a threat to NAR.

In 2019, NAR took decisive action to limit the ability of subscribing agents (and so, effectively, all licensed agents) to engage in private, off-MLS transactions. The organization adopted a rule called the "MLS Clear Cooperation Policy" that essentially prohibits MLS subscribers from marketing listings anywhere else unless they also post the listing to their local MLS. In full, the Policy states: "Within 24 hours of marketing a property to the public, the listing broker must submit the listing to the MLS for cooperation with other MLS participants. Public marketing includes, but is not limited to, flyers displayed in windows, yard signs, digital marketing on public facing websites, brokerages website displays (including IDX and VOW), digital communications marketing (email blasts), multi-brokerage listing sharing networks, and applications available to the general public." In other words, **[**11]** almost as soon as a home is listed for sale in any forum, it must be listed on the MLS too. If you want to benefit from the information available on the MLS, you can't withhold information from the MLS.

The Policy contains an exemption for agents discussing listings within their own firms. This means that agents employed by large brokerages are able to list properties on internal platforms, send firm-wide emails describing an available home, or discuss a property over coffee with a colleague without needing to post the listing on the MLS. These arrangements are known as "office exclusives." The complaint alleges that allowing office exclusives to continue under the Policy while forbidding other off-MLS listings unfairly benefits large brokerages, to the detriment of consumers. Any home seller who wishes to avoid a public listing on the MLS is left with no choice but to hire an agent at a brokerage. The problem is that sales within brokerages do not entail negotiations between financially independent actors. Agents from the same company—whose financial incentives are inherently linked—represent both the buyer and the seller. According to the complaint, this situation "robs consumers **[**12]** of the independent advice they expect from an agent."

The Policy is enforced through local NAR affiliates, which were required to fully implement it by May 1, 2020. In San Francisco, SFAR took a fairly strict approach to implementation and enforcement. **[*1030]** In March 2020, the local organization announced that any subscribing agent found to have violated the Policy would be subject to a $5,000 fine for the first offense and a $10,000 fine for a second offense. An agent caught violating the rule for a third time would owe a $15,000 fine and would also get kicked off the MLS. Additionally, SFAR interprets "public marketing" to include one-on-one communication about a listing between two agents. As the complaint puts it, "if an agent has coffee with another agent and mentions a property for sale," that property must be listed on the MLS within one business day. In short, MLS subscribers in the San Francisco area now face a fairly dramatic choice: cease negotiating off-MLS home sales entirely or lose access to the MLS.

For TAN, the fact that all of its members are also MLS subscribers means that every listing posted on TAN's exclusive service now must also be posted on the MLS. In San Francisco **[**13]** (and in any other area where the local NAR affiliate has interpreted the Policy to reach one-on-one conversations), the same is true even if a TAN member uses the company's matchmaking service and only discusses the home with one other agent.

TAN alleges that NAR's explicit purpose in instituting the Policy is to eliminate competition from TAN and other alternative listing services. The company points to NAR's statements in this litigation and in another case challenging the Policy that agents' use of competing listing services reduces the value of subscribing to an MLS, as well as public statements by various NAR-associated entities expressing expectations that the Policy would put TAN out of business. Moreover, TAN alleges that the Policy is achieving its aim. The company reports that over the last year, membership in its various local chapters has dropped by an average of more than 20%, and some chapters have seen membership cut nearly in half. While some of this loss is likely attributable to the overall drop in real estate sales during the Covid-19 pandemic, TAN states that in three markets that are not dominated by a NAR-affiliated MLS, membership has only declined by an average **[**14]** of about 11%. In short, TAN alleges that the Policy is stifling competition by cutting off the ability of other platforms to recruit and retain member agents, which in turn harms people who wish to sell their homes off-MLS.

II

TAN claims that the Policy constitutes a violation of the Sherman Antitrust Act's prohibition on agreements creating unreasonable restraints of trade. *15 U.S.C. § 1*. Specifically, the complaint frames the Policy as a "group boycott," meaning an agreement among competitors to cut off certain businesses from the supplies needed to compete in the market. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 290, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*. As described above, TAN alleges that the Policy constitutes an agreement among NAR member agents not to compete with each other through off-MLS marketing, thereby cutting off TAN and other private listings services from the supply of agent memberships.

A

Although the Sherman Act itself does not include a private right of action, competitors are sometimes permitted to bring suit if they can allege that the defendant's activities in violation of the antitrust laws have caused them harm. *15 U.S.C. § 15*. But not just any harm will do. In addition to alleging an actual injury to support Article III standing, the Supreme Court has also required plaintiffs like **[**15]** TAN **[*1031]** seeking to bring antitrust claims against their competitors to specifically plead "antitrust injury." The canonical rule is that an antitrust injury must be an injury that flows from the anticompetitive aspect of the defendant's activity. *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. The theory is that a company should only be able to invoke the antitrust laws to recoup its own losses when those losses result from harm done to competition in the market, "since it is inimical to the antitrust laws to award damages for losses stemming from continued competition." *Id.* (internal quotations omitted). If a company harms a competitor, the competitor must explain why the company's actions ultimately result in higher prices, lower quality, or reduced choice, and how the competitor's harms can be traced to the same aspects of the company's activity.

Atlantic Richfield involved an agreement between a large gasoline seller called ARCO and its retailers not to sell the company's gasoline for more than a maximum price, intended to out-price independent gas stations like the plaintiff USA Petroleum. The complaint alleged that the agreement had caused USA Petroleum and other independents to lose sales, while retailers selling ARCO gas saw **[**16]** an increase in sales. But the Supreme Court explained that this kind of shift in sales was not one of the reasons that such vertical maximum-price fixing arrangements are deemed illegal. The kinds of harm to competition that arise from such agreements largely have to do with the ways they restrain the retailors who are part of the agreement from competing with each other: the artificially low price might prevent such retailors from recouping their operating costs, cause them to stop engaging in non-price competition by offering perks or services consumers find valuable, and ultimately result in what is effectively a minimum-price fixing scheme as none of the retailors are willing or able to charge less than the maximum agreed price. *Id. at 335*. In short, reduction in competition among those retailors ultimately reduces consumer choice. But USA Petroleum had alleged that the agreement allowed retailors who joined the agreement to *increase* their sales and improve their viability—the opposite of the anticompetitive effects ***antitrust law*** is concerned with. As a result, although USA Petroleum's lost sales constituted a real injury, they did not count as an antitrust injury because they did not result **[**17]** from "the aspects of vertical, maximum price fixing that render it illegal." *Id. at 337*.

One helpful rule is that an injury can never be an antitrust injury if it flows from an aspect of the defendant's activity that actually benefits competition. *Pool Water Products v. Olin Corporation, 258 F.3d 1024, 1034 (9th Cir. 2001)* (citing *Rebel Oil Co. v. ARCO, 51 F.3d 1421, 1433 (9th Cir. 1995)*). The *Pool Water Products* case involved two companies that manufactured certain chemicals used to sanitize swimming pools. Among several allegedly anticompetitive activities, the Olin Corporation had purchased another chemical manufacturer that also packaged and distributed the sanitizers, thereby integrating its activities across multiple levels of the supply chain. Pool Water Products alleged that the integration allowed Olin to reduce its prices and increase its own market share as competitors were unable to match the price drop. The goal, Pool Water Products alleged, was to drive all the competition out of the market and then start charging monopoly prices. But Olin had not actually begun charging high prices, and low prices are not necessarily anticompetitive—in fact, lower prices are usually better for consumers. *Id. at 1035*. Because the plaintiff **[*1032]** had not alleged that the low prices were predatory (i.e. that Olin was charging consumers less for **[**18]** its products than it was spending to produce and distribute them), they could not allege an antitrust injury. The fact that Pool Water Products and other competitors lost market share while Olin gained market share did not mean that the level of competition in the market for pool sanitizers had been harmed; it actually showed that consumers had benefited. Thus, Pool Water Products did not have antitrust injury.

Antitrust injury is a threshold issue, meaning that if a plaintiff cannot allege an antitrust injury, the suit cannot proceed no matter how egregious the defendant's alleged antitrust violation may be. On a motion to dismiss, the normal pleading rules apply. The Court must take all allegations plausibly pled in the complaint as true and draw all inferences in favor of the plaintiff. *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In short, the inquiry at this stage is whether the complaint alleges facts giving rise to a plausible inference that the plaintiff has suffered some injury that flows from the anticompetitive effects of the defendants' allegedly illegal activities.

B

The complaint lays out a reasonable argument that the Policy is so broad that its overall effect on the market for homes is anticompetitive. The Policy **[**19]** leverages NAR's control of the real estate market to coerce most agents into giving up their off-MLS activities entirely, without regard to the competitive value of those activities. The complaint alleges with particularity that there is demand among consumers—that is, home buyers and sellers—for options to engage agents who can help them buy or sell a home without going through the MLS. And the complaint plausibly alleges that the Policy, by forcing those consumers to choose between the MLS and a problematic in-house transaction at a large brokerage, reduces consumer choice and stymies competition among agents for off-MLS sales. While not as clear-cut as concerns about super-competitive pricing, these kinds of harms are also the concern of ***antitrust law***. *See* *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*; *Regional Multiple Listing Service of Minnesota, Inc. v. American Home Realty Network, Inc., 960 F. Supp. 2d 958, 985 (D. Minn. 2013)*). To the extent that other alternative listing services (particularly ones that allow any licensed agent to join or subscribe) might plausibly be unable to stay afloat under the Policy, it would seem to be harming competition. All of that could conceivably be enough to plead a *Sherman Act* *Section 1* claim. *But see* *The PLS.com, LLC v. The National Association of Realtors, 516 F. Supp. 3d 1047, 2021 U.S. Dist. LEXIS 21098, 2021 WL 369545, at *8 (C.D. Cal. Feb. 3, 2021)* (appeal pending) (finding that another private listing service had not alleged a plausible injury to consumers).

But even **[**20]** assuming for the purposes of this motion that the Policy constitutes an antitrust violation, TAN has failed to state antitrust injury because its alleged harm—the loss of agent members—does not flow from effects of the Policy that are harmful to competition. Moreover, taking the allegations in the complaint as true, TAN could never allege an antitrust injury from the Policy, because TAN's business model is itself anticompetitive in a way that the Policy would tend to remedy.

What TAN's complaint fails to reckon with is that listings are just information, and competitive marketplaces generally thrive on open information. Indeed, the point of the MLS is that such platforms **[*1033]** are necessary for facilitating home sales. Sellers need to be able to list their homes in a manner that allows buyers to compare listings and identify potential matches. And keeping that platform running and operational requires setting rules that ensure fair play among members. *See* *Northwest Wholesale Stationers, 472 U.S. at 296*; *Freeman v. San Diego Association of Realtors, 322 F.3d 1133, 1147 (9th Cir. 2003)* (citing *United States v. Realty Multi-List, Inc., 629 F.2d*

1351, 1368 (5th Cir. 1980)). The key procompetitive benefit of this system is that every NAR-affiliated MLS is open to any licensed real estate agent who is willing to pay the fees.

One could certainly imagine a competing listing service that was nevertheless **[**21]** equally open to all licensed agents. That NAR exercises control over the operating rules of the market for home sales in most major markets across the country is not, in and of itself, good for competition. The presence and viability of other listings services that wanted to compete by offering different rules regarding showings or commissions would likely be valuable to consumers. It thus seems likely that any competitor seeking to operate a non-exclusive listing service (that is, a service that offers subscriptions to any agent willing to pay) would have standing to bring an antitrust claim if it plausibly alleged that the Policy was causing it to lose members. In that sense, it is the breadth of the Policy—sweeping in open-network competitors as well as exclusive ones—that raises an antitrust concern.

But to the extent the Policy prevents an exclusive network like TAN from operating the way it seeks to operate, it is not harmful to competition, even assuming the truth of the complaint's well-pled allegations. TAN describes itself as an exclusive listing service for elite real estate agents—a service that intentionally screens out everyone else. The only reasonable inference to be **[**22]** drawn from that description is that when a seller's agent lists a home on TAN without listing it on the local MLS, competition for that home is decreased. Only buyers who have enlisted the services of a TAN member agent are able to view the listing and bid for it. At the same time, the allegation that all TAN agents are also NAR members means that those agents and their clients are benefitting from open access to the listings on the MLS. Sellers' agents can gather information on how to position their homes competitively against comparable properties and buyers' agents can seek listings for their clients both in the open pool and on the exclusive network. But the vast majority of agents (those who are NAR members but not TAN members) have no way of knowing what listings the TAN agents are keeping secluded from the open market.

TAN seems unwilling to recognize the reality of how its "elite" members earned their status as "top agents" in the first place. If, as alleged, every single one of them has been and still is a NAR subscriber, then each has climbed their way to the top by dint of their access to an MLS. Now, these agents want to pull the ladder up behind them. TAN's platform would **[**23]** (absent the Policy) allow these agents to use the elite status they gained as a result of NAR's open-access rules to diminish the opportunity of others who seek to achieve similar status through use of the MLS going forward. Instead of continuing to share listings with the open network of agents that supported their ascent, they would prefer to hoard choice listings among themselves. ***Antitrust law*** does not give them that right. *See Hahn v. Oregon Physicians' Service, 868 F.2d 1022, 1030-31 (9th Cir. 1988)*.

Thus, the Policy has some pro-competitive applications, even if its breadth may render it problematic overall from an antitrust **[*1034]** standpoint. Agents are free to be members of TAN (or other exclusive listing services) and to post listings on that platform, but they are not permitted to sequester listings away from the open MLS unless they are willing to forgo access to the MLS themselves. The most plausible inference is that the overall effect of the Policy, at least to the extent it applies to agents who wish to join exclusive listing services, is to increase competition. For homes listed by sellers' agents who are TAN members, the Policy ensures that buyers represented by both TAN and non-TAN agents are able to view their listings. And better information **[**24]** is available to the market, as agents are equally able to compare price and quality across all listings and use that information to create listings and negotiate sales.

The allegation that TAN is suffering a loss of membership due to the Policy comes as no surprise. But, in the language of the case law, TAN's injury flows from an aspect of the Policy that is not anti-competitive. *Pool Water Products, 258 F.3d at 1034*. The complaint itself confesses that TAN's members "generally advertise off-MLS for the purpose of avoiding the MLS," a tactic that is "render[ed] moot" by the Policy. And TAN recognizes that its members cannot simply give up their NAR memberships, because access to an MLS remains essential to being a successful player in the market for homes. In other words, TAN is losing members because agents recognize that the company's core value proposition is its offer of exclusivity. Thus, in contrast to an open-network service, TAN's injury is flowing from the aspect of the Policy that keeps listings available to a much larger audience of agents and their clients. In that context, the relatively small competitive harm represented by the loss of consumers' ability to choose TAN rather than the MLS pales in comparison **[**25]** to the procompetitive benefits of open information.

Indeed, the competitive harms alleged by TAN would largely be alleviated if the Policy merely applied to exclusive listing services. TAN complains that people wishing to sell their homes off-MLS are forced to use large brokerage firms, but that harm would be alleviated if a competing non-exclusive listing service could offer a matchmaking function akin to TAN's. TAN complains that some people wishing to sell their homes want a degree of privacy the MLS can't give them, but again, a non-exclusive listing service offering a matchmaking function would give them that. TAN complains that other rules governing the operation of and participation in the MLS are unattractive to home buyers and sellers, but a competing listing service open to all subscribers would alleviate that harm. A narrower policy would thus alleviate the competitive harms that TAN complains about, while still preventing exclusive services like TAN from harming competition in a different way.

Ultimately, when the allegations in the complaint show that the plaintiff's desired business model is harmful to competition, injury resulting from the aspect of a competitor's practice **[**26]** that interferes with that business model cannot be antitrust injury. TAN is not the first plaintiff to attempt to allege an antitrust injury by stating that a competitor's practice is preventing it from reaping the benefits of anticompetitive activity. *See* *Daniel v. American Board of Emergency Medicine, 428 F.3d 408, 438-39 (2d Cir. 2005)* ("In short, [plaintiffs'] theory of injury is not simply that ABEM-certified doctors command super-competitive remuneration; their injury is the inability to do likewise.").[2] But one of the virtues of the **[*1035]** antitrust standing analysis is that it prevents such a plaintiff from deploying ***antitrust law*** as a shield for its own anticompetitive activities. Accordingly, TAN's Sherman Act claim must be dismissed with prejudice.

C

Because TAN lacks antitrust injury, its three claims under California state laws also fail. A plaintiff bringing claims under the Cartwright Act must meet the same antitrust injury requirement as under the Sherman Act. *Kolling v. Dow Jones & Co., 137 Cal. App. 3d 709, 723-24, 187 Cal. Rptr. 797 (1982)*. And TAN has not stated a claim for intentional interference with contractual relations under California common law, because TAN does not allege that NAR induced TAN's members to breach their existing contracts—only that they chose not to renew their memberships. *See* *Ixchel Pharma, LLC v. Biogen, Inc., 9 Cal. 5th 1130, 1142, 266 Cal. Rptr. 3d 665, 470 P.3d 571 (2020)*. Finally, because TAN **[**27]** has not stated a claim for violation of any other law, its subsidiary claim for unlawful acts under the Unfair Competition Law also fails.

III

The motion to dismiss is granted, and the complaint is dismissed with prejudice.

IT IS SO ORDERED.

Dated: August 16, 2021

/s/ Vince Chhabria

VINCE CHHABRIA

United States District Judge

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[2] When asked to identify cases supporting its theory of antitrust standing, TAN flagged Judge Katzmann's partial dissent in *Daniel*. But even accepting Judge Katzmann's view of that case, it does not change the analysis here. In *Daniel*, allowing more doctors to join the contested certification program would have incrementally benefited competition insofar as it would have increased the supply of certified doctors available to consumers. *Id. at 446*. But in this case, there is no marginal benefit to competition in allowing TAN to operate, because it has designed its platform to exclude the vast majority of competing agents.

End of Document

Meyberg v. City of Santa Cruz

United States Court of Appeals for the Ninth Circuit

July 9, 2021**, Submitted, San Francisco, California; August 17, 2021, Filed

No. 20-16229

Reporter

2021 U.S. App. LEXIS 24502 *; __ Fed. Appx. __; 2021 WL 3630226

DAVID MEYBERG; NEW SANTA CRUZ SURF SCHOOL, LLC, Plaintiffs-Appellants, v. CITY OF SANTA CRUZ; CAROL SCURICH, individually and as Director of Santa Cruz City Department of Parks and Recreation; ED GUZMAN; RICK MARTINEZ, Chief Deputy of Santa Cruz Police Department; JEFFREY AULDRIGE; LEE BUTLER; ERIC MARLATT; ALEX KHOURNY; DONALD TIMOTEO; ADAM BAKER; LAURA LANDRY; JOE GRANDA; NANCY CONCEPCION; JACOB RODRIGUEZ; RICHARD SUCHOMEL; CLUB ED, INC., Defendants-Appellees.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Rehearing denied by, En banc, Rehearing denied by *Meyberg v. City of Santa Cruz, 2021 U.S. App. LEXIS 30296 (9th Cir. Cal., Oct. 8, 2021)*

Prior History: [*1] Appeal from the United States District Court for the Northern District of California. D.C. No. 5:19-cv-00700-NC. Nathanael M. Cousins, Magistrate Judge, Presiding.

Meyberg v. City of Santa Cruz, 2020 U.S. Dist. LEXIS 81662 (N.D. Cal., May 8, 2020)

Disposition: AFFIRMED.

Core Terms

zoning, surf, anticompetitive, articulation, immunity, foreseeable, antitrust, ordinance, district court, open space, recreation, delegated, displace, beaches, protected activity, motivating factor, natural resources, zoning regulation, scenic beauty, coastal zone, state action, Coastal Act, conservation, state-action, retaliation, regulating, undertaken, unfettered, enjoyment, quotation

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's grant of a motion to dismiss.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Sherman Act > Defenses

HN2[] **Sherman Act, Claims**

Because Congress cannot accidentally abrogate state sovereignty, the United States Supreme Court in the Parker decision announced the state action immunity doctrine, cabining the Sherman Antitrust Act to non-state actors. But the United States Court of Appeals for the Ninth Circuit recognizes state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that is the State's own.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN3[] **Sherman Act, Defenses**

The United States Supreme Court has extended the state action antitrust immunity doctrine to local government entities as long as the challenged action was undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. And to pass the clear articulation test, a state legislature need not expressly state that the legislature intends for the delegated action to have anticompetitive effects. Rather, the clear articulation test is satisfied if the anticompetitive effect is the foreseeable result of what the State authorized.

Environmental Law > Natural Resources & Public Lands > Coastal Zone Management > Delineation & Identification

Environmental Law > Natural Resources & Public Lands > Coastal Zone Management > Permits

Environmental Law > Natural Resources & Public Lands > Coastal Zone Management > Enforcement

HN4[] **Coastal Zone Management, Delineation & Identification**

The *California Coastal Act, Cal. Pub. Res. Code § 30001 et seq.*, affirms basic goals for the coastal zone, which include assuring orderly, balanced utilization and conservation of coastal zone resources, and maximizing public access to and along the coast and maximizing public recreational opportunities in the coastal zone consistent with sound resources conservation principles. *Cal. Pub. Res. Code § 30001.5(b)* and *(c)*.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Local Planning

HN5[] Zoning, Local Planning

Cal. Gov't Code § 65850(a) authorizes a municipality to regulate the use of land as between industry, business open space, including recreation, enjoyment of scenic beauty, use of natural resources, and other purposes.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN6[] Fundamental Freedoms, Freedom of Speech

In a *First Amendment* case, a plaintiff must allege facts showing that the protected activity was a substantial or motivating factor in the defendant's conduct.

Counsel: For DAVID MEYBERG, NEW SANTA CRUZ SURF SCHOOL, LLC, Plaintiffs - Appellants: Kathleen Elizabeth Wells, Esquire, Attorney, Law Office of Kate Wells, Santa Cruz, CA.

For CITY OF SANTA CRUZ, CAROL SCURICH, individually and as Director of Santa Cruz City Department of Parks and Recreation, RICK MARTINEZ, Chief Deputy of Santa Cruz Police Department, JEFFREY AULDRIGE, LEE BUTLER, ERIC MARLATT, ALEX KHOURNY, DONALD TIMOTEO, ADAM BAKER, LAURA LANDRY, JOE GRANDA, NANCY CONCEPCION, JACOB RODRIGUEZ, Defendants - Appellees: Catherine Mary Bronson, Atchison, Barisone & Condotti, Santa Cruz, CA; Barbara H. Choi, Esquire, Atchison, Barisone, Condotti & Kovacevich, Santa Cruz, CA.

For ED GUZMAN, RICHARD SUCHOMEL, CLUB ED, INC., Defendants - Appellees: S. Colin Brown, AT, Law Office of S. Colin Brown, Santa Cruz, CA.

Judges: Before: GRABER, MURGUIA, and LEE, Circuit Judges.

Opinion

MEMORANDUM*

After the City of Santa Cruz refused to issue an operating permit to his surf school, David Meyberg sued the City and many of its employees. He alleged, among other **[*2]** things, that the City violated the *Sherman Antitrust Act, 15 U.S.C. § 1*, by limiting the number of surf school permits available and that a City employee violated his *First Amendment* rights by preventing him from operating his surf school in retaliation for his prior litigation. The district court dismissed his claims. We have jurisdiction under *28 U.S.C. § 1291*. **HN1**[] We review de novo a district court's grant of a motion to dismiss, *Shames v. Cal. Travel & Tourism Comm'n, 626 F.3d 1079, 1082 (9th Cir. 2010)*, and we affirm.

1. *Sherman Antitrust Act*: **HN2**[] Because Congress cannot accidentally abrogate state sovereignty, the Supreme Court in *Parker v. Brown* announced the "state action" immunity doctrine, cabining the Sherman Antitrust Act to non-state actors. *317 U.S. 341, 351-52, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. But we "recognize[] state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that is the State's own." *Chamber of Com. v. City of Seattle, 890 F.3d 769, 781 (9th Cir. 2018)* (internal quotation marks and citation omitted).

* This disposition is not appropriate for publication and is not precedent except as provided by *Ninth Circuit Rule 36-3*.

HN3[] The Supreme Court later extended this immunity to local government entities as long as the challenged action was "undertaken pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition." *FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 226, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013)* (quoting *Cmty. Commc'ns Co. v. Boulder, 455 U.S. 40, 52, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)*). And "[t]o pass the 'clear articulation' test, a state legislature need not expressly state . . . that the legislature **[*3]** intends for the delegated action to have anticompetitive effects." *Id.* (citation and internal quotation marks omitted). Rather, the clear articulation test is satisfied "if the anticompetitive effect [is] the 'foreseeable result' of what the State authorized." *Id. at 226-27* (citation omitted).

The district court held that the City lawfully limited the number of permits for surf schools on its beaches because *California Government Code section 65850* and the *California Coastal Act, Cal. Pub. Res. Code § 30001 et seq.*, evince a clear articulation of California's intent to extend its "state action" antitrust immunity to Santa Cruz's permitting ordinance. Thus, we must determine whether these state laws "confer 'express authority to take action that *foreseeably* will result in anticompetitive effects.'" *Hass v. Or. State Bar, 883 F.2d 1453, 1457 (9th Cir. 1989)* (quoting *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 43-44, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*).

We agree with the district court's reasoning. *California Government Code section 65850* states that any city may adopt ordinances to regulate "the use of . . . land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes," as well as the "size and use of . . . open spaces." *Cal. Gov't Code § 65850(a)*, *(c)(2)*. **HN4**[] And the Coastal Act affirms "basic goals . . . for the coastal zone," which include "[a]ssurn[ing] orderly, balanced utilization and conservation of **[*4]** coastal zone resources," and "[m]aximiz[ing] public access to and along the coast and mazimiz[ing] public recreational opportunities in the coastal zone consistent with sound resources conservation principles." *Cal. Pub. Res. Code § 30001.5(b)*, *(c)*. These two statutes provide clear guidance for expressly delegated zoning authority. In sum, it is foreseeable that, in pursuit of State goals embodied in the Coastal Act, the City will use its lawfully delegated zoning powers to limit business activity on public beaches.

Indeed, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, South Carolina zoning laws authorized an anti-competitive city ordinance regulating the size, location, and spacing of billboards, thereby immunizing the ordinance from antitrust enforcement. *499 U.S. 365, 373, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*. The Court explained that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition[.]" *Id. at 373*. **HN5**[] Like the South Carolina statute, *section 65850(a)* authorizes the City to regulate the use of "land as between industry, business . . . open space, including . . . recreation, enjoyment of scenic beauty, use of natural resources, and other purposes." *Cal. Gov't Code § 65850(a)*. Surely, if "[t]he very **[*5]** purpose of zoning regulation is to displace unfettered business freedom," then a restriction on new entrants into the surfing school market is a foreseeable consequence of a statute authorizing restrictive zoning on a beach popular with surfing schools. *Omni, 499 U.S. at 373*.

Plaintiffs' argument that *Omni* applies only to "fixed structures" is unpersuasive. If the City may limit the number of businesses in a zone, then that power applies to all businesses, fixed or not. The contention that the City's regulation impermissibly limits competition because there are less restrictive alternatives available also fails. After all, because *section 65850* satisfies the test for state-action immunity, the City is exempt from federal ***antitrust law***.

2. *First Amendment*: We also affirm the district court's dismissal of the *First Amendment* claim because Meyberg has not plausibly pled his retaliation theory. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. **HN6**[] He must allege facts showing that "the protected activity was a substantial or motivating factor in the defendant's conduct." *O'Brien v. Welty, 818 F.3d 920, 932 (9th Cir. 2016)* (quoting *Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 770 (9th Cir. 2006)*).

Meyberg maintains that, because a City employee, Carol Scurich, was one of many named parties in a 2007 lawsuit in which he acted as counsel, "there is more than a 'suggestion' that SCURICH would have been aware of MEYBERG **[*6]** as the attorney who litigated a suit against her." But even if Scurich knew who he was, let alone remembered him as co-counsel in litigation roughly a decade earlier, Meyberg failed to plead facts plausibly supporting an inference that "the protected activity was a substantial or motivating factor in [Scurich's] conduct." *Id.* (citation omitted); *see* *Iqbal, 556 U.S. at 679-80*.

Finally, the district court did not abuse its discretion in denying Meyberg's request to file a Fourth Amended Complaint. *See* *Rich v. Shrader, 823 F.3d 1205, 1209 (9th Cir. 2016)*. Despite multiple opportunities, Meyberg has not been able to articulate a plausible theory of Sherman Act or *First Amendment* violation. It would be futile to allow him yet another chance.

AFFIRMED.

Rose Ml v. Mazaya United States

Superior Court of California, County of Orange

August 19, 2021, Decided

30-2020-01168467-CU-BT-CJC

Reporter
2021 Cal. Super. LEXIS 26682 *

ROSE ML, Inc. v. Mazaya USA, LLC

Core Terms

cause of action, Demurrer, unfair, violates, demur, business practice, sufficient facts, fail to state, grounds, notice, violation of antitrust laws, regulatory provisions, tentative ruling, anti trust law, fraudulent, threatens, prong

Counsel: **[*1]** No Appearance by all parties.

Judges: Theodore Howard.

Opinion by: Theodore Howard

Opinion

MINUTE ORDER

EVENT ID/DOCUMENT ID: 73541949

EVENT TYPE: Demurrer to Amended Complaint

MOVING PARTY: Brennan Appel, GLOBAL HOOKAH DISTRIBUTORS, INC.

CAUSAL DOCUMENT/DATE FILED: Demurrer to Amended Complaint First Amended Complaint, 05/24/2021

EVENT ID/DOCUMENT ID: 73541950

EVENT TYPE: Motion to Strike Complaint

MOVING PARTY: Brennan Appel, GLOBAL HOOKAH DISTRIBUTORS, INC.

CAUSAL DOCUMENT/DATE FILED: Motion to Strike First Amended Complaint, 05/24/2021

Tentative Ruling posted on the Internet .

The Court **CONFIRMS** the tentative ruling as follows:

The Demurrer by Defendants Global Hookah Distributors, Inc., ("GHD") and Brennan Appel ("Appel"), collectively ("Defendants") to the First Amended Complaint ("FAC") by Plaintiff ROSE ML, Inc. ("Rose") is **SUSTAINED with 20 days leave to amend.**

Rose's FAC states one cause of action against moving Defendants for violation of *Bus. & Prof. Code §17200*, the California Unfair Competition Law ("UCL"). GHD and Appel demur to that 5th cause of action stated in the FAC on the grounds that it fails to state sufficient facts to constitute a cause of action against demurring defendants. (*CCP §430.10 (e)*). GHD and Appel also demur to the entire complaint **[*2]** on the grounds of uncertainty. (*CCP §430.10 (f)*). Rose admits that the only cause of action brought against these defendants is the 5th cause of action for violation of the UCL. (Opp. 4:3-4).

A party against whom a complaint has been filed may object by demurrer on the grounds of failure to state sufficient facts to constitute a cause of action (*C.C.P. §430.10(e)*) A demurrer challenges the defects appearing on the face of the pleading or from other matters properly subject to judicial notice. *(C.C.P. §430.30*)

Unfair competition includes "any unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising." (*Bus. & Prof. Code, §17200*.) A UCL claim "is not an all-purpose substitute for a tort or contract action." (*Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 609*). By prohibiting "any unlawful business act or practice" the UCL borrows rules from other laws and makes violations of those rules independently actionable under the UCL. (*Id. at p. 610*). "A violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong." (*Id.*) A defendant cannot be held liable for unlawful business practices where there is no violation of another law. (*Id*., citing *Scripps Clinic v. Superior Court (2003) 108 Cal.App.4th 917, 938*).

"...a plaintiff alleging an unfair business practice must show the 'defendant's conduct **[*3]** is tethered to an underlying constitutional, statutory or regulatory provision'" or threatens a "violation of an ***antitrust law*** or violates the policy or spirit of an ***antitrust law***". (*Id. at p. 613*).

The fraud prong of the UCL requires a duty to disclose (*Id. at p. 613-614*).

The facts pled in the FAC do not allege unlawful, unfair, or fraudulent conduct by GHD and Appel. The FAC does not allege that the defendants violated any other laws. The FAC does not factually plead conduct by GHD or Appel which violates an underlying constitutional, statutory or regulatory provision or which threatens a violation of an ***antitrust law*** or violates the policy or spirit of an ***antitrust law***. The FAC does not allege any agreement, oral or written contract, or any relationship between Rose and demurring Defendants, and there are no facts plead establishing GHD and Appel owed any duty of disclosure to Rose. The FAC fails to state sufficient facts to constitute a UCL claim against GHD and Appel.

Defendants' Motion to Strike portions of the FAC is **moot** in light of the court's ruling on the Demurrer.

Moving parties to give Notice.

Court orders Clerk to give notice.

End of Document

Edwards Vacuum, LLC v. Hoffman Instrumentation Supply, Inc.

United States District Court for the District of Oregon

August 23, 2021, Decided; August 23, 2021, Filed

Case No. 3:20-cv-1681-SI

Reporter

556 F. Supp. 3d 1156 *; 2021 U.S. Dist. LEXIS 159160 **; 2021 WL 3721818

EDWARDS VACUUM, LLC, Plaintiff, v. HOFFMAN INSTRUMENTATION SUPPLY, INC. d/b/a/ HIS INNOVATIONS GROUP, MARK ROMEO, JEFFREY SCHWAB, ELISHA LEVETON, JOHN CHADBOURNE, and ANDREW ENSELEIT, Defendants.

Prior History: *Edwards Vacuum LLC v. Hoffman Instrumentation Supply, Inc., 2020 U.S. Dist. LEXIS 235448, 2020 WL 7360682 (D. Or., Dec. 15, 2020)*

Core Terms

counterclaims, antitrust, customer, monopolization, alleges, frame, supplier, lawsuit, motion to dismiss, trade secret, Airlines, competitor, anticompetitive conduct, discovery, breach of contract, monopoly power, district court, sham, confidential information, vacuum pump, integrated, bifurcate, employees, argues, forum-selection, non-compete, baseless, forum non conveniens, anticompetitive, antitrust claim

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

The same standards that apply to a defendant's motion to dismiss a claim asserted by a plaintiff also generally apply to a plaintiff's and counterclaim defendants motion to dismiss a counterclaim asserted by a defendant and counterclaim plaintiff.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) may be granted only when there is no cognizable legal theory to support the claim or when the complaint lacks sufficient factual allegations to state a facially plausible claim for relief. In evaluating the sufficiency of a complaint's factual allegations, the court must accept as true all well-pleaded material facts alleged in the complaint and construe them in the light most favorable to the non-moving party. To be entitled to a presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. The district court must draw all reasonable inferences from the factual allegations in favor of the plaintiff. The district court need not, however, credit the plaintiff's legal conclusions that are couched as factual allegations.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Evidence > Inferences & Presumptions > Inferences

HN3[] **Complaints, Requirements for Complaint**

A complaint must contain sufficient factual allegations to plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN4[] **Contract Conditions & Provisions, Forum Selection Clauses**

The appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens. The doctrine of forum non conveniens rests on the principle that a court may resist imposition upon its jurisdiction when the matter may be more conveniently tried in another forum, even when jurisdiction is authorized by the letter of a general venue statute. The United States Court of Appeals for the Ninth Circuit has cautioned, however, that the doctrine of forum non conveniens is a drastic exercise of the court's inherent power because, unlike a mere transfer of venue, it results in the dismissal of a plaintiff's case. Therefore, an appellate court has treated forum non conveniens as an exceptional tool to be employed sparingly, and not a doctrine that compels plaintiffs to choose the optimal forum for their claim.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > ... > Venue > Motions to Transfer > Choice of Forum

HN5[] **Contract Conditions & Provisions, Forum Selection Clauses**

When parties to a lawsuit have formed a contract that includes a valid forum-selection clause, federal law controls whether that clause is enforceable. In Atl. Marine Constr. Co. v. United States Dist. Court, the U.S. Supreme Court clarified the factors that a district court should consider when evaluating the enforceability of a valid forum-selection clause. When a valid forum-selection clause is present, the plaintiff's choice of forum merits no weight. Additionally, the district court should not consider arguments about the parties' private interests. A court accordingly must deem the private-interest factors including inconvenience to the parties to weigh entirely in favor of the preselected forum. A district court may only consider arguments concerning public-interest factors, which will rarely defeat a motion to dismiss.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Evidence > Burdens of Proof > Allocation

HN6[] Contract Conditions & Provisions, Forum Selection Clauses

A valid forum-selection clause alters the ordinary forum non conveniens analysis. A district court must give a valid forum-selection clause controlling weight in all but the most exceptional cases. Courts should not unnecessarily disrupt the parties' settled expectations when the parties have contracted in advance to litigate disputes in a particular forum. In all but the most unusual cases, therefore, the interest of justice is served by holding parties to their bargain. Forum selection clauses are prima facie valid and are enforceable unless the party challenging enforcement shows the clause is unreasonable under the circumstances. A party asserting a claim subject to a valid forum-selection clause pointing to another forum bears the burden of showing exceptional circumstances that make dismissal inappropriate despite that clause.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN7[] Contract Conditions & Provisions, Forum Selection Clauses

In the absence of a valid forum-selection clause, the common law doctrine of forum non conveniens provides that a court may dismiss an action even when venue is proper if the defendant makes a clear showing of facts which establish such oppression and vexation of a defendant so as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent. The moving party must prove: (1) that there is an adequate alternative forum, and (2) that the balance of private and public interest factors favor dismissal.

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN8[] Federal Venue Transfers, Convenience Transfers

After the codification of 28 U.S.C.S. § 1404(a), the doctrine of forum non conveniens has limited application, as explained by the Supreme Court, the common-law doctrine of forum non conveniens has continuing application in federal courts only in cases where the alternative forum is abroad, and perhaps in rare instances where a state or territorial court serves litigational convenience best. For the federal court system, Congress has codified the doctrine and has provided for transfer, rather than dismissal, when a sister federal court is the more convenient place for trial of the action.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN9[] Motions to Dismiss, Failure to State Claim

A plaintiff who makes a claim in a complaint but fails to raise the issue in response to a defendant's motion to dismiss that claim has effectively abandoned that claim.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN10[] Breach of Contract Actions, Elements of Contract Claims

Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation by the defendant (or counterclaim defendant); and (3) resulting damage to the plaintiff (or counterclaim plaintiff).

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN11[] Breach of Contract Actions, Elements of Contract Claims

To state a claim for breach of contract, plaintiff must allege the existence of a contract, its relevant terms, plaintiff's full performance and lack of breach, and defendant's breach resulting in damage to plaintiff.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN12[] Actual Monopolization, Claims

To state a claim of monopolization, a defendant must plausibly allege that: (1) Plaintiff possesses monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct. To state a claim of attempted monopolization, a defendant must plausibly allege: (1) that plaintiff has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN13[] Clayton Act, Claims

For a private plaintiff to recover money damages, indeed, automatic treble damages in an antitrust action, § 4 of the Clayton Act, 15 U.S.C.S. § 15, requires a plaintiff to show causal antitrust injury, which is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN14[] **Actual Monopolization, Claims**

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN15[] **Actual Monopolization, Monopoly Power**

One of the leading treatises in the field defines monopolistic conduct as acts that: (1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and (2) either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

HN16[] **Attempts to Monopolize, Elements**

Direct evidence of intent alone, without corroborating evidence of conduct, cannot sustain a claim of attempted monopolization. Direct evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation. It also must be shown that the defendant sought victory through unfair or predatory means. Evidence of conduct is thus indispensable.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN17[] **Actual Monopolization, Claims**

In reciting the basic elements of monopolization and attempted monopolization, the United States Court of Appeals for the Ninth Circuit stated that conduct that does not constitute willful acquisition or maintenance of monopoly power thus precluding establishment of the offense of monopolization cannot constitute the predatory or anticompetitive conduct required to establish the offense of attempt to monopolize. Conduct lawful for a monopolist must, a fortiori, be excluded as a basis for the attempt offense.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN18[] **Per Se Rule & Rule of Reason, Per Se Violations**

Ancillary non-compete agreements among participants in a vertical supply relationship, however, are not per se unlawful but instead are evaluated under a Rule of Reason. The Rule of Reason has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction. Vertical nonprice restraints are evaluated under the Rule of Reason. Holding that per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN19[] **Private Actions, Sherman Act**

Disparagement of competitors is only actionable in the Ninth Circuit when the representation is: (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals.ECF 236 at 17-18. Edwards then cites.

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN20[] **Private Actions, Sherman Act**

While the disparagement of a rival or compromising a rival's employee may be unethical and even impair the opportunities of a rival, its harmful effects on competitors are ordinarily not significant enough to warrant recognition under § 2 of the Sherman Act. The district court therefore insists on a preliminary showing of significant and more-than-temporary harmful effects on competition and not merely upon a competitor or customer before these practices can rise to the level of exclusionary conduct.

Antitrust & Trade Law > Consumer Protection > False Advertising > US Federal Trade Commission

Evidence > Inferences & Presumptions > Presumptions > Creation

HN21[] **False Advertising, US Federal Trade Commission**

A plaintiff may overcome de minimis presumption by cumulative proof that the representations were: (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN22[] **Remedies, Damages**

For the proposition that private plaintiffs can be compensated only for injuries that the antitrust laws were intended to prevent. To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN23[] **Attempts to Monopolize, Elements**

Antitrust laws protect competition, not competitors. Thus, an antitrust plaintiff must demonstrate not only that the defendant engaged in unfair or predatory tactics, but also that those tactics allowed the defendant to maintain or come dangerously close to obtaining monopoly status. Indeed, not even an act of pure malice by one business competitor against another will alone state an antitrust violation.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Sherman Act > Defenses

HN24[] **Remedies, Damages**

A claimed breach of contract by unreasonable conduct, standing alone, should not give rise to antitrust liability. A breach of contract is not ordinarily an antitrust violation. It is not antitrust's purpose to regulate ordinary business contracts. Instead, antitrust liability will only be predicated on conduct that also happens to create a contract dispute when that conduct is anticompetitive and without a legitimate business reason.

Antitrust & Trade Law > Sherman Act > Claims

HN25[] Sherman Act, Claims

Nor is reticence to premise antitrust liability on a single instance of bad conduct aimed at a single competitor unique to antitrust claims relying on breach of contract. Isolated tortious activity alone does not constitute exclusionary conduct for purposes of a 15 U.S.C.S. § 2 violation, absent a significant and more than a temporary effect on competition, and not merely on a competitor or customer. A single incident of the defendant secretly hiring one of the plaintiff's employees and then having that employee and other enter the plaintiff's office at night and remove and destroy various files was a single event that did not amount to anticompetitive conduct.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN26[] Noerr-Pennington Doctrine, Right to Petition Immunity

Under the Noerr-Pennington doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct, including the use of the channels and procedures of state and federal courts. Although Noerr-Pennington immunity extends to judicial proceedings, it does not protect persons engaging in sham litigation. The United States Court of Appeals for the Ninth Circuit has recognized three circumstances when litigation might be a sham.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN27[] Noerr-Pennington Doctrine, Right to Petition Immunity

The sham exception requires that the antitrust plaintiff must demonstrate that the lawsuit was: (1) objectively baseless, and (2) a concealed attempt to interfere with the plaintiff's business relationships. The Supreme Court has explained these two necessary criteria for sham litigation as follows: First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under E. R.R. Presidents Conf. v. Noerr Motor Freight, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon. The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in a sham litigation.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN28[] Noerr-Pennington Doctrine, Sham Exception

The second circumstance for when litigation might be a sham is if the alleged anticompetitive behavior is the filing of a series of lawsuits. The third circumstance may arise if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN29[] **Noerr-Pennington Doctrine, Sham Exception**

A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN30[] **Jury Trials, Right to Jury Trial**

Bifurcation enhances the parties' right to a jury trial by making the issues the jury must consider less complex.

Counsel: [1]** Nicholas F. Aldrich, Jr., Scott D. Eads, and Jason A. Wrubleski, SCHWABE, WILLIAMSON & WYATT PC, Portland, OR; John D. Vandenberg, KLARQUIST SPARKMAN LLP, Portland, OR; and Justin W. Bernick, HOGAN LOVELLS US LLP, Washington, DC. Of Attorneys for Plaintiff.

David H. Angeli, Joanna T. Perini-Abbott, Edward A. Piper, and Michelle Holman Kerin, ANGELI LAW GROUP LLC, Portland, OR; and Michael E. Haglund and Eric J. Brickenstein, HAGLUND KELLEY LLP, Portland, OR. Of Attorneys for Defendant Hoffman Instrumentation Supply, Inc.

Jeff S. Pitzer and Peter M. Grabiel, PITZER LAW, Portland, OR. Of Attorneys for Defendants Mark Romeo, Jeffrey Schwab, Elisha Leveton, John Chadbourne, and Andrew Enseleit.

Judges: Michael H. Simon, United States District Judge.

Opinion by: Michael H. Simon

Opinion

[*1161] OPINION AND ORDER ON PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS

Michael H. Simon, District Judge.

Plaintiff Edwards Vacuum, LLC (Edwards) brings this lawsuit against one of its suppliers and competitors, Hoffman Instrumentation Supply, Inc., doing business as HIS Innovations Group (HIS), and five employees of HIS who previously worked for Edwards (the Individual Defendants). Edwards designs integrated vacuum pump systems, mostly for computer **[**2]** (or semiconductor) chip manufacturers. HIS supplies parts to Edwards but also recently began to compete with Edwards by designing, making, and selling its own integrated vacuum pump systems. In its Second Amended Complaint, Edwards alleges misappropriation of trade secrets, breach of contract, tortious interference with economic relations, conversion, breach of the duty of loyalty, and unjust enrichment. HIS denies liability. HIS also asserts three counterclaims, alleging breach of contract, monopolization, and attempted monopolization. Before the Court is Edwards's motion to dismiss HIS's counterclaims under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* and alternative motion to dismiss under the doctrine of forum *non conveniens*. For the reasons stated below, the Court grants in part and denies in part Edwards's motions to dismiss. The Court also bifurcates HIS's antitrust counterclaims and stays any discovery that is related only to HIS's antitrust counterclaims. HIS's breach of contract counterclaim may proceed.

STANDARDS[1]

A. Motion to Dismiss for Failure to State a Claim

HN2[] A motion to dismiss under *Rule 12(b)(6)* may be granted only when there is no cognizable legal theory to support the claim or when the complaint lacks sufficient factual **[**3]** allegations to state a facially plausible claim for relief. *Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir. 2010)*. In evaluating the sufficiency of a complaint's factual allegations, the court must accept as true all well-pleaded material facts alleged in the complaint and construe them in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1140 (9th Cir. 2012)*; *Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010)*. "[T]o be entitled to a presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*. The court must draw all reasonable inferences from the factual allegations in favor of the plaintiff. *Newcal Indus. v. Ikon Office Solution, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008)*. The court need not, however, credit the plaintiff's legal conclusions that are couched as factual allegations. *Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

HN3[] A complaint must contain sufficient factual allegations to "plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr, 652 F.3d at* ***[*1162]*** *1216*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the **[**4]** misconduct alleged." *Iqbal, 556 U.S. at 678* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Mashiri v. Epsten Grinnell & Howell, 845 F.3d 984, 988 (9th Cir. 2017)* (quotation marks omitted).

B. Motion to Dismiss for Forum *Non Conveniens*

1. Forum *Non Conveniens* Based on a Contractual Forum-Selection Clause

HN4[] "[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum *non conveniens*." *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex., 571 U.S. 49, 60, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013)*. The doctrine of forum *non conveniens* "rests on the principle that a court may resist imposition upon its jurisdiction when the matter may be more conveniently tried in another forum, even when jurisdiction is authorized by the letter of a general venue statute." *Hamilton v. Firestone Tire & Rubber Co., 679 F.2d 143, 146 (9th Cir. 1982)* (citing *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)*). The Ninth Circuit has cautioned, however, that "[t]he doctrine of forum *non conveniens* is a drastic exercise of the court's 'inherent power' because, unlike a mere transfer of venue, it results in the dismissal of the plaintiff's case. . . . Therefore, we have treated forum *non conveniens* as 'an exceptional tool to be employed sparingly,' and

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[1] ***HN1***[] The same standards that apply to a defendant's motion to dismiss a claim asserted by a plaintiff also generally apply to a plaintiff's (and counterclaim defendant's) motion to dismiss a counterclaim asserted by a defendant (and counterclaim plaintiff). *See* *Unigestion Holding, S.A. v. UPM Tech., Inc., 2016 U.S. Dist. LEXIS 97083, 2016 WL 4033976, at *2 (D. Or. July 26, 2016)*.

not a 'doctrine that compels plaintiffs to choose the optimal forum for their claim.'" *Carijano v. Occidental Petroleum Corp., 643 F.3d 1216, 1224 (9th Cir. 2011)* (quoting *Dole Food Co. v. Watts, 303 F.3d 1104, 1118 (9th Cir. 2002)*).

HN5[] When **[**5]** parties to a lawsuit have formed a contract that includes a valid forum-selection clause, federal law controls whether that clause is enforceable. *See Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 513 (9th Cir. 1988)*. In *Atlantic Marine*, the Supreme Court clarified the factors that a district court should consider when evaluating the enforceability of a valid forum-selection clause. *571 U.S. at 63-65*. When a valid forum-selection clause is present, "the plaintiff's choice of forum merits no weight." *Id. at 63*. Additionally, the district court "should not consider arguments about the parties' private interests. . . . A court accordingly must deem the private-interest factors [including inconvenience to the parties] to weigh entirely in favor of the preselected forum." *Id. at 582*. A district court may only consider arguments concerning public-interest factors, which "will rarely defeat" a motion to dismiss. *Id.*

HN6[] The Supreme Court also explained that a valid forum-selection clause alters the ordinary forum *non conveniens* analysis. *See Atl. Marine, 571 U.S. at 63*. A court must give a valid forum-selection clause "controlling weight in all but the most exceptional cases." *Id. at 60* (citation and quotation marks omitted). Courts should not "unnecessarily disrupt the parties' settled expectations" when the parties have "contracted **[**6]** in advance to litigate disputes in a particular forum." *Id. at 66*. "In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain." *Id.*; *see also Swenson v. T-Mobile USA, Inc., 415 F. Supp. 2d 1101, 1104 (S.D. Cal. 2006)* ("[Forum **[*1163]** selection clauses] are prima facie valid and are enforceable unless the party challenging enforcement shows the clause is unreasonable under the circumstances." (citing *R.A. Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 325 (9th Cir. 1996)*)). A party asserting a claim subject to a valid forum-selection clause pointing to another forum bears the burden of showing exceptional circumstances that make dismissal inappropriate despite that clause. *See Atl. Marine, 571 U.S. at 63*.

2. Common Law Forum *Non Conveniens*

HN7[] In the absence of a valid forum-selection clause, the common law doctrine of forum *non conveniens* provides that a court may dismiss an action even when venue is proper if the defendant makes "a clear showing of facts which establish such oppression and vexation of a defendant so as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent." *Dole Food Co., 303 F.3d at 1118* (citation and quotation marks omitted). The moving party must prove "(1) that there is an adequate alternative forum, and (2) that the balance of private and public interest factors favor dismissal." **[**7]** *Id.*

HN8[] After the codification of *28 U.S.C. § 1404(a)*, the doctrine of forum *non conveniens* has limited application, as explained by the Supreme Court:

> The common-law doctrine of forum *non conveniens* has continuing application in federal courts only in cases where the alternative forum is abroad, and perhaps in rare instances where a state or territorial court serves litigational convenience best. For the federal court system, Congress has codified the doctrine and has provided for transfer, rather than dismissal, when a sister federal court is the more convenient place for trial of the action.

Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) (citations and quotation marks omitted).

BACKGROUND[2]

[2] HIS's three counterclaims are stated in HIS's Answer, Affirmative Defenses, and Counterclaims to Plaintiff's Second Amended Complaint. ECF 191. HIS did not use sequentially numbered paragraphs throughout the entirety of that document. Instead, HIS sequentially numbered first its paragraphs for its Answer (¶¶ 1-205), did not number its paragraphs for its 19 affirmative defenses, and then sequentially numbered its paragraphs for its counterclaims beginning, for a second time, with ¶ 1. In this

A. HIS's Counterclaim Alleging Breach of Contract

In its counterclaim alleging breach of contract, HIS asserts that in the spring of 2019, HIS and Edwards were in active discussions about HIS possibly becoming Edwards's exclusive supplier of key components used in Edwards's integrated vacuum pump frame systems. The parties also were discussing the potential for HIS to build subsystems for Edwards, or to assemble subsystems into complete systems. In exchange, HIS would agree not to perform similar work for any other seller or brand. By mid-May 2019, HIS had circulated **[**8]** a draft proposal for Edwards's consideration. ECF 191, ¶ 37. Shortly thereafter, Edwards's key customer[3] reached out to HIS to request that HIS develop an "agnostic" integrated vacuum pump frame system, capable of being used with vacuum pumps and other equipment made by any approved supplier and not just by Edwards. **[*1164]** Soon after receiving that invitation, HIS informed Edwards of HIS's new "opportunity" presented by this key customer. *Id.* ¶ 38.

Within a few weeks, Edwards and HIS began discussing a new topic, the possibility of Edwards acquiring HIS. *Id.* ¶ 45. HIS and Edwards formally began due diligence on June 21, 2019, and they agreed to a confidentiality and nondisclosure agreement (NDA) on that date. *Id.* ¶ 46; ECF 77-12 at 9-12 (copy of NDA). With HIS listed as the "Disclosing Party" and Edwards as the "Recipient," the parties agreed in the NDA that if HIS disclosed certain confidential information to Edwards about HIS's business, then the "Recipient [Edwards] shall use the Confidential Information solely for the Purpose" of evaluating a possible business transaction between Edwards and HIS. ECF 77-12 at 9. This confidential information included Edwards receiving "detailed information **[**9]** regarding HIS's strategic plans to develop an integrated vacuum pump frame system, including HIS's anticipated cost, margin, head count requirements, labor rates, and capital equipment spending for its new system." ECF 191, ¶ 47. The NDA also included the following choice of law provision and mandatory forum-selection clause:

> This Agreement and all matters relating hereto are governed by, and construed in accordance with, the laws of the State of Delaware, without regard to the conflict of laws [*sic*] provisions of such State. Each Party irrevocably submits to the exclusive jurisdiction of the federal or state courts of Delaware in any such suit, action or proceeding.

ECF 77-12 at 11, ¶ 11.

HIS further alleges that on July 31, 2019, Edwards delivered to HIS a "lowball offer" to purchase HIS, which HIS rejected. ECF 191, ¶ 48. Edwards then "withdrew from the acquisition process." *Id.* HIS also contends that "[p]romptly after withdrawing from the acquisition process, Edwards began a systematic effort to reduce its pricing just enough to target HIS's projected cost savings to [Edwards's primary customer]." *Id.* ¶ 49. HIS adds, on "information and belief," that Edwards began "soliciting HIS's **[**10]** suppliers and demanding price concessions to match HIS's confidentially disclosed cost targets" and that "Edwards used HIS's confidential information obtained pursuant to the NDA to make targeted representations to [Edwards's key customer] that [Edwards] could achieve cost savings in order to persuade [that customer] to defer its invitation for HIS to qualify" HIS's competitive integrated vacuum pump frame system, known as the "Liberty Frame System." *Id*; *see also id.* ¶¶ 29-31. Based on these allegations, HIS contends that Edwards breached the June 21, 2019 NDA. *Id.* ¶¶ 101-105.[4]

B. HIS's Counterclaims Alleging Monopolization and Attempted Monopolization

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Opinion and Order, all paragraph citations to HIS's counterclaims in ECF 191 refer to the second set of HIS's sequentially numbered paragraphs.

[3] The parties know the identity of this customer and have requested that the Court not identify that customer in publicly filed documents.

[4] In HIS's counterclaims (ECF 191), HIS sometimes refers to the date of the 2019 NDA as June 21, 2019 (*see* ¶ 46) and sometimes refers to its date as June 17, 2019 (*see* ¶ 102). Based on ECF 77-12 at 9-12, which appears to be a copy of the NDA at issue, the Court assumes that the correct date is June 21, 2019.

HIS's other counterclaims allege monopolization and attempted monopolization, in violation of *§ 2 of the Sherman Act*, *15 U.S.C. § 2*. HIS identifies "integrated vacuum pump frame systems" as the relevant product market and the entire United States as the relevant geographic market. ECF 191, ¶¶ 3-5. HIS also alleges that the relevant market is highly concentrated, with two manufacturers collectively holding a 95 percent market share. *Id.* ¶ 12. HIS asserts that in the relevant market Edwards holds a 70 percent market share **[*1165]** and the second largest competitor **[**11]** (a company other than HIS) holds a 25 percent market share. *Id.* ¶ 18. HIS also contends that the relevant market has "high barriers to entry" and "inelastic demand." *Id.* ¶ 18-20.

In addition, HIS alleges that HIS's potential entry into this market threatens Edwards's monopoly power and that Edwards's unlawfully maintains its monopoly power through exclusionary conduct. As alleged in HIS's antitrust counterclaims, Edwards

> exacerbated barriers to entry and suppressed competition through a *set of anticompetitive tactics that include imposing (or attempting to impose) non-compete covenants on its suppliers, employee intimidation, "no poach" agreements, customer threats, and bad faith litigation*. Edwards has deployed a combination of these tactics against HIS, first in an effort to prevent its market entry and, failing that, to burden HIS's ability to gain sales and market *share*.

Id. ¶ 32 (emphasis added).[5]

To summarize, HIS alleges that Edwards engaged in the following anticompetitive conduct: (1) Edwards demanded (but did not receive) a non-compete agreement from HIS in exchange for nominal status as a "preferred supplier" (*id.* ¶¶ 36-44); (2) an Edwards officer incorrectly assumed that **[**12]** Edwards and HIS had entered into a mutual "no-poach" agreement regarding each company's respective employees (*id.* ¶¶ 53-69); (3) Edwards "warned" one of HIS's customers, GlobalFoundries, "not to purchase [HIS's] Liberty Frame Systems because GlobalFoundaries would risk having the systems ordered to be removed from its sub-fabs" (*id.* ¶ 33) and not to do "business with HIS, implying that doing so would risk retaliation from Edwards" (*id.* ¶ 72(c)); (4) after failing to acquire HIS, Edwards exploited HIS's confidential information in breach of the NDA, to obstruct HIS's market entry (*id.* ¶¶ 45-52); and (5) Edwards brought this lawsuit asserting meritless claims, including trade secret claims, for the purpose of retaliating against HIS and its employees for HIS's use of competitive hiring practices, raising HIS's costs, and chilling demand for HIS's competitive frame systems (*id.* ¶¶ 53-84).

DISCUSSION

A. Edwards's Motion to Dismiss for Failure to State a Claim

Under *Rule 12(b)(6)*, Edwards challenges both HIS's breach of contract counterclaim and HIS's two antitrust counterclaims, arguing that HIS has failed to state claims upon which relief can be granted. The Court first discusses HIS breach of contract **[**13]** counterclaim. The Court then discusses HIS's two antitrust counterclaims, alleging monopolization and attempted monopolization.

1. HIS's Counterclaim Alleging Breach of Contract

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[5] In its antitrust counterclaims, HIS also alleges that Edwards "ties" the sale of its integrated vacuum pump frame systems to related products and services (e.g., pumps, abatement systems, and aftermarket services). ECF 191, ¶¶ 26-27. In HIS's response to Edwards's motion to dismiss, however, HIS does not mention tying among HIS's recitation of Edwards's allegedly anticompetitive acts. Thus, for purposes of the pending motion, the Court will only consider the alleged anticompetitive conduct that HIS explicitly discusses in its response. *Accord* *Walsh v. Nevada Dep't of Hum. Res., 471 F.3d 1033, 1037 (9th Cir. 2006)* (stating that ***HN9***[] a plaintiff who "makes a claim" in a complaint "but fails to raise the issue in response to a defendant's motion to dismiss" that claim "has effectively abandoned [that] claim").

HIS asserts that the June 21, 2019 NDA is a valid and binding contract between **[*1166]** Edwards and HIS and that Edwards breached that contract. The NDA contains a choice of law provision selecting Delaware law. ECF 77-12, ¶ 11. ***HN10***[] Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation by the defendant (or counterclaim defendant); and (3) resulting damage to the plaintiff (or counterclaim plaintiff). *See* *Greenstar, LLC v. Heller, 814 F. Supp. 2d 444, 450 (D. Del. 2011)* (citation omitted).[6]

Edwards argues that HIS's breach of contract claim fails "because HIS never alleges any actual facts—as opposed to unsupported speculation—that Edwards breached the NDA." ECF 228 at 28. Edwards adds, "HIS pleads that 'upon information and belief, Edwards began soliciting HIS's suppliers and demanding price concessions to match HIS's confidentially disclosed cost targets" and "[u]pon information and belief, Edwards used HIS's confidential information obtained pursuant to the NDA to make targeted representations to [Edwards's **[**14]** key customer] that it could achieve cost savings in order to persuade [that customer] to defer its invitation for HIS to qualify the Liberty Frame System." *Id.* (quoting ECF 191, ¶ 49); *see also* ECF 191, ¶104 ("Upon information and belief, Edwards breached the NDA by using confidential information regarding HIS's development of the Liberty Frame System to interfere with HIS's relationship with [Edwards's key customer] and persuade [that customer] to defer its solicitation of HIS to develop and qualify the Liberty Frame System.").

Edward cites a district court decision for the proposition that "[a]lthough a plaintiff may allege a fact upon information and belief where there is reason to believe that discovery would likely find evidence for the fact, such allegations require more than a mere hunch or guess." *Cooney v. BAC Home Loans Servicing, 2012 U.S. Dist. LEXIS 205452, 2012 WL 13042680, at *5 (D.N.J. March 28, 2012)*. Edwards also relies on another district court decision for the statement that, "[a]llegations based on information and belief, however, must set forth sufficient factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Stimson Lumber Co. v. Int'l. Paper Co., 2010 U.S. Dist. LEXIS 131087, 2010 WL 5128650, at *4 (D. Mont. Oct. 18, 2010)* (simplified).

In response, HIS cites the Ninth Circuit's decision in *Soo Park v. Thompson, 851 F.3d 910 (9th Cir. 2017)*. In that case, the Ninth **[**15]** Circuit explained:

> The *Twombly* plausibility standard . . . does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible.

Id. at 928 (quoting *Arista Records, LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010)*).

Soo Park involved a civil conspiracy claim under *42 U.S.C. § 1983*, in which the plaintiff (the defendant in a murder trial) alleged on information and belief that the defendant in the civil lawsuit (the District Attorney) colluded with unnamed state officers to arrange for the unavailability of a defense witness at the criminal trial. The plaintiff's allegation was supported by facts, including that, during criminal proceedings against the plaintiff, the District **[*1167]** Attorney brought unexpected felony charges against the witness, who then refused to testify, after which the District Attorney dropped the charges against that witness. *Id. at 917*. The district court granted the defendant's (the District Attorney) motion to dismiss, and the plaintiff appealed. The Ninth Circuit reversed, holding that the "complaint alleged facts that are suggestive of an agreement to engage in illegal **[**16]** conduct" and that "[w]hen the entire factual context is considered," the plaintiff's claim was plausible. *Id. at 928*.

Here, HIS alleges that shortly after HIS was approached by Edwards's key customer, asking Edwards to develop an "agnostic" integrated vacuum pump frame system, Edwards expressed interest in potentially acquiring HIS and sought disclosure from HIS of HIS's confidential business information, including costs, margins, labor rates, and

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[6] ***HN11***[] Oregon law is not materially different. *See, e.g.,* *Slover v. Or. State Bd. of Clinical Soc. Workers, 144 Or. App. 565, 570, 927 P.2d 1098 (1996)* ("To state a claim for breach of contract, plaintiff must allege the existence of a contract, its relevant terms, plaintiff's full performance and lack of breach[,] and defendant's breach resulting in damage to plaintiff." (citation and quotation marks omitted)).

capital equipment spending, all of which HIS provided under the NDA. ECF 191, ¶¶ 45-47. On July 31, 2019, after Edwards received HIS's confidential information, Edwards gave HIS a "lowball offer of approximately one-third of the minimum sale price recommended by HIS's investment banking consultant." *Id.* ¶ 48. HIS promptly rejected Edwards's lowball offer, and Edwards then withdrew from the acquisition process. *Id.* "Promptly after withdrawing from the acquisition process, Edwards began a systematic effort to reduce its pricing just enough to target HIS's projected cost savings to [Edwards's key customer]." *Id.* ¶ 49. In August 2019, Edwards's key customer "advised HIS that it was deferring its invitation for HIS to qualify a new integrated vacuum pump **[**17]** frame system and was instead working with its existing supplier . . . to determine whether it could create a value-engineered frame system that would sufficiently reduce costs to meet [that customer's] price expectations." *Id.* ¶ 50. Edwards's key customer "did not reengage with HIS regarding the qualification of the Liberty Frame System until several months later, in or around the spring of 2020." *Id.* ¶ 51. HIS did not allege any of these facts "on information and belief."

Based on these facts (including their timing and all reasonable inferences from these facts), HIS alleges on information and belief that "Edwards began soliciting HIS's suppliers and demanding price concessions to match HIS's confidentially disclosed cost targets" and "that Edwards used HIS's confidential information obtained pursuant to the NDA to make targeted representations to [Edwards's key customer] that it [Edwards] could achieve cost savings in order to persuade [the key customer] to defer its invitation for HIS to qualify the Liberty Frame System." *Id.* ¶ 49. Also based on these facts, HIS states that it "believes" that Edwards was the "existing supplier" with whom Edwards's key customer was working "to determine **[**18]** whether [the existing supplier] could create a value-engineered frame system that would sufficiently reduce costs to meet [the key customer's] price expectations." *Id.* ¶ 50. Finally, HIS alleges, again on information and belief, "this delay in the qualification process was the direct result of Edwards's interference with HIS's relationship with [Edwards's key customer] through the misuse of [HIS's] confidential information that Edwards obtained pursuant to the NDA" and that the key customer "reengaged with HIS only after it became clear that contrary to Edwards's initial representations, Edwards was unable or unwilling to reduce costs sufficiently to satisfy [that customer's] expectations." *Id.* ¶ 51.

The key customer eventually "placed its first purchase order with HIS for a pilot system on July 15, 2020, and HIS shipped its first Liberty Frame System to [that customer] in August 2020." *Id.* ¶ 52. According to HIS, had that customer "not **[*1168]** postponed its solicitation of HIS, HIS estimates that it would have qualified the Liberty Frame System at [that customer] by approximately December 2019" and that "the delay in [the customer's] decision to purchase and ultimately qualify the Liberty **[**19]** Frame System resulted in a revenue loss between December 2019 and July 2020 of approximately $15-30 million." *Id.* ¶ 52.

The Court finds that, based on the facts alleged by HIS not on information and belief, the allegations pleaded by HIS on information and belief are not *mere* "hunches" or "guesses." Those allegations instead set forth sufficient factual content to draw the *reasonable inference* that Edwards is liable for the alleged breach of contract, and that most of facts alleged by HIS on information and belief are particularly within the possession and control of Edwards. Thus, it is appropriate to consider the allegations made by HIS on information and belief. When all of HIS's allegations are considered, HIS has stated a claim for breach of the NDA sufficient to withstand Edwards's motion to dismiss. HIS may or may not eventually have sufficient facts to create a genuine issue for the jury and may or may not eventually persuade a jury. But at this stage of the litigation, HIS may proceed with its breach of contract claim. The Court denies Edwards's *Rule 12(b)(6)* motion to dismiss HIS's counterclaim alleging breach of contract.

2. HIS's Counterclaims Alleging Monopolization and Attempted Monopolization [**20]

HN12[] To state a claim of monopolization, HIS must plausibly allege that (1) Edwards possesses "monopoly power in the relevant market"; and (2) the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*). As explained by the Supreme Court: "To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Trinko, 540 U.S. at 407*.

To state a claim of attempted monopolization, HIS must plausibly allege: "(1) that [Edwards] has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.[7]

Although Edwards denies each of these elements, Edwards's pending motion to dismiss HIS's antitrust counterclaims challenges *only* the sufficiency of HIS's pleading of the element of "anticompetitive conduct," which is required in both of HIS's two antitrust counterclaims. *See* ECF 228 at 18. As previously noted, HIS discusses five categories of alleged anticompetitive conduct by Edwards. The Court will discuss each **[**21]** in turn, but first a few comments about the concept of anticompetitive conduct may be helpful.

[*1169] "Commentators have long described defining unlawful dominant firm conduct as one of the most uncertain areas of antitrust." ABA ***Antitrust Law*** Section, *Monopolization and Dominance Handbook* 75 (2d ed. 2021) (citation and quotation marks omitted). In *United States v. United Shoe Machinery*, Judge Wyzanski condemned a shoe machinery monopolist, noting:

> The facts show that (1) defendant has, and exercises, such overwhelming strength in the shoe machinery market that it controls that market, (2) this strength excludes some potential, and limits some actual, competition, and (3) *this strength is not attributable solely to defendant's ability, economies of scale, research, natural advantages, and adaptation to inevitable economic laws*.

110 F. Supp. 295 (D. Mass 1953), *aff'd*, *347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954)* (emphasis added).

Similarly,***HN14***[] in *Grinnell Corp.*, the Supreme Court stated:

> The offense of monopoly under *§ 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) *the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen,* ***[**22]*** *or historic accident*.

384 U.S. at 570-71 (emphasis added). Indeed, this explanation of anticompetitive conduct was repeated by the Supreme Court in *Trinko* in 2004.

Finally, ***HN15***[] one of the leading treatises in the field defines "monopolistic conduct" as acts that

> (1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and
> (2) either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits.

6C Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 651a (Online ed. 2021). The Court now addresses HIS's five categories of anticompetitive conduct allegedly committed by Edwards.

a. Edwards's Demand for a Non-Compete Agreement

HIS alleges that the day after HIS informed Edwards that Edwards's key customer had solicited HIS to develop an "agnostic" integrated vacuum pump frame system, Edwards returned revisions to HIS's draft supplier agreement. According to HIS, Edwards's new proposal "eliminated the proposed agreement's benefit to HIS" by deleting supplier exclusivity and, instead, substituted a requirement that in exchange for "nominal **[**23]** status as a

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[7] In addition, ***HN13***[] for a private plaintiff to recover money damages (indeed, automatic treble damages) in an antitrust action, *§ 4 of the Clayton Act, 15 U.S.C. § 15*, requires a plaintiff to show causal antitrust injury, which is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl—O—Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

preferred supplier," HIS must stipulate to a "Non-Compete/Non-Solicitation" term. ECF 191, ¶ 40. HIS further alleges:

> In short, Edwards sought a covenant not to compete in the integrated vacuum pump frame systems market and forced intellectual property transfer from HIS in exchange for no material benefit to HIS save for a non-committal prospect of increased sales to Edwards. Edwards's proposal, had HIS accepted, would have directly undercut [the key customer's] effort to diversify its supply chain and realize cost savings by stimulating competition.

Id. ¶ 42. HIS also states: "Although HIS rejected the preferred supplier agreement, Edwards's demands carried a dangerous probability of inducing HIS to stay out of the market precisely because HIS depends significantly on component sales to Edwards as a result of Edwards's existing monopoly." *Id.* ¶ 43.

[*1170] In its motion to dismiss, Edwards argues that although non-compete and non-solicitation agreements might be actionable as antitrust offenses under certain circumstances, the absence of such an agreement cannot satisfy the exclusionary conduct requirement of HIS's antitrust counterclaims. As the Ninth Circuit has held:

> [***HN16***[]] D]irect evidence **[**24]** of intent alone, without corroborating evidence of conduct, cannot sustain a claim of attempted monopolization. . . . Direct evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation. It also must be shown that the defendant sought victory through unfair or predatory means. Evidence of conduct is thus indispensable.

William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1028 (9th Cir. 1981).

In response, HIS argues that Edwards's proposal of a preferred supplier agreement containing a non-compete clause, which HIS rejected, is itself an anticompetitive act that supports HIS's claim of attempted monopolization.[8] In support of its argument, HIS relies on the Fifth Circuit's decision in *United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984)*. In that case, the Fifth Circuit held that, under the specific economic conditions presented, an unaccepted offer to fix prices made by one competitor to another in a two-firm market with high barriers to entry adequately stated a claim for attempted monopolization. *Id. at 1118-19*.

In reply, Edwards makes two arguments. First, relying on *Transamerica Computer Co., v. International Business Machines Corp., 698 F.2d 1377 (9th Cir. 1983)*, Edwards argues that the Fifth Circuit's holding in *American Airlines* is inconsistent with earlier binding Ninth Circuit precedent. Second, Edwards argues that even if *American Airlines* is not **[**25]** inconsistent with Ninth Circuit law, it is factually and legally distinguishable from the pending case. The Court rejects Edwards's first argument but accepts its second.

In *Transamerica*, a company that supplied the capital needs of manufacturers of "plug-compatible" computer peripherals brought claims of monopolization and attempted monopolization against a major supplier of computer central processing units and peripherals. The plaintiff, Transamerica, challenged IBM's leasing practices, design changes, and pricing decisions. After a jury trial that lasted 120 days, including ten days of deliberation, the court found the jury was deadlocked. Under a pretrial stipulation, the district judge then became the trier of fact. Next, the district court ruled for IBM on all major issues, holding that IBM was not a monopolist, and even if it were, its leasing program, design changes, and pricing behavior did not unreasonably restrain competition. *Transamerica, 698 F.2d at 1381*. In addition, the district court held that IBM had not attempted to monopolize. *Id.*

The Ninth Circuit affirmed the district court's result but modified the district court's test for predatory pricing. ***HN17***[] In reciting the basic elements of monopolization **[**26]** and attempted monopolization, the Ninth Circuit stated:

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[8] HIS offers this theory only in support of its claim of attempted monopolization, not actual monopolization. *See* ECF 191, ¶ 43 (referring to the creation of a "dangerous probability" of market dominance, which is an element of attempted monopolization but not actual monopolization). Indeed, it is difficult to see how an unaccepted offer could ever satisfy the causal antitrust injury requirement needed in a private antitrust claim seeking money damages because an unaccepted offer would not be the "cause" of any material result in the marketplace.

> **[*1171]** Conduct that does not constitute "willful acquisition or maintenance" of monopoly power (thus precluding establishment of the offense of monopolization) cannot constitute the "predatory or anticompetitive conduct" required to establish the offense of attempt to monopolize. *See* CalComp, 613 F.2d at 738, quoting 3 P. Areeda & D. Turner, ***Antitrust Law*** ¶ 828, at 321 (1978) ("conduct lawful for a monopolist must, a fortiori, be excluded as a basis for the attempt offense."). We will analyze IBM's conduct with this principle in mind. We will assume that IBM possessed monopoly power. If IBM's conduct proves lawful despite that assumption, then, *a fortiori*, IBM's conduct could not constitute an attempt to monopolize, thereby eliminating the need to consider this offense.

Id. at 1382. Edwards relies on the Ninth Circuit's statement in *Transamerica* that "[c]onduct that does not constitute 'willful acquisition or maintenance' of monopoly power (thus precluding establishment of the offense of monopolization) cannot constitute the 'predatory or anticompetitive conduct' required to establish the offense of attempt to monopolize." This statement, however, merely expresses the unremarkable **[**27]** proposition that conduct that is lawful (and not anticompetitive) for a monopolist cannot be considered anticompetitive for purposes of stating a claim of attempted monopolization. In *Transamerica*, however, there were no "unaccepted" offers to fix price or otherwise to restrain trade. Thus, nothing in *Transamerica*, properly understood, is inconsistent with the Fifth Circuit's decision in *American Airlines*. The Court rejects Edwards's argument on this point.

Edwards's second argument fares better. *American Airlines* is both factually and legally distinguishable from the pending dispute. This is so for three independent reasons. But first, it may be helpful for provide further background on the *American Airlines* decision.

As discussed in that case, the chief executive officer of American Airlines (Robert Crandall) offered to the chief executive officer of Braniff International Airways (Howard Putnam) a blatant—and unlawful—price-fixing agreement between two competing airlines in several two-firm city-pair markets with high barriers to entry. If Putman had accepted Crandall's offer, there is no doubt that there would have immediately been a completed *per se* unlawful antitrust violation, **[**28]** subjecting both executives to criminal liability. The United States brought a civil enforcement action, seeking injunctive relief against American Airlines and Crandall. The United States alleged that American Airlines, through this unaccepted offer, had "attempted to monopolize" numerous city-pair markets for air travel under circumstances involving high (indeed, insurmountable, at least for a time) barriers to entry, based on landing slot restrictions imposed by the Federal Aviation Administration after the PATCO strike of air traffic controllers and President Reagan's firing of the striking employees. The district court dismissed the government's complaint under Rule 12(b)(6), but the Fifth Circuit reversed.

In its ruling, the Fifth Circuit held that, among other things, the dangerous probability element of attempted monopolization was satisfied because

> if Putnam had accepted Crandall's offer, the two airlines, at the moment of acceptance, would have acquired monopoly power. At that same moment, the offense of joint monopolization would have been complete. . . .
>
> * * *
>
> Both Crandall and Putnam were the chief executive officers of their airlines; each arguably had the power to implement Crandall's **[**29]** plan. The airlines jointly **[*1172]** had a high market share in a market with high barriers to entry. American and Braniff, at the moment of Putnam's acceptance, would have monopolized the market. Under the facts alleged, it follows that Crandall's proposal was an act that was the most proximate to the commission of the completed offense that Crandall was capable of committing. Considering the alleged market share of American and Braniff, the barriers to entry by other airlines, and the authority of Crandall and Putnam, the complaint sufficiently alleged that Crandall's proposal had a dangerous probability of success.

American Airlines, 743 F.2d at 1118-19.

Here, the Court concludes that the *American Airlines* case has no application in the pending dispute for three independent reasons. First, in *American Airlines*, had American's offer to fix price been accepted by Braniff, at that moment of acceptance, there would have been the creation of joint monopoly power. That, however, is not the situation here. Had HIS accepted Edwards's proposed preferred supplier agreement containing a non-compete clause, that would not have created monopoly power at that moment of acceptance.

Second, in *American Airlines*, the act that would have created **[**30]** monopoly power (the price fix) was *per se* unlawful and thus unquestionably illegal. That, however, is not the situation here. At the time of Edwards's offer to enter into a preferred supplier agreement containing a non-compete clause, HIS and Edwards were (and remain) in a vertical supply relationship. ***HN18***[] Ancillary non-compete agreements among participants in a vertical supply relationship, however, are not *per se* unlawful but instead are evaluated under a "Rule of Reason." *See generally* *Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 689, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)* ("The Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction[.]"). Relatedly, vertical nonprice restraints are evaluated under the Rule of Reason. *See generally* *Cont'l T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36, 49-50, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (holding that "*per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive"). Under a Rule of Reason analysis, it is far from clear whether the proposed preferred supplier agreement containing a non-compete clause would be found to be manifestly anticompetitive.

Finally, in *American Airlines*, the government brought that civil action seeking injunctive relief. Here, HIS's attempted monopolization **[**31]** counterclaim seeks treble damages, which requires, in addition to the three basic elements of attempted monopolization, a showing of causal antitrust injury.[9] As noted earlier, it is difficult to see how an *unaccepted* offer to enter into a preferred supplier agreement with a non-compete clause can *cause* antitrust injury to HIS.[10] This further distinguishes the pending case from *American Airlines*.

b. Edwards's Assumed "No-Poach" Agreement

HIS alleges that after HIS hired several of Edwards's employees, Edwards sent a communication to HIS stating,

> I thought we mutually agreed not to hire each other's employees. Can you give me any insight into what has changed and why you're not honoring your commitment?

ECF 191, ¶ 56. HIS "promptly responded that HIS never agreed that Edwards and **[*1173]** HIS would not hire each other's employees and that the agreement suggested by [Edwards] would be illegal." Id.

In its motion to dismiss, Edwards argues that although a non-solicitation agreement might be actionable as an antitrust offense under certain circumstances, the absence of such an agreement does not satisfy the "exclusionary conduct" requirement of HIS's antitrust counterclaims. Edwards's argument **[**32]** is similar to its argument regarding its unaccepted preferred supplier agreement. For the same reasons that the Court just held that Edwards's unaccepted offer to enter into a preferred supplier agreement is not an anticompetitive act, the Court also holds that Edwards's apparently erroneous belief that Edwards and HIS had entered into an agreement not to hire (or "poach") each other's employees is not an anticompetitive act that can support HIS's claims of monopolization or attempted monopolization.

c. Edwards's "Warning" to HIS's Customer GlobalFoundries

HIS alleges that Edwards had warned one of HIS's customers, GlobalFoundries, that it should not "purchase [HIS's] Liberty Frame Systems because GlobalFoundries would risk having the systems ordered to be removed from its sub-fabs" (ECF 191, ¶ 33) and not to do "business with HIS, implying that doing so would risk retaliation from Edwards" (*id.* ¶ 72(c)). Edwards did not explicitly mention this allegation in its motion to dismiss. In its response to Edwards's motion, HIS stated:

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[9] *See* n.7, *supra*.

[10] *See* n.8, *supra*.

> And Edwards simply ignores HIS's allegation that it intimidated GlobalFoundries—a large semiconductor chip manufacturer and mutual customer of Edwards and HIS—not **[**33]** to purchase Liberty Frame Systems. Representatives of GlobalFoundries have indicated to HIS that GlobalFoundries adopted a "wait and see" approach by reducing purchases of Liberty Frame Systems.

ECF 235 at 8; see also id. at 32.

In its reply, Edwards argued:

> HIS tries to argue that Edwards's statements to its customers regarding its lawsuit against HIS somehow rise to the level of a separate "category of exclusionary conduct," (Opp'n at 9), even though the allegations all relate to the alleged "sham" litigation section of its Counterclaims. (Countercl. ¶ 72.) Specifically, HIS alleges "three separate occasions" when an Edwards employee told a customer "not to do business with HIS." (Opp'n at 26.) HIS further alleges that Edwards informed customers that it would file a lawsuit against HIS. (Countercl. ¶ 72.) HIS cites no precedent for such commercial speech to constitute anticompetitive conduct. ***HN19***[] Disparagement of competitors is only actionable in the Ninth Circuit when the representation is "(1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not **[**34]** readily susceptible of neutralization or other offset by rivals."

ECF 236 at 17-18. Edwards then cites *Am. Pro. Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Pro. Publ'ns, Inc., 108 F.3d 1147 (9th Cir. 1997)*.

In that case, the Ninth Circuit explained:

> ***HN20***[] While the disparagement of a rival or compromising a rival's employee may be unethical and even impair the opportunities of a rival, its harmful effects on competitors are ordinarily not significant enough to warrant recognition under *§ 2* of the Sherman Act. We therefore insist on a preliminary showing of significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or customer) before **[*1174]** these practices can rise to the level of exclusionary conduct.
>
> * * *
>
> To prove that Harcourt's false and misleading advertising constituted exclusionary conduct, the disparagement must overcome a presumption that the effect on competition of the fliers was de minimis. ***HN21***[] [A] plaintiff may overcome de minimis presumption by cumulative proof that the representations were [1] clearly false, [2] clearly material, [3] clearly likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or other offset by rivals. **[**35]** American must satisfy all six elements to overcome de minimis presumption. Otherwise, American fails to prove its claim.

Id. at 1151-52 (citations and quotation marks omitted; alterations in original). The Court agrees with Edwards and holds that HIS has failed adequately to plead more-than-temporary harmful effects on competition (and not merely upon a competitor or customer). Thus, HIS has failed to plead exclusionary conduct relating to Edwards's alleged comments to GlobalFoundries (or others).

d. Edwards's Alleged Breach of the 2019 NDA

The Court has already discussed HIS's counterclaim alleging breach of contract relating to the June 21, 2019 NDA. HIS also contends that Edwards's alleged breach of the NDA to "exploit" HIS's confidential information and to obstruct HIS's market entry is anticompetitive conduct that supports HIS's antitrust counterclaims. In its motion to dismiss, Edwards argues that HIS's breach of contract theory cannot form a basis for an antitrust claim. Edwards cites *Pool Water Products v. Olin Corp., 258 F.3d 1024 (9th Cir. 2001)*,***HN22***[] for the proposition that "private plaintiffs can be compensated only for injuries that the antitrust laws were intended to prevent. To show antitrust injury, a plaintiff must prove that his loss flows from an **[**36]** anticompetitive aspect or effect of the defendant's behavior." *Id. at 1034*.[11] In response, HIS argues that Edwards did not outcompete HIS by delivering to Edwards's key customer a value-engineered system at a superior price. Nor does HIS allege that it lost sales or was otherwise damaged in its business due to Edwards's lower prices. Rather, HIS contends that Edwards used HIS's confidential information to make representations that Edwards would reduce prices that misled Edwards's key customer into deferring business with HIS. ECF 191, ¶¶ 49-51. According to HIS, this is an entirely different class of conduct than mere aggressive price competition.

HN23[] Antitrust laws protect "*competition*, not *competitors*." *Brown Shoe Co. v. United States, 370 U.S 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* (emphasis added). Thus, an antitrust plaintiff must demonstrate not only that the defendant engaged in unfair or predatory tactics, but also that those tactics allowed the defendant to maintain or come dangerously close to obtaining monopoly status. *See* *Spectrum Sports, 506 U.S. at 459*. Indeed, not "even an act of pure malice by one business competitor against another" will alone state an antitrust violation. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. HIS argues that Edwards's breach of contract satisfies this test. The Court disagrees.

HN24[] "[A] claimed breach **[**37]** of contract by unreasonable conduct, *standing alone*, **[*1175]** should not give rise to antitrust liability." *City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1368 (9th Cir. 1992)* (emphasis added); *see also* 2B Areeda & Hovenkamp, ***Antitrust Law***, ¶ 709d1 ("A breach of contract is not ordinarily an antitrust violation."); 3A Areeda & Hovenkamp, ***Antitrust Law***, ¶ 782m ("It is not antitrust's purpose to regulate ordinary business contracts."). Instead, antitrust liability will only be predicated "on conduct that also happens to create a contract dispute" when that conduct is "anticompetitiv[e] and without a legitimate business reason." *City of Vernon, 955 F.2d at 1368*. In *City of Vernon*, the City had a colorable—although ultimately unsuccessful[12]—antitrust claim against Edison based on Edison's alleged breach of contract because Edison's allegedly breaching conduct, intermittently refusing to transmit electricity purchased from other suppliers to the City over Edison's lines, was not "a single incident," but instead was "relatively long-term activity aimed at crushing a competitor." *Id. at 1368-69*. That is not what HIS has alleged here.

HN25[] Nor is reticence to premise antitrust liability on a single instance of bad conduct aimed at a single competitor unique to antitrust claims relying on breach of contract. *See* *Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 783 (6th Cir. 2002)* ("Isolated **[**38]** tortious activity alone does not constitute exclusionary conduct for purposes of a *§ 2* violation, absent a significant and more than a temporary effect on competition, and not merely on a competitor or customer."); *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048, 1109 (D. Colo. 2004)* (finding that a single incident of the defendant "secretly hir[ing]" one of the plaintiff's employees and then having that employee and other "enter[] [the plaintiff's] office at night and remove[] and destroy[] various files" was a "single event" that did "not amount to anticompetitive conduct"); *cf.* *Conwood Co., 290 F.3d at 784-88* (affirming a jury's finding of a *§ 2* violation when the defendant engaged in a "pervasive practice" of damaging a single competitor's property and making misrepresentations about the competitor);. Because HIS has not alleged pervasive and long-term activity that has had more than a temporary effect on a single competitor, HIS's allegations regarding the June 21, 2019 NDA do not allege anticompetitive conduct sufficient to support a claim for monopolization or attempted monopolization.[13]

e. Edwards's Filing of this Lawsuit

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[11] *See also* n.7, *supra* (discussing the requirement of causal antitrust injury).

[12] The Ninth Circuit ultimately granted Edison summary judgment, holding that the evidence that Edison interrupted the City's service was insufficient to "lead a rational trier of fact to find for [the City]." *Id. at 1369* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*).

[13] As previously noted, however, HIS has sufficiently alleged a claim for breach of contract.

HIS alleges that Edwards brought this lawsuit asserting meritless claims, including trade secret claims, for the purposes of: (1) retaliating against HIS and its **[**39]** employees for HIS's use of competitive hiring practices; (2) raising HIS's costs; and (3) chilling demand for HIS's competitive frame systems. ECF 191, ¶¶ 53-84. In its motion to dismiss, Edwards argues that the *Noerr-Penningt*on doctrine immunizes this lawsuit from challenge under the antitrust laws.[14] ***HN26***[] "Under **[*1176]** the *Noerr-Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct," including "the use of the channels and procedures of state and federal courts." *Sosa v. DIRECTV, Inc., 437 F.3d 923, 929-30 (9th Cir. 2006)* (citing *Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*). "Although *Noerr-Pennington* immunity extends to judicial proceedings, it does not protect persons engaging in sham litigation." *Int'l Longshore & Warehouse Union v. ICTSI Or., Inc., 863 F.3d 1178, 1187 (9th Cir. 2017)*. The Ninth Circuit has "recognized three circumstances when litigation might be a sham." *Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180, 1184 (9th Cir. 2005)*.

HN27[] The "sham exception" that appears to be most relevant in this lawsuit, and upon which HIS relies, requires that "the antitrust plaintiff must demonstrate that the lawsuit was (1) objectively baseless, and (2) a concealed attempt to interfere with the plaintiff's business relationships."[15] *Id.* The Supreme Court has explained these two necessary criteria for sham litigation as follows:

> First, the lawsuit must **[**40]** be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.

Pro. Real Est. Invs. v. Columbia Pictures Indus., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) ("*PRE*") (quotation marks omitted); *see also* *Int'l Longshore, 863 F.3d at 1187-88*. "The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in a sham litigation." *PRE, 508 U.S. at 62*.

Edwards filed its Complaint in this lawsuit on September 29, 2020, against HIS and 13 of HIS's employees, including many who previously worked for Edwards. ECF 1. On November 16, 2020, Edwards moved for a preliminary injunction. ECF 41. In that motion, **[**41]** Edwards sought to enjoin HIS from making, selling, offering to sell, shipping, or otherwise using any product containing Edwards's asserted trade secrets. After limited discovery relating to Edwards's motion, Edwards informed HIS and the Court on February 12, 2021 that Edwards was narrowing the scope of its preliminary injunction motion to allege *only* a breach of contract claim against HIS arising from what Edwards alleged was HIS's unauthorized use of Edwards's custom-designed '541 Bellows based on "Terms and Conditions" that were not alleged in Edwards's original Complaint.

[*1177] Edwards has twice amended its Complaint, with the Second Amended Complaint being the currently operative pleading. Edwards also voluntarily dismissed eight of the Individual Defendants originally named. On May 10, 2021, after a three-day evidentiary hearing, the Court found that Edwards had shown that it was likely to prevail

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[14] The doctrine derives its name from two cases, *E. R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, and *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*.

[15] ***HN28***[] The second circumstance for when litigation might be a sham is "if the alleged anticompetitive behavior is the filing of a series of lawsuits." *Freeman, 410 F.3d at 1184*; *cf.* *Int'l Longshore, 863 F.3d at 1187* (noting that "[t]wo sham suits cannot amount to a whole series of legal proceedings"). The third circumstance may arise "if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court." *Freeman, 410 F.3d at 1184*.

on its claim that HIS breached the contractual obligations stated in the Terms and Conditions, relating to the '541 Bellows. The Court granted Edwards's motion for preliminary injunction. ECF 212.

In support of its motion to dismiss that portion of HIS's antitrust counterclaims focused on Edwards's **[**42]** filing of this lawsuit, Edwards invokes the *Noerr-Pennington* doctrine. Among other things, Edwards argues that in granting in part Edwards's motion for preliminary injunction, the Court has determined that Edwards is likely to succeed against HIS on the merits of Edwards's breach of contract claim based on the Terms and Conditions relating to the '541 Bellows. According to Edwards, this precludes HIS's assertion that Edwards's lawsuit is "objectively baseless." Edwards explains that the Supreme Court in *PRE* stated: "***HN29***[] A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." *PRE, 508 U.S. at 60 n.5*.

In response, HIS argues that the specific claim upon which the Court granted Edwards preliminary injunctive relief was not even alleged in Edwards's original Complaint and was only added months after Edwards began this lawsuit. HIS also states that Edwards has voluntarily dismissed its claims against eight of the 13 Individual Defendants. Finally, HIS urges the Court to follow the approach used in *In re Wellbutrin SR Antitrust Litigation, 749 F. Supp. 2d 260, 266 (E.D. Pa. 2010)*. In that case, the district court declined to dismiss the plaintiffs' antitrust claim alleging "sham litigation" in a mixed-claim case, explaining that "[d]ismissing **[**43]** plaintiffs' claims at this point would ignore the reality that the [claim alleged to lack an objective basis], in and of itself, was sufficient to cause antitrust damage." *Id. at 266*.

In reply, Edwards cites *IPtronics Inc. v. Avago Techs. U.S., Inc., 2015 U.S. Dist. LEXIS 112914, 2015 WL 5029282 (N.D. Cal. Aug. 25, 2015)*, for the proposition that "a plaintiff who prevails on some claims but not others in a single lawsuit can claim the *Noerr-Pennington* immunity is the dominant view in [the Ninth C]ircuit and around the country." *2015 U.S. Dist. LEXIS 112914, [WL] at *6*. In *Avago*, however, the district court addressed multiple patent infringement claims brought against multiple defendants and concluded that

> the *PRE* analysis may be applied solely to the '456 Patent infringement claims against IPtronics, which constituted Avago's "lawsuit" against IPtronics. Based upon the unredacted information before the Court, it appears that the '595 Patent infringement claims and accused products in the ITC action were severable from the '456 Patent infringement claims and accused products. In other words, Avago could have filed a separate complaint against IPtronics and Mellanox/FCI concerning the products that infringed only the '456 Patent. Assuming as true the assertion that Avago had no reasonable basis for accusing IPtronics, that Avago chose to join its frivolous claims against IPtronics to an otherwise **[**44]** valid lawsuit against other defendants should not preclude IPtronics from invoking the Sherman Act.

Id. In addition, the district court in *Avago* noted the Ninth Circuit's decision in *Freeman*, explaining that "[b]ecause the *Noerr—Pennington* doctrine grows out of the *Petition Clause*, its reach extends only so far as necessary to steer the Sherman **[*1178]** Act clear of violating the *First Amendment*." *2015 U.S. Dist. LEXIS 112914, 2015 WL 5029282, at *6* (alteration in original) (quoting *Freeman, 410 F.3d at 1184*). The court in *Avago* denied the defendant's motion to dismiss the plaintiff's antitrust claim, concluding:

> In sum, the Court finds that IPtronics' allegations of objective baselessness are sufficiently well-pleaded to circumvent Avago's claim to *Noerr-Pennington* immunity at this stage. This is not to say that it is smooth sailing for IPtronics from this point forward, as the arguments by Avago that this Court rejected on a motion to dismiss may gain more traction on a more fully developed record. At a minimum, Avago's arguments demonstrate that there may be significant challenges to IPtronics' ability to prove objective baselessness down the road.

*Avago, 2015 U.S. Dist. LEXIS 112914, 2015 WL 5029282 at *8*.

Many of the same considerations found in *Avago* apply here. In addition, Edwards added the sole claim on which it prevailed at the preliminary injunction **[**45]** stage *months after* Edwards's filed its original Complaint. This fact provides a further ground for applying HIS's antitrust counterclaims "sham exception" argument to Edwards's originally alleged trade secret claims, notwithstanding Edwards's partially successful preliminary injunction motion on one of its later-filed breach of contract claims.

Regarding Edwards's trade secret claims, HIS alleges in its antitrust counterclaims the following:

> What Edwards has concealed from the Court (and, through its abuse of the "OAEO" designation under the Protective Order, from the semiconductor industry generally) is that most if not all of the "trade secrets" identified in its disclosure are such basic engineering techniques and common industry knowledge that no reasonable person in Edwards's position could have genuinely believed them to be trade secrets. Throughout its 135-page disclosure (ECF No. 35-1), Edwards repeatedly misrepresents that it possesses "trade secrets" that it knows are in fact not confidential or proprietary.

ECF 191, ¶ 74. Further, HIS alleges:

> Contrary to its allegations in this lawsuit, Edwards does not maintain confidentiality of the various basic engineering techniques and **[**46]** standard off-the-shelf components that it claims as "trade secrets." For example, Edwards has allowed the public access to its integrated vacuum pump frame systems during open house events without even requiring guests to sign a sign in sheet. Photographs of the SynErgis system that show the location or use of several of Edwards's alleged trade secrets are readily available to anyone with an internet connection. *See, e.g.*, https://pamplinmedia.com/but/239-news/440111-349658-edwards-putsdown-new-roots-in-silicon-forest-pwoff . As Mr. Romeo testified during the preliminary injunction hearing, not only were Edwards's employees not instructed to keep various components of the SynErgis system a secret, but they were also at times encouraged to widely share these features as part of Edwards's sales, marketing, and employee recruiting efforts.

ECF 191, ¶ 77.

To paraphrase the district court's decision in *Avago*, the Court here finds that HIS's allegations that Edwards's trade secret claims are objectively baselessness are sufficiently pleaded to circumvent Edward's claim to *Noerr—Pennington* immunity at this stage. To paraphrase *Avago* further, this is not to say that it is "smooth sailing" for **[**47]** HIS from this point forward, and the arguments by Edwards on its motion to dismiss that the Court rejects today "may gain more traction on a **[*1179]** more fully developed record." Indeed, if Edwards prevails at trial on any of its trade secret claims, or possibly even if Edwards's trade secret claims can withstand a motion for summary judgment,[16] that may well be the end of HIS's antitrust counterclaims, or at least those based on Edwards's filing of this lawsuit.

B. Edwards's Alternative Motion to Dismiss Based on Forum *Non Conveniens*

Edwards previously moved under *28 U.S.C. § 1404(a)* to transfer venue of HIS's counterclaims (and only HIS's counterclaims) to the District of Delaware. ECF 216. In support of that motion, Edwards invoked the mandatory forum selection clause contained in the contract that Edwards allegedly breached, the June 21, 2019 NDA. The Court denied Edwards's motion, concluding that Edwards had waived or forfeited its right to benefit from that forum selection clause based on Edwards's litigation conduct. ECF 233. The Court sees no reason to revisit that ruling. Accordingly, the Court will not consider the forum-selection clause now in evaluating Edwards's motion **[**48]** to dismiss based on forum *non conveniens*. The Court stands by its earlier ruling that Edwards's litigation conduct in this case results in a waiver or forfeiture of that clause.

This leaves Edwards only with the common law doctrine for forum *non conveniens*. The Court finds that Edwards has not made "a clear showing of facts which establish such oppression and vexation of a [counterclaim] defendant so as to be out of proportion to [a counterclaim] plaintiff's convenience." *See* *Dole Food, 303 F.3d at 1118*. In addition, Edwards has not shown that defending against HIS's counterclaims here presents one of the "rare instances" where "a state or territorial court serves litigational convenience best." *See* *Sinochem Int'l, 549 U.S. at*

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16 Whether Edwards's defeating HIS's motion for summary judgment on Edwards's trade secret claims (if that were to occur) would be sufficient to show that those claims were not objectively baseless for purposes of *Noerr-Pennington* immunity is a question that may benefit from further briefing and study at the appropriate time. *See generally* *In re Relafen Antitrust Litig., 346 F. Supp. 2d 349, 362-64 (D. Mass. 2004)* (discussing issue).

430. Accordingly, the common law doctrine of forum *non conveniens* does not support Edwards's alternative motion, and that motion is denied.

C. Partial Reconsideration of Edwards's Motion to Bifurcate and Stay Discovery

Edwards previously moved to bifurcate for discovery and trial *all* counterclaims asserted by HIS. ECF 204. The Court denied Edwards's motion, concluding that the motion was premature. ECF 215. In that ruling, the Court explained: "Here, whether bifurcation would result in increased convenience and judicial **[**49]** economy or would reduce the risk of jury confusion and unfair prejudice cannot be determined at this stage of the litigation." *Id.* at 4. Since then, Edwards filed its pending motion to dismiss HIS's three counterclaims under *Rule 12(b)(6)*, among other grounds. That motion has been fully briefed, and the Court has had the benefit of counsel's oral argument on these issues. It now is appears to the Court that Edwards's motion to bifurcate for discovery and trial, at least regarding HIS's antitrust counterclaims, has merit.

As Edwards argued in its motion to bifurcate,

> Courts routinely bifurcate antitrust claims from complex legal issues such as intellectual property and unfair competition claims. *See, e.g.,* *In re Data Gen. Corp. Antitrust Litig., 529 F. Supp. 801, 804,* ***[*1180]*** *n.2 (N.D. Cal. 1981)* (rev'd on other grounds) (bifurcating antitrust claims from underlying trade secrets claim)[.] . . . ***HN30***[] Bifurcation "enhance[s] the parties' right to [a] jury trial by making the issues the jury must consider less complex." *Warner Lambert Co. v. Purepac Pharm. Co., No. Civ.A. 98-02749 (JCL), 2000 U.S. Dist. LEXIS 22559, 2000 WL 34213890, at *11 (D.N.J. Dec. 22, 2000)* (quoting *In re Innotron Diagnostics, 800 F.2d 1077, 1086 (Fed. Cir. 1986)*[.]

ECF 204 at 10. In addition, Edwards noted that in *Ecrix Corp. v. Exabyte Corp., 191 F.R.D. 611 (D. Colo. 2000)*, the district court explained:

> Bifurcation allows for (1) quicker resolution of the [intellectual property] infringement issue as there is less discovery required, and (2) judicial economy as the antitrust and unfair **[**50]** competition claims may not have to be heard if [intellectual property] infringement is proved in the first trial.

Ecrix, 191 F.R.D. at 614.

Applying these considerations here, there does not appear to be any significant benefit to be achieved from staying HIS's breach of contract counterclaim. There is, however, significant benefit to be had from staying HIS's antitrust counterclaims. Antitrust claims by their nature are more complex and expensive to litigate than litigating a discrete breach of contract claim.

Moreover, all that remains of HIS's antitrust counterclaims is HIS's contention that Edwards engaged in anticompetitive conduct by filing an objectively baseless lawsuit, or at least by filing objectively baseless trade secret claims. As previously discussed, to refute Edwards's *Noerr-Pennington* defense, HIS will need to show that Edwards's trade secret claims are a "sham," both objectively and subjectively.

Whether Edwards's trade secret claims are objectively baseless may be informed by the jury's verdict on those claims, or possibly even by the Court's ruling on a motion for summary judgment.[17] Also, discovery on the subjective prong of the issue of sham litigation will be both expensive and intrusive—and **[**51]** completely unnecessary if the objective prong is not satisfied. Edwards's defense against HIS's monopolization and attempted monopolization counterclaims will also involve lengthy, complex, and expensive litigation over the proper market definition and the assessment of market power (including barriers to entry) in that properly defined market. All of that would be wasteful if HIS cannot show that Edwards's trade secret claims were objectively baseless.

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[17] *See* n.16, *supra*.

Accordingly, pursuant to *Rule 42(b) of the Federal Rules of Civil Procedure*, the Court bifurcates HIS's antitrust counterclaims from the rest of this litigation. The litigation will move forward, through trial if necessary, on Edwards's claims and HIS's breach of contract counterclaim. The Court will then resolve HIS's antitrust counterclaims after Edwards's claims and HIS's breach of contract counterclaim have been determined. Further, the Court stays all discovery that is related only to HIS's antitrust counterclaims. In other words, if discovery is otherwise properly related to the prosecution or defense of any of Edwards's claims or HIS's breach of contract counterclaim, that discovery may proceed, even if it also may be relevant to HIS's antitrust counterclaims. If, however, **[**52]** discovery is related only to HIS's antitrust counterclaims, it may not proceed at this time, absent stipulation of the parties or further order of the Court.

CONCLUSION

The Court GRANTS IN PART AND DENIES IN PART Edwards's Motion to **[*1181]** Dismiss HIS's Counterclaims (ECF 228) as stated in this Opinion and Order. The Court also BIFURCATES HIS's antitrust counterclaims and STAYS any discovery that is related only to HIS's antitrust counterclaims, as stated in this Opinion and Order. HIS's breach of contract counterclaim, and all appropriate discovery related to that counterclaim, may proceed.

IT IS SO ORDERED.

DATED this 23rd day of August, 2021.

/s/ Michael H. Simon

Michael H. Simon

United States District Judge

Hetronic Int'l, Inc. v. Hetronic Germany GmbH

United States Court of Appeals for the Tenth Circuit

August 24, 2021, Filed

Nos. 20-6057 & 20-6100

Reporter

10 F.4th 1016 *; 2021 U.S. App. LEXIS 25354 **; 2021 U.S.P.Q.2D (BNA) 896

HETRONIC INTERNATIONAL, INC., Plaintiff - Appellee, v. HETRONIC GERMANY GMBH; HYDRONIC-STEUERSYSTEME GMBH; ABI HOLDING GMBH; ABITRON GERMANY GMBH; ABITRON AUSTRIA GMBH; ALBERT FUCHS, Defendants - Appellants.

Subsequent History: Later proceeding at *Abitron Austria GmbH v. Hetronic Int'l, Inc., 142 S. Ct. 2673, 212 L. Ed. 2d 761, 2022 U.S. LEXIS 2324, 2022 WL 1295705 (U.S., May 2, 2022)*

US Supreme Court certiorari granted by *Abitron Austria GmbH v. Hetronic Int'l, Inc., 143 S. Ct. 398, 214 L. Ed. 2d 197, 2022 U.S. LEXIS 4835, 2022 WL 16703748 (U.S., Nov. 4, 2022)*

Motion granted by *Abitron Austria GmbH v. Hetronic Int'l, Inc., 143 S. Ct. 978, 215 L. Ed. 2d 104, 2023 U.S. LEXIS 1011, 2023 WL 2227654 (U.S., Feb. 27, 2023)*

Vacated by, Remanded by *Abitron Austria GmbH v. Hetronic Int'l, Inc., 2023 U.S. LEXIS 2789 (U.S., June 29, 2023)*

Prior History: [1]** Appeal from the United States District Court for the Western District of Oklahoma. (D.C. No. 5:14-CV-00650-F).

Hetronic Int'l, Inc. v. Hetronic Germany GmbH, 2020 U.S. Dist. LEXIS 73896 (W.D. Okla., Apr. 22, 2020)
Hetronic Int'l, Inc. v. Hetronic Germany GmbH, 2019 U.S. Dist. LEXIS 118271 (W.D. Okla., Mar. 22, 2019)

Core Terms

district court, extraterritoriality, Defendants', Lanham Act, trademark, commerce, products, sales, infringing, courts, injunction, personal jurisdiction, intellectual property, ownership, substantial effect, summary judgment, assessing, rights, consumers, marks, selling, defendant's conduct, disputed, abroad, entities, customers, remote control, successor, contacts, cases

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

HN1[] **Standards of Review, De Novo Review**

The appellate court reviews de novo a district court's exercise of personal jurisdiction, and the appellate court considers each defendant separately, The plaintiff has the burden of proving that the court has jurisdiction.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

Evidence > Types of Evidence > Documentary Evidence > Affidavits

HN2[] **In Rem & Personal Jurisdiction, In Personam Actions**

When the district court evaluates personal jurisdiction based only on the complaint and affidavits, a prima facie showing of personal jurisdiction is sufficient.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Long Arm Jurisdiction

HN3[] **In Personam Actions, Long Arm Jurisdiction**

In assessing personal jurisdiction, a corporation's contacts with a forum may be imputed to its successor.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Mergers & Acquisitions Law > Liabilities & Rights of Successors > Mere Continuation

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Consent

Mergers & Acquisitions Law > Liabilities & Rights of Successors > Successor Liability Doctrine

HN4[] **Contract Conditions & Provisions, Forum Selection Clauses**

Courts that have considered whether a successor corporation is bound by its predecessor's contractual waiver of personal jurisdiction through a forum-selection clause have uniformly found that it is consistent with due process to impute a corporation's waiver of personal jurisdiction to its successor for the same reasons that imputation of jurisdictional contacts is appropriate. Under this theory of personal jurisdiction, the court asks whether the successor is a mere continuation of the predecessor.

Mergers & Acquisitions Law > Liabilities & Rights of Successors > De Facto Mergers

Torts > Vicarious Liability > Corporations > Predecessor & Successor Corporations

Mergers & Acquisitions Law > Liabilities & Rights of Successors > Mere Continuation

Mergers & Acquisitions Law > Liabilities & Rights of Successors > Successor Liability Doctrine

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Shareholders

HN5[] **Liabilities & Rights of Successors, De Facto Mergers**

Under Oklahoma law, the general rule is that where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor. But Oklahoma's courts have recognized four exceptions to that general rule: (1) Where there is an agreement to assume such debts or liabilities; (2) Where the circumstances surrounding the transaction warrant a finding that there was a consolidation or merger of the corporations; or (3) that the transaction was fraudulent in fact; or (4) that the purchasing corporation was a mere continuation of the selling company. Under the mere continuation exception, the test is not whether there is a continuation of business operations, but whether there is a continuation of the corporate entity. To assess whether the corporate entity has been continued, Oklahoma courts consider (1) whether there is a common identity of directors, officers, and stockholders before and after the sale, (2) whether there was good consideration for the sale, and (3) whether the seller corporation continues to exist in fact. Concerning the third factor, the bare de jure existence of the seller corporation after the sale is insufficient alone to establish that the successor corporation is not a mere continuation of the seller company.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Long Arm Jurisdiction

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

HN6[] **In Rem & Personal Jurisdiction, Constitutional Limits**

Under *Fed. R. Civ. P. 4(k)(2)*, which has been described as a kind of federal long-arm statute, a court may exercise personal jurisdiction over a foreign defendant if (1) the plaintiff's claims arise under federal law; (2) the defendant is not subject to the jurisdiction of any state court of general jurisdiction; and (3) the plaintiff can show that the exercise of jurisdiction comports with due process.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Consent

HN7[] **In Personam Actions, Consent**

A defendant who wants to preclude use of *Fed. R. Civ. P. 4(k)(2)* has only to name some other state in which the suit could proceed. Naming a more appropriate state would amount to a consent to personal jurisdiction there (personal jurisdiction, unlike federal subject-matter jurisdiction, is waivable). If, however, the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use *Rule 4(k)(2)*.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN8[] **In Personam Actions, Due Process**

To determine whether the exercise of federal jurisdiction over defendants satisfies due process, the court must determine whether defendants had minimum contacts with the United States. Under that standard, a federal court can exercise specific personal jurisdiction over a foreign defendant only if the defendant purposely directed its activities at the forum and the plaintiff's injuries arose from the defendant's forum-related activities.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN9[] **Standards of Review, Abuse of Discretion**

The appellate court reviews for abuse of discretion the district court's grant of a permanent injunction. A district court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. A district court's factual findings are clearly erroneous if they lack factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > False Designation of Origin

Trademark Law > ... > Registration Procedures > Federal Registration > Degree of Protection

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Jurisdiction

HN10[] **Likelihood of Confusion, False Designation of Origin**

The Lanham Act governs federal trademark and unfair competition disputes. It subjects to liability any person who shall use in commerce any colorable imitation of a registered mark, *15 U.S.C.S. § 1114(1)*, or any person who uses in commerce any word, false description, or false designation of origin that is likely to cause confusion or to deceive as to the affiliation, origin, or sponsorship of any goods, *15 U.S.C.S. § 1125(a)(1)*. Notably, the Act defines commerce broadly as all commerce which may lawfully be regulated by Congress, *15 U.S.C.S. § 1127*, and affords federal courts jurisdiction over all claims arising under it, *15 U.S.C.S. § 1121(a)*.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Jurisdiction

HN11[] **Lanham Act, Extraterritorial Jurisdiction**

The United States Supreme Court established a two-step framework for analyzing extraterritoriality issues. At step one, the court asks whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. The Supreme Court settled this question with regard to the Lanham Act when it held that the Act's use in commerce element and broad definition of commerce clearly indicate Congress's intent that the Act should apply extraterritorially. When a court concludes at step one that the statute in question applies extraterritorially, it need not reach step two (which asks whether the case involves a domestic application of the statute. Instead, when the presumption against extraterritoriality has been rebutted, the scope of an extraterritorial statute turns on the limits Congress has (or has not) imposed on the statute's foreign application. In other words, just because a statute can apply extraterritorially doesn't mean that it always will.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Jurisdiction

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

HN12[] **False Advertising, Lanham Act**

In deciding whether the Lanham Act governs a defendant's foreign conduct, the McBee v. Delica Co. court held that the court begins by determining whether the defendant is an American citizen. That's because a separate constitutional basis for jurisdiction exists for control of activities, even foreign activities, of an American citizen. The court adopted a separate test to assess the Lanham Act's extraterritorial reach when a plaintiff seeks damages based on foreign activities of foreign defendants. In that situation, the court held that the Lanham Act applies only if the complained-of activities have a substantial effect on U.S. commerce, viewed in light of the purposes of the Lanham Act.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Jurisdiction

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

HN13[] **False Advertising, Lanham Act**

Besides one caveat, the Tenth Circuit adopts the McBee v. Delica Co. framework for deciding whether the Lanham Act governs a defendant's foreign conduct. The Tenth Circuit agrees with McBee that the Lanham Act will usually extend extraterritorially when the defendant is an American citizen. No one questions Congress's ability to regulate the conduct of its own citizens, even extraterritorial conduct. Indeed, Congressional power over American citizens is a matter of domestic law that raises no serious international concerns, even when the citizen is located abroad. So when the defendant is an American citizen, courts may conclude that the Lanham Act reaches that defendant's extraterritorial conduct even when the effect on U.S. commerce isn't substantial.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Jurisdiction

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

HN14[] **False Advertising, Lanham Act**

When a plaintiff seeks to recover under the Lanham Act against a foreign national, the Tenth Circuit also agrees with McBee v. Delica Co. that the plaintiff must show that the defendant's conduct has a substantial effect on U.S. commerce. Requiring that the defendant's conduct has a substantial effect on U.S. commerce aligns the test for

Lanham Act extraterritoriality with both the Supreme Court's antitrust jurisprudence and general principles of foreign relations law.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Jurisdiction

HN15[] **Lanham Act, Extraterritorial Jurisdiction**

If a plaintiff successfully shows that a foreign defendant's conduct has had a substantial effect on U.S. commerce, courts should also consider whether extraterritorial application of the Lanham Act would create a conflict with trademark rights established under the relevant foreign law. In conducting this analysis, courts should weigh any foreign trademark rights established by the defendant.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Jurisdiction

HN16[] **Lanham Act, Extraterritorial Jurisdiction**

In deciding whether the Lanham Act applies extraterritorially, courts should consider three factors. First, courts should determine whether the defendant is a U.S. citizen. Second, when the defendant is not a U.S. citizen, courts should assess whether the defendant's conduct had a substantial effect on U.S. commerce. Third, only if the plaintiff has satisfied the substantial-effects test, courts should consider whether extraterritorial application of the Lanham Act would create a conflict with trademark rights established under foreign law.

Securities Law > ... > Subject Matter Jurisdiction > Postoffering & Secondary Distributions > Federal Jurisdiction

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Jurisdiction

Securities Law > ... > Scope of Provisions > Covered Transactions > Foreign Transactions

Securities Law > Postoffering & Secondary Distributions > Scope of Provisions > Statutory Application & Interpretation

HN17[] **Postoffering & Secondary Distributions, Federal Jurisdiction**

Questions about the extraterritorial reach of a federal statute go to the merits, not jurisdiction. In assessing the extraterritoriality of the Securities Exchange Act, to ask what conduct *§ 10(b)* reaches is to ask what conduct *§ 10(b)* prohibits, which is a merits question. That same rationale holds true for the Lanham Act.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

Business & Corporate Compliance > ... > Unfair Competition > Federal Unfair Competition Law > Lanham Act

HN18[] **Lanham Act, Extraterritorial Jurisdiction**

District courts should ordinarily decide questions about the scope of the Lanham Act's extraterritorial reach as a matter of law, preferably in the litigation's early stages.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

Governments > Legislation > Interpretation

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Jurisdiction

HN19[] **Lanham Act, Extraterritorial Jurisdiction**

The proper extraterritorial reach of a Lanham Act injunction is a matter of statutory interpretation. The scope of an extraterritorial statute turns on the limits Congress has (or has not) imposed on the statute's foreign application. The court has always considered questions of statutory interpretation as quintessentially legal in nature. The question here is one of statutory interpretation and thus a pure matter of law. Judges, not juries, decide purely legal questions. The extraterritoriality of the Lanham Act usually presents just such a question.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Jurisdiction

HN20[] **Lanham Act, Extraterritorial Jurisdiction**

Actual factual disputes underlying the extraterritoriality question certainly can arise. For example, a defendant could dispute whether (or how much of) its allegedly infringing products entered the United States. Establishing that factual predicate could affect the court's determination of whether the defendant's conduct had a substantial effect on U.S. commerce. In those instances, the court may submit the factual dispute to the jury while reserving the ultimate legal determination for itself. The Tenth Circuit has expressed its preference for this procedure in dealing with issues that, like the Lanham Act's extraterritorial scope, usually constitute a question of law but may involve factual disputes.

Governments > Legislation > Interpretation

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Jurisdiction

HN21[] **Legislation, Interpretation**

The scope of the Lanham Act's extraterritorial reach generally presents a legal question of statutory interpretation.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

HN22[] **Lanham Act, Extraterritorial Jurisdiction**

In deciding whether the Lanham Act applies extraterritorially, the substantial effects test requires that there be evidence of impacts within the United States, and these impacts must be of a sufficient character and magnitude to give the United States a reasonably strong interest in the litigation. In applying this test, courts should keep in mind the Lanham Act's core purposes—protecting U.S. consumers from confusion and assuring a trademark's owner that it will reap the financial and reputational rewards associated with having a desirable name or product.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Jurisdiction

HN23[] **Lanham Act, Extraterritorial Jurisdiction**

A foreign infringer's direct U.S. sales do not factor into our analysis of whether the Lanham Act applies abroad. Applying the Lanham Act to a foreign infringer's direct U.S. sales is not an extraterritorial application of the Act: Courts have repeatedly distinguished between domestic acts of a foreign infringer and foreign acts of that foreign infringer; the extraterritoriality analysis attaches only to the latter.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

Evidence > Burdens of Proof > Allocation

HN24[] **Lanham Act, Extraterritorial Jurisdiction**

Numerous courts have recognized that a foreign defendant can be liable for Lanham Act violations when its products find their way into the United States, even if initially sold abroad: Quite commonly, plaintiffs in these sorts of cases can meet their burden by presenting evidence that while the initial sales of infringing goods may occur in foreign countries, the goods subsequently tend to enter the United States in some way and in substantial quantities. And when a plaintiff presents evidence that American consumers have been exposed to the infringing mark, confusion and reputational harm can often be inferred.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

Governments > Legislation > Interpretation

HN25[] **Lanham Act, Extraterritorial Jurisdiction**

Once a court determines that a statute applies extraterritorially to a defendant's conduct, that statute captures all the defendant's illicit conduct.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Jurisdiction

HN26[] **Lanham Act, Extraterritorial Jurisdiction**

In connection with deciding whether the Lanham Act applies extraterritorially, several courts have recognized that evidence of diverted sales evinces a substantial effect on U.S. commerce: The effect-on-U.S.-commerce criteria may be met even where all of the challenged transactions occurred abroad, and where injury would seem to be limited to the deception of consumers' abroad, as long as there is monetary injury in the United States to an American plaintiff. Courts have considered sales diverted from American companies in foreign countries in their analyses.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

HN27[] **Appeals, Appellate Briefs**

The appellate court generally deems arguments raised for the first time in a reply brief waived.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Extraterritorial Jurisdiction

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

HN28[] **Lanham Act, Extraterritorial Jurisdiction**

In connection with deciding whether the Lanham Act applies extraterritorially, when the defendant is a U.S. citizen with a U.S. presence, the sales divert from one U.S. company to another—either way, U.S. commerce benefits from the sales revenue flowing into the U.S. economy.

Civil Procedure > Judgments > Entry of Judgments > Compelling Specific Acts

Civil Procedure > Remedies > Injunctions

HN29[] **Entry of Judgments, Compelling Specific Acts**

Fed. R. Civ. P. 65 requires that injunctions contain reasonable detail. *Fed. R. Civ. P. 65(d)(1)(C)*. Injunctions violate *Rule 65* when the delineation of the proscribed activity lacks particularity, or when containing only an abstract conclusion of law, not an operative command capable of enforcement.

Business & Corporate Compliance > ... > Trademark Cancellation & Establishment > Commercial Use > Actual Use

Trademark Law > ... > Equitable Relief > Injunctions > Preliminary Injunctions

Business & Corporate Compliance > ... > Trademark Cancellation & Establishment > Priority > Actual Use Priority

HN30[] **Commercial Use, Actual Use**

Even the owner of a federally registered mark—who enjoys the presumption of nationwide priority—is not entitled to injunctive relief except in the area actually penetrated through use of the mark. A trademark extends to every market where the trader's goods have become known and identified by his use of the mark. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN31[] **Standards of Review, De Novo Review**

District court's ruling on summary judgment is reviewed de novo.

Business & Corporate Compliance > ... > Judgments > Enforcement & Execution > Foreign Judgments

HN32[] **Business & Corporate Compliance, Foreign Judgments**

Federal courts recognize and enforce foreign judgments if they meet due-process standards. Valid judgments rendered in a foreign nation will be accorded the same degree of recognition to which sister state judgments are entitled. This due-process standard is met if there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting, or fraud in procuring the judgment.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN33[] **Estoppel, Collateral Estoppel**

Issue preclusion bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim. In the civil context, four criteria must be met before a court may apply the doctrine of issue preclusion: (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN34[] **Estoppel, Collateral Estoppel**

For issue preclusion purposes, the court aims to prevent repetitious litigation of what is essentially the same dispute.

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN35[] **Standards of Review, Reversible Errors**

Even if the trial court is mistaken, it will not be reversed unless its ruling results in substantial prejudice, or had a substantial effect on the outcome of the case.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN36[] **Standards of Review, Abuse of Discretion**

Evidentiary rulings generally are committed to the very broad discretion of the trial judge, and they may constitute an abuse of discretion only if based on an erroneous conclusion of law, a clearly erroneous finding of fact or a manifest error in judgment. And even if the court finds an erroneous evidentiary ruling, a new trial will be ordered only if the error affected the substantial rights of the parties.

Civil Procedure > Appeals > Record on Appeal

Civil Procedure > Appeals > Standards of Review

HN37[] **Appeals, Record on Appeal**

The appellate court may affirm the district court for any reason supported by the record. A district court may exclude an economic expert if the expert's opinions lacked foundation because they were based on the self-serving statements of an interested party.

Counsel: Geren T. Steiner (Anton J. Rupert and Mack J. Morgan with him on the briefs), of Rupert, Steiner & Morgan PLLC, Oklahoma City, Oklahoma, for Defendants-Appellants.

Debbie L. Berman (Wade A. Thomson and Matthew S. Hellman with her on the brief), of Jenner & Block LLP, Chicago, Illinois, for Plaintiff-Appellee.

Judges: Before PHILLIPS, MURPHY, and McHUGH, Circuit Judges.

Opinion by: PHILLIPS

Opinion

[*1023] PHILLIPS, Circuit Judge.

Hetronic International, Inc., a U.S. company, manufactures radio remote controls—the kind used to remotely operate heavy-duty construction equipment (think cranes). Defendants, none of whom are U.S. citizens, distributed Hetronic's products, mostly in Europe. That relationship worked well for nearly a decade. But then one of Defendants' employees stumbled across an old research-and-development agreement between the parties. Embracing a creative legal interpretation of the agreement endorsed by Defendants' lawyers, Defendants concluded that they—not Hetronic—owned the rights to Hetronic's trademarks and other intellectual property.

That caused some tension in the relationship. Defendants began **[**2]** manufacturing their own products—identical to Hetronic's—and selling them under the Hetronic brand, mostly in Europe. They even kept the same product names. Hetronic terminated the parties' distribution agreements, **[*1024]** but that didn't stop Defendants from making tens of millions of dollars selling their copycat products (which they continue to sell today). Defendants attempted a brief foray into the U.S. market but backed off after Hetronic sued them.

Hetronic asserted numerous claims against Defendants, but we're here concerned almost exclusively with its trademark claims under the *Lanham Act*. A jury sitting in the Western District of Oklahoma awarded Hetronic over $100 million in damages, most of which related to Defendants' trademark infringement. Then on Hetronic's motion, the district court entered a worldwide injunction barring Defendants from selling their infringing products. Defendants have ignored the injunction.

In the district court and now on appeal, Defendants have focused on one defense in particular: Though they accept that the Lanham Act can sometimes apply extraterritorially, they insist that the Act's reach doesn't extend to their conduct, which generally involved foreign **[**3]** defendants making sales to foreign consumers. Our circuit has yet to grapple with that question. After considering the Supreme Court's lone decision on the issue and persuasive authority from our sibling circuits, we conclude that the district court properly applied the Lanham Act to Defendants' conduct. But we narrow the district court's expansive injunction. And so, exercising jurisdiction under *28 U.S.C. § 1291*, we affirm in part, reverse in part, and remand for further consideration consistent with this opinion.

BACKGROUND

I. Factual Background

Hetronic sells and services its radio remote controls in over forty-five countries around the world. Though Hetronic offers a wide range of radio remote controls, the parties' dispute centers on ten of those products: ERGO, EURO, GL, GR, HH, MINI, NOVA, Pocket, TG, and RX. Hetronic's products feature a distinctive black-and-yellow color scheme to distinguish them from those of its competitors:

Hetronic NOVA

Hetronic ERGO

Appellants' App. vol. 7 at 1615-16, 1644.

Hetronic markets and distributes its radio remote controls through a worldwide network of wholly-owned subsidiaries and distributors. In 2006, Hetronic entered distribution and licensing agreements with Hydronic Steuersysteme GmbH, **[**4]** an Austrian corporation managed by Albert Fuchs. In time, Hydronic came to distribute Hetronic's products in over twenty European countries. In 2007, Hetronic entered similar distribution and licensing agreements with a company that would eventually be purchased by Hetronic Germany **[*1025]** GmbH, a German corporation owned by Fuchs. Hetronic Germany became Hetronic's principal distributor in Germany.

The distribution and licensing agreements authorized Hydronic and Hetronic Germany to assemble and sell Hetronic's remote controls under Hetronic's brand, but they were required to purchase parts from Hetronic unless otherwise authorized in writing. Further, the two distributors agreed to act in Hetronic's best interest and to protect Hetronic's confidential information. They also agreed not to compete with Hetronic. They abided by those conditions without issue through much of 2011.

September 2011 marked the beginning of the end of Hetronic's business relationship with Hetronic Germany and Hydronic. That month, a Hetronic Germany employee happened upon an old research-and-development agreement entered between Hetronic and Hetronic Germany's predecessor. After consulting with legal counsel, Hetronic **[**5]** Germany took the position that it owned all the technology developed under that agreement (more on that later).

Based on that understanding, Hetronic Germany and Hydronic began reverse-engineering Hetronic's products. One of Hetronic Germany's former employees testified by deposition that he used Hetronic-manufactured parts to try to "recreate the model . . . so that no difference could be seen." *Id.* at 1631. Once they developed these new, copycat parts (what they referred to as "KH" parts, *id.*), Hetronic Germany and Hydronic sought out new suppliers to source them. Eventually, both Hetronic Germany and Hydronic began selling Hetronic-branded products that incorporated KH parts sourced from unauthorized third-parties.

In 2014, a whistleblower who had worked for Hetronic Germany told Hetronic what had been going on the past few years. That June, once Hetronic understood the scope of Hetronic Germany and Hydronic's activities, it terminated their licensing and distribution agreements. But both distributors continued to sell Hetronic-branded products for several months.

Around the same time, Fuchs used an Austrian company he owned, ABI Holding GmbH, to incorporate two new companies, Abitron **[**6]** Germany GmbH and Abitron Austria GmbH. Abitron Austria purchased Hydronic in August 2014; Abitron Germany purchased Hetronic Germany the following month. They soon began competing directly with Hetronic, selling the same NOVA and ERGO products with the exact same trade dress (compared below).

[*1026] 

Id. at 1644. Before this litigation ensued, they sold several hundred thousand dollars' worth of products in the United States.

II. Procedural Background

In June 2014, Hetronic sued Hetronic Germany and Hydronic in the Western District of Oklahoma, alleging breach of contract. In 2015, Hetronic filed an amended complaint that added as defendants Fuchs, ABI, Abitron Austria, and Abitron Germany. The amended complaint also added new claims under the Lanham Act and state tort law.

Two motions to dismiss soon followed, one filed by the Abitron companies and the other by ABI and Fuchs. Each motion argued that the district court lacked personal jurisdiction over the relevant Defendants. The district court denied both motions. First, the district court concluded that the forum-selection clause in Hetronic's agreements with Hetronic Germany and Hydronic extended to both Abitron Germany and Abitron Austria **[**7]** as Hetronic Germany's and Hydronic's successors-in-interest. Second, the district court denied ABI and Fuchs's motion because it concluded that they had purposefully availed themselves of a U.S. forum under *Federal Rule of Civil Procedure 4(k)(2)*.

Hetronic then filed a Second Amended Complaint, and both sides moved for summary judgment. Though the district court granted Hetronic's motion on Defendants' counterclaims, it otherwise denied the motion.

Defendants' motion argued that the court lacked subject-matter jurisdiction to resolve Hetronic's Lanham Act claims because the conduct at issue occurred overseas. Specifically, Defendants asserted that the Lanham Act applies extraterritorially only if a defendant's conduct has a substantial effect on U.S. commerce; because that was allegedly lacking here, Defendants maintained that Hetronic's claims had to be dismissed. The district court rejected that argument and denied Defendants summary judgment based on their extraterritoriality defense.

While Defendants played defense in federal district court, they sought to go on offense in the European Union. In July 2015, Abitron Germany sought a "declaration of invalidity" from the European Union Intellectual Property Office (EUIPO) **[**8]** that would nullify Hetronic's "NOVA" **[*1027]** trademark in the EU. *Id.* vol. 13 at 3106-07, 3171. The Cancellation Division—the initial EUIPO tribunal to consider the request—rejected Abitron Germany's claim. Abitron Germany appealed, but the Board of Appeal affirmed. The Board concluded that Hetronic owned all the disputed intellectual property.

Based on that ruling, Hetronic moved for summary judgment on Defendants' defense that they owned the disputed intellectual property, arguing that the doctrine of issue preclusion barred Defendants from relitigating that question. After briefing and two hearings, the district court granted Hetronic's motion, concluding that the EUIPO proceeding afforded Defendants a full and fair opportunity to adjudicate the merits of the ownership dispute.

About a week later, the eleven-day jury trial began. The jury returned a verdict for Hetronic on all counts, finding that Defendants had willfully infringed Hetronic's trademarks. The jury awarded Hetronic over $115 million in damages, $96 million of which related to Defendants' Lanham Act violations.

After the trial, Hetronic moved for a permanent injunction to prohibit Defendants from further infringing its trademarks. **[**9]** In opposing the injunction, Defendants reasserted their contention that the court lacked jurisdiction under the Lanham Act to enjoin Defendants' foreign activities. Applying the facts established at trial, the district court concluded that the Lanham Act reached Defendants' foreign conduct. The court granted Hetronic's motion and entered a permanent injunction order, enjoining Defendants' infringing activities worldwide.

This appeal followed.

DISCUSSION

Defendants raise numerous issues on appeal. First, Defendants argue that the district court erroneously exercised personal jurisdiction over four of the six defendants. Second, Defendants argue that the district court erred in concluding that the Lanham Act applied extraterritorially to reach their foreign activities. Third, Defendants argue that the district court erred when it ruled that issue preclusion barred them from asserting at trial that they owned the disputed intellectual property. Fourth, Defendants argue that the district court made several erroneous evidentiary rulings at trial. We address each argument in turn.

I. Personal Jurisdiction

Defendants have never disputed the district court's exercise of personal jurisdiction over **[**10]** Hetronic Germany and Hydronic, which derived from a forum-selection clause in the parties' distribution and licensing agreements. That clause designates Oklahoma as the forum for all disputes. But Defendants challenge the district court's exercise of personal jurisdiction over the Abitron entities, ABI, and Fuchs. Following the parties' lead, we first address the court's personal jurisdiction over Abitron Germany and Abitron Austria and then consider its jurisdiction over Fuchs and ABI.

HN1[] We review de novo a district court's exercise of personal jurisdiction, *ClearOne Commc'ns, Inc. v. Bowers, 651 F.3d 1200, 1214 (10th Cir. 2011)* (footnote and citation omitted), and we consider each defendant separately, *Newsome v. Gallacher, 722 F.3d 1257, 1265-66 (10th Cir. 2013)* (citation omitted). "The plaintiff has the burden of proving that the court has jurisdiction." *Compañía de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V., 970 F.3d 1269, 1281 (10th Cir. 2020)* (citation omitted), *cert. denied*, *No. 20-1033, 141 S. Ct. 2793, 210 L. Ed. 2d 927, 2021 U.S. LEXIS 3218, 2021 WL 2519105 (2021)*.

HN2[] When the district court evaluates personal jurisdiction "based only on the **[*1028]** complaint and affidavits, 'a prima facie showing of personal jurisdiction' is sufficient." *Niemi v. Lasshofer, 770 F.3d 1331, 1347 (10th Cir. 2014)* (quoting *Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1070 (10th Cir. 2008)*). Because the district court here assessed personal jurisdiction based only on the complaint and affidavits—and because Defendants never challenge the jurisdictional facts upon which the district court based its rulings—we consider only whether Hetronic **[**11]** made a prima facie showing of personal jurisdiction. *See id.*

A. Abitron Companies

Though Abitron Germany and Abitron Austria weren't parties to Hetronic's distribution and licensing agreements with Hetronic Germany and Hydronic, the district court nevertheless concluded that the forum-selection clauses in those agreements bound both Abitron entities. According to the district court, Abitron Austria and Abitron Germany were Hydronic's and Hetronic Germany's successors-in-interest. We agree.

HN3[] In assessing personal jurisdiction, we have acknowledged that "[a] corporation's contacts with a forum may be imputed to its successor. . . ." *Williams v. Bowman Livestock Equip. Co., 927 F.2d 1128, 1132 (10th Cir. 1991)* (citation omitted). But our Circuit has yet to address the specific issue here: whether a successor corporation is bound by its predecessor's contractual waiver of personal jurisdiction through a forum-selection clause.

HN4[] Courts that have considered this question "have uniformly found that it is consistent with due process to impute a corporation's waiver of personal jurisdiction to its successor . . . for the same reasons that imputation of jurisdictional contacts is appropriate." *Patin v. Thoroughbred Power Boats Inc., 294 F.3d 640, 654 & n.19 (5th Cir. 2002)* (collecting cases); *cf.* *Purdue Rsch. Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 783-84 (7th Cir. 2003)* (distinguishing between "a corporate successor," whose **[**12]** contacts may be attributed to a predecessor, and "an assignee of a contract," whose contacts generally shouldn't be attributed to the assignor). Under this theory of personal jurisdiction, we ask whether the successor is a "mere continuation" of the predecessor. *Patin, 294 F.3d at 654* ("The premise underlying the 'mere continuation' exception to the rule against successor liability is that the successor corporation is, in fact, the *same corporate entity* as the predecessor corporation, simply wearing a 'new hat.'" (citations omitted)).

To start, we must first answer the threshold question whether Abitron Austria and Abitron Germany are in fact successors-in-interest of Hydronic and Hetronic Germany, respectively. To decide that question, we look to the law of the forum state—here, Oklahoma. *See* *Williams, 927 F.2d at 1132*. HN5[] Under Oklahoma law, "[t]he general rule . . . is that where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor." *Pulis v. U.S. Elec. Tool Co., 1977 OK 36, 561 P.2d 68, 69 (Okla. 1977)*; *see also* *Flores v. U.S. Repeating Arms Co., 19 F. App'x 795, 797 (10th Cir. 2001)* (unpublished) (applying Oklahoma law). But Oklahoma's courts have recognized four exceptions to that general rule:

(1) Where there is an agreement to assume such debts or liabilities[;]

> (2) Where **[**13]** the circumstances surrounding the transaction warrant a finding that there was a consolidation or merger of the corporations[;] or
> (3) that the transaction was fraudulent in fact[;] or
> (4) that the purchasing corporation was a mere continuation of the selling company.

[*1029] *Pulis, 561 P.2d at 69* (citations omitted). Only the fourth exception applies here.

Under the "mere continuation" exception, "the test is not whether there is a continuation of business operations, but whether there is a continuation of the corporate entity." *Crutchfield v. Marine Power Engine Co., 2009 OK 27, 209 P.3d 295, 301 (Okla. 2009)* (footnote omitted). To assess whether the corporate entity has been continued, Oklahoma courts consider (1) "whether there is a common identity of directors, officers, and stockholders before and after the sale," (2) "whether there was good consideration for the sale," and (3) "whether the seller corporation continues to exist in fact." *Id.* (footnote omitted). Concerning the third factor, "[t]he bare *de jure* existence of the seller corporation after the sale is insufficient alone to establish that the successor corporation is not a mere continuation of the seller company." *Id. at 301-02* (footnote omitted).

These factors weigh heavily in favor of concluding that the Abitron entities are Hydronic's and **[**14]** Hetronic Germany's successors-in-interest. The analysis is the same for both companies under the first and third factors. Starting with the first factor, Defendants don't contest that Fuchs owns all four companies. Nor do they contest the district court's finding that "the Abitron entities are using the same facilities, management, employees, customer lists, and product mark and dress as H[etronic] Germany and Hydronic." Appellants' App. vol. 1 at 122-23. Further, Hetronic Germany's former CEO became the CEO of both Abitron companies.

On the third factor, though the seller corporations continue to exist in fact, their "bare *de jure* existence" carries little weight. *Crutchfield, 209 P.3d at 301-02*. Almost all of Hydronic's and Hetronic Germany's assets were transferred to the Abitron entities, with only "a small amount being left for the purposes of satisfying debt with Hetronic International." Appellants' App. vol. 1 at 122.

The analysis on the second prong—whether there was good consideration for the sale—is less straightforward. Abitron Germany purportedly paid €3 million[1] to purchase Hetronic Germany. But no funds were exchanged when the sale closed, and ABI loaned Abitron Germany the money to complete the sale. **[**15]** As for the sale of Hydronic to Abitron Austria, the parties provide no information about the purchase's details. So we can't assess the second prong as to Abitron Austria.

But even if we concluded that the second factor cuts against finding that the Abitron companies are successors-in-interest (and it isn't clear that it does), Oklahoma courts weigh all three factors in deciding this issue. *See* *Pulis, 561 P.2d at 71-72*. At least two of those three factors weigh against Defendants. Considering the three factors collectively, particularly the common identity of directors, officers, and stockholders before and after the sale, we hold that the Abitron companies constitute a "mere continuation" of Hydronic and Hetronic Germany and are therefore successors-in-interest under Oklahoma law. *See* *Crutchfield, 209 P.3d at 301*. And because the Abitron entities are mere continuations of Hetronic Germany and Hydronic, the district court rightly concluded that the forum-selection clause in the parties' licensing agreements bound both Abitron Germany and Abitron Austria.[2] *See* *Patin, 294 F.3d at 654*. Consequently, the district **[*1030]** court properly exercised personal jurisdiction over both companies.

B. Fuchs and [16] ABI**

The district court ruled that it could exercise personal jurisdiction over Fuchs and ABI under *Federal Rule of Civil Procedure 4(k)(2)*. *Rule 4(k)(2)* states that

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[1] €3 million refers to 3 million euros. Though the exchange rate varies, 3 million euros currently equates to about $3.54 million. *See Foreign Exchange Rates H.10*, Board of Governors of the Federal Reserve System, https://www.federalreserve.gov/releases/h10/current/ (last visited July 29, 2021).

[2] Defendants appear to argue that the forum-selection clauses don't bind them because Hetronic sued them only *after* terminating the licensing agreements. Our circuit hasn't addressed that issue, but the Supreme Court "presume[s] as a matter of contract interpretation that . . . parties d[o] not intend a pivotal dispute resolution provision to terminate for all purposes upon the expiration of [an] agreement." *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B., 501 U.S. 190, 208, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991)*. Though *Litton* related to arbitration clauses in the collective-bargaining context, our sibling circuits that have considered this question agree that dispute-resolution clauses generally may be enforced even after an agreement is terminated. *Silverpop Sys., Inc. v. Leading Mkt. Techs., Inc., 641 F. App'x 849, 857 (11th Cir. 2016)* (unpublished) ("While contractual obligations may expire upon the termination of a contract, provisions that are structural (e.g., relating to remedies *and the resolution of disputes*) may survive that termination." (emphasis added) (citations omitted)); *U.S. Smoke & Fire Curtain, LLC v. Bradley Lomas Electrolok, Ltd., 612 F. App'x 671, 672-73 (4th Cir. 2015)* (unpublished) ("Generally, dispute-resolution provisions, such as forum-selection clauses, are enforceable beyond the expiration of the contract if they are otherwise applicable to the disputed issue and the parties have not agreed otherwise." (citations omitted)).

> For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:
> (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
>
> (B) exercising jurisdiction is consistent with the United States Constitution and laws.

Fed. R. Civ. P. 4(k)(2).***HN6***[] Under this rule, which has been described as a kind of federal long-arm statute, a court may exercise personal jurisdiction over a foreign defendant if (1) the "plaintiff's claims arise under federal law"; (2) "the defendant is not subject to the jurisdiction of any state court of general jurisdiction"; and (3) "the plaintiff can show that the exercise of jurisdiction comports with due process." *CGC Holding Co. v. Hutchens, 974 F.3d 1201, 1208 (10th Cir. 2020)* (citing *Grupo Cementos, 970 F.3d at 1281 n.1*).

Defendants don't dispute that Hetronic's claims arise under federal law; their arguments focus on the second and third elements. On the second element, Defendants indirectly argue that the district court failed to properly consider whether they were subject to the jurisdiction of other states' courts besides Oklahoma. *See* Appellants' Opening Br. **[**17]** at 53 (faulting the district court because it "actually considered contacts with other forums (Nevada, Massachusetts) that might have been proper forums, but made no determination as to same" (citation omitted)). Defendants imply that the district court was required to conduct a sua sponte analysis of all fifty states—or at least Nevada and Massachusetts—to assess whether *Rule 4(k)(2)*'s requirements had been satisfied.

It's true that *subsection A of Rule 4(k)(2)* could be read to require a plaintiff to conduct a state-by-state assessment showing that the defendant isn't subject to any state's courts of general jurisdiction. But we recently joined the majority of circuits that have rejected that reading of the rule: "Every other circuit court [besides the First and Fourth Circuits] to consider the issue has placed the initial burden on the defendant to identify a state in which the lawsuit could proceed." *Grupo Cementos, 970 F.3d at 1283* (citations omitted). We adopted the Seventh Circuit's reasoning on this point:

> **[*1031]** Now one might read *Rule 4(k)(2)* . . . [as] requiring 51 constitutional decisions: The court must first determine that the United States has power and then ensure that none of the 50 states does so . . . . Constitutional analysis for each of **[**18]** the 50 states is eminently avoidable by allocating burdens sensibly. ***HN7***[] A defendant who wants to preclude use of *Rule 4(k)(2)* has only to name some other state in which the suit could proceed. Naming a more appropriate state would amount to a consent to personal jurisdiction there (personal jurisdiction, unlike federal subject-matter jurisdiction, is waivable). If, however, the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use *Rule 4(k)(2)*.

Id. at 1283-84 (quoting *ISI Int'l, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 552 (7th Cir. 2001)*).

Defendants never argued in the district court that some other state's courts could exercise personal jurisdiction over them. So they have forfeited any challenge along those lines. *Grupo Cementos, 970 F.3d at 1282*. Even on appeal, they never argue that Nevada or Massachusetts could exercise personal jurisdiction over them. Rather, they merely allege that the district court erred by not considering those states in assessing *Rule 4(k)(2)*'s applicability. But as our caselaw makes clear, the district court wasn't required to consider all 50 states (or even two states that a defendant merely alludes to). By failing to point to some other state that could exercise personal jurisdiction over them, Defendants **[**19]** conceded that Hetronic satisfied the second element to establish personal jurisdiction under *Rule 4(k)(2)*.

Finally, Hetronic has satisfied the third element by demonstrating that the exercise of jurisdiction comports with due process. ***HN8***[] "To determine whether the exercise of federal jurisdiction over [Defendants] satisfies due process, we must determine whether [Defendants] had minimum contacts with the United States." *CGC Holding Co., 974 F.3d at 1209*. Under that standard, a federal court can exercise specific personal jurisdiction over a foreign defendant "only if the defendant purposely directed [its] activities at the forum and the plaintiff's injuries arose from the defendant's forum-related activities." *Id.* (citing [Dudnikov, 514 F.3d at 1071]). The relevant forum here is not an individual state, but the United States as a whole.[3]

Both Fuchs and ABI have sufficient minimum contacts that demonstrate they purposefully directed their activities at the forum (the United States), and Hetronic's injuries arose in part from those forum-related activities. As for Fuchs, Hetronic alleged the following:

> **[*1032]** • Fuchs traveled to the United States to try to obtain certifications from the U.S. Federal Communications Commission, which he needed for the Abitron entities **[**20]** to sell radio products in the United States.
> • Fuchs also engaged a Massachusetts company to obtain the FCC certifications.
> • Fuchs traveled to Las Vegas, Nevada, to meet with Hetronic's former President, Torsten Rempe, to seek advice about competing with Hetronic, along with sending over twenty separate e-mail communications to Rempe.

These contacts suffice to show Fuchs directed his activities at the United States and directly relate to the injuries Hetronic complained of (i.e., trademark violations). *See* *CGC Holding Co., 974 F.3d at 1209* (holding that a Canadian defendant had sufficient minimum contacts with the United States even though she operated her RICO conspiracy mostly from Toronto because she worked extensively with a U.S. partner and "prepar[ed] loan commitment letters directed at U.S. borrowers").

The same goes for ABI. The district court detailed the following contacts ABI had with the United States:

> • ABI filed a trademark application for the Abitron entities in the United States to protect the competing remote-control products it intended to sell.
>
> • ABI entered a project agreement with a U.S.-based company (AZCS) owned by Rempe. Under the agreement, ABI received consulting services from AZCS, including **[**21]** market research, so that ABI could directly compete with Hetronic in the United States.

Based on these findings, ABI can't seriously contest that it purposefully directed its activities at the United States. Nor can it dispute that Hetronic's injuries arose in part from these activities. On these facts, ABI should have expected that it could be haled into court in the United States. *See id.*

In sum, we conclude that the district court properly exercised personal jurisdiction over all Defendants. The forum-selection clauses in Hydronic's and Hetronic Germany's licensing agreements bound both Abitron companies as successors in interest. And Hetronic has shown that the court rightly exercised personal jurisdiction over both Fuchs and ABI under *Rule 4(k)(2)*. We thus consider the merits of the parties' dispute.

II. Permanent Injunction

Defendants attack the permanent injunction prohibiting their worldwide sales of look-alike remote controls on primarily three grounds. They argue (1) that the district court erroneously concluded that the Lanham Act applied extraterritorially here; (2) that the injunction lacks the specificity required by *Rule 65 of the Federal Rules of Civil*

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[3] Ordinarily, we would also consider whether the exercise of jurisdiction was reasonable. *CGC Holding Co., 974 F.3d at 1209* ("Even when a defendant has purposely established minimum contacts with a forum state, minimum requirements inherent in the concept of fair play and substantial justice may defeat the reasonableness of jurisdiction." (internal quotation marks and citations omitted)). That entails weighing five factors: (1) "the burden on the defendant," (2) "the forum state's interest in resolving the dispute," (3) "the plaintiff's interest in receiving convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) "the shared interest of the several states in furthering fundamental substantive social policies." *Id. at 1210* (citation omitted). But to defeat jurisdiction on this ground, "[a] defendant must present a 'compelling' case that these factors render jurisdiction unreasonable." *Id.* (*quoting* *Grupo Cementos, 970 F.3d at 1289*). Defendants ignore these reasonableness factors entirely, so we needn't consider them.

Procedure; (3) and that the injunction sweeps too broad. Though we agree that **[**22]** the district court's worldwide injunction reaches too far, we otherwise reject Defendants' challenges and uphold the injunction.

HN9[] We review for abuse of discretion the district court's grant of a permanent injunction. *Husky Ventures, Inc. v. B55 Invs., Ltd., 911 F.3d 1000, 1011 (10th Cir. 2018)* (citation omitted). "A district court 'necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Id.* (brackets omitted) (quoting *Zurich N. Am. v. Matrix Serv., Inc., 426 F.3d 1281, 1289 (10th Cir. 2005)*). A district court's factual findings are clearly erroneous if they lack "factual **[*1033]** support in the record, or if we, after reviewing all the evidence, are left with the definite and firm conviction that a mistake has been made." *Id.* (brackets and citation omitted).

We begin by considering whether the district court correctly concluded that the Lanham Act reaches all of Defendants' allegedly infringing conduct here, after which we assess the injunction's specificity and scope.

A. Extraterritorial Reach of the Lanham Act

HN10[] The Lanham Act governs federal trademark and unfair competition disputes. It subjects to liability "[a]ny person who shall . . . use in commerce any . . . colorable imitation of a registered mark," *15 U.S.C. § 1114(1)* (*Section 32*), or "[a]ny person who . . . uses in commerce **[**23]** any" word, false description, or false designation of origin that "is likely to cause confusion . . . or to deceive as to the affiliation," origin, or sponsorship of any goods, *id. § 1125(a)(1)* (*Section 43*). Notably, the Act defines commerce broadly as "all commerce which may lawfully be regulated by Congress," *id. § 1127*, and affords federal courts jurisdiction over all claims arising under it, *id. § 1121(a)*. Though most of the damages the jury awarded to Hetronic flowed from Defendants' Lanham Act violations, Defendants argue as a threshold matter that the Act doesn't apply extraterritorially to their foreign conduct. We disagree.

The Supreme Court has in recent years considered (or reconsidered) the extraterritoriality of several federal statutes, some of them multiple times: the Alien Tort Statute, *Nestlè USA, Inc. v. Doe, 141 S. Ct. 1931, 1936-37, 210 L. Ed. 2d 207 (2021)*, and *Kiobel v. Royal Dutch Petro. Co., 569 U.S. 108, 115-17, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013)*; the Patent Act, *WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2136-38, 201 L. Ed. 2d 584 (2018)*; the Racketeer Influenced and Corrupt Organizations Act, *RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 136 S. Ct. 2090, 2099-2103, 195 L. Ed. 2d 476 (2016)*; *section 10(b) of the Securities Exchange Act of 1934*, *Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255-65, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010)*; and both the *Foreign Trade Antitrust Improvements Act of 1982*, *F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 163-73, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*, and its predecessor, the Sherman Act, *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 794-99, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*. But you have to go back almost three-quarters of a century since the Court last substantively considered the extraterritoriality of the Lanham Act. *Steele v. Bulova Watch Co., 344 U.S. 280, 282-85, 73 S. Ct. 252, 97 L. Ed. 319, 1953 Dec. Comm'r Pat. 424 (1952)*. Though the *Steele* Court acknowledged the general presumption against extraterritoriality, **[**24]** *see id. at 285*, it held that the Lanham Act could apply abroad at least in some circumstances, *see id. at 286* ("In the light of the broad jurisdictional grant in the Lanham Act, we deem its scope to encompass petitioner's [foreign] activities here.").[4] Still, that lone decision **[*1034]** leaves much unanswered about the extent of the Lanham Act's extraterritorial reach—particularly, as in our case, as it relates to foreign defendants. *See McBee v. Delica Co., 417 F.3d 107, 117 (1st Cir. 2005)* (noting that although "[t]he Supreme Court has long since made it clear that the Lanham Act could

[4] The Court has in passing reaffirmed the Lanham Act's extraterritorial reach in two more recent decisions. *See Morrison, 561 U.S. at 271 n.11* (citing *Steele* and noting that the Court has interpreted the Lanham Act "to have extraterritorial effect"); *EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 252, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991)* ("While recognizing that 'the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears,' the Court concluded that in light of the fact that the allegedly unlawful conduct had some effects within the United States, coupled with the [Lanham] Act's 'broad jurisdictional grant' and its 'sweeping reach into "all commerce which may lawfully be regulated by Congress,"' the statute was properly interpreted as applying abroad." (quoting *Steele, 344 U.S. at 285, 287*)).

sometimes be used to reach extraterritorial conduct," "it has never laid down a precise test for when such reach would be appropriate" (footnote and citations omitted)).

Though none of the Supreme Court's recent decisions concerning extraterritoriality resolve the issues we face here related to the Lanham Act, they offer some useful guidance. ***HN11***[] In *RJR*, the Court established "a two-step framework for analyzing extraterritoriality issues." *136 S. Ct. at 2101*. At step one, "we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id. Steele* already answered that question in **[**25]** the affirmative. *See 344 U.S. at 285-88*; *see also Trader Joe's Co. v. Hallatt, 835 F.3d 960, 966 (9th Cir. 2016)* ("The Supreme Court settled this question with regard to the Lanham Act when it held [in *Steele*] that the Act's 'use in commerce' element and broad definition of 'commerce' clearly indicate Congress's intent that the Act should apply extraterritorially." (citing *Steele, 344 U.S. at 286*)). When a court concludes at step one that the statute in question applies extraterritorially, it needn't reach step two (which asks "whether the case involves a domestic application of the statute"). *RJR, 136 S. Ct. at 2101*. Instead, when the presumption against extraterritoriality has been rebutted, *RJR* tells us that "[t]he scope of an extraterritorial statute . . . turns on the limits Congress has (or has not) imposed on the statute's foreign application." *Id.* (footnote omitted). In other words, just because a statute *can* apply extraterritorially doesn't mean that it always will.

Since *Steele*, the courts of appeals have devised various tests to answer that question—namely, what are the limits of the Lanham Act's extraterritorial reach? Because our circuit has never confronted this issue, we have yet to speak on the matter. So we begin by adopting a framework for resolving this question. After that, we address the **[**26]** procedural objections Defendants raised regarding how the district court went about addressing this issue. Last, we apply our newly adopted framework to the dispute before us.

1. Framework for Assessing the Scope of the Lanham Act's Extraterritoriality

Each of the tests developed by the courts of appeals to explore the Lanham Act's extraterritorial reach stems from the Supreme Court's *Steele* decision. There, the defendant, an American citizen operating a watch business in Texas decided to move his business to Mexico City. *344 U.S. at 284-85*. He discovered that "Bulova" had not been registered in Mexico, so he secured the rights to the name. *Id.* Importing watch parts from Switzerland and the United States, he sold the watches in Mexico under the "Bulova" name. *Id. at 285*. Bulova Watch Co., one of the largest watch manufacturers in the world, soon began receiving complaints from customers who needed repairs of defective "Bulova" watches that often turned out to be the defendant's product. *Id.* Bulova challenged in Mexico's courts the defendant's right to use the **[*1035]** Bulova name, and the Mexico Supreme Court upheld an administrative ruling that had nullified the defendant's trademark registration. *Id.* Bulova then sought **[**27]** relief in federal court under the Lanham Act. *Id. at 281-82*.

The Court concluded that the Lanham Act encompassed the defendant's conduct, reasoning that "the United States is not debarred . . . from governing the conduct of i[t]s own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed." *Id. at 285-86* (citation omitted). The Court explained that "Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States." *Id. at 286* (citation omitted). Key to the Court's decision was that the defendant's "operations *and their effects* were not confined within the territorial limits of a foreign nation"; the "spurious 'Bulovas' filtered through the Mexican border into" the United States. *Id.* (emphasis added). And the Court noted that the inferior watches could damage Bulova's reputation in both the United States and foreign markets. *Id.*

Since *Steele*, the courts of appeals that have confronted this issue have adopted one of three tests for deciding whether the Lanham Act governs a defendant's foreign conduct. The first, devised **[**28]** by the Second Circuit and known as the *Vanity Fair* test, considers three factors: (1) whether the defendant's conduct had a substantial effect on U.S. commerce; (2) whether the defendant was a United States citizen; and (3) whether there was a conflict with trademark rights established under the relevant foreign law. *Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633,* 642 (2d Cir. 1956). Though no factor is dispositive, the absence of one of the factors "might well be determinative and . . . the absence of both is certainly fatal." *Id. at 643* (footnote omitted).

Of our sibling circuits that have considered this issue, most have adopted some version of the *Vanity Fair* test. The Eleventh and Federal Circuits have adopted it wholesale. *See* *Int'l Cafe, S.A.L. v. Hard Rock Cafe Int'l, (U.S.A.), Inc., 252 F.3d 1274, 1278 (11th Cir. 2001)* (describing the three-factor analysis as the "*Bulova* test" but citing *Vanity Fair*); *Aerogroup Int'l, Inc. v. Malboro Footworks, Ltd., 152 F.3d 948, *2*, published in full-text format at *1998 U.S. App. LEXIS 7733*] (Fed. Cir. 1998) (per curiam) (unpublished). The Fourth and Fifth Circuits have also adopted the *Vanity Fair* test, but each has tweaked the first prong. Rather than asking whether the defendant's conduct had a "substantial effect" on U.S. commerce, the Fourth Circuit asks whether the conduct had a "significant effect." *Nintendo of Am., Inc. v. Aeropower Co., 34 F.3d 246, 250 (4th Cir. 1994)*. The Fifth Circuit, following the Ninth Circuit's lead (discussed below), lowered the bar further, requiring only "*some* effect" on U.S. commerce. **[**29]** *Am. Rice, Inc. v. Ark. Rice Growers Coop. Ass'n, 701 F.2d 408, 414 n.8 (5th Cir. 1983)*.

The Ninth Circuit has adopted a similar but distinct tripartite test, based on its decisions governing the extraterritorial application of ***antitrust law*** under the Sherman Act. *See* *Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 427-28 (9th Cir. 1977)*; *Star-Kist Foods, Inc. v. P.J. Rhodes & Co., 769 F.2d 1393, 1395 (9th Cir. 1985)* ("In *Wells Fargo* we concluded that the Lanham Act's coverage of foreign activities may be analyzed under the test for extraterritorial application of the federal antitrust laws set forth in *Timberlane Lumber Co. v. Bank of America National Trust & Savings Ass'n, 549 F.2d 597 (9th Cir. 1976)* . . . ."). Under what's **[*1036]** known as the *Timberlane* test, the Lanham Act applies extraterritorially if:

> (1) the alleged violations . . . create some effect on American foreign commerce; (2) the effect [is] sufficiently great to present a cognizable injury to the plaintiffs under the Lanham Act; and (3) the interests of and links to American foreign commerce [are] sufficiently strong in relation to those of other nations to justify an assertion of extraterritorial authority.[5]

Trader Joe's Co., 835 F.3d at 969 (alterations in original) (citation and footnote omitted). Notably, the Ninth Circuit rejected other circuits' conclusions that the effect on U.S. commerce must be "substantial," reasoning that *Steele* "contains no such requirement." *Wells Fargo, 556 F.2d at 428*.

Finally, the First Circuit has rejected both the *Timberlane* and *Vanity Fair* tests. *See* *McBee, 417 F.3d at 110* ("[W]e choose not to adopt the formulations used by various other circuits." (citations omitted)). Relying heavily on the Supreme Court's caselaw governing the extraterritoriality of U.S. antitrust laws (wisely, in our view),[6] *id. at 111*, the *McBee* court adopted the following framework. ***HN12***[] The court begins by determining whether the defendant is an American citizen. *Id.* That's because "a separate constitutional basis for jurisdiction exists for control of activities, even foreign activities, of an American citizen." *Id.* In that scenario, the court reasoned that "the domestic effect of the international activities **[**31]** may be of lesser importance and a lesser showing of domestic effects may be all that is needed." *Id. at 118*.

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[5] *Timberlane*'s third prong "considers international comity," *Trader Joe's Co., 835 F.3d at 972* (citation omitted), and further breaks down into *seven* additional factors:

> [1] the degree of conflict with foreign law or policy, [2] the nationality or allegiance of the parties **[**30]** and the locations or principal places of business of corporations, [3] the extent to which enforcement by either state can be expected to achieve compliance, [4] the relative significance of effects on the United States as compared with those elsewhere, [5] the extent to which there is explicit purpose to harm or affect American commerce, [6] the foreseeability of such effect, and [7] the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 972-73 (brackets in original) (quoting *Star-Kist Foods, 769 F.2d at 1395*).

[6] "The Court has written in [the antitrust context], on the issue of extraterritorial application, far more recently than it has written on the Lanham Act, and thus the decisions reflect more recent evolutions in terms of legal analysis of extraterritorial activity." *McBee, 417 F.3d at 119*.

The court adopted a "separate test" to assess the Lanham Act's extraterritorial reach when a plaintiff seeks damages based on "foreign activities of foreign defendants." *Id. at 111*. In that situation, the court held that the Lanham Act applies "only if the complained-of activities have a substantial effect on [U.S.] commerce, viewed in light of the purposes of the Lanham Act." *Id.* The court noted that its substantial-effect requirement aligned with the framework the Supreme Court has established for assessing the extraterritorial scope of Sherman Act (antitrust) claims. *See id. at 119-20* (analogizing to *Hartford Fire Ins. Co., 509 U.S. at 796*).

Besides one caveat we explain below, we adopt the *McBee* framework for several reasons. ***HN13***[] First, we agree with *McBee* that the Lanham Act will usually extend extraterritorially when the defendant is an American citizen. *Id. at 118*. No one questions Congress's ability "to regulate the conduct of its own citizens, even extraterritorial conduct." *Id.* (quoting **[*1037]** *Steele, 344 U.S. at 285-86*) (internal quotation marks omitted). Indeed, "Congressional power over American citizens is a matter of domestic law that raises no serious international concerns, even **[**32]** when the citizen is located abroad." *Id.* (collecting cases); *see also Restatement (Third) of Foreign Rels. Law of the United States § 402* (1987) ("[A] state has jurisdiction to prescribe law with respect to . . . the activities . . . of its nationals *outside as well as within its territory*. . . ." (emphasis added)). Some federal statutes even govern U.S. citizens' conduct abroad regardless of whether that conduct produces domestic effects. *See, e.g.*, *18 U.S.C. § 2423(c)* ("Engaging in illicit sexual conduct in foreign places. Any United States citizen . . . who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both."). So when the defendant is an American citizen, courts may conclude that the Lanham Act reaches that defendant's extraterritorial conduct even when the effect on U.S. commerce isn't substantial. *See McBee, 417 F.3d at 118*. Though that probably amounts to something akin to the Fifth Circuit's "some effect" test, *Am. Rice, Inc., 701 F.2d at 414 n.8*, we've no need to lay down a specific test given that our case involves only foreign defendants.

HN14[] Second, when a plaintiff seeks to recover under the Lanham Act against a foreign national, we **[**33]** also agree with *McBee* that the plaintiff must show that the defendant's conduct has a substantial effect on U.S. commerce. True, the *Steele* Court never required that the effects on U.S. commerce must be *substantial* to trigger extraterritorial application of the Lanham Act (as the Fifth and Ninth Circuits have pointed out in adopting their less-stringent "some effect" test). *See 344 U.S. at 286* (noting that the defendant's conduct "and their effects were not confined within the territorial limits of a foreign nation"); *Am. Rice, 701 F.2d at 414 n.8*; *Wells Fargo, 566 F.2d at 428*. But we nonetheless adopt the substantial-effects requirement for two reasons. First, the defendant in *Steele* was an American citizen—for the reasons just explained, it's no surprise that the *Steele* Court was unconcerned about the relatively modest effect of the defendant's conduct on U.S. commerce given Congress's uncontroversial and extensive powers to regulate the conduct of its own citizens. Second, requiring that the defendant's conduct has a substantial effect on U.S. commerce aligns the test for Lanham Act extraterritoriality with both the Supreme Court's antitrust jurisprudence and general principles of foreign relations law. *See Hartford Fire Ins., 509 U.S. at 796* ("[I]t is well established by now that the **[**34]** Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." (collecting cases)); *Restatement (Third) of Foreign Rels. Law of the United States § 402(1)(c)* (1987) ("[A] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory. . . .").

HN15[] Finally, if a plaintiff successfully shows that a foreign defendant's conduct has had a substantial effect on U.S. commerce, courts should also consider whether extraterritorial application of the Lanham Act would create a conflict with trademark rights established under the relevant foreign law. *See Steele, 344 U.S. at 289* ("Mexico's courts have nullified the Mexican registration of 'Bulova'; there is thus no conflict which might afford petitioner a pretext that such relief would impugn foreign law."). Though the *McBee* court eschewed such an analysis, *417 F.3d at 111*, every other circuit court considers **[*1038]** potential conflicts with foreign law in assessing the Lanham Act's extraterritorial reach, *see, e.g.*, *Vanity Fair, 243 F.3d at 642*; *Trader Joe's Co., 835 F.3d at 972-73*. Accordingly, in conducting this analysis, courts should weigh any foreign trademark rights established by the defendant.

Hetronic urges us to adopt the Ninth Circuit's *Timberlane* ***[**35]*** test, noting that our Circuit has looked to that test in assessing extraterritoriality in the antitrust context. *See* *Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869 (10th Cir. 1981)*. But we remain persuaded that *McBee* provides the better framework for assessing Lanham Act claims for several reasons. As an initial matter, Hetronic doesn't argue that we're bound by *Montreal Trading*—nor could it. Unlike our focus here on the Lanham Act, that case considered the extraterritorial reach of the *Sherman Act*. *Id.* Further, that case involved U.S. defendants; the defendants here are all foreign. *Id. at 865-66*. As we have explained, unlike the *Timberlane* test adopted in *Montreal Trading*, the *McBee* framework accounts for the differences in a defendant's citizenship. Indeed, the *Montreal Trading* court didn't have the benefit of *McBee* or the Supreme Court's more recent decisions concerning how courts should approach extraterritoriality questions. Considering those developments, we conclude that *McBee* establishes the best test for assessing extraterritoriality under the Lanham Act.

HN16[] To recap, in deciding whether the Lanham Act applies extraterritorially, courts should consider three factors. First, courts should determine whether the defendant is a U.S. citizen. Second, when **[**36]** the defendant is *not* a U.S. citizen, courts should assess whether the defendant's conduct had a substantial effect on U.S. commerce. Third, only if the plaintiff has satisfied the substantial-effects test, courts should consider whether extraterritorial application of the Lanham Act would create a conflict with trademark rights established under foreign law.

Having adopted a framework for assessing the scope of the Lanham Act's extraterritorial reach, we next consider Defendants' arguments that the district court erred procedurally in resolving this issue.

2. The District Court Should Have Decided As a Matter of Law Whether the Lanham Act Reached Defendants' Foreign Conduct

a. Background

The district court considered the Lanham Act's extraterritoriality three times: once before trial at summary judgment, once during trial on Hetronic's relevance objection, and once after trial in considering Hetronic's preliminary-injunction motion. Most of Defendants' procedural objections flow from uncertainties about the district court's summary-judgment ruling.

In moving for partial summary judgment, Defendants argued that Hetronic's Lanham Act claims failed because the Act didn't reach Defendants' **[**37]** foreign sales (which made up nearly 97% of their total sales). It's clear that the district court rejected that argument and denied Defendants summary **[*1039]** judgment on their extraterritoriality defense: "Viewed in a light favorable to plaintiff, the record evidence raises genuine issues of material fact as to customer confusion and harm to reputation to plaintiff in the United States due to [D]efendants' alleged infringing conduct." Appellants' App. vol. 7 at 1712. What's less clear is whether the district court granted *Hetronic* summary judgment on the extraterritoriality issue. At times, the district court's order suggests that it did: "[T]he court concludes that extraterritorial application of the Lanham Act to defendants' foreign sales . . . is appropriate." *Id.* at 1716.

But on appeal, both sides agree that the court merely denied Defendants summary judgment on their extraterritoriality defense, reserving definitive resolution of the issue for another day. Appellee's Resp. Br. at 50 n.15 (conceding that the district court had not granted summary judgment on the extraterritoriality issue; "it . . . only denied defendants' summary judgment motion"); Reply Br. at 4-5. Despite some of the **[**38]** order's language suggesting otherwise, we agree that the district court didn't resolve the extraterritoriality issue at summary judgment. Indeed, the court repeatedly stated that it was viewing the evidence in a light favoring Hetronic. But summary judgment in Hetronic's favor on that issue would have been appropriate only if there were no genuine disputes of material fact when viewing the evidence in *Defendants'* favor. *See, e.g.,* *Obermeyer Hydro Accessories, Inc. v. CSI Calendering, Inc., 852 F.3d 1008, 1014 (10th Cir. 2017)* (reviewing summary-judgment evidence in a light most favorable to the nonmoving party (citation omitted)). Even more fundamentally, the district court concluded that genuine disputes of material fact existed relevant to the extraterritoriality issue. That alone precludes summary judgment. *Fed. R. Civ. P. 56(a)* ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact . . . .").

Based on the district court's order, Defendants understandably believed that they could argue the issue to the jury. So they "prepared to present at trial their evidence that there was no 'effect' on U.S. commerce, and that there was no confusion among U.S. citizens, caused by the[ir] purely foreign sales." Reply Br. at 4. But the district court **[**39]** precluded them from doing so. At trial, Hetronic called Josef Scheuerer, one of Hetronic's sales representatives, to testify about the confusion Defendants' alleged trademark infringement created among Hetronic's customers. On cross-examination, Defendants sought to establish that only non-U.S. customers were confused and that, as a result, any infringement couldn't have substantially affected U.S. commerce. Defendants' line of questioning went to "whether or not there [was] a Lanham Act claim at all." Appellants' App. vol. 13 at 3273. That is, as Defendants argued on summary judgment, if their foreign sales didn't substantially affect U.S. commerce, the Lanham Act wouldn't apply.

Hetronic objected to the questioning, asserting that the subject matter was irrelevant and unfairly prejudicial. During a sidebar between the court and counsel, Hetronic's counsel misspoke, telling the court that it had already granted summary judgment in Hetronic's favor on the extraterritoriality issue. The court apparently assumed this was so and sustained the objection:

> HETRONIC'S COUNSEL: Your Honor, . . . it seems like defendants are trying to reargue extraterritoriality, *which Your Honor granted summary* ***[**40]*** *judgment on* . . . . [T]hey're trying to back-door it through this witness and I think it's inappropriate. It's 402 and 403. Where the confusion took place is irrelevant to whether there's confusion under the Lanham Act.
> THE COURT [to Defendants' counsel]: Where are you headed with this?
>
> DEFENDANTS' COUNSEL: The most recent case that we read . . . does suggest that where the confusion occurs matters. . . . But [Hetronic's counsel is] exactly right, that is where I'm going. *It was my understanding this issue was still open*. If Your Honor has already ruled on it, we can perhaps at a break put that on the record and I'll stop this. I thought this was still open.
> * * *
> THE COURT: It's [D]efendants' position that the location of the confusion is relevant for what purpose?
>
> **[*1040]** DEFENDANTS' COUNSEL: For whether or not there is a Lanham Act claim at all.
>
> THE COURT: Well, I've -- for better or worse, *I've already crossed that bridge*. And there may be a . . . case from last week, and if so, that's really not something that I can revisit in the middle of this trial, so the objection will be sustained.

Id. at 3272-73 (emphasis added).

As noted, Hetronic now concedes that the district court never granted it **[**41]** summary judgment on the extraterritoriality issue. Yet Hetronic contends—without citing to the record—that "the trial court already had held (correctly) . . . that the [Lanham] Act could apply extraterritorially." Appellee's Resp. Br. at 50.

Hetronic is mistaken. The only time the district court addressed the extraterritoriality issue before trial was in denying Defendants' motion for summary judgment. But as Hetronic acknowledges, the court's ruling concluded that there was a genuine dispute of material fact about whether Defendants' foreign activities had caused confusion among U.S. consumers.

After the jury rendered its verdict in Hetronic's favor, Hetronic moved for a worldwide injunction barring Defendants from selling their infringing products. In granting that injunction, the district court considered the Lanham Act's extraterritoriality for the third time. This time, relying on the evidence established at trial, the district court undeniably concluded that the Lanham Act reached Defendants' foreign conduct.

b. Determining the Scope of the Lanham Act's Extraterritoriality Presents a Question of Law

With that background in mind, Defendants argue that the district court erred in two **[**42]** ways. First, Defendants insist that the district court should have resolved the extraterritoriality issue as a matter of subject-matter jurisdiction before trial. Second, because the district court didn't do so, Defendants maintain that the court erred by precluding them from arguing the issue at trial.

We agree with Defendants that the district court should have resolved the extraterritoriality issue as a matter of law before trial, but we disagree that this issue presents a question of subject-matter jurisdiction. Defendants' confusion on this point is understandable. Before 2010, every court—including the U.S. Supreme Court—considered the Lanham Act's extraterritoriality as a matter of subject-matter jurisdiction. *See, e.g., Steele, 344 U.S. at 281*; *McBee, 417 F.3d at 117* (collecting cases). ***HN17***[] But in 2010, the Supreme Court clarified in *Morrison* that questions about the extraterritorial reach of a federal statute go to the merits, not jurisdiction. *561 U.S. at 254*. In assessing the extraterritoriality of the *Securities Exchange Act*, the Court explained that "to ask what conduct *§ 10(b)* reaches is to ask what conduct *§ 10(b)* prohibits, which is a merits question." *Id.* That same rationale holds true for the Lanham Act. *Derma Pen, LLC v. 4EverYoung Ltd., 736 F. App'x 741, 748 n.4 (10th Cir. 2018)* (unpublished) (citing *Morrison* and rejecting **[**43]** appellant's suggestion that the Lanham Act's extraterritoriality was a question of subject-matter jurisdiction); *Trader Joe's Co., 835 F.3d at 968* ("We hold that the extraterritorial reach of the Lanham Act is a merits question that does not implicate federal courts' subject-matter jurisdiction . . . .").

But to hold that the extraterritorial reach of the Lanham Act presents a merits question isn't to say that the question can't be decided as a matter of law. To the **[*1041]** contrary, the *Morrison* Court decided a similar extraterritoriality issue as a matter of law under *Rule 12(b)(6)*, concluding that the petitioners "failed to state a claim on which relief [could] be granted." *561 U.S. at 273*. And in considering the Lanham Act's extraterritoriality post-*Morrison*, the Ninth Circuit recently decided the issue as a matter of law in reversing the district court's *12(b)(6)* dismissal of the plaintiff's trademark claims. *See Trader Joe's Co., 835 F.3d at 975, 977-78*.

HN18[] Consistent with how courts have previously handled this issue, we hold that district courts should ordinarily decide questions about the scope of the Lanham Act's extraterritorial reach as a matter of law, preferably in the litigation's early stages. We think this the best course for several reasons. First, as just discussed, courts have always **[**44]** decided this issue as a matter of law since the Supreme Court decided *Steele* and have continued to do so even after *Morrison* cleared up that it's not a question of subject-matter jurisdiction. *See id.*

HN19[] Second, "the proper extraterritorial reach of a Lanham Act injunction is a matter of statutory interpretation." *Derma Pen, 736 F. App'x at 748 n.4*; *see also RJR, 136 S. Ct. at 2101* ("The scope of an extraterritorial statute . . . turns on the limits Congress has (or has not) imposed on the statute's foreign application." (footnote omitted)). We have "always considered" questions of statutory interpretation as "quintessentially legal in nature." *United States v. McLinn, 896 F.3d 1152, 1156 (10th Cir. 2018)* (citation omitted); *see also Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1271 (10th Cir. 2000)* ("The question here is one of statutory interpretation *and thus a pure matter of law* . . . ." (emphasis added)). Judges, not juries, decide purely legal questions. *See McLinn, 896 F.3d at 1156*. The extraterritoriality of the Lanham Act usually presents just such a question.[7]

Even so, Defendants at times appear to frame the issue of whether their conduct created a substantial effect on U.S. commerce as a factual dispute. But on closer examination, we see only a legal dispute. For instance, Defendants insist that they should have been able to cross-examine Joseph Scheuerer to show **[**45]** that his testimony related primarily to foreign customers. From that testimony, Defendants sought to establish that no U.S. consumers were confused, so there couldn't have been a substantial effect on U.S. commerce. The problem for Defendants is that this cross-examination testimony of Scheuerer wouldn't have created a factual dispute. Hetronic

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[7] *Montreal Trading* isn't to the contrary. *661 F.2d at 870*. There, we noted that the trial court let the jury decide the subject-matter jurisdiction question about whether the Sherman Act applied extraterritorially to reach the defendants' conduct. *See id. at 866, 870*. But we didn't pass on the question whether the trial court should have decided that issue as a matter of law. *Id. at 870*.

presented other evidence, discussed below, detailing instances of confusion among *U.S. consumers*. Defendants never tried to argue that those examples never happened or otherwise refute that portion of Hetronic's evidence. Instead, Defendants sought to show that *most* of the confusion occurred among foreign customers, in effect arguing that even if there was some effect on U.S. commerce, it wasn't substantial. But weighing that argument—whether a defendant's conduct created a substantial effect on U.S. commerce—requires a legal determination that's left to the courts.

HN20[] Actual factual disputes underlying the extraterritoriality question certainly can arise. For example, a defendant could dispute whether (or how much of) its allegedly **[*1042]** infringing products entered the United States. Establishing that factual predicate could affect the court's determination **[**46]** of whether the defendant's conduct had a substantial effect on U.S. commerce. In those instances, the court may submit the factual dispute to the jury while reserving the ultimate legal determination for itself. We have expressed our preference for this procedure in dealing with issues that, like the Lanham Act's extraterritorial scope, usually constitute a question of law but may involve factual disputes. *Cf.* *Gonzales v. Duran, 590 F.3d 855, 862-63 (10th Cir. 2009)* (Ebel, J., concurring) ("[I]f a district court submits the question of qualified immunity to the jury because there are disputed historical facts material to resolving the immunity question, the district court should submit to the jury only the disputed factual contentions underlying the immunity question and should reserve for itself the legal question of objective reasonableness.").

HN21[] Having reaffirmed that the scope of the Lanham Act's extraterritorial reach generally presents a legal question of statutory interpretation, we now review the issue de novo. *McLinn, 896 F.3d at 1156* (citation omitted).

3. Applying the Framework

Our analysis proceeds in three steps. We begin by assessing whether any of Defendants are American citizens. None are. Thus, to prevail, Hetronic must show that Defendants' foreign **[**47]** infringing conduct had a substantial effect on U.S. commerce. The extraterritoriality issue turns solely on this question because Defendants nowhere argue the third element—that applying the Lanham Act extraterritorially would conflict with trademark rights under another country's laws (an issue we would normally consider only if a plaintiff first satisfied the substantial-effect requirement). We conclude that Defendant's foreign conduct had a substantial effect on U.S. commerce.

HN22[] "The substantial effects test requires that there be evidence of impacts within the United States, and these impacts must be of a sufficient character and magnitude to give the United States a reasonably strong interest in the litigation." *McBee, 417 F.3d at 120* (citations omitted). In applying this test, courts should keep in mind the Lanham Act's "core purposes"—protecting U.S. consumers from confusion and "assur[ing] a trademark's owner that it will reap the financial and reputational rewards associated with having a desirable name or product." *Id. at 121* (citing *Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33-34, 123 S. Ct. 2041, 156 L. Ed. 2d 18 (2003)* (second citation omitted)).

To meet its burden, Hetronic points to three "great wells of effects on U.S. commerce": (1) Defendants' direct sales into the United States; (2) Defendants' **[**48]** sales of products abroad that ended up in the United States; and (3) diverted foreign sales that Hetronic would have made but for Defendants' infringing conduct. *See* Appellee's Resp. Br. at 18-19, 23-28. We address each theory in turn and conclude that Hetronic has sufficiently shown that Defendants' conduct had a substantial effect on U.S. commerce.

On appeal, the parties dispute the amount of Defendants' direct sales into the United States.[8] But we needn't resolve **[*1043]** that disagreement because, regardless, ***HN23***[] a foreign infringer's direct U.S. sales don't factor

[8] Defendants assert that only Abitron Germany sold products directly into the United States and that those sales totaled $16,670. But as Hetronic flags, that assertion contradicts Defendants' admissions both in their statement of undisputed facts in their motion for summary judgment and in an offer of proof they submitted at trial. Defendants represented in their statement of undisputed facts that their remote-control sales into the U.S. totaled €202,134.12 and "were comprised of €185,463.52 of sales

into our analysis of whether the Lanham Act applies abroad. *See* McBee, 417 F.3d at 122. Applying the Lanham Act to a foreign infringer's direct U.S. sales isn't an extraterritorial application of the Act: "Courts have repeatedly distinguished between domestic acts of a foreign infringer and foreign acts of that foreign infringer; the extraterritoriality analysis . . . attaches only to the latter." *Id.* (collecting cases). In other words, the Lanham Act would encompass Defendants' direct sales into the United States even if we concluded that the Act didn't apply extraterritorially to Defendants' infringing sales abroad. *See id.* So we turn to Hetronic's two **[**49]** other theories.

First, Hetronic argues that many of Defendants' foreign sales have ended up in the United States. ***HN24***[] Numerous courts have recognized that a foreign defendant can be liable for Lanham Act violations when its products find their way into the United States, even if initially sold abroad: "Quite commonly, plaintiffs in these sorts of cases can meet their burden by presenting evidence that while the initial sales of infringing goods may occur in foreign countries, the goods subsequently tend to enter the United States in some way and in substantial quantities." McBee, 417 F.3d at 125 (collecting cases). Defendants acknowledge that over €1.7 million of their foreign sales ended up in the United States (Abitron Germany: €1,026,482; Hetronic Germany: €592,591; Hydronic: €120,344; Abitron Austria: €10,792). And when a plaintiff presents evidence that "American consumers have been exposed to the infringing mark"—here, in the form of over €1.7 million worth of products that ended up in the hands of American consumers—"confusion and reputational harm . . . can often . . . be inferred." *Id.*

But we don't need to rest on an inference of confusion. Hetronic submitted evidence that U.S. consumers were confused **[**50]** about Hetronic's products relationship to the Abitron companies. *See* Supp. App. vol. 2 at 529-33 (former Abitron Germany employee agreeing that "there were instances where [U.S.] customers were confused about the relationship between Abitron and Hetronic"). For instance, U.S. consumers would sometimes reach out to Abitron Germany to obtain Hetronic products under the mistaken belief that Abitron manufactured and sold Hetronic products. *See id.* at 528-29. One U.S. customer emailed Abitron Germany about buying a "Nova-XL Hetronic." *Id.* at 530. An Abitron Germany employee instructed its U.S. sales representative to "inform the customer that it can obtain an Abitron part from us, not Hetronic." *Id.* at 531. And one of Hetronic's sales representatives testified that "[a]lmost every week," customers sent Abitron products to Hetronic USA for repair. *Id.* vol. 3 at 651. Even Abitron Germany's own U.S. distributor was uncertain about the relationship between the Abitron companies and Hetronic.

> Q: And when I mentioned the brand Hetronic, what's your understanding as to that brand? Is that a competitor brand of Abitron's, or is that the same thing?
>
> A: I don't really know, honestly. I know that Hetronic **[**51]** was based in Germany, and then they changed their name to Abitron. Now, I am aware that there **[*1044]** was a company in Oklahoma called Hetronic International . . . . Am I paying attention to whether it says "Germany" or "International" or whatever? Generally, no, I really wasn't. So to me it was Hetronic.

Appellants' App. vol. 13 at 3289. Hetronic's counsel also showed Abitron Germany's U.S. distributor a photograph of an Abitron NOVA and a Hetronic NOVA side by side. When asked if he could "tell which one was Hetronic and which one was Abitron" if they hadn't been labelled, the distributor responded, "I would have no idea, no." *Id.* at 3294.

On this evidence alone—that millions of euros worth of infringing products found their way into the United States and that Defendants' efforts to sell those products caused confusion among U.S. consumers—we could conclude that the effects of Defendants' foreign conduct are sufficiently substantial to give the United States a reasonably strong interest in the litigation.

Defendants offer two rebuttals. First, Defendants argue that the €1.7 million worth of products represented only 3% of Defendants' total sales and that such a small fraction can't serve as **[**52]** a "springboard to call the rest of the $90 million of purely foreign sales damages under the Lanham Act." Reply Br. at 7 (internal quotation marks omitted). But Defendants misunderstand the nature of our inquiry here. We ask only whether the effects of

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by Hetronic Germany, and €16,670.60 of sales by Abitron Germany." Appellants' App. vol. 4 at 939. They made an identical representation in an offer of proof at trial. Given Defendants' failure in their reply brief to explain the disparity, we accept its admissions in the district court as the true totals of their direct U.S. sales.

Defendants' foreign conduct produce substantial impacts on U.S. commerce; it's irrelevant what proportion of Defendants' global sales entered the United States. Otherwise, billion-dollar-revenue companies could escape Lanham Act liability by claiming that millions of dollars of their infringing products entering the United States represented only a fraction of their sales. But the United States would certainly have a strong interest in litigation brought by an American company seeking to stem the flow of such substantial amounts of infringing products. ***HN25***[] Besides, the Supreme Court has made clear that once a court determines that a statute applies extraterritorially to a defendant's conduct, as we do here, that statute captures all the defendant's illicit conduct: "If *§ 10(b)* did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation)." *RJR, 136 S. Ct. at 2101* (quoting *Morrison, 561 U.S. at 267 n.9*).

Second, **[**53]** Defendants argue that Hetronic failed to present evidence at trial of Defendants' infringing foreign sales that eventually entered the United States. But as we explained above, this was an issue that the district court should have resolved as a matter of law; it should have never reached a jury. And Defendants admitted long before trial that about €1.7 million worth of their products reached the United States. Considering that admission, we reject Defendants' contention that Hetronic needed to provide additional evidence on this point.

Next, Hetronic relies on a diversion-of-sales theory—the idea that Defendants stole sales from Hetronic abroad, which in turn affected Hetronic's cash flows in the United States. ***HN26***[] Several courts have recognized that evidence of diverted sales evinces a substantial effect on U.S. commerce: "The [effect-on-U.S.-commerce] criteria may be met even where all of the challenged transactions occurred abroad, and where 'injury would seem to be limited to the deception of consumers' abroad, as long as 'there is monetary injury in the United States' to an American plaintiff." *Love v. Associated Newspapers, Ltd., 611 F.3d 601, 613 (9th Cir. 2010)* (first quoting *Ocean Garden, Inc. v. Marktrade Co., 953 F.2d 500, 503 (9th Cir. 1991)*; and then citing *Reebok Int'l, Ltd. v. Marnatech Enters.,* ***[*1045]*** *Inc., 970 F.2d 552, 554-55 (9th Cir. 1992)*); *see also* *McBee, 417 F.3d at 126* ("Courts have considered sales diverted from **[**54]** American companies in foreign countries in their analyses." (collecting cases)).

In *McBee*, the court explained that "[e]vidence of economic harm to McBee in Japan due to confusion of Japanese consumers is less tightly tied to the interests that the Lanham Act intends to protect, since there is no United States interest in protecting *Japanese consumers*." *417 F.3d at 126*. But the court still approved of the diversion-of-sales theory because "American courts do . . . have an interest in protecting American commerce by protecting McBee from lost income" due to a foreign defendant's infringing conduct. *Id.* Under that rationale, U.S. courts have an interest in protecting Hetronic from the economic harm it suffered in the form of lost sales that it would have made if it weren't for Defendants' trademark infringement. Here, Hetronic presented evidence that Defendants' conduct cost it tens of millions of dollars in lost sales. Those lost revenues would have flowed into the U.S. economy but for Defendants' conduct infringing a U.S. trademark. Thus, this monetary injury to Hetronic also caused substantial effects on U.S. commerce. *See* *Love, 611 F.3d at 613* (citations omitted).

In response, Defendants contend that the diversion-of-sales **[**55]** theory applies only when the defendant is a U.S. citizen.[9] For that proposition, they rely heavily on *Tire Engineering & Distribution, LLC v. Shandong Linglong Rubber Co., 682 F.3d 292 (4th Cir. 2012)*. There, the Fourth Circuit rejected the plaintiff's argument, stating that "courts invoking the diversion-of-sales theory have required the defendants to be U.S. corporations that conducted operations—including at least some of the infringing activity—within the United States." *Id. at 311* (citations omitted). We find *Tire Engineering* unpersuasive for three reasons.

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[9] In their reply brief, Defendants also challenge Hetronic's diversion-of-sales theory on two other grounds—that applying the theory "exceeds the authority of the *Commerce Clause*" and that Hetronic failed to prove its lost sales. Reply Br. at 13-21. ***HN27***[] But we generally deem arguments raised for the first time in a reply brief waived. *United States v. Leffler, 942 F.3d 1192, 1197 (10th Cir. 2019)*. Defendants offer no reason why we should depart from our usual rule, so we decline to consider these additional arguments. *Id.* ("[T]o allow an appellant to raise an argument for the first time in a reply brief would be manifestly unfair to the appellee who, under our rules, has no opportunity for a written response." (internal quotation marks and citations omitted)).

First, though both of the cases *Tire Engineering* cites involved U.S.-citizen defendants, neither court suggested—let alone *held*—that the diversion-of-sales theory is inapplicable to foreign defendants. *See* *Ocean Garden, 953 F.2d at 504*; *Am. Rice, 701 F.2d at 414-15*. Second, the *Tire Engineering* court ignored courts that have conducted a diversion-of-sales analysis involving foreign defendants. *E.g., McBee, 417 F.3d at 126*. Third, restricting the diversion-of-sales theory to U.S.-citizen defendants makes little sense; if anything, it applies with *greater* force to a foreign defendant. When diverted sales that would have otherwise flowed to a U.S. company instead inure to a foreign defendant, the loss to U.S. commerce is clear. By contrast, ***HN28***[] when the defendant is a U.S. citizen with a U.S. presence, the sales **[**56]** divert from one U.S. company to another—either way, U.S. commerce benefits from the sales revenue flowing into the U.S. economy. We thus reject Defendants' argument that plaintiffs may argue a diversion-of-sales theory only against U.S.-citizen defendants.

Viewing the evidence as a whole, Hetronic has presented more than enough **[*1046]** evidence to show that Defendants' foreign infringing conduct had a substantial effect on U.S. commerce. Besides the millions of euros worth of infringing products that made their way into the United States after initially being sold abroad, Defendants also diverted tens of millions of dollars of foreign sales from Hetronic that otherwise would have ultimately flowed into the United States. Moreover, though much of Hetronic's evidence focused on consumer confusion abroad, it also documented numerous incidents of confusion among U.S. consumers. We thus conclude that Hetronic has presented evidence of impacts within the United States of a sufficient character and magnitude as would give the United States a reasonably strong interest in the litigation. Accordingly, the Lanham Act applies extraterritorially here to reach all of Defendants' foreign infringing conduct. **[**57]**

B. Injunction's Specificity

Defendants next argue that the injunction "lacks the specificity required by *[Federal Rules of Civil Procedure] 65*." Appellants' Opening Br. at 32. We disagree.

HN29[] *Rule 65 of the Federal Rules of Civil Procedure* requires that injunctions contain "*reasonable* detail." *Fed. R. Civ. P. 65(d)(1)(C)* (emphasis added). Injunctions violate *Rule 65* "when the delineation of the proscribed activity lacks particularity, or when containing only an abstract conclusion of law, not an operative command capable of enforcement." *CF & I Steel Corp. v. United Mine Workers of Am., 507 F.2d 170, 173 (10th Cir. 1974)* (internal quotation marks and footnotes omitted).

The district court's injunction goes far beyond an abstract conclusion of law and easily satisfies *Rule 65*. The trial court enjoined Defendants from "[d]irectly or indirectly using . . . Hetronic's . . . Trade Dress, or any reproduction, counterfeit, copy or colorable imitation thereof on or in connection with any products or services." Appellants' App. vol. 10 at 2518. The injunction specifically defines trade dress: "'trade dress' refers to the total image of a product, product packaging, product label, product design, or a combination of these things," including "features such as size, shape, color or color combinations, texture, graphics, or particular sales techniques." *Id.* at 2515 n.1. Crucially, the court further states **[**58]** that the trade dress is "the black and yellow color scheme and the design of the housings" of Hetronic's products. *Id.* at 2515. This provides ample detail to meet *Rule 65*'s requirements.

C. Injunction's Scope

Despite the above, we conclude that the district court's injunction is improperly broad. Recall that the court's injunction extends not only to countries in which Hetronic currently sells its products, but to every country in the world. The Lanham Act—the statute on which the district court relied—cannot support such a broad injunction here.

Hetronic dismisses Defendants' "lengthy disquisition on trademark history and geography" as "irrelevant to this case." Appellee's Resp. Br. at 30. But Defendants' argument that trademark rights "are fundamentally geographical" is sound. Appellants' Opening Br. at 27. ***HN30***[] "[E]ven the owner of a federally registered mark—who enjoys the presumption of nationwide priority—is not entitled to injunctive relief *except in the area actually penetrated through* *use of the mark*." Emergency One, Inc. v. Am. Fire Eagle Engine Co., 332 F.3d 264, 269 (4th Cir. 2003) (emphasis added) (internal quotation marks, citation, and footnote omitted); *see also* Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 416, 36 S. Ct. 357, 60 L. Ed. 713, 1916 Dec. Comm'r Pat. 265 (1916) ("[A] trademark . . . extends to every market **[*1047]** where the trader's goods have become known and identified **[**59]** by his use of the mark. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article."). Though *Emergency One* involved a trademark dispute confined within the United States, it's equally applicable here: Hetronic isn't entitled to injunctive relief in markets it hasn't actually penetrated.

In a footnote, Hetronic argues that "Defendants' geographic argument is doubly irrelevant because Hetronic obtained the marks in question by sale, not by first use; rights thus flowed *via contract* rather than particular jurisdictions' first-use laws." Appellee's Resp. Br. at 31 n.7 (emphasis altered). If anything, Hetronic's argument on this point undermines the district court's injunction. As Hetronic acknowledges, its rights against Defendants flow from contract—not necessarily from trademark violations under the Lanham Act.

Consider an example. If Defendants begin tomorrow selling their remote controls in a country in which Hetronic has no presence, Hetronic could hardly assert a trademark claim against Defendants. How could there be market confusion, the hallmark of a trademark claim, when there were no confusingly similar products **[**60]** being marketed? Hetronic seems to argue that it could assert a contract claim against Defendants because the parties' agreements limited Defendants' rights to use Hetronic's product marks (NOVA, ERGO, etc.). And Hetronic would probably be right. But that contract claim wouldn't necessarily support a trademark claim, much less injunctive relief under the Lanham Act.

Accordingly, we narrow the injunction to the countries in which Hetronic currently markets or sells its products. To the extent those countries have changed since the district court entered the injunction, we remand for the court to modify the injunction in accordance with this opinion.

II. Defendants' Ownership Defense

A. Background

Leading up to trial, Defendants repeatedly argued that Hetronic's claims failed because Defendants owned all the disputed intellectual property, including the products' trademarks and trade dress. To explain Defendants' rationale, we first provide additional background about the products' origins and Hetronic's formation.

Hetronic was initially founded in Germany in the early 1980s as Hetronic Steuersysteme GmbH. In 2000, Hetronic Steuersysteme's founder, Max Heckl, moved to the United States and **[**61]** formed Hetronic International, Inc. (the company we have called "Hetronic"), which became the headquarters for Hetronic-related companies. By this time, there were several Hetronic-related subsidiary companies, including Hetronic Malta Limited and Hetronic USA.

In July 2000, Hetronic entered a research-and-development agreement with Hetronic Steuersysteme, Hetronic Malta, and Hetronic USA to "pool their resources" and to "share the costs equally between them" as they worked to further develop, market, and sell radio remote controls. Appellants' App. vol. 7 at 1617. The R&D Agreement refers to Hetronic as the "Contractor" and refers to the other three Hetronic companies collectively as "Developer." *Id.* The R&D Agreement contains this later-disputed provision:

> Contractor acknowledges that the Developer [i.e., Hetronic Steuersysteme, Hetronic Malta Limited, and Hetronic USA] is, and shall remain, the sole owner of all that which is done, produced or developed by the Contractor, *including but not limited to the know-how, technical information, designs, product descriptions, trade marks, trade names* and of all and any data or information **[*1048]** that the Developer has supplied to the Contractor or **[**62]** which may have been developed by the Contractor in connection with the Work and of any improvements . . . made by either the Developer or the Contractor during the term of this agreement or at

> any other time if these relate to the Work, *and acknowledges Developer's exclusive right, title, and interest in and to such property*.

Id. at 1617-18 (emphasis altered).

By 2006, Hetronic Steuersysteme—Heckl's original company—had a minor role in the company's wider operations. It sold to Hetronic its "Hetronic" trademarks registered in Germany, the United States, South Korea, Japan, China, Taiwan, and the European Union. And because Hetronic Steuersysteme's business "was focused on the marketing, sales and assembly of [radio remote controls] in Germany," it changed its name to Hetronic Deutschland (which would later be purchased by Fuchs's company, Hetronic Germany). *Id.* at 1618.

In January 2008, years after the R&D Agreement was signed, Methode Electronics, Inc., a Delaware corporation, sought to acquire all the Hetronic-related companies. But during negotiations, Methode learned that Hetronic's distributor in Germany, Hetronic Deutschland, was embroiled in a tax dispute with the German government, **[**63]** so Methode declined to purchase that company.

Before completing the sale to Methode, Heckl sought to consolidate all of his companies' intellectual property in Hetronic. So Hetronic Deutschland sold to Hetronic the trademarks for the "Hetronic" name that it had registered in South America and Malta. Heckl believed that when the sale to Methode was completed, Hetronic had owned the rights to all the intellectual property held by the Hetronic-related companies, including the NOVA and ERGO trademarks and their trade dress.

In September 2008, Methode completed its purchase of the Hetronic companies. The purchase agreement included "All Intellectual Property owned by, licensed by or used by any [Hetronic-related company not including Hetronic Deutschland]." *Id.* at 1620. The agreement defined "Intellectual Property" as "[a]ll trademarks, service marks, certification marks, trade dress, logos, trade names, Internet domain names, and corporate names, . . . including all goodwill associated therewith." *Id.* at 1621.

After the sale, Heckl continued to own and manage Hetronic Deutschland. But in 2009, he considered selling the company. In response to a due-diligence inquiry from Fuchs, Hetronic Deutschland **[**64]** represented that it had no "patents, utility models or design rights . . . copyrights, trademarks, and/or respective applications." *Id.* at 1623. Yet when Hetronic Germany bought Hetronic Deutschland in 2010, the purchase agreement provided that "Seller sells and hands over to the Buyer . . . any and all intangible assets . . . including, in particular, patents, trademarks, rights relating to designs and utility models . . . that the Seller holds and can dispose of . . . ." *Id.* at 1624.

Based on that series of transactions, Hetronic Germany alleges it believed that it owned all the technology developed under the 2000 R&D Agreement as well as "legacy" technology developed before the Agreement was executed. *Id.* at 1629. Its rationale was as follows. Hetronic Germany is the successor of Hetronic Deutschland, which, when it was known as Hetronic Steuersysteme, became a party to the R&D Agreement. Under that agreement, Hetronic Steuersysteme—along with Hetronic Malta and Hetronic USA—retained ownership over "the know-how, technical information, designs, product descriptions, trade marks, [and] trade names." *Id.* at **[*1049]** 1617-18. Though Hetronic Deutschland later sold to Hetronic the trademark rights **[**65]** to the "Hetronic" name, Hetronic Germany maintained that the sale didn't include any other intellectual property. And because Methode didn't purchase Hetronic Deutschland (or any of its assets, intangible or otherwise), Hetronic Germany claimed that it owns the intellectual property that its predecessor, Hetronic Deutschland, retained under the R&D Agreement. Defendants have continued to rely on that same theory in defending against Hetronic's trademark claims.

B. The District Court Correctly Barred Defendants from Raising Their Ownership Defense

Based on their reading of the R&D Agreement, Defendants planned to assert their ownership defense at trial. But just two months before trial, the EUIPO Board of Appeal issued its decision in Hetronic's favor, and Hetronic moved for summary judgment on Defendants' ownership defense.[10] Relying on the Board of Appeal's decision in the EUIPO proceedings, Hetronic argued that preclusion principles barred Defendants from claiming any ownership interest in the relevant intellectual property. The district court granted the motion via oral ruling after a hearing, and, after *another* hearing addressing Defendants' "Motion to Clarify" (essentially a motion **[**66]** to reconsider), the court prohibited Defendants from arguing at trial that they owned any of the trademarks or trade dress. Defendants assert that the district court erred in so ruling.

HN31[] Because the district court construed Hetronic's motion as one for summary judgment, we review the district court's ruling de novo. *Savant Homes, Inc. v. Collins, 809 F.3d 1133, 1137 (10th Cir. 2016)* (citation omitted).

The issue-prelusion dispute before us is atypical in that we're considering the preclusive effect of a foreign judgment. ***HN32***[] Federal courts recognize and enforce foreign judgments if they meet due-process standards. *See Phillips USA, Inc. v. Allflex USA, Inc., 77 F.3d 354, 359 (10th Cir. 1996)* (quoting *Hilton v. Guyot, 159 U.S. 113, 202, 16 S. Ct. 139, 40 L. Ed. 95 (1895)*);[11] *Restatement (Second) of Conflict of Laws § 98 cmt. b* (1971) (explaining that valid "[j]udgments rendered in a foreign nation . . . will be accorded the same degree of recognition to which sister State judgments are entitled"). The parties agree that the judgments rendered in the EUIPO proceedings satisfy this standard, as do we.

But although we consider the preclusive effect of a foreign judgment, as a federal court examining a federal-law question, we rely on the federal law of issue preclusion. *See Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation, 975 F.2d 683, 687 (10th Cir. 1992)* (footnote and citations omitted); *cf. Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 324 n.12, 91 S. Ct. 1434, **[*1050]** 28 L. Ed. 2d 788 (1971)* (discussing res judicata and noting that "[i]n federal-question cases, the law applied is federal law").[12] ***HN33***[] "[I]ssue preclusion bars **[**67]** a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim." *Park Lake Res. Ltd. Liab. v. U.S. Dep't of Agric., 378 F.3d 1132, 1136 (10th Cir. 2004)* (citation omitted). In the civil context, four criteria must be met before a court may apply the doctrine of issue preclusion:

(1) the issue previously decided is identical with the one presented in the action in question,

(2) the prior action has been finally adjudicated on the merits,

(3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and

(4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

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[10] For reasons unimportant here, Hetronic initially moved under *Rule 50(a)*, but the district court rightly construed the motion as one for summary judgment.

[11] This due-process standard is met if "there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting, or fraud in procuring the judgment." *Phillips USA, 77 F.3d at 359* (quoting *Hilton, 159 U.S. at 202*); *see also Soc'y of Lloyd's, 402 F.3d at 999* (quoting same *Hilton* language).

[12] At least one authority suggests that U.S. courts should apply foreign preclusion law if the foreign rules "are substantially the same as the rules of the [U.S.] court." *Restatement (Second) of Conflict of Laws § 98 cmt. f* (1971). Under that principle, it's arguable that EU preclusion law should govern this dispute. But the parties agree that federal issue-preclusion law applies, and they didn't provide any discussion of EU preclusion law. Given the lack of briefing on EU preclusion law, we follow the parties' lead and the authority we identify above in considering this issue under federal issue-preclusion law.

Id. (citation omitted). Though Hetronic argues why it has met each element, Defendants seriously contest only the first two elements. Focusing our discussion on those elements, we conclude that the district court rightly precluded Defendants from presenting their ownership defense to the jury.

Under the first element, we assess whether the issue Defendants seek to litigate "is the same as the one addressed previously by" EUIPO. *Murdock, 975 F.2d at 687*. That is, ***HN34***[] we aim "to prevent repetitious litigation **[**68]** of what is essentially the same dispute." *Restatement (Second) of Judgments § 27 cmt. c* (1982). Here, the issue—whether Defendants own the disputed intellectual property—is essentially the same one decided in the EUIPO proceedings. That becomes clear, though, only after reading *both* the Cancellation Division's decision and the Board of Appeal's decision.

Defendants are correct that the Cancellation Division didn't decide the ownership issue. Recall that Abitron Germany initiated the EUIPO proceedings, arguing that the EU should nullify Hetronic's "NOVA" trademark because Hetronic had filed for the mark in bad faith (i.e., Hetronic supposedly knew that Abitron Germany had a stronger claim to ownership of the mark). Both parties to that proceeding based much of their arguments on their respective claims to ownership of the intellectual property. But the Cancellation Division equivocated on the ownership issue: "The arguments . . . give the impression that both [Defendants] and [Hetronic] were authorized to use" the NOVA trademark. Appellants' App. vol. 13 at 3180. So that initial tribunal decided the dispute on a narrow basis. It concluded only that Hetronic didn't act in bad faith when it filed for (and obtained) the NOVA trademark **[**69]** because Hetronic had a valid basis to believe that it owned the mark, regardless of whether it actually had the superior claim to ownership. If the EUIPO proceedings had ended with the Cancellation Division, issue preclusion would not apply.

But unlike the Cancellation Division, the Board of Appeal tackled the ownership issue head-on. It framed the dispute this way: When a company transfers all of its **[*1051]** "business operation"—as the original Hetronic International did when Methode acquired it—that necessarily includes "the right to a trademark acquired by use." *Id.* at 3112. In other words, though Abitron Germany tried to argue that Methode's purchase of Hetronic International didn't include the rights to use the *non-registered* "NOVA" trademark, the Board of Appeal concluded that it was impossible to separate the rights to a company's trademarks from the operation of the business as a whole.

In reaching its decision, the Board of Appeal reasoned that "[t]he decisive question is . . . whether the Hetronic business operation remained with [Abitron Germany's] legal predecessors. That is not the case." *Id.* at 3112. Indeed, the Board of Appeal reached the opposite conclusion, holding that "[i]t **[**70]** is clear from all the[] agreements that Hetronic Deutschland, as one of the legal predecessors to [Abitron Germany], had no rights to the company name [or] the German 'Hetronic' trademarks." *Id.* at 3113. It based its ruling on its conclusion that Methode's purchase of Hetronic International "comprise[d] *all* of the intellectual property." *Id.* at 3112 (emphasis added). In short, the Board of Appeal resolved the exact issue that Defendants sought to dispute at trial: that when Methode bought Hetronic International, it obtained ownership of all the Hetronic-related intellectual property.[13] Thus, the district court rightly concluded that the EUIPO proceedings resolved the same issue that Defendants sought to dispute at trial.

Defendants' contrary arguments fail to persuade us. They argue that the Board of Appeal didn't decide the same issue because the parties' dispute before EUIPO was limited to the NOVA trademark and no others. According to Defendants, because the Board of Appeal's decision didn't mention EURO, GL, GR or any of the other product marks, its decision governs only ownership of the NOVA trademark.

But we read the Board of Appeal's decision the same way as the district court: **[**71]** "ownership of the intellectual property at issue was very much an either/or proposition. Either it all passed to [Hetronic] in 2008 or to [D]efendants

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[13] Several months after oral argument, Hetronic filed a *Rule 28(j)* letter informing us that the General Court of the European Union had upheld the Board of Appeal's decision. In response, Defendants renewed their assertion that the General Court, like EUIPO, lacked jurisdiction to decide the ownership issue. But as we explain below, Defendants waived any argument about EUIPO lacking jurisdiction by not raising it in the district court.

in 2010." Supp. App. vol. 2 at 361. It's evident that the Board of Appeal concluded that all the intellectual property passed to Hetronic, not just the NOVA trademark. *See* Appellants' App. vol. 13 at 3112 (explaining that the relevant agreements "show that the assets transferred . . . comprise *all of the intellectual property*, including all Intellectual Property incorporated into the radio remote control products developed, manufactured, marketed or sold by [Hetronic]." (emphasis added) (internal quotation marks omitted)). Moreover, Defendants fail to explain how the ownership dispute would differ as to the other trademarks. Indeed, Abitron Germany's claim to the other intellectual property would be based on the same theories, documents, and arguments it presented vis-à-vis the NOVA mark and that the Board of Appeal rejected. *See* [Restatement (Second) of Judgments § 27 cmt. c]() (1982) (suggesting that in assessing whether the previous tribunal decided the same issue, courts should ask if "there [is] a substantial overlap between the evidence or argument to be advanced in the second **[**72]** proceeding and that advanced in the first").

[*1052] Defendants fare no better on the second element. There, we consider whether "the prior action has been finally adjudicated on the merits." [United States v. Rogers, 960 F.2d 1501, 1508 (10th Cir. 1992)]() (citation omitted). It has. After resolving the parties' dispute, EUIPO dismissed Abitron Germany's petition and ordered it to pay the costs of the proceeding.

Defendants nevertheless insist that the Board of Appeal's finding concerning ownership is mere dicta, and thus it didn't actually decide the issue. True, "[a]djudication on the merits requires that the adjudication be necessary to the judgment," so dicta wouldn't suffice. [Murdock, 975 F.2d at 687]() (citations omitted). But the Board of Appeal's ownership ruling wasn't dicta. Dictum refers to "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." *Dictum*, Black's Law Dictionary (11th ed. 2019). Here, the Board of Appeal's decision turned on its conclusions regarding who owned the intellectual property: "[Abitron Germany] bases its allegation of bad faith on supposedly earlier rights in the mark 'NOVA'. As already pointed out . . . , however, **[**73]** it has no rights to a 'NOVA' trademark acquired by use." Appellants' App. vol. 13 at 3114. Stated differently, the Board of Appeal's ruling that Hetronic owned all the intellectual property was a necessary predicate to its conclusion that Defendants' bad-faith claim failed. So the ownership ruling wasn't dicta.[14]

In brief, because Hetronic has met each of the required elements, we affirm the district court's summary-judgment ruling on Defendants' ownership defense.

III. District Court's Evidentiary Rulings at Trial

Defendants challenge three of the district court's trial rulings. First, Defendants argue that the district court erroneously sustained Hetronic's relevance objection, precluding them from arguing that the Lanham Act didn't reach their foreign-sales activity. We already dealt with that issue above: Any error by the district court was harmless because we conclude as a matter of law that the Lanham Act reaches Defendants' conduct. *See* [Bridges v. Wilson, 996 F.3d 1094, 1099 (10th Cir. 2021)]() ("***HN35***[] [E]ven if the trial court is mistaken, it will not be reversed unless its ruling results in substantial prejudice, or had a substantial effect on the outcome of the case." (alteration in original) (quotation omitted)).

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[14] Defendants raise a number of other arguments in passing—usually devoting little more than a sentence to each—that we decline to address. First, they argue that EUIPO lacked jurisdiction to decide the ownership issue. Defendants have forfeited that argument by failing to raise it in the district court. And because Defendants failed to identify plain error as the standard of review governing this new argument (let alone contend that the argument survives that exacting standard), we decline to consider it. *See* [Grupo Cementos, 970 F.3d at 1282-83]() ("[I]n order to avoid a waiver on appeal, a party is required to identify plain error as the standard of review in their opening brief and to provide a defense of that standard's application." (citations omitted)). Second, addressing the third element, Defendants argue that issue preclusion could bind only Abitron Germany, as the other Defendants weren't parties to the EUIPO proceedings. But like their jurisdictional argument, they didn't argue the third element in the district court, nor do they make the case that their argument can survive plain-error review, so we consider that argument waived. *Id.*

Second, Defendants **[**74]** argue that the district court wrongly precluded them from using their evidence that they owned the intellectual property for purposes unrelated to the court's issue-preclusion ruling. **[*1053]** And third, Defendants contest the district court's exclusion of their damages expert. We reject both of these challenges in turn.

HN36[] "Evidentiary rulings generally are committed to the very broad discretion of the trial judge, and they may constitute an abuse of discretion only if based on an erroneous conclusion of law, a clearly erroneous finding of fact or a manifest error in judgment." *Leprino Foods Co. v. Factory Mut. Ins. Co., 653 F.3d 1121, 1131 (10th Cir. 2011)* (internal quotation marks and citation omitted). And "[e]ven if the court finds an erroneous evidentiary ruling, a new trial will be ordered only if the error 'affected the substantial rights of the parties.'" *Id.* (quoting *Webb v. ABF Freight Sys., Inc., 155 F.3d 1230, 1246 (10th Cir. 1998)*).

A. Waiver-and-Acquiescence and Good-Faith-Belief-in-Ownership Defenses

Despite the district court's issue-preclusion ruling that Defendants couldn't assert at trial that they owned the intellectual property, Defendants argue that they should have been allowed to introduce ownership evidence for a different purpose. Specifically, Defendants sought to present a waiver-and-acquiescence defense to Hetronic's **[**75]** contract claims and a good-faith-belief-in-ownership defense to combat the willful-infringement element of the trademark claims. The district court didn't abuse its discretion in handling either of these issues.

First, the district court ruled—over Hetronic's objection—that Defendants *could* assert a waiver-and-acquiescence defense. But the district court clarified that that defense "raises no issue as to whether *defendants* believed they owned the trademarks or the technology"; "[t]he question is whether *Hetronic* had the factual knowledge and subjective intent necessary to establish the acquiescence defense." Supp. App. vol. 2 at 362 (emphasis added). In other words, to present this defense and show that Hetronic acquiesced to Defendants' contractual breaches, Defendants needed to prove that Hetronic believed that Defendants owned the intellectual property—it was irrelevant whether Defendants believed that they owned it. Based on that ruling, Defendants apparently chose not to pursue the defense. That was no fault of the district court's.

Second, Defendants challenge the district court's refusal to permit them to assert a good-faith-belief-in-ownership defense, but they ignore the district **[**76]** court's rationale. The district court prohibited Defendants from raising that defense, not because of its preclusion ruling, but because Defendants had forfeited it: They had failed to raise it in their answers, at summary judgment, or in their pretrial briefing. And Defendants don't challenge the district court's conclusion that allowing them to raise that defense on the eve of trial would have significantly prejudiced Hetronic. We thus conclude that the district court rightly prevented Defendants from raising this defense.

B. Exclusion of Defendants' Damages Expert

During the trial, Defendants sought to introduce testimony from their damages expert, Alexander Demuth, that any damages the jury awarded under the Lanham Act must be reduced by Defendants' costs of goods (i.e., their expenses in producing their remote controls). The district court permitted Demuth to testify but prohibited him from opining about the costs-of-goods issue. Defendants appeal that ruling.

During discovery, Defendants "consistently claimed . . . that they could not determine their costs of goods sold because their accounting system of 'total cost **[*1054]** method' does not contain the requisite information." Supp. App. **[**77]** vol. 1 at 77 (citations omitted). Yet in his expert report, Demuth purported to calculate Defendants' costs of goods sold based on spreadsheets that Defendants had prepared "after-the-fact" "in which they . . . 'allocated' total costs for the companies into several categories—but not costs associated with particular sales." *Id.* Hetronic moved to exclude Demuth's costs-of-goods testimony, asserting that it was based on "unreliable data that defendants ginned up for Demuth after claiming for months that they had no way to estimate their costs of goods sold." *Id.* at 76.

At the *Daubert* hearing, the district court provisionally denied Hetronic's motion based on Defendants' representation that "[a]n independent person from the company will testify to the validity of the numbers." *Id.* vol. 2 at 288 ("He will not confirm these numbers are, in fact, accurate. That's up to the company to confirm, to support his expert opinion."). The district court conditioned its ruling on Defendants verifying the underlying numbers upon which Demuth would base his testimony: "I do conclude that . . . *if* the defendants do carry their burden of presenting evidence to support . . . the cost of goods sold, then **[**78]** Mr. Demuth will be permitted to testify that cost of goods sold should be deducted from any Lanham Act recovery of the defendants' profits." *Id.* at 291-92 (emphasis added).

But by the time of trial, Defendants had failed to introduce any testimony or evidence confirming the accuracy of the underlying numbers upon which Demuth based his expert report. So, in an oral ruling near the end of the trial, the district court prohibited Demuth from testifying about the costs-of-goods issue: "We don't have the witness that I was told [at the *Daubert* hearing] I would have . . . , but more importantly, we don't have . . . the independently admissible evidence that I was told that we would have, and which I conclude is required under *Section 35* of the Lanham Act." Appellants' App. vol. 13 at 3334-35.

Complicating matters, the district court's brief oral ruling doesn't clearly establish the legal basis for its decision. The parties advance competing—and equally erroneous—theories. Defendants argue that the district court excluded Demuth's testimony under *Rule 602* because he lacked "*personal knowledge* of the cost information about which he testified." Appellants' Opening Br. at 49. But Defendants misconstrue the court's point about **[**79]** *Rule 602*. The court merely pointed out that Demuth himself couldn't testify about the accuracy of the underlying numbers because he hadn't verified them. Appellants' App. vol. 13 at 3334 ("[Demuth] is not a *Rule 602* percipient witness *as to the reliability of the numbers* supplied by [the Abitron entities' CEO]." (emphasis added)).

For its part, Hetronic contends that the district court excluded Demuth's testimony "under *Daubert*." Appellee's Resp. Br. at 54. But that's equally incorrect. The district court recognized that Demuth's testimony sufficed under *Rules 702* and *703* but explained that more was required under the Lanham Act:

> It's very likely that the basis that Mr. Demuth has offered for testifying about cost of goods sold is sufficient for use by an expert under *Rule 703* for purposes of expert testimony under *Rule 702*. . . .
>
> But it's one thing for a source of information to be sufficient for use by an expert under *Rule 703* for purposes of *Rule 702* expert [testimony]; in my view, it is quite another thing for the jury to have testimony and evidence that passes muster *under the substantive demands of Section 35 of the Lanham Act*.

[*1055] Appellants' App. vol. 13 at 3334 (emphasis added). Thus, the district court appears to have concluded that Defendants failed **[**80]** to "prove all elements of cost or deduction claimed," as required by the Lanham Act. *15 U.S.C. § 1117(a)*.

HN37[] Though the district court's precise rationale is unclear, "we may affirm the district court for any reason supported by the record." *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv., II, LLC, 887 F.3d 1003, 1032-33 (10th Cir. 2018)* (citation omitted). We have previously recognized that a district court may exclude an economic expert if the expert's "opinions lacked foundation because they were based on the self-serving statements of an interested party." *Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1080 n.4 (10th Cir. 2006)* (brackets and internal quotation marks omitted). That's what happened here. It was the underlying data supplied to Demuth—not Demuth's testimony itself—that was problematic. After consistently asserting that they kept no costs-of-goods records, Defendants suddenly produced just the financial records they needed to offset any potential damages award. The district court was rightly skeptical of those fortuitous documents. And even though the district court concluded that Demuth had used reliable methods to form his opinion, his testimony wouldn't be worth much if it was based on unreliable, manufactured numbers. Defendants had ample time and opportunity to authenticate the disputed numbers (as they promised they would), but they never did. On these **[**81]** facts, the district court didn't abuse its discretion in excluding Demuth's costs-of-goods testimony.

CONCLUSION

For the forgoing reasons, we affirm in part, reverse in part, and remand to the district court to modify its injunction in accordance with our opinion.[15]

[15] We also grant Defendants' unopposed motion to file five documents under seal. Each of the documents was marked as confidential under the district court's protective order, and we are satisfied that the parties have demonstrated "a real and substantial interest that justifies depriving the public of access to the records." *JetAway Aviation, LLC v. Bd. of Cnty. Comm'rs, 754 F.3d 824, 826 (10th Cir. 2014)* (citation and internal quotation marks omitted).

In re Glumetza Antitrust Litig.

United States District Court for the Northern District of California

August 25, 2021, Decided; August 25, 2021, Filed

No. C 19-05822 WHA; No. C 19-06138 WHA; No. C 19-06839 WHA; No. C 19-07843 WHA; No. C 19-08155 WHA; No. C 20-01198 WHA; No. C 20-05251 WHA

Reporter
2021 U.S. Dist. LEXIS 161066 *; 2021 WL 3773621

In re GLUMETZA ANTITRUST LITIGATION. This Document Relates to: ALL ACTIONS.

Prior History: *In re Glumetza Antitrust Litig., 2020 U.S. Dist. LEXIS 39649, 2020 WL 1066934 (N.D. Cal., Mar. 5, 2020)*

Core Terms

patent, generic, defendants', opines, plaintiffs', motion to exclude, settlement, overcharge, purchasers, brand, anticompetitive, wholesalers, antitrust, damages, infringement, but-for, market power, manufacturer, marketing, calculation, indirect, parties, procompetitive, methodology, reliable, effects, Reply, predictions, benefits, prices

LexisNexis® Headnotes

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN1[] **Expert Witnesses, Helpfulness**

District courts have a gatekeeping role to ensure that expert testimony admitted into evidence is both reliable and relevant, and to exclude junk science. Under Fed. R. Evid. 702, an expert witness may provide opinion testimony if: (1) the expert's specialized knowledge will help the trier of fact; (2) the testimony is based upon sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the witness has applied the principles and methods reliably to the facts of the case.

Evidence > Burdens of Proof > Allocation

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN2[] **Burdens of Proof, Allocation**

Under Daubert and its progeny, the admissibility of expert testimony turns on whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute. The district court's inquiry is flexible and based on the particular circumstances of the case--it must assure that the expert testimony both rests on a reliable foundation and is relevant to the task at hand. Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline. Ultimately, while the proponent of expert testimony bears the burden of demonstrating its admissibility, the Daubert inquiry should be applied with a liberal thrust favoring admission. Refer to Fed. R. Evid. 702, Advisory Committee Notes.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN3[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Actavis held: In sum, a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects; one who makes such a payment may be unable to explain and to justify it; such a firm or individual may well possess market power derived from the patent.

Evidence > Admissibility > Expert Witnesses

HN4[] **Admissibility, Expert Witnesses**

Therasense held that no professional should reasonably rely on rigged and biased sources of information for any materially important fact to his or her opinion. The order elaborated: Given the obvious bias of clients, however, any litigation-driven test must be subjected to heightened scrutiny such that it would be reasonable for a truly independent professional in the field of endeavor to base an important decision on it. The more central the "fact" issue is in the overall opinion and overall trial and the more controverted the "fact" is in the context of the case, the more due diligence an expert should exercise before merely taking a partisan's word.

Civil Procedure > Attorneys

HN5[] **Civil Procedure, Attorneys**

Counsel must remember and honor their duty of candor, including in the description of the caselaw.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

HN6[] **Private Actions, Remedies**

Illinois Brick rejected attempts to carve out exceptions to the Hanover Shoe rule for particular types of markets.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

HN7[] **Private Actions, Remedies**

Illinois Brick suggests the antitrust laws are much more concerned with fully divesting antitrust violators of the benefit of their violation than with any potential windfall to plaintiffs.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

HN8[] **Private Actions, Remedies**

Hanover Shoe and Illinois Brick make clear that courts and juries will not be forced down the rabbit hole of hypothetical issues antitrust violators may raise to minimize their liability.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN9[] **Inequitable Conduct, Anticompetitive Conduct**

it is normally not necessary to litigate patent validity to answer the antitrust question. An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival.

Torts > Wrongful Death & Survival Actions > Survival Actions

HN10[] **Wrongful Death & Survival Actions, Survival Actions**

An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival.

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

HN11[] **Settlement Agreements, Validity of Agreements**

Reverse-payment settlement agreements should be analyzed holistically (in the context of ***antitrust law***).

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > ... > Testimony > Expert Witnesses > Qualifications

Patent Law > Jurisdiction & Review > Standards of Review > Abuse of Discretion

HN12[] **Standards of Review, Abuse of Discretion**

In Sundance, the Court of Appeals for the Federal Circuit held: It is an abuse of discretion to permit a witness to testify as an expert on the issues of noninfringement or invalidity unless that witness is qualified as an expert in the pertinent art. Indeed, where an issue calls for consideration of evidence from the perspective of one of ordinary skill in the art, it is contradictory to Fed. R. Evid. 702 to allow a witness to testify on the issue who is not qualified as a technical expert in that art.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN13[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Actavis held that reverse-payment settlements can sometimes violate antitrust laws. Actavis stated that the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The existence and degree of any anticompetitive consequence may also vary as among industries. These complexities lead the Court to conclude that the plaintiff must prove its case as in other rule-of-reason cases.

Evidence > Admissibility > Expert Witnesses

HN14[] **Admissibility, Expert Witnesses**

It is common, indeed required, under Fed. R. Civ. P. 26(a)(2), for an expert to summarize the facts and data considered in their report.

Civil Procedure > ... > Equity > Maxims > Own Wrongs Principle

HN15[] **Maxims, Own Wrongs Principle**

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

Counsel: [*1] For Meijer, Inc., Meijer Distribution, Inc., Plaintiffs (3:19-cv-05822-WHA): Adam P Merrill, Daniel Abraham Shmikler, PRO HAC VICE, Sperling Slater, P.C., Chicago, IL; Alberto Rodriguez, Eamon Padraic Kelly, Sperling & Slater P.C., Chicago, IL; Anna Theresa Neill, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL; Barry Steven Taus, PRO HAC VICE, Taus, Cebulash & Landau, LLP, New York, NY; Brett H Cebulash, PRO HAC VICE, Taus, Cebulash and Landau, New York, NY; David Paul Germaine, John Paul Bjork, Joseph M Vanek, Sperling & Slater, P.C., Chicago, IL; David S. Nalven, Jessica R. MacAuley ,, Lauren G. Barnes, Rochella T. Davis, Thomas M. Sobol, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Kristen A. Johnson, Hagens Berman Sobol Shapiro, Cambridge, MA; Richard M Brunell, Hilliard and Shadowen, Austin, TX; Robert David Cheifetz, PRO HAC VICE, Sperling Slater, Chicago, IL; Steve D. Shadowen, Hilliard & Shadowen, LLP, Austin, TX; Shana E. Scarlett, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For BI-LO, LLC, (19-6138), Winn-Dixie Logistics, Inc., (19-6138), Plaintiffs (3:19-cv-05822-WHA): Matthew C. Weiner, LEAD ATTORNEY, PRO HAC VICE, Nicholas William Shadowen, LEAD **[*2]** ATTORNEY, Hilliard & Shadowen LLP, Austin, TX; Anna Theresa Neill, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL; Barry Steven Taus, PRO HAC VICE, Taus, Cebulash & Landau, LLP, New York, NY; Brett H Cebulash, PRO HAC VICE, Taus, Cebulash and Landau, New York, NY; David S. Nalven, Jessica R. MacAuley ,, Lauren G. Barnes, Rochella T. Davis, Thomas M. Sobol, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Kristen A. Johnson, Hagens Berman Sobol Shapiro, Cambridge, MA; Richard M Brunell, Hilliard and Shadowen, Austin, TX; Rudy F. Gonzales , Jr., PRO HAC VICE, Hilliard Munoz Gonzales, Corpus Christi, TX; Steve D. Shadowen, Hilliard & Shadowen, LLP, Austin, TX; Tina Joann Miranda, PRO HAC VICE, Hillard Shadowen LLC, Austin, TX; Shana E. Scarlett, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For KPH Healthcare Services, Inc., (19-6839) individually and on behalf of all others similarly situated, also known asKinney Drugs, Inc., Plaintiff (3:19-cv-05822-WHA): A.J. De Bartolomeo, LEAD ATTORNEY, Tadler Law LLP, San Francisco, CA; Karen Sharp Halbert, Sarah E. DeLoach, Stephanie Smith, Stephanie Egner Smith, LEAD ATTORNEYS, PRO HAC VICE, Michael Roberts, LEAD ATTORNEY, **[*3]** Roberts Law Firm, P.A., Little Rock, AR; Lauren G. Barnes, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Anna Theresa Neill, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL; Brian R Morrison, PRO HAC VICE, Tadler Law LLP, New York, NY; Steve D. Shadowen, Hilliard & Shadowen, LLP, Austin, TX.

For Walgreen Co., C19-7843), Plaintiff (3:19-cv-05822-WHA): Anna Theresa Neill, LEAD ATTORNEY, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL; Richard Alan Arnold, LEAD ATTORNEY, Scott Eliot Perwin, Kenny Nachwalter, P.A., Miami, FL; Barry L. Refsin, Hangley Aronchick Segal Pudlin Schiller, Philadelphia, PA; Lauren C. Ravkind, PRO HAC VICE, Kenny Nachwalter, PA, Austin, TX; Steve D. Shadowen, Hilliard & Shadowen, LLP, Austin, TX; William Francis Murphy, Dillingham & Murphy, San Francisco, CA.

For Kroger Co., The, (19-7843), Albertsons Companies, Inc., (19-7843), H-E-B LP, (19-7843), Plaintiffs (3:19-cv-05822-WHA): Anna Theresa Neill, LEAD ATTORNEY, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL; Richard Alan Arnold, Scott Eliot Perwin, LEAD ATTORNEYS, Kenny Nachwalter, P.A., Miami, FL; Barry L. Refsin, Hangley Aronchick Segal Pudlin Schiller, Philadelphia, PA; **[*4]** Steve D. Shadowen, Hilliard & Shadowen, LLP, Austin, TX.

For Bausch Health Companies Inc., Salix Pharmaceuticals, Ltd., Salix Pharmaceuticals, Inc., Santarus, Inc., Defendants (3:19-cv-05822-WHA): David R. Marriott, LEAD ATTORNEY, Damaris Hernandez, PRO HAC VICE, Cravath, Swaine Moore LLP, New York, NY; Jennifer Bridget Patterson, LEAD ATTORNEY, PRO HAC VICE, Arnold and Porter Kaye Scholer LLP, New York, NY; Laura S Shores, LEAD ATTORNEY, PRO HAC VICE, Arnold and Porter Kaye Scholer LLP, Washington, DC; Daniel B. Asimow, Matthew Harrison Fine, Arnold & Porter Kaye Scholer LLP, San Francisco, CA; Helam Gebremariam, Sharonmoyee Goswami, PRO HAC VICE, Cravath Swaine Moore LLP, New York, NY.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-05822-WHA): Eric Jonathan Stock, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn, New York, NY; Caeli A. Higney, Gibson Dunn, San Francisco, CA; Daniel B. Asimow, Arnold & Porter Kaye Scholer LLP, San Francisco, CA; Lauren Michelle Kole, PRO HAC VICE, Denver, CO; Leesa Nicole Haspel, PRO HAC VICE, Gibson, Dunn and Crutcher LLP, New York, NY.

For Lupin Pharmaceuticals, Inc., Defendant (3:19-cv-05822-WHA): Jay P. Lefkowitz, LEAD ATTORNEY, Kirkland Ellis LLP, **[*5]** New York, NY; Jeffrey Blumenfeld, LEAD ATTORNEY, PRO HAC VICE, Lowenstein Sandler, Washington, DC; Leiv Hamilton Blad, Zarema Arutyunova Jaramillo, LEAD ATTORNEYS, Joshua Elijah Morris, PRO HAC VICE, Lowenstein Sandler LLP, Washington, DC; Daniel B. Asimow, Arnold & Porter Kaye Scholer LLP, San Francisco, CA; Devora Allon, Kirkland and Ellis LLP, New York, NY; James Hileman, Chicago, IL; Meg T. Slachetka, Sydney Julia Kaplan, PRO HAC VICE, Lowenstein Sandler LLP, New York, NY; Michael John Shipley, Kirkland and Ellis LLP, Los Angeles, CA.

For Lupin Ltd., Defendant (3:19-cv-05822-WHA): Jay P. Lefkowitz, LEAD ATTORNEY, Kirkland Ellis LLP, New York, NY; Jeffrey Blumenfeld, LEAD ATTORNEY, PRO HAC VICE, Lowenstein Sandler, Washington, DC; Leiv Hamilton Blad, Zarema Arutyunova Jaramillo, LEAD ATTORNEYS, Joshua Elijah Morris, PRO HAC VICE, Lowenstein Sandler LLP, Washington, DC; Daniel B. Asimow, Arnold & Porter Kaye Scholer LLP, San Francisco, CA; Devora Allon, Kirkland and Ellis LLP, New York, NY; James Hileman, Chicago, IL; Meg T. Slachetka, Sydney Julia Kaplan, PRO HAC VICE, Lowenstein Sandler LLP, New York, NY.

For CVS Pharmacy, Inc., Movant (3:19-cv-05822-WHA): Anna Theresa Neill, LEAD **[*6]** ATTORNEY, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL; Alexander J. Egervary, Caitlin V. McHugh, Chelsea M. Nichols, PRO HAC VICE, Hangley Aronchick Segal Pudlin & Schiller, Philadelphia, PA; Barry L. Refsin, PRO HAC VICE, Hangley Aronchick Segal Pudlin Schiller, Philadelphia, PA; Eric L Bloom, Monica L. Kiley, PRO HAC VICE, Hangley Aronchick Segal Pudlin & Schiller, Harrisburg, PA; Scott Eliot Perwin, Kenny Nachwalter, P.A., Miami, FL; Steve D. Shadowen, Hilliard & Shadowen, LLP, Austin, TX; William Francis Murphy, Dillingham & Murphy, San Francisco, CA.

For Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Movants (3:19-cv-05822-WHA): Anna Theresa Neill, LEAD ATTORNEY, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL; Alexander J. Egervary, Caitlin V. McHugh, Chelsea M. Nichols, PRO HAC VICE, Hangley Aronchick Segal Pudlin & Schiller, Philadelphia, PA; Barry L. Refsin, PRO HAC VICE, Hangley Aronchick Segal Pudlin Schiller, Philadelphia, PA; Eric L Bloom, Monica L. Kiley, PRO HAC VICE, Hangley Aronchick Segal Pudlin & Schiller, Harrisburg, PA; Scott Eliot Perwin, Kenny Nachwalter, P.A., Miami, FL; Steve D. Shadowen, Hilliard & Shadowen, LLP, Austin, TX.

For Hy-Vee, Inc., **[*7]** Movant (3:19-cv-05822-WHA): Anna Theresa Neill, LEAD ATTORNEY, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL; Scott Eliot Perwin, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL; Steve D. Shadowen, Hilliard & Shadowen, LLP, Austin, TX.

For Humana Inc., Movant (3:19-cv-05822-WHA): Peter St. Phillip, LEAD ATTORNEY, PRO HAC VICE, Lowey Dannenberg, P.C., White Plains, NY; Todd Michael Schneider, LEAD ATTORNEY, Mark Francis Ram, Schneider Wallace Cottrell Konecky LLP, Emeryville, CA; Uriel Rabinovitz, LEAD ATTORNEY, Lowey Dannenberg, PC, White Plains, NY; Anna Theresa Neill, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL; Charles Z Kopel, Lowey Dannenberg, P.C., West Conshohocken, PA; Matthew Sinclair Weiler, Schneider Wallace Cottrell Konecky et al, Emeryville, CA; Steve D. Shadowen, Hilliard & Shadowen, LLP, Austin, TX.

For Cardinal Health, Inc., Interested Party (3:19-cv-05822-WHA): Robert James Tucker, BakerHostetler LLP, Columbus, OH.

For Teva Pharmaceuticals USA, Inc., Miscellaneous (3:19-cv-05822-WHA): Todd Andrew Boock, Goodwin Procter LLP, Los Angeles, CA.

For BI-LO, LLC, Winn-Dixie Logistics, Inc., Plaintiffs (3:19-cv-06138-WHA): Shana E. Scarlett, LEAD ATTORNEY, Hagens **[*8]** Berman Sobol Shapiro LLP, Berkeley, CA; Lauren G. Barnes, Thomas M. Sobol, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Matthew C. Weiner, PRO HAC VICE, Nicholas William Shadowen, Hilliard & Shadowen LLP, Austin, TX; Steve D. Shadowen, PRO HAC VICE, Hilliard & Shadowen, LLP, Austin, TX.

For Bausch Health Companies Inc., Salix Pharmaceuticals, Ltd., Salix Pharmaceuticals, Inc., Santarus, Inc., Defendants (3:19-cv-06138-WHA): Laura S Shores, LEAD ATTORNEY, PRO HAC VICE, Arnold and Porter Kaye Scholer LLP, Washington, DC; Saul P. Morgenstern, LEAD ATTORNEY, Kaye Scholer LLP, New York, NY; Daniel B. Asimow, Arnold & Porter Kaye Scholer LLP, San Francisco, CA.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-06138-WHA): Eric Jonathan Stock, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn, New York, NY; Victoria Leigh Weatherford, Baker & Hostetler LLP, San Francisco, CA.

For Lupin Pharmaceuticals, Inc., Lupin Ltd., Defendants (3:19-cv-06138-WHA): Jeffrey C. Bank, LEAD ATTORNEY, PRO HAC VICE, Wilson Sonsini Goodrich and Rosati, New York, NY; Wendy Lynn Devine, Wilson Sonsini Goodrich Rosati PC, San Francisco, CA.

For KPH Healthcare Services, Inc., individually and on behalf of all others similarly **[*9]** situated, also known as Kinney Drugs, Inc., Plaintiff (3:19-cv-06839-WHA): A.J. De Bartolomeo, LEAD ATTORNEY, Tadler Law LLP, San Francisco, CA; Stephanie Smith, LEAD ATTORNEY, PRO HAC VICE, Stephanie Egner Smith, PRO HAC VICE, Little Rock, AR; Karen Sharp Halbert, Michael Roberts, Sarah E. DeLoach, PRO HAC VICE, Michael L. Roberts, Roberts Law Firm, P.A., Little Rock, AR.

For Bausch Health Companies Inc., Salix Pharmaceuticals, Ltd., Salix Pharmaceuticals, Inc., Santarus, Inc., Defendants (3:19-cv-06839-WHA): Laura S Shores, LEAD ATTORNEY, PRO HAC VICE, Arnold and Porter Kaye Scholer LLP, Washington, DC; Saul P. Morgenstern, LEAD ATTORNEY, Kaye Scholer LLP, New York, NY; Daniel B. Asimow, Arnold & Porter Kaye Scholer LLP, San Francisco, CA.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-06839-WHA): Eric Jonathan Stock, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn, New York, NY; Victoria Leigh Weatherford, Baker & Hostetler LLP, San Francisco, CA.

For Lupin Pharmaceuticals, Inc., Lupin Ltd., Defendants (3:19-cv-06839-WHA): Jeffrey C. Bank, LEAD ATTORNEY, Wilson Sonsini Goodrich and Rosati, New York, NY; Wendy Lynn Devine, Wilson Sonsini Goodrich Rosati PC, San Francisco, CA.

For Walgreen **[*10]** Co., The Kroger Co., Albertsons Companies Inc., H-E-B LP, Plaintiffs (3:19-cv-07843-WHA): Anna Theresa Neill, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-07843-WHA): Eric Jonathan Stock, Gibson Dunn, New York, NY.

For CVS Pharmacy, Inc, Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Plaintiffs (3:19-cv-08155-WHA): Anna Theresa Neill, Kenny Nachwalter, P.A., Four Seasons Tower, Miami, FL.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-08155-WHA): Eric Jonathan Stock, Gibson Dunn, New York, NY.

For Hy-Vee, Inc., Plaintiff (3:20-cv-01198-WHA): Anna Theresa Neill, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL.

For Assertio Therapeutics, Inc., Defendant (3:20-cv-01198-WHA): Victoria Leigh Weatherford, LEAD ATTORNEY, Baker & Hostetler LLP, San Francisco, CA; Eric Jonathan Stock, Gibson Dunn, New York, NY.

For Humana Inc., Plaintiff (3:20-cv-05251-WHA): Charles Z Kopel, Lowey Dannenberg, P.C., West Conshohocken, PA; Jason H. Kim, Todd Michael Schneider, Schneider Wallace Cottrell Konecky LLP, Emeryville, CA; Matthew Sinclair Weiler, Schneider Wallace Cottrell Konecky et al, Emeryville, CA; Peter St. Phillip, Lowey Dannenberg, **[*11]** P.C., White Plains, NY; Uriel Rabinovitz, Lowey Dannenberg, PC, White Plains, NY.

Judges: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM ALSUP

Opinion

ORDER RE *DAUBERT* MOTIONS TO EXCLUDE TESTIMONY INTRODUCTION

In this antitrust action, defendant brand and generic manufacturers of a type-2 diabetes drug allegedly engaged in a reverse-payment scheme and agreed not to compete with each other by delaying the introduction of a generic version of the drug for several years. The parties seek to winnow the battle of the experts at trial with ten *Daubert* motions to exclude testimony.

STATEMENT

The order denying summary judgment describes the facts of this action in detail (Dkt. No. 537). For the purposes of this order, in 2009, pharmaceutical company Depomed, Inc. sued Lupin Pharmaceuticals, Inc. in its various corporate forms for infringing Depomed's patents on Glumetza — an extended-release version of metformin hydrochloride, a drug that helps control blood sugar levels for individuals suffering from type 2 diabetes. Lupin entered Depomed's crosshairs because it had filed an Abbreviated New Drug Application (ANDA) with the FDA, seeking to manufacture and market generic versions of Glumetza. The parties litigated **[*12]** before the Honorable Phyllis J. Hamilton of our district for over a year before a claim construction order prompted the parties to settle in February 2012.

As our plaintiffs allege, this settlement hid an underlying conspiracy from Judge Hamilton — a *quid pro quo* where Lupin would delay market entry of its generic for four years (until February 1, 2016) and, in return, Depomed guaranteed it would not launch an authorized generic to compete with Lupin for one year (atop an FDA-granted 180-day period of market exclusivity) and would also protect Lupin from *other* generic competition. *First*, if any other manufacturer succeeded in marketing a generic Glumetza before February 2016, Lupin could market immediately. *Second*, Depomed covenanted not to license any other generic Glumetza manufacturers until at least 180 days following Lupin's market entry.

The agreement resulted in a windfall for defendants. Depomed had already sold its marketing rights in Glumetza to defendant Santarus, Inc., but then sold its royalty rights to PDL Biopharma in October 2013 (Dkt. No. 464-1). The juiced Glumetza portfolio aided Santarus' sale to defendant Salix Pharmaceuticals for $2.6 billion in November 2013, and **[*13]** Salix's sale to defendant Valeant Pharmaceuticals for $14.5 billion in April 2015. Then, in summer of 2015, Valeant hiked the price of Glumetza on the order of 800%. The wholesale acquisition cost of a 500 mg pill spiked form $5.72 in May to $51.48 by the end of July. At the same time, the cost of a 1000 mg pill rose from $12.37 to $113.36. When Lupin joined the market in February, the supposed-affordable generic did so at around $45 for each 500 mg tablet.

Both direct and indirect purchasers started suing in August 2019. The cases were consolidated before the undersigned, the indirect purchasers eventually exited the case, and a direct-purchaser class was certified in August 2020. An order dated May 6, 2021, denied all motions for summary judgment but left off ruling on the parties' ten *Daubert* motions to exclude expert testimony. The paperwork involved in this massive motion practice has taken the court many hours to sort out, and oral argument would be of no assistance in this endeavor. The Court is satisfied that the best way to proceed is to rule based on the papers themselves. This order makes those rulings now.

ANALYSIS

HN1[] District courts have a gatekeeping role to ensure that expert **[*14]** testimony admitted into evidence is both reliable and relevant, and to exclude "junk science." *Messick v. Novartis Pharms. Corp., 747 F.3d 1193, 1197 (9th Cir. 2014)*. Under *Rule 702 of the Federal Rules of Evidence*, an expert witness may provide opinion testimony if: (1) the expert's specialized knowledge will help the trier of fact; (2) the testimony is based upon sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the witness has applied the principles and methods reliably to the facts of the case.

HN2[] Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and its progeny, the admissibility of expert testimony turns on "whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *509 U.S. 579, 591, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. The district court's inquiry is flexible and based on the particular circumstances of the case — it "must assure that the expert testimony 'both rests on a reliable foundation and is relevant to the task at hand.'" *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (quoting *Daubert, 509 U.S. at 597*). "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Id.* at 565. Ultimately, **[*15]** while the proponent of expert testimony bears the burden of demonstrating its admissibility, the *Daubert* inquiry should be applied with a liberal thrust favoring admission. *Messick, 747 F.3d at 1196* (quoting *Daubert, 509 U.S. at 588*); *Lust v. Merrell Dow Pharms., Inc., 89 F.3d 594, 598 (9th Cir. 1996)*; *Fed. R. Evid. 702* Advisory Comm. Notes.

1. PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY OF DEFENDANTS' EXPERT DR. JENA.

First up is plaintiffs' *Daubert* motion regarding Dr. Anupam B. Jena (Dkt. Nos. 435, 473, 486). Dr. Jena, M.D., Ph.D. is a University of Chicago educated economist and physician currently teaching at Harvard Medical School and practicing at Massachusetts General Hospital. In his report, Dr. Jena opines: that Drs. Starr and Leffler take flawed approaches to assessing market power as well as the market definition and that the brand defendants did not possess monopoly or market power over pricing for Glumetza; that there is strong evidence of clinical substitutability between Glumetza and other metformin medications; and that there is strong evidence of economic substitutability as well (Jena Rep. ¶¶ 1-3; 11, Dkt. No. 440-16).

Dr. Jena's market power analysis makes two inquiries. First, he critiques the opinions of defendants' experts and argues that Glumetza's 2015 list-price increases is not evidence of market **[*16]** power, that the (actual or projected) decline in Glumetza's price in light of the entry of generics into the market does not imply market power, and the fact that Glumetza's price exceeded short-run marginal cost also does not imply market power (*id.* at ¶¶ 44-64). Second, Dr. Jena addresses indirect evidence of market power, which requires him to define Glumetza's market structure. Dr. Jena analyzes the clinical and economic substitutability of Glumetza and concludes that the relevant market is not just Glumetza and its generics, but also includes extended-release metformin products, such as brand and generic versions of Glucophage XR and Fortamet, and immediate-release metformin products, such as brand and generic versions of Glucophage (*id.* at ¶¶ 130-32).

In their *Daubert* motion, plaintiffs primarily argue that, as "a matter of law . . . in a generic-suppression case such as this, the generic price is the competitive price," and that Dr. Jena's "denial that the generic price is the relevant competitive price is fatal to his market-power analysis" (Br. 4, 6). To reach this conclusion, plaintiffs rely on *In re Aggrenox Antitrust Litigation*, which limited the scope of discovery in a **[*17]** reverse-payment case, holding that "the only relevant market in this litigation is [] the market of Aggrenox and its generic equivalents." *199 F. Supp. 3d 662, 663 (D. Conn. 2016)*. *Aggrenox* reasoned that, while a reverse payment is not dispositive of antitrust liability, a resulting imposition of supracompetitive prices is direct (and conclusive) evidence of market power as a matter of law, which obviates any need for an inquiry into a market definition. Accordingly, charging a supracompetitive price for a patented drug demonstrates at least a degree of market power, so the substitutability of the patented drug with another drug on the market could only limit damages and would have no bearing on liability. *Id. at 664-66, 668-69* (citing *FTC v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*; *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*).

Plaintiffs' argument in their *Daubert* motion is cut from the same cloth as those denied in the May 2021 summary judgment order: "Though the Supreme Court approved of direct proof of market power in *Indiana Federation*, there remains a broad gap between affirmance of a direct factual finding of market power versus plaintiffs' request here to take that question from the jury" (Summary Judgment Order 13). As the summary judgment order stated, no appellate opinions have adopted *Aggrenox's* reasoning, and *Indiana* ***[*18]*** *Federation* did, in fact, roughly define the market. The *Aggrenox* court recognized the opinion's novel approach and certified it for interlocutory appeal, saying that "district courts have struggled to fill the gaps that *Actavis* left open," and implying that its "effort to provide some of the missing structure" may not be the final word. *Aggrenox, 199 F. Supp. 3d at 669-70*.

As another court has noted, *Aggrenox* proposed a seductively simple standard. *See In re Loestrin 24 Fe Antitrust Litig., 2017 U.S. Dist. LEXIS 38558, 2017 WL 1491911, at *5 (D.R.I. Mar. 15, 2017)* (Judge Patricia A. Sullivan). *Aggrenox* itself recognized the Supreme Court's missive in *Actavis* that "trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed." *Aggrenox, 199 F. Supp. 3d at 664* (citing *Actavis, 570 U.S. at 159-60*). Given the present posture of this action — much farther along than *Aggrenox* — and the conclusion at summary judgment that left the finding of direct proof of market power in the hands of the jury, this order will not now withhold from that jury relevant expert testimony on this critical issue. To do otherwise would unduly abbreviate the market power analysis.

Plaintiffs also briefly argue that **[*19]** Dr. Jena fails to tether his market power analysis to potential anticompetitive effects by neglecting to discuss the reverse-payment scheme (Br. 4-5). ***HN3***[] *Actavis* held: "In sum, a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects; one who makes such a payment may be unable to explain and to justify it; such a firm or individual may well possess market power derived from the patent." *Actavis, 570 U.S. at 158*. In light of the summary judgment order, even if his report only tangentially references the reverse payment, Dr. Jena's testimony does not run counter to *Actavis* and is relevant to the inquiries of this action, such as the clinical and economic sustainability of Glumetza. He may leave specific analysis of the reverse payment to other experts without risking exclusion. Plaintiffs' other arguments to exclude Dr. Jena's testimony presuppose, pursuant to *Aggrenox*, that that the competitive price is the generic price, and fail for the reasons previously stated.

Because the summary judgment order foreclosed plaintiffs' theory that, in a generic-suppression case, the generic price is necessarily the competitive price, plaintiffs' motion to exclude Dr. **[*20]** Jena's testimony is **DENIED**.

2. PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY OF DEFENDANTS' EXPERTS PROFESSOR HOPFENBERG AND PROFESSOR ADELMAN.

Plaintiffs next move to exclude testimony of Professor Harold B. Hopfenberg — a professor of chemical and biomolecular engineering who performs an infringement analysis of the patents at issue in the *Lupin* litigation — and Professor Martin Adelman — a law professor who opines on the likely outcome of the *Lupin* litigation and relies on various aspects of Professor Hopfenberg's opinions (Dkt. Nos. 434, 478, 483).

Professor Hopfenberg received his bachelor's, master's and Ph.D. degrees in chemical engineering from MIT, and he is the Camille Dreyfus Professor Emeritus of Chemical and Biomolecular Engineering at the North Carolina State University. Professor Hopfenberg's research has concerned controlled drug delivery systems as well as swellable polymers and their interactions with small molecules. He has testified in a couple dozen patent litigation matters, including four cases involving the patents-in-suit on behalf of Depomed (Hopfenberg Rep. ¶¶ 1-3, 7, 12, Dkt. No. 440-7).

Depomed previously retained Professor Hopfenberg as an expert for the litigation **[*21]** predicating the instant dispute, *Depomed, Inc. v. Lupin Pharms.*, No. C 09-05587 PJH (N.D. Cal. filed Nov. 25, 2009) (Judge Phyllis Hamilton). In his expert report in that case, Professor Hopfenberg opined that Lupin's tablets infringed Depomed's patents. In the instant action, Professor Hopfenberg opines:

> each element of claim 1 of the '475 patent and each element of claim 1 of the '280 patent as construed by Judge Phyllis J. Hamilton in the Lupin litigation, was present in the 500 mg and 1000 mg Lupin tablets. It is also my opinion that each claim element of claim 1 of the '962 patent, as construed by Judge Hamilton, was present in the 1000 mg Lupin tablets"

(Hopfenberg Rep. ¶¶ 16-17, 38). Professor Hopfenberg also states, "it is my opinion that the asserted claims of the Depomed patents are valid even in light of the prior art cited by Dr. Park," Lupin's expert in the litigation (*id.* ¶ 39).

To reach these conclusions here, Professor Hopfenberg compares the patent claims to Lupin's tablets using data from a variety of sources from both the patent owner Depomed and the alleged infringer Lupin. Sources from Lupin include: Lupin's ANDA, tests Lupin submitted to the FDA, development data, and testimony from Lupin's technical **[*22]** expert, Professor Kinam Park — which includes both deposition testimony from this action and a draft expert report from the patent litigation (*id.* at ¶¶ 64, 66, 68, 71-72, 89). Professor Hopfenberg uses a similar collection of data from Depomed, including: reports from other technical experts Depomed retained for the *Lupin* litigation (Leslie Z. Benet, Linda A. Felton, and Eden Tesfu), tests conducted by Depomed technicians, and his own expert analysis at the time (*id.* at ¶¶ 80, 82, 96, 98, 114).

Turning to defendants' patent-law expert, Professor Adelman received his bachelor's degree, master's degree in physics, and law degree from the University of Michigan at Ann Arbor, and clerked for the Honorable Theodore Levin. In 1973, Professor Adelman became a Professor of Law at Wayne State University Law School, and currently serves as the Co- Director of the Dean Dinwoodey Center for Intellectual Property Studies at George Washington University Law School, among other titles (Adelman Rep. ¶ 2-5, 7, Dkt. No. 440-10).

Defendants asked Professor Adelman to opine on the likelihood Depomed would have prevailed on the merits in the *Lupin* litigation absent settlement (*id.* at ¶ 1). He concludes: **[*23]**

> [I]f the parties had not settled, the likelihood that Depomed would have prevailed as to the '475 and/or '280 patents was 80%; and the likelihood that Depomed would have prevailed as to the '962 patent was 60%. I do not think it was likely that any decision by the district court in favor of Depomed would have been reversed on appeal. I further conclude that a reasonable executive at a company such as Depomed who was advised by litigation counsel would have also expected that Depomed would likely have prevailed in the Lupin litigation on any subsequent appeal

(*id.* at ¶ 143). To reach these opinions, Professor Adelman (similar to Attorney Lentz, discussed below) reviews Judge Hamilton's claim construction order and how it would have impacted Depomed's claims. Professor Adelman subsequently compares Depomed's infringement case with Lupin's noninfringement arguments, using analysis from Professor Hopfenberg (*id.* at ¶¶ 56-58, 69-120). Professor Adelman then addresses Lupin's invalidity case by reviewing previous cases where invalidity challenges against the Depomed patents failed, again using on Professor Hopfenberg's technical evaluation. Lastly, to support his ultimate opinions, Professor Adelman reviews contemporary **[*24]** written analysis by Lupin's counsel on the patent litigation as well as retrospective testimony from the same counsel from their despositions in this action (*id.* at ¶¶ 123-42).

Plaintiffs cite the undersigned's order in *Therasense, Inc. v. Becton, Dickinson and Co.* to argue that Professor Hopfenberg's testimony — and, by proxy, Professor Adelman's testimony — should be excluded because they typify "the attempted spoon-feeding of client-prepared and lawyer-orchestrated 'facts' to a hired expert who then 'relies' on the information to express an opinion." *2008 U.S. Dist. LEXIS 124780, 2008 WL 2323856, at *1 (N.D. Cal. May 22, 2008)*. ***HN4***[] *Therasense* held that "no professional should reasonably rely on . . . rigged and biased source[s] of information for any materially important fact to his or her opinion." *2008 U.S. Dist. LEXIS 124780, [WL] at *2*. The order elaborated:

> Given the obvious bias of clients, however, any litigation-driven test must be subjected to heightened scrutiny such that it would be reasonable for a truly independent professional in the field of endeavor to base an important decision on it. The more central the "fact" issue is in the overall opinion and overall trial and the more controverted the "fact" is in the context of the case, the more due diligence an expert should exercise before **[*25]** merely taking a partisan's word

Ibid. Defendants contend that the same issues present themselves here because "Dr. Hopfenberg took test results that had previously been prepared by employees of defendant Depomed and/or experts retained by Depomed's counsel in the *Lupin* litigation and relied on them as the basis for his infringement opinions in this case" (Br. 14).

While the principles in *Therasense* hold true, Professor Hopfenberg's role as Depomed's expert in the underlying *Lupin* litigation does not, by itself, raise any red flags. Just as there may be wisdom in plaintiffs' decision to forgo retaining an expert in molecular biology and having their patent-law expert Attorney Lentz opine using only the technical-expert opinions generated contemporaneously for the *Lupin* litigation, there may also be wisdom in defendants' decision to retain Professor Hopfenberg in this action to again opine on technical infringement and invalidity issues in the *Lupin* litigation due to his familiarity with the underlying technology, which in turn supports Professor Adelman's evaluation of the patent litigation.

To that end, Professor Hopfenberg does not necessarily regurgitate facts orchestrated by counsel **[*26]** and prepared by his current clients — Lupin and Depomed (now Assertio) — for *this* antitrust action. Rather, he reviews data from when his clients were *adverse* in the *Lupin* patent litigation. Plaintiffs argue Professor Hopfenberg improperly relies upon testing performed by Depomed's experts and employees (Br. 14-15). For example, plaintiffs find it problematic that Professor Hopfenberg cited tests performed by Depomed technicians in his analysis of the claim term "releases substantially all of said drug" from the '475 patent (Br. 8). If this was the sole source of data on the issue, it might indeed be problematic. But Professor Hopfenberg begins his analysis by reviewing Judge Hamilton's claim construction, after which he: reviews data Lupin submitted to the FDA as part of its ANDA, examines Lupin laboratory notebooks, and, only then, does he assess tests undertaken by Depomed technicians at the direction of counsel (Hofenberg Rep. ¶¶ 86-93). By critically evaluating a variety of sources to arrive at his conclusion (including data from opposing sides in that litigation), Professor Hopfenberg avoids the nuisance of made-for-litigation facts condemned by *Therasense*. His general methodology is thus **[*27]** not *per se* unsound and may be admitted.

To the extent an *aspect* of Professor Hopfenberg's analysis solely (or unreasonably) relies on data from one test or source in the *Lupin* litigation, plaintiffs will have the opportunity to cross-examine Professor Hopfenberg. While *Therasense* mandated a higher level of scrutiny for partisan facts it did not hold that an expert can never rely on testing he or she was not involved with — that would contravene *Rule of Evidence 703*. For example, it should "be reasonable for a truly independent professional in the field of endeavor to base an important decision on" data Lupin submitted to the FDA as part of its ANDA (*see, e.g.*, Hofenberg Rep. ¶¶ 68, 87, 89). If, however, for any particular point, Professor Hopfenberg relies on testing from Depomed's experts and employees with less rigorous protocols, plaintiffs may probe Professor Hopfenberg's diligence in incorporating that data in order to determine whether one could rely on the test after the fact.

Because this order permits Professor Hofenberg to testify, Professor Adelman's opinions, which rely in part on Professor Hopfenberg's report, will also be permitted. Plaintiffs argue: "The problem is then compounded by Professor **[*28]** Adelman's reliance on Professor Hopfenberg's opinion in forming his legal opinions on infringement. By filtering questionable test results through two layers of experts, defendants seek to evade any scrutiny" (Br. 15). While not dispositive on the matter, this order notes that plaintiffs undermine their *Daubert* arguments here by proffering a patent-law expert (Attorney Lentz) who performs substantially the same analysis using substantially the same methodology as Professor Adelman. Just as Attorney Lentz found the (draft) technical expert report by Professor Park persuasive and distinguishes the arguments made by Deopmed's technical experts, Professor Adelman can find persuasive analysis from Professor Hopfenberg and Depomed's other technical experts from the *Lupin* litigation. Plaintiffs will be able to cross-examine Professor Hopfenberg similar to how defendants will be able to cross-examine Professor Park, who is on the parties' joint witness list. Plaintiffs cannot use an argument regarding filtered opinions as both a sword and a shield.

In sum, plaintiffs' motion to exclude testimony of Professor Hopfenberg and Professor Adelman is **DENIED**.

3. PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY [*29] OF LUPIN'S EXPERT PROFESSOR PHILIPSON.

This order continues next to plaintiffs' motion to exclude the testimony of Lupin's health-economics expert Professor Tomas J. Philipson (Dkt. Nos. 436, 480, 483). For reasons similar to those underpinning the August 2020 order granting class certification, his opinions run counter to Supreme Court precedent and mistake the cognizable harm here.

Plaintiffs do not question Professor Philipson's credentials. Professor Philipson currently serves as the Daniel Levin Professor of Public Policy Studies at the Irving B. Harris Graduate School of Public Policy Studies at the University of Chicago, where he also has affiliations with the university's department of economics and law school (Philipson Rep. ¶¶ 1-6, Dkt. No. 440-13).

Professor Philipson asserts three primary opinions:

> • Based on their contractual relationships with Lupin, the Wholesalers were not harmed by, and likely benefitted from, the prices charged by Lupin at entry and thereafter.
>
> • Lupin's contractual obligation to the Wholesalers insulated the Wholesalers from any adverse effects of Lupin's prices.
>
> • Implicit credit markets in the Wholesalers' contracts with Lupin served as an additional **[*30]** source to benefits to Wholesalers from high prices

(*id.* at ¶ 11). His twelve-page expert report reviews the contracts between Lupin and the wholesalers and specifically concludes that "without regard to their downstream sales" the wholesalers benefitted from Lupin "entering at the price at which it entered, compared to having entered at a lower price" (*id.* at ¶ 26).

Plaintiffs argue they claim overcharge damages in this dispute and that Professor Philipson bases his opinions on theories rejected by *Hanover Shoe* and *Illinois Brick*. This order pauses to restate that, in those cases, the Supreme Court rejected the antitrust defense that a defendant's illegal overcharge does not injure a direct purchaser when that overcharge was "passed on" to the direct purchaser's customers. *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 488-89, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*; *Illinois Brick Co. v. Illinois, 431 U.S. 720, 728-29, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Lupin responds (italics added):

> Dr. Philipson opines that Purchasers cannot meet the threshold question of harm *in order to arrive at an overcharge calculation*, based on the operation of the distribution agreements in place between Lupin and the Distributors, which governed the Distributors purchases of generic Glumetza from Lupin.

(Opp. 5). In other words, Lupin says the wholesalers cannot show harm from an overcharge **[*31]** because the contractual agreements between the wholesalers and Lupin insulate the wholesalers from the economic effects of higher generic prices.

It's déjà vu all over again. Lupin has asserted variations of this argument throughout this litigation. Magistrate Judge Illman rejected Lupin's request for discovery of the wholesalers' downstream data since 2011 as contrary to *Hanover Shoe* and *Illinois Brick* in a June 2020 order (Dkt. No. 305 at 26-30). That order noted the argument that a direct purchaser "otherwise benefitted" from an overcharge "amounts to little more than a subtle variation of the pass-on defense" (*id.* at 30, cleaned up, citing *Meijer, Inc. v. Abbott Labs., 251 F.R.D. 431, 435 (N.D. Cal. 2008)* (Judge Claudia Wilken)). In their opposition to class certification, defendants similarly argued that plaintiffs' expert Dr. Leitzinger did not account for the fact that "wholesalers can *benefit* as a result of generic delay, and the vast majority of claims in this case are held by class members that likely befitted from such a delay" (Dkt. No. 263 at 18). The class certification order again rejected this theory, stating that "defendants' argument incorrectly focuses on the wholesaler's later realized profit margin instead of the actual injury **[*32]** here, the *overcharge*. . . . '[An] antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset'" (Class Certification Order 17, Dkt. No. 347, quoting *In re Nexium Antitrust Lit., 777 F.3d 9, 27 (1st Cir. 2015)*).

Lupin here argues at right angles in an attempt to sidestep these issues, insisting that Professor Philipson opines "without regard to the Wholesalers' downstream activities" (which he repeats five times in his report, almost every other page) and that the distribution agreements governed the purchase of generic Glumetza (Opp. 5). Indeed, Professor Philipson filed an errata adding the phrase "for a given quantity of drugs acquired" five times in order to "neutralize any downstream effects" (Br. 9). But the overcharge precipitated by the delayed entry logically presupposes the distribution agreements, and what do the distribution agreements in this context accomplish other than providing offsets for that overcharge? Lupin argues that Professor Philipson's opinions do not run afoul of *Hanover Shoes* and *Illinois Brick* because he limits his opinions to the upstream arrangements. But those upstream arrangements focused on the downstream revenues, such as guaranteeing a chargeback from **[*33]** Lupin of the difference between the wholesale acquisition cost and the price Lupin had negotiated with the retailer and the wholesalers' contractual right to return any amount of product to Lupin for a full refund (Philipson Rep. ¶ 11.2). Professor Philipson's opinion that the wholesalers likely benefitted from the agreement still focuses on the wholesaler's later-realized profit margin (as contemplated by the distribution agreements) instead of the actual injury — the overcharge. His arguments are just another rhetorical rearticulation of the "otherwise benefitted defense" rejected by Magistrate Judge Illston and the class certification order.

In sum, Lupin's hand-waving does not persuade. To the extent stated above, plaintiffs' motion to exclude Professor Philipson's testimony is **GRANTED**.

4. PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY OF DEFENDANTS' EXPERT PROFESSOR TUCKER.

Plaintiffs next move to exclude two discrete opinions of defendants' expert Professor Catherine Tucker (Dkt. Nos. 438, 476, 483).

Plaintiffs do not generally contest Professor Tucker's qualifications. She received her Ph.D. in economics from Stanford University and is currently the Sloan Distinguished Professor of Management **[*34]** Science at MIT Sloan School of Management, as well as an editor for several journals (Tucker Rep. ¶¶ 1-4, Dkt. No. 440-11). Plaintiffs take issue with two aspects of her analysis: her opinion that the marketing commitments in the Lupin agreement were procompetitive; and her opinion regarding Sun's probability of success in *Depomed, Inc. v. Sun Pharma Global FCE*, No. C 11-03553 JAP (D.N.J. filed June 20, 2011) (Judge Joel A. Pisano) — another patent infringement case Depomed filed against another would-be generic manufacturer of Glumetza that included all the patents at issue in *Lupin* (Br. 1).

First, Professor Tucker opines that the marketing commitments in the Lupin agreement were procompetitive. She reaches this conclusion through an analysis of how the marketing commitments addressed four ways that patients could fail to embrace Glumetza (described in an early internal analysis (Tucker Rep. ¶¶ 120-32). Plaintiffs argue for exclusion of this testimony on the basis that "a defendant may not claim procompetitive justification for the settlement as a whole," and instead, as part of the rule-of-reason analysis, must demonstrate the no-AG *provision* had procompetitive effects (Br. 2-3). **[*35]** Plaintiffs adjust this point in their reply brief, arguing that, at minimum, a nexus must exist between the procompetitive benefit and the reverse payment (Reply Br. 3).

Plaintiffs base this argument on a narrow interpretation of *Actavis* and *In re Impax Labs., Inc.*, 2019 FTC LEXIS 25, 2019 WL 1552939, at *31 (F.T.C. Mar. 28, 2019). Here's the relevant excerpt from *Actavis*:

> That [reverse] payment may reflect compensation for other services that the generic has promised to perform — such as distributing the patented item or helping to develop a market for that item. . . . An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason.

Actavis, 570 U.S. at 156 (cleaned up).

This order agrees with defendants that the Supreme Court's language, in context, contemplated a broader review of the agreement than solely the no-AG term in isolation. Regarding the nexus argument in plaintiffs' reply, plaintiffs' expert Professor McGuire *also* acknowledges a connection between the reverse payment and the marketing provisions when he states that "the commitment to a minimum level of promotion expenditures is also a form of pay from the Brand Defendants" (McGuire **[*36]** Rep. ¶ 101 n. 168, Dkt. No. 440-19). If both the no-AG provision and the marketing provisions in the agreement constitute forms of payment to Lupin, then a nexus between the no-AG provision and reverse payment would include (or at least be affected by) the marketing provisions with their alleged procompetitive effects.

Impax, an FTC opinion, crafted a narrow view of *Actavis* when it held: "[A]n antitrust defendant cannot salvage an anticompetitive reverse payment merely by pointing to unrelated terms in the same settlement agreement," and that "the defendant has the burden to explain and justify the payment itself, not the settlement as a whole." 2019 FTC LEXIS 25, 2019 WL 1552939, at *32. But even *Impax* does not necessarily forbid Professor Tucker's testimony. If, as plaintiffs' expert Professor McGuire states, the marketing provisions represent another form of payment, then the provisions are not, per *Impax*, unrelated terms in the same settlement agreement that should not be included in the antitrust analysis. Regardless, this order will not withhold this testimony from the jury based on *Impax* alone. How the jury will be instructed on this point will be determined later.

Plaintiffs' equivocations undermine their critique of **[*37]** the post-*Actavis* caselaw defendants cite in support of Professor Tucker's position. *See* *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., 2018 U.S. Dist. LEXIS 18979, 2018 WL 734655 (D. Mass. Feb. 6, 2018)*; *In re Loestrin 24 Fe Antitrust Litig., 433 F. Supp. 3d 274 (D.R.I. 2019)*; *In re Wellbutrin XL Antitrust Litig., 133 F. Supp. 3d 734 (E.D. Pa. 2015)*. For example, plaintiffs either misread or misrepresent when they assert that "[t]he entire rule-of-reason analysis in *Wellbutrin* . . . was reversed on appeal in an opinion in which the Third Circuit correctly focused on the need to justify the no-AG agreement, not the settlement as a whole" (Reply Br. 5-6). Rather, as this order reads the opinion, the Court of Appeals for the Third Circuit simply disagreed with an argument from the appellee/defendant that echoed the district court's dictum that the challenged settlements might be beyond the reach of antirust law. But the district court explicitly *did not assert that dictum as its holding*, and instead analyzed the settlement using the rule of reason. *See* *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class, 868 F.3d 132, 161 (3d Cir. 2017)*. In fact, the Court of Appeals for the Third Circuit explicitly affirmed the district court on still other grounds: "Having concluded that the Appellants lack antitrust standing, we do not need to consider the District Court's application of the rule of reason." *Id. at 170 n. 64*. ***HN5***[] Counsel must remember and honor their duty of candor, including in the description of the caselaw.

Plaintiffs' other argument that **[*38]** Professor Tucker fails to consider the brand defendants' preexisting marketing commitments goes to the weight, not relevancy, of her argument. Preexisting marketing commitments and their impact on the marketing clauses in the Lupin agreement may be fodder for cross-examination. In sum, this order permits Professor Tucker to opine on whether the marketing commitments in the Lupin agreement were procompetitive.

Second, plaintiffs seek to exclude Professor Tucker's opinion that the plaintiffs' experts but-for world fails to reflect the actual state of information in the *Sun* litigation (Tucker Rep. ¶¶ 88-91, Fig. 8). To that end, Professor Tucker performs a sensitivity analysis of the models that Drs. McGuire and Leffler use to predict an alternative settlement date. Plaintiffs argue that Professor Tucker is not a patent litigator and that she does not articulate a reasonable basis in fact for choosing the variables she selected, and that, without that basis, the obvious changes in the model are meaningless and should be excluded (Br. 7-10; Reply Br. 10-11).

This order finds Professor Tucker's methodology clear enough. As part of her but-for analysis she noted that Attorney Lentz's report **[*39]** relies, in part, on materials that would be unavailable in February 2012, when the parties signed the Lupin agreement. Next, she cites a pertinent third-party study that found that patent owners succeeded at trial in Paragraph IV litigation over 60% of the time in 2016 and 2017. She then substitutes Attorney Lentz's 82.5% probability of Sun winning on all patent claims with probabilities of 50, 60, and 70% to probe how it would impact the ultimate alternative settlement date in Professor McGuire's modelling. It does not take a patent expert to construct this sensitivity analysis, and the Paragraph IV study provides a reasonable basis for Professor Tucker to select a 60% baseline (and additional variables at plus/minus 10%, to account for variability and provide greater context) (*see* Reply Br. 10-11, citing *In re Comm. Fin. Servs., Inc., 350 B.R. 520, 2005 WL 6499290, at *23 (Bankr. N.D. Okla. 2005)*).

In sum, plaintiffs' motion to exclude Professor Tucker's opinions is **DENIED**.

5. Plaintiffs' Motion to Exclude Testimony of Defendants' Expert Dr. Strombom.

Next is plaintiffs' motion to exclude the testimony of Dr. Bruce Strombom (Dkt. Nos. 437, 474, 483). Dr. Strombom is a managing principal of Analysis Group, Inc., a national economics consulting firm. In relevant part, Dr. Strombom **[*40]** opines that, assuming the *Lupin* litigation ended with a finding that Lupin infringed Depomed's valid patents, the settlement agreement had procompetitive benefits, as well as that direct purchasers' overcharge damages should be reduced by rebates paid by the manufacturer to indirect purchasers (Strombom Rep. ¶¶ 1-4, 12, 15-33, Dkt. No. 440-12). Purchaser plaintiffs argue that these opinions must be excluded as contrary to *Actavis*.

Dr. Strombom opines that the procompetitive benefits of the settlement totaled $1.28 billion, and that, contrary to the damages measure put forth by Drs. Leitzinger and Leffler, plaintiffs' damages should be reduced by the rebates paid by manufacturer-defendants to indirect purchasers such as Pharmacy Benefit Managers ("PBMs"). To reach this number, Dr. Strombom's report explains that drug manufacturers have at least three ways to lower prices: "(1) lower the list price (WAC) [wholesale acquisition cost]; (2) provide lower prices to indirect purchasers [*e.g.*, PBMs] through discounts that result in chargeback payments [from the manufacturer] to direct purchasers; or (3) provide discounts and/or rebates to indirect purchasers that bypass direct purchasers or **[*41]** flow through the PBM functions" (*id.* at ¶ 57). According to Dr. Strombom, regardless of whether the manufacturer chose to use mechanism two or three to adjust the drug list price, all parties are in the same economic position (*id.* at ¶¶ 52-61, Fig. 2).

Dr. Strombom asserts that, in the case of Glumetza, the manufacturers primarily used the third mechanism and provided rebates to indirect purchasers, rather than issuing chargebacks to the wholesalers via the second mechanism. Thus, while he "understand[s] that the standard measure of damages in a direct purchaser class case is the overcharge paid by direct purchasers," here "substantial payments related to the purchase of Glumetza went between the manufacturers and indirect purchasers" (*id.* at ¶ 54). Dr. Strombom concludes that, "[a]s a result, the overcharge paid by direct purchasers does not reflect the total amount of the overcharge paid across the entire supply chain," and that, "the payments made between manufacturers and indirect purchasers should be included in any estimate of damages" (*ibid.*).

First, plaintiffs argue that Dr. Strombom's reduction of overcharge damages by the amount of rebates paid by the manufacturers to indirect **[*42]** purchasers contravenes *Hanover Shoe* and *Illinois Brick*, which, as this order restates, generally precluded the pass-on defense. *Hanover Shoe, 392 U.S. at 487-88, 494*; *Illinois Brick, 431 U.S.*

at 728-29. Defendants disagree and assert that the complexities of the pharmaceutical market warrant Dr. Strombom's calculations (Opp. 10-13).

This order holds that Dr. Strombom's inclusion of indirect-purchaser rebates in his damages calculation runs afoul of *Hanover Shoe* and *Illinois Brick*: "*Hanover Shoe* . . . rest[ed] on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois Brick, 431 U.S. at 734-35*. Full recovery is concentrated in direct purchasers, but Dr. Strombom's damages calculation considers manufacturers' *indirect* rebate to the downstream *indirect* purchaser, a transaction that does not involve the wholesalers (*see* Strombom Rep. Fig. 2). Defendants recognize this issue and argue that *Illinois Brick* never intended the consequence here, nor contemplated "damages in an amount significantly greater than the overall overcharge" (Opp. 11-12). But ***HN6***[] *Illinois* ***[*43]*** *Brick* "reject[ed] . . . attempts to carve out exceptions to the Hanover Shoe rule for particular types of markets." *Illinois Brick, 431 U.S. at 744*. Moreover, as *Illinois Brick* recited:

> The concern in Hanover Shoe for the complexity that would be introduced into treble-damages suits if pass-on theories were permitted was closely related to the Court's concern for the reduction in the effectiveness of those suits if brought by indirect purchasers with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge. The apportionment of the recovery throughout the distribution chain would increase the overall costs of recovery by injecting extremely complex issues into the case; at the same time such an apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group. Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could **[*44]** seriously impair this important weapon of antitrust enforcement.

Id. at 745. Dr. Strombom's consideration of the overcharge across the entire supply chain contravenes the express concerns of *Hanover Shoe* and *Illinois Brick*. This order on *Daubert* motions declines to transgress the explicit bounds of *Hanover Shoe* and *Illinois Brick*. As another court has similarly noted: ***HN7***[] "*Illinois Brick* suggests . . . the antitrust laws are much more concerned with fully divesting antitrust violators of the benefit of their violation than with any potential windfall to plaintiffs." *In re Skelaxin (Metaxalone) Antitrust Litig., 2014 U.S. Dist. LEXIS 66707, 2014 WL 2002887, at *6 (E.D. Tenn. May 15, 2014)* (Judge Curtis L. Collier).

The class certification order previously addressed the arguments defendants now proffer in support of Dr. Strombom's opinions. Defendants argued then, "Dr. Leitzinger's damages model 'does not reflect the many discounts and subsequent payments that must be account for to calculate the ultimate *net* price'" (Class Certification Order 17, citation omitted). The class certification order rejected that argument because the injury in question occurred when the manufacturer sold the drug to the wholesaler at the anticompetitive price (*ibid.*). The rebates that Dr. Strombom contemplates here are not directed to the injured **[*45]** party in the antitrust analysis. "***HN8***[] *Hanover Shoe* and *Illinois Brick* make clear that courts and juries will not be forced down the rabbit hole of hypothetical issues antitrust violators may raise to minimize their liability." *Skelaxin, 2014 U.S. Dist. LEXIS 66707, 2014 WL 2002887, at *5*. The cases defendants cite in their opposition either recite broad, inapposite, conclusions of law, or involve indirect, not just direct, purchaser claims, and thus do not persuade (*See* Opp. 12-13). Dr. Strombom shall not testify that an overcharge damages calculation should be reduced or otherwise be affected by the amount of indirect-purchaser rebates.

Second, plaintiffs argue that *Actavis* precludes Dr. Strombom's opinion that the settlement agreement had procompetitive effects because it assumes that the patents would have been found valid and infringed. *Actavis* recognized that the validity (or invalidity) of the asserted patents need not always be analyzed in a rule-of-reason analysis for a reverse-payment agreement. *570 U.S. at 157, 159*. Besides, Dr. Strombom explicitly conditions his opinion on "assuming that, as [d]efendants contend, the relevant patents asserted against Lupin were valid and infringed," and thus lets defendants' other experts opine on the merits of the patent **[*46]** litigation (Strombom Rep.

¶ 12). *Actavis* does not preclude Dr. Strombom from cabining off the patent issues and opining on the other aspects of the rule-of-reason analysis. Indeed, Justice Breyer's opinion in *Actavis* anticipated just that sort of review: "That is because ***HN9***[] ***HN10***[] it is normally not necessary to litigate patent validity to answer the antitrust question . . . . An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival." *570 U.S. at 157*.

Third, plaintiffs say Dr. Strombom's opinion that the settlement agreement had procompetitive effects should be excluded because *Actavis* required him to justify the no-AG provision in isolation, without regard to the rest of the agreement. This order addresses and rejects this argument in its review of the motion to exclude Professor Tucker's testimony. *Actavis* held that ***HN11***[] reverse-payment settlement agreements should be analyzed holistically and is not as narrow as plaintiffs argue. *Id. at 156, 159*; *see also* *In re Lidoderm Antitrust Litigation, 2018 U.S. Dist. LEXIS 227750, 2018 WL 7814761 at *2 (N.D. Cal. Feb. 7, 2018)* (Judge William H. Orrick). Accordingly, plaintiffs' argument fails.

In sum, the motion to exclude Dr. Strombom's testimony is, to the extent stated above, **GRANTED IN PART** and **DENIED IN PART**.

6. PLAINTIFF [*47] HUMANA'S MOTION TO EXCLUDE TESTIMONY FROM DEFENDANTS' EXPERT DR. STROMBOM.

Plaintiff Humana separately moves to exclude testimony of Dr. Strombom embodied in a separate report that primarily critiques plaintiffs' damages expert, Professor Rena Conti (Dkt. Nos. 441, 475, 482). As an initial matter, as this order notes in its analysis of defendants' motion to exclude testimony of Professor Conti and Dr. Leitzinger, a February 2021 order denied Humana leave to file an amended complaint, which renders several of Dr. Strombom's opinions here moot (Dkt. No. 460). As relevant, then, Humana takes issue with two portions of Dr. Strombom's report.

First, Dr. Strombom opines that Dr. Conti's methodology fails to consider "that generic prices might have increased with brand WAC increases" (Strombom Reb. Rep. ¶ 21, Dkt. No. 440-18). To correct for this alleged deficiency, Dr. Strombom explains that he calculates the "but-for generic prices using the contemporaneous brand price rather than the brand price prior to assumed but-for generic entry, thus assuming that generic prices would have increased when the brand price increased" (*id.* at ¶ 60). To implement this adjustment, Dr. Strombom assumes that **[*48]** the but-for price of brand Glumetza would have increased by 109% in 2015, and he bases this number on two datapoints: Fortamet's price increase in 2014 (also 109%), as well as drug pricing data cited by Professor McGuire that show, for example, that Valeant increased the price of 200 drugs by more than 100% annually (*id.* at ¶¶ 60-61 (citing McGuire Rep. ¶ 182)).

Humana argues the comparison falls short because the information Dr. Strombom relies upon did not involve price increases when a new generic entered the market after the end of the exclusivity period. Humana also argues that the comparison to the Fortamet price increases is unreliable because those price increases are the subject of "allegations of industry-wide price fixing" (Br. 6, citing *Humana v. Actavis Elizabeth, LLC., et al.*, No. C 19-04862 CMR (E.D. Pa. filed Dec. 15, 2020) (Judge Cynthia M. Rufe)). Humana's argument regarding its recently-filed action goes to the weight of Dr. Strombom's evidence, not its admissibility — the district court in that action has not even considered a motion to dismiss, let alone adjudicated the merits of the claims. Regarding the price increases for comparable drugs, Dr. Strombom has built **[*49]** his analysis on seemingly relevant and reliable foundation, and Humana's critiques again go to the weight of the evidence, not its admissibility.

Second, Dr. Strombom seeks to undermine three assumed but-for scenarios which Dr. Conti uses as bases for her damages calculations. For example, counsel instructed Dr. Conti to assume a "Lupin generic, as well as an authorized generic, would have entered the market in or around December 2012. A third generic would have entered the market before February 2016, and a fourth generic in or around May 2017." Dr. Conti then calculates Humana's damages under each of the assumed but-for scenarios using a "yardstick methodology" which aims to estimate a but-for price through consideration of a comparable market.

Dr. Strombom impeaches Dr. Conti's calculations not by attacking Dr. Conti's methodology or application, but by questioning the assumptions directly (italics added):

> Dr. Conti provides no explanation of what would have needed to occur in the but-for world in order for Lupin to enter as early as December 2012. Perhaps this scenario corresponds to an implicit assumption that Lupin would have continued to litigate the patent (rather than settle), **[*50]** would have won the patent litigation, and would have received final FDA approval by December 2012. . . . However, there is *strong evidence* in this case indicating that Lupin believed there was a substantial likelihood that it would have lost the patent litigation. . . . Similarly, *it is unlikely that Lupin would have entered at risk* given the potential financial liability if they subsequently lost the patent litigation

(Strombom Reb. Rep. ¶ 66). This order notes, for what it's worth, that Dr. Strombom also relies on similar counsel-dictated assumptions in his report (Strombom Reb. Rep. ¶ 71). More to the point, as Humana argues, Dr. Strombom is an economist, not a molecular biologist or patent litigator, and the support he cites (his own previous declaration) does not provide a reliable basis for his testimony (Dkt. No. 262-21 at ¶¶ 36-41). Dr. Strombom has insufficient experience or training to opine on the weaknesses (or strengths) of Lupin's patent case.

This same issue reoccurs several times in Dr. Strombom's report. In their opposition, defendants defend Dr. Strombom's opinions, saying that, for example, "the undisputed record evidence showed that Lupin would not have continued **[*51]** to litigate the case to verdict or launched at risk because it believed, based on the advice of its qualified outside patent counsel, that it was going to lose" (Opp. 6). The question of who would have won the underlying patent litigation but-for the settlement is vigorously disputed, and Dr. Strombom is not qualified to opine directly on those issues. Dr. Strombom's patent analysis will not aid the jury, and he shall not testify regarding the merits of Lupin's patent case, which includes testimony from paragraphs 16, 66, and 68 of his report.

In sum, to the extent stated, the motion is **GRANTED IN PART** and **DENIED IN PART**.

7. Defendants' Motion to Exclude Testimony of Plaintiffs' Expert Attorney Lentz.

Turning to defendants' *Daubert* motions, this order next considers the motion to exclude the testimony of Attorney Edward T. Lentz, who, similar to Professor Adelman for defendants, opined on Depomed's pharmaceutical patent litigation against Lupin and Sun (Dkt. Nos. 442, 470, 489).

Attorney Lentz has a B.A. and an M.A. in biology from Fordham University and Indiana State University, respectively, and earned his J.D. from Villanova University. At GlaxoSmithKline ("GSK"), Attorney Lentz held **[*52]** the position of Senior Vice President and General Counsel-U.S., SmithKline Beecham Corporation. At GSK, Attorney Lentz managed the entire corporate-patent lifecycle, handling everything from patent prosecution to advising on litigation. Attorney Lentz left GSK to work at Morgan Lewis & Bockius and later started his own private practice. He has served as adjunct faculty at Albany Law School and on multiple executive committees for trade associations in the biopharma and intellectual property areas (Lentz Rep. ¶¶ 17-30, Dkt. No. 445-5). He has also recently testified in other reverse-payment cases. *See* In re Loestrin 24 Fe Antitrust Litig., 433 F. Supp. 3d 274 (D.R.I. 2019) (Judge William E Smith).

Plaintiffs requested Attorney Lentz to testify regarding the likely outcome in both the *Lupin* and *Sun* litigation — as previously noted, *Sun* is another patent infringement case Depomed filed against another would-be generic manufacturer of Glumetza that included all the patents at issue in Lupin. Plaintiffs also asked Attorney Lentz to opine on the litigation costs avoided by Depomed and Lupin by settling the *Lupin* litigation and the likely timeline to complete the *Lupin* and *Sun* actions absent settlement (Lentz Rep. ¶ 31).

First, in his expert report, Attorney Lentz **[*53]** opines that, at the time of the *Lupin* settlement, a reasonable patent attorney would have advised his or her client that Depomed would be unable to meet its burden of proving infringement, either literally or under the doctrine of equivalents, for U.S. Patent Nos. 6,340,475 ("the '475 patent"), 6,635,280 ("the '280 patent"), and 6,488,962 ("the '962 patent"). More specifically, Attorney Lentz states that it was "very likely" that the district court would find in Lupin's favor on noninfringement, but that, regardless of the district court's decision, the Court of Appeals for the Federal Circuit would have ruled in favor of Lupin in the event of an appeal. He then parses this analysis and assigns a numerical value to the probability that Lupin would prevail on the merits: estimating Lupin to have a 60 to 65% chance of success for the '475 and '280 patents, and a 70 to 75% chance of success for the '962 patent. Attorney Lentz further opines that the likelihood of prevailing on the '962 patent would jump to 85 to 90% if Lupin prevailed on the '475 and '280 patents (*id.* at ¶¶ 32-38). He opines that Lupin and Depomed avoided approximately $3-3.5 million and $2.9 million, respectively in litigation costs by settling, and that, if the parties had not settled, the outcome of the trial could have been known as early as November or December 2012, **[*54]** but that a reasonable patent attorney would have expected a decision by February 2013. Attorney Lentz expects that a Federal Circuit decision, if needed, would have arrived on or before March 2014 (*id.* at ¶¶ 43-45).

Second, Attorney Lentz opines on *Depomed v. Sun*, again concluding Depomed would have been unable to prove infringement, either literally or under the doctrine of equivalents, for the '475, '280, and '962 patents, as well as U.S. Patent Nos. 7,736,667 ("the '667 patent") and 7,780,987 ("the '987 patent"). He states that the Court of Appeals for the Federal Circuit would have vindicated Sun regardless of the outcome in the district court and assigns Sun an 80 to 85% probability of winning. As for a predicted timeline, Attorney Lentz opines that the parties could have known the outcome by January 2014 and, if the Federal Circuit got involved, he expects their opinion to have arrived on or before February 2015 (*id.* at ¶¶ 39-45).

To reach these conclusions, Attorney Lentz performs a multi-part analysis. He first summarizes the *Lupin* and *Sun* disputes, as well as *Depomed, Inc. v. Ivax Corp.*, an earlier case from 2006 involving the '475 and '280 patent where the Honorable Charles R. Breyer of our district granted Depomed summary judgment of patent infringement. *532 F. Supp. 2d 1170 (N.D. Cal. 2007)*. Turning to *Lupin*, Attorney **[*55]** Lentz reviews Judge Hamilton's claim construction order, then uses those constructions in an analysis that reviews the testimony from the parties' various technical experts — including Professor Hopfenberg for Depomed and Professor Kinman Park for Lupin. In other words, Attorney Lentz seeks to simulate the litigation as it would have happened had the parties not decided to settle. After he performs this analysis for all three patents at issue in *Lupin*, Attorney Lentz considers, based on the relevant legal standards, the possible outcomes from appeal, and applies numerical values to the probability that Lupin would prevail as to the various patent claims. From there, Attorney Lentz projects the timeline of the *Lupin* litigation using data regarding similar cases from our district, the District of New Jersey, the District of Delaware, and the Court of Appeals for the Federal Circuit (*See* Lentz Rep. App. I). Lastly, using these dates, Attorney Lentz calculates the litigation costs the parties avoided by settling. After he completes his evaluation of the *Lupin* case, Attorney Lentz repeats this analysis for the *Sun* litigation. Defendants move to exclude Attorney Lentz's testimony on several **[*56]** grounds.

First, defendants argue Attorney Lentz' opinion on whether Lupin's generic infringes the patents should be excluded. ***HN12***[] In *Sundance, Inc. v. DeMonte Fabricating, Inc.*, the Court of Appeals for the Federal Circuit held:

> [I]t is an abuse of discretion to permit a witness to testify as an expert on the issues of noninfringement or invalidity unless that witness is qualified as an expert in the pertinent art. . . . Indeed, where an issue calls for consideration of evidence from the perspective of one of ordinary skill in the art, it is contradictory to *Rule 702* to allow a witness to testify on the issue who is not qualified as a technical expert in that art.

550 F.3d 1356, 1363 (Fed. Cir. 2008). Relying on *Sundance*, defendants argue that Attorney Lentz is not a person of ordinary skill in the art for the patents at issue in *Lupin* and *Sun*. Attorney Lentz, in fact, defines a person of ordinary skill in the art in his report:

> [A] person of ordinary skill in the art would have formal education of at least a bachelor's degree in the fields of chemistry, chemical engineering, pharmaceutical science and/or material science with a focus on polymer science, combined with substantial experience in development of controlled release drug **[*57]** dosage forms (even more desirably controlled release oral dosage forms). Alternatively, if the person had obtained a Ph.D. in any of the relevant fields, the required amount of industry experience would decline to about two years

(Lentz Rep. ¶ 101). Plaintiffs do not contest that Attorney Lentz fails to qualify as a person of ordinary skill under this definition. Rather, they argue that Attorney Lentz is not opining on technical issues at all and that he offers "his opinion as to how an experienced pharmaceutical patent attorney at the time of the Lupin settlement would have evaluated the patent litigation" at issue (Opp. 3).

Sundance does not warrant exclusion here. The patent claims at issue in *Lupin* required consideration of evidence from the perspective of a person of reasonable skill in the art, and Depomed and Lupin's respective experts (including Drs. Park and Hopfenberg) provide that testimony in the underlying patent litigation. Attorney Lentz's report parses the testimony of those experts regarding noninfringement and validity in order to evaluate the legal merit of the *Lupin* and *Sun* parties' respective cases and predict the outcome of the disputes if they had not settled. **[*58]** Attorney Lentz reviews this expert analysis through the lens of the *Lupin* and *Sun* courts' respective claim construction orders, *legal* interpretations of the scope of the patents in question. Attorney Lentz is thus not performing a technical analysis of the "factual predicates" that *Sundance* found inadmissible, he performs exactly the type of *legal* review a party would expect from a seasoned patent litigator. *See* *Sundance, 550 F.3d at 1361-62*. Patent litigation requires technical evaluation, but it remains a legal process, one on which Attorney Lentz is qualified to opine. Attorney Lentz offers the same analysis now that he has offered GSK and his other clients throughout his career. To the extent Attorney Lentz analyzes a *particular* factual predicate for validity or infringement without the foundation of a pertinent technical analysis from a person of ordinary skill in the art, it would be fodder for cross-examination, ripe for counsel's objection and possibly for an admonition to the jury that he is unqualified to address issues only a technical expert can address. With these reasonable limits in place, Attorney Lentz's testimony will not confuse the jury or otherwise cause any "mischief." *See ibid.* It will ultimately **[*59]** be up to the jury to weigh how much credibility should be awarded to Attorney Lentz's opinion.

Defendants also argue that it is improper for Attorney Lentz to "adopt" Professor Park's unsigned report from *Lupin* (Br. 12-13). In other words, defendants contend that plaintiffs needed to engage an expert here qualified to testify on the technical issues relating to Lupin's alleged patent infringement, such as their re-retained expert Dr. Hopfenberg, rather than leaving Attorney Lentz to review the reports from the *Lupin* litigation sans technical assistance. As previously stated, this philosophical dispute between the parties on the correct methodology for a patent-law expert does not merit exclusion. This order finds no inherent fault with a patent-law analysis that primarily relies on contemporary technical expert analysis of the parties from the underlying patent litigation that excludes further *post hoc* input. Indeed, that methodology may have advantages over other approaches because it may more accurately take the particularities and developments of the actual litigation into account. On the other hand, should Attorney Lentz get stuck on a technical point, he does not have a person **[*60]** of ordinary skill in the art to back him up. Nevertheless, these arguments do not expose Attorney Lentz's opinions as unreliable.

In the same vein, defendants also claim that Attorney Lentz exclusively relies on Professor Park's report for many opinions, rendering them inadmissible. The examples provided do not bear out this thesis. For example, defendants contend that Attorney Lentz relies solely on Professor Park for the opinion about the degree of swelling of the Lupin generic (Br. 14). Looking at Paragraph 159 of his report as highlighted by defendants, Attorney Lentz explains that Professor Park's report cited images showing the swelling of the Lupin products, and then explains that "Dr. Park also cited data from the Tesfu swelling study report in support of his opinion." As Attorney Lentz explains earlier in Paragraph 149 of his report, Professor Hopfenberg had also relied on the Tesfu swelling study in his report. Defendants' assertion that Attorney Lentz exclusively adopts Professor Park's perspective is thus not quite accurate, as it appears Attorney Lentz found Professor Park's opinion persuasive in this instance because Professor Park not only had photographic evidence but **[*61]** also support from the data underlying the opposing technical expert's opinions. To the extent Attorney Lentz does not give Professor Hopfenberg's expert report in *Lupin* a fair shake, defendants will have the opportunity to critique that shortfall during cross-examination.

Defendants next seek to exclude Attorney Lentz's opinions on the likelihood that Lupin or Sun would prevail in their respective patent litigation because they are not based on a discernable methodology and because they ignore key facts and data, such as: contemporary documentation by Lupin's attorneys regarding their less-than-favorable outlook on the case; depositions of Lupin's outside counsel and others taken for this case; and other data points such as litigation involving the patents at issue in other fora (Br. 14-19). Plaintiffs argue that predicting the outcome to litigation is exactly what lawyers do and cite to an opinion permitting these predictions, *In re Namenda Direct Purchaser Antitrust Litigation, 331 F. Supp. 3d 152, 186-89 (S.D.N.Y. 2018)* (Judge Thomas P. McMahon).

Attorney Lentz does not appear to cherry pick his data. He addresses the *Ivax* litigation where Judge Breyer found in Depomed's favor on summary judgment. And Attorney Lentz also considers other data that cuts against his conclusion, **[*62]** including the July 2011 email from Lupin's outside counsel William Rakoczy where he stated "the likelihood of success is significantly less than 50%" — although this order recognizes that Attorney Lentz does not examine that specific email in body of his report (Lentz Rep. App. B at 9). Moreover, it will be up to the jury to determine how much weight (if any) to give to this email and defendants' *post hoc* testimony on the likely outcome *Lupin* litigation absent settlement. Taking all this into account, and recognizing he performs a sufficiently rigorous analysis of the *Lupin* and *Sun* litigation, this order finds Attorney Lentz's opinions rests on a reliable foundation that is not contrary to the record and that will prove helpful to a jury. *See* *In re Online DVD-Rental Antitrust Litig., 779 F.3d 914, 923-24 (9th Cir. 2015)*. Defendants will have free reign on cross-examination to introduce any evidence they believe undermines Attorney Lentz's opinions (within time limits).

Defendants also argue Attorney Lentz's numerical predictions should be excluded. In their opposition, plaintiffs point to *Namenda* and its rejection of a similar *Daubert* challenge to a patent attorney's numerical predictions. As defendants note, however, the expert report in *Namenda* contained a **[*63]** more extensive analysis of the statistical likelihood of success in order to calculate his predictions. *See* Expert Report of George W. Johnston, Esq. ¶¶ 74-109, *Namenda*, No. C 15-07488 CM, Dkt. No. 696-9 (S.D.N.Y. Apr. 29, 2019). While the report in *Namenda* provided a more thorough analysis, it does not set the threshold for the admissibility of a numerical prediction. Attorney Lentz, as discussed, performed a considered analysis, and did not only evaluate information that supports his opinion. Relying on his experience, Attorney Lentz translates his analysis into numerical predictions, something patent litigators consistently do for clients. This order will permit Attorney Lentz to opine on his numerical predictions and allow the jury to evaluate whether his or Professor Adelman's numbers are more persuasive.

Lastly, defendants' arguments to exclude Attorney Lentz's "narrative testimony" fail for the same reasons described in the analysis of the motion to exclude Professor Leffler, discussed below. In sum, defendants' motion to exclude Attorney Lentz's testimony is **DENIED**.

8. DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF PLAINTIFFS' EXPERT PROFESSOR MCGUIRE.

Next up is defendants' motion **[*64]** to exclude the testimony of Professor Thomas G. McGuire (Dkt. Nos. 444, 477, 488). Professor McGuire is an economist who currently serves as a professor of health economics in the Department of Health Care Policy at Harvard Medical School. He also served as an editor for the Journal of Health Economics for ten years and has served as an expert in several reverse-payment cases (McGuire Rep. ¶¶ 7-10, Dkt. No. 445-8).

In his report Professor McGuire opines on: whether the Lupin agreement contained an reverse payment and whether its anticompetitive effects outweigh any procompetitive justifications; the competitive circumstances if the parties to the Lupin agreement had not settled; and the Valeant price increases (*id.* ¶¶ 3-4). Defendants argue that both Professor McGuire's alternative settlement theory and his opinion that the settlement was anticompetitive are inadmissible.

First, defendants take issue with Professor McGuire's alternative settlement theory, where he uses a bargaining model to opine that, if the brand defendants and Lupin behaved competitively and had not included a reverse payment in their agreement, the date of generic entry would have been between January and April 2014 **[*65]** (*id.* at ¶¶ 143-165, Tbl. 3). Professor McGuire's bargaining model assumes a split of gains that matched the actual settlement agreement (97.3% of the gains to the brand defendants), which defendants argue runs contrary to the academic literature (Br. 8-9). Professor McGuire's report contains several supporting citations sufficient to show a reliable foundation for his assumption (McGuire Rep. ¶ 161). Defendants' citation to one contrary article does not render Professor McGuire's opinion deficient. Defendants also primarily argue that Professor McGuire relies on inadmissible opinions from plaintiffs' patent-law expert, Attorney Lentz. Specifically, defendants focus on Attorney

Lentz's opinions on Lupin's prospects of success in the patent litigation (Br. 10-13). This order addresses (and rejects) those arguments in its analysis of defendants' motion to exclude Attorney Lentz's testimony.

Defendants contend that, due to his reliance on Attorney Lentz's report, Professor McGuire's testimony contradicts the undisputed evidence, but then try to preempt any counterargument that Professor McGuire may testify on but-for scenarios: "In constructing the but-for world, everything except the alleged **[*66]** misconduct must be held constant. That means, of course, keeping constant the actual parties and their actual beliefs and expectations" (Br. 12). Defendants thus conclude: "Permitting Dr. McGuire to opine on the parties' expectations based on the unsupported extrapolation of Lupin's odds of success in the patent litigation, while ignoring the actual evidence of Lupin's actual subjective expectations, would mislead the jury" (*id.* at 13). But defendants here go too far, as the summary judgment order made clear:

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created" . . . [O]ur actors have no reason to contemplate action they might have taken in the but-for world *which never came to pass*

(Summary Judgment Order 22, citing *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*). That the numbers input into Professor McGuire's model did not, to defendants' eyes, align with contrary evidence will be grounds for cross-examination but not exclusion. The ultimate resolution of the patent litigation on the merits never happened, and defendants have not demonstrated that Professor McGuire's but-for analysis has not provided a reasoned deviation **[*67]** from the record, or that his alleged failure to input some contrary datapoints renders Professor McGuire's model unreliable (*id.* at 26). The same reasoning applies and forecloses on defendants' later argument to exclude Dr. McGuire's opinion that the settlement agreement was anticompetitive to the extent it addressed Lupin's intentions or expectations (Br. 20-21).

Defendants' last argument regarding Professor McGuire's alternate settlement model concerns the shift of the estimated Sun generic entry date from May 1, 2015 (in Professor McGuire's class-certification report) to April 1, 2014 (in his instant expert report). Defendants say that this revised datapoint, when input into Professor McGuire's model, shifts the estimated Lupin generic entry six months, which may profoundly impact damages given the timeline for price increase in the actual world (Br. 15-17). Plaintiffs argue that Attorney Lentz's report provides the data that prompt the revised date for Sun's likely generic entry, and that the datapoint shifts the date of the Lupin/brand defendants' settlement up by only two months (Opp. 19 n. 78). In their reply, Defendants conflate the shift in the estimated Sun settlement date **[*68]** with the resulting shift in the model's proposed entry for Lupin's generic, which muddles their argument (Reply Br. 7-8). This order finds that the shift in a datapoint in between class certification and final expert reports, apparently made in light of new data from other experts, does not render Professor McGuire's opinion here unreliable.

Second, similar to their argument regarding Professor Leffler, defendants argue that Professor McGuire's opinion that the settlement agreement is anticompetitive should be excluded as contrary to law. Professor McGuire, in relevant part, opines that the no-AG clause and cash payment constituted an anticompetitive reverse payment with an estimated worth of $28.6 million, that the value of the reverse payment induced a delay in Lupin's introduction of a generic Glumetza product, and that jumps in Santarus and Depomed's stock prices upon the announcement of the settlement signaled that the agreement stimulated unanticipated profit flows that validate the conclusion that the agreement was anticompetitive (McGuire Rep. ¶ 5).

To reach his conclusion that the reverse payment was anticompetitive, Professor McGuire describes and considers the "*Actavis* inference": **[*69]**

> The logic of the inference goes like this. The litigation (competitive) route yields an expected profit to the brand, recognizing that the patent may or may not be found by the court to be valid and infringed. This is the expected profit associated with following through with litigation. Litigation requires the brand to pay its litigation costs. If the reverse payment exceeds any avoided litigation costs, we can infer that the brand must be getting higher profits from the settlement than it would with litigation (because if the brand expected higher profits with litigation, it would litigate). The only way for the brand's profits to be greater through a reverse payment settlement than through continued litigation is if the length of the monopoly retained by the brand under a

> reverse payment settlement is greater than the length of the monopoly it could expect to retain by continuing to litigate through trial and appeals

(*id.* at ¶ 79). Professor McGuire here explains his understanding of the economic logic of *Actavis*. Defendants argue Professor McGuire's inference misrepresents *Actavis* because it states that a large reverse payment *necessarily* indicates an anticompetitive effect (Br. **[*70]** 19).

HN13[] *Actavis* held that reverse-payment settlements can *sometimes* violate antitrust laws. *Actavis, 570 U.S. at 141*. Here, again, the language from *Actavis*:

> [T]he likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The existence and degree of any anticompetitive consequence may also vary as among industries. These complexities lead us to conclude that the [plaintiff] must prove its case as in other rule-of-reason cases

Id. at 159. Professor McGuire cites this exact portion of *Actavis* in his report, and plaintiffs argue that he makes no statement that a reverse payment is *per se* anticompetitive, pointing to several qualifying statements in his report, such as (italics added):

> In other words, when the reverse payment exceeds the expected future litigation costs of the brand, *and in the absence of any other explanation for the payment*, the brand's exclusivity period obtained under the agreement must exceed the expected entry date with litigation, and is therefore anticompetitive. **[*71]**

(McGuire Rep. ¶ 80). Professor McGuire also provides an analysis of procompetitive benefits to the agreement, although he unsurprisingly finds none (McGuire Rep. ¶¶ 139-42).

All that being said, Professor McGuire cannot insert mere cosmetic qualifiers to show he comports with *Actavis* — his actual analysis must also align. Professor McGuire opines that the "*Actavis* Inference is an if-then condition, or equivalently, a *sufficient* condition to conclude that the agreement was a pay-for-delay and anticompetitive" (*Id.* at ¶ 80 n. 154). This order finds statements like this run afoul of the Supreme Court's opinion. *Cf. In re Intuniv Antitrust Litig., 2020 U.S. Dist. LEXIS 187578, 2020 WL 5995326, at *20-21 (D. Mass. Oct. 10, 2020)* (Judge Allison D. Burroughs). Accordingly, Professor McGuire shall not testify that a large reverse payment *necessarily* means that the agreement was a pay-for-delay and anticompetitive.

Defendants next attack Professor McGuire's stock-price analysis. Professor McGuire conducts a stock price analysis and opines that "the Depomed and Santarus stock price jumps imply that unanticipated profit flows were created because of the payment in the Lupin Agreement (at the expense of purchasers) and that the payment in the Agreement was anticompetitive" (McGuire Rep. ¶ 136, Fig. 6). Defendants **[*72]** say that the stock-price analysis is not reliable and should be excluded.

On reliability, defendants argue that the alleged increase in Depomed's stock price was not statistically significant (which Professor McGuire acknowledges in his report) and that the increase in Santarus' stock price was too short-lived to be evidence of increased revenues (Br. 22). These criticisms do not go to reliability or the robustness of Professor McGuire's methodology, they address the weight the analysis should be given by a jury. This order also finds that analysis not too disconnected from the issues in the case to be excluded on a *Daubert* motion. As *defendants* state in their reply brief, *Actavis* "makes clear that all facts and circumstances . . . must be considered in the [rule-of-reason] analysis" (Reply Br. 10). Professor McGuire also does not use his stock analysis as a substitute for the rule-of-reason investigation, he includes it as further evidence supporting his analysis (McGuire Rep. ¶ 136). Defendants point to caselaw where the Court of Appeals for the First Circuit affirmed the exclusion of Professor McGuire's stock price study — but admit that the Professor McGuire offered that study for **[*73]** a completely different purpose than he offered it here (Br. 23, citing *In re Nexium (Esomeprazole) Antitrust Litig., 842 F.3d 34, 52 (1st Cir. 2016)*). That argument accordingly fails to persuade.

Third, and finally, defendants argue that Professor McGuire cannot provide a factual or legal narrative. This order addresses this argument (made in several of defendants' *Daubert* motions) in its discussion of the motion to exclude Dr. Leffler's testimony, below. In short, this argument is not appropriate for a *Daubert* motion.

In sum, to the extent stated, defendants' motion to exclude Professor McGuire's opinions is **GRANTED IN PART** and **DENIED IN PART**.

9. DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF PLAINTIFFS' EXPERT DR. LEFFLER.

Next is defendants' motion to exclude the expert opinion testimony of Professor Keith Leffler (Dkt. Nos. 443, 469, 487). Professor Leffler has a Ph.D. in economics from UCLA and is an emeritus associate professor of economics at the University of Washington (Leffler Rep. ¶¶ 1-3, Dkt. No. 445-3). Professor Leffler opines on the following: whether the brand defendants exercised market power; the economic effects of the brand defendants' reverse payments; the value of the no-AG provision to Lupin and its cost to brand defendants; whether it would **[*74]** have been economically rational for defendants to agree to an alternate settlement with an earlier entry date absent the no-AG reverse payment; and the amount of overcharge damages suffered by the retailer plaintiffs (Leffler Rep. ¶ 10).

Defendants argue that Professor Leffler fails to apply the correct legal standard for evaluating the anticompetitive effects of the settlement agreement (Br. 2, 11-14). As this order explains in its analysis of the motion to exclude Professor McGuire's report, *Actavis* held that reverse-payment settlements can *sometimes* violate antitrust laws. *Actavis, 570 U.S. at 141*. Throughout his report, Professor Leffler improperly states that a large reverse payment is *necessarily* an anticompetitive effect. For example, Professor Leffler states (italics added): "The presence of a large payment above the brand's avoided litigation cost, whether in cash or some other form, *indicates* a 'payment for delay'" (Leffler Rep. ¶ 73). He repeats this again a several paragraphs later: "Consequently, a significant payment from the patent holder to the challenger, like that here, moves the settlement entry date to a later, more anticompetitive, and more inefficient date" (*id.* at ¶ 83).

In response, **[*75]** plaintiffs argue Professor Leffler's statement in paragraph 73 is vindicated by context, and that the whole paragraph addresses delay of *expected* generic entry (Br. 14-15). This order finds this over-fastidious justification insufficient. Plaintiffs also contend that Professor Leffler's testimony does not contain the conditional "if-then" statement excluded in *Intuniv, 2020 U.S. Dist. LEXIS 187578, 2020 WL 5995326, at *21*. If Professor Leffler's opinions are not explicit "if-then statements," then they are close enough to make no difference and would confuse the jury. Accordingly, Professor Leffler shall not testify that a large reverse payment *necessarily* means that the agreement was a payment for delay and anticompetitive.

Defendants next move to exclude Professor Leffler's opinions to the extent they rely on the opinions of another of plaintiffs' experts, Attorney Lentz. This order addresses (and rejects) those in its analysis of defendant's motion to exclude Attorney Lentz's testimony.

Defendants finally request to exclude any testimony from Professor Leffler regarding plaintiffs' "preferred view" of the factual narrative, arguing that he cannot be a "human highlighter" (Br. 3). ***HN14***[] It is common, indeed required, under *Rule 26(a)(2)*, for an expert to summarize **[*76]** the facts and data considered in their report. Professor Leffler's testimony at trial must remain tethered to the expert opinions he provides, but he must be allowed to discuss facts apropos to those opinions. This order finds Defendants' concerns here improper for a *Daubert* motion and best raised as an objection at trial (should one be necessary).

In sum, to the extent stated, defendants' motion is **GRANTED IN PART** and **DENIED IN PART**.

10. DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF PLAINTIFFS' EXPERTS PROFESSOR CONTI AND DR. LEITZINGER

The final remaining *Daubert* is defendants' motion to exclude the testimony of both Dr. Jeffrey Leitzinger and Professor Rena Conti, damages experts for Humana and direct-purchaser plaintiffs, respectively (Dkt Nos. 446, 471, 477, 485). A February 2021 order denied Humana leave to file a second amended complaint, thereby extinguishing its indirect-purchaser claims and mooting defendants' primary argument here to exclude Professor Conti's calculation of indirect-purchaser damages (Dkt. No. 460). In their reply brief, defendants reiterate their secondary argument that Professor Conti and Dr. Leitzinger's testimony should be excluded because their but-for assumptions **[*77]** are incorrect and misleading (Reply Br. 2-6).

Humana's expert Professor Conti is associate professor of markets, public policy and law at the Questrom School of Business at Boston University, as well as an academic affiliate of Greylock Mckinnon Associates (Conti Rep. ¶ 6, Dkt. No. 447-1). In her report, Professor Conti opines that: if the delay in generic entry of Glumetza by defendants occurred, then it resulted in injury in the form of antitrust overcharges to Humana; and that the aggregate amount of overcharges damages may be calculated using standard economic methods and, depending on the but-for assumptions provided by counsel, direct purchase damages range from $5.24 to $5.32 million (*id.* at ¶ 2). Direct-purchaser plaintiffs' expert Dr. Leitzinger is the founding and managing director of the economic research and consulting firm Econ One Research (Leitzinger Rep. ¶ 1, Dkt. No. 447-9). In his report, Dr. Leitzinger opined, in relevant part, that under a series of alternative entry scenarios, aggregate overcharges range from $1.9 to $2.0 billion (*id.* at ¶ 9e).

Defendants do not contest Professor Conti's methodology in constructing an economic model to assess damages. Rather, defendants **[*78]** take issue with three but-for scenarios for generic entry dates counsel provided to Professor Conti to set the parameters of her calculation. For example, in scenario one: "A Lupin generic, as well as an authorized generic, would have entered the market in or around December 2012. A third generic would have entered the market before February 2016, and a fourth generic in or around May 2017" (Conti Rep. ¶ 48). Defendants say these but-for assumptions are imagined and contradicted by facts in the record, and that Professor Conti "did not consider possible later but-for entry dates" (Reply Br. 3).

But Professor Conti does not opine on when generic entry will occur, she leaves that up to the jury: "My damages methodology is flexible and can be adjusted to accommodate whatever factual findings the jury makes on the number of generic entrants, the time of entry, and whatever inputs are deemed to be relevant" (Conti Rep. ¶ 49). The parties' dispute over whether Lupin would lose the underlying patent litigation, and whether Sun and Watson could have launched their generic products as early as February 2016 will be put to the jury, and those dates can then be input into Professor Conti's model **[*79]** — a model whose methodology and rigor defendants do not otherwise contest. ***HN15***[] "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow, 327 U.S. at 265*. As the May 2021 order denying summary judgment explained, "[o]ur jury will craft the but-for world, in which defendants acted rationally and lawfully, based on measured deviation from the record" (Summary Judgment Order 22). Defendants' arguments are proper for cross-examination, and do not merit exclusion of Professor Conti's opinions.

The same reasoning applies and requires rejection of defendants' argument to exclude Dr. Leitzinger's opinions. As the summary judgment order made clear, Lupin's generic entry date was not set in stone, and fact issues abound (*id.* at 23-25). In sum, defendants' motion is **Denied**.

CONCLUSION

For the reasons stated above, the parties' *Daubert* motions are **Granted in Part** and **Denied in Part**. This does not foreclose individual objections to specific testimony at trial.

IT IS SO ORDERED.

Dated: August 25, 2021

/s/ William Alsup

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

Maxwell Foods, LLC v. Smithfield Foods, Inc.

North Carolina Superior Court, Wayne County

August 26, 2021, Decided

20 CVS 1430

Reporter
2021 NCBC 50 *; 2021 NCBC LEXIS 71 **; 2021 WL 3811610

MAXWELL FOODS, LLC, Plaintiff, v. SMITHFIELD FOODS, INC., Defendant.

Prior History: *Maxwell Foods, LLC v. Smithfield Foods, Inc., 2021 NCBC LEXIS 39, 2021 NCBC Order 11 (Apr. 13, 2021)*

Core Terms

negotiate, suppliers, allegations, parties, pricing, terms, hog, unfair, circumstances, most-favored-nation, quotation, marks, deceptive, swine, economic benefit, antitrust, monopoly, spot market, good faith, breached, motion to dismiss, output, claim for breach, designate, promise, sales, anti trust law, indefinite, egregious, processor

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

An N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(b)(6), motion tests the legal sufficiency of the complaint. The motion should be granted only when (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] **Motions to Dismiss, Failure to State Claim**

In deciding an N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(b)(6), motion, the court must treat the well-pleaded allegations of the complaint as true and view the facts and permissible inferences in the light most favorable to the nonmoving party. Exhibits to the complaint are deemed to be part of it and may also be considered, but the court need not accept as true any conclusions of law or unwarranted deductions of fact.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

HN3[] Offers, Definite Terms

Definiteness is an aspect of contract formation. It is essential to the formation of any contract that there be mutual assent of the parties to the terms of the agreement so as to establish a meeting of the minds. The terms must be definite and certain or capable of being made so. When an agreement is so vague and indefinite that it is not possible to collect from it the full intent of the parties, then there was no true meeting of the minds, and the agreement is void.

Business & Corporate Compliance > ... > Contracts Law > Breach > Material Breach

HN4[] Breach, Material Breach

Because contracts are consensual arrangements, it is up to the parties to define their material rights and obligations. When they haven't, neither the court nor the jury can make an agreement for them. Incomplete and incomprehensible agreements also pose a practical problem: a court cannot enforce a contract unless it can determine what it is.

Contracts Law > Contract Interpretation > Intent

HN5[] Contract Interpretation, Intent

The law does not favor the destruction of contracts on account of uncertainty. If the parties' intent can be ascertained, the court should, if possible, so construe the contract as to carry into effect that intent.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

HN6[] Offers, Definite Terms

Courts must take language as it is and people as they are. All agreements have some degree of indefiniteness and some degree of uncertainty. Indefiniteness is fatal only when the court cannot reasonably ascertain what was intended from the language used, construed with reference to the circumstances surrounding the making of the contract.

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Entire Contract

HN7[] Policy Interpretation, Entire Contract

Contract terms are not construed in isolation but as a whole.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

HN8[] Contract Interpretation, Ambiguities & Contra Proferentem

The aim of contract construction is for every provision to be given effect. When contract language is susceptible of two meanings, one of which will destroy it or render it invalid, the former will be adopted so as to uphold the contract.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

Contracts Law > Contract Interpretation > Parol Evidence

HN9[] **Offers, Definite Terms**

It is rare to hold a contract void for vagueness at the pleading stage. This is because extrinsic evidence, such as preliminary negotiations and surrounding circumstances, may explain and clarify the contract's terms.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

HN10[] **Offers, Definite Terms**

Courts routinely refuse to enforce mere letters of intent, statements of good faith, and other preliminary arrangements that leave material terms open to future negotiations.

Business & Corporate Compliance > ... > Contract Conditions & Provisions > Contracts Law > Contract Conditions & Provisions

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN11[] **Contracts, Contract Conditions & Provisions**

Contracts sometimes include express promises to negotiate additional terms in good faith. These promises may be enforceable, and depending on the circumstances, allegations that one party refused to negotiate might support a claim for breach of contract.

Contracts Law > Contract Interpretation > Intent

HN12[] **Contract Interpretation, Intent**

The court must construe the contract as written, leaving out imagined terms that the parties could have included but did not.

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

HN13[] **Contract Formation, Meeting of Minds**

No duty to negotiate arises from a mere agreement to agree.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Torts > Business Torts > Unfair Business Practices > Elements

HN14[] Trade Practices & Unfair Competition, State Regulation

To state a claim under N.C. Gen. Stat. § 75-1.1, a plaintiff must allege that (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff. The determination as to whether an act is unfair or deceptive is a question of law for the court.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Antitrust & Trade Law > Clayton Act > Scope

HN15[] Scope, Monopolization Offenses

A monopoly on the buyer side of a market is known as a monopsony. In a monopsony, the buyers have market power to decrease market demand for a product and thereby lower prices. Actual and attempted monopsonies are prohibited both by state and federal antitrust laws. N.C. Gen. Stat. § 75-2.1; 15 U.S.C.S. § 2.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN16[] Actual Monopolization, Monopoly Power

When a plaintiff alleges monopolistic misconduct as the basis for overlapping antitrust and N.C. Gen. Stat. § 75-1.1 claims, the failure of the antitrust claim also defeats liability under § 75-1.1.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN17[] Actual Monopolization, Monopoly Power

North Carolina courts have rejected arguments that exploitation of market power, even if not monopolistic, amounts to an inequitable assertion of power or position under N.C. Gen. Stat. § 75-1.1 based on the principle that, in the absence of conspiracy or monopoly, one may deal with whom he pleases.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN18[] Attempts to Monopolize, Elements

To be clear, it is possible to plead and prove an inequitable assertion of position or power that is not based on an abuse of market or monopoly power. Plenty of cases have upheld N.C. Gen. Stat. § 75-1.1 liability when the circumstances involve fraud, wrongful retention of property, and abuse of overmatched consumers by well-heeled institutions.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Business & Corporate Compliance > ... > Breach > Contracts Law > Breach

HN19[] **Trade Practices & Unfair Competition, State Regulation**

North Carolina appellate courts have stressed that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C. Gen. Stat. § 75-1.1. Something more is needed. There must be egregious or aggravating circumstances coupled with the breach.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Business & Corporate Compliance > ... > Breach > Contracts Law > Breach

HN20[] **Trade Practices & Unfair Competition, State Regulation**

As a general proposition, unfairness or deception either in the formation of the contract or in the circumstances of its breach may establish the existence of substantial aggravating circumstances under N.C. Gen. Stat. § 75-1.1. But it is far more difficult to allege and prove egregious circumstances after the formation of the contract because disputes concerning the circumstances of the breach are often bound up with one party's exercise of perceived rights and remedies under the contract. These claims are best resolved by simply determining whether the parties properly fulfilled their contractual duties.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Business & Corporate Compliance > ... > Breach > Contracts Law > Breach

HN21[] **Trade Practices & Unfair Competition, State Regulation**

Only where the circumstances of the breach exhibit clear deception are they sufficiently egregious to impose N.C. Gen. Stat. § 75-1.1 liability. This might include, for example, the concealment of a breach combined with acts to deter further investigation. A simple failure to disclose a breach, on the other hand, is not enough.

Counsel: Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips, Charles E. Coble, Eric M. David, Amanda S. Hawkins, and Shepard D. O'Connell, for Plaintiff Maxwell Foods, LLC.[1] **[**1]** .

Robinson, Bradshaw & Hinson, P.A., by Robert E. Harrington, Ethan R. White, and Mark A. Hiller, for Defendant Smithfield Foods, Inc.

Judges: Adam M. Conrad, Special Superior Court Judge.

Opinion by: Adam M. Conrad

Opinion

[1] After this motion was fully briefed, Ms. O'Connell moved for leave to withdraw as counsel for Maxwell, which the Court granted. (ECF No. 32.)

ORDER AND OPINION ON DEFENDANT'S PARTIAL MOTION TO DISMISS

[*1] For over 25 years, Maxwell Foods, LLC has supplied swine to Smithfield Foods, Inc. under an output contract. Once one of the country's largest swine suppliers, Maxwell recently began cutting its production and will soon be out of the hog business entirely. Maxwell blames Smithfield for its demise. The nub of the complaint is that Smithfield—the dominant player in the hog market—has used its market position to depress prices, rendering the output contract unprofitable for Maxwell. Although aware of Maxwell's tenuous financial position, Smithfield supposedly slashed its purchases, refused to renegotiate swine prices, and reneged on its promise to give Maxwell the same pricing and related economic benefits given to other suppliers. Believing these steps were **[**2]** designed to force it out of business, Maxwell has sued Smithfield for sundry breaches of the output contract and for unfair and deceptive trade practices.

[*2] Smithfield has moved to dismiss most of the pending claims. For the following reasons, the Court **GRANTS in part** and **DENIES in part** the motion.

Conrad, Judge.

I.

BACKGROUND

[*3] The Court does not make findings of fact on a motion to dismiss. The following background assumes that the amended complaint's allegations are true.

[*4] Smithfield is the largest pork producer in the world, processing over six billion pounds annually. On the East Coast alone, it owns and operates three plants—one in Virginia and two in North Carolina—that together process over 55,000 hogs per day. (*See* Am. Compl. ¶¶ 10-12, ECF No. 7.) Smithfield sources hogs from hundreds of its own farms and from many independent suppliers, including Maxwell. (*See* Am. Compl. ¶¶ 7, 8, 14, 15.)

[*5] The production sales agreement ("PSA") between Smithfield and Maxwell dates back to the mid-1990s and is still in effect. (Am. Compl. ¶¶ 7, 8, 16, 28; *see also* Am. Compl. Ex. 1 ["PSA"].)[2] It is an output contract. Subject to adjustments and conditions that are not relevant for present purposes, Smithfield **[**3]** must buy all "Market Swine"—up to 155,000 per month—produced by Maxwell in Virginia and the Carolinas. (*See* Am. Compl. ¶¶ 16, 21-23; PSA ¶¶ 1(e), 3(a).)

[*6] Pricing figured heavily in the parties' negotiations over the PSA and is the seed of their current dispute. The parties agreed to a per-pound purchase price equal to "Market Value" plus or minus various premiums, discounts, and credits. (PSA ¶¶ 1(f), 5(b).) Market Value is tied to the average daily price quoted for hogs sold on the Iowa-Southern Minnesota spot market. (PSA ¶ 1(b).) Readers may wonder why the agreement looks to a market in the Midwest for hog sales in the Southeast. At the time of the PSA, spot market transactions (also called negotiated sales) were prevalent in the hog trade. (*See* Am. Compl. ¶ 38.) Maxwell and Smithfield chose the Iowa-Southern Minnesota spot market "to establish a relatively stable national market price" as the basis for calculating Market Value. (PSA ¶ 1(b).) Recognizing that the marketplace might change, they agreed to "designate a substitute basis" if the Iowa-Southern Minnesota market ever ceased to be viable, backed by a "right to submit the matter to arbitration" should they fail to reach **[**4]** an agreement. (PSA ¶ 1(b).)

[*7] Maxwell also demanded assurances that Smithfield would not treat it less favorably than Smithfield's other major suppliers. (*See* Am. Compl. ¶¶ 18, 19.) Just one day after inking the PSA, the parties signed a letter agreement with additional terms, including a "most-favored-nation" clause. (Am. Compl. ¶ 28; *see also* Am. Compl. Ex. 2 ["Letter Agrmt."].) Smithfield represented that the PSA gave Maxwell "the same economic incentives (including any Grade and Yield Matrix) as given all of Smithfield Foods' other major swine suppliers" and further

[2] Maxwell Foods, LLC, the plaintiff here, is the successor-in-interest to Maxwell Foods, Inc., the party to the PSA. (*See* Am. Compl. ¶¶ 1, 2, 16; PSA, Preamble.)

agreed to offer Maxwell "the benefit of future changes in economic benefits given said major swine suppliers" during the PSA's term. A handwritten annotation states that Smithfield's "[m]ajor swine suppliers include Carroll's Foods, Inc., Murphy Family Farms, Inc., and Prestage Farms, Inc." (Letter Agrmt. ¶ 1; *see also* Am. Compl. ¶¶ 17, 30, 32.)

[*8] Nearly twenty-seven years have elapsed since the PSA was signed. In that time, the national hog market has seen immense change. There are fewer hog farms, due in part to industry consolidation. There are also fewer negotiated sales, falling from sixty percent of all hog sales **[**5]** in 1994 to twelve percent in 2004 to less than two percent in 2021. (*See* Am. Compl. ¶¶ 37, 39-41.) Thinly traded spot markets are, as alleged, "easily manipulated" by pork processors. (Am. Compl. ¶ 46.) This has changed the way the industry does business. As the number of negotiated sales has dwindled, the number of marketing agreements between processors and suppliers has swelled. Those looking for a reliable base price for their marketing agreements now favor index pricing and wholesale (or "cut out") pricing over spot market prices. (*See* Am. Compl. ¶ 47.)

[*9] Smithfield was "a leader" in the "effort" to consolidate the hog market. (Am. Compl. ¶ 37.) It expanded its own hog-farming operations and acquired two of its major suppliers, Carroll's and Murphy. (*See* Am. Compl. ¶¶ 42-45.) These acquisitions, according to Maxwell, have made Smithfield the "dominant pork processor in the Southeast"—so dominant that it "controls the market for hog processors in the Southeast" and wields "monopoly buyer power." (Am. Compl. ¶¶ 50, 87, 88.) Likewise, vertical integration allows Smithfield to control much of its pork production from top to bottom, beginning with breeding and ending with processing **[**6]** and packing. (*See* Am. Compl. ¶ 14.)

[*10] Smithfield's success is Maxwell's sorrow. Indeed, Maxwell believes that Smithfield has used its market power to manipulate the Iowa-Southern Minnesota spot market and depress swine prices. (*See* Am. Compl. ¶¶ 46, 88.) By 2017, volume at the Iowa-Southern Minnesota market dropped to the point that it ceased to be viable. (*See* Am. Compl. ¶ 52.) As a direct consequence, the PSA "no longer yields pricing that allows Maxwell to operate at a profit." (Am. Compl. ¶ 48.) Maxwell has repeatedly proposed a substitute basis for determining Market Value in the PSA, but Smithfield has rejected its proposals and refused to negotiate. (*See* Am. Compl. ¶¶ 59-67.)

[*11] That is not how Smithfield has dealt with its other major suppliers. At some point (the amended complaint does not say when), Maxwell learned that Smithfield had given other major suppliers (the amended complaint does not say which) better terms, such as index or cut out pricing. (*See* Am. Compl. ¶¶ 68, 81-83.) Maxwell further alleges that Smithfield stopped sharing production and sales information with its major suppliers in 2016—information that might have revealed its discriminatory pricing practices. (**[**7]** *See* Am. Compl. ¶ 55.) Confronted by Maxwell, Smithfield did not deny the charge that it had given other suppliers better terms. (*See* Am. Compl. ¶¶ 84, 85; Am. Compl. Ex. 3.)

[*12] The relationship between Maxwell and Smithfield deteriorated just as the COVID-19 pandemic began to unfold. In April 2020, without invoking the PSA's force majeure provisions, Smithfield halved its purchases from Maxwell. (*See* Am. Compl. ¶¶ 70-72.) Maxwell alleges that Smithfield could have continued buying the entire output but chose to maximize purchases from its own affiliates instead. (*See* Am. Compl. ¶¶ 75, 79.) Because Smithfield is the only processor "with the capacity to handle Maxwell's production," Maxwell faced a backup of hogs, had to reduce its output, and has since begun winding down its business entirely. (Am. Compl. ¶¶ 50, 72-78, 86.)

[*13] This suit followed. The original complaint included claims for breach of the most-favored-nation clause and breach of the output requirement. It also claimed that Smithfield breached a duty to renegotiate the PSA's pricing formula once the Iowa-Southern Minnesota spot market was no longer viable. After Smithfield unsuccessfully tried to remove the case to federal court, **[**8]** Maxwell amended its complaint to add a claim for unfair or deceptive trade practices under *N.C.G.S. § 75-1.1* based partly on allegations that Smithfield "abused its monopoly buyer power" in an effort "to target Maxwell unfairly and to force Maxwell out of the hog business." (Am. Compl. ¶ 88.) Smithfield cited the new claim as grounds to designate this action as a mandatory complex business case, which Maxwell opposed. The designation was upheld, though, "[b]ecause there exists a material issue of ***antitrust law*** that must be resolved to litigate Maxwell's claim arising under *section 75-1.1*." *Maxwell Foods, LLC v. Smithfield Foods, Inc., 2021 NCBC LEXIS 39, at *6, 2021 NCBC Order 11 (N.C. Super. Ct. Apr. 13, 2021)* (Bledsoe, C.J.) (located at ECF No. 20).

[*14] Now, Smithfield has moved to dismiss three of the four pending claims under *Rule 12(b)(6) of the North Carolina Rules of Civil Procedure*. (ECF No. 21.) The motion has been fully briefed, and the Court held a hearing on 21 May 2021. This matter is ripe for resolution.

II.

LEGAL STANDARD

[*15] ***HN1***[] A *Rule 12(b)(6)* motion "tests the legal sufficiency of the complaint." *Isenhour v. Hutto, 350 N.C. 601, 604, 517 S.E.2d 121 (1999)* (citation and quotation marks omitted). The motion should be granted only when "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily **[**9]** defeats the plaintiff's claim." *Corwin v. Brit. Am. Tobacco PLC, 371 N.C. 605, 615, 821 S.E.2d 729 (2018)* (citation and quotation marks omitted).

[*16] ***HN2***[] In deciding the motion, the Court must treat the well-pleaded allegations of the complaint as true and view the facts and permissible inferences in the light most favorable to the nonmoving party. *Sykes v. Health Network Sols., Inc. (Sykes), 372 N.C. 326, 332, 828 S.E.2d 467 (2019)*; *CommScope Credit Union v. Butler & Burke, LLP, 369 N.C. 48, 51, 790 S.E.2d 657 (2016)*. Exhibits to the complaint are deemed to be part of it and may also be considered, *see* *Krawiec v. Manly, 370 N.C. 602, 606, 811 S.E.2d 542 (2018)*, but the Court need not accept as true any "conclusions of law or unwarranted deductions of fact," *Wray v. City of Greensboro, 370 N.C. 41, 46, 802 S.E.2d 894 (2017)* (citation and quotation marks omitted).

III.

ANALYSIS

[*17] Smithfield challenges the claims for breach of the most-favored-nation clause, breach of the duty to negotiate, and violation of *section 75-1.1*. The Court will address each claim in turn.

A. Most-Favored-Nation Clause

[*18] Maxwell alleges that Smithfield breached the most-favored-nation clause by giving other major swine suppliers better terms, including a more favorable pricing formula. (*See* Am. Compl. ¶¶ 94-102.) Smithfield argues that this clause is unenforceable because it is hopelessly vague and indefinite. (*See* Br. in Supp. 6-13, ECF No. 22.)

[*19] ***HN3***[] Definiteness is an aspect of contract formation. "It is essential to the formation of any contract that there be mutual assent of the parties to the terms **[**10]** of the agreement so as to establish a meeting of the minds." *Creech v. Melnik, 347 N.C. 520, 527, 495 S.E.2d 907 (1998)* (citation and quotation marks omitted). The terms "must be definite and certain or capable of being made so." *Horton v. Humble Oil & Refin. Co., 255 N.C. 675, 679, 122 S.E.2d 716 (1961)* (citations and quotation marks omitted). "When an agreement is 'so vague and indefinite that it is not possible to collect from it the full intent of the parties,' then there was no true meeting of the minds, and the agreement 'is void.'" *Epic Chophouse, LLC v. Morasso, 2020 NCBC LEXIS 101, at *7-8 (N.C. Super. Ct. Sept. 8, 2020)* (quoting *Holder v. Home Mortg. Co., 214 N.C. 128, 133, 198 S.E. 589 (1938)*).

[*20] There are good reasons for this rule. ***HN4***[] Because contracts are consensual arrangements, it is up to the parties to define their material rights and obligations. When they haven't, "neither the court nor the jury can make an agreement for" them. *Holder, 214 N.C. at 133* (citation and quotation marks omitted). Incomplete and incomprehensible agreements also pose a practical problem: "a court cannot enforce a contract unless it can determine what it is." *F. Indus., Inc. v. Cox, 45 N.C. App. 595, 599, 263 S.E.2d 791 (1980)* (cleaned up); *see also* *Boyce v. McMahan, 285 N.C. 730, 734, 208 S.E.2d 692 (1974)*.

[*21] ***HN5***[] But "[t]he law does not favor the destruction of contracts on account of uncertainty." *Chew v. Leonard, 228 N.C. 181, 185, 44 S.E.2d 869 (1947)*. If the parties' intent "can be ascertained," the Court should, "if possible, so construe the contract as to carry into effect" that intent. *Id.* (citations and quotation marks omitted). Parties presumably intend that their agreements **[**11]** will be effective. Demanding perfect clarity would frustrate that intent, make it harder to draft contracts, and render contractual relationships less certain rather than more. ***HN6***[] Courts "must take language as it is and people as they are. All agreements have some degree of indefiniteness and some degree of uncertainty." *Carolina Helicopter Corp. v. Cutter Realty Co., 263 N.C. 139, 146, 139 S.E.2d 362 (1964)* (citation and quotation marks omitted). Indefiniteness is fatal only when the court cannot reasonably ascertain what was intended "from the language used, construed with reference to the circumstances surrounding the making of the contract." *Welsh v. N. Telecom, Inc., 85 N.C. App. 281, 290, 354 S.E.2d 746 (1987)*.[3]

[*22] The most-favored-nation clause is hardly so vague as to defy understanding. Smithfield assured Maxwell that the PSA gave it "the same economic incentives" as given all "other major swine suppliers" and promised to offer Maxwell "the benefit of future changes in economic benefits given said major swine suppliers during the term of this contract." (Letter Agrmt. ¶ 1.) The undeniable intent was to ensure that Smithfield would treat Maxwell just as well as similarly situated suppliers. Clauses like this one are both common and commonly enforced. *See State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 376, 358 S.E.2d 339 (1987)* (observing that the "clear intent" of a most-favored-nation clause was **[**12]** to "to equalize the net monetary benefits" for the contracting party and another similarly situated party).[4]

[*23] Smithfield frets that the phrase "economic benefits" is boundless and could include any term in the PSA—pricing, of course, but also length of term, limits on assignability, and even choice of law. Without a definition in the PSA, Smithfield contends, the parties and the Court are left "to guess" at what is and isn't an economic benefit. (Br. in Supp. 8.)

[*24] The uncertainty, if any, is not insoluble. The words "economic" and "benefit" are neither technical nor obscure. They might be broad, but it would be a mistake to equate breadth with ambiguity, much less indefiniteness. ***HN7***[] Besides, contract terms are not construed in isolation but "as a whole." *State v. Philip Morris USA Inc., 359 N.C. 763, 773, 618 S.E.2d 219 (2005)*. The surrounding text obviates much of the guesswork by pointing to the "economic incentives" given to "other major suppliers"—three are named—as benchmarks for comparison and by specifying the PSA's "Grade and Yield Matrix" as one of those incentives, (Letter Agrmt. ¶ 1). *See Welsh, 85 N.C. App. at 291* (construing "company benefits" with reference to company policies and retirement plan); *La Tortilleria, Inc. v. Nuestro Queso, LLC, 2014 U.S. Dist. LEXIS 43344, at *8 (M.D.N.C. Mar. 31, 2014)* (construing "equivalent pricing" and "comparable quality" **[**13]** by using "a clear benchmark for comparison" in contract), *R. & R. adopted*, *2014 U.S. Dist. LEXIS 94315 (July 11, 2014)*.

[*25] Smithfield objects that "economic incentives" and "economic benefits" cannot be the same because contracting parties ordinarily intend different words to have different meanings. (*See* Br. in Supp. 8 (citing *Hunter v.*

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[3] Although both parties appear to agree that the PSA is governed by the Uniform Commercial Code, neither discussed it in any depth. The Code is arguably more tolerant of vagueness than the common law. *See, e.g.*, *N.C.G.S. § 25-2-204(3)* ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."); *id. § 25-2-202(a)* (stating that contract terms "may be explained or supplemented by course of performance, course of dealing, or usage of trade"); *Carolina Builders Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 228, 324 S.E.2d 626 (1985)*.

[4] *See also, e.g., DeLoach v. Lorillard Tobacco Co., 391 F.3d 551, 555 (4th Cir. 2004)* (construing clause in settlement agreement that provided that defendants' obligations "would be 'no less favorable' to them 'than those terms agreed to'" in any later settlement plaintiffs might reach with another co-defendant); *Albertini v. Warner Music Grp. Corp., 2008 U.S. Dist. LEXIS 103878, at *2, *7 (S.D.N.Y. Dec. 23, 2008)* (concluding that most-favored-nation clause was "neither ambiguous nor reasonably subject to more than one interpretation" when it provided that employee would "be treated no less favorably than" another), *aff'd*, ***351 Fed. Appx. 547 (2d Cir. 2009)***; *Eveleth Taconite Co. v. Minn. Power & Light Co., 301 Minn. 20, 27, 221 N.W.2d 157 (1974)* ("In our judgment, there is little doubt that the parties intended that the most-favored-nations clause would protect plaintiff from being placed in a noncompetitive position by provisions in its contracts with defendant . . . which were less advantageous than provisions its competitors might be granted by defendant at a later time during the agreed-upon span of plaintiff's contracts."); *Hyatt v. Al Jazeera Am. Holdings II, LLC, 2016 Del. Ch. LEXIS 57, at *29 n.54 (Del. Ch. Mar. 31, 2016)* ("Generally speaking, 'MFN provisions' are undertakings that the contracting party will be treated at least as well as other [parties] similarly situated.").

Town of Mocksville, 897 F.3d 538, 552 (4th Cir. 2018)).) Here, though, the context suggests that the terms are interchangeable. And in any event, canons of construction are tools, not absolutes. Smithfield uncouples incentives and benefits as a means to destroy the most-favored-nation clause, not to construe it. ***HN8***[] Yet the aim of contract construction is for "every provision . . . to be given effect." *Singleton v. Haywood Elec. Membership Corp., 357 N.C. 623, 629, 588 S.E.2d 871 (2003)*. When contract language "is susceptible of two meanings, one of which will destroy it or render it invalid, the former will be adopted so as to uphold the contract." *Torrey v. Cannon, 171 N.C. 519, 521, 88 S.E. 768 (1916)* (citation and quotation marks omitted); *accord* *Slocumb v. Raleigh, Charlotte & S. R.R. Co., 165 N.C. 338, 341, 81 S.E. 335 (1914)*.

[*26] ***HN9***[] Regardless, it is rare to hold a contract void for vagueness at the pleading stage. This is because extrinsic evidence, such as "preliminary negotiations and surrounding circumstances," may "explain and clarify the contract's terms." *Thomco Realty, Inc. v. Helms, 107 N.C. App. 224, 227-28, 418 S.E.2d 834 (1992)*. Maxwell has alleged that "economic benefits" were "understood and intended by the parties" to include "the pricing **[**14]** of hogs, the market or index that served as the base price for hogs, the Market Value, the Average Terminal Price, and the Grade and Yield Matrix."[5] (Am. Compl. ¶ 33.) These allegations must be taken as true, and Maxwell is entitled to discovery and a chance to prove its preferred interpretation. *See* *Boyce, 285 N.C. at 734* ("In the usual case, the question whether an agreement is complete or partial is left to inference or further proof."); *Epic Chophouse, 2020 NCBC LEXIS 101, at *8* ("Usually, whether there was a meeting of the minds is a question of fact.").

[*27] The Court has considered Smithfield's remaining arguments and finds them equally unpersuasive. The phrase "benefit of future changes" is no less definite than "economic benefits" for essentially the same reasons. Indeed, courts often describe the purpose of most-favored-nation clauses using similar language. *See, e.g.,* *Cent. States, Se. & Sw. Areas Pension Fund v. Reebie Storage & Moving Co., 815 F. Supp. 1131, 1135 (N.D. Ill. 1993)* (describing clause to mean that "if I give somebody else a better deal at any point during the life of our contract, I promise to give you the benefit of that better deal too"); *Claassen v. City of Newton, 353 P.3d 469, 2015 Kan. App. Unpub. LEXIS 528, at *3 (Kan. Ct. App. June 26, 2015)* ("Basically, a most favored nations provision requires Party A to modify its contract with Party B to include more beneficial terms Party A agrees to in later contracts with other parties.").

[*28] Last, **[**15]** with minimal explanation, Smithfield calls the most-favored-nation clause an unenforceable agreement to agree. (*See* Br. in Supp. 7.) ***HN10***[] Courts routinely refuse to enforce mere letters of intent, statements of good faith, and other preliminary arrangements that leave material terms open to future negotiations. *See, e.g.,* *Boyce, 285 N.C. at 734*. This clause is none of those. Smithfield is not subject to terms it cannot anticipate or to an indefinite obligation to agree to something in the future. Rather, it has a fixed and final obligation to offer Maxwell the economic benefits given to other major suppliers. Nothing about that is left to future agreement.

[*29] The Court therefore denies Smithfield's motion to dismiss Maxwell's claim for breach of the most-favored-nation clause.

B. Duty to Negotiate

[*30] According to Maxwell, the parties were required to negotiate in good faith to establish a new basis for determining Market Value once the Iowa-Southern Minnesota spot market ceased to be viable. Maxwell claims that Smithfield breached the PSA by refusing to negotiate. (*See* Am. Compl. ¶¶ 104-10.) Smithfield argues that it did not breach any duty to negotiate because none exists. (*See* Br. in Supp. 13-18.)

[*31] ***HN11***[] Contracts sometimes **[**16]** include express promises to negotiate additional terms in good faith. These promises may be enforceable, and depending on the circumstances, allegations that one party refused to negotiate might support a claim for breach of contract. *See* *Recurrent Energy Dev. Holdings, LLC v. SunEnergy1,*

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[5] To Smithfield's dismay, Maxwell goes on to say that the contemplated economic benefits also include "any other economic benefits." (Am. Compl. ¶ 33.) This sort of circularity won't do at trial, but a little lenity is allowed in the pleadings.

LLC, 2017 NCBC LEXIS 18, at *43-47 (N.C. Super. Ct. Mar. 7, 2017) (addressing express agreement to "use best efforts to negotiate [the anticipated transaction] in good faith"); New Friendship Used Clothing Collection, LLC v. Katz, 2017 NCBC LEXIS 72, at *40-44 (N.C. Super. Ct. Aug. 18, 2017) (addressing express agreement "to negotiate in good faith the terms of the acquisition that remained open").

[*32] Not so here. The PSA requires the parties to "designate" a new basis for determining Market Value. It then allows either party to compel arbitration for that purpose beginning sixty days after the Iowa-Southern Minnesota spot market ceases to be viable. (*See* PSA ¶ 1(b).) Missing is any promise to negotiate the new basis in good faith.

[*33] Maxwell argues that the duty to negotiate is implied because the PSA requires designation of a new basis for Market Value by mutual agreement and no mutual agreement is possible absent negotiations. This is unpersuasive for two reasons. First, the parties expressly agreed to *arbitrate* their disagreements, not to *negotiate* them. ***HN12***[] The Court must construe the PSA as written, leaving out "imagined terms" **[**17]** that the parties could have included but did not. *Morrell v. Hardin Creek, Inc., 371 N.C. 672, 686, 821 S.E.2d 360 (2018)*. Second, Maxwell conceded at the hearing that the bare promise to designate a new basis—unlike the agreement to arbitrate—is itself a nonbinding agreement to agree. ***HN13***[] No duty to negotiate arises from a mere agreement to agree. *See* *Insight Health Corp. v. Marquis Diagnostic Imaging of N.C., LLC, 2016 NCBC LEXIS 77, at *6-19 (N.C. Super. Ct. Oct. 7, 2016)*; *Comput. Design & Integration, LLC v. Brown, 2018 NCBC LEXIS 216, at *61-65 (N.C. Super. Ct. Dec. 10, 2018)*; *Remi Holdings, LLC v. IX WR 3023 HSBC Way L.P., 2016 NCBC LEXIS 110, at *16-19 (N.C. Super. Ct. Dec. 12, 2016)*.

[*34] Furthermore, the only case that has recognized an implied duty to negotiate had "unique facts." *RREF BB Acquisitions, LLC v. MAS Props., L.L.C., 2015 NCBC LEXIS 61, at *57 (N.C. Super. Ct. June 9, 2015)*. There, the Court "did not imply a duty to negotiate in good faith based on the terms" of the agreement at issue but concluded that there was a question of fact as to "whether the parties had entered into an agreement to continue negotiating in good faith" based on their conduct. *Insight Health, 2016 NCBC LEXIS 77, at *8-10* (discussing *RREF*'s unique facts and narrow holding). Nothing of the sort is alleged here. Maxwell points only to the terms of the PSA, not to any conduct by the parties. Indeed, Maxwell alleges that Smithfield rebuffed all overtures—the opposite of an implied agreement to negotiate.

[*35] In short, the PSA does not impose a duty to negotiate in good faith to establish a substitute basis for determining Market Value. The Court therefore grants Smithfield's motion to dismiss the claim for breach of the duty to negotiate.

C. Section 75-1.1 **[**18]**

[*36] The last claim at issue is for violation of *N.C.G.S. § 75-1.1*. ***HN14***[] To state a claim, a plaintiff must allege that "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp, 353 N.C. 647, 656, 548 S.E.2d 704 (2001)*. "The determination as to whether an act is unfair or deceptive is a question of law for the court." *Id.*

[*37] Maxwell asserts two theories: one that it calls a "'direct' or 'pure' unfairness claim" based on Smithfield's alleged abuse of market power, (Opp'n 22, ECF No. 26; *see also* Am. Compl. ¶ 127), and another based on Smithfield's alleged breaches of the PSA, (*see* Am. Compl. ¶ 128). Smithfield argues that neither is unfair or deceptive within the meaning of the statute. (*See* Br. in Supp. 18-29.)

1. Unfair Use of Market Power

[*38] The premise of Maxwell's first theory is that Smithfield abused its "position in the market" to "creat[e] the conditions that made the hog business economically unsustainable for Maxwell." (Am. Compl. ¶ 126.) Thanks to "aggressive vertical integration" and "industry consolidation," Smithfield is the "dominant processor in the Southeast" and "substantially controls the market." (Am. Compl. ¶¶ **[**19]** 14, 37, 39, 44, 46, 50, 87, 88, 90, 93, 124, 127.) Possessing "monopoly buyer power," Smithfield has "manipulate[d] the Iowa-Southern Minnesota spot market" and "exert[ed] undue influence over the entire negotiated market." (Am. Compl. ¶¶ 46, 88, 125.) These actions drove down prices, putting severe "economic pressure" on Maxwell. (Am. Compl. ¶¶ 48, 51, 53, 88, 90, 124, 127.) Smithfield then used its leverage to force Maxwell out of business while giving better pricing to other suppliers, including its affiliates. (*See* Am. Compl. ¶¶ 46, 50, 51, 69, 80, 88, 90.)

[*39] Although Maxwell tries to deny it, there's no serious question that these are allegations of antitrust misconduct. ***HN15***[] A monopoly on the buyer side of a market—which is what Maxwell alleges—is known as a monopsony. In a monopsony, "the buyers have market power to decrease market demand for a product and thereby lower prices." *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1315 (10th Cir. 2017)* (quoting *Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1118 (10th Cir. 2008)*).[6] Actual and attempted monopsonies are prohibited both by state and federal antitrust laws. *See* N.C.G.S. § 75-2.1; 15 U.S.C. § 2.

[*40] It's also clear that Maxwell has not alleged all that is needed to state a valid monopsony claim. Without rebuttal, Smithfield showed that the amended complaint lacks essential elements, including **[**20]** the "possession of monopoly power in the relevant market" and the "willful acquisition or maintenance" of that power. *Sykes v. Health Network Sols., Inc., 2017 NCBC LEXIS 73, at *60 (N.C. Super. Ct. Aug. 18, 2017)* (quoting *Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 710 (4th Cir. 1991)*), *aff'd by an equally divided court*, *372 N.C. 326, 828 S.E.2d 467 (2019)*.

[*41] The upshot is that Maxwell's *section 75-1.1* claim is based on antitrust allegations that fall short of an antitrust violation. According to Smithfield, that ends the matter, and the claim must be dismissed.

[*42] ***HN16***[] The Court agrees. When a plaintiff alleges monopolistic misconduct as the basis for overlapping antitrust and *section 75-1.1* claims, "the failure of the antitrust claim also defeats liability under *section 75-1.1*." *SiteLink Software, LLC v. Red Nova Labs, Inc., 2016 NCBC LEXIS 45, at *32 (N.C. Super. Ct. June 14, 2016)*; *see also, e.g.*, *Sykes, 372 N.C. at 333* (affirming dismissal of *section 75-1.1* claim premised on "the same conduct that is the subject of" deficient antitrust claims); *Sykes v. Blue Cross & Blue Shield of N.C., 2018 NCBC LEXIS 28, at *31 (N.C. Super. Ct. Apr. 5, 2018)* (dismissing *section 75-1.1* claim based on deficient antitrust allegations), *aff'd*, *372 N.C. 318, 828 S.E.2d 489 (2019)*; *Drs. Making Housecalls-Internal Med., P.A. v. Onsite Care, PLLC, 2019 NCBC LEXIS 6, at *20 (N.C. Super. Ct. Jan. 16, 2019)* (same); *R. J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362, 396 (M.D.N.C. 2002)* (same), *aff'd per curiam*, *67 F. App'x 810 (4th Cir. 2003)*.

[*43] It makes no difference that Maxwell chose not to pair its *section 75-1.1* claim with a matching antitrust claim. What matters is the claim's substance, not its label. Chief Judge Bledsoe made this clear when he overruled Maxwell's opposition to designation of this case to the Business Court. Maxwell argued at that time that it had not raised an issue of ***antitrust law*** because it had not asserted a claim under the antitrust **[**21]** statutes. Chief Judge Bledsoe disagreed, concluding that Maxwell "otherwise invoked state or federal ***antitrust law*** by alleging that Smithfield's monopolistic misconduct serves as the basis for its claim under *section 75-1.1*." *Maxwell Foods, 2021 NCBC LEXIS 39, at *5-6, 2021 NCBC Order 11* (citations and quotation marks omitted). As he put it, even without an independent antitrust claim, "there exists a material issue of ***antitrust law*** that *must be resolved* to litigate Maxwell's claim arising under *section 75-1.1*." *Id.* at *6 (emphasis added).

[*44] That issue can now be resolved on the pleadings. It is uncontested that Maxwell's allegations of monopolistic misconduct, even if taken as true, do not show a violation of the antitrust laws. Neither do they support liability under *section 75-1.1*.

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[6] Monopoly claims usually involve allegations that a seller acquired market power so as to restrict output and raise prices. "[A] monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.'" *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)* (citation and quotation marks omitted); *see also* *Sykes, 372 N.C. at 330 n.2* (describing a monopsony as "a market situation in which one buyer controls the market" (citation and quotation marks omitted)).

[*45] Maxwell maintains that Smithfield's exploitation of market power, even if not monopolistic, amounts to "an inequitable assertion of its power or position" under *section 75-1.1*. (Opp'n 20 (quoting *Krebs v. Charlotte Sch. of L., 2017 U.S. Dist. LEXIS 143060, at *28 (W.D.N.C. Sept. 5, 2017)*).) ***HN17***[] But North Carolina courts have rejected similar arguments based on the principle that, "[i]n the absence of conspiracy or monopoly, one may deal with whom he pleases." *Telephone Services, Inc. v. General Tel. Co. of South, 92 N.C. App. 90, 93, 373 S.E.2d 440 (1988)* (quoting *United Artists Records, Inc. v. E. Tape Corp., 19 N.C. App. 207, 214, 198 S.E.2d 452 (1973)*), *review denied*, *324 N.C. 251, 377 S.E.2d 763 (1989)*.

[*46] In *Telephone Services*, a telecommunications common carrier removed a contractor from its list of providers for installation and **[**22]** repair services. This effectively eliminated the contractor from the market. *See id. at 91*. Seeking relief under *section 75-1.1*, the contractor alleged that the carrier had "monopoly status" and had "unfairly us[ed] its position of power" to force the contractor out of the market. *Id. at 93*. The Court of Appeals concluded that the allegations of monopoly power were inadequate and that, absent a monopoly, the carrier's exclusion of the contractor was not an unfair assertion of power. *See id. at 93-94*.

[*47] This Court followed suit in *Thompson Installations, Inc. v. Stock Building Supply, LLC, 2012 NCBC LEXIS 12 (N.C. Super. Ct. Feb. 21, 2012)*. That case involved an installation and supply contract. Although the contract was nonexclusive, the defendant instructed the plaintiff not to perform installations for its competitors and threatened to terminate the contract if the plaintiff refused. The plaintiff sued for breach of contract and unfair trade practices, alleging anticompetitive coercion but "no monopoly or attempted monopoly by Defendant." *Id.* at *12. Relying on *Telephone Services*, this Court concluded that the defendant's actions were not unfair within the meaning of *section 75-1.1* "regardless of [its] potentially anti-competitive intent." *Id.* at *14.

[*48] ***HN18***[] To be clear, it is possible to plead and prove an inequitable assertion of position or power that **[**23]** is not based on an abuse of market or monopoly power. Plenty of cases have upheld *section 75-1.1* liability when the circumstances involve fraud, wrongful retention of property, and abuse of overmatched consumers by well-heeled institutions. *See, e.g., Nash Hosps., Inc. v. State Farm Mut. Auto. Ins. Co., 254 N.C. App. 726, 738, 803 S.E.2d 256 (2017)* (involving insurer's conduct that "effectively deprived [the plaintiff] of the funds to which [it] was entitled by law"); *Faucette v. 6303 Carmel Road, LLC, 242 N.C. App. 267, 276, 775 S.E.2d 316 (2015)* ("Defendants abused their positions of power to withhold payment of the money [plaintiff] legally was owed, solely to pressure [plaintiff] to resolve several unrelated disputes . . . .").[7]

[*49] This is not such a case. Maxwell accuses Smithfield of crafting a scheme to put it out of business, but the alleged scheme depends on the existence and misuse of monopoly power, not fraud or conversion of property. And these parties are large, sophisticated companies dealing at arms' length.

[*50] Maxwell also suggests that Smithfield had all the power in the parties' relationship, making its conduct unfair. Again, though, the alleged source of Smithfield's power in its relationship with Maxwell is its monopoly power and control of the market. Without the monopoly allegations, Smithfield's actions are not unfair within the meaning of **[**24]** *section 75-1.1*. See *Thompson, 2012 NCBC LEXIS 12, at *14*. Maxwell has not cited any decision in which a court has upheld a *section 75-1.1* claim based on an alleged imbalance of power between two sophisticated companies in an arms'-length contractual relationship even when the "economic fate" of one is tied to the other. *Sara Lee Corp. v. Quality Mfg., Inc., 61 F. App'x 836, 839-40 (4th Cir. 2003)* (concluding that party did not act unfairly or deceptively by imposing "onerous and one-sided" agreement on supplier, threatening to terminate exclusive relationship, and ending relationship in favor of performing supplier's duties in-house).

[7] *See also, e.g., Moose v. Allegacy Fed. Credit Union, 2021 NCBC LEXIS 47, at *11-13 (N.C. Super. Ct. May 5, 2021)* (involving a consumer adhesion contract); *Hamm v. Blue Cross & Blue Shield of N.C., 2010 NCBC LEXIS 17, at *31 (N.C. Super. Ct. Aug. 27, 2010)* ("Conduct by an insurance company that manifests an inequitable assertion of power or position also constitutes an unfair trade practice." (citation and quotation marks omitted)); *Gray v. North Carolina Ins. Underwriting Ass'n, 352 N.C. 61, 68-73, 529 S.E.2d 676 (2000)* (involving insurance carrier conduct).

[*51] In sum, Maxwell has not adequately alleged monopolistic misconduct by Smithfield. Nor has it alleged any other basis to support its "direct" unfairness theory.

2. Breach of Contract and Aggravating Circumstances

[*52] As a second theory, Maxwell claims that Smithfield violated *section 75-1.1* by breaching the PSA. Well-settled law holds otherwise.

[*53] ***HN19***[] Our appellate courts have stressed that "a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under *N.C.G.S. § 75-1.1*." *Branch Banking & Tr. Co. v. Thompson, 107 N.C. App. 53, 62, 418 S.E.2d 694 (1992)*; *see also, e.g., SciGrip, Inc. v. Osae, 373 N.C. 409, 427, 838 S.E.2d 334 (2020)*; *Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 347 (4th Cir. 1988)*. Something more is needed. There must be "*egregious* or *aggravating* circumstances" coupled with the breach. *Dalton, 353 N.C. at 657* (citations and quotation marks omitted); *see also SciGrip, 373 N.C. at 426-27*; *Bumpers v. Cmty. Bank of N. Va., 367 N.C. 81, 88, 747 S.E.2d 220 (2013)*.

[*54] ***HN20***[] "As a general proposition, unfairness **[**25]** or 'deception either in the formation of the contract or in the circumstances of its breach' may establish the existence of substantial aggravating circumstances" under *section 75-1.1*. *SciGrip, 373 N.C. at 426* (quoting *Bartolomeo v. S.B. Thomas, Inc., 889 F.2d 530, 535 (4th Cir. 1989)*). But "[i]t is far more difficult to allege and prove egregious circumstances *after* the formation of the contract" because "disputes concerning the circumstances of the breach are often bound up with one party's exercise of perceived rights and remedies under the contract." *Post v. Avita Drugs, LLC, 2017 NCBC LEXIS 95, at *10-11 (N.C. Super. Ct. Oct. 11, 2017)*. These claims are "best resolved by simply determining whether the parties properly fulfilled their contractual duties." *Heron Bay Acquisition, LLC v. United Metal Finishing, Inc., 245 N.C. App. 378, 383, 781 S.E.2d 889 (2016)* (citation and quotation marks omitted).

[*55] ***HN21***[] "Only where the circumstances of the breach exhibit clear deception are they sufficiently egregious to impose *section 75-1.1* liability." *Post, 2017 NCBC LEXIS 95, at *11*. This might include, for example, "the concealment of a breach combined with acts to deter further investigation." *Id.* at *12 (citation and quotation marks omitted). A simple failure to disclose a breach, on the other hand, is not enough. *See Heron Bay, 245 N.C. App. at 383 n.1*; *see also Post, 2017 NCBC LEXIS 95, at *11* ("A party's threats to terminate, efforts to encourage another to continue contractual performance while planning to breach, and refusal to otherwise meet contractual obligations do not rise to the level **[**26]** of aggravating circumstances." (citations and quotation marks omitted)).

[*56] Maxwell's allegations do not stack up. Its claim for breach of the duty to negotiate has been dismissed. And it has not pointed to deception or other egregious circumstances related to the alleged breach of the output provision. (*See generally* Opp'n 26-28.)

[*57] As for the most-favored-nation clause, Maxwell argues that "Smithfield had a duty to inform Maxwell of other economic benefits" given to major swine suppliers and that Smithfield hid that information to conceal its breach. (Opp'n 27.) It's not clear what Maxwell means by a duty to inform because the PSA does not expressly impose any duty on Smithfield to disclose information to Maxwell about other suppliers. In any event, whether Smithfield had an express or implied duty to inform Maxwell and whether it complied with such a duty are simply contract questions, turning on the scope of each side's rights and obligations under the PSA.

[*58] More broadly, Maxwell has not alleged that Smithfield concealed its breach or took steps to deter investigation. What the amended complaint alleges is that Smithfield voluntarily began sharing production and sales information with **[**27]** its suppliers, including Maxwell, in 1994 and then stopped some twenty years later. (*See* Am. Compl. ¶¶ 54, 55.) At no point does the amended complaint allege that Smithfield provided false or misleading information, that it took affirmative steps to conceal or destroy information, or that Maxwell was prevented from making inquiries to police compliance with the most-favored-nation clause. Likewise, Smithfield "has not denied" that it gave other suppliers better terms, even when confronted by Maxwell. (Am. Compl. ¶ 85.) At most, these allegations show that Smithfield failed to disclose its breach, which is not sufficiently deceptive or egregious to support liability under *section 75-1.1*. *See* *Heron Bay, 245 N.C. App. at 383 n.1*; *see also* *United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 992 (4th Cir. 1981)* (holding that no "unfairness inhered in the circumstances of the breach within the meaning of the statute simply because the breach was intentional and not promptly disclosed").

[*59] Maxwell offers little else. It contends that Smithfield "intentionally deprived Maxwell of the benefit of the" most-favored-nation clause. (Opp'n 27.) Even assuming that Smithfield acted with ill will and with knowledge of how severe the harm would be to Maxwell, that's just another way of saying that Smithfield intentionally **[**28]** breached the PSA. *See, e.g.,* *Haddock v. Volunteers of Am., Inc., 2021 NCBC LEXIS 70, at *28-29 (N.C. Super. Ct. Aug. 25, 2021)*; *Kerry Bodenhamer Farms, LLC v. Nature's Pearl Corp., 2017 NCBC LEXIS 27, at *21-23 (N.C. Super. Ct. Mar. 27, 2017)*; *Flanders/Precisionaire Corp. v. Bank of N.Y. Mellon Tr. Co., Nat'l Ass'n, 2015 NCBC LEXIS 36, at *38 (N.C. Super. Ct. Apr. 7, 2015)*; *see also* *CF Indus., Inc. v. Transcon. Gas Pipe Line Corp., 448 F. Supp. 475, 485 (W.D.N.C. 1978)* ("It can hardly be doubted that most, if not all, . . . buyers who refuse delivery in a falling market do so intentionally, yet these ordinary commercial breaches are wholly foreign to the purposes of *§ 75-1.1*.").

[*60] This is not "the unusual case in which the circumstances of the breach itself are egregious and deceptive." *Post, 2017 NCBC LEXIS 95, at *13*. The PSA's "terms—and not *section 75-1.1*—define the parties' rights and obligations, as well as the remedies for the alleged breaches." *Id.* at *16.

* * *

[*61] Neither of Maxwell's theories states a claim for relief under *section 75-1.1*. The Court therefore grants Smithfield's motion to dismiss the claim.

IV.

CONCLUSION

[*62] For all these reasons, the Court **GRANTS in part** and **DENIES in part** Smithfield's partial motion to dismiss and **ORDERS** as follows:

> a. The Court **GRANTS** the motion to dismiss Maxwell's second claim for breach of the duty to negotiate. The claim is dismissed with prejudice.
>
> b. The Court **GRANTS** the motion to dismiss Maxwell's fourth claim for violation of *N.C.G.S. § 75-1.1*. In its discretion, the Court dismisses the claim without prejudice.
>
> c. In all other respects, the Court **DENIES** the motion.

SO ORDERED, this the 26th day of August, 2021.

/s/ Adam M. Conrad

Adam M. Conrad

Special **[**29]** Superior Court Judge for Complex Business Cases

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Rosenman v. Facebook Inc.

United States District Court for the Northern District of California, San Jose Division

August 27, 2021, Decided; August 27, 2021, Filed

Case No. 21-CV-02108-LHK

Reporter
2021 U.S. Dist. LEXIS 163171 *; 2021 WL 3829549

SHARI ROSENMAN, Plaintiff, v. FACEBOOK INC., Defendant.

Core Terms

unfair, prong, alleges, federal issue, privacy, federal court, instant case, consumers, monopoly, users, federal question, anti trust law, Sherman Act, antitrust, unfair competition, violates, degrade, raises, unjust enrichment, disputed, state law claim, personal data, Cartwright Act, monopolization, unilateral, practices, network, removal, abused

LexisNexis® Headnotes

Civil Procedure > ... > Removal > Postremoval Remands > Jurisdictional Defects

Civil Procedure > ... > Removal > Elements for Removal > Removability

HN1[] **Postremoval Remands, Jurisdictional Defects**

A suit may be removed from state court to federal court only if the federal court would have had subject matter jurisdiction over the case. 28 U.S.C.S. § 1441(a). Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. If it appears at any time before final judgment that the federal court lacks subject matter jurisdiction, the federal court must remand the action to state court. 28 U.S.C.S. § 1447(c).

Civil Procedure > ... > Removal > Postremoval Remands > Jurisdictional Defects

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Removal > Elements for Removal > Removability

HN2[] **Postremoval Remands, Jurisdictional Defects**

The party seeking removal bears the burden of establishing federal jurisdiction. The removal statute is strictly construed, and any doubt about the right of removal requires resolution in favor of remand.

Civil Procedure > ... > Removal > Specific Cases Removed > Diversity of Citizenship

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Well Pleaded Complaint Rule

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Removal > Elements for Removal > Removability

HN3[] **Specific Cases Removed, Diversity of Citizenship**

Absent diversity of citizenship, federal-question jurisdiction is required. Under 28 U.S.C.S. § 1331, federal courts have original jurisdiction over civil actions arising under the Constitution, laws, or treaties of the United States. Federal question jurisdiction is determined (and must exist) as of the time the complaint is filed and removal is effected. Removal pursuant to § 1331 is governed by the well-pleaded complaint rule, which provides that federal question jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Federal Questions

HN4[] **Subject Matter Jurisdiction, Federal Questions**

Generally, a complaint that asserts only state law claims does not arise under federal law.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Substantial Questions

HN5[] **Federal Questions, Substantial Questions**

Federal question jurisdiction will lie over state law claims only in certain cases where those state law claims implicate significant federal issues. Under Grable, a federal court may exercise jurisdiction over a state law claim only if (1) the action necessarily raises a federal issue that is (2) disputed and (3) substantial, and if (4) the court may entertain the case without disturbing the congressionally approved balance of federal and state judicial responsibilities. The party seeking to establish jurisdiction must justify a need for the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN6[] **Trade Practices & Unfair Competition, State Regulation**

The Unfair Competition Law, (UCL) prohibits any unlawful, unfair, or fraudulent business act or practice. Cal. Bus. & Prof. Code § 17200. The statutory language referring to any unlawful, unfair, or fraudulent practice makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN7[] **Sherman Act, Claims**

Indeed, a plaintiff may state an Unfair Competition Law (UCL) unfair prong claim by alleging that the defendant's conduct: (1) threatens an incipient violation of an ***antitrust law***; (2) violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law; or (3) otherwise significantly threatens or harms competition. Under this test, conduct could violate the UCL's unfair prong without constituting a violation of an ***antitrust law***. Thus, a violation of federal law is not necessary to state a UCL unfair prong claim. A violation of the unfair prong of the UCL does not necessarily require establishing a violation of the Sherman Act.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

HN8[] **Actual Monopolization, Claims**

However, where a plaintiff's Unfair Competition Law (UCL) unfair prong claim relies on a defendant's alleged abuse of its monopoly position, that claim requires establishing a violation of federal ***antitrust law***. The plaintiff must establish a violation of federal ***antitrust law*** because no California statute deals expressly with monopolization or attempted monopolization. Indeed, California's antitrust statute, the Cartwright Act, contains no provision parallel to the Sherman Act's prohibition against monopolization, and the Cartwright Act applies only to a combination involving two or more persons, not to unilateral conduct. Thus, UCL unfair prong claims that rely on a defendant's unilateral abuse of its monopoly position require establishing a violation of federal ***antitrust law***.

Antitrust & Trade Law > Sherman Act

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

HN9[] **Antitrust & Trade Law, Sherman Act**

The substantiality inquiry under Grable looks to the importance of the issue to the federal system as a whole. The United States Supreme Court and the Ninth Circuit have emphasized the importance of the Sherman Act to the federal system The United States Supreme Court has emphasized the importance of the Sherman Act's procompetition policy and has stated that the federal interest in enforcing the national policy in favor of competition is both familiar and substantial. Similarly, the Ninth Circuit has held that the federal interest embodied in the Sherman Act is well-recognized and substantial.

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

HN10[] **Specific Cases Removed, Federal Questions**

The United States Supreme Court and the Ninth Circuit have stated that a federal issue is substantial where a ruling on the issue is both dispositive of the case and would be controlling in numerous other cases.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

HN11[] **Jurisdiction, Exclusive Jurisdiction**

Under federal law, federal antitrust claims are within the exclusive jurisdiction of the federal courts. Thus, Congress has determined that federal courts should decide federal antitrust claims.

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

HN12[] **Specific Cases Removed, Federal Questions**

Federal question jurisdiction lies over state claims when four Grable criteria are met.

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Removal > Elements for Removal > Removability

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction

HN13[] **Specific Cases Removed, Federal Questions**

If only one of several state claims satisfies the requirements for removal on federal-question grounds, then any other purely state claims in the same complaint may also be determined by the federal court under its supplemental jurisdiction.

Counsel: **[*1]** For Shari Rosenman, individually and on behalf of all others similarly situated, Plaintiff: Ari Yale Basser, Jordan L. Lurie, LEAD ATTORNEY, Pomerantz LLP, Los Angeles, CA.

For Facebook Inc., a Delaware corporation headquartered in California, Defendant: David Zahler Gringer, PRO HAC VICE, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Sonal N. Mehta, Wilmer Cutler Pickering Hale and Dorr LLP, Palo Alto, CA.

Judges: LUCY H. KOH, United States District Judge.

Opinion by: LUCY H. KOH

Opinion

ORDER DENYING MOTION TO REMAND

Re: Dkt. No. 17

On February 22, 2021, Plaintiff Shari Rosenman ("Plaintiff"), individually and on behalf of all others similarly situated, sued Defendant Facebook, Inc. ("Facebook"), in the California Superior Court for the County of San Mateo for violations of California's Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200, et seq.*, and unjust enrichment. ECF No. 1 Exh. B. On March 25, 2021, Facebook removed the instant case to federal court based on federal question jurisdiction. *See* ECF No. 1. Before the Court is Plaintiff's motion to remand the instant case to the

California Superior Court for the County of San Mateo. ECF No. 17. Having considered the submissions of the parties, the relevant law, and the record in this **[*2]** case, the Court DENIES Plaintiff's motion to remand.

I. BACKGROUND

A. Factual Background

Plaintiff alleges that Facebook "is by far the biggest social network in the United States." ECF No. 1 Exh. B ("Compl.") ¶ 1. According to Plaintiff, "Ninety-Nine percent of adults in the U.S. that use social media use Facebook." *Id.* ¶ 17. Plaintiff alleges that "Facebook itself boasted in 2011 that 'Facebook is now 95% of all social media.'" *Id.* ¶ 15.

Plaintiff alleges that "Facebook's popularity gives it wide latitude to set the terms for how its users' private information is collected, used, and protected and the privacy protections afforded to its users." *Id.* ¶ 19. Plaintiff alleges that, as a result, "[c]onsumers effectively face a singular choice: either to use Facebook and submit to the quality and stipulations of Facebook's product or forgo all use of the only social network used by most of their friends, family, and acquaintances." *Id.* ¶ 17.

According to Plaintiff, Facebook initially distinguished itself from other social networks on the basis of its privacy practices. *Id.* ¶ 20. Facebook allegedly "tried to backslide on its privacy commitments, but it faced discipline from competitors that **[*3]** it still had not cornered." *Id.* ¶ 21. However, once Facebook overtook its rivals, Facebook allegedly "leveraged its popularity to successfully degrade privacy to levels unsustainable in the earlier market when Facebook and its competition were subject to consumer privacy demands." *Id.* ¶ 20.

Plaintiff alleges that, "[w]ith nearly every privacy policy update, Facebook steadily increased the richness of the user data it allowed itself to collect and retain and expanded what it could do with the data." *Id.* ¶ 28. For example, "by 2011, Facebook's privacy policy allowed enhanced third-party tracking, permitting Facebook to collect data when users visited a site with Facebook features." *Id.* In addition, "[b]y 2012, Facebook had abandoned a previous pledge to anonymize user data received by Facebook's advertising partners and customers within 180 days." *Id.* ¶ 29. Furthermore, "[b]y 2015, Facebook had abandoned its previous promise to collect payment account numbers only with user consent." *Id.* ¶ 30.

Plaintiff alleges that "users exchange their time, attention, and personal data for access to Facebook's services." *Id.* ¶ 38. Plaintiff alleges that, rather than raising prices, Facebook harmed consumers **[*4]** "by charging them the use of ever-increasing amounts of their personal data to use its platform." *Id.* ¶ 39. According to Plaintiff, "Facebook's conduct has caused consumers to suffer and to continue to suffer substantial economic injury through the degradation of their privacy." *Id.* ¶ 40.

B. Procedural History

On December 14, 2020, Plaintiff sued Facebook in the California Superior Court for the County of San Mateo for violation of California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code §§ 17200, et seq.*, and unjust enrichment. *See Rosenman v. Facebook*, Case No. 21-CV-00336-LHK, ECF No. 1 Exh. B. Plaintiff's class was defined as "[a]ll persons or entities who maintained a Facebook profile at any time within four years of the date of the filing of this action." *Id.* ¶ 47.

On January 13, 2021, Facebook removed Plaintiff's case to this Court. *See Rosenman v. Facebook*, Case No. 21-CV-00336-LHK, ECF No. 1. Facebook asserted that this Court had jurisdiction based on the *Class Action Fairness Act* and federal question jurisdiction. *Id.*

On February 9, 2021, this Court granted Facebook's motion to relate *Rosenman v. Facebook* to *Klein v. Facebook. See Klein v. Facebook*, Case No. 20-CV-8570-LHK, ECF No. 47. On February 11, 2021, Plaintiff voluntarily **[*5]** dismissed her case without prejudice. *See Rosenman v. Facebook*, Case No. 21-CV-00336-LHK, ECF No. 17.

On February 22, 2021, Plaintiff filed the instant case against Facebook in the California Superior Court for the County of San Mateo for violations of the UCL and unjust enrichment. ECF No. 1 Exh. B. Plaintiff seeks to represent a class of "[a]ll California citizens who, while citizens of the State of California, maintained a Facebook profile at any time within four years of the date of the filing of this action." *Id.* ¶ 50.

On March 25, 2021, Facebook removed the instant case to federal court based on federal question jurisdiction. *See* ECF No. 1. On April 9, 2021, the Court granted Facebook's motion to relate the instant case to *Klein v. Facebook. See Klein v. Facebook*, Case No. 20-CV-8570-LHK, ECF No. 47.

On April 26, 2021, Plaintiff filed the instant motion to remand. ECF No. 17 ("Mot.). On May 26, 2021, Facebook filed an opposition. ECF No. 20 ("Opp'n"). On June 25, 2021, Plaintiff filed a reply. ECF No. 21 ("Reply").

II. LEGAL STANDARD

HN1[] A suit may be removed from state court to federal court only if the federal court would have had subject matter jurisdiction over the case. *28 U.S.C. § 1441(a)*; *see* *Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)* ("Only **[*6]** state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant."). If it appears at any time before final judgment that the federal court lacks subject matter jurisdiction, the federal court must remand the action to state court. *28 U.S.C. § 1447(c)*.

HN2[] The party seeking removal bears the burden of establishing federal jurisdiction. *Provincial Gov't of Marinduque v. Placer Dome, Inc., 582 F.3d 1083, 1087 (9th Cir. 2009)*. "The removal statute is strictly construed, and any doubt about the right of removal requires resolution in favor of remand." *Moore-Thomas v. Alaska Airlines, Inc., 553 F.3d 1241, 1244 (9th Cir. 2009)* (citing *Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)*).

III. DISCUSSION

HN3[] "Absent diversity of citizenship, federal-question jurisdiction is required." *Caterpillar, 482 U.S. at 392*. Under *28 U.S.C. § 1331*, federal courts have original jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States." Federal question jurisdiction "is determined (and must exist) as of the time the complaint is filed and removal is effected." *Strotek Corp. v. Air Transp. Ass'n of Am., 300 F.3d 1129, 1131 (9th Cir. 2002)*. Removal pursuant to *Section 1331* is governed by the "well-pleaded complaint rule," which provides that federal question jurisdiction exists only when "a federal question is presented on the face of plaintiff's properly pleaded complaint." *Caterpillar, 482 U.S. at 392*.

In the instant case, Plaintiff's complaint alleges two state law claims: violations of California's **[*7]** Unfair Competition Law ("UCL") and unjust enrichment. *See* ECF No. 1 Exh. ***HN4***[] B. Generally, a complaint that asserts only state law claims does not arise under federal law. *Taylor, 481 U.S. at 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55*.

HN5[] Federal question jurisdiction will lie over state law claims like Plaintiff's only "in certain cases" where those state law claims "implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)*. Under *Grable*, a federal court may exercise jurisdiction over a state law claim only if (1) the action necessarily raises a federal issue that is (2) disputed and (3) substantial, and if (4) the court may entertain the case without disturbing the congressionally approved balance of federal and state judicial responsibilities. *Id. at 314*. The party seeking to establish jurisdiction must justify a need for "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Id. at 312*.

Facebook contends that the instant case meets all four criteria set forth in *Grable*. Opp'n at 5-14. Specifically, Facebook asserts that Plaintiff's claim under the unfair prong of the UCL "necessarily turns on a disputed and substantial question of federal ***antitrust law***—whether Facebook unlawfully obtained and maintained an illegal monopoly." *Id.* at 6. Facebook **[*8]** thus contends that this Court has federal question jurisdiction over Plaintiff's claim under the unfair prong of the UCL and should exercise supplemental jurisdiction over Plaintiff's claim under the fraudulent prong of the UCL and for unjust enrichment. *Id.* at 6 n.4. The Court addresses in turn each of the *Grable* criteria.

A. Plaintiff's UCL unfair prong claim necessarily raises a federal issue.

First, Plaintiff's UCL unfair prong claim necessarily raises a federal issue. As Facebook acknowledges, Opp'n at 7, it is possible to state a UCL unfair prong claim without raising a federal issue. ***HN6***[] The UCL prohibits "any unlawful, unfair, or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. "[T]he statutory language referring to 'any unlawful, unfair, *or* fraudulent' practice . . . makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law." *Cel-Tech Comm'ns, Inc. v. L.A. Cellular Telephone Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (emphasis in original).

HN7[] Indeed, a plaintiff may state a UCL unfair prong claim by alleging that the defendant's conduct: (1) "threatens an incipient violation of an ***antitrust law***"; (2) "violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law"; or (3) "otherwise **[*9]** significantly threatens or harms competition." *Cel-Tech Comm'ns, 20 Cal. 4th at 187*. Under this test, conduct could violate the UCL's unfair prong without constituting a violation of an ***antitrust law***. *See id.* (stating that "unfair" means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition"); *see also* *Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375, 113 Cal. Rptr. 2d 175 (2001)* ("We do not hold that in all circumstances an 'unfair' business act or practice must violate an ***antitrust law*** to be actionable under the unfair competition law."). Thus, as Facebook acknowledges, a violation of federal law is not necessary to state a UCL unfair prong claim. *See PeopleBrowsr, Inc. v. Twitter*, No. C-12-6120 EMC, 2013 U.S. Dist. LEXIS 31786, 2013 WL 843032, at *5 (N.D. Cal. Mar. 6, 2013) (concluding that "a violation of the unfair prong of the UCL does not necessarily require establishing a violation of the Sherman Act").

HN8[] However, where a plaintiff's UCL unfair prong claim relies on a defendant's alleged abuse of its monopoly position, that claim requires establishing a violation of federal ***antitrust law***. *In re Nat'l Football Leagues Sunday Ticket Antitrust Litig., No. 15-CV-09996-BRO, 2016 U.S. Dist. LEXIS 41639, 2016 WL 1192642, at *5 (C.D. Cal. Mar. 28, 2016)* (denying motion to remand where "Plaintiff's UCL cause of action relies on Defendants' alleged 'abuse of its monopoly position' **[*10]** and charging 'supra-competitive prices'"). The plaintiff must establish a violation of federal ***antitrust law*** because "[n]o California statute deals expressly with monopolization or attempted monopolization." *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986)*, *modified on denial of reh'g*, *810 F.2d 1517 (9th Cir. 1987)*. Indeed, California's antitrust statute, the Cartwright Act, "contains no provision parallel to the Sherman Act's prohibition against monopolization, and the Cartwright Act applies only to a 'combination' involving 'two or more persons', not to *unilateral* conduct." *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 198 Cal. App. 4th 1366, 1386, 131 Cal. Rptr. 3d 519 (2011)* (citations omitted). Thus, UCL unfair prong claims that rely on a defendant's unilateral abuse of its monopoly position require establishing a violation of federal ***antitrust law***.

For example, in *National Football Leagues Sunday Ticket Antitrust Litigation*, a plaintiff alleged a UCL unfair prong claim based on allegations that "Defendants abuse their monopoly position, leaving Plaintiff . . . with no available market alternatives" and that Defendants "maliciously and oppressively abuse[d] that position by imposing unreasonably high prices." *2016 U.S. Dist. LEXIS 41639, 2016 WL 1192642 at *4*. The Central District of California court concluded that the plaintiff's UCL unfair prong claim necessarily raised an issue of federal law because **[*11]** "Defendants' monopolistic conduct, as alleged by Plaintiff in his Complaint, is only actionable under *Section 2* of the

Sherman Act, particularly where '[n]o California statute deals expressly with monopolization.'" *Id.* (quoting *Dimidowich, 803 F.2d at 1478*).

In the instant case, Plaintiff's UCL unfair prong claim similarly alleges that Facebook abused its monopoly position to force consumers to accept worse privacy settings. Compl. ¶¶ 1, 20, 23. Indeed, in the first section of Plaintiff's substantive allegations, which is entitled "Facebook's Popularity," Plaintiff alleges that: (1) "Facebook is by far the biggest social network in the United States"; (2) "Facebook itself boasted in 2011 that 'Facebook is now 95% of all social media,'"; and (3) "Facebook is the reigning platform, not only in the lives of Americans, but in the lives of 2.2 billion people worldwide." *Id.* ¶¶ 14-17.

Plaintiff alleges that Facebook's popularity allowed Facebook to force consumers to accept worse privacy settings. *Id.* ¶¶ 1, 20, 23. Specifically, Plaintiff alleges that, in the early days of social media, when Facebook had competition, Facebook was "subject to consumer privacy demands." *Id.* ¶ 20; *see also id.* ¶ 34 (alleging that, when Facebook **[*12]** was competing with Google+, Facebook could not degrade its privacy practices further). Facebook allegedly "tried to backslide on its privacy commitments, but it faced discipline from competitors that it still had not cornered." *Id.* ¶ 21.

Plaintiff alleges that, once Facebook overtook its rivals, Facebook allegedly "leveraged its popularity to successfully degrade privacy to levels unsustainable in the earlier market when Facebook and its competition were subject to consumer privacy demands." *Id.* ¶ 20. According to Plaintiff, "Facebook's popularity gives it wide latitude to set the terms for how its users' private information is collected, used, and protected and the privacy protections afforded to its users." *Id.* ¶ 19. Plaintiff alleges that, as a result, "[c]onsumers effectively face a singular choice: either to use Facebook and submit to the quality and stipulations of Facebook's product or forgo all use of the only social network used by most of their friends, family, and acquaintances." *Id.* ¶ 17; *see also id.* ¶ 23 (alleging that Facebook's tracking of users "is just one of many ways in which Facebook rolled back privacy protections once it sensed that users couldn't take their business **[*13]** elsewhere").

In addition, Plaintiff alleges that Facebook charged consumers supra-competitive prices in the form of increased personal data. Plaintiff alleges that, although Facebook is free, "users exchange their time, attention, and personal data for access to Facebook's services." *Id.* ¶ 38. Plaintiff alleges that, rather than raising prices, Facebook harmed consumers "by charging them the use of ever-increasing amounts of their personal data to use its platform." *Id.* ¶ 39.

Considering these allegations, the Court concludes that, like the claim brought by the plaintiff in *National Football Leagues Sunday Ticket Antitrust Litigation*, the UCL unfair prong claim that Plaintiff has pled relies on Facebook's alleged abuse of its monopoly position. Facebook's alleged unilateral monopolistic conduct is only actionable under *Section 2* of the Sherman Act. *See* *Dimidowich, 803 F.2d at 1478* (explaining that the Cartwright Act "does not address unilateral conduct"); *Flagship Theatres, 198 Cal. App. 4th at 1386 (2011)* (explaining that the Cartwright Act, "contains no provision parallel to the Sherman Act's prohibition against monopolization, and the Cartwright Act applies only to a 'combination' involving 'two or more persons', not to unilateral conduct."). Moreover, Plaintiff does **[*14]** not allege in her Complaint that Facebook's conduct violated California-specific constitutional, statutory, or regulatory provisions. Thus, "Plaintiff's unfair competition cause of action will require a Court to interpret and apply federal antitrust statutes, case law, and policies in order to determine whether [Facebook's] conduct constitutes unfair competition under the UCL." *Central Valley Med. Grp., Inc. v. Independent Physician Assoc. Med. Grp., 19-CV-00404-LJO-SKO, 2019 U.S. Dist. LEXIS 100265, 2019 WL 2491328, at *3 (E.D. Cal. June 14, 2019)* (denying motion to remand and concluding that UCL unfair prong claim necessarily raised a federal issue).

Accordingly, Plaintiff's UCL unfair prong claim necessarily raises a federal issue. *See* *In re Nat'l Football Leagues Sunday Ticket Antitrust Litig., 2016 U.S. Dist. LEXIS 41639, 2016 WL 1192642, at *5* (concluding that plaintiff's UCL unfair prong claim necessarily raised a federal issue where plaintiff alleged that defendant abused its monopoly position); *see also* *Central Valley Med. Grp., Inc., 2019 U.S. Dist. LEXIS 100265, 2019 WL 2491328, at *3* (concluding that plaintiff's UCL unfair prong claim necessarily raised a federal issue where "Plaintiff's sole theory of UCL unfair competition liability is that [defendant's] conduct violates policies tethered to federal antitrust laws" and "Plaintiff does not explicitly plead in its complaint, much less argue in its opposition, that [defendant's] alleged conduct violates policies tethered to California-specific constitutional, statutory, or regulatory **[*15]** provisions").[1] Therefore, the first *Grable* criteria is satisfied.

B. The federal issue is disputed.

As Plaintiff concedes, the federal issue in the instant case is disputed. As explained above, *supra* Section III(A), Plaintiff alleges that Facebook acquired popularity and then "leveraged its popularity to successfully degrade privacy to levels unsustainable in the earlier market when Facebook and its competition were subject to consumer privacy demands." Compl. ¶ 20. Facebook denies all of these claims, including that Facebook created an unlawful monopoly and abused its monopoly power to degrade its data practices and harm consumers. Opp'n at 13. Accordingly, the federal issue is disputed. *See* *Gunn v. Minton, 568 U.S. 251, 259, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013)* (holding that the federal issue was actually disputed where the defendants denied the plaintiff's allegations on the federal issue). Thus, the second *Grable* criteria is satisfied.

C. The federal issue is substantial.

In addition, the federal issue in the instant case is substantial. ***HN9***[] "The substantiality inquiry under *Grable* looks . . . to the importance of the issue to the federal system as a whole." *Gunn, 568 U.S. at 260*. The United States Supreme Court and the Ninth Circuit have emphasized the importance **[*16]** of the Sherman Act to the federal system. The United States Supreme Court has emphasized "the importance of the [Sherman] Act's procompetition policy" and has stated that "[t]he federal interest in enforcing the national policy in favor of competition is both familiar and substantial." *Cal. Retail Liquor Dealers, Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110-11, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. Similarly, the Ninth Circuit has held that "[t]he federal interest embodied in the Sherman Act is well-recognized and substantial." *Miller v. Hedlund, 813 F.2d 1344, 1352 (9th Cir. 1987)*; *accord Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 903 (9th Cir. 2008) (acknowledging the "federal interest in promoting competition under the Sherman Act").

Moreover, resolution of the antitrust questions presented in this case could affect other cases being brought by consumers, advertisers, and federal agencies in federal court against Facebook under the Sherman Act. *See, e.g., Klein v. Facebook*, No. 20-CV-08570-LHK, ECF Nos. 86, 87 (consumer and advertiser class actions, alleging that Facebook has offered worse data practices because Facebook does not face competition); *FTC v. Facebook*, No. 20-CV-03590-JEB (case brought by FTC against Facebook for abusing its monopoly position). ***HN10***[] The United States Supreme Court and the Ninth Circuit have stated that a federal issue is substantial where "a ruling on the issue is both dispositive **[*17]** of the case and would be controlling in numerous other cases." *City of Oakland v. BP PLC, 969 F.3d 895, 905 (9th Cir. 2020)*; *see* *Empire Healthchoice Assur. v. McVeigh, 547 U.S. 677, 700, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006)* (stating that an issue was substantial where "its resolution was both dispositive of the case and would be controlling in numerous other cases"). Thus, the Court concludes that the federal issue presented in the instant case is substantial. *See* *In re Nat'l Football Leagues Sunday Ticket Antitrust Litig., 2016 U.S. Dist. LEXIS 41639, 2016 WL 1192642, at *5* (concluding that the federal issue presented by plaintiff's allegations that defendant had abused its monopoly position were substantial). Thus, the third *Grable* criteria is satisfied.

[1] In arguing to the contrary, Plaintiff relies on *Lippitt v. Raymond James Fin. Servs., Inc.. 340 F.3d 1033 (9th Cir. 2002)*. However, *Lippitt* is distinguishable because the Ninth Circuit concluded that "a state court need not inquire into [federal] regulations, or even refer to federal law" to adjudicate the securities claim at issue in that case. *Id. at 1045*. For the reasons explained above, the instant cases requires application of federal antitrust laws. *See* *California ex rel. Lockyer v. Dynegy, Inc., 375 F.3d 831, 841 n.7 (9th Cir. 2004)* (distinguishing *Lippitt* in case where "the reference to and necessity of relying upon federal law is unavoidable").

D. The Court may entertain the instant case without disturbing the congressionally approved balance of federal and state judicial responsibilities.

Finally, the Court may entertain the instant case without disturbing the congressionally approved balance of federal and state judicial responsibilities. ***HN11***[] Under federal law, "federal antitrust claims are within the exclusive jurisdiction of the federal courts." *Eichman v. Fotomat Corp., 759 F.2d 1434, 1437 (9th Cir. 1985)*. Thus, Congress has determined that federal courts should decide federal antitrust claims. *See* *Midcal Aluminum, 445 U.S. at 111* (stating that Congress "'exercis[ed] all the power it possessed' under the *Commerce Clause* when it approved the Sherman Act") (quotation omitted). Accordingly, this Court may entertain the instant case without **[*18]** disturbing the congressionally approved balance of federal and state judicial responsibilities, and the fourth *Grable* criteria is satisfied.

In sum, Plaintiff's UCL unfair prong claim satisfies all four criteria set forth in *Grable*. Accordingly, this Court has federal question jurisdiction over Plaintiff's claim under the unfair prong of the UCL. *See* *Grable, 545 U.S. at 312* (holding that ***HN12***[] federal question jurisdiction lies over state claims when four *Grable* criteria are met). This Court thus exercises federal question jurisdiction over Plaintiff's UCL unfair prong claim. Additionally, this Court exercises supplemental jurisdiction over Plaintiff's claims under the fraudulent prong of the UCL and for unjust enrichment because these claims, which also concern Facebook's alleged conduct in degrading its data practices, arise from "the same case or controversy" as Plaintiff's UCL unfair prong claim. *28 U.S.C. § 1367*; *see* *County of Santa Clara v. Astra USA, Inc., 401 F. Supp. 2d 1022, 1025 (N.D. Cal. 2005)* ***HN13***[] ("If only one of several state claims satisfies the requirements for removal on federal-question grounds, then any other purely state claims in the same complaint may also be determined by the federal court under its supplemental jurisdiction."). Thus, the Court DENIES Plaintiff's motion to remand.

IV. CONCLUSION [*19]

For the foregoing reasons, the Court DENIES Plaintiff's motion to remand.

IT IS SO ORDERED.

Dated: August 27, 2021

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

End of Document

Bais Yaakov of Spring Valley v. ACT, Inc.

United States Court of Appeals for the First Circuit

August 30, 2021, Decided

No. 20-1537

Reporter

12 F.4th 81 *; 2021 U.S. App. LEXIS 26135 **; 110 Fed. R. Serv. 3d (Callaghan) 951

BAIS YAAKOV OF SPRING VALLEY, on behalf of itself and all others similarly situated, Plaintiff, Appellant, v. ACT, INC., Defendant, Appellee.

Prior History: **[**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Timothy S. Hillman, U.S. District Judge.

Bais Yaakov of Spring Valley v. ACT, Inc., 461 F. Supp. 3d 3, 2020 U.S. Dist. LEXIS 89550, 2020 WL 2575724 (D. Mass., May 21, 2020)
Bais Yaakov of Spring Valley v. ACT, Inc., 328 F.R.D. 6, 2018 U.S. Dist. LEXIS 182507, 2018 WL 5281746 (D. Mass., Oct. 24, 2018)

Core Terms

fax, class member, predominance, advertisements, certification, district court, permission, opt-out, class certification, recipient, putative class, notice, individualized, Regulation, unsolicited, express permission, fax number, solicited, schools, summary judgment, declaration, individual issues, rights, moot, class action, promise, cases, documents, brand, putative class member

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Telemarketing

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Telephone Consumer Protection Act

HN1[] **Consumer Protection, Telemarketing**

The Telephone Consumer Protection Act of 1991 prohibits sending advertisements to fax machines, but with two principal exceptions: An advertisement may be sent to a fax machine (1) if the person to whom it is sent has given prior express invitation or permission, in writing or otherwise, *47 U.S.C.S. § 227(a)(5)*; or (2) if certain conditions are satisfied, one of which requires the inclusion of an opt-out notice on the fax, *§ 227(b)(1)(C)*.

Antitrust & Trade Law > Consumer Protection > Telemarketing

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Telemarketing & Consumer Fraud & Abuse Prevention Act

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Telephone Consumer Protection Act

HN2[] **Consumer Protection, Telemarketing**

The FCC defines the term advertisement for purposes of the Telephone Consumer Protection Act as any material advertising the commercial availability or quality of any property, goods, or services, *47 C.F.R. § 64.1200(f)(1)*; *47 U.S.C.S. § 227(a)(5)* (using similar language to define the term unsolicited advertisement). To classify a communication as advertising, the agency looks to the communication's primary purpose.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN3[] **Standards of Review, Deference to Agency Statutory Interpretation**

When a court reviews an agency's construction of a statute the agency administers, it conducts the familiar Chevron two-step analysis: First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Antitrust & Trade Law > Consumer Protection > Telemarketing

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Telephone Consumer Protection Act

Governments > Legislation > Interpretation

HN4[] **Consumer Protection, Telemarketing**

The Supreme Court has directed courts to apply traditional tools of statutory construction in determining Congress's intent, and it is a settled rule that courts must, if possible, construe a statute to give every word some operative effect. Moreover, in another subsection of the Telephone Consumer Protection Act, Congress placed requirements not just on unsolicited fax advertisements but on "any communication" or "any message" sent via fax, *47 U.S.C.S. § 227(d)(1)(A)*, *(B)*, demonstrating that when Congress wanted to regulate faxes broadly, it used broad language to do so. To read the statute as requiring opt-out notices on solicited advertisements would be to remove the word "unsolicited" from the provision discussing opt-out notices or to ink in new provisions discussing solicited faxes.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN5[] **Prerequisites for Class Action, Superiority**

Fed. R. Civ. P. 23(b)(3) states in part as follows: A class action may be maintained if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. In practice, litigation over these requirements often reduces itself to a contest in which the party opposing certification points to issues that it claims will need to be decided separately for many class members. In turn, the putative class representative tries to carry the burden of convincing the court either that prevailing on any of those issues is not important to obtaining the remedy sought, that the issues can be adjudicated in a manner that produces a common answer for all class members, or that, to the extent individual issues remain, they can be resolved in a manner that is both practicable and protective of the parties' rights. Unfairness is equally well pictured as an attempt to eliminate inefficiency by presuming to do away with the rights a party would customarily have to raise plausible individual challenges on those issues.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN6[] **Class Actions, Certification of Classes**

In deciding whether individual issues predominate over common questions, a court must not rely on mere speculation that individual issues may arise. Rather, it should consider only those issues that would likely arise if an individual class member's claims were being adjudicated on the merits. In so doing, a court considers the probable course of the litigation so as to formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate. Even then, the mere fact that concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones. To the contrary, we have recognized that a class may be certified notwithstanding the need to adjudicate individual issues so long as the proposed adjudication will be both administratively feasible and protective of defendants' *Seventh Amendment* and due process rights.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Telephone Consumer Protection Act

HN7[] **Types of Contracts, Oral Agreements**

Under the Telephone Consumer Protection Act of 1991, express permission means permission that is clearly and unmistakably granted by actions or words, oral or written. Furthermore, FCC rules provide that in gauging whether express permission was provided, we consider the understanding of the recipient.

Torts > Procedural Matters > Settlements > Settlement Offers

HN8[] **Settlements, Settlement Offers**

An unaccepted settlement offer -- like any unaccepted contract offer -- is a legal nullity, with no operative effect.

Counsel: Aytan Y. Bellin, with whom Bellin & Associates LLC was on brief, for appellant.

Robert A. Burgoyne, with whom Perkins Coie LLP, Robert L. Leonard, and Doherty, Wallace, Pillsbury & Murphy, P.C., were on brief, for appellee.

Judges: Before Lynch, Kayatta, and Barron, Circuit Judges. BARRON, Circuit Judge, concurring.

Opinion by: KAYATTA

Opinion

[*83] KAYATTA, Circuit Judge. ACT, Inc., is a non-profit entity that develops and administers the ACT college admissions test. Bais Yaakov of Spring Valley is a small private high school to which ACT sent three one-page faxes in 2012. Bais Yaakov has since pursued ACT with a zeal that would impress even Hugo's Inspector Javert. On behalf of itself and a class of similarly situated recipients of faxes from ACT, Bais Yaakov alleges that the faxes were unsolicited advertisements sent in violation of the *Telephone Consumer Protection Act of 1991 (TCPA)*, 47 U.S.C.

§ 227(b)(1)(C). Bais Yaakov seeks injunctive relief and statutory damages in an amount ACT estimates to exceed $400,000,000. After almost eight years of litigation -- including an interlocutory appeal to this court, **[**2]** see *Bais Yaakov of Spring Valley v. ACT, Inc., 798 F.3d 46, 46 (1st Cir. 2015)* -- the district court entered judgment against Bais Yaakov. It found that class certification was unwarranted and that Bais Yaakov's individual claim was rendered moot by ACT's offer to pay the full amount of that claim ($46,500) and its promise not to send further faxes to Bais Yaakov. While we see no abuse of discretion in the denial of class certification, we vacate the judgment because Bais Yaakov's own claim for damages is not quite moot. Our reasoning follows.

I.

In 2005, Bais Yaakov filled out a High School Code Request Form, on which it provided its fax number. Students use the High School Code number to have their ACT test scores reported to their high school. On the form, Bais Yaakov checked a box indicating that it wanted to administer certain standardized tests, that it wanted to receive its students' test scores, and that it wanted to receive SAT or ACT publications.

Seven years later, ACT sent three faxes to Bais Yaakov over the course of three months. The first fax was a one-page flyer stating in large bold letters, "Don't forget to register for the ACT !" Underneath, the fax directed counseling staff to "[r]emind" students of the next ACT test date, which it featured **[**3]** prominently. It listed the registration deadlines for the test date and advised that "[s]tudents can meet the . . . deadline by registering on-line" at a specified ACT web address. In the top-left corner, the fax presented the name "ACT " above the words "advancing lives."

The second fax was identical to the first but with a different test date and corresponding registration deadlines.

The third fax contained what appears to be an image of a crowd cheering at a baseball game, with the words "Give Your Students the Home-Field Advantage" superimposed on one side and "ACT" on the other. The bottom of the image stated, "Become an ACTTest Center." Beneath **[*84]** the image was more text, which said, among other things: "By offering the ACTat your high school you provide your students with a competitive edge."; "Your school can benefit too. Your school staff will be compensated for assuming the roles of test supervisor, room supervisors, and proctors."; and "The curriculum-based ACTis accepted by all 4-year colleges and universities in the U.S." (emphasis omitted).

Bais Yaakov alleges that these three faxes are among over 28,000 unlawfully faxed advertisements ACT sent to over 7,000 schools across **[**4]** the country between 2008 and 2012.

II.

A.

HN1[] The TCPA prohibits sending advertisements to fax machines, but with two principal exceptions: An advertisement may be sent to a fax machine (1) if the person to whom it is sent has given "prior express invitation or permission, in writing or otherwise," *47 U.S.C. § 227(a)(5)*; or (2) if certain conditions are satisfied, one of which requires the inclusion of an opt-out notice on the fax, id. *§ 227(b)(1)(C)*. None of the faxes at issue in this appeal contains an opt-out notice, so any that are advertisements are unlawful if they were sent without prior express invitation or permission.

By regulation, the Federal Communications Commission (FCC) promulgated a substantial further limitation on sending advertisements by fax. In its so-called Opt-Out Regulation (also referred to as the Solicited Fax Rule), the agency decreed that even faxes sent with prior express invitation or permission must contain an opt-out notice. See Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, *71 Fed. Reg. 25,967, 25,971-72 (May 3, 2006)* (formerly codified at *47 C.F.R. § 64.1200(a)(4)(iv)*); *Bais Yaakov of Spring Valley v. FCC, 852 F.3d 1078, 1080, 428 U.S. App. D.C. 165 (D.C. Cir. 2017)* (Kavanaugh, J.). ACT included no opt-out notice in any of its faxes, so if the Opt-Out Regulation is valid, prior express invitation **[**5]** or permission would be no defense. Instead, ACT's liability to any recipient would turn entirely on whether the fax was an advertisement.

HN2[] The FCC defines the term "advertisement" for purposes of the TCPA as "any material advertising the commercial availability or quality of any property, goods, or services." *47 C.F.R. § 64.1200(f)(1)*; see also *47 U.S.C. § 227(a)(5)* (using similar language to define the term "unsolicited advertisement"). To classify a communication as "advertising," the agency looks to the communication's "primary purpose." *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 31 FCC Rcd. 13,289, 13,291 (2016)*.

B.

Bais Yaakov proposed two alternative classes, labeled Class A and Class B. With Class A, Bais Yaakov sought to include only recipients of "unsolicited" fax "advertisements" from ACT containing no opt-out notice. With Class B, Bais Yaakov sought to take advantage of the Opt-Out Regulation by broadening the class to include recipients of any (even solicited) fax advertisements from ACT that did not contain an opt-out notice as required by the regulation.

With the parties' consent, the district court considered first whether the Opt-Out Regulation was valid. In finding the regulation to be invalid, the district **[**6]** court deemed binding a decision to that effect by the Court of Appeals for the D.C. Circuit. See *Bais Yaakov of Spring Valley v. ACT, **[*85]** Inc., 328 F.R.D. 6, 10 (D. Mass. 2018)* (citing *Bais Yaakov, 852 F.3d at 1083*).[1]

Having eliminated the Opt-Out Regulation as a tool for establishing that every fax sent by ACT necessarily violated the TCPA because ACT never included opt-out notices, the district court turned its attention to the two issues raised by the TCPA's exceptions from its prohibition on advertisements: Did the fax contain an advertisement? And, if so, was it unsolicited (i.e., sent without prior express invitation or permission)? As to these two issues, the district court took the standard *Rule 23* approach: It did not try to resolve the issues; rather, it properly tried to decide whether Bais Yaakov had shown that resolution of the issues could be accomplished on a common, class-wide basis. See *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 459-60, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)* ("[T]he office of a *Rule 23(b)(3)* certification ruling is not to adjudicate the case; rather **[**7]** it is to select the 'metho[d]' best suited to adjudication of the controversy fairly and efficiently." (second alteration in original)).

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[1] Following the D.C. Circuit's ruling in Bais Yaakov, the FCC eventually repealed the Opt-Out Regulation. See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991 Junk Fax Prevention Act of 2005 Petitions for Reconsideration &/or Declaratory Ruling & Retroactive Waiver of *47 C.F.R. § 64.1200(a)(4)(iv)* Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission, *35 FCC Rcd. 3079 (2020)*.

Looking first at the request to certify Class B, the district court found that the invalidity of the Opt-Out Regulation permitted a defense based on prior express permission. Assaying the record, it then concluded that the need to adjudicate such a defense would require an examination of the circumstances of each class member and its communications with ACT to determine whether that class member gave the requisite permission. And the need to engage in such an individual inquiry meant that common issues would not predominate as required in order to certify a class under *Rule 23(b)(3)*. See *In re Asacol Antitrust Litig., 907 F.3d 42, 51-52 (1st Cir. 2018)*.

With proposed Class A, Bais Yaakov sought to eliminate this diversity among class members by limiting that class to recipients of unsolicited faxes. The district court rejected this attempt, finding that such a class would constitute a "fail-safe class," i.e., a class that would bind class members only if they won. See *In re Nexium Antitrust Litig., 777 F.3d 9, 22 & n.19 (1st Cir. 2015)*. The district court then reasoned that if the class were redefined to include recipients of any faxes from ACT, it would suffer from the same defects as did Class **[**8]** B.

Having denied class certification, the district court turned to Bais Yaakov's individual claim, on which the parties had cross-moved for summary judgment. See *Bais Yaakov of Spring Valley v. ACT, Inc., 438 F. Supp. 3d 106, 108 (D. Mass. 2020)*. The district court found that genuine disputes of material fact -- namely, whether the three faxes identified by Bais Yaakov qualified as advertisements and whether Bais Yaakov gave the requisite permission -- precluded granting summary judgment for either party. *Id. at 109-10*.

Later, ACT moved to dismiss Bais Yaakov's claim as moot. According to the district court, by that point ACT had "unconditionally tendered to [Bais Yaakov] all the statutory damages that it [sought] on an individual basis." *Bais Yaakov of Spring Valley v. ACT, Inc., 461 F. Supp. 3d 3, 5 (D. Mass. 2020)*. As to injunctive relief, ACT had not sent Bais Yaakov a fax since **[*86]** 2012, and it had agreed not to send any faxes in the future in violation of the TCPA. Id. at 4-5. The district court therefore found the case moot and dismissed it. Id. at 5.

Bais Yaakov now appeals three rulings of the district court: the holding that the Opt-Out Regulation is invalid, the denial of class certification, and the dismissal of Bais Yaakov's individual claim as moot. Bais Yaakov also asks us to review the district court's denial of its motion for summary judgment, **[**9]** but "[i]t is settled beyond peradventure that we lack jurisdiction to hear appeals from the routine denial of summary judgment motions on the merits." *Morse v. Cloutier, 869 F.3d 16, 31 (1st Cir. 2017)*.

III.

We consider first the validity of the Opt-Out Regulation. The parties argue at length over whether the decision of the D.C. Circuit finding the regulation invalid binds this court. We sidestep that issue because we find the D.C. Circuit's decision -- whether binding or not -- correct, largely for the reasons cogently set forth in that opinion. See *Bais Yaakov, 852 F.3d at 1081-83*; see also *Physicians Healthsource, Inc. v. Cephalon, Inc., 954 F.3d 615, 624 n.11 (3d Cir. 2020)* (declining to decide whether Bais Yaakov was binding on other circuits because it agreed with the D.C. Circuit's reasoning); *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc., 863 F.3d 460, 467 & n.1 (6th Cir. 2017)* (treating the D.C. Circuit's ruling as binding and separately agreeing with its reasoning); *Nack v. Walburg, 715 F.3d 680, 682 (8th Cir. 2013)* (noting that the FCC's authority to promulgate the Opt-Out Regulation was "questionable").

HN3[] When a court reviews an agency's construction of a statute the agency administers, it conducts the familiar Chevron two-step analysis:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously **[**10]** expressed intent of Congress. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (footnote omitted). In Bais Yaakov, the D.C. Circuit stopped after the first step. *852 F.3d at 1082*. It held that Congress had spoken directly about whether solicited fax advertisements required opt-out notices (giving the FCC no authority to issue a regulation on the matter), because the text of the statute explicitly required opt-out notices only on unsolicited fax advertisements and said nothing about requiring such notices on solicited fax advertisements. See id.; *47 U.S.C. § 227(b)(1)(C)(iii)* (prohibiting the sending via fax of "an unsolicited advertisement, unless [among other things,] the unsolicited advertisement contains a notice meeting the requirements under" another provision of the statute).

HN4[] This reasoning makes good sense. The Supreme Court has directed courts to apply "traditional tools of statutory construction" in determining Congress's intent, *Chevron, 467 U.S. at 843 n.9*, and it is a "settled rule that [courts] must, if possible, construe a statute to give every word some operative effect," *Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 167, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004)*. Moreover, in another subsection **[**11]** of the TCPA, Congress placed **[*87]** requirements not just on unsolicited fax advertisements but on "any communication" or "any message" sent via fax, *47 U.S.C. § 227(d)(1)(A)*, *(B)*, demonstrating that when Congress wanted to regulate faxes broadly, it used broad language to do so. See *Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002)* (explaining the "general principle of statutory construction" that courts presume Congress has acted "intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another section of the same Act" (quoting *Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)*)). To read the statute as requiring opt-out notices on solicited advertisements would be to remove the word "unsolicited" from the provision discussing opt-out notices or to ink in new provisions discussing solicited faxes.

The panel dissent from the D.C. Circuit's opinion in Bais Yaakov criticized the majority for "fail[ing] to see the FCC's rationale for requiring that all fax ads include an informative opt-out notice," which the agency had justified as an interpretation of what it means for a fax to be sent with "prior express invitation or permission" and therefore "solicited." *852 F.3d at 1083-84* (Pillard, J., dissenting). But, assuming that the FCC might justifiably conclude that a fax is not solicited **[**12]** within the meaning of the TCPA if the immediately preceding fax did not include an opt-out mechanism, we do not see how the agency reasonably could have concluded that a particular fax is unsolicited unless it itself contains an opt-out notice. And, even if the presence of an opt-out notice bears on whether the subsequently received fax is solicited, the first fax received after the recipient provides express permission cannot be considered unsolicited under any plausible construction of the term. Thus, as the FCC's rule applied to every fax sent, it required an opt-out notice on at least some faxes that were indisputably solicited and cannot be sustained as an interpretation of what "solicited" means. Nor is it our role to rewrite the regulation, even if one assumes that some alternative version might suffice.

Bais Yaakov argues, however, that our precedent compels a different understanding of whether the FCC has authority to require opt-out notices on solicited fax advertisements. It attempts to analogize to *Alexander v. Treasurers of Boston University, 766 F.2d 630 (1st Cir. 1985)*, a case concerning the so-called Solomon Amendment, which denied federal financial aid to students who were required to register for the military draft but failed to do so. *Id. at 632* **[**13]** . To implement the Amendment, the Secretary of Education obviously needed to know whether each financial aid applicant was required to register for the draft and, if so, whether the applicant had in fact registered. So the Secretary simply required each applicant as a condition of receiving aid to certify either that he or she was registered or was not required to register. *Id. at 632-33*. We found that requiring applicants for aid to indicate that they were eligible for that aid, with a "minimum of fuss and inconvenience," *id. at 638*, to be within the Secretary's authority to promulgate regulations so as to do the job Congress assigned it. "[T]he Secretary is simply saying that if an individual is unwilling to tell the government that he or she fulfills the conditions for aid, the government will not dispense it." *Id. at 639*.

The analogy to Alexander is unpersuasive. There, as explained, we concluded that, where the Secretary was uncertain whether a particular aid applicant was within the category of people who might be denied aid under the statute, it could impose a burden on that individual in the **[*88]** name of determining whether he or she was in fact within that regulable category. Here, Bais Yaakov asks us to hold something very different: that an agency can regulate a particular type of fax that it knows with certainty is necessarily beyond its regulatory authority --

specifically, a first fax that is plainly a solicited one -- in order to determine whether a subsequently received fax does fall within the scope of its authority. Bais Yaakov has not explained why we can or should extend Alexander in that way. As such, the Opt-Out Regulation **[**14]** finds no haven in Alexander. See *Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 91-92, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002)*.

IV.

A.

We turn our attention next to Bais Yaakov's appeal of the district court's order denying class certification. In briefing that challenge, the parties sensibly train their arguments on the requirements of ***HN5***[] *Rule 23(b)(3) of the Federal Rules of Civil Procedure*, which states in pertinent part as follows: "A class action may be maintained if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

In practice, litigation over these requirements often reduces itself to a contest in which the party opposing certification points to issues that it claims will need to be decided separately for many class members. In turn, the putative class representative tries to carry the burden of convincing the court either that prevailing on any of those issues is not important to obtaining the remedy sought, that the issues can be adjudicated in a manner that produces a common answer for all class members, or that, to the extent individual issues remain, they can be resolved in a manner that is both practicable **[**15]** and protective of the parties' rights. See *Asacol, 907 F.3d at 51* ("The aim of the predominance inquiry is to test whether any dissimilarity among the claims of class members can be dealt with in a manner that is not 'inefficient or unfair.'" (quoting *Amgen, Inc., 568 U.S. at 469*)). "Inefficiency can be pictured as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues." Id. "Unfairness is equally well pictured as an attempt to eliminate inefficiency by presuming to do away with the rights a party would customarily have to raise plausible individual challenges on those issues." *Id. at 51-52*.

True to form, ACT points to five issues allegedly central to the relief sought that ACT claims cannot be resolved fairly without an unmanageable need to consider the varying circumstances of individual class members. These issues are: (1) Did the school actually receive a fax from ACT ? (2) Which fax did it receive? (3) Was the fax an advertisement when viewed in the circumstances of that recipient? (4) Does that school have the capacity to sue or belong to a class? and (5) Did the recipient of the fax advertisement provide prior express permission for ACT to send the advertisement by fax?

The district court **[**16]** sidestepped the first four of these issues, training its attention on the fifth, the question of permission: Did a recipient of a faxed advertisement give ACT prior express permission to send the advertisement by fax? Under Class A, this issue must be resolved to determine **[*89]** even if someone is a class member (i.e., received an "unsolicited" fax). Under Class B, this issue must be resolved to determine whether ACT has a defense on the merits (i.e., that it received prior express permission to send the fax). *47 U.S.C. § 227(a)(5)*, *(b)(1)(C)*. In either instance, the pivotal *Rule 23* question is whether the record reasonably shows that some putative class members may have permitted ACT to send by fax what ACT faxed them and, if so, whether there is a fair and efficient method for culling those consenting recipients from the class. The district court found that ACT presented sufficient evidence that the class likely included members who invited ACT to send any materials by fax, and that to identify those members the court would have to "parse through each unique relationship" between every class member and ACT ; hence, certification of Class B was precluded for lack of predominance.

As to Class A, the district court found that **[**17]** limiting the definition of class members to those who received "unsolicited" faxes created a prohibited "fail-safe class," *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012)*, and that, in any event, no jiggering with the class definition would eliminate the need to decide the issue of permission (or solicitation) for each putative class member. We now review that decision, reversing only if we find an abuse of discretion (including any error of law). *Asacol, 907 F.3d at 51*.

B.

HN6[] In deciding whether individual issues predominate over common questions, a court must not rely on mere speculation that individual issues may arise. See *Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 298 (1st Cir. 2000)*; *Bridging Cmtys. Inc. v. Top Flite Fin. Inc., 843 F.3d 1119, 1125 (6th Cir. 2016)* (concluding that the district court abused its discretion in finding that issues of consent predominated where the defendant "did not offer any information or evidence to support that theory"). Rather, it should consider only those issues that would likely arise if an individual class member's claims were being adjudicated on the merits. See *Mowbray, 208 F.3d at 298*; *Madison v. Chalmette Ref., L.L.C., 637 F.3d 551, 555 (5th Cir. 2011)*. In so doing, a court considers "the probable course of the litigation" so as to "formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate." *Mowbray, 208 F.3d at 298*. Even then, "the mere fact that . . . concerns may arise and may affect **[**18]** different class members differently does not compel a finding that individual issues predominate over common ones." *Id. at 296*. To the contrary, "we have recognized that a class may be certified notwithstanding the need to adjudicate individual issues so long as the proposed adjudication will be both 'administratively feasible' and 'protective of defendants' *Seventh Amendment* and due process rights.'" *Asacol, 907 F.3d at 52* (quoting *Nexium, 777 F.3d at 19*). So, here, we ask whether there is more than speculation that individual issues of permission may arise and, if so, whether Bais Yaakov has shown that those who gave ACT prior express permission to send advertisements can be culled from the class in a way that is administratively feasible and protective of ACT 's due process rights.

We start with the fact that some unknown number of the putative class members sent a form to ACT providing a fax number and requesting that ACT send them ACT "publications." Indeed, Bais Yaakov itself both sent such a request and claims to be a typical member of the classes it seeks to represent. See *Fed. R. Civ. P. 23(a)(3)*. Further, according to the declaration of an ACT official, class members routinely provided ACT with their fax **[*90]** number when inquiring about becoming a test center, requesting **[**19]** a High School Code number, seeking information about the dates the test will be administered, or asking for copies of publications. At least two of the three faxed documents to which Bais Yaakov points as advertisements are notices of the exam dates and sign-up deadlines -- i.e., just the sort of information that a school asking for ACT publications would likely expect to receive by way of the fax number it supplied when asking for the documents. The third document, in turn, concerned the opportunity to administer ACT exams. And because the typical class member (e.g., Bais Yaakov) registered interest in giving such exams, one can easily see how a request by that school to receive ACT publications would cover such a document.

Nevertheless, as Bais Yaakov points out, the TCPA requires "express permission." ***HN7***[] "Express permission" means "[p]ermission that is clearly and unmistakably granted by actions or words, oral or written." Permission, Black's Law Dictionary (11th ed. 2019); cf. id. (defining "implied permission" as "permission that is inferred from words or actions"). Furthermore, FCC rules (unchallenged by either side) provide that in gauging whether express permission was provided, **[**20]** we consider the understanding of the recipient. *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14,014, 14,129 (2003)* ("Express permission to receive a faxed ad requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements."). So we do not reject the possibility that, notwithstanding the strong inference to be drawn from supplying a fax number while requesting a publication, any given school may not have understood its communications to invite ACT to send by fax that which it sent. There is evidence, furthermore, that Bais Yaakov itself did not understand its request for publications to convey perpetual permission for ACT to send Bais Yaakov any advertisements. After all, Bais Yaakov objected when it received the faxed publications from ACT And Bais Yaakov had no longstanding relationship with ACT that might have lent further support to the notion that it received by fax what it clearly asked to receive by fax. To the contrary, the record as described by the parties paints a picture of faxes sent to Bais Yaakov out-of-the-blue after years of no contact.

There is evidence, though, that other members of the putative class did not share Bais Yaakov's understanding concerning the express requests **[**21]** that they receive ACT publications. Indeed, ACT presented concrete examples of schools that did not share Bais Yaakov's understanding. These examples took the form of declarations from representatives of seventy-eight schools with whom ACT corresponded. The declarants confirmed that their schools provided ACT with fax numbers, and that they frequently requested and received publications from ACT by fax. When shown the three faxed ACT publications alleged by Bais Yaakov to be advertisements, they replied that the information contained in the publications was "integral to" the school's ongoing interactions with ACT , and that "ACT would have had permission from the declarant or other school personnel" to send "these types of informational communications using any available type of communication, including facsimile."

Bais Yaakov makes no argument that the concrete examples offered by ACT did not exemplify a larger subset of similar class members that could only be identified were one to parse through the circumstances of each school in the putative class. The fact that many schools expressly **[*91]** asked when giving their fax numbers to receive ACT publications likely suggests why Bais Yaakov **[**22]** makes no argument that ACT's examples constitute just "a few unusual class members, who can be picked off by the defendant." *Asacol, 907 F.3d at 57* (citing *Halliburton v. Erica P. Jong Fund, Inc., 573 U.S. 258, 276, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014)*.

Rather, Bais Yaakov argues that ACT would have no plausible defense of consent even in the circumstances presented by the proffered examples. To support that argument, Bais Yaakov points out that the key sentence concerning permission to send the faxes employs the conditional "would have" formulation, rather than stating that ACT did in fact have permission to send the type of information contained in the faxes appended to the complaint. Certainly the syntax could have been clearer. But given the prior communication providing a fax number and asking to receive ACT publications, we think that a factfinder could reasonably read the declarations as reflecting a lack of memory about whether the faxes were received, not a doubt about whether they were invited if received. A prior paragraph in each declaration explains that the declarant has been told that ACT might have sent to the recipient the three faxes appended to Bais Yaakov's complaint. Rather than claiming a rather remarkable memory about exactly what was received years ago, each declarant simply **[**23]** points to the faxes appended to Bais Yaakov's complaint and confirms that those faxes were the type of publications the school was requesting to receive by fax, and that ACT "would have had permission" to send them. In short, a factfinder could reasonably read the declarations as conveying the point that "I do not recall if ACT sent these specific faxes, but if it did, it would have had my permission to do so."

Bais Yaakov argues that the Seventh Circuit concluded otherwise in construing a recipient's declaration that the recipient "would have given" consent. *Physicians Healthsource, Inc. v. A-S Medication Sols., LLC, 950 F.3d 959, 966 (7th Cir. 2020)* (emphasis omitted). In so holding, it appears that the Seventh Circuit read the condition implied by that statement as "if asked, I would have given consent (but I was never asked)." While it may have been reasonable in the context of that case to read the statements as indicating that the recipients never gave permission at all, here the context for at least some class members is markedly different.

Many schools were obviously trying to assist their students in taking the ACT test and, in many cases, in serving as test centers. As the schools' representatives explain, they therefore wanted information about "the nature of the **[**24]** test, how scores are used, how students can prepare for the test, test registration deadlines, and related topics." In this context, a factfinder could determine that the request for ACT "publications" was clearly understood by the school to be a request for notice of exam dates, deadlines for sign-ups, and -- in the case of test centers -- opportunities to give exams. This possibility finds reinforcement in some instances where a school, unlike Bais Yaakov, repeatedly requested information year in and year out. As best the parties' briefs reveal, Bais Yaakov was the only one of out of thousands of recipients that complained about receiving faxes from ACT Silence is not express permission. But widespread and prolonged silence of this type strongly suggests that other recipients were more like ACT 's examples than they were like Bais Yaakov.

Bais Yaakov points out (correctly) that the TCPA requires permission to send advertisements, not just faxes. To leverage **[*92]** that point, Bais Yaakov argues that the three subject faxes were advertisements. The declarations, though, deflect the thrust of this argument because they expressly refer to the specific documents appended to the complaint. In **[**25]** short, even if we assume that these documents are advertisements, ACT would not incur liability if in the context of a particular relationship a request for ACT publications was clearly understood as an invitation to fax what was faxed. See *Gorss Motels, Inc. v. Safemark Sys., LP, 931 F.3d 1094, 1100 (11th Cir. 2019)* ("Although express permission requires a 'clear[] and unmistakabl[e] communicat[ion],' it does not require that a recipient state specifically that his permission includes faxed advertisements.").

On this record, we see no abuse of discretion in the district court's finding that there were, among the thousands of yet-to-be-canvassed putative class members, schools that could be found by the factfinder to have given the requisite permission. So that left a problem: How could one identify and cull out those who did give express permission to send what was sent?

Bais Yaakov has made no argument that the court could cull from the class the consenting schools in an administratively feasible way, protective of ACT's rights. Compare *Sandusky Wellness Ctr., 863 F.3d at 469* ("Identifying solicited fax recipients through a form-by-form inquiry is sufficiently individualized to preclude class certification."), with *Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003)* ("Common issues predominate where individual factual determinations can be accomplished **[**26]** using computer records, clerical assistance, and objective criteria -- thus rendering unnecessary an evidentiary hearing on each claim."). The district court therefore reasonably determined that individual issues of permission would predominate over common questions for both Class A and Class B. See *Asacol, 907 F.3d at 51* (explaining that review of class-certification decision for abuse of discretion involves clear-error review of "'fact-dominated' issues" (quoting *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 17 (1st Cir. 2008)*)); *Díaz-Alarcón v. Flández-Marcel, 944 F.3d 303, 312 (1st Cir. 2019)* (explaining that a "judge's choice between competing, but rational, views cannot be clearly erroneous" (citing *Anderson v. City of Bessemer City, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)*)).[2]

C.

Bais Yaakov has asked that, were we to affirm the district court's denial of class certification, we should direct the district court to consider revising the class definitions as Bais Yaakov now proposes. As we have explained, Bais Yaakov had, in pertinent part, defined Class B as consisting of those whom ACT sent "a facsimile advertisement" and Class A as consisting of those whom ACT sent "an unsolicited facsimile advertisement." In a footnote on the last page of Bais Yaakov's reply memorandum in support of its motion for class certification before the district court, Bais Yaakov suggested that, if necessary, the district **[**27]** court could narrow Class B to consist of those whom ACT sent "a facsimile whose content was identical or substantially similar to the content of any of the [three] facsimiles" Bais Yaakov says it received and that the district court could **[*93]** narrow Class A the same way but concerning an "unsolicited facsimile." Neither below nor on appeal has Bais Yaakov explained how these alternative definitions might cure the problems we have just discussed. Indeed, our discussion effectively assumed -- favorably to Bais Yaakov -- that each putative class member received those three documents from ACT via fax. In short, the proposed amendment would not eliminate the need to resolve individual issues of permission.

To summarize: The typical school sent ACT a form providing the school's fax number and expressly asking to be sent ACT publications. The documents ACT then sent in return to the supplied fax number appear on their face to provide just the sort of information that a school would want to receive after requesting ACT publications. These common facts raise quite a strong inference that the school sending such a form understood its request as inviting ACT to fax the documents that it faxed. After **[**28]** all, why supply the fax number and request ACT publications if not to receive the publications by fax? Bais Yaakov does have a point in arguing that its own circumstances may be found to belie any inference that it had any such understanding. The faxes it received were sent seven years later, and it promptly objected. But the evidence submitted by ACT makes clear that the circumstances of at least some other schools was to the contrary, actually reinforcing the strong inference that the forms sent to ACT were clearly

[2] We need not reach the question of whether Class A as defined initially by Bais Yaakov would nevertheless be rejected as a fail-safe class were there otherwise no predominance problem.

understood and intended to be read as invites to send by fax that which was faxed. Whether that is so in any individual case may be a close question which we need not resolve. We hold simply that it is a genuine question that may well be answered one way or the other for any given school, and beyond arguing on the merits that no school gave permission to fax the documents -- an argument we have now rejected -- Bais Yaakov offers no means by which to answer that crucial question on a common basis. Hence, the district court did not abuse its discretion in finding that the proposed classes could not be certified.

V.

We consider, finally, Bais Yaakov's appeal from the dismissal **[**29]** of its own individual claim as moot. After denying Bais Yaakov's motion to proceed as a class action, the district court turned to the merits of the case, eventually denying in pertinent part contending motions for summary judgment on the questions of whether the three faxes appended to the complaint were advertisements and whether Bais Yaakov had permitted ACT to send them by fax. ACT thereupon sent Bais Yaakov a check in the amount of $45,600, which Bais Yaakov does not dispute is the most that it can recover in this lawsuit. In a letter accompanying the check, ACT also promised to honor the check no matter the outcome of the case, and it offered to deposit the check with the district court, to be held until any appeal is completed and final judgment entered.[3] ACT also promised not to send Bais Yaakov any further faxes "that violate the TCPA," upon pain of paying "$1,500 should it send any such fax." The record also reflects that ACT has sent no faxes of any type to Bais Yaakov since 2012.

Bais Yaakov rejected the check and the accompanying promises. Unimpressed, the district court concluded that Bais Yaakov **[*94]** had received all that it could possibly receive as damages, and that it had **[**30]** no basis to obtain injunctive relief because "the allegedly wrongful behavior could not reasonably be expected to recur." *Bais Yaakov, 461 F. Supp. 3d at 4* (quoting *Am. C.L. Union of Mass. v. U.S. Conf. of Cath. Bishops, 705 F.3d 44, 55 (1st Cir. 2013)*).

In this very lawsuit, we previously considered and rejected a prior attempt by ACT to moot the litigation by tendering an offer of judgment under *Rule 68 of the Federal Rules of Civil Procedure*. See *Bais Yaakov of Spring Valley v. ACT, 798 F.3d 46 (1st Cir. 2015)*. In so doing we expressed concern about the threat to meritorious class actions posed by sanctioning efforts to cut off *Rule 23* certification by mooting the individual claims of the named plaintiff. *Id. at 48-49*. Nevertheless, we also recognized uncertainty regarding the weight attributed by the Supreme Court to such a concern. Compare *Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)* ("Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions."), with *Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 78, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013)* (describing that line from Roper as dicta and explaining that Roper's holding turned on the named plaintiff "possess[ing] an ongoing, personal economic stake in the substantive controversy -- namely, to shift a portion of attorney's fees and expenses to successful class litigants"). So we ultimately based our rejection **[**31]** of the *Rule 68* pick-off gambit on a prediction that the Supreme Court would find that a rejected *Rule 68* offer provides no actual relief. See *Bais Yaakov, 798 F.3d at 52*.

HN8[] The Supreme Court has since held just that: "An unaccepted settlement offer -- like any unaccepted contract offer -- is a legal nullity, with no operative effect." *Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 162, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016)* (quoting *Genesis Healthcare, 569 U.S. at 81* (Kagan, J., dissenting)). So the question before us is whether there is good reason to reach a different result when a check, rather than a *Rule 68* offer, is tendered.

[3] The letter stated, "In all events, ACT hereby commits to paying $45,600 to Bais Yaakov, by way of the payment tendered with this letter or through other means as necessary at the conclusion of this litigation." It also stated that "this tendered payment is unconditional and irrevocable."

The precedent is admittedly uncertain and sparse on this subject. After all, not many plaintiffs walk away from an offer to pay 100% of what they seek. Nevertheless, there are reasons to conclude that ACT's tender of a check and associated promises did not moot Bais Yaakov's claims. Bais Yaakov's self-interest in appealing the denial of class certification might have been reason enough depending on how well Roper stands up in light of Genesis, see *Campbell-Ewald, 577 U.S. at 165* ("While a class lacks independent status until certified, a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." (citation omitted)), though we have now concluded the district court did not err in denying **[**32]** class certification. In any event, as Justice Thomas pointed out, at common law unconditionally offering funds while still denying liability is not a tender that requires the end of a lawsuit. *Id. at 170-71* (Thomas, J., concurring in the judgment). Most narrowly, the transmittal of an ordinary check does not differ for present purposes from an offer to pay: The recipient has a promise, but no funds. As the ancient proverb goes, "[t]here's many a slip 'twixt the cup and lip." 4 The Greek Anthology 21 (W.R. Paton trans., 1918). Indeed, the *Rule 68* offer at least conveys the ability to obtain a **[*95]** judgment, while the check conveys only a hope that the bank account will have the promised funds. Cf. *id. at 166* (majority opinion) (reserving judgment on whether a deposit of funds with the court and entry of judgment in the amount of those funds would moot the case); *id. at 186* & n.2 (Alito, J., dissenting).[4] So, as best we can tell, Bais Yaakov's damage claim is not moot.

Finally, there is Bais Yaakov's request for injunctive relief. We find no error in the district court's finding that ACT's cessation of sending faxes to Bais Yaakov since 2012, its deletion of Bais Yaakov's fax number from ACT's database, and its admission **[**33]** that any further faxing to ACT would render ACT liable, all combine to establish that ACT 's allegedly wrongful behavior as to Bais Yaakov "could not reasonably be expected to recur." *Bais Yaakov, 461 F. Supp. 3d at 4* (quoting *Am. C.L. Union of Mass., 705 F.3d at 55*).

Bais Yaakov makes no other argument that its individual claim for injunctive relief should survive if we both affirm the denial of class certification and find no error in the district court's finding that Bais Yaakov cannot reasonably be expected to receive any more faxes from ACT after eight years of silence and the express assurances tendered.

VI.

For the foregoing reasons, we affirm the district court's denial of class certification and its dismissal of the claim for injunctive relief. We otherwise vacate the judgment and remand for further proceedings.

Concur by: BARRON

Concur

BARRON, Circuit Judge, concurring. This case raises a question like the one that we confronted in *In Re Asacol Antitrust Litig., 907 F.3d 42 (1st Cir. 2018)*: Does *Federal Rule of Civil Procedure 23*'s predominance requirement permit certification of a class whose members could prove their claim -- at least in part -- only through individual testimony? It is easy enough to see why the answer might be, "No." How will common rather than individualized issues predominate after certification if each class member's claim depends on **[**34]** testimony as individualized as, to take this case as an example, whether the class member had expressly agreed to receive a fax from the defendant before the defendant sent it?

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[4] Compare *Chen v. Allstate Ins. Co., 819 F.3d 1136, 1144-46 (9th Cir. 2016)* (reasoning that the defendant's deposit of the full amount of plaintiff's claims in an escrow account did not moot the plaintiff's claim since the plaintiff had not "actually or constructively received" the money), with *Leyse v. Lifetime Ent. Servs., LLC, 679 F. App'x 44, 48 & n.2 (2d Cir. 2017)* (summary order) (concluding that the district court properly entered judgment on the plaintiff's individual claim where the defendant deposited the full amount recoverable by the plaintiff with the clerk of court).

This case also results in the same answer to that question that we gave in Asacol: The class certification request must be denied on predominance grounds because the defendant has made a seemingly credible promise to challenge the testimony that each class member would give if required to do so at a trial on that issue. Thus, here, as there, we reject a class certification request on predominance grounds, despite the important role that a class action would play in making meaningful relief possible for the defendant's alleged wrongs.

It is safe to assume that our "predominance" holding in this case will not go unnoticed. District Court judges in our Circuit thoughtfully expressed the concern **[*96]** in the wake of Asacol that we had construed the predominance requirement there too strictly. See, e.g., *In re Loestrin 24 FE Antitrust Litig., 410 F. Supp. 3d 352, 403-04 (D.R.I. 2019)* (Smith, C.J.); *In re Intuniv Antitrust Litig., No. 1:16-cv-12396, 2019 U.S. Dist. LEXIS 141643, 2019 WL 3947262, at *7 n.8 (D. Mass. Aug. 21, 2019)* (Burroughs, J.). Our reliance on Asacol here may increase the concern that we are mistakenly construing the predominance requirement to render *Rule 23*, at least in certain important categories of cases, incapable **[**35]** of protecting "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (quotation marks omitted); see also *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 8 (1st Cir. 2008)* ("[A]n erroneous failure to certify a class where individual claims are small may deprive plaintiffs of the only realistic mechanism to vindicate meritorious claims.").

Nonetheless, I continue to think that our decision in Asacol was right, and I am in full agreement with my colleagues that it requires that we affirm the District Court's denial of the motion to certify the class in this case. I write separately, though, to emphasize the limits on the scope of our holding in Asacol and to explain how our holding in this case accords with them.

Asacol's limits are worth highlighting because they convince me that the concern that we are unduly cutting back on *Rule 23* through our construction of the predominance requirement is misplaced, or, at least, premature. The current state of our precedent does not preclude certification in cases in which the putative class members' claims depend on an individualized means of proof just because the defendant has vowed to challenge each class member's showing at trial if the request **[**36]** for class certification is granted. Instead, as I will explain, our precedent in this area leaves open various viable means by which a putative class can satisfy the predominance requirement in such cases even if the defendant makes that promise about its litigation strategy going forward.

I.

Before Asacol, we had decided a very similar case: *In re Nexium Antitrust Litig., 777 F.3d 9 (1st Cir. 2015)*. A review of Nexium's own limitations -- and how Asacol responded to them -- helps to place our precedent in this area in its proper context.

The named plaintiffs in Nexium were suing AstraZeneca, which was the holder of several patents related to the anti-heartburn drug Nexium, as well as several of its generic pharmaceutical competitors. *Id. at 13-14*. The named plaintiffs alleged that the defendants had violated state antitrust laws by entering into agreements not to compete with three generic drug manufacturers and that, as a result, AstraZeneca had overcharged for Nexium between 2008 and 2014. Id. The named plaintiffs also sought certification of a class consisting of all persons or entities who had purchased Nexium during that six-year period (with certain limitations unnecessary to enumerate here). *Id. at 14*.

The defendants objected to the **[**37]** certification of the proposed class on the ground that expert evidence showed that it contained "some number of brand-loyal consumers who would [have] continue[d] to purchase branded Nexium even when a generic bec[ame] available." *Id. at 20*. The defendants argued that "the [brand-loyalist issue] present[ed] problems that [the] plaintiffs [could not] overcome, for [the] plaintiffs ha[d] no methodology to identify . . . **[*97]** those consumers who would have switched to a generic version." Id. (first alteration in original).

The Nexium defendants were in part mounting a "categorical challenge" to the bid for class certification on the ground that "the hypothetical nature of the inquiry into [antitrust] injury . . . turned on what was necessarily speculation about a plaintiff's . . . [individual] purchasing preference." *Asacol, 907 F.3d at 59-60* (Barron, J., concurring). Nexium rejected that aspect of the defendants' challenge, because an individual class member could prove the defendant's anticompetitive conduct caused injury under the applicable state ***antitrust law*** through "testimony . . . that, given the choice, he or she would have purchased the generic." *Nexium, 777 F.3d at 20*.

Nexium explained that "[s]uch testimony, if unrebutted, would **[**38]** be sufficient to establish injury in an individual action." Id. It further explained that, because "[t]here cannot be a more stringent burden of proof in class actions than in individual actions," "similar testimony in the form of an affidavit or declaration would be sufficient in a class action" to prove the alleged antitrust injury. Id.

The Nexium defendants did also argue that the contemplated affidavits could not save the class certification request because, under *Rule 23*'s predominance requirement, "any mechanism of [proving injury] that requires determination of the individual circumstances of class members is improper." *Id. at 21*. But, Nexium rejected this ground for denying class certification as well.

Nexium emphasized that "the Supreme Court . . . and the circuits in other cases have made clear that the need for some individualized determinations at the liability and damages stage does not defeat class certification." Id. (citing *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 469, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)*). Moreover, the defendants had not asserted that they would -- let alone that they feasibly could -- challenge the claims of antitrust injury, class member by class member, at trial in the event of class certification, as the defendants had not at any point **[**39]** asserted that they would challenge the class members' affidavits if submitted. See *Asacol, 907 F.3d at 52*.

Thus, although Nexium affirmed certification of the class at issue there, it did not hold that a putative class could always fend off a defendant's predominance-based challenge just by offering to submit affidavits previewing how the class members would testify at trial. Nexium held only that such affidavits could allow the putative class to defend against such a challenge to certification if the affidavits were unrebutted.

It was against this backdrop that we then decided Asacol. There, we once again addressed a request to certify a class made up of individuals claiming an injury under state antitrust laws premised on the defendants' allegedly anticompetitive efforts to keep a cheaper generic off the market. *Id. at 44-45*.

The proponents of class certification in Asacol invoked Nexium to explain why affidavits from members of the putative class attesting to their willingness to buy the generic would solve any predominance problem. See *id. at 52*. But, we concluded that Nexium did not support the certification request. See *id. at 52-53*.

We explained that the Asacol defendants had done exactly what the defendants in Nexium had not. **[**40]** In addition to putting forth expert evidence showing that some class members were brand loyal (though without identifying any specific individuals who were), the Asacol defendants had "expressly stated their intention to challenge **[*98]** any affidavits that might be gathered" from class members asserting that they would have bought the generic drug had they been given the choice to do so. *Id. at 52*.

We acknowledged that "'unrebutted testimony' . . . in an affidavit could be used prior to trial to obtain summary judgment, thereby efficiently and fairly removing the issue of injury-in-fact from the case for trial." Id. (quoting *Nexium, 777 F.3d at 21*). But, we pointed out, "[t]estimony that is genuinely challenged, certainly on an element of a party's affirmative case, cannot secure a favorable summary judgment ruling disposing of the issue." *Id. at 53* (emphasis added).

We thus concluded that it was dispositive of the predominance issue that those seeking class certification in Asacol had offered no response to the defendants' assertion that they intended to challenge any affidavits that might be produced by class members denying their brand loyalty. See *id. at 52-54*. The class would not be able to "rely on unrebutted testimony in affidavits to **[**41]** prove injury-in-fact" as the case unfolded post-certification. *id. at 53*.

That being so, the contemplated affidavits could not preclude the need for mini-trials on the merits of the disputed issue concerning injury. It therefore followed that the putative class could not rely on the affidavits to surmount the defendants' predominance-based objection to class certification, given the number of plaintiffs who seemingly would have had to take the stand post-certification if the defendants pressed their *Seventh Amendment* and due process rights to the end. See id.

Asacol was no more categorical in denying certification on predominance grounds, however, than Nexium had been in granting certification in the face of a predominance challenge. Asacol did hold that the predominance requirement could not be satisfied in the face of a defendant's asserted intent to press its rights all the way through trial. But, it did so in a case in which the putative class had offered no basis for deeming that threat to be, in effect, an empty one. See *id. at 61* (Barron, J., concurring) ("[T]he plaintiffs do not argue that the defendants would be incapable of mounting effective challenges to any, let alone to most, of the plaintiffs' affidavits **[**42]** at summary judgment. Nor may we conclude that the plaintiffs would only need to rely on individualized proof of injury for a small identifiable subset of the class . . . .").

In light of this important limitation on Asacol's holding, its primary significance in my view is not to be found in the outcome in that specific case. It is to be found in the structure of the inquiry that it required a district court to undertake in every case in which it must determine whether a putative class can satisfy the predominance requirement.

Asacol makes clear that to assess predominance a district court must consider, in a realistic but rigorous manner, how a trial would proceed in the event of certification. Asacol thus requires a district court, in undertaking that assessment, to make a prediction about what would happen post-certification if the defendant were to follow through and challenge the claims of the putative class members by asking whether certification would result in, as we put it then, inefficiency (which "can be pictured as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues") or unfairness (which can be "pictured as an attempt **[**43]** to eliminate inefficiency by presuming to do away with the rights a party would customarily have to raise plausible individual challenges on those issues"). *Id. at 51-52*.

[*99] Importantly, then, Asacol leaves open the possibility that a district court's predictive assessment might not paint the concerning picture of how the post-certification litigation would unfold (even assuming no settlement) that would preclude certification of a class on predominance grounds. Accordingly, I understand Asacol to leave open the possibility that the predominance requirement might be met even in a case involving a claim in which the members of the putative class must rely on a means of proof that is individualized.

II.

We come, then, to the case at hand. Here, we once again conclude on predominance grounds that the proposed class cannot be certified. But, in doing so, we break no ground that Asacol did not already break.

As in Asacol, the claim of class members in this case depends on knowledge that is specific to each one: here, whether the class member provided advance permission to receive the kind of fax at issue. As in Asacol, the defendant in this case has vowed to contest each class member's claim on that highly **[**44]** individualized issue, thereby suggesting that each such member will have to provide individualized testimony -- one by one -- at trial on it. And, as in Asacol, the proponent of class certification here has not explained how the evidentiary realities on the ground undermine the defendant's assertion that it can force a trial on the disputed issue as to each class member.

Indeed, if anything, the defendant's promise to contest the class-member testimony at trial post-certification is even more credible here than it was in Asacol. It comes supported by affidavits of the defendant's own from class members. Yet, the proponent of certification, Bais Yaakov, has failed to identify a persuasive ground for doubting the defendant's showing that a stream of mini-trials likely awaits on the other side of certification.

True, Bais Yaakov contests the significance of the undisputed evidence that thousands of schools had asked for ACT to send them publications while supplying it with a fax number. Bais Yaakov responds that, because the recipient's prior consent to receiving a faxed advertisement is an affirmative defense that the defendant bears the burden of proving, that evidence does not suffice **[**45]** to show that issues of consent would have to be adjudicated class member by class member at trial. Bais Yaakov relies for that contention on the TCPA's requirement that the defendant show that there was express permission given in advance applicable to each advertisement that it faxed.

It is far from clear that requirement in the TCPA would spare an individualized inquiry into the nature of a class member's relationship to ACT. But, even if we assume that the TCPA makes the bar for establishing the express-permission defense as high as Bais Yaakov construes it to be, there remains the fact that ACT. has introduced affidavits from seventy-odd schools to bolster its predominance case. ACT. contends that those affidavits show that those schools did expressly consent to the receipt of such faxes when they requested publications from ACT. while supplying their fax numbers to it.

Bais Yaakov does not attempt in response to make anything of the fact that these affidavits concern only seventy-odd schools -- and thus merely "a small identifiable subset of the class's members."[5] *In* ***[*100]*** *re Asacol Antitrust Litig., 907 F.3d 42, 61 (1st Cir. 2018)* (Barron, J., concurring). For example, Bais Yaakov makes no argument that ACT "would be incapable of mounting effective **[**46]** challenges" to a non-de minimis number of class members' claims, id. (Barron, J., concurring), because speculation alone supports the notion that ACT would be able to obtain either additional affidavits beyond those that it has produced or any similar evidence that could suffice to create a genuine issue of disputed fact as to whether those class members consented to receiving the faxes, *id. at 53* ("Nor have the plaintiffs provided any basis from which we could conclude that the number of affidavits to which the defendants will be able to mount a genuine challenge is so small that it will be administratively feasible to require those challenged affiants to testify at trial."); see also *id. at 52-53* ("Nor do plaintiffs point to any basis in the record for deeming all such challenges [by the defendants] to be so implausible as to warrant a finding that we can consider the issue to be uncontested.").

In fact, Bais Yaakov's only argument with respect to the affidavits from school officials is that none shows that even those officials' own schools gave the requisite prior express permission. But, as we explain, that contention is not tenable, given what those affidavits indisputably show.

As a result, much like **[**47]** in Asacol itself, the proponent of certification here has failed to explain how the claim of each class member could be dealt with post-certification in a manner that would not be "inefficient or unfair." *Id. at 51*. Thus, because the proponent of class certification bears the burden of satisfying the predominance requirement, *In re Nexium Antitrust Litig., 777 F.3d 9, 18 (1st Cir. 2015)*, we must reject this request for class certification just as we rejected the one in Asacol.

III.

For the reasons set forth above, it is clear to me that our decision today does not extend Asacol beyond its own limits. But, I do think it is important not to lose sight of the reasons for those limits. Attending to them will ensure that neither Asacol nor this case is understood to impose a greater bar to class certification than it does.

For one thing, I understand the limited nature of Asacol's predominance holding to reflect a recognition that even in an individual action involving a claim that necessarily depends on individualized testimony, the plaintiff may be able to secure summary judgment in her favor based on an affidavit previewing that testimony. After all, a defendant in an individual action cannot defeat a motion for summary judgment predicated on an affidavit **[**48]** previewing the plaintiff's testimony merely by asserting that it will contest that testimony at trial. See *In re Asacol Antitrust Litig.,*

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[5] ACT's records indicate that it sent more than 28,355 fax advertisements between June 30, 2008, and June 30, 2012. *Bais Yaakov of Spring Valley v. ACT, Inc., 328 F.R.D. 6, 9 (D. Mass. 2018)*.

907 F.3d 42, 53 (1st Cir. 2018). The defendant must make a showing at the summary judgment stage that suffices to put the contents of the plaintiff's affidavit in doubt. See Triangle Trading Co. v. Robroy Indus., 200 F.3d 1, 2 (1st Cir. 1999) (explaining that "[c]onclusory allegations, improbable inferences, and unsupported speculation" cannot give rise to a genuine issue of disputed fact (quoting Smith v. F.W. Morse & Co., 76 F.3d 413, 428 (1st Cir. 1996))).

For another thing, I understand the limited nature of Asacol's predominance holding to reflect a recognition that a class cannot be held to a higher standard in moving for summary judgment than the **[*101]** standard to which its members would be held in moving for summary judgment in individual actions of their own. See id. at 52; Nexium, 777 F.3d at 20 ("There cannot be a more stringent burden of proof in class actions than in individual actions."); see also Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 456-57, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016) (allowing a class to rely on representative statistical evidence because each member "likely would have had to introduce [that] study" if the members "had proceeded with 3,344 individual lawsuits"). Thus, I understand Asacol to recognize that, if an individual class member could win at summary judgment on an issue dependent on individual testimony and central to **[**49]** the claim in her own individual action, that class member also could do so on the strength of that same showing as a member of a class made up of numerous individuals.

Accordingly, I understand Asacol to be in line with our prior precedent recognizing that when a district court assessing predominance "supportably finds that an issue which, in theory, requires individualized factfinding is, in fact, highly unlikely to survive typical pretrial screening (such as a motion to strike or a motion for summary judgment), a concomitant finding that the issue neither renders the case unmanageable nor undermines the predominance of common issues generally will be in order." Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 298 (1st Cir. 2000) (emphasis added).[6] After all, due to the lack of any need for a "mini-trial on the issue" in that circumstance, Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 477, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013), the concerning picture that Asacol paints of long lines of plaintiffs waiting to give testimony at the courthouse will fade to black.

Because of this understanding of Asacol, I do not read it to hold that a putative class may surmount a defendant's predominance-based challenge to certification only by showing that class members are entitled to invoke a presumption in their favor on the individualized aspect **[**50]** of their claim that the defendant vows to dispute at trial. Asacol did recognize that in Halliburton Co. v. Erica P. John Fund, the Supreme Court relied on the existence of such a legal presumption in rejecting a predominance-based challenge to certification, see Asacol, 907 F.3d at 53 (citing Halliburton, 573 U.S. 258, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014)). And, in rejecting the request for class certification in Asacol, we did note that the putative class members there were not entitled to any presumption regarding their willingness to purchase a generic under the state antitrust laws that supplied their causes of action. Id.

But, a closer look at Halliburton's logic suggests that the entitlement to invoke a presumption like the one that applied there may not be a prerequisite to a putative class satisfying the predominance requirement in the face of a defendant's assertion that the putative class's underlying **[*102]** claim can be proved only through individualized testimony from each class member. Nor does Asacol, as I read it, indicate that it adopted a different understanding of Halliburton on that score.

The Supreme Court in Halliburton considered a request for certification of a class of those alleging that Halliburton Co. had violated section 10(b) of the Securities Exchange Act of 1934 **[**51]** and Securities and Exchange Commission Rule 10b-5 by making a series of material misrepresentations to try to inflate its stock price. 573 U.S.

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[6] It is worth noting that the inquiry that I contemplate a district court undertaking here is not particularly novel, even in the class action context. As to any request to certify a class, the district court must assess whether the class definition is sufficiently "definite" so as to "allow the class members to be ascertainable." Nexium, 777 F.3d at 19. In Nexium, we concluded that the proposed class "satisfie[d] th[at] standard[] by being defined in terms of purchasers of Nexium during the class period," id., even though the determination of whether any particular individual falls within that class is an inherently individualized one that the defendants there in theory could have contested. Yet, we expressed no concern -- and no one argued -- that this feature of the inquiry on its own automatically destroyed the efficiencies that make class actions a valuable procedural device.

at 264. The Court had held in a prior case, Basic Inc. v. Levinson, 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988), that "requiring . . . direct proof of reliance [in such an individual securities fraud action] 'would place an unnecessarily unrealistic evidentiary burden on the [investor],'" because the investor would "have to 'show a speculative state of facts, i.e., how he would have acted . . . if the misrepresentation had not been made.'" Halliburton, 573 U.S. at 267 (fourth alteration in original) (quoting Basic, 485 U.S. at 245). Basic thus had held that investors could "invok[e] a presumption that a public, material misrepresentation will distort the price of stock traded in an efficient market, and that anyone who purchases the stock at the market price may be considered to have done so in reliance on the misrepresentation." Id. at 283-84.

The putative class in Halliburton pointed to this presumption of reliance as a reason to reject the predominance-based challenge to class certification that the defendants were pressing in that case. See id. at 265-66. The notion was that the crucial issue of class member reliance on the defendants' alleged misinformation could be proved on a class-wide basis **[**52]** -- rather than class member by class member through individualized testimony at trial -- in consequence of the presumption of reliance that Basic had recognized each class member was entitled to invoke. See id. at 267-68.

In considering that contention, Halliburton did note that there were features of the presumption that arguably favored the defendants' position regarding predominance. For example, "Basic [had] emphasized that the presumption of reliance was rebuttable rather than conclusive," id. at 268, and that a defendant could defeat that presumption by making "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or [the plaintiff's] decision to trade at a fair market price," id. at 269 (first alteration in original) (quoting Basic, 485 U.S. at 248).

But, the Court ultimately held that there was no predominance-based reason to deny class certification. The defendant's "opportunity to rebut the presumption of reliance" on an "individual" basis did have, according to the Court, "the effect of 'leav[ing] individualized questions . . . in the case.'" Id. at 276 (first alteration in original) (quoting id. at 295 (Thomas, J., concurring in the judgment)). Nevertheless, the Court explained, **[**53]** that was "no reason to think that these questions w[ould] overwhelm common ones." Id. For, while the Court acknowledged that a defendant might be able to show that an individual class member "would have bought or sold the stock even had he been aware that the stock's price was tainted by fraud," id. at 269, it determined that the prospect "[t]hat the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal **[*103]** does not cause individual questions to predominate." Id. at 276.

Halliburton in this respect may be understood to have determined that it would be -- to use our own way of putting the point -- "highly unlikely" that a defendant would have much luck puncturing an otherwise unrebutted case for finding investor reliance in such a securities fraud case. See Waste Mgmt. Holdings, Inc., 208 F.3d 288, 298 (1st Cir. 2000). But, if so, then there is no reason why, in principle, a court could not make a similar assessment based on the prospect of affidavits previewing class member testimony in certain types of case in which no such presumption applies.

Of course, the defendant in a case of that kind would still have the "opportunity," Halliburton, 573 U.S. at 276, to make a responsive showing that would suffice to establish at the certification stage **[**54]** that after certification were granted it would be able to create a genuine dispute of material fact as to the putative class members' claims, despite the affidavits previewing their testimony on the critical issue. But, the defendants in Halliburton had a similar opportunity in that case to cast doubt on the putative class members' claims -- supported by the presumption recognized in Basic -- to have relied on misleading investment information. And yet the Court did not think that bare possibility a reason to conclude that individualized issues would predominate, as it implicitly predicted that it would be difficult for a defendant to produce evidence that could cast doubt on the reliance of more than "the occasional class member here or there." Id.

Of course, even when the putative class points to the affidavits from class members that it could use to secure summary judgment on the disputed issue, the defendant may well find it quite easy at the certification stage to demonstrate that there is a predominance problem nonetheless. A defendant might have business records that suffice to permit it to do just that. Or, it might even have affidavits from putative class members -- as ACT **[**55]** has here -- that are representative of more than a de minimis chunk of the class and that thus would suffice to put a substantial number of the class members' own affidavits in doubt.

In other cases, though, a defendant might turn out to have a difficult time identifying evidence of that kind at the certification stage. Halliburton itself is, of course, an example of a case in which, by virtue of a strong presumption, that was so. But, even in a case involving a claim akin to the ones in Nexium or Asacol, for which no similar presumption applies, it may not be easy for the defendant to demonstrate that there is a predominance problem.

A plaintiff's representation about how it would have acted if the world had been different than it was (such as a consumer's testimony about whether she would have purchased a generic drug cheaper than the brand-named one that she had previously used) is, by its nature, not easily undermined. It is thus not clear to me how a defendant could show that it would be able to genuinely challenge such a representation post-certification if faced with the prospect of affidavits from class members attesting to something so peculiarly within their own knowledge.

[56]** True, a defendant in a case similar to Asacol could respond to the prospect of affidavits disclaiming brand loyalty by pointing to class members' health plan purchasing records. But such documents might merely highlight that a class defined by price-sensitive health plans -- indicating a lack of brand loyalty -- would still be a viable one. See *Asacol, 907 F.3d at 61* (Barron, J., concurring).

[*104] I also do not understand our precedent to this point to establish that a defendant's invocation of expert statistical evidence about the presence of uninjured class members materially changes the analysis that a district court must undertake. In Asacol, the district court did find based on expert testimony that approximately ten percent of the putative class was brand loyal and thus uninjured, *907 F.3d at 46-47*, and we then held that this evidence indicated that the inherently individualized issue of brand loyalty presented a predominance concern, given the "needle in a haystack" problem, *id. at 61* (Barron, J. concurring). But, we did not go on to suggest that such statistical evidence sufficed on its own to establish that the individual class members would not have been able to obtain summary judgment as to the issue of brand loyalty had they introduced affidavits attesting that they would have been willing to buy the cheaper generic if it had been available. Such statistical evidence would neither have established that any single class member was personally brand loyal nor even provided a basis for finding by a preponderance that any **[**57]** one of them was. See *Nexium, 777 F.3d at 20*; see also *Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 458, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016)* (explaining that the introduction of representative evidence in *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*, "would have violated the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action"); cf. Charles Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, *98 Harv. L. Rev. 1357, 1378-80 (1985)* (explaining the "blue bus hypothetical," in which a plaintiff loses in his suit against the Blue Bus Company before reaching the jury because a "factfinder c[ould] only conclude from the plaintiff's evidence that there was an 80% chance that he was injured by the Blue Bus Company and a 20% chance that he was not").

IV.

I do not seek here to define with any precision the showing at the certification stage that a defendant must make in the face of an assertion by the proponent of certification that common questions will predominate. I also do not seek here to define precisely the showing that the certification proponent must make to rebut the defendant's contention that common issues will not. Nor, finally, do I mean to catalog the specific types of cases that are more or less susceptible to being challenged on predominance **[**58]** grounds.

The reviewing court's task when it comes to the predominance requirement is to make a reasoned judgment about how the litigation would proceed in the event of certification. It must make that judgment by predicting how many individual mini-trials would be required if the class were certified, which in turn entails a forecast about whether it is "highly unlikely" that the defendant will be able to stave off a post-certification motion for summary judgment. *Waste Mgmt. Holdings, Inc., 208 F.3d 288, 298 (1st Cir. 2000)*. The showing required of both the putative class and the defendant at the certification stage as to predominance thus will necessarily vary from case to case, in line with the nature of the underlying claim and the type of issue that it requires class members to prove through individualized showings. The summary judgment standard is such that I do not hazard more categorical observations.

Still, the showings must have enough substance to them to permit the court to engage meaningfully in the required predictive **[*105]** exercise. And, in determining how much substance is enough, it is important to keep in mind both that the district court's judgment on that score is entitled to deference, see *In re Asacol Antitrust Litig., 907 F.3d 42, 51 (1st Cir. 2018)* (reviewing the certification decision **[**59]** for abuse of discretion), and that a certifying court will have an opportunity to revise that determination if in reality proceeding as a class proves unworkable, *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.").

It is also important to keep in mind that we have never indicated that, in a case where affidavits from class members are required to show that they can prove their claim, it would be an abuse of discretion for a district court to certify a class unless the putative class has already in fact collected and introduced those affidavits into the record. See *In re Nexium Antitrust Litig., 777 F.3d 9, 20-21, 24 (1st Cir. 2015)*. Nor is there anything in our case law to indicate that a defendant must actually collect and introduce at the certification stage all of the evidence on which it would rely in the merits phase, including the evidence it would introduce in order to oppose summary judgment. Indeed, I would be concerned that requirements to that effect would conflict with the principles that undergird *Rule 23(b)(3)*, and upset the careful balance that the (b)(3) class action procedure strikes between efficiency of litigation and fidelity to a defendant's due process **[**60]** and *Seventh Amendment* rights. See *Asacol, 907 F.3d at 51-52*; see also *Fed. R. Civ. P. 23* advisory committee's note to 1966 amendment ("*Subdivision (b)(3)* encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.").

That said, a review of the state of our precedent in this area reveals to me that there is still much to be decided when it comes to the predominance requirement, notwithstanding our important holdings to date establishing the applicable framework that must be used to decide future cases implicating it. For that reason, while I join the majority in full in affirming the District Court's denial of certification for this class, just as I joined the majority in Asacol itself, I think it important to emphasize here, as I thought it important to emphasize there, the limited nature of our holding in this case. For, I am confident that, as a consequence of this decision, our current precedent in this area continues to ensure that viable opportunities remain for securing class certification in cases involving claims that inherently depend on highly individualized **[**61]** means of proof, no matter how intently a defendant may represent at the certification stage that it wishes to contest those means at any trial that might ensue.

End of Document

Binotti v. Duke Univ.

United States District Court for the Middle District of North Carolina

August 30, 2021, Decided; August 30, 2021, Filed

Case No. 1:20-CV-470

Reporter
2021 U.S. Dist. LEXIS 225003 *

LUCIA BINOTTI, individually and on behalf of all others similarly situated, Plaintiff. v. DUKE UNIVERSITY, Defendant.

Prior History: *Binotti v. Duke Univ., 2020 U.S. Dist. LEXIS 218677 (M.D.N.C., Nov. 9, 2020)*

Core Terms

Settlement, class member, notice, class action, antitrust, adequacy, proposed settlement, final approval, cy pres, negotiations, parties, no-poach, damages, certification, Appointment, factors, faculty, funds

Counsel: **[*1]** For Duke University, Defendant: JAMES P. COONEY III, LEAD ATTORNEY, SARAH MOTLEY STONE, WOMBLE BOND DICKINSON (US) LLP, Charlotte, NC; ASHLEY BASS, DEREK LUDWIN, COVINGTON & BURLING LLP, Washington, DC; BRENT F. POWELL, WOMBLE BOND DICKINSON (US) LLP, Winston-Salem, NC.

For Lucia Binotti, individually and on behalf of all others similarly situated, Plaintiff: ANNE B. SHAVER, DEAN M. HARVEY, LIN Y. CHAN, JALLE H. DAFA, YAMAN SALAHI, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, San Francisco, CA; M. TRAVIS PAYNE, EDELSTEIN AND PAYNE, Raleigh, NC; DANIEL C. LYON, ELLIOT MORGAN PARSONAGE PLLC, Charlotte, NC.

Judges: Catherine C. Eagles, UNITED STATES DISTRICT JUDGE.

Opinion by: Catherine C. Eagles

Opinion

ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT

This matter is before the Court on motion by Plaintiff Dr. Lucia Binotti for final approval of a class action settlement with Duke University ("Duke"). A final fairness hearing at which counsel for all parties and Class Members had an opportunity to appear was held on August 25, 2019. The Court having considered the motion, all other papers filed concerning that motion, and all other pertinent documents and pleadings, and counsel and all interested parties having been **[*2]** heard at a final fairness hearing, **GRANTS** Plaintiff's motion, enters final judgment, and dismisses this action with prejudice.

FACTORS FOR CLASS CERTIFICATION

The proposed Settlement Class is defined as:

> All natural persons employed by Duke University or the University of North Carolina, Chapel Hill from October 1, 2001 through February 5, 2018, as a faculty member. Excluded from the Class are: members of the boards of directors and boards of trustees, boards of governors, senior administrators of Duke and UNC, unpaid faculty, and faculty with an academic appointment at the School of Medicine; and any and all judges and justices, and chambers' staff, assigned to hear or adjudicate any aspect of this litigation.

Doc. 58 at 4-5.

When a settlement is reached before *Rule 23* certification, a class may be certified solely for the purposes of settlement. *Covarrubias v. Capt. Charlie's Seafood, Inc., No. 2:10-CV-10-F, 2011 U.S. Dist. LEXIS 72636, 2011 WL 2690531, at *2 (E.D.N.C. July 6, 2011)*.

The parties seeking class certification must meet the four prerequisites of *Federal Rules of Civil Procedure 23(a)(1) through (4)*: numerosity, commonality, typicality, and adequacy. *Fed. R. Civ. P. 23(a)*; *Cerrato v. Durham Pub. Sch. Bd. of Educ., No. 1:16CV1431, 2017 U.S. Dist. LEXIS 216318, 2017 WL 2983301, at *2 (M.D.N.C. Mar. 17, 2017)*. The Court will certify the class for purposes of settlement.

First, the Settlement Class—which has over 15,000 members—is so numerous that joinder of all members is impracticable.

Second, commonality is satisfied because **[*3]** the common question of whether Duke and UNC entered into an unlawful agreement is "dispositive and over-shadow[s] other issues." *Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 146 (4th Cir. 2001)*. Specifically, the following major factual and legal issues are common to the Settlement Class: whether Duke and UNC entered into a no-poach agreement restraining recruitment and hiring, the agreement's scope and duration, and its effect on compensation.

Third, Dr. Binotti—who has worked as a non-medical faculty member at UNC since 1990, Doc. 1 at ¶ 9, and allegedly was paid less during the Class Period as a result of the alleged agreement—has claims that are typical of the Settlement Class. *Deiter v. Microsoft Corp., 436 F. 3d 461, 466 (4th Cir. 2006)* ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members."). Dr. Binotti shares with the Settlement Class Members the same alleged injuries arising from the same alleged conduct: suppression of their compensation due to the alleged no-poach agreement.

Lastly, Dr. Binotti adequately represents the class. "The adequacy inquiry . . . serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prod., Inc. v. Windsor, 117 S. Ct. 2231, 2250 (1997)*. The Court has carefully evaluated whether Dr. Binotti adequately **[*4]** represents the Class, as intra-class conflicts may arise where, as here, some of the Class claims are potentially time-barred, if the settlement value of one set of claims (e.g., "timely" or "time-barred") is substantially higher than the other. *See* *In re Cmty. Bank of N. Va. Mortg. Lending Pracs. Litig., 795 F.3d 380, 389 (3d Cir. 2015)*; *In re Corrugated Container Antitrust Litig., 643 F.2d 195, 220 (5th Cir. 1981)*. However, a conflict will only defeat the adequacy requirement if it is fundamental. *Sharp Farms v. Speaks, 917 F.3d 276, 295 (4th Cir. 2019)*. A conflict is not fundamental if all class members: (1) "share common objectives and the same factual and legal positions," and (2) have the same interest in proving the defendant's liability. *Id.* (citation omitted). Here, Dr. Binotti and the Class have the same interest in proving that Duke's conduct violated antitrust laws and suppressed compensation and mobility as a result. *See* *In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 272-73 (3d Cir. 2009)* (rejecting a time-period conflict argument because the class members "shared a unified interest" in establishing liability). There is nothing to indicate that any unnamed Class Members would assert a different legal or factual position to prove Duke's liability or to measure the damages resulting from the alleged conspiracy. *See* *Sharp Farms, 917 F.3d at 295* (holding a fundamental conflict existed where, because of divergent legal theories, the settlement "would provide broader relief to [part of] **[*5]** the settlement class at the expense of [other] class members . . .."). Approximately 95% of Class Members have claims in both periods, Doc. 51 at ¶ 4, and share Dr. Binotti's interest in maximizing damages for both periods. Moreover, the adequacy of the settlement does not rest only on the value of one set of claims; each set of claims had strengths and weaknesses and after careful investigation and consideration, Dr. Binotti and her counsel concluded that that there was no basis to value the claims of one period differently than the other. Doc. 49-1 at ¶¶ 5-6. There appears to be a reasonable and rational basis to distribute the settlement funds evenly throughout the Class Period, as proposed in the Settlement Agreement. *See* *Boyd v. Coventry Health Care Inc., 299 F.R.D. 451, 461 (D. Md. 2014)* ("The proposed allocation need not meet standards of scientific precision, and given that qualified counsel endorses the proposed allocation, the allocation need only have a reasonable and rational basis.") (citation omitted); *see also* *In re Corrugated Container Antitrust Litig., 643 F.2d at 220* (suggesting circumstances in which an "even spread" across two time periods might be appropriate). Considering the percentage of Class Members with claims in both periods and the similar valuation of the claims, any intra-class **[*6]** conflict arising from the fact that the Class Period covers "timely" and "time-barred" claims is minimal and is not a fundamental conflict sufficient to defeat the adequacy requirement at this stage.

Class certification is therefore appropriate if the predominance and superiority requirements of *Rule 23(b)(3)* are satisfied. *Fed. R. Civ. P. 23(b)(3)*. First, "questions of law or fact common to class members [must] predominate over any questions affecting only individual members . . .." *Id.* Second, "a class action [must be] superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* In settlement-only certification cases, "a district court need not inquire whether the case, if tried, would present intractable management problems, see *Fed. Rule Civ. P. 23(b)(3)(D)*, for the proposal is that there be no trial." *Windsor, 117 S. Ct. at 2248*.

a. Here, predominance is met because the significant legal and factual questions pertinent to the underlying cause of action that can be answered with common proof and without individual inquiries include (1) whether Duke entered an agreement violating the ***antitrust law***; (2) whether the agreement injured Plaintiff and the Class; and (3) whether damages can be measured through a common method. *See* *In re Titanium Dioxide Antitrust Litig., 284 F.R.D. 328, 344 (D. Md. 2012)*. The same **[*7]** is true for impact and damages. Proof of injury is not individualized, it instead depends on a common theory that pay structures at Duke and UNC were systematically suppressed, thus affecting all class members.

b. Superiority is also satisfied. Class treatment of the legal issues identified in this case would be superior to other procedures for the handling of the claims. No other litigation concerning this matter and filed by any of the parties involved in the present action is currently pending. Furthermore, this Court has a substantial interest in the resolution of the issues raised in this litigation occurring in a single forum.

Based on these findings and reasons, the Court hereby certifies the Settlement Class under *Rule 23(b)(3)*.

The Court hereby appoints Dr. Binotti and her counsel as Settlement Class Representative and Settlement Class Counsel.

Appointment of Dr. Binotti as Settlement Class Representative is appropriate because she is a member of the Settlement Class, she has adequately represented the interests of the Settlement Class in the past, and there is nothing to indicate that she will be unable to represent those interests in the future.

Appointment of Lieff, Cabraser, Heimann & Bernstein, **[*8]** LLP (LCHB), Elliot Morgan and Parsonage, P.A. (EMP), and Edelstein & Payne (EP) as Settlement Class Counsel is appropriate. In evaluating the appointment of class counsel, courts must consider: (i) counsel's work in identifying or investigating claims; (ii) counsel's experience in handling the types of claims asserted; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. *Fed. R. Civ. P. 23(g)(1)(A)*.

Counsel's work in identifying and investigating the claims at issue in this action dates back many years. *See* Doc. 49-1 at ¶ 8, Doc. 41 at ¶ 13. LCHB and EMP successfully negotiated a settlement for the medical faculty at UNC and Duke in *Seaman v. Duke University*, No. 1:15-cv-00462 (M.D.N.C.), an action arising out of the same alleged no-poach agreement. Doc. 41 at ¶ 13; Doc. 49-1 at ¶¶ 8. Through discovery in that litigation, counsel obtained documentary evidence and elicited witness testimony revealing the alleged agreement stretched beyond the medical schools. Doc. 41 at ¶ 13.

Second, LCHB, EMP, and EP have significant experience handling class actions, including antitrust and employment class actions. Doc. 44 at ¶¶ 3-12; Doc. 43 at ¶¶ 3-7.

Third **[*9]** and relatedly, LCHB, EMP, and EP have demonstrated their knowledge of the applicable law by successfully negotiating a Settlement here and the *Seaman* settlement and by successfully defending against part of Duke's motion for judgment on the pleadings, despite the unsettled case law underlying some of its theories for proving liability. Doc. 33 at 3-4. Counsel thereafter renewed settlement discussions with Duke, recognizing the risks of litigation for both sides. Doc. 49-1 at ¶¶ 11-13.

Fourth, LCHB, EMP, and EP have devoted ample resources to litigating this action and to negotiating the Settlement. *Id.* at ¶¶ 9-13; Doc. 43 at ¶¶ 8-9; Doc. 44 at ¶¶ 13-14.

FACTORS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

1. Dr. Binotti's motion for final approval of the proposed Settlement is **GRANTED**.

Unless otherwise defined herein, all terms that are capitalized herein shall have the meanings ascribed to those terms in the Settlement Agreement.

The Court makes the following FINDINGS under *Federal Rule of Civil Procedure 23*:

a."It has long been clear that the law favors settlement." *United States v. Manning Coal Corp., 977 F.2d 117, 120 (4th Cir. 1992)*. This is particularly true in class actions. *Reed v. Big Water Resort, LLC, No. 2:14-cv-101583-DCN, 2016 U.S. Dist. LEXIS 187745, 2016 WL 7438449, at *5 (D.S.C. May 26, 2016)* (noting the "strong judicial policy in favor of settlements, particularly in the class action context" (citation **[*10]** omitted)); 4 William B. Rubenstein et al., *Newberg on Class Actions* § 13.44 & n.1 (5th ed. 2018) ("*Newberg*") (collecting cases).

The Court previously granted preliminary approval of the Settlement, finding that it was fair, reasonable, and adequate, and that the Court was likely to grant final approval of the Settlement pursuant to *Federal Rule of Civil Procedure 23(e)(2)*. *See* Doc. 55. Accordingly, notice to the Class was distributed on June 28, 2021, pursuant to the Court-approved notice plan. Doc. 65 ¶ 3. The Class had 30 days to object or, if eligible, to opt-out of the Settlement. There was only one objection and only 8 Class Members opted out. Supp. Decl. of Amy Fringer, Doc. 68 ¶ 4; Second Supp. Decl. of Amy Fringer, Doc. 70-4 ¶ 2. "[T]aking account all of the information learned during [the notice process], the court [now] decides whether or not to give 'final approval' to the settlement." *Newberg* § 13:1.

A class settlement may be approved if it is "fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(2)*; *In re Jiffy Lube Sec. Litig., 927 F.2d 155, 158-59 (4th Cir. 1991)*. "In applying this standard, the Fourth Circuit has bifurcated the analysis into consideration of fairness, which focuses on whether the proposed settlement was negotiated at arm's length, and adequacy, which focuses on whether the consideration **[*11]** provided the class members is sufficient." *Beaulieu v. EQ Indus. Servs., Inc., No. 5:06-CV-00400BR, 2009 U.S. Dist. LEXIS 63574, 2009 WL 2208131, at *23 (E.D.N.C. July 22, 2009)* (citing *Jiffy Lube, 927 F.2d at 158-59*).

A four-factor test is applied to determine the fairness of a proposed settlement: "(1) the posture of the case at the time the proposed settlement was reached, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the settlement negotiations, and (4) counsel's experience in the type of case at issue." *2009 U.S. Dist. LEXIS 63574, [WL] at *24*.

All four fairness factors favor approval here, as the Court held at preliminary approval. *See* Doc. 55 at 11-12. The Settlement was reached after adversarial litigation, including Duke's Motion for Judgment on the Pleadings, which involved complex questions of law prompting the Court to grant permission for the Parties to supply supplemental briefing. Docs. 28, 32. Further, Class Counsel's work in the *Seaman* litigation set the stage for these settlement negotiations. Class Counsel also retained qualified economic experts to estimate the extent to which the alleged misconduct suppressed Class pay. Doc. 41 at ¶ 5. Counsel for both sides had sufficient information to evaluate the costs and benefits of settlement at this juncture. The parties' negotiations were adversarial and at arm's-length. The negotiations **[*12]** were facilitated through the capable work of a neutral third-party mediator, Jonathan Harkavy.

Finally, counsel for Dr. Binotti have extensive experience in antitrust and class action litigation, and their informed opinion is entitled to weight.

The Court assesses the adequacy of the Settlement through the following factors: "(1) the relative strength of the plaintiffs' case on the merits, (2) any difficulties of proof or strong defenses the plaintiffs would likely encounter if the case were to go to trial, (3) the expected duration and expense of additional litigation, (4) the solvency of the defendants and the probability of recovery on a litigated judgment, and (5) the degree of opposition to the proposed settlement." *Beaulieu, 2009 U.S. Dist. LEXIS 63574, 2009 WL 2208131, at *26* (citing *Jiffy Lube, 927 F.2d at 158*; *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 855 F. Supp. 825, 828-29 (E.D.N.C. 1994)*).

As to the first and second factors, Dr. Binotti has adequately explained both the strengths and risks associated with continued litigation of her claims and trial. In particular, though Dr. Binotti had evidence of liability, Duke was prepared to introduce contrary evidence that the alleged no-poach agreement either did not exist or was not in force during the Class Period. Settlement is also favorable at this stage given the Court's decision that the claims **[*13]** for damages before 2016 are barred by the statute of limitations, Doc. 33 at 2, 4-5, and for damages after 2016, the Class would face the challenge of persuading a jury that Duke and UNC continued their alleged no-poach agreement even after Dr. Seaman filed her complaint on June 9, 2015. Dr. Binotti could have sought reconsideration of the decision or an appeal, but there is no guarantee Dr. Binotti would have prevailed. Considering these risks, the $19 million monetary recovery reflects a strong result for the Class. The proposed allocation plan is fair and reasonable as it will compensate class members on a pro rata basis according to the degree of alleged harm they suffered.

As to the third factor, the parties were fully informed about the strengths and weaknesses of the evidence. Continued litigation would involve considerable time and expense for the parties and the Court and risked the chance of no recovery for the Class. The Settlement guarantees Class Members significant monetary and injunctive relief.

The fourth factor is irrelevant because there is no indication that Duke would be unable to satisfy a judgment.

The fifth factor, the degree of opposition to the Settlement, can **[*14]** be evaluated because the Class has had an opportunity to comment in response to the notice program. Only one Class Member objected to the Settlement and the proposed request for attorney's fees and reimbursement of costs, and he did not object to the proposed allocation plan or the proposed service award for Dr. Binotti. Doc. 65 at ¶ 10; Doc. 70-4 ¶ 2; id. at p 4-5. Furthermore, only eight Class Members exercised their right to opt out of the Class. Doc. 68 at ¶ 4. In other words, over 99% of Class Members have chosen to release their claims against Duke in exchange for relief under the Settlement. The small number of exclusion requests is a strong indication of widespread support for the Settlement and that the Settlement is fair, reasonable, and adequate. *See* *In re Mills Corp. Sec. Litig., 265 F.R.D. 246, 257 (E.D. Va. 2009)* ("[A]n absence of objections and a small number of opt-outs weighs significantly in favor of the settlement's adequacy."); *Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975)* ("The attitude of the members of the class, as expressed directly or by failure to object, after notice, to the settlement, is a proper consideration for the trial court . . . ."). The only objection filed did not turn on the adequacy of the settlement amount. *See* Doc. 70-4 at p 4-5.

In addition, Duke University **[*15]** provided the required notice of the proposed settlement under the provisions of the *Class Action Fairness Act, 28 U.S.C. § 1715*, to the Attorney General of the United States, the Antitrust Division of the Department of Justice, and the various attorneys-general for all states and territories. *See* Docs. 71 ¶¶ 4, 7; 71-1. This included the Attorney General of North Carolina. Doc. 71-1 at 6 (column 2). The notices attached the materials required by CAFA, including the proposed settlement agreement and plan of allocation. Doc. 71 at ¶ 5; *see* Doc. 71-1. No governmental officer made any objection to the settlement, which also tends to indicate the settlement is appropriate.

The Court therefore concludes that the Settlement and proposed Plan of Allocation are fair, reasonable, and adequate and satisfy the criteria for final approval under *Federal Rule of Civil Procedure 23*.

Notice to Class Members

The Class notice was delivered by mail and e-mail to all Class Members. *See* Docs. 65 at ¶ 3, 65-1, 65-2. The mail and e-mail notices clearly explained Class Members' rights, including the nature of the action, the Class definition, the legal issues, Class Members' rights to make an appearance with an attorney, Class Members' right to request exclusion, Class Members' right **[*16]** to object to the Settlement, and the binding effect of a Class judgment. *See* *Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii)*. The Notice apprised Class Members of Class Counsel's intent to seek 25% of the common fund as attorney's fees, to request reimbursement of costs, and to request a service award for Dr. Binotti.

Notice was also given through a case-specific website that published all relevant litigation documents and settlement notices, and which received over 4,652 unique visits. *See* Doc. 65 at ¶ 4. Additionally, the Settlement Administrator established a toll-free telephone number and handled calls from over 197 Class Members concerning the Settlement. *Id.* at ¶ 8.

The Court finds that the notice program effectively apprised Class Members of their rights, was the best practicable under the circumstances, and complied with all due process requirements. *See* *Fed. R. Civ. P. 23(e)(1)(B)* (notice must be given to class "in a reasonable manner"); *Domonoske v. Bank of Am., N.A., 790 F.Supp.2d 466, 472 (W.D. Va. 2011)* ("In the context of a class action, the due process requirements of the *Fifth Amendment* require reasonable notice combined with an opportunity to be heard and withdraw from the class.") (cleaned up).

The Notice given by Duke University complied with the requirements of the Class Action Fairness Act. *See* Docs. 71; 71-1.

Designation [*17] of *Cy Pres* Recipient

"[A] *cy pres* distribution is designed to be a way for a court to put any unclaimed settlement funds to their 'next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'" *Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 474 (5th Cir. 2011)* (quoting *Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007)*. *Cy pres* recipients must promote the objectives of the underlying statutes at issue and benefit the interests of the class members. *See Nachshin v. AOL, 663 F.3d 1034, 1040 (9th Cir. 2011)* (noting that *cy pres* distribution should be guided by the objectives of the underlying statutes, target the plaintiff class, and provide reasonable certainty that class members will benefit); *accord, Krakauer v. Dish Network, LLC, No. 1:14-CV-333, , 2020 U.S. Dist. LEXIS 199112, 2020 WL 6292991, at *7 (M.D.N.C. Oct. 27, 2020)*. Generally, courts approve *cy pres* distributions "only when more redistribution is no longer feasible." *Newberg* § 12:32.

Pursuant to the parties' Settlement, a *cy pres* distribution is only contemplated if further redistribution of unclaimed funds to Class Members would not be economically feasible. *See* Settlement, Doc. 41-1, ¶ IV(A)(8). Dr. Binotti proposes that the Court designate the American Antitrust Institute (AAI) as the *cy pres* recipient. The AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. **[*18]** Its mission includes "research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy." *See, Mission and History*, AM. ANTITRUST INST., https://www.antitrustinstitute.org/about-us/ (last visited August 10, 2021). Further, the AAI has a track record of advocating specifically against no-poach agreements on behalf of workers. *See, e.g.*, Randy Stutz, *AAI Issues New White Paper on the Antitrust Treatment of Labor-Market Restraints*, AM. ANTITRUST INST. (July 31, 2018), https://www.antitrustinstitute.org/work-product/2246/ .

Having reviewed the organization's purpose and considered its nexus to this case and to the advancement of Class Members' interests, the Court concludes that the AAI is an appropriate *cy pres* recipient. Should unclaimed funds remain for which further redistribution would be economically unfeasible, the Settlement Administrator is authorized to disburse those funds to the AAI, consistent with the terms of the Settlement Agreement.

For these reasons and based on the record before it, the Court **GRANTS** Plaintiff's motion for final approval of the Settlement.

IT IS SO ORDERED [*19] , this the 30th day of August, 2021.

/s/ Catherine C. Eagles

UNITED STATES DISTRICT JUDGE

Sanborn Library LLC v. Eris Info. Inc.

United States District Court for the Southern District of New York

August 30, 2021, Decided; August 30, 2021, Filed

19-CV-2049 (LAK) (OTW)

Reporter
2021 U.S. Dist. LEXIS 165496 *

THE SANBORN LIBRARY LLC, Plaintiff, -against- ERIS INFORMATION INC., et al., Defendants.ERIS INFORMATION INC., et al., Counterclaim-Plaintiffs, -against- THE SANBORN LIBRARY LLC and ENVIRONMENTAL DATA RESOURCES, LLC, Counterclaim-Defendants.

Subsequent History: Motion granted by *Sanborn Library Llc v. Eris Info., 2021 U.S. Dist. LEXIS 183796, 2021 WL 4316141 (S.D.N.Y., Sept. 22, 2021)*

Request denied by *Sanborn Libr. LLC v. ERIS Info. Inc., 2022 U.S. Dist. LEXIS 156538 (S.D.N.Y., Aug. 30, 2022)*

Core Terms

maps, alleges, customers, fire insurance, motion to dismiss, oral statement, disparagement, bundle, sham, environmental, argues, consumers, products, lawsuit, Counterclaims, competitors, recommend, defamation, Blog, facilities, packages, courts, special damage, collecting, business relationship, district court, discovery, pricing, tortious interference, public domain

Counsel: **[*1]** For The Sanborn Library LLC, Plaintiff, Counter Defendant: Catherine Yunie Stillman, Joshua Scott Wolkoff, Baker & McKenzie LLP, NY, NY; Ellen Yueh-Ning Cheong, James S. Blank, Baker & McKenzie LLP, New York, NY; Mark Harris Hamer, Baker McKenzie, Washington, DC.

For ERIS Information Inc., Eco Log Environmental Risk Information Services Ltd., ERIS Information Limited Partnership, Defendants: Barry R. Horwitz, Sara Skulman, LEAD ATTORNEYS, PRO HAC VICE, Greenberg Traurig, LLP, Chicago, IL; Justin Albano MacLean, LEAD ATTORNEY, Greenberg Traurig, LLP, New York, NY; Richard D. Harris, LEAD ATTORNEY, PRO HAC VICE, Greenberg Traurig, LLP (Chicago), Chicago, IL; Gregory J. Casas, Greenberg Traurig, LLP, Austin, TX; Jacqueline Brousseau, Greenberg Traurig, P.A, Chicago, IL; Li-Yu Jade Chen, Greenberg Traurig, P.A, New York, NY.

For ERIS Information Limited Partnership, Eco Log Environmental Risk Information Services Ltd., ERIS Information Inc., Counter Claimants: Barry R. Horwitz, Sara Skulman, LEAD ATTORNEYS, Greenberg Traurig, LLP, Chicago, IL; Justin Albano MacLean, LEAD ATTORNEY, Greenberg Traurig, LLP, New York, NY; Richard D. Harris, LEAD ATTORNEY, Greenberg Traurig, LLP (Chicago), Chicago, **[*2]** IL; Gregory J. Casas, Greenberg Traurig, LLP, Austin, TX; Jacqueline Brousseau, Greenberg Traurig, P.A, Chicago, IL.

For Environmental Data Resources, LLC, Counter Defendant: James S. Blank, LEAD ATTORNEY, Ellen Yueh-Ning Cheong, Baker & McKenzie LLP, New York, NY; Joshua Scott Wolkoff, LEAD ATTORNEY, Catherine Yunie Stillman, Baker & McKenzie LLP, NY, NY; Mark Harris Hamer, Baker McKenzie, Washington, DC.

Judges: Ona T. Wang, United States Magistrate Judge. Honorable LEWIS A. KAPLAN, United States District Judge.

Opinion by: Ona T. Wang

Opinion

REPORT & RECOMMENDATION

ONA T. WANG, United States Magistrate Judge:

To the Honorable LEWIS A. KAPLAN, United States District Judge:

I. Introduction

Plaintiff/counterclaim-defendant The Sanborn Library LLC ("Sanborn") filed a complaint alleging copyright infringement and violation of the Digital Millennium Copyright Act ("DMCA") against defendants/counterclaim-plaintiffs ERIS Information Inc., Eco Log Environmental Risk Information Services, Ltd., and ERIS Information Limited Partnership (collectively, "ERIS"). ERIS subsequently filed counterclaims against Sanborn and counterclaim-defendant Environmental Data Resources, LLC (individually, "EDR," and collectively with Sanborn, "EDR-Sanborn") seeking declaratory relief **[*3]** and alleging antitrust violations of the Sherman Act and Clayton Act; false advertising under the Lanham Act; and defamation, product disparagement, trade libel, deceptive acts and practices, false advertising, and tortious interference with prospective business relations under New York law. Before the District Court is EDR-Sanborn's motion to dismiss ERIS's counterclaims pursuant to *Fed. R. Civ. P. 12(b)(6)*. For the reasons discussed below, I recommend the motion to dismiss be **GRANTED in part and DENIED in part as follows**:

- ERIS's product disparagement (Count IX), trade libel (Count XI), and tortious interference with prospective business relations (Count XII) claims should be **DISMISSED**.
- ERIS's Sherman Act and Clayton Act claims (Count IV and V) should proceed, except that any essential facilities or product bundling claims should be **DISMISSED**.
- ERIS's Lanham Act (Count VI), New York General Business Law (Counts VII and VIII), and defamation (Count X) claims should proceed with the limitations detailed below. *See infra* Section III.D.
- ERIS should be granted leave to amend its counterclaims, with its Second Amended Counterclaims due within **fourteen (14)** days of the District Court's ruling on this Report and Recommendation. **[*4]**

II. Background[1]

A. The Parties and the Relevant Market

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[1] The facts set forth herein are drawn from ERIS's First Amended Counterclaims (the "Counterclaims") (ECF 40) and materials incorporated by reference in the Counterclaims, including the ASTM E1527 standard and EDR's sample "Certified Sanborn Map Report." Decl. of Joshua S. Wolkoff ("Wolkoff Decl.") (ECF 46), Ex. A, C. *See, e.g., Halebian v. Berv, 644 F.3d 122, 131 n.7 (2d Cir. 2011)* ("[I]t is well established that on a motion to dismiss for failure to state a claim pursuant to *Rule 12(b)(6)*, the court may also rely upon documents attached to the complaint as exhibits and documents incorporated by reference in the complaint.") (internal citations omitted). Citations to "¶" or "¶¶" are to the corresponding paragraph numbers in the Counterclaims.

Sanborn[2] purports to own "the largest and most comprehensive collection" of fire insurance maps in the world (the "Sanborn Collection," or when referring to maps in the Sanborn Collection, "Sanborn Maps"). ¶ 2 (quoting ECF 12 ¶ 2). Fire insurance maps were initially created to provide insurance underwriters with historical factual information needed to assess a property's risk of being damaged by fire. ¶ 17. They depict, *inter alia*, the "size, shape, and construction of dwellings, commercial buildings, and factories as well as fire walls, locations of windows and doors, sprinkler systems, . . . types of roofs[,] . . . the widths and names of streets, property boundaries, building uses, and house and block numbers." ¶ 17. Sanborn began creating maps in 1866 and has held a near-100% monopoly on fire insurance maps since the early twentieth century. ¶¶ 3, 18. Today, fire insurance maps are used by environmental professionals conducting site assessments to protect owners of real property from liability for environmental contamination under the *Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et seq.* ("CERCLA"). ¶¶ 2, 4.

Under CERCLA and its implementing regulations, parties with **[*5]** interests in a commercial real estate holding may face strict liability for environmental contamination unless they undertake an "all appropriate inquiry assessment" of the property, known as a Phase I Environmental Site Assessment ("Phase 1 ESA"), that complies with standards set by the international standards-setting organization ("SSO") ASTM International, namely ASTM E1527. ¶ 4, 23, 25; *see generally* 40 C.F.R. § 312.[3] A Phase I ESA is conducted by an "environmental professional," who inquires into the past ownership and uses of the property, evaluates environmental conditions, and ultimately creates a written report that identifies existing and potential contamination liabilities ("Phase 1 ESA Report"). ¶ 25. These environmental professionals engage the services of data provision companies, such as EDR or ERIS, to provide them with "report packages" containing the necessary historical sources and data needed to assess environmental risk and create a Phase I ESA Report for a given site. ¶ 36. ERIS refers to the "products and services required for the Phase I ESA report . . . as the 'environmental risk assessment data market'" ("ERAD" or the "ERAD market"). ¶ 37.

EDR and ERIS compete, throughout **[*6]** the US, in this market to provide environmental professionals with report packages of ERAD—which include fire insurance maps—used for conducting Phase I ESAs. ¶¶ 37-38. EDR purchased rights to the more than 1.3 million Sanborn Maps in the Sanborn Collection in 1995 or 1996 and purports to be the exclusive licensee of all Sanborn Maps for commercial use. ¶¶ 26, 30, 40, 47, 49, 56.[4] EDR allegedly holds at least a 70% market share in the ERAD market. ¶¶ 3, 5, 38, 77, 123-24. ERIS entered the US market in 2013 and is the next largest competitor to EDR with a 10-15% market share. ¶¶ 78, 129. In 2011, ERIS acquired hundreds of thousands of Sanborn Maps (including a complete set of Sanborn Maps from 1867-1970) from academic publishers ProQuest and LexisNexis for use and inclusion in ERIS's ERAD report packages. ¶¶ 82-83.

As described more fully below, ERIS alleges that EDR-Sanborn has "systematically and intentionally taken steps that have prevented any real and meaningful competition in the environmental risk assessment data market" through manipulation of industry standards, failure to license standard-essential products, sham litigation, **[*7]**

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[2] For simplicity, "Sanborn" is used to refer to The Sanborn Library LLC and its alleged predecessors, including The Sanborn Map Company. ERIS alleges, on information and belief, that EDR is a "sister company" to Sanborn "with a common parent or with a group of common members," but states that "[f]urther discovery" is needed to ascertain the "exact nature" of EDR's relationship with Sanborn. ¶ 16; *see* ¶ 88 (suggesting EDR may own or have owned Sanborn "in whole or in part"). It is also worth noting that ERIS refers to counterclaim-defendants collectively as "EDR-Sanborn" throughout the Counterclaims, though all parties refer to the entities collectively as only "EDR" in their motion to dismiss briefs. As specified above, I refer to the entities collectively as "EDR-Sanborn."

[3] ERIS alleges, on information and belief, that "every commercial property sold in this country for $1 million in value or more first undergoes a Phase I ESA before it is purchased" to protect against liability under CERCLA. ¶ 25.

[4] While ERIS alleges that there are more than 1.3 million Sanborn Maps, EDR-Sanborn inconsistently suggests that the number of Sanborn Maps ranges from 1.2 to 1.4 million in its pleadings and the documents incorporated by reference into the Counterclaims. *See* ECF 12 at ¶ 19 (1.2 million); *SANBORN® AND SANBORN MAP®*, EDR Lightbox, https://edrnet.com/prods/sanborn-maps/ (1.3 million); Derek Ezovski, *Free Sanborns - Part 1*, EDR CONNECT, https://connect.edrnet.com/s/article/Free-Sanborns-Part-1-1489082078068 (1.4 million).

disparagement, discounted bundled pricing, and exclusive dealing. ¶¶ 7, 158. ERIS alleges such conduct has "erected a substantial barrier" to market entry and "dissuaded many entities" from entering or remaining in the ERAD market. ¶¶ 5, 72, 123, 125, 127-30. EDR-Sanborn's conduct has also allegedly coerced environmental professionals into obtaining products from EDR rather than from competitors (such as ERIS), for free, or not at all. ¶¶ 60, 64, 67, 130.

B. ASTM E1527

The ASTM E1527 standard was first set in 1993, two or three years before EDR allegedly acquired rights to the Sanborn Maps, and has been continuously updated every few years since that time. ¶¶ 24-26, 40. The standard, in relevant part, requires that "[a]ll obvious uses of the property [at issue] shall be identified from the present, back to the property's first developed use, or back to 1940, whichever is earlier" and explains that "this task requires reviewing only as many of the [enumerated] standard historical sources . . . as are necessary and both reasonably ascertainable and likely to be useful." Wolkoff Decl., Ex. A (ASTM Standard § 8.3.2); ¶ 27. Additionally, "[r]elevant supporting documentation shall be included **[*8]** in the [Phase I ESA Report] or adequately referenced" and "[i]f the environmental professional has chosen to exclude certain documentation from the report, the environmental professional shall identify in the report the reasons for doing so (for example, a confidentiality agreement)." Wolkoff Decl., Ex. A (ASTM Standard § 12.2); *see* ¶¶ 27, 31.

One of the enumerated "standard historical sources" are fire insurance maps, which are defined as "maps produced for private fire insurance map companies that indicate uses of properties at specified dates and that encompass the property." Wolkoff Decl., Ex. A (ASTM Standard §§ 3.2.37; 8.3.4.2); ¶ 27. According to ERIS, "the only product that meets this definition is the EDR-acquired Sanborn Maps." ¶¶ 27, 32. While ASTM E1527 says fire insurance maps are "often available at local libraries, historical societies, private resellers, or from the map companies who produced them," Wolkoff Decl., Ex. A (ASTM Standard §§ 3.2.37; 8.3.4.2), ERIS alleges that (1) not all maps are available at all such sources and (2) even when they are available, EDR-Sanborn has taken the position that commercial use of Sanborn Maps acquired from any other sources, including **[*9]** libraries, is against copyright, and that EDR "sells the only map products that can [legally] be used to satisfy the [ASTM E1527] standard." ¶¶ 27, 30, 32.

ERIS contends that (Sanborn) fire insurance maps are *de facto* necessary to comply with the standard. As illustrated above, ASTM E1527 does not facially require environmental professionals to use or physically attach fire insurance maps in Phase I ESAs, which usually involve various sources, such as street directory searches, aerial photographs, topographical maps, property tax files, and recorded land title records, among others. ¶ 29. However, due to their "historical factual significance" and "the nature and accuracy of the factual details contained" in fire insurance maps, ERIS alleges that "[i]t is standard practice to rely on and consult fire insurance maps (*i.e.*, Sanborn maps) for the historical facts they portray when preparing Phase I ESAs" and, further, that it is "impossible" to conduct a competent and standard-compliant Phase I ESA without searching for, consulting, and physically providing copies of relevant and available (Sanborn) fire insurance maps. ¶¶ 4, 29, 33. ERIS insists that "there are no alternative sources **[*10]** for the factual information set forth in those maps" and thus "[n]o substitute products, alternative map or otherwise, exist that a purchaser can use to comply with the ASTM E1527 standard and qualify for the liability shield." ¶¶ 4, 25, 33, 39.

ERIS contends that EDR-Sanborn manipulated the ASTM E1527 to incorporate Sanborn fire insurance maps "without disclosing [to the ASTM committee] the true effect of the standard that [it] had created." ¶ 35. Specifically, according to ERIS, representatives from EDR, including former Chief Executive Officer Anthony Buonicore, were "intentionally and heavily" involved in setting ASTM E1527 and possessed "enough clout" to "institute [EDR's] preferred requirements." ¶ 27. Buonicore, who held leadership roles at the ASTM, including as committee chairman in the 1990s, allegedly "lobbied and pushed" for the adoption of Sanborn fire insurance maps as a (*de facto*) required historical source. ¶¶ 4, 26. Buonicore supposedly took such steps while knowing—but not disclosing to the relevant ASTM committee—that EDR would purchase rights to (and claim exclusive control over) all maps capable of meeting the standard. ¶¶ 26, 32, 34-35, 39. ERIS adds that EDR-Sanborn **[*11]** has continued to manipulate the ASTM standard since 1992, such as by recently proposing to revise the standard's definition of fire insurance maps to omit that they are "available at local libraries, historical societies, [and] private resellers" so as to "conceal legitimate sources of Sanborn Maps (especially those clearly in the public domain) . . . in an attempt to funnel all requests for such maps to EDR." ¶ 75. Because of its conduct, ERIS argues that EDR is obliged to at least license any valid copyrights covering the Sanborn Maps and to do so under fair, reasonable, and non-discriminatory ("FRAND") terms. ¶ 39.

C. Copyright Litigation and Statements to the Marketplace

ERIS alleges that EDR-Sanborn has repeatedly and widely stated and advertised—in EDR's report packages, on EDR's website, and in oral and email communications—that **all** Sanborn Maps are subject to valid copyright protection; that ERIS is committing copyright infringement through its report packages; and that obtaining and using Sanborn Maps for a Phase 1 ESA from ERIS or any source other than EDR-Sanborn is illegal. ¶¶ 62-72, 101; *see infra* Section III.D. ERIS alleges that such statements have been made to customers **[*12]** and potential customers for at least as long as ERIS has been in the ERAD market (*i.e.*, since at least 2013).

On March 6, 2019, Sanborn sued ERIS for copyright infringement under *17 U.S.C. § 101 et seq.* and violation of the DMCA, *17 U.S.C. § 1202* (the "Copyright Suit"), alleging, *inter alia*, that ERIS has acquired a collection of fire insurance maps "built entirely of Sanborn Library's copyrighted maps," "infringed [Sanborn's] copyrights in each of the Sanborn Maps," and replaced Sanborn's copyright management information ("CMI") with ERIS's own, false CMI on each map. (ECF 12 ¶¶ 1, 5, 26, 38, 43, 52, Prayer for Relief A). ERIS alleges EDR has "undertaken an extensive marketing campaign" since the start of the Copyright Suit, making statements regarding its claims orally, on its website, and in a market-wide email. ¶¶ 94-101.

ERIS acknowledges that it copies and distributes Sanborn Maps, but alleges that there are no "valid or enforceable copyright in most, if not all, of the maps at the center of this case" because they "are either invalid, expired, or unenforceable (if not all three)."[5] ¶ 6. For example, ERIS alleges that many Sanborn Maps are "firmly" and "objectively" in the public domain because they, *inter alia*, (a) **[*13]** "were published before 1924, and thus any copyright in the original and renewal terms would have expired," (b) "were published between 1924 and 1964 and were not effectively renewed," (c) are "updated" maps "copied from the expired-copyrighted works," or (d) were "published without an appropriate copyright notice." ¶¶ 6, 22, 47-49, 64; *see also* ¶¶ 57-60 (providing examples of Sanborn Maps allegedly in the public domain).[6] However, ERIS claims that it is difficult for outsiders to verify EDR-Sanborn's claims about its purported copyright rights because of the "sheer number" of Sanborn copyright registrations and the fact that "Copyright Office records (especially older records) are difficult to find or identify." ¶¶ 7, 54, 93. Further, EDR-Sanborn "refus[es] to ever identify" relevant copyright registrations when making accusations of infringement. ¶¶ 54, 92.[7]

Moreover, EDR-Sanborn has supposedly known "for decades" that the "vast majority" of the maps in the Sanborn Collection are not protected by valid copyrights and has "detailed documentation showing that only few of its maps continue to remain subject to copyright protection." ¶¶ 40, 52, 57, 132, 134. Specifically, ERIS asserts **[*14]** that between 1995 and 1998, around the time that EDR acquired rights to the Sanborn Maps, "EDR undertook a thorough [multi-year] analysis of each copyright registration and each Sanborn map to determine the copyright status of each map," and discovered that most of the copyrights were lapsed or invalid because Sanborn had not been "diligent in registering, updating and/or renewing its copyrights, nor was it diligent in publishing its updated

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[5] ERIS also alleges that its conduct is consistent with the terms and conditions (or lack thereof) of ERIS's acquisition of Sanborn Maps from ProQuest and LexisNexis. ¶¶ 83-84, 87.

[6] ERIS also suggests that Sanborn Maps "do not exhibit the creativity and originality required to be copyrightable" and that the use of information in the Sanborn Maps for the "transformative" purpose of creating environmental risk assessment report packages constitutes "quintessential fair use." ¶¶ 6, 50, 73-77.

[7] EDR-Sanborn has had to make such identifications during the course of discovery. *See, e.g.*, December 3, 2019 Tr. (ECF 65) at 3-27.

works while providing still effective copyright notice of those works." ¶¶ 102, 132. EDR allegedly created a spreadsheet cataloguing "each and every expired or invalid copyright." ¶ 52.

ERIS alleges that despite knowledge that the vast majority of the alleged copyrights are invalid, non-existent, or expired, EDR-Sanborn has used its misrepresentations and the Copyright Suit (as well as other similar lawsuits) to dissuade competitors from staying or remaining in the market, drive up their costs through legal fees, and "choke" their cash flow by scaring customers away from meeting and doing business with companies other than EDR. ¶¶ 5, 7, 53, 60, 135.[8] Indeed, ERIS states that the Copyright Suit has caused it to lose business opportunities, alleging **[*15]** that an entity ERIS refers to as "Company K" refused to meet with ERIS to see a demonstration of ERIS's products and services, "citing the existence of the lawsuit as a reason." ¶¶ 128, 135.

D. Product Bundling

As explained above, EDR and ERIS both provide environmental professionals with "report packages containing [ERAD]." ¶ 109. However, these professionals also require report "writer" software in order to generate usable reports from this data. Because "ERIS does not have its own in-house writer," its "customers have to purchase the writer from a separate company at a cost of approximately $150 per package of materials." ¶ 112.

EDR, on the other hand, has in-house report writer software called "Parcel," though ERIS alleges that Parcel "is not as good as the other similar products on the market." ¶¶ 112, 114. While EDR has long sold Parcel separately for between $100-$150 per report generated from a package of materials, EDR is now including its writer software "as part of a bundle" with its package of ERAD for around $180, a price which allegedly "does not cover the cost of every item in the overall bundle." ¶¶ 107, 112-13. EDR is allegedly offering Parcel "as a free perk to capture **[*16]** additional sales," "divert customers from ERIS to EDR," and ultimately "drive ERIS from the market." ¶¶ 112, 115. ERIS states that this has caused ERIS to lose sales to EDR and that, in order to continue to compete in the ERAD market, ERIS will have to lower its prices and/or acquire an in-house writer and sell it at a loss by including it for free in a bundle with its report packages. ¶¶ 107, 113, 117.

E. Exclusivity Agreements

EDR is allegedly entering into steeply discounted, long-term exclusive contracts with environmental professionals who perform Phase I ESAs. ¶¶ 118-123. Specifically, ERIS alleges that EDR has already entered into exclusive contracts with at least seven of the ten largest consulting firms, with all ten firms constituting (*i.e.*, purchasing products equaling) 60% of the (customer) market and the "locked in" seven constituting 25% of the market. ¶¶ 118, 122. EDR has also entered into exclusive contracts with "several smaller consultants," including three former clients of ERIS. ¶ 122. ERIS alleges, on information and belief, that EDR is "actively engaged in negotiations for" additional exclusive contracts, and either already has foreclosed or is at risk of foreclosing **[*17]** over 60% of purchasing in the market through exclusive contracts. ¶¶ 123, 176.

EDR's exclusive contracts last for "several years" and are priced using either an "'all you can eat' annual flat fee"—the customer can purchase as many products as it wants during the contract term for a set price—or a "tiered pricing" model—the customer can purchase products at a flat fee, which decreases as the customer guarantees higher volumes of orders. ¶¶ 119, 121. ERIS alleges losing "several clients" and "several million dollars in lost revenue and profits" due to EDR's exclusive contracts. ¶¶ 121-22. Further, on at least one occasion, ERIS actually "attempted to bid against EDR's exclusive contract and was turned down because ERIS's best price was not even close to EDR's contract price." ¶ 121.

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[8] At a cocktail reception weeks before the Copyright Suit was filed, the CEO of Lightbox told ERIS's President that he had "been hired [by EDR] to impede [ERIS's] progress." ¶ 106.

F. ERIS's Counterclaims

Based on the above allegedly anticompetitive and tortious conduct, on June 17, 2019, ERIS filed counterclaims against EDR-Sanborn, which were subsequently amended on August 16, 2019. ERIS asks for declaratory relief arising from the Copyright Suit in the form of a declaratory judgment that: (1) ERIS has not infringed any valid copyright in any Sanborn Maps (Count I); (2) ERIS has not **[*18]** violated the DMCA with respect to the Sanborn Maps (Count II); and (3) any valid copyrights in any Sanborn Maps are unenforceable due to copyright misuse (Count III). ERIS also alleges antitrust violations of the Sherman Act and Clayton Act (Counts IV and V) and violations of the Lanham Act for false advertising (Count VI), as well as state law claims for deceptive acts and practices (Count VII), false advertising (VIII), product disparagement (Count IX), defamation (Count X), trade libel (Counts XI), and tortious interference with prospective business relations (Count XII). EDR-Sanborn has moved to dismiss Counts IV through XII of the Counterclaims.[9]

III. Analysis

A. Legal Standard

"A motion to dismiss counterclaims under *Rule 12(b)(6)* is decided under the same standard applied to a motion to dismiss the claims of a complaint." *Dress Barn, Inc. v. Klauber Bros., Inc., No. 18-CV-8085(DLC), 2019 U.S. Dist. LEXIS 68869, 2019 WL 1949675, at *2 (S.D.N.Y. Apr. 22, 2019)*. When presented with a motion to dismiss pursuant to *Rule 12(b)(6)*, a court must accept as true all non-conclusory factual allegations in the complaint, together with the contents of documents "integral" to the complaint and any matters of which courts may take judicial notice, and draw all reasonable inferences in favor of the plaintiff. *See* *Doe v. Columbia Univ., 831 F.3d 46, 48 (2d Cir. 2016)*; *McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007)*. However, "a pleading that offers 'labels **[*19]** and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*).

To survive a *Rule 12(b)(6)* motion to dismiss, the complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. Thus, the non-conclusory factual allegations "must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. If the plaintiff has not "nudged [the] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Id. at 570*.

"[T]here is no heightened pleading standard in antitrust cases." *Wacker v. JP Morgan Chase & Co., 678 F. App'x 27, 29 (2d Cir. Feb. 1, 2017)* (summary order) (quoting *Concord Assocs., L.P. v. Entm't Props. Trust, 817 F.3d 46, 52 (2d Cir. 2016)*); *Provepharm, Inc. v. Akorn, Inc., No. 17-CV-7087 (SJF) (AKT), 2019 U.S. Dist. LEXIS 98719, 2019 WL 2443185, at *8 (E.D.N.Y. June 11, 2019)* (featuring standards manipulation claim); *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig., 383 F. Supp. 3d 187, 218 (S.D.N.Y. 2019)* (featuring sham litigation claim). Though antitrust claims should be "reviewed carefully" at the pleading stage "because false condemnation

[9] The undersigned previously denied EDR-Sanborn's motion to stay discovery related to ERIS's Counterclaims pending decision on the motion to dismiss. (ECF 61) (noting, *inter alia*, that "any discovery relating to the [C]ounterclaims would also be related to ERIS's defenses, and thus not amenable to a stay"). Accordingly, fact discovery, including discovery related to the Counterclaims, has been ongoing since 2019 and is nearly complete: the deadline for the completion of (the few remaining) fact witness depositions was most recently extended to September 17, 2021, and the parties have agreed to exchange and respond to contention interrogatories during the six-week period following the close of depositions. (ECF 114 at 3; ECF 125).

of competitive conduct threatens to 'chill the very conduct the antitrust laws are designed **[*20]** to protect,'" *In re Keurig, 383 F. Supp. 3d at 218* (quoting *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*), to survive dismissal, the allegations need only satisfy *Federal Rule of Civil Procedure 8(a)*'s general requirement of a "short plain statement" of facts supporting a plausible claim, rather than *Rule 9(b)*'s stricter requirements, *Concord Assocs., 817 F.3d at 52*. Moreover, "[i]n antitrust cases in particular, the Supreme Court has stated that 'dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'" *Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001)* (quoting *George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 139 (2d Cir.1998)*).

B. Sherman Act Section 2 (Count IV)

Section 2 of the Sherman Act ("*Section 2*") makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize ... trade or commerce . . . ." *15 U.S.C. § 2*. ERIS alleges that EDR violated *Section 2* though (1) monopolization, (2) attempted monopolization, and (3) monopoly leveraging. The elements on ERIS's *Section 2* theories vary, as explained below. "Nevertheless, all three offenses require predatory or anticompetitive conduct or an inappropriate use of monopoly power by the defendant." *Ortho Diagnostic Sys., Inc. v. Abbott Lab'ys, Inc., 920 F. Supp. 455, 465 (S.D.N.Y. 1996)* (Kaplan, J.)

To state a claim for monopolization, a plaintiff must demonstrate that the defendant (1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that power, *i.e.*, through anticompetitive conduct. *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002)*. To state an attempted monopolization **[*21]** claim, a plaintiff must demonstrate that the defendant (1) engaged in predatory or anticompetitive conduct with (2) the specific intent to monopolize and (3) "a dangerous probability of achieving monopoly power." *Id.* (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*). Finally, a monopoly leveraging claim requires a plaintiff to establish that the defendant "(1) possessed monopoly power in *one market*; (2) used that power to create a dangerous probability of monopolizing *another* [second] market; and (3) caused injury by such anticompetitive conduct." *A.I.B. Express, Inc. v. FedEx Corp., 358 F. Supp. 2d 239, 247 (S.D.N.Y. 2004)* (emphasis added) (quoting *Trinko, 540 U.S. at 414*).

In its briefing, EDR argues that ERIS has not sufficiently alleged a second relevant market for its monopoly leveraging claim or, more generally, any anticompetitive conduct to support its *Section 2* claims.[10] I address the market issue first and then analyze each category of alleged anticompetitive conduct. For the following reasons, I recommend that Count IV be dismissed only insofar as it asserts "essential facilities" or "product bundling" claims. ERIS's *Section 2* claims should otherwise be permitted to proceed.

1. Monopoly Leveraging and Market Definition

ERIS claims that EDR-Sanborn engaged in monopoly leveraging by using "Sanborn's near 100% monopoly **[*22]** over fire insurance maps to garner more than 70% of the market share nationwide in the [ERAD] market [for EDR] because that [latter] market relies heavily on fire insurance maps for approved historical data." ¶ 124. ERIS claims EDR-Sanborn has accomplished such leveraging though a multitude of anticompetitive conduct, such as

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[10] EDR does ***not*** contest ERIS's allegations regarding definition of the ERAD market, EDR's possession (or dangerous probability of possession) of monopoly power in that market, or EDR's intent to monopolize that market. For the purposes of this motion, I assume that ERIS has sufficiently pleaded these elements, as it is well-settled that "[i]ssues not sufficiently argued in the [parties'] briefs are considered waived." *E.g. Grytsyk v. Morales, 527 F. Supp. 3d 639, 2021 WL 1105368, at *6 (S.D.N.Y. 2021)* (collecting cases and quoting *Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998)*); *Ball v. New York City Council, No. 17-CV-4828 (JMF), 2018 U.S. Dist. LEXIS 165402, 2018 WL 4625625, at *3 n.3 (S.D.N.Y. Sept. 26, 2018)* (same); *Kassman v. KPMG LLP, 416 F. Supp. 3d 252, 279 (S.D.N.Y. 2018)* (same); *see also Emigra Grp., LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP, 612 F. Supp. 2d 330, 351 (S.D.N.Y. 2009)* (Kaplan, J.) (assuming that "the so-called Service Market [was] a relevant market" where defendant did not argue otherwise).

manipulation of the ASTM E1527 standard, disparagement of competitors, bundled pricing, and sham litigation. ¶¶ 3, 158.

EDR's argument that ERIS has not sufficiently pleaded any anticompetitive conduct sufficient to maintain a *Section 2* claim will be discussed below. However, EDR separately argues that the fire insurance map market is not a cognizable product market because it does not account for viable substitute-products, and therefore, that ERIS has not met the threshold requirement of pleading *two* relevant markets to support its leveraging claim. *E.g., Ortho Diagnostic Sys. v. Abbott Labs., Inc., 822 F. Supp. 145, 154 (S.D.N.Y. 1993)* (Kaplan, J.) ("[T]he Second Circuit requires two markets for a leveraging claim."). I recommend against dismissal of ERIS's leveraging claim based on market definition because ERIS has sufficiently pleaded a relevant product market for fire insurance maps.

For purposes of the Sherman Act, a market "must be a market for **[*23]** particular products or services," and "its outer boundaries . . . are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 64 (2d Cir. 2019)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*); *Emigra, 612 F. Supp. 2d at 351-52*.[11] Thus, a relevant market for antitrust purposes "includes the product or service at issue as well as its substitutes." *US Airways, 938 F.3d at 64*. However, "'a single brand of a product or service' may 'be a relevant market under the Sherman Act' if no substitute exists for the brand's products or services." *Id.* (quoting *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*) (holding district court erred by dismissing complaint "based on its conclusion that a market which is limited to a defendant's product or service cannot be viable").

The Second Circuit has emphasized that "market definition is a deeply fact-intensive inquiry and courts therefore hesitate to grant motions to dismiss for failure to plead a relevant product market." *Chapman v. N.Y. State Div. for Youth, 546 F.3d 230, 238 (2d Cir. 2008)* (quoting *Todd, 275 F.3d at 199-200*). Courts must do so, however, "where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even **[*24]** when all factual inferences are granted in plaintiff's favor." *Id.* (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)*).

Granting all inferences in ERIS's favor, I find that ERIS has sufficiently alleged a relevant fire insurance map market, dominated by EDR-Sanborn, because it is plausible that no viable substitutes exist for fire insurance maps. Significantly, ERIS alleges that Sanborn controlled nearly 100% of the fire insurance map industry since the early twentieth century, having "created nearly all, if not all" fire insurance maps, and that EDR has acquired and expanded this monopoly as the supposedly exclusive licensee of Sanborn Maps for commercial use. ¶¶ 5, 18, 47, 124. Fire insurance maps are used today to conduct ASTM E1527-compliant Phase I ESAs. While ASTM E1527 facially contemplates the use of various historical sources, including other types of maps (*i.e.*, topographic maps), and does not specifically require the use of fire insurance maps, ERIS repeatedly alleges that the historical significance, accuracy, and nature of information contained in fire insurance maps make them *de facto* necessary for satisfying the standard's requirements.[12] While discovery will ultimately expose the validity of ERIS's

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[11] Products will be considered to be reasonably interchangeable "if consumers treat them as acceptable substitutes." *PepsiCo, 315 F.3d at 105* (citation omitted). "Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product." *Todd, 275 F.3d at 201-02* (citation omitted).

[12] *See, e.g.*, ¶ 25 ("[T]he *de facto* standard for complying with ASTM E1527 . . . requires consulting and copying fire insurance maps, comprising those maps that were created by the Sanborn Map Company. No substitute products, alternative map or otherwise, exist that a purchaser can use to comply with the ASTM E1527 standard and qualify for the liability shield"); ¶ 29 ("[F]ire insurance maps are particularly relevant historical source elements of a Phase I report, given the known historical factual significance of fire insurance maps and the nature and accuracy of the factual details contained in those maps . . . It would be impossible for an environmental professional to conduct a competent Phase I ESA . . . without searching for, consulting, relying upon and providing copies of relevant fire insurance maps, if they are available for the property"); ¶ 39 ("[T]here are no alternative sources for the factual information set forth in those maps."); s*ee also* ECF 47 at 9 n.12 ("[W]hile EDR argues that the

assertions, **[*25]** EDR has alleged sufficient facts for the District Court to draw a reasonable inference that there are no viable substitutes for fire insurance maps. Accordingly, ERIS's monopoly leveraging claim should not fail for failure to plead two relevant markets.[13]

2. Anticompetitive Conduct

While ERIS asserts a panoply of allegedly anticompetitive conduct, EDR-Sanborn argues that ERIS cannot state a *Section 2* claim based on any such conduct. Below, I address the parties' arguments regarding each category of conduct.[14] Ultimately, I find that ERIS should be permitted to pursue a *Section 2* claim for sham litigation, standard manipulation, and disparagement, but not for failure to license essential facilities or product bundling.

a. Sham Litigation

ERIS argues that the Copyright Suit is a sham lawsuit used by EDR-Sanborn to harm ERIS and foreclose competition in the ERAD market. ERIS alleges that EDR-Sanborn has always known that the Copyright Suit is objectively baseless because the vast majority of Sanborn Maps are "firmly" in the public domain and lack copyright protection, as evident on the face of the maps and/or the results of an investigation conducted by EDR at the close **[*26]** of the 20th century. *See, e.g.*, ¶¶ 22, 48, 57-61, 132-36. EDR argues that the *Noerr-Pennington* doctrine precludes ERIS from alleging any antitrust claim based on the filing of the Copyright Suit. For the reasons stated below, I recommend that the District Court deny EDR's motion to dismiss as it pertains to ERIS's *Section 2* sham litigation claim.

Pursuant to the *Noerr-Pennington* doctrine, parties are "generally immune from antitrust liability for engaging in litigation, even if the litigation might have anticompetitive effects." *Nat'l Jewish Democratic Council v. Adelson, 417 F. Supp. 3d 416, 430 (S.D.N.Y. 2019)*; *see* *In re Elysium Health-Chromadex Litig., 354 F. Supp. 3d 330, 335 (S.D.N.Y. 2019)*, *as amended* (Feb. 7, 2019). However, while the *Noerr-Pennington* doctrine protects a litigant's *First Amendment* right to petition the courts, immunity will not attach where the challenged litigation is "a mere

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ASTM Standard 'requires reviewing only as many of the standard historical sources . . . as are necessary and both reasonably ascertainable and likely to be useful,' as a practical matter, where Sanborn Maps are available, they *are* necessary, reasonably ascertainable, and likely to be useful, and thus must be consulted and included in a Phase I ESA.").

[13] While EDR also emphasizes that "fire insurance maps are in fact alleged to fall *within* the larger [ERAD] market," (ECF 51 at 7), "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *In re Inclusive Access Course Materials Antitrust Litig., No. 20-CV-6339 (DLC), 2021 U.S. Dist. LEXIS 111135, 2021 WL 2419528, at *11 (S.D.N.Y. June 14, 2021)* (quoting *Sabre, 938 F.3d at 64*).

[14] Defendants assert that instead of isolating each category of anticompetitive conduct, the District Court should sustain its Sherman Act claims because they are supported by a combined "monopoly broth" of anticompetitive conduct. (ECF 40 at 3). The "monopoly broth" concept recognizes that, in analyzing antitrust claims alleging a multitude of anticompetitive conduct, courts should "avoid 'tightly compartmentalizing the various factual components' of [each claim] and 'wiping the slate clean after scrutiny of each.'" *Valassis Commc'ns, Inc. v. News Corp., No. 17-CV-7378 (PKC), 2019 U.S. Dist. LEXIS 27770, 2019 WL 802093, at *9 (S.D.N.Y. Feb. 21, 2019)* (quoting *City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 928-29 (2d Cir. 1981)*). However, the "monopoly broth" concept has only been mentioned in two cases in this Circuit and, critically, has never been employed as a replacement for an individual review of alleged anticompetitive conduct. *See* *Groton, 662 F.2d at 928* ("[W]e must, like the [plaintiffs'] briefs, analyze the various issues individually"); *Valassis, 2019 U.S. Dist. LEXIS 27770, 2019 WL 802093 at *6* (dismissing plaintiff's antitrust claims insofar as they alleged predatory bidding and explaining that "not all actions of an alleged violator may be properly considered by a jury as ingredients in a 'monopoly broth'"). Moreover, both cases recognize that "it is unlikely that multiple independently lawful acts can come together to create" a monopoly broth, as "it is not the case that 'if there is a fraction of validity to each of [a litigant's] claims and the sum of the fractions is one or more, the plaintiffs have proved a violation of *section 1* or *section 2* of the Sherman Act.'" *Valassis, 2019 U.S. Dist. LEXIS 27770, 2019 WL 802093 at *9* (quoting *Groton, 662 F.2d at 929*). Thus, I will proceed to analyze each category of allegedly anticompetitive conduct, keeping in mind the context and possible "synergistic effect" of the conduct. *Id.*

sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus. ("PRE"), 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) (internal citation omitted).

Accordingly, "[a] single lawsuit can violate ***antitrust law*** as long as it is both an objective and subjective sham." In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 686 (2d Cir. 2009). To state a claim of sham litigation, a litigant must plausibly allege that "the lawsuit [is] objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." PRE, 508 U.S. at 60 (internal citation **[*27]** omitted). If a court finds the challenged litigation is "objectively baseless," then the court "examine[s] the litigant's subjective motivation and focus[es] on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor." *Id.*[15] While courts in this District have observed that the sham exception should be construed narrowly and, *where possible*, decided on the pleadings "in order to avoid chilling a litigant's exercise of the right to petition," Twin City Bakery Workers & Welfare Fund v. Astra Aktiebolag, 207 F. Supp. 2d 221, 223 (S.D.N.Y. 2002), it has also recognized that the applicability of the sham exception is often regarded as a question of fact for the jury, *see* Elysium, 345 F. Supp. 3d at 336, and has repeatedly denied motions to dismiss sham litigation claims, *e.g.,* In re Keurig, 383 F. Supp. 3d at 234 (denying motion to dismiss antitrust claim challenging allegedly baseless patent litigation).[16]

The parties, focusing on the first prong, disagree whether a party must allege that an *entire* lawsuit is objectively meritless in order to escape *Noerr-Pennington* immunity. ERIS argues that liability may be premised on a **single objectively meritless** claim. Conversely, EDR-Sanborn argues that they are immune from liability if the Copyright Suit alleges a **single colorable** claim, and **[*28]** thus that the District Court must dismiss ERIS's sham litigation claim because ERIS does not allege that the Copyright Suit is objectively baseless *in toto*, and even affirmatively recognizes that the suit may concern a "small subset of potentially colorable infringement claims." (ECF 47 at 15; *see* ¶¶ 40, 132-33). While the parties each cite copious non-binding caselaw from various districts to support their arguments, (ECF 45 at 8-9; 47 at 5-7; 51 at 3), courts in this Circuit have not directly spoken to whether a sham litigation claim can be based on an underlying lawsuit featuring both sham and non-sham claims.[17]

Given the unsettled state of the law on this issue and the procedural posture of this action, I recommend that the District Court not resolve this issue at the pleading stage. In making this recommendation, I find the reasoning of *Intel Corp. v. Via Techs., Inc.* to be particularly instructive:

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[15] This two-step test has been described as placing a "heavy thumb on the scale in favor of the [antitrust] defendant." Elysium, 345 F. Supp. 3d at 336 (quoting Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 180 (3d Cir. 2015)).

[16] *See* Louisiana Wholesale Drug Co. v. Sanofi-Aventis, No. 07-CV-7343 (HB), 2008 U.S. Dist. LEXIS 3611, 2008 WL 169362, at *5 (S.D.N.Y. Jan. 18, 2008) (denying motion to dismiss antitrust claim challenging an allegedly sham FDA Citizen-Petition where the complaint and administrative record established "triable issues of fact concerning the reasonability and viability" of the petition); ICOS Vision Sys. Corp., N.V. v. Scanner Techs. Corp., No. 05-CV-6322 (DC), 2006 U.S. Dist. LEXIS 13847, 2006 WL 838990, at *5 (S.D.N.Y. Mar. 29, 2006) ("If, as alleged, [defendant] knew that [the statute] did not apply and threatened [patent infringement] litigation for the sole purpose of harming [plaintiff], then its threats were neither objectively reasonable nor taken in good faith. This is all that need be alleged at this early stage of the litigation . . . . If, after discovery, [plaintiff] is unable to present evidence from which a reasonable jury could find that [defendant] knew that its threats of infringement litigation were baseless, the claims may be dismissed at summary judgment."); *see also* Alternative Electrodes, LLC v. Empi, Inc., 597 F. Supp. 2d 322, 331 (E.D.N.Y. 2009) ("Plaintiff alleges that the litigation was both subjectively and objectively baseless and plausibly supports this claim with the assertion that there could be no valid patent claim due to the existence of 'prior art.' At this stage of litigation, such allegations are sufficient to withstand a motion to dismiss.").

[17] However, the District of Connecticut has noted that application of the sham exception should be based on the "measure [of] merit" of the "strongest claim" rather than the "weakest aspect" of a lawsuit. Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc., No. 3:02-CV 2253 (AHN), 2006 U.S. Dist. LEXIS 18853, 2006 WL 516749, at *6 (D. Conn. Mar. 1, 2006) (refusing to apply sham exception based on an allegedly unreasonable request for equitable relief because "the mere fact that a plaintiff has sought one form of relief that may be objectively unreasonable cannot vitiate the First Amendment protections afforded underlying claims that are not objectively without merit").

> The Court can imagine good arguments both ways. On the one hand, a plaintiff who adds a baseless claim to an otherwise bona fide lawsuit presumably does so for a reason, i.e., presumably to obtain an additional strategic advantage over and above those flowing from the assertion of non-sham **[*29]** counts. To immunize such bad-faith conduct because it is joined with good-faith conduct would eviscerate most of the sham litigation exception. Especially in patent litigation, an overreaching plaintiff will usually have a large portfolio of patents to press. It would be comparatively easy to find a colorable claim to join with baseless claims. On the other hand, evaluation and segregation of counts into "objectively bad" versus "objectively good" claims as well as "subjectively bad" versus "subjectively good" claims could require large amounts of work for a jury, not to mention claim-construction hearings (on patents no longer part of the case-in-chief). In a mixed-claim scenario, it would also be necessary for a jury to isolate and to trace the harms resulting solely by reason of the wrongful components of the litigation.
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> **Given the uncertain state of the law on this issue, this order will not resolve it at the pleading stage. Rather, discovery will go forward. Discovery may reveal that the incremental effects of the supposed sham components were negligible or may show that they dominated the original complaint. Discovery may shed light on the actual factual pattern in need of a rule. [*30] While ultimately the Court may (or may not) agree with [Plaintiff's] sweeping categorical rule of immunity, it should not do so at the pleading stage**.

*No. 99-03062 (WHA), 2001 U.S. Dist. LEXIS 27157, 2001 WL 777085, at *5-6 (N.D. Cal. Mar. 20, 2001)* (denying motion to dismiss sham litigation claim). The *Intel* court's course of action seems appropriate here, where EDR-Sanborn has acknowledged that some Sanborn Maps have "lapsed into the public domain," (ECF 45 at 1), and fact discovery—which has nearly concluded—will soon shed light on the *extent* to which the allegedly infringing maps are objectively in the public domain. Accordingly, the District Court should deny EDR-Sanborn's motion to dismiss at this juncture. EDR-Sanborn may raise the issue of *Noerr-Pennington* immunity at a later point following the close of discovery, such as in a motion for summary judgment.[18]

b. Standards Manipulation

ERIS argues that EDR-Sanborn intentionally monopolized or attempted to monopolize the ERAD market by manipulating the ASTM E1527 standard. ERIS alleges that EDR, through CEO Anthony Buonicore, influenced the ASTM to set a standard that *de facto* requires fire insurance maps be consulted and copied in the preparation of Phase I ESA Reports, while knowing—but not disclosing—that EDR would later purchase **[*31]** supposedly exclusive rights to all maps capable of meeting the standard. ¶¶ 25-35.[19] I recommend that the District Court deny EDR-Sanborn's motion to dismiss as it pertains to ERIS's *Section 2* standards manipulation claim.

"Intentional misrepresentations designed to deceive a standard-setting organization can constitute an antitrust violation." *Amphastar Pharm., Inc. v. Momenta Pharm., Inc., 297 F. Supp. 3d 222, 230 (D. Mass. 2018)* (explaining that "[b]y incorporating patented technology into a standard, the patent-holder obtains market power because adoption of the standard eliminates alternatives to the patented technology"). While the Second Circuit has not addressed the elements of standard manipulation claims, in 2019, the Eastern District of New York found that a counterclaim-plaintiff made a sufficient showing of anticompetitive conduct by alleging facts from which it could be reasonably inferred that: (1) the counterclaim-defendant sought to maintain monopoly power and substantially

[18] While EDR also argues that ERIS's sham litigation allegations are undermined by the fact that ERIS did not file a motion to dismiss the Copyright Suit, (ECF 45 at 9), courts have previously emphasized that this is not "fatal to a sham litigation claim." *In re Keurig, 383 F. Supp. 3d at 232*.

[19] *See also, e.g.*, ¶ 60 ("In essence, by engineering the relevant standards to require consultation with, and the reproduction of, relevant Sanborn Maps, EDR-Sanborn has effectively required that if a customer desires the liability shield under CERCLA, only it, and it alone, can be the storehouse, source and 'curator' of maps from the Sanborn Collection—and the collection of rote historical facts set forth therein without any substitute products available on the market.").

foreclose competition in the relevant market by (2) soliciting an SSO to change its standard (3) without disclosing its intellectual property rights in the manufacturing process necessary to meet that standard and (4) but for counterclaim-defendant's conduct, the SSO would not have **[*32]** adopted the revised standard. *See Provepharm, 2019 U.S. Dist. LEXIS 98719, 2019 WL 2443185, at *10, 13*. EDR suggests, in substance, that ERIS has not made a sufficient showing regarding the third and fourth elements.

EDR-Sanborn firsts argues that ERIS has not plausibly alleged Sanborn Maps to be necessary or essential to satisfying the ASTM E1527 standard, insisting that Sanborn Maps cannot be categorized as "essential IP" because ASTM E1527 expressly "allows consultants to comply with the standard's requirements *without consulting and attaching* fire insurance maps (let alone those maps that [EDR-Sanborn] specifically holds copyrights in) to a Phase I Environmental Site Assessment." (ECF 45 at 10). However, as discussed above, ERIS repeatedly and plausibly alleges that the standard makes fire insurance maps—defined so that "the only product that meets th[e] definition is the EDR-acquired Sanborn Maps"—*de facto* essential as a matter of practice, meaning that it is practically "impossible" to satisfy the standard without using and including such maps. *See supra* Section III.B.2.a. While discovery will shine light on the validity of these allegations, ERIS has alleged sufficient facts for the District Court to draw a reasonable inference that Sanborn Maps **[*33]** are necessary to satisfying the ASTM E1527 standard.

EDR-Sanborn next argues that it had no duty to disclose not-yet-existing intellectual property rights, let alone rights not acquired until two or three years after the standard was first set. However, EDR (through Buonicore) was at some point duty-bound to disclose its impending control of the allegedly standard-essential Sanborn Maps—when the standard was set or at least before it "garnered significant market acceptance"—in light of Buonicore's membership and leadership in the ASTM and role in setting the standard. *See Provepharm, 2019 U.S. Dist. LEXIS 98719, 2019 WL 2443185, at *13* (collecting cases and quoting *Actividentity Corp. v. Intercede Grp. PLC, No. 08-CV-4577 (VRW), 2009 U.S. Dist. LEXIS 132206, 2009 WL 8674284, at * 4 (N.D. Cal. Sept. 11, 2009)* (rejecting argument that SSO member's failure to disclose must occur "prior to the issuance of a standard," and sustaining monopolization claim for failure to disclose before the standard "garnered significant market acceptance" and the market became "locked in" to the standard); ¶ 32 (alleging that Section 19.2.5 of the ASTM Policies and Procedures bars committees from "bring[ing] about the standardization of any product or service for the purpose or with the effect of . . . preventing the manufacture or sale of any product or service not conforming to a specified standard"). Moreover, **[*34]** ERIS alleges that at the time the standard was set, EDR at least "knew" that it would soon have "complete control of the only maps that could satisfy the standard," and was "simultaneously and surreptitiously working" towards the acquisition. ¶¶ 32, 34, 39-40. Thus, ERIS does not allege a hypothetical future intention or a mere desire to control the Sanborn Maps, but rather asserts something concrete, though not yet finalized. Assuming ERIS's allegations to be true, I find that it would be overly technical to allow EDR to avoid a duty to disclose merely because its control over the Sanborn Maps was consummated following the creation of the ASTM standard.[20]

Lastly, EDR-Sanborn argues that ERIS has not met its pleading burden since it has not alleged that the ASTM was considering an "alternative technology." (ECF 45 at 12). However, like the court in *Provepharm*, I am "not necessarily persuaded that this is a proper pleading standard, as opposed to an evidentiary standard." *Provepharm, 2019 U.S. Dist. LEXIS 98719, 2019 WL 2443185, at *12 n.16*. At this point in the proceedings, it is sufficient that ERIS has plausibly alleged that but for EDR's conduct and failure to disclose, the ASTM would not have adopted ASTM E1527 or would have adopted a different **[*35]** standard, particularly in light of ASTM's policies. Thus, ERIS's allegations are ultimately sufficient to survive a motion to dismiss.[21]

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[20] *Cf. Townshend v. Rockwell Int'l Corp., No. 99-CV-0400 (SBA), 2000 U.S. Dist. LEXIS 5070, 2000 WL 433505, at *11 (N.D. Cal. Mar. 28, 2000)* (finding counterclaim-plaintiff did not sufficiently allege anticompetitive conduct before an SSO where counterclaim-defendants' patents issued after adoption of the relevant standard, counterclaim-defendants had disclosed their pending patent applications to the SSO, and counterclaim-plaintiff did not argue that the SSO could have adopted a standard that did not encompass counter-defendants' technology).

[21] EDR argues that standards manipulation claims are subject to a heightened pleading standard under *Rule 9(b)*. However, EDR's argument is based on non-binding case law that predates cases such as *Provepharm. See* ECF 45 at 10 (citing *Lotes Co.*

c. Disparagement

ERIS also alleges that EDR-Sanborn has caused ERIS competitive harm by making false and misleading statements to the effect that EDR-Sanborn owns copyrights to *all* Sanborn Maps and that it is unlawful to use *any* Sanborn Map acquired from ERIS for a Phase I ESA. I find that ERIS's Section 2 disparagement allegations are sufficient to survive a motion to dismiss.

False and misleading statements may give rise to actionable antitrust claims. *See* In re Keurig, 383 F. Supp. 3d at 240. Still, a "monopolization claim based on misleading advertising must overcome a presumption that the effect on competition of such a practice was *de minimis*." Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., 1988 U.S. App. LEXIS 8710, 850 F.2d 904, 916 (2d Cir. 1988) (internal citations omitted). The Second Circuit has directed courts to consider several factors in determining whether a plaintiff has overcome this presumption, including whether the representations: "were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization **[*36]** or other offset by rivals." Ayerst, 850 F.2d at 916 (internal citations omitted).

Challenges to these factors are better suited for decision on summary judgment, with the aid of discovery. Keurig, 383 F. Supp. 3d at 240. At the motion to dismiss stage, plausible allegations that representations were "false and misleading in certain respects," have been found to be sufficient "to go forward with the discovery process to substantiate its claim that the [representations were] clearly false, clearly material, and clearly likely to induce reasonable reliance." Ayerst, 850 F.2d at 916 (reversing dismissal and explaining that "in the present case the several factors . . . noted above cannot be adequately evaluated until the discovery process has moved forward to a greater extent than it has thus far"); Keurig, 383 F. Supp. 3d at 240-41 (denying dismissal and finding that "attacks [regarding] certain specifics" of plaintiffs' allegations "are more appropriately raised on summary judgment, after discovery"); Alternative Electrodes, 597 F. Supp. 2d at 332 (denying dismissal and finding that plaintiff was "entitled to discovery in order to substantiate its claims").[22]

Here, ERIS has plausibly alleged that EDR repeatedly made false and misleading statements, such as on its website, to (potential) customers regarding the copyright **[*37]** status of ***all*** Sanborn Maps and the impermissibility of ERIS's use of ***any*** such maps. *See* ¶¶ 94-103, 105; *infra* Section III.D (cataloguing the relevant statements). Customers cannot easily verify the truth of such statements because of the "sheer number" of Sanborn's copyright registrations and the fact that "Copyright Office records (especially older records) are difficult to find or identify." ¶¶ 7, 54, 101; *see* ¶ 134 (stating that "the fact that no [copyright] renewal was ever filed . . . is not readily publicly available"). Because Sanborn Maps are supposedly essential to the ASTM E1527 standard, EDR's statements have allegedly harmed ERIS, as well as smaller competitors in the ERAD market, and created substantial barriers to market entry. ¶¶ 128-29. Thus, construing the allegations most favorably to ERIS and drawing reasonable inferences in its favor, dismissal at this stage is unwarranted and ERIS is entitled to utilize what it has learned in discovery to substantiate its disparagement claim.

d. Essential Facilities

ERIS argues that Sanborn Maps are "essential facilities" in the ERAD market that EDR-Sanborn has failed to license in violation of Section 2. I recommend that the District Court **[*38]** dismiss ERIS's essential facilities claim.

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v. Hon Hai Precision Indus. Co., No. 12-CV-7465 (SAS), 2013 U.S. Dist. LEXIS 69407, 2013 WL 2099227, at *5 (S.D.N.Y. May 14, 2013) (relying on Apple Inc. v. Samsung Elecs. Co., Ltd., No. 11-CV-01846, 2012 U.S. Dist. LEXIS 67102, 2012 WL 1672493 (N.D.Cal. May 14, 2012) for the proposition that "deception on the SSO theory of anti-competitive conduct is subject to the heightened pleading standards for fraud") and ChriMar Sys. v. Cisco Sys., 72 F. Supp. 3d 1012, 1019 (N.D. Cal. 2014)).

[22] *Cf.* Reed Const. Data Inc. v. McGraw-Hill Companies, Inc., 49 F. Supp. 3d 385, 421-22 (S.D.N.Y. 2014), *aff'd*, 638 F. App'x 43 (2d Cir. 2016) (granting summary judgment in favor of defendant based on presumption that disparagement had *de minimis* effect pursuant to the *Ayerst* factors).

To state a *Section 2* essential facilities claim, a plaintiff must allege: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir.1990)*. Thus, a successful plaintiff must assert "more than inconvenience, or even some economic loss," but rather that there are no feasible alternatives to the facility, that its denial "inflicts a severe handicap on . . . market entrants," and that the defendant-monopolist is the "only" entity with which the litigant "feasibly can do business" to access the facility. *Id.; Eatoni Ergonomics, Inc. v. Research in Motion Corp., 486 F. App'x 186, 190 (2d Cir. 2012)* (summary order). However, "the continued viability of the essential facilities doctrine has been called into question in recent years," *TrueEX, LLC v. MarkitSERV Ltd., 266 F. Supp. 3d 705, 723 & n.124 (S.D.N.Y. 2017)* (Kaplan, J.), and courts in this Circuit have not sustained a claim under the doctrine since the Supreme Court's ruling in *Verizon v. Trinko, LLP, 540 U.S. at 407-08* ("We have never recognized such a doctrine and we find no need either to recognize it or to repudiate it here.").

To the extent that a *Section 2* essential facilities claim remains viable, ERIS has at least made **[*39]** plausible allegations to satisfy the first and fourth prongs of the *Twin* standard. For the same reasons I find that ERIS has plausibly alleged Sanborn Maps to be *de facto* standard-essential, *see supra* Sections III.B.2.a & b, ERIS plausibly alleges that Sanborn Maps constitute an essential facility. *See Twin Labs., 900 F.2d at 569* (noting that essential facilities are usually "facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized," and that "[i]n cases finding liability in other categories . . . the facility in question . . . was effectively the only one in town."). ERIS has also plausibly alleged that it would be feasible for EDR-Sanborn to provide it with access to Sanborn Maps by at least not asserting copyright over maps it allegedly knows to be in the public domain, as well as licensing any under valid copyright. While EDR-Sanborn repeatedly argues that it is not obliged to do so, it fails to make any non-conclusory arguments regarding infeasibility. *Am. Tel. & Tel. Co. v. N. Am. Indus. of New York, Inc., 772 F. Supp. 777, 785-86 (S.D.N.Y. 1991)* (refusing to dismiss essential facilities claim where defendant-monopolist "provided no evidence on [its] motion [to dismiss] that it cannot provide [the essential] services **[*40]** to" plaintiff-competitor).

Whether ERIS has sufficiently alleged its inability to duplicate Sanborn Maps, by creating or recreating non-Sanborn fire insurance maps or a standard-complaint substitute, is a closer call. While the Counterclaims state that it would be "overly laborious," "time-consuming," and "painstaking" for "**consumers**" such as "**individual environmental professionals**" to "***search for and collect***" fire insurance maps and other types of ERAD, without the assistance of data provision firms like EDR and ERIS, they do not speak to what is or is not feasible for competitors such as ERIS. ¶¶ 36, 81 (emphasis added).[23] *Cf. TrueEX, 266 F. Supp. 3d at 723* (finding plaintiffs had not shown likelihood of success on their essential facilities claim where it would take "time and money" to duplicate a facility); *RxUSA Wholesale Inc. v. Alcon Labs., 391 F. App'x 59, 61 (2d Cir. 2010)* (summary order) (finding that plaintiff's "essential facilities claim fails . . . at the very least because [plaintiff] is able to obtain pharmaceutical products from other sources, albeit at a higher price").

Even more apparent, however, is ERIS's failure to allege that it actually sought and was denied access to Sanborn Maps from EDR-Sanborn. While this element may be satisfied by something less than an "outright **[*41]** refusal to deal," *Delaware & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 180 (2d Cir. 1990)* (finding that [i]t is sufficient if the terms of the offer to deal are unreasonable"), ERIS only alleges that EDR "appears unwilling to license its copyrights or sell the maps" to competitors without alleging facts supporting this conclusion. ¶ 39; *cf. TrueEX, 266 F. Supp. 3d at 724* ("Because reasonable access to the essential facility exist[ed]—even if not in a way that [was] conducive to [plaintiff's] existing business model—[plaintiff] cannot establish an essential facilities claim.") (quoting *MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1132 (9th Cir. 2004)*). While ERIS may be able to sufficiently amend the Counterclaims to ameliorate these pleading deficits, ERIS currently fails to plausibly state an essential facilities *Section 2* claim.

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[23] While ERIS states, in its opposition brief, that it has "factually allege[d] that the duplication of the Sanborn Maps would be economically infeasible," ERIS merely cites to ¶ 36 and ¶ 81 for this proposition, which are inapposite, as explained above.

e. Product Bundling

ERIS alleges that EDR is offering Parcel—EDR's in-house writer software used to generate reports from packages of ERAD—as a perk in a "product bundle" with its ERAD packages to divert customers from ERIS and ultimately squeeze ERIS out of the ERAD market. ¶¶ 112-17. However, ERIS's "bundled discount" allegations fail to state a viable *Section 2* claim.

Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc. provides the relevant framework for analyzing ERIS's bundling claim. In this Circuit, pricing is generally not considered **[*42]** to be predatory or anticompetitive unless the prices at issue are below the defendant's average variable cost. *Info. Res., Inc. v. Dun & Bradstreet Corp., 359 F. Supp. 2d 307, 307 (S.D.N.Y. 2004)*; *see* *Affinity LLC v. GfK Mediamark Rsch. & Intel., LLC, No. 12-CV-1728 (RJS), 2013 U.S. Dist. LEXIS 45921, 2013 WL 1189317, at *3 (S.D.N.Y. Mar. 25, 2013)*, *aff'd*, *547 F. App'x 54 (2d Cir. 2013)*. However, in *Ortho*, Judge Kaplan considered whether the average variable cost standard invariably applies to claims challenging package or bundled discounts:

> [In] a case in which a monopolist **(1)** faces competition on only part of a complementary group of products, **(2)** offers the products both as a package and individually, and **(3)** effectively forces its competitors to absorb the differential between the bundled and unbundled prices of the product in which the monopolist has market power [a *Section 2* plaintiff] must allege and prove either that **(a)** the monopolist has priced below its average variable cost or **(b)** the plaintiff is at least as efficient a producer of the competitive product as the defendant, but that the defendant's pricing makes it unprofitable for the plaintiff to continue to produce. **Any other rule would entail too substantial a risk that the antitrust laws would be used to protect an inefficient competitor against price competition that would afford substantial benefits to consumers**.

920 F. Supp. at 466 (emphasis added) (noting that "care must be exercised to avoid judicial **[*43]** actions that penalize or threaten to penalize beneficial price cutting in an unduly zealous effort to punish less desirable forms").[24]

As an initial matter, ERIS fails to allege that EDR "faces competition on only part of a complementary group of products" in the challenged bundle. ERIS alleges a product bundle consisting of: (1) ERAD report packages (available from both EDR and ERIS) and (2) in-house report writing software (available from EDR, but not ERIS). ¶ 112; ECF 46 at 14. Pursuant to the first part of the *Ortho* standard, ERIS must allege that EDR's bundle involves a product over which it holds monopoly power **and** a product (here, ERAD) over which it faces—but seeks to foreclose—competition with ERIS, *i.e.*, by forcing ERIS to absorb the difference between the bundled and unbundled price of the monopoly product. *See* *Ortho, 920 F. Supp. at 458, 469* (alleging defendant's pricing for a bundle of blood screening tests took advantage of defendant's monopoly in some tests to foreclose or impair competition in the sale of tests offered by both parties).[25] Alternatively stated, "*Ortho* . . . does not analyze bundled

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[24] In *Ortho*, Judge Kaplan emphasized that pricing is an "exceptionally sensitive area" because while "price cutting can be used by a dominant firm with superior staying power to drive its competitors out of business with the intention thereafter of using its market power to restrict output, raise prices, and recoup the losses sustained in the competitive battle," it is also "a classic, and a socially desirable, form of competition" that "make[s] more goods available to more people and thus result[s] in greater overall benefits to society." *Id. at 465-66*.

[25] *See* *SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1065 (3d Cir.1978)* (in case relied upon by *Ortho*, finding that defendant-pharmaceutical company violated *Section 2* by bundling the sale of monopoly cephalosporin antibiotics (Keflin and Keflex) with the sale of its competitive cephalosporin antibiotic (Kefzol) to drive Kefzol-competitor-plaintiff out of the market); *Virgin Atl. Airways Ltd. v. British Airways PLC, 69 F. Supp. 2d 571, 578, 580 n.8 (S.D.N.Y. 1999)*, *aff'd*, *257 F.3d 256 (2d Cir. 2001)* (featuring challenge to defendant-airline's incentive agreements because "the bundling feature . . . c[ould] cause an incentivized customer who flies on routes on which [defendant] has a monopoly as well as routes on which [defendant] faces competition to fly with [defendant] on the competitive routes," but granting summary judgment for defendant because plaintiff failed to factually support its bundling theory).

pricing for a non-monopolized, non-competing product." (ECF 45 at 16). However, EDR's in-house report **[*44]** writing software is just that: EDR is not alleged to be a monopolist of report writing software nor a competitor with ERIS with respect to such software. Accordingly, ERIS has not satisfied the first part of the *Ortho* standard.

Additionally, while ERIS must plausibly allege either (a) that EDR priced below its average variable cost or (b) that ERIS is an equally efficient producer of ERAD but that EDR's pricing makes it unprofitable to compete, EDR makes no non-conclusory allegations regarding EDR's costs. ¶ 121; *see Astra Media Grp., LLC v. Clear Channel Taxi Media, LLC, 414 F. App'x 334, 336 (2d Cir.2011)* (upholding dismissal where plaintiff failed to plead defendant's actual costs).[26] Further, while ERIS alleges that EDR's bundles have caused ERIS to lose sales to EDR and created pressure to lower its prices and/or match EDR's bundle, ¶¶ 107, 113, 117, ERIS does not allege that it cannot continue to sell ERAD profitably, *see Ortho, 920 F. Supp. 470* (dismissing claim where plaintiff conceded that defendant's "package leaves [plaintiff] able to sell its products at a profit, albeit not as large a profit as previously").[27] Accordingly, ERIS has not alleged facts raising a reasonable inference that EDR's bundles represent anticompetitive price cutting.

C. Sherman Act *Section 1* and Clayton Act *Section 3* Claims (Counterclaim V)

ERIS claims EDR is violating *Section 1* of the Sherman Act and *Section 3* of the Clayton Act by entering into long-term, exclusive contracts with environmental consultants in order to "lock up" the ERAD market. ¶¶ 119-23. While EDR argues that ERIS cannot state an antitrust claim based on such contracts because ERIS has not alleged harm to competition, ERIS has made sufficient allegations to survive its low burden on a motion to dismiss.[28]

Under *Section 1* of the Sherman Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." *15 U.S.C. § 1*. Accordingly, a

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[26] *See MiniFrame Ltd. v. Microsoft Corp., 11-CV-7419 RJS, 2013 U.S. Dist. LEXIS 49813, 2013 WL 1385704, at *6 (S.D.N.Y. Mar. 28, 2013)*, *aff'd*, *551 F. App'x 1 (2d Cir. 2013)* (dismissing pricing claim where plaintiff did not plausibly allege that defendant suffered losses on its pricing scheme); *Affinity, 2013 U.S. Dist. LEXIS 45921, 2013 WL 1189317, at *4* (same); *see also Info. Res., Inc., 359 F. Supp. 2d at 307* (noting that "[w]hen price discounts in one market are bundled with the price charged in a second market, the discounts must be applied to the price in the second market in determining whether that price is below that product's average variable cost").

[27] ERIS's reliance on *LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir.2003)* to support its bundling allegations is inapposite. *Id.at 177* (Greenberg, J., dissenting) (emphasizing that plaintiff had "not satisfied the stricter tests devised by other courts considering bundled rebates," including the *Ortho* standard). The *LePage*'s standard for bundled discounts has not been adopted by other circuits and has been interpreted narrowly by the Third Circuit. *See ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 274 n.11 (3d Cir. 2012)* (interpreting ***[*45]*** *LePage's* narrowly in light of intervening Supreme Court precedent); ***Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 897-905 (9th Cir. 2008)*** (discussing differences between the exclusionary effects approach in *LePage*'s and cost-based approaches, such as *Ortho*'s, and emphasizing that the bipartisan Antitrust Modernization Commission, created by Congress in 2002, "noted [that] the fundamental problem with the *LePage*'s standard is that it does not consider whether the bundled discounts constitute competition on the merits, but simply concludes that all bundled discounts offered by a monopolist are anticompetitive with respect to its competitors who do not manufacture an equally diverse product line" and thus "could protect a less efficient competitor at the expense of consumer welfare").

[28] To the extent ERIS also seeks to pursue a *Section 2* exclusive dealing claim (¶ 158), it should likewise be sustained. As an initial matter, because EDR-Sanborn did not address such a claim in its opening brief and only mentioned it in one footnote in its reply brief, EDR-Sanborn arguably waived any argument in favor of dismissal. *See supra* note 10. Regardless, exclusive dealing claims are subjected to the same substantial foreclosure analysis under both sections (as EDR acknowledges), and, thus, ERIS's allegations survive dismissal for the reasons set out below. *Maxon Hyundai Mazda v. Carfax, Inc., No. 13-CV-2680 (AJN), 2014 U.S. Dist. LEXIS 139480, 2014 WL 4988268, at *9 (S.D.N.Y. Sept. 29, 2014)* (finding, after sustaining plaintiff's *Section 1* Claim, that "the analysis [regarding whether defendant participated in anticompetitive conduct for purposes of *Section 2*] is essentially the same as it was for *Section 1* above. The requisite anticompetitive action alleged in the Complaint is the formation of exclusive dealing contracts that foreclose a significant share of the market."); ECF 51 at 8 n.16.

litigant bringing a *Section 1* claim must allege: "(1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) unreasonably restrains trade." *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 506 (2d Cir.2004)*.

Similarly, under *Section 3* of the Clayton Act, it is "unlawful . . . to . . . make a sale or contract for sale of goods . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller" **[*46]** ***if*** "the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." *15 U.S.C. § 14*. Clayton Act *Section 3* claims are analyzed in essentially the same manner (besides the additional requirement of a "sale or contract for sale of goods"[29]) as Sherman Act *Section 1* claims challenging exclusivity agreements; accordingly, both EDR-Sanborn and ERIS analyze these claims together. *See* *CDC Techs., Inc. v. IDEXX Lab., Inc., 186 F.3d 74, 79 (2d Cir. 1999)*; *Comm. Data Servers, Inc. v. IBM, 262 F. Supp. 2d 50, 78 (S.D.N.Y. 2003)*. EDR-Sanborn's principal argument is that both claims should be dismissed because ERIS does not plausibly allege that the exclusive contracts at issue restrain trade.

Because of their potentially procompetitive benefits, exclusive dealing agreements are considered "presumptively legal" and the question of whether they unreasonably restrain trade is analyzed under the rule of reason. *Maxon, 2014 U.S. Dist. LEXIS 139480, 2014 WL 4988268, at *9* (quoting *CDC Techs., 186 F.3d at 80*). Under the rule of reason, plaintiffs bear an initial burden of demonstrating that the agreements have an actual adverse effect on competition. *Id.* "Thus, to survive a motion to dismiss they must plead plausible allegations that, if true, would show such an adverse effect; if Plaintiffs then provide evidence of anticompetitive effects, Defendant will later have the opportunity to show the procompetitive **[*47]** effects of the agreements." *Id.*

To meet their burden, ERIS must plausibly allege that a substantial share of the ERAD market has been foreclosed by EDR's exclusivity agreements. *Id.* at *13; ("Exclusive dealing is an unreasonable restraint of trade and a *§ 1* violation only when the agreement freezes out a significant fraction of buyers or sellers from the market."). In determining substantial market foreclosure, courts place great weight on the percentage of the market foreclosed by the agreements at issue, and foreclosure percentages below 30 to 40 percent are generally insufficient. *See* *Maxon, 2014 U.S. Dist. LEXIS 139480, 2014 WL 4988268, at *14*; *Am. Express Travel Related Servs. Co. v. Visa U.S.A., No. 04-CV-8967 (BSJ), 2005 U.S. Dist. LEXIS 42852, 2005 WL 1515399, at *3 (S.D.N.Y. June 23, 2005)*. However, courts also consider non-numeric factors, such as the duration and terminability of the agreements and whether there are significant barriers to entry into the relevant market. *Mazda v. Carfax, Inc., No. 13-CV-2680 (AJN), 2016 U.S. Dist. LEXIS 171418, 2016 WL 7231941, at *5 (S.D.N.Y. Dec. 9, 2016)*, *aff'd sub nom,* *Maxon Hyundai Mazda, et al. v. Carfax, Inc., 726 F. App'x 66 (2d Cir. 2018)*.

Here, ERIS has plausibly alleged that EDR has substantially foreclosed the ERAD market through exclusivity agreements. By generally alleging, on information and belief, that EDR has foreclosed 60% of purchasing in the market using exclusivity agreements, and specifically alleging that (a) EDR has locked *at least* seven of the ten largest potential customers in the market into exclusivity agreements, (b) these **[*48]** ten customers constitute 60% of the purchasing in the market and the "locked in" seven constitute 25% of the purchasing, and (c) EDR has also locked several smaller customers into such agreements, ERIS raises a reasonable inference that EDR has foreclosed a substantial share of the ERAD market. ¶¶ 118, 122-23. *See* *In re Keurig, 383 F. Supp. 3d at 236-37* (explaining that "[a]t the motion to dismiss stage, such specific mathematical pleading is unnecessary" and that "[t]he extent to which competitors were excluded . . . is fact-dependent and not properly disposed of on a motion to dismiss"); *see also* *E.I. DuPont de Nemours & Co. v. Kolon Indus., 637 F.3d 435, 452 n.12 (4th Cir. 2011)* ("While [counterclaim-plaintiff] did not allege a specific percentage of market foreclosure in its Counterclaim, it would be problematic to reject its Counterclaim, with its extensive factual allegations, solely on that basis at the pre-discovery, motion-to-dismiss stage, when [counterclaim-plaintiff] likely has insufficient information to calculate a precise number.").

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[29] EDR-Sanborn has waived any argument based on this factor. *See supra* note 10.

ERIS's other allegations also support a reasonable inference of substantial foreclosure. For example, EDR's contracts are alleged to last several years. *See* Am. Express, 2005 U.S. Dist. LEXIS 42852, 2005 WL 1515399, at *3 ("[T]he shorter an agreement's term and the easier it is to terminate, the more likely that it will be **[*49]** upheld."). ERIS also alleges significant barriers to market entry, in light of the other anticompetitive conduct alleged in the complaint. These allegations are sufficient at the motion to dismiss stage. *Compare* Mazda, 2014 U.S. Dist. LEXIS 139480, 2014 WL 4988268, at *13-14 (denying motion to dismiss where plaintiff estimated more than 30% market foreclosure by allegedly long-term agreements), *with* Mazda, 2016 U.S. Dist. LEXIS 171418, 2016 WL 7231941, at *14-15 (later granting summary judgment in favor of defendant in the same case where discovery revealed less than 30% foreclosure by exclusivity agreements, most of which lasted less than three years, and plaintiff failed to provide evidence of barriers to market entry).[30]

D. Counterclaims VI-XII: Tort and Lanham Act Claims

ERIS's tort and Lanham Act claims (Counts VI through XII) center on four categories of written and oral statements about EDR-Sanborn and its products and/or ERIS and its products. Before analyzing ERIS's claims, I briefly describe each contested statement:

1. **Copyright Management Information ("CMI")**: ERIS asserts that EDR has wrongfully included CMI—consisting of Sanborn's corporate logo, a copyright date, and a legend stating that "[o]nly Environmental Data Resources (EDR) is authorized to grant rights for **[*50]** commercial reproduction of maps by the Sanborn Library LLC, the copyright holder for the collection"—on **each and every** Sanborn Map, even those in the public domain based on their publication date or lack of timely copyright renewal. ¶ 62. Such CMI can be publicly viewed on **all** maps in a sample "Certified Sanborn Map Report" available on EDR's website. ¶ 63; Wolkoff Decl., Ex. C. ERIS alleges that EDR-Sanborn includes this "patently false" CMI on public domain Sanborn Maps in order to "unduly restrict[] the dissemination of these uncopyrighted and uncopyrightable maps and coerc[e] environmental consultants, governments, and others to turn to EDR—and only EDR—for copies of these public domain maps." ¶ 64.

2. **Blog Post**: ERIS also alleges that the below language, appearing in a two-part blog post available on EDR's website, wrongly suggests that all Sanborn Maps[31] are protected by copyright:

> Finally, an issue that many people are not aware of is the fact **that when Sanborn Maps . . . are not procured via EDR and The Sanborn Library, it is against copyright to include them in a Phase I or similar report**. Yet we are aware of many instances **where companies are using the actual maps in**

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[30] I reject EDR's argument that its exclusivity agreements cannot be anticompetitive because ERIS attempted to bid against at least one of EDR's exclusive contracts and lost. ¶ 121. The cases cited by EDR are inapposite: In *Balaklaw v. Lovell*, the Circuit affirmed summary judgment in favor of defendants and found no evidence of market foreclosure where an exclusivity agreement was freely terminable on six-months' notice and was entered into after an open, competitive bidding process. 14 F.3d 793, 796, 799, 801 (2d Cir. 1994). Relying on *Lovell*, Judge Sweet found, on a motion to dismiss, that exclusive contracts were not anticompetitive where, as alleged, they were not fully exclusive and were of limited duration (no more than three years), and defendant entertained bids at the conclusion of each agreement's term. Spinelli v. Nat'l Football League, 96 F. Supp. 3d 81, 117-18 (S.D.N.Y. 2015). Still, the *Spinelli* court acknowledged that a plaintiff can plausibly allege exclusivity agreements to be anticompetitive by "alleg[ing] facts showing exceptional circumstances, such as evidence of predatory practices or a unique opportunity to leverage two distinct monopolies." Id. at 118 (internal citations omitted). Here, the exclusivity agreements are not alleged to be of short duration or (invariably) subject to an open, competitive bidding process, and ERIS plausibly alleges that EDR is engaging in predatory practices harming competition in the ERAD market.

[31] The Blog Post does not directly define "Sanborn Maps" but instead seems to use the term to refer to all maps published by Sanborn. *See* Ezovski, *supra* note 4 ("As many people familiar with Environmental Data Resources know, EDR purchased the complete Sanborn Library in 1996 . . . . By doing this, EDR secured the largest, most complete collection of 1.4 million Sanborn Maps in the country (which it still is today). However, since then, many people in our industry have been trying to 'skirt around' the copyright issue of Sanborns."). The Blog Post nowhere suggests that any Sanborn Maps lack copyright protection.

> **reports [*51] illegally**. In fact, many of our clients are also dealing with the same limitations with Google Maps, Polk City Directories and other tools that can be used for research. While they can be used for reference, all of these sources are protected by copyright infringement laws and **are not allowed to be used for commercial purposes such as Phase I ESA reports. Many folks are not even aware that they are violating a copyright law when they include them, but it is true**. You would think that those who promote and market the use of "Free Sanborn Maps" would be so kind to mention this "*minor*" detail. ¶ 65 (emphases in Counterclaims) (quoting language and providing links).

3. **Oral Statements**. ERIS challenges three sub-categories of oral statements by EDR to customers and potential customers:

a. **Oral Statement 1**: "[T]he lawsuit is an 'open and shut case' and . . . when it is over, ERIS will not be able to provide 'any fire insurance maps.'" ¶¶ 101, 126, 159.

b. **Oral Statement 2**: "EDR-Sanborn is the owner of copyrights in all of the Sanborn Maps." ¶¶ 101, 105.

c. **Oral Statement 3**: **"**ERIS is acting illegally and in violation of all of EDR's copyrights" and Sanborn Maps acquired from any source other **[*52]** than EDR for use in a Phase I ESA are "illicit and unlawful." ¶¶ 70, 101, 105, 182, 203.

4. **Litigation Statements**. Lastly, ERIS also challenges written statements, made in March 2019 on EDR's website and in an industry-wide email, stating that, *inter alia*: EDR "filed a copyright infringement action against [ERIS] in order to stop its unlawful use of our Sanborn Map® collection"[32] and EDR "believe[s] that ERIS is illegally copying, selling and distributing our Sanborn Maps without our permission and that its actions constitute copyright infringement." ¶¶ 94-100.

Although it is not fully clear from the Counterclaims which particular statements form the basis of which claims, ERIS's brief clarifies that the Blog Post, Oral Statements 1 and 3, and the Litigation Statements—statements supposedly about ERIS and its products—form the basis of its Defamation (Count X), Product Disparagement (Count IX), and Trade Libel (Count XI) claims. (ECF 47 at 20-21). Alternatively, ERIS states that **all** of the above-mentioned statements form the basis of its Lanham Act (Count VI), New York General Business Law (Count VII and VIII), and tortious interference (Count XII) claims. (*Id.* at 20-21, **[*53]** 26).

1. Statements of Fact vs. Statements of Opinion

Before undertaking a claim-by-claim analysis, I will address EDR-Sanborn's general argument that the contested statements are not actionable as a matter of law because they are all properly characterized as statements of pure

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[32] The Litigation Statements do not directly define the "Sanborn Map® collection" but seem to use the term to refer to all maps published by Sanborn and acquired by EDR. *See* ¶¶ 94-100 ("We acquired the Sanborn Map collection in 1996. The maps were carefully crafted by cartographers . . . This craftsmanship is reflected in each Sanborn Map, and we are proud to serve as the owner and custodian of this important historical resource."). Sanborn uses the term similarly in the Copyright Suit complaint (which is linked in the Litigation Statements). *See* ECF 12 ¶ 16 ("EDR's offerings include . . . the complete catalog of fire insurance maps originally published by Sanborn Library's predecessor in-interest, the Sanborn Map Company (the 'Sanborn Maps')."); ¶ 19 ("Today, digital copies of the Sanborn Maps can be purchased for commercial use exclusively through EDR, on an a-la-carte basis, through a variety of customizable report packages. In all, there are roughly 1.2 million Sanborn Maps in Sanborn Library's collection."); *see also* ¶ 5 ("ERIS has amassed a collection of nearly one million fire insurance maps which, upon information and belief, is built entirely of Sanborn Library's copyrighted maps."); Prayer for Relief A (asking for "[a] declaration that [ERIS] ha[s] directly and/or indirectly infringed [Sanborn's] copyrights in each of the Sanborn Maps).

opinion. With the exception of Oral Statement 1, I find that the contested statements are properly characterized as statements of fact or mixed opinion.[33]

"The Lanham Act does not proscribe liability for mere [or pure] opinions, nor do opinions give rise to liability under state law for defamation [or] deceptive acts and practices." *See* GeigTech E. Bay LLC v. Lutron Elecs. Co., No. 18-CV-5290 (CM), 2019 WL 1768965, at *8 (S.D.N.Y. Apr. 4, 2019) (collecting cases). However, a statement of opinion "that implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it" may be actionable as a "mixed opinion." Davis v. Boeheim, 24 N.Y.3d 262, 269-70, 998 N.Y.S.2d 131, 22 N.E.3d 999 (2014) (internal citations omitted). "Distinguishing between fact and opinion is a question of law" for courts to decide. *Id.*

In determining whether a statement constitutes an opinion or factual representation, courts must consider whether, in the view of an objective, reasonable listener or reader: (1) "the specific language in issue has a precise meaning which is readily understood," **[*54]** (2) "the statements are capable of being proven true or false," and (3) "either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal [to] . . . readers or listeners that what is being read or heard is likely to be opinion, not fact." Id. at 270 (internal citations omitted); *accord* Mr. Chow N. Y. v. Ste. Jour Azur S.A., 759 F.2d 219, 224 (2d Cir. 1985). The "dispositive inquiry" is "whether the challenged statement can reasonably be construed to be stating or implying facts about the . . . plaintiff." Flamm v. Am. Ass'n of Univ. Women, 201 F.3d 144, 146 (2d Cir. 2000); Davis, N.Y.3d at 269-270.

EDR's alleged statement to customers that the Copyright Suit is an "open and shut case" and will lead ERIS to not being able to sell any fire insurance maps in the future ("Oral Statement 1") is puffery, or "defensive salvo in this ongoing [legal] battle." Karp v. Hill & Knowlton, Inc., 631 F. Supp. 360, 365 (S.D.N.Y. 1986). A description of a case as "open and shut" does not have a precise meaning and thus cannot be proven true or false, and statements regarding the outcome of ongoing litigation are nothing more than conjecture or speculation. *See* Live Face on Web, LLC v. Five Boro Mold Specialist Inc., No. 15-CV-4779 (LTS) (SN), 2016 U.S. Dist. LEXIS 56601, 2016 WL 1717218, at *2 (S.D.N.Y. Apr. 28, 2016) (finding "hyperbolic and imprecise" statements describing case as "frivolous" to be non-actionable opinion and noting that "[c]ourts have consistently found that statements calling into **[*55]** question the legitimacy of litigation are non-actionable statements of opinion"); Scholastic, Inc. v. Stouffer, 124 F. Supp. 2d 836, 850 (S.D.N.Y. 2000) (finding statements that legal claims were "absurd," "ridiculous" and "meritless" to be non-actionable opinion); Karp, 631 F. Supp. at 365 (finding statement interpreting Second Circuit opinion as supporting [a company's] claim to be non-actionable opinion where "whether the Second Circuit approved of [the] claims on the merits [was] still an open question"); Gotbetter v. Dow Jones & Co., 259 A.D.2d 335, 687 N.Y.S.2d 43, 44 (1999) (finding defense counsel's statement calling plaintiff's lawsuit "baseless" to be non-actionable opinion); *see also* Moya v. United Airlines, Inc., No. 18-CV-14829, 2019 U.S. Dist. LEXIS 13888, 2019 WL 351904, at *4 (D.N.J. Jan. 29, 2019) (collecting cases for the proposition that "[c]ourts generally find parties' statements regarding the probable outcome of a litigation to be non-actionable opinion").

However, the remaining challenged statements make or imply a factual representation that EDR-Sanborn holds valid copyright rights in *all* Sanborn Maps. Oral Statement 3 and the Litigation Statements also convey a factual representation that because EDR-Sanborn holds copyrights in all Sanborn Maps, ERIS's use and inclusion of Sanborn Maps in its products infringes on EDR-Sanborn's copyrights. Relevant terms such as "copyright" and "infringement" have precise meanings, and whether EDR holds and **[*56]** ERIS is infringing upon currently-valid

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[33] At the motion to dismiss stage, courts typically evaluate each challenged statement (or set of statements) and determine whether it is actionable. "If the Court finds that some of the statements are actionable but others are not, then the Court may dismiss the claims based on the nonactionable statements and allow the claims based on the actionable statements to go forward . . . [D]iscovery w[ill] then proceed for any statements held to be actionable, but not for any statements that fail to support a claim." Biro v. Conde Nast, 883 F. Supp. 2d 441, 457 (S.D.N.Y. 2012) (granting motion to dismiss claims with respect to some statements and denying motion with respect to others); *see* Watson v. NY Doe 1, 439 F. Supp. 3d 152, 160-62 (S.D.N.Y. 2020) (same); Treppel v. Biovail Corp., No. 03-CV-3002, 2004 U.S. Dist. LEXIS 20714, 2004 WL 2339759, at *17 (S.D.N.Y. Oct. 15, 2004) (same).

copyrights is, *at least in relevant part*, susceptible to proof by way of verifiable facts, such as the date the maps were originally published and whether renewals were (timely) made; alternatively stated, that a map is within the term of copyright protection, is too old to be protected, or was not timely or properly renewed can be objectively proven true or false. *See* Perfect Pearl Co. v. Majestic Pearl & Stone, Inc., 887 F. Supp. 2d 519, 539-40 (S.D.N.Y. 2012) (finding use of "®" registration symbol on promotional materials after trademark registration had lapsed constituted an actionable, false statement).

Additionally, context cuts both ways. While a reasonable reader or listener might discount such statements as the biased opinion of a legal adversary and business competitor, they also may assume that EDR-Sanborn is "is privy to undisclosed and damning information, the details of which formed the basis for statements." GeigTech, 2019 U.S. Dist. LEXIS 59319, 2019 WL 1768965 at *8 (finding company president's statements that competitor "poached [the company's] patented designs" and engaged in "blatant infringement," published in press release announcing lawsuit, to be actionable); *cf.* Lombardo v. Dr. Seuss Enter., L.P., No. 16-CV-9974 (AKH), 2017 U.S. Dist. LEXIS 64854, 2017 WL 1378413, at *7 (S.D.N.Y. Apr. 7, 2017) (finding company's cease and desist letter stating, *inter alia*, "upon information and belief, the Infringing **[*57]** Work appears to be based on or derived from" defendant's book was not actionable because a reasonable reader "could not believe that defendant sent the letters in order to assert false statements of fact about plaintiffs" rather than to "notify the recipients of its legal opinion"). Thus, even to the extent that such statements can be classified as opinions, readers and listeners could reasonably assume such statements are based on undisclosed facts concerning, for example, EDR-Sanborn's renewal of their alleged copyrights.

2. Defamation (Count X)

As stated above, ERIS alleges defamation liability based on the Blog Post, Oral Statements 1 and 3, and the Litigation Statements. EDR argues that ERIS's defamation claim fails because (a) the Blog Post is not a statement "of and concerning" ERIS; (b) the Oral Statements are inadequately identified and (c) the Litigation Statements (and Oral Statement 3) fall under New York's "fair report" privilege. I agree with EDR's first two arguments and thus recommend that this claim be dismissed insofar as it is based on the Blog Post and the Oral Statements. Alternatively stated, ERIS should be permitted to proceed with a defamation claim based only **[*58]** on the Litigation Statements.

"Defamation is the injury to one's reputation either by written expression, which is libel, or by oral expression, which is slander." Idema v. Wagner, 120 F. Supp. 2d 361, 365 (S.D.N.Y.2000), *aff'd*, 29 Fed. Appx. 676 (2d Cir.2002). Under New York law, a defamation claim must allege: (1) a false and defamatory, factual statement "of and concerning" the plaintiff (2) that was published to a third party without authorization or privilege; (3) through fault on the part of the defendant; and (4) and either special damages or *per se* actionability. *Id.;* Kamchi v. Weissman, 125 A.D.3d 142, 1 N.Y.S.3d 169, 180 (2d Dep't 2014). Additionally, plaintiff must "identify adequately who actually made the allegedly [defamatory] statements, when they were made and to whom they were communicated." Watson, 439 F. Supp. 3d at 163 (internal citations omitted).

a. Blog Post

As an initial matter, ERIS has not sufficiently alleged that the Blog Post is a statement "of and concerning" ERIS. While "it is not necessary for the plaintiff[] to be named in the publication, [the plaintiff] must plead and prove that the statement referred to [the plaintiff] and that a person [familiar with the parties and subject] hearing or reading the statement reasonably could have interpreted it as such." Three Amigos SJL Rest., Inc. v. CBS News Inc., 28 N.Y.3d 82, 42 N.Y.S.3d 64, 65 N.E.3d 35, 37 (2016); *see* Elias v. Rolling Stone LLC, 872 F.3d 97, 105 (2d Cir. 2017). "This burden is not a light one," and whether a statement can reasonably **[*59]** be interpreted to be "of and concerning" a particular party is a question of law generally resolved at the pleading stage. Three Amigos, 65 N.E.3d at 37; *see* Elias, 872 F.3d at 105.

Additionally, under the "group libel doctrine," statements regarding a small, "specifically-defined group" may reasonably be interpreted as being "of and concerning" an individual member of such group, Three Amigos, 65 N.E.3d at 38, whereas "an impersonal reproach of an indeterminate class is not actionable," Gross v. Cantor, 270 N.Y. 93, 200 N.E. 592, 593 (1936); Diaz v. NBC Universal, Inc., 536 F. Supp. 2d 337, 343 (S.D.N.Y. 2008), *aff'd*, 337 F. App'x 94 (2d Cir. 2009) ("Under the group libel doctrine, when a reference is made to a large group of people, no individual within that group can fairly say that the statement is about him, nor can the 'group' as a whole state a claim for defamation."). New York courts apply an "intensity of suspicion" test to determine whether statements made against a group are actionable under a group libel theory, considering factors such as the size of the group, its definiteness in number and composition, its degree of organization and prominence, and the degree to which the defamatory comments focus on individual members. *See* Elias, 872 F.3d at 108; Anyanwu v. Columbia Broad. Sys., Inc., 887 F. Supp. 690, 693 (S.D.N.Y. 1995); Brady v. Ottaway Newspapers, Inc., 84 A.D.2d 226, 445 N.Y.S.2d 786, 790 (2d Dep't 1981).

Here, the Blog Post can reasonably be interpreted as being "of and concerning" everyone that uses or has used Sanborn Maps not procured from EDR for commercial purposes. **[*60]** This group seems to include data provision firms such as ERIS, who provide ERAD report packages including Sanborn Maps to environmental professionals, as well as the environmental professionals who then use these packages to create Phase I ESA Reports. While ERIS's opposition asserts (in a single sentence) that the Blog Post makes implied statements about ERIS,[34] ERIS has not pleaded any facts suggesting that a reasonable reader would understand the Blog Post to be referring to ERIS individually. Chicherchia v. Cleary, 207 A.D.2d 855, 616 N.Y.S.2d 647, 648 (2d Dep't 1994) ("[W]here extrinsic facts are relied upon to prove such reference the party alleging defamation must show that it is reasonable to conclude that the publication refers to him or her and the extrinsic facts upon which that conclusion is based were known to those who read or heard the publication."). Moreover, ERIS has not alleged any information regarding the (approximate) size or definitiveness/stability of the referenced group to enable application of the "small group libel doctrine." Elias, 872 F.3d at 108 (noting that "successful small group defamation claims typically involve groups with twenty-five or fewer members," though New York courts have allowed claims to go forward where the relevant group included **[*61]** 53 members). Thus, the District Court should reject ERIS's conclusory statement that the Blog Post makes an implied representation about ERIS.

b. Oral Statements

Next, I find that EDR cannot base defamation liability on the Oral Statements[35] because ERIS fails to plead the identity of a single individual who made such statements or to provide any details regarding when they were made or to whom they were communicated.

It is well-settled that allegations regarding defamatory statements or misrepresentations must provide some identifying information regarding the relevant statements, who made them, when they were made, and to whom they were communicated. *See, e.g.,* Evliyaoglu Tekstil A.S. v. Turko Textile LLC, No. 19-CV-10769 (LJL), 2020 U.S. Dist. LEXIS 244703, 2020 WL 7774377, at *3 (S.D.N.Y. Dec. 30, 2020) ("A long line of cases in this District holds that a defamation claim is only sufficient if it adequately identifies the purported communication, and an indication of who made the communication, when it was made, and to whom it was communicated.") (internal citations omitted).[36]

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[34] Any argument for defamation liability based on the Blog Post may also be deemed waived or abandoned due to ERIS's failure to sufficiently address it in its opposition brief. *See supra* note 10; ECF 47 at 26.

[35] I have already found Oral Statement 1 to constitute unactionable opinion. *See supra* Section III.D.1.

[36] Under New York procedural law, a plaintiff must plead defamatory statements with greater particularity. N.Y. C.P.L.R. 3016(a) ("In an action for libel or slander, the particular words complained of shall be set forth in the complaint . . . ."). While federal courts instead subject defamation claims to the more "liberal pleading standards of Fed R. Civ. P. 8," courts in this Circuit have repeatedly emphasized that "[e]ven under the more lenient federal standard, however, the [litigant] must at least 'identify the

ERIS alleges that certain oral statements were made by "EDR and its agents and representatives" to "consumers and potential consumers," but does not provide even approximate dates of any instances that such comments were made. ¶¶ 68, **[*62]** 70, 101-103; 126; 159. Moreover, EDR provides no indication of who at EDR made the statements and to which customers and potential customers the statements were made. ERIS cannot survive a motion to dismiss based on these oral statements without providing further identifying information. *See Adyb Engineered for Life, Inc. v. Edan Admin. Servs. Ltd., No. 1:19-CV-7800 (MKV), 2021 U.S. Dist. LEXIS 59666, 2021 WL 1177532, at *25 (S.D.N.Y. Mar. 29, 2021)* (granting motion to dismiss where plaintiff "vaguely" alleged that defendant's owner sent emails to "representatives" of a company without identifying those representatives or when the emails were sent); *MCM Prod. USA, Inc. v. Botton, No. 16-CV-1616, 2016 U.S. Dist. LEXIS 127426, 2016 WL 5107044, at *6 (S.D.N.Y. Sept. 19, 2016)* (granting motion to dismiss where counterclaim-plaintiffs merely "allege[d] that an unidentified [counterclaim-defendant] employee told an unidentified customer of [counterclaim-plaintiffs] that the . . . goods sold by [counterclaim-plaintiffs] were counterfeit and defective," without providing the date, time, or location of the statement or identifying information for the employee-speaker or customer-listener); *Neal, 2014 U.S. Dist. LEXIS 113142, 2014 WL 3887760, at *3* (granting motion to dismiss and finding that "plaintiff's failure to identify the anonymous 'employee or agent of [defendant-organization]' responsible for making the statement [was] fatal to his [defamation] claim"); *Biomed Pharms., Inc. v. Oxford Health Plans (N.Y.), Inc., 775 F. Supp. 2d 730, 739 (S.D.N.Y. 2011)* (granting motion to dismiss where plaintiff alleged "only vaguely **[*63]** that [the statements] were made to unidentified patients of [plaintiff], unidentified physicians, and unidentified individuals at the [state agency]"); *Camp Summit of Summitville, Inc. v. Visinski, No. 06-CV-4994 (CM) (GAY), 2007 U.S. Dist. LEXIS 28496, 2007 WL 1152894, at *10 (S.D.N.Y. Apr. 16, 2007)* (granting motion to dismiss where counterclaim-plaintiff "neither allege[d] who at [counterclaim-defendant's organization] made the defamatory remarks, nor to whom the comments were made").[37]

c. Litigation Statements

Lastly, at this point in the proceedings, I do not find that EDR-Sanborn is immunized from defamation liability based on New York's "fair report" litigation privilege. Accordingly, ERIS's defamation claim may proceed only based on the Litigation Statements.

Under *Section 74* of New York's Civil Rights Law, absolute privilege attaches to any statement giving a substantially fair and accurate reporting of judicial proceedings. *N.Y. Civ. Rights Law § 74*. However, in *Williams v. Williams*, the New York Court of Appeals clarified that *Section 74* does not permit a person or entity to "maliciously institute a judicial proceeding alleging false and defamatory charges, and to then circulate a press release or other communication based thereon and escape liability by invoking the statute." *23 N.Y.2d 592, 246 N.E.2d 333, 337, 298 N.Y.S.2d 473 (1969)*; *Sparrow Fund Mgmt. LP v. MiMedx Grp., Inc., No. 18-CV-4921 (PGG) (KHP), 2020 U.S. Dist. LEXIS 49813, 2020 WL 1330283, at *7 (S.D.N.Y. Mar. 22, 2020)* ("[S]tatements made as part of a sham or 'maliciously instituted' action, or communications **[*64]** about such an action, are not privileged."); *Flomenhaft v. Finkelstein, 127 A.D.3d 634, 8 N.Y.S.3d 161, 165 (1st Dep't 2015)* ("[T]he privilege is capable of abuse and will not be conferred where the underlying lawsuit was a sham action brought solely to defame the defendant"). Still, courts have emphasized that *Williams* created a "narrow" exception that "does not apply in the absence of any allegation that the . . . [underlying] action was brought maliciously and solely for the purpose of later defaming the plaintiff." *Fuji Photo Film U.S.A., Inc. v. McNulty, 669 F. Supp. 2d. 405, 412 (S.D.N.Y.2009)* (internal citations omitted).

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allegedly defamatory statements, the person who made the statements, the time when the statements were made, and the third parties to whom the statements were published.'" *Neal v. Asta Funding, Inc., 13-CV-2176 (VB), 2014 U.S. Dist. LEXIS 113142, 2014 WL 3887760, at *3 (S.D.N.Y. June 17, 2014)* (quoting *Mobile Data Shred. Inc. v. United Bank of Switzerland, 2000 U.S. Dist. LEXIS 4252, 2000 WL 351516, at *6 (S.D.N.Y. Apr. 5, 2000)*); *see Alvarado v. Mount Pleasant Cottage Sch. Dist., 404 F. Supp. 3d 763, 790 (S.D.N.Y. 2019)*.

[37] ERIS has now had the opportunity to take discovery on these statements, which are also relevant to ERIS's affirmative defense of copyright misuse that EDR-Sanborn has not moved to strike.

Here, ERIS alleges that EDR-Sanborn intentionally filed a sham lawsuit against ERIS and publicized its allegations on EDR's website and via email in order to injure ERIS and drive away customers. ¶¶ 94-102, 132-136. As discussed above, the Copyright Suit remains pending and has neither been subjected to dispositive motion practice nor been decided to be (or not be) a sham as a matter of law. *See supra* Section III.B.2.a. Thus, "[w]hether the [Copyright Suit] meet[s] [the *Williams*] standard is an open question of fact that cannot be resolved on a motion to dismiss." *Frydman v. Verschleiser, 172 F. Supp. 3d 653, 673 (S.D.N.Y. 2016)* (dismissing defamation claim pursuant to New York's fair report privilege only insofar as it was related to a dismissed state court lawsuit because the **[*65]** state court's denial of sanctions established that the suit was not a sham, but refusing to dismiss defamation claim insofar as it was related to two pending lawsuits); *see Long v. Marubeni Am. Corp., 406 F. Supp. 2d 285, 296 (S.D.N.Y. 2005)* (explaining that "[d]evelopment of a factual record, and further developments in this lawsuit, may well permit the Court to conclude that the [allegedly defamatory] e-mail was absolutely privileged [under *Section 74*], but the applicability of the privilege cannot be ascertained solely from the facts alleged in plaintiffs' complaint"). Accordingly, *at least at this stage of the case*, the fair report privilege does not immunize EDR from any defamation liability.[38]

3. Product Disparagement and Trade Libel (Counts IX and XI)

EDR-Sanborn argues that ERIS's Product Disparagement (Count IX) and Trade Libel (Count XI) claims fail for the same reasons its defamation claim fails, *as well as for the additional reason that ERIS fails to plead special damages*. I recommend that these claims (Counts IX and XI) be dismissed *in toto* for failure to plead special damages.

Under New York law, "[t]rade libel or product disparagement is an action to recover for words or conduct which tend to disparage or negatively **[*66]** reflect upon the condition, value or quality of a product or property." *Angio-Med. Corp. v. Eli Lilly & Co., 720 F. Supp. 269, 274 (S.D.N.Y.1989)*; *Bilinski v. Keith Haring Found., Inc., 96 F. Supp. 3d 35, 51 & n.15 (S.D.N.Y. 2015)*, *aff'd in part*, *632 F. App'x 637 (2d Cir. 2015)* (observing that defamation of a product, under New York law, is "described interchangeably as trade libel, injurious falsehood, and product disparagement"). To recover for such a claim, a "plaintiff must show that the defendant published a[] . . . defamatory statement directed at the quality of a business's goods *and must prove that the statements caused special damages*." *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 59 (2d Cir. 2002)* (emphasis added).

As Judge Liman recently emphasized, "[a]n adequate pleading of special damages must clear several hurdles." *Soter Techs., LLC v. IP Video Corp., 523 F. Supp. 3d 389, 2021 WL 744511, at *13 (S.D.N.Y. 2021)*. Special damages are "limited to losses having pecuniary or economic value, and must be fully and accurately stated, with sufficient particularity to identify actual losses." *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC, 194 F. Supp. 3d 263, 292 (S.D.N.Y. 2016)* (quoting *Kirby v. Wildenstein, 784 F. Supp. 1112, 1116 (S.D.N.Y. 1992)*). "[S]pecial damages must [also] be the natural and immediate consequence of the disparaging statements to be recoverable." *Kirby, 784 F. Supp. at 1116* (internal citations omitted). Further, "[w]here loss of customers constitutes the alleged special damages, the individuals 'who ceased to be customers, or who refused to purchase, must be named' and the exact damages itemized." *Fashion Boutique, 314 F.3d at 57* (quoting *Drug Research Corp. v. Curtis Publ'g Co., 7 N.Y.2d 435, 166 N.E.2d 319, 322, 199 N.Y.S.2d 33 (1960)*); *Dentsply Int'l Inc. v. Dental Brands for Less LLC, No. 15-CV-8775 (LGS), 2016 U.S. Dist. LEXIS 149139, 2016 WL 6310777, at *6 (S.D.N.Y. Oct. 27, 2016)* (explaining that "general allegations of lost sales from **[*67]** unidentified customers are insufficient" and "[r]ound figures or a general allegation of a dollar amount . . . will not suffice"). Because whether a plaintiff has suffered special damages "goes to the cause of an action itself and not merely to the recovery . . . Courts considering product disparagement claims have therefore applied this requirement strictly, granting motions to

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[38] EDR-Sanborn also argues that ERIS's defamation, as well as all other claims made in Counts VI-XII, should be dismissed pursuant to the *Noerr-Pennington* doctrine insofar as they are based on the Litigation Statements. (ECF 45 at 31 & n. 24). However, for the reasons stated in Section III.B.2.a, any dismissal based on *Noerr-Pennington* immunity should not be granted at this point in the litigation.

dismiss . . . for failure to allege special damages with the requisite specificity." Enigma Software Grp., 194 F. Supp. 3d at 292 (quoting Computech Int'l, Inc. v. Compaq Computer Corp., 2002 U.S. Dist. LEXIS 20307, 2002 WL 31398933, at *6 (S.D.N.Y. Oct. 24, 2002)).

With respect to damages, ERIS has only alleged injury "in an amount to be determined at trial" with one example: "an inability to achieve any sales with Company K, which has refused to do business with ERIS because of this lawsuit and EDR's statements to the public about this lawsuit." ¶¶ 226, 242-43; *see* ¶ 128 (explaining that "an individual at Company K told a sales agent for ERIS that they were not interested in meeting with ERIS to see a demonstration of ERIS's products and services because of this lawsuit"). EDR has not actually named any lost customers—let alone customers lost due to product disparagement specifically, rather than the Copyright Suit—nor made any attempt to quantify its damages resulting from **[*68]** the allegedly disparaging statements. Given the stringent requirement to plead special damages, ERIS' allegations are too general to avoid dismissal.[39]

ERIS's argument that it is exempt from pleading special damages lacks merit. ERIS argues that it need not allege special damage with particularity because "the nature of ERIS's business and the widespread dissemination of disparaging statements" makes it "impossible . . . at this stage" for ERIS to identify lost customers. (ECF 47 at 30-31). However, the cases relied on by ERIS—Charles Atlas, Ltd. v. Time-Life Books, Inc., 570 F. Supp. 150 (S.D.N.Y.1983) and Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC, No. 08-CV-442 (TPG) (FM), 2014 U.S. Dist. LEXIS 133839, 2014 WL 4723299 (S.D.N.Y. Sept. 23, 2014)—are inapposite and do not excuse ERIS's failure to quantify its damages.

In *Charles*, Judge Goettel held that the plaintiff did not need to identify lost customers because the plaintiff made sales to an amorphous customer base only through mail orders, making it "virtually impossible to identify those who did not order the plaintiff's product because . . . [i]n all likelihood, such people would simply have failed to order, thus leaving no record of their identity." Charles, 570 F. Supp. at 156; *cf.* Verizon Directories Corp. v. Yellow Book USA, Inc., 309 F. Supp. 2d 401, 408 (E.D.N.Y. 2004) (dismissing product disparagement claim for not identifying lost customers where plaintiff "ma[de] no representation that it is in the nature of its business not to have direct contact **[*69]** with its customers"). Critically, however, Judge Goettel found that "plaintiff ha[d] pleaded special damages adequately" by identifying an exact amount of lost sales and revenues, as well as an exact amount of "special advertising expenses" incurred to counteract the alleged product disparagement. Id. at 155. ERIS, on the other hand, has not attempted to quantify its lost sales or provided any other enumeration of special damages. Moreover, it appears that the only New York decision to (at least explicitly) adopt the exception to the requirement of naming lost customers established by *Charles* was reversed on appeal because "[p]laintiffs failed to plead . . . special damages with the requisite specificity." *Prince v. Fox Tel. Stas., Inc., 93 A.D.3d 614, 941 N.Y.S.2d 488, 488 (2012)*; Bilinski, 96 F. Supp. 3d at 52 (noting that *Charles* predates *Prince* and finding that "[n]one of the authorities cited by plaintiffs [including *Charles*] excuse[d] their failure to identify the amount of lost sales").

Later, in *Romeo & Juliette*, Judge Griesa held that the plaintiff was not required to allege special damages to state a claim of product disparagement arising from anonymous reviews made on websites, such as "Yelp.com," because it was "impossible at [the motion to dismiss] stage" for plaintiff to identify lost **[*70]** customers. 2014 U.S. Dist. LEXIS 133839, 2014 WL 4723299, at *6. Notably, *Romeo & Juliette* relied on *Charles*, which—as noted above—predates

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[39] *See, e.g.,* Soter, 523 F. Supp. 3d 389, 2021 WL 744511, at *13 (finding insufficient plaintiff's conclusory allegation that "[a]s a natural and immediate consequence of [the] disparaging statements [alleged], [plaintiff] suffered monetary losses in the amount of at least $1990," because plaintiff provided "no further explanation," did not identify the lost customer other than as a "school on the west coast," and did not present facts showing that a sale was imminent or foreseeable); Enigma Software Grp., 194 F. Supp. 3d at 292 (finding "far too generalized" plaintiff's allegation that it "has and will continue to suffer significant monetary and reputational injury in amounts that will be proven at trial but that are believed to exceed $75,000"); Kirby, 784 F. Supp. at 1116, 1118 (finding plaintiff's "vague allegations" that it sustained $250,000 in damages as a result of disparaging remarks about a painting it sought to sell, without "specify[ing] the losses underlying that figure" or identifying anyone who did not bid on the painting because of the alleged disparagement, were "clearly inadequate" to plead special damages); Drug Research Corp., 166 N.E.2d at 441 (holding that plaintiff failed to plead special damages where it alleged damages of $5 million because "[s]uch round figures, with no attempt at itemization, must be deemed to be a representation of general damages").

Prince. Moreover, while the court in *Romeo & Juliette* exempted the plaintiff from itemizing damages (rather than merely from naming lost customers, as done in *Charles*), the weight of authority indicates that even where it is impossible for plaintiffs to identify lost customers, "plaintiffs must do more than estimate damages." *Bilinski, 632 F. App'x 637 at 642-42* (collecting cases). Here, ERIS has not even provided such an estimate. Lastly, whereas the nature of the *Romeo & Juliette* plaintiff's business as a laser hair-removal establishment serving limitless consumers in New York made it impossible for the plaintiff to identify customers lost due to anonymous disparaging posts on online forums, ERIS's complaint raises no such inference. Instead, ERIS's reference to "Company K" and various customer relationships with which EDR allegedly interfered, as well as ERIS's admitted familiarity and contact with the companies that make up the majority of the market's customer-base, suggest that it ***is*** possible for ERIS to identify lost customers and plead special damages. *See* ¶¶ 69, 118, 121-23, 128, 135, 243; *Bilinski, 632 F. App'x at 642* ("In light of plaintiffs' allegations **[*71]** regarding [a] lost sale to a museum with whose representative he has spoken, plaintiffs do not plausibly allege the impossibility of identification."); *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 75 F. Supp. 2d 235, 240 (S.D.N.Y. 1999)*, *aff'd*, *314 F.3d 48 (2d Cir. 2002)* (finding identification possible where plaintiff maintained a customer list and could contact lost customers to determine why they stopped shopping at plaintiff's store).

4. Lanham Act (Count VI)

ERIS alleges violations of *Section 43(a)* of the Lanham Act based on all four categories of challenged statements. For the reasons set forth below, I recommend that ERIS's Lanham Act claim be dismissed with regard to the Oral Statements.

Section 43 of the Lanham Act provides, in relevant part, for civil liability if a defendant's "commercial advertising or promotion[] misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's good, services, or commercial activities." *15 U.S.C. § 1125(a)(1)(B)*. To prove liability, "a plaintiff must establish that the challenged message is (1) either literally or impliedly false, (2) material, (3) placed in interstate commerce, and (4) the cause of actual or likely injury to the plaintiff." *Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmBH, 843 F.3d 48, 65 (2d Cir. 2016)*. In addition to the arguments regarding opinion statements and *Noerr-Pennington* immunity addressed above, *see* ***[*72]*** *supra* Section III.D.1 and note 38, EDR-Sanborn argues that ERIS's Lanham Act claim fails in two respects: (a) the Oral Statements are too indefinite to support a claim and (b) neither the Blog Post nor the CMI make false statements about EDR-Sanborn's goods, services, or commercial activities.

a. The Oral Statements

EDR-Sanborn argues that the Oral Statements cannot form the basis of *Section 43* liability because ERIS does not allege who made these statements, when they were made, or to whom they were made. I interpret this argument as positing that ERIS has not sufficiently identified these statements as "commercial advertising or promotion." I agree.

As a threshold matter, *Section 43* expressly only applies to "commercial advertising or promotion." Though not limited to representations made as part of a classic advertising campaign, commercial advertising or promotion must be "(1) commercial speech, as defined by the *First Amendment*, (2) made 'for the purpose of influencing consumers to buy defendant's goods or services,' and (3) 'disseminated sufficiently to the relevant purchasing public.'" *Globe Cotyarn Pvt. Ltd. v. Next Creations Holdings LLC, No. 18-CV-04208 (ER), 2019 U.S. Dist. LEXIS 21226, 2019 WL 498303, at *4 (S.D.N.Y. Feb. 8, 2019)* (quoting *Boule v. Hutton, 328 F.3d 84, 90-91 (2d Cir. 2003)*).

Critically, pursuant to the third prong, "businesses harmed by isolated disparaging statements do not have redress under **[*73]** the Lanham Act." *Fashion Boutique, 314 F.3d at 57* (finding "twenty-seven oral statements regarding plaintiff's products in a marketplace of thousands of customers" were not disseminated sufficiently widely to constitute commercial adverting or promotions). While the Second Circuit has not set an exact number or percentage of customers that must be exposed to the challenged statement for it to qualify as sufficiently disseminated, courts in this District have found that a plaintiff cannot rely on conclusory allegations of widespread dissemination to unidentified customers. *Globe Cotyarn Pvt. Ltd., 2019 U.S. Dist. LEXIS 21226, 2019 WL 498303, at *4* (canvassing caselaw and concluding allegations regarding messages sent to two identified customers in a marketplace of an unidentified size and "naked assertions" of messages sent to other unidentified customers did not sufficiently plead the dissemination prong); *Solmetex, LLC v. Dental Recycling of N. Am., Inc., No. 17-CV-860 (JSR), 2017 U.S. Dist. LEXIS 102451, 2017 WL 2840282, at *3 (S.D.N.Y. June 26, 2017)* (rejecting conclusory allegations of widespread dissemination made without detail and "solely upon information and belief").

ERIS's Counterclaims states, "on information and belief," that the Oral Statements were made by EDR's agents to customers and potential customers "routinely," "repeatedly," "on a frequent basis" and as part of "an extensive marketing campaign." ¶¶ 68, 71, 82, 101, **[*74]** 105. However, these bare assertions regarding a belief of widespread dissemination and existence of an oral marketing campaign, without more, are not enough to plead sufficient dissemination. *Solmetex, LLC, 2017 U.S. Dist. LEXIS 102451, 2017 WL 2840282, at *3* (explaining that while allegations solely on information on belief are appropriate "where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible, such allegations must be accompanied by a statement of the facts upon which the belief is founded") (internal citations omitted). Accordingly, EDR-Sanborn's motion to dismiss any Lanham Act false advertising claim based on the Oral Statements should be granted. *See* *Weight Watchers Int'l, Inc. v. Noom, Inc., 403 F. Supp. 3d 361, 376 (S.D.N.Y. 2019)* (dismissing one category of statements based on insufficient public dissemination); *In re Elysium Health-Chromadex Litig., 2018 U.S. Dist. LEXIS 168417, 2018 WL 4907590, at *9 (S.D.N.Y. Sept. 27, 2018)* (same).

b. The Blog Post and CMI

Next, I find that ERIS has plausibly alleged that the Blog Post and CMI make false statements about the Sanborn Maps supposedly owned and exclusively licensed by EDR-Sanborn. An allegation of false advertisement "may be based on at least one of two theories: [1] that the challenged advertisement is literally false, *i.e.*, false on its face, or [2] that the **[*75]** advertisement, while not literally false, is nevertheless likely to mislead or confuse consumers." *Chanel, Inc. v. RealReal, Inc., 449 F. Supp. 3d 422, 442 (S.D.N.Y. 2020)* (quoting *Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 103 (2d Cir. 2010)*). Under the second "impliedly false" prong, "[t]he Court may presume that the advertisement is misleading where the defendant's misrepresentation is intentional." *Turbon Int'l, Inc. v. Hewlett-Packard Co., 769 F. Supp. 2d 262, 268 (S.D.N.Y. 2011)*. Under either prong, the misrepresentation must be "material," in that it would influence consumers' purchasing decisions. *Id.*

ERIS alleges that the Blog Post and CMI falsely represent that ***all*** Sanborn Maps are protected by copyright and can only be legally used in Phase 1 ESA Reports when obtained from EDR-Sanborn, though EDR-Sanborn knows that many Sanborn Maps are in the public domain. As already detailed above, the Blog Post categorically states, among other things, that "[w]hen Sanborn Maps . . . are not procured via EDR and The Sanborn Library, it is against copyright to include them in a Phase I or similar report," and the CMI consists of Sanborn's corporate logo, a copyright date, and a legend stating that "[o]nly Environmental Data Resources (EDR) is authorized to grant rights for commercial reproduction of maps by the Sanborn Library LLC, the copyright holder for the collection." ¶¶ 62, 65. Critically, the **[*76]** CMI is allegedly included on and with ***each and every*** Sanborn Map provided by EDR, including those published before 1924 or whose copyright protection was not timely renewed; for example, in the Sample Report available on EDR's website, the CMI is physically included on all enclosed maps, including those dating back to 1890. ¶¶ 62-64. Drawing all inferences in favor of ERIS, and considering each statement in context, I find that ERIS has plausibly alleged that the Blog Post and CMI make literally false or deliberately misleading representations about Sanborn Maps, at least some of which are plausibly in the public domain. Moreover, because Sanborn Maps are used today for Phase 1 ESA Reports and are supposedly necessary for generating standard-compliant Reports, ERIS has also plausibly alleged that these misrepresentations are material in that they would influence the purchasing decisions of consumers in the ERAD market.

5. New York's General Business Law (Counts VII and VIII)

EDR-Sanborn next argues that the District Court should dismiss ERIS's New York General Business Law § 349 and § 350 (individually, "Section 349" and "Section 350," or together, "GBL") claims for failure to adequately plead consumer injury. I recommend against dismissal on this **[*77]** ground. Like ERIS's Lanham Act claims, ERIS's GBL claims may proceed except with respect to the Oral Statements. *See* Mimedx Grp., Inc. v. Osiris Therapeutics, Inc., No. 16-CV-3645 (KPF), 2017 U.S. Dist. LEXIS 114105, 2017 WL 3129799, at *14 (S.D.N.Y. July 21, 2017) (collecting cases for the proposition that GBL claims are analyzed under substantially the same standard as claims under Section 43 of the Lanham Act, including with regard to the requirement of commercial or consumer-oriented conduct); In re Elysium Health-Chromadex Litig., 2018 U.S. Dist. LEXIS 168417, 2018 WL 4907590, at *13 (holding that counterclaim-plaintiff's Section 349 claim may proceed only "on the basis of the statements above that the Court deemed sufficiently pleaded to sustain a Lanham Act claim"); ECF 45 at 32 n.25 and ECF 47 at 26 (analyzing GBL and Lanham Act claims together).

Section 349 and Section 350 are "directed at wrongs against the consuming public." Car-Freshner Corp. v. D & J Distributing and Mfg., Inc., 2014 U.S. Dist. LEXIS 109944, 2014 WL 3900564, at *4 (S.D.N.Y. Aug. 8, 2014) (quoting Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 647 N.E.2d 741, 744, 623 N.Y.S.2d 529 (1995)). Section 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." Section 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state."

To state a claim under Section 349, a plaintiff must allege "(1) the [challenged] act or practice was consumer-oriented; (2) the [challenged] act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result." Spagnola v. Chubb Corp., 574 F.3d 64, 74 (2d Cir. 2009). "The standard **[*78]** for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to section 349." New World Sols., Inc. v. NameMedia Inc., 150 F. Supp. 3d 287, 330 (S.D.N.Y. 2015) (collecting cases). Under both sections, the standard is objective, meaning that the challenged act or practice must be likely to mislead a reasonable consumer under the circumstances. Cline v. TouchTunes Music Corp., 211 F. Supp. 3d 628, 635 (S.D.N.Y. 2016) (Kaplan, J.).

Critically, while business competitors may bring suit under these sections if there is "some harm to the public at large," in order "to successfully state a claim under Section 349 'the gravamen of the complaint must be consumer injury or harm to the public interest.'" Electra v. 59 Murray Enterprises, Inc., 987 F.3d 233, 258 (2d Cir. 2021) (quoting Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 264 (2d Cir. 1995)). While this requirement "has been construed liberally," New York v. Feldman, 210 F. Supp. 2d 294, 301 (S.D.N.Y. 2002), the public or consumer harm caused by the challenged conduct must be more than mere consumer confusion. Mayes v. Summit Entm't Corp., 287 F. Supp. 3d 200, 208 (E.D.N.Y. 2018).

Here, ERIS alleges that EDR's statements falsely represent that all Sanborn Maps are under copyright and must be obtained from EDR, and that any of ERIS's products containing Sanborn Maps are unlawful. EDR's statements were supposedly made to "to misinform and create confusion among . . . consumers." ¶ 203. ERIS has also alleged injury other than mere consumer confusion: harm to consumers via reduced competition in the market for environmental risk assessment data. *See* Actava TV, Inc. v. Joint Stock Co. "Channel One Russia Worldwide," 412 F. Supp. 3d 338, 353 (S.D.N.Y. 2019) (finding **[*79]** that competitor-plaintiff plausibly alleged consumer injury beyond mere confusion where defendant's conduct "caused damage to competition . . ., harming consumers via the reduced competition in the market"). ERIS's complaint is replete with allegations that EDR's misrepresentations have harmed competition by, for example, dissuading entities from entering or remaining in the market. ¶¶ 5, 7, 46, 56, 60, 64-65, 71-72, 130. Moreover, ERIS suggests that consumers are economically harmed by being misled into believing that they must pay EDR for maps in the public domain that can be lawfully copied for free. ¶¶ 27, 30, 65, 67. Thus, while EDR-Sanborn argues that the gravamen of the harm alleged by ERIS is to ERIS's own business by way of lost customers and sales to EDR, I recommend against dismissal of ERIS's GBL claims because "[a]t this stage, the facts alleged . . . are sufficient to make it plausible that [EDR-Sanborn's] conduct carries with it 'significant ramifications for the public at large.'" Actava, 412 F. Supp. 3d at 353.

6. Tortious Interference (Count XII)

Lastly, EDR-Sanborn argues that ERIS's tortious interference claim is inadequately pleaded in all respects. I recommend that this claim be dismissed for **[*80]** failure to sufficiently plead a business relationship with a third party with which EDR-Sanborn intentionally interfered.

To state a claim for tortious interference with prospective economic advance under New York Law, ERIS must allege that: (1) "it had a business relationship with a third party"; (2) EDR-Sanborn "knew of that relationship and intentionally interfered with it"; (3) EDR-Sanborn "acted solely out of malice, or used dishonest, unfair, or improper means"; and (4) EDR-Sanborn's "interference caused injury to the relationship." *Kirch v. Liberty Media Corp., 449 F.3d 388, 400 (2d Cir. 2006)* (quoting *Carvel Corp. v. Noonan, 350 F.3d 6, 17 (2d Cir. 2003)*.

As an initial matter, ERIS's claim easily satisfies the third requirement by alleging "improper means." Generally, in order to satisfy this element, "the defendant's conduct must amount to a crime or an independent tort." *Carvel Corp. v. Noonan, 3 N.Y.3d 182, 818 N.E.2d 1100, 1103, 785 N.Y.S.2d 359 (2004)* (answering certified question from Second Circuit).[40] Here, I have already found that ERIS has adequately stated claims for antitrust violations, defamation, false advertising, and deceptive practices based on some of the same conduct and statements underlying ERIS's tortious interference claim. As both parties acknowledge, if the District Court adopts my recommendations regarding those claims, the District Court must also **[*81]** find that ERIS has adequately pleaded improper conduct for purposes of its tortious interference claim. (ECF 45 at 35; ECF 47 at 34-35; ECF 51 at 15).

ERIS has not adequately alleged, however, causation or a relevant business relationship with a third party. In a few cases, courts have only required that a plaintiff allege a "reasonable expectancy" of contracting with a particular third-party, which "can result from mere negotiations." *See, e.g., Glob. Packaging Servs., LLC v. Glob. Printing & Packaging, 248 F. Supp. 3d 487, 494 (S.D.N.Y. 2017)* (quoting *Strapex Corp. v. Metaverpa N.V., 607 F. Supp. 1047, 1050 (S.D.N.Y. 1985)*). The weight of authority in this Circuit and the New York Appellate Divisions, however, indicates that a plaintiff must further allege that it "would have entered into an economic relationship [with a specific third party] but for the defendant's wrongful conduct." *See, e.g., Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754, 766 & n.6 (S.D.N.Y. 2020)* (quoting *Premium Mortg. Corp. v. Equifax, Inc., 583 F.3d 103, 107 (2d Cir. 2009)*) (rejecting argument that a "reasonable expectancy" was sufficient to state a tortious interference claim); *Shawe v. Kramer Levin Naftalis & Frankel LLP, 167 A.D.3d 481, 91 N.Y.S. 3d 369, 373 (1st Dep't 2018)* (affirming dismissal where plaintiff made conclusory allegations of a potential business relationship and did not "allege, as required, that but for defendants' conduct plaintiff would have had an economic relationship with the" third party); *Zetes v. Stephens, 108 A.D.3d 1014, 969 N.Y.S.2d 298, 304 (4th Dep't 2013)* ("[A] plaintiff is required to identify a specific customer that the plaintiff would have obtained **[*82]** 'but for' the defendant's wrongful conduct."); N.Y. Pattern Jury Instructions 3:57 (2020) (collecting cases addressing causation).[41]

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[40] "There is at least one exception to the general rule that the defendant's conduct must be criminal or independently tortious: If the plaintiff can demonstrate that the 'defendant engage[d] in conduct for the sole purpose of inflicting intentional harm on plaintiffs,' then the wrongful means element of the test is satisfied." *Gym Door Repairs, Inc. v. Young Equip. Sales, Inc., 206 F. Supp. 3d 869, 908 (S.D.N.Y. 2016)* (quoting *Carvel, 818 N.E.2d at 1103*).

[41] Indeed, courts in this District routinely grant motions to dismiss tortious interference claims for failure to allege but for causation. *See, e.g., Chahine v. City of New York, No. 19-CV-0276 (DLC), 2020 U.S. Dist. LEXIS 89162, 2020 WL 2555228, at *4 (S.D.N.Y. May 20, 2020)*; *Nat'l Air Cargo Grp., Inc. v. Maersk Line Ltd., No. 17-CV-8659 (KPF), 2019 U.S. Dist. LEXIS 166871, 2019 WL 4735426, at *10 (S.D.N.Y. Sept. 27, 2019)*; *Arcadia Biosciences, Inc. v. Vilmorin & Cie, 356 F. Supp. 3d 379, 405 (S.D.N.Y. 2019)*; *see also J&R Multifamily Grp., Ltd. v. U.S. Bank Nat'l Ass'n as Tr. for Registered Holders of UBS-Barclays Com. Mortg. Tr. 2012-C4, Com. Mortg. Pass-Through Certificates, Series 2012-C4, No. 19-CV-1878 (PKC), 2019 U.S. Dist. LEXIS 209758, 2019 WL 6619329, at *6 (S.D.N.Y. Dec. 5, 2019)* (finding an "actual conflict" between New York and Texas substantive tortious interference law because New York law requires an allegation of but for causation whereas Texas only requires plaintiff to allege a "reasonable probability" of entering into a transaction).

Here, ERIS provides only one example of a business relationship with which EDR has interfered: ERIS's relationship with Company K. ¶¶ 128, 135, 249, 251.[42] However, ERIS has not suggested a reasonable expectation of transacting with Company K, let alone (as required) that that a transaction with Company K would have been consummated but for EDR's alleged interference. Instead, ERIS only pleads that "Company K has refused to do business with ERIS" and that "an individual at Company K told a sales agent for ERIS that they were not interested ***in meeting*** with ERIS to see a demonstration of ERIS's products and services" because of (EDR's statements regarding) this lawsuit. *Id.* (emphasis added). ERIS has not alleged that it was actively involved in negotiations with Company K or any other particular prospective customer or that an economic relationship would have been consummated between ERIS and any particular customer but for EDR's statements.

Moreover, Plaintiff alleges no facts suggesting that EDR-Sanborn knew of ERIS's business relationship **[*83]** with Company K, let alone intentionally interfered with that relationship. ERIS's vague and conclusory statement that "Counterclaim Defendants had knowledge of ERIS's business relations" is insufficient. *See, e.g., Wolff v. Rare Medium, Inc., 171 F. Supp. 2d 354, 360 (S.D.N.Y. 2001)* (dismissing tortious interference claim featuring only conclusory assertions of knowledge, noting that "even on a motion to dismiss, is not required to accept conclusory allegations—particularly allegations such as those asserted here, characterizing or attributing a state of mind of another person"); N.Y. Pattern Jury Instr. Civil 3:57 (noting that defendant is required to have knowledge of the prospective business relationship, though not specific terms thereof). Accordingly, ERIS has failed to state a claim under New York law for tortious interference with prospective business relations.

IV. Leave to Amend

In its opposition brief, ERIS requests leave to amend in the event that EDR's motion to dismiss is granted in whole or in part. District courts "ha[ve] broad discretion in determining whether to grant leave to amend," *Gurary v. Winehouse, 235 F.3d 792, 801 (2d Cir. 2000)*, and leave to amend should generally be "freely give[n] . . . when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. "Where the possibility exists that [a pleading] defect can be cured" and amendment would not be **[*84]** futile, "leave to amend should normally be granted." *Isaac v. City of New York, No. 17-CV-1021 (PGG), 2018 U.S. Dist. LEXIS 41653, 2018 WL 1322196, at *8 (S.D.N.Y. Mar. 13, 2018)* (internal citations omitted); *see Hayden v. County of Nassau, 180 F.3d 42, 53 (2d Cir. 1999)* ("When a motion to dismiss is granted, the usual practice is to grant leave to amend the complaint.").

Based on the current record, I cannot conclude that leave to amend ERIS's Counterclaims would be futile.[43] Accordingly, I recommend that ERIS be granted leave to amend, and that ERIS's Second Amended Counterclaims be due within **fourteen (14)** days of District Court's ruling on this Report and Recommendation.

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[42] ERIS cites to cases supporting its contention that it need not reveal, in its pleading, the real name of Company K. *E.g. Tatintisan v. Vorotyntsev, 2019 U.S. Dist. LEXIS 66379, 2019 WL 1746004, at *6 (S.D.N.Y. Apr. 18, 2019)* (plaintiff not required to plead name of third party where plaintiff identified a specific, existing relationship and offered to provide defendant with name); *Brill Physical Therapy, P.C. v. Leaf, 2011 N.Y. Misc. LEXIS 6967, 2011 WL 11074836, at *3 (Sup. Ct. Aug. 4, 2011)* (plaintiff not required to plead specific names of third parties); *Bilinski, 96 F. Supp. 3d at 51* (finding that *Brill* "stands at most for the proposition that a plaintiffs [sic] need not identify the name of the buyer in [its] pleading"). However, even if ERIS is excused from revealing the ***name*** of relevant third parties, ERIS is still required to identify prospective business relations with *specific* third parties. *See, e.g. Gallagher v. N.Y.C. Health & Hosps. Corp., No. 16-CV-4389 (GBD), 2017 U.S. Dist. LEXIS 155259, 2017 WL 4326042, at *5 (S.D.N.Y. Sept. 20, 2017)* (emphasizing that a plaintiff "must specify some particular, existing relationship through which [it] would have done business but for the allegedly tortuous behavior.") (internal citation omitted); *Vigoda v. DCA Prods. Plus Inc., 293 A.D.2d 265, 741 N.Y.S.2d 20, 23 (2002)* (same).

[43] Indeed, EDR-Sanborn does not argue that amendment would be futile. Instead, EDR-Sanborn states that any dismissal should be with prejudice because "ERIS has amended its counterclaims once and declined to do so a second time" during the parties' meet and confer process. (ECF 45 at 35; ECF 47 at 35).

V. Conclusion

For the foregoing reasons, I recommend that EDR-Sanborn's motion to dismiss be **GRANTED in part and DENIED in part**, as follows: (1) EDR-Sanborn's motion to dismiss should be granted with respect to ERIS's product disparagement (Count IX), trade libel (Count XI), and tortious interference with prospective business relations (Count XII) claims; (2) it should also be granted with respect to ERIS's Lanham Act (Count VI) and New York General Business Law (Counts VII and VIII) claims **insofar** as they are based on allegations regarding the Oral Statements, and with respect to ERIS's defamation (Count X) claim **insofar** as it is based on the Blog Post and Oral Statements; and (3) it should lastly **[*85]** be granted as to ERIS's Sherman Act *Section 2* (Count IV) essential facilities and bundling claims. ERIS's Lanham Act (Count VI) and New York General Business Law (Counts VII and VIII), defamation (Count X), and Sherman Act and Clayton Act (Count IV and V) claims should otherwise proceed.

VI. Objections

In accordance with *28 U.S.C. § 636(b)(1)* and *Fed. R. Civ. P. 72(b)*, the parties shall have **fourteen (14)** days (including weekends and holidays) from receipt of this Report to file written objections. *See* *Fed. R. Civ. P. 6* (allowing three (3) additional days for service by mail). A party may respond to any objections within **fourteen (14)** days after being served. Objections, and any responses to objections, shall be addressed to the Hon. Lewis A. Kaplan. Any requests for an extension of time for filing objections must be directed to Judge Kaplan.

FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See* *Thomas v. Arn, 474 U.S. 140, 155, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993)*; *Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992)*; *Wesolek v. Canadair Ltd., 838 F.2d 55, 58 (2d Cir. 1988)*; *McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983)*.

Dated: August 30, 2021

New York, New York

Respectfully submitted,

/s/ Ona T. Wang

Ona T. Wang

United States Magistrate Judge

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